

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONADesigner 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 16, 2008
8:56 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Jury Trial - Day 2 - Pages 238 - 404)**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) 322-7251PROCEEDINGS TAKEN BY STENOGRAPHIC COURT REPORTER
TRANSCRIPT PREPARED BY COMPUTER-AIDED TRANSCRIPTION

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4 Attorneys at Law
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By: Ronald D. Coleman, Esq.

I N D E X

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
BETH FELKER ROMERO					
By Mr. Coleman (Cont'd)		253			
By Mr. Crown			276		

E X H I B I T SPLAINTIFFS' EXHIBIT

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
6	S & L's Tax Returns 2000-2005	275	275
7-1	Website 2-1-06	313	313
7-2	Website 10-18-06	313	313
7-3	Website 5-5-08	313	313
7-1	Website 10-10-05 & 11-7-05	313	313

DEFENDANTS' EXHIBIT

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
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Phoenix, Arizona
July 16, 2008

(Proceedings convened at 8:56 a.m.)

THE COURT: Thank you. Please be seated.

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

08:56:00

Last night before I even had a chance to sit down one
of my externs presented me with an Eighth Circuit case which
made me feel good because it supported my hypothesis that
perhaps failure to tender a witness fee might simply be grounds
to refuse to accept the subpoena, but before I could feel very
good one of my other externs presented me with a Ninth Circuit
case and reminded that we're in the Ninth Circuit, not the
Eighth Circuit, and that's the CF & I case, which though
dealing with a slightly different phraseology of Rule 45 I
think is right on point in holding that the plain meaning of
Rule 45(c), quote, requires simultaneous tendering of witness
fees and the reasonably estimated mileage allowed by law with
service of a subpoena, upholding the District Court's decision
that the subpoenas were therefore invalid.

08:57:00

08:57:00

08:58:00

So based on that -- and then, coincidentally, this
morning I have a letter from counsel calling to my attention
the CF & I case as well as another case.

So it seems clear to me that I must reverse my ruling
last night and quash the subpoena, but before I do so I would

08:59:00

1 ask the plaintiffs if somehow there's authority that has eluded
2 my staff and me.

3 MR. MIZRAHI: May I speak, Judge?

4 THE COURT: You may.

5 MR. MIZRAHI: Judge, actually, I received
6 Mr. Coleman's letter late last night and I did some poking
7 around on my own and I also confirmed with my office that
8 indeed in their hurry to get the witness subpoena out that the
9 check was not included, and so on the record I'll state that
10 that's a fact and even though Mr. Mercadante is not here I will
11 confirm that the witness fee was not included with the service
12 of the subpoena.

13 Now, having said that, and having read Mr. Coleman's
14 letter and having read the CF & I case, which is a Ninth
15 Circuit case, I agree that that stands for the proposition that
16 at the time that you serve a subpoena you're supposed to also
17 serve the witness fee and that those two things can happen --
18 that those two things should happen at the same time.

19 Now, there are cases, however, including one case that
20 actually cites the CF & I case, that says that you can
21 subsequently cure that by tendering the witness fee at a time
22 before the witness actually testifies. And there's even cases
23 that say that tendering that upon the party's counsel once
24 they've been served is a way of curing that defect.

25 And, Judge, if you recall, yesterday in open court we

1 offered to pay that money to Mr. Coleman. We offered to tender
2 it to the Court. We offered to pay it to Mr. Coleman.

3 And I can give you case cites for that.

4 One case is a case called PHE, Inc. versus the
5 Department of Justice. It's 139 F.R.D. 249, DDC, 1991. That
6 case stands for the proposition that the subsequent tender of a
7 check can cure the defect.

09:00:00

8 There's a case called First City Texas-Houston, NA
9 v. Rafidadan Bank, R-A-F-I-A-D-A-N, 197 F.R.D. 250, Southern
10 District of New York, 2000, that stands for the proposition
11 that service can be made on an attorney.

09:01:00

12 And then there's the case of Myer versus Foti,
13 F-O-T-I, 720 F.Supp. 1234, Eastern District of Louisiana, 1989,
14 that also stands for the proposition that the subsequent
15 tenders of check can cure the defect.

09:01:00

16 And then there's a couple of Ohio cases that are not
17 published decisions, but to be honest with you, Judge, I looked
18 and I didn't find any contrary rule anywhere that said that
19 once the service is made that that can't be cured by the
20 perfunctory tendering of what is just a witness fee afterwards
21 once there's been actual notice and so on upon the attorney.

09:02:00

22 And those cases are Future Communications, Inc. versus
23 Hightower. That's located at 2002 Westlaw 92679, Ohio App.,
24 and I had -- there was one other one that I think Hightower
25 cites, but again, it's not a reported decision.

09:02:00

1 But I couldn't find any reported decision that stood
2 for the contrary proposition that once a service is made that
3 you can't just pay the lawyer, and with the body of cases that
4 say that, number one, you can subsequently cure it and, number
5 two, that you can pay the money to the lawyer, I would suggest 09:02:
6 that that should -- that same logic should apply here.

7 Because again, this is a situation where we thought
8 that Mr. Mercadante was going to be here. He wasn't here. We
9 couldn't really serve him in New York.

10 And I checked Rule 45 again about the out-of-state 09:03:
11 subpoena because it didn't really make sense that you could,
12 you know, serve that subpoena out of state and haul somebody
13 across the country, and basically, it said in the comments that
14 you can serve that and haul somebody across the country but it
15 has to be supported by, quote, super special cause. 09:03:

16 And so, again, under that circumstance, under the
17 circumstance that Mr. Mercadante has essentially been in town,
18 he's been hiding in a hotel room, in an effort to try to cure
19 this situation we actually tried to send process servers out
20 last night, we were calling all over town, hotel rooms. He 09:03:
21 checked out of this hotel yesterday, by the information I
22 received, at 4:03, which is right when we were in court dealing
23 with this issue, and he checked out of his hotel and
24 essentially disappeared.

25 Mr. Coleman has basically represented that his client 09:04:

1 is not going to voluntarily appear even though he's in town.

2 And so I would suggest that under those circumstances
3 the tender of those funds would have cured any technical
4 defect. The funds were available, he would have them in
5 advance of testifying, which is what -- which is what the
6 cases stand for.

09:04:..

7 And so we would obviously leave that to the Court
8 and hope that that is instructive in terms of deciding this
9 issue.

10 Thank you, Your Honor.

09:04:..

11 THE COURT: The cases that you recited to me all
12 sounded like District Court cases in circuits other than the
13 ninth. Did I hear that right?

14 MR. MIZRAHI: That's correct, Your Honor.

15 And I did check the Ninth Circuit, and again, the case
16 that Mr. Coleman relies upon, CF & I, stands for a proposition
17 that is -- I think a proposition that's -- that -- aside from
18 your Eighth Circuit case that you found, which I haven't read,
19 but it sounds to me, based on my research, is generally
20 accepted amongst the circuits in terms of being the law because
21 it comes straight from the language of the statute.

09:05:..

09:05:..

22 And so the Ninth Circuit case seems to essentially
23 recite that on the front end once the subpoena is served in
24 order for it to be technically valid it has to have both of
25 those elements, and I think that that's -- I think that that's

09:05:..

1 the case. I'm not quarrelling with that case and I didn't find
2 any -- like I said, I didn't find any other Arizona or Ninth
3 Circuit cases that discuss the subsequent proposition about
4 curing and curing by tender upon an attorney.

5 And so that's what -- I'm not disputing the Ninth
6 Circuit law. I'm just bringing up the other cases that I
7 found.

8 THE COURT: All right. Thank you.

9 The Court will reverse its ruling from last night and
10 vacate -- and grant the motion to quash.

11 I note that the CF & I case -- in the CF & I case, the
12 opinion recites that on September 30, 1982, 34 days after
13 service and one week after movant's attorney told them that
14 service was defective, CF & I sent three checks for a hundred
15 dollars each to movant's attorney. The checks were returned to
16 CF & I because they were inadequate in amount and too late to
17 satisfy the requirements of Rule 45(c).

18 I just quoted from the case.

19 And -- but in the CF & I case, the court says, quote,
20 the District Court construed the conjunctive effect of, quote,
21 and by tendering to him, end quote, as requiring the concurrent
22 tender of witness fees and an estimated mileage allowance with
23 service, period. We agree. Period. End quote.

24 And then finally, the court says, therefore, quote, we
25 hold the plain meaning of Rule 45(c) -- and it was Rule 45(c)

1 then. It's got a little different organization -- Rule 45 --
2 we hold the plain meaning of Rule 45(c) requires simultaneous
3 tendering of witness fees and the reasonably estimated mileage
4 allowed by law with service of a subpoena, period. In so
5 holding, we decline to reach how much CF & I was required to 09:08:..
6 tender or whether the checks sent one month after service were
7 adequate. Because we affirm on the plain meaning of Rule
8 45(c), we, like the District Court, do not reach the issue of
9 whether movants were immune from service, end quote.

10 Well, it is clear to me that while the court in CF & 09:08:..
11 I, I suppose, as a highly technical matter did not reach the
12 issue of whether there was a cure, because apparently there was
13 an issue as to whether the fees were adequate, it seems to me
14 the Ninth Circuit clearly views the conjunctive effect as
15 requiring the concurrent tender. 09:09:..

16 So I'm not prepared to depart in the way of some
17 district courts across the country and other circuits to find a
18 cure, and accordingly, the motion to quash will be granted.

19 We're ready for the jury, then.

20 MR. CROWN: Your Honor, may I address the Court before 09:09:..
21 the jury comes in?

22 THE COURT: You may.

23 MR. CROWN: In the interests of scheduling and
24 pursuant to the final pretrial order submitted, now that it's
25 clear that neither Larry Sagarin or Steven Mercadante are here 09:09:..

1 in court for us to call them as witnesses, then we will be
2 offering portions of their deposition transcripts that are
3 identified in the final pretrial order as the final part of our
4 case in chief.

5 My suggestion to the Court is, in light of this 09:10:
6 ruling, is that when Ms. Romero's testimony is finished we take
7 a break, which may be a little bit before the Court's intended
8 break, we will streamline but will publish to the jury portions
9 of Mr. Mercadante's deposition and Mr. Sagarin's deposition and
10 then at that point we will move additional exhibits into 09:10:
11 evidence and we will be prepared to rest.

12 So I just wanted the Court to have a heads up.

13 THE COURT: Is there any issue on the deposition
14 reading, Mr. Coleman?

15 MR. COLEMAN: Not in theory but the fact that 09:10:
16 deposition segments are designated doesn't make them
17 necessarily admissible or relevant. I'm going to want to know
18 what they intend to offer and for what purpose and to be
19 accorded the opportunity to make appropriate objections just
20 like any other testimony. 09:11:

21 THE COURT: Well, my pretrial order -- again, if
22 there's no objection, then I'm not going to -- then I'll wait
23 and deal with what I'm faced with, but my pretrial order at
24 page 4, paragraph G, says, "The parties shall list the
25 depositions that may be used at trial. The portions to be read 09:11:

1 at trial shall be identified by page and line number.

2 Counterdesignations, if any, to proposed deposition testimony
3 shall also be listed in this section. Additionally, the party
4 offering the deposition shall provide the Court with a copy of
5 the offered deposition testimony..."

09:12:00

6 And it goes on to talk about highlighted copies and so
7 forth.

8 So I'm sure --

9 MR. COLEMAN: Well, Your Honor, I'm actually having
10 trouble finding that section in the pretrial order. I'm sorry.

09:12:00

11 THE COURT: It's in the order setting final pretrial
12 conference.

13 MR. COLEMAN: Okay.

14 MR. CROWN: Your Honor, we had addressed that
15 yesterday. The parties stipulated to language that actually,
16 with all due respect, as we acknowledge from the Court, has a
17 superseding component to it, and that is in the final pretrial
18 order in section G, page 18, this is what both parties told the
19 Court. And it was in light of this very issue. That's why,
20 again, I was clear to raise it before we even picked the jury
21 because we knew there was going to be potential problems, and
22 unfortunately, although we got lucky to find Mr. Mercadante in
23 the lobby of the Hilton, not so lucky that we had the fee.

09:12:00

09:12:00

24 And here's my point.

25 We stated, "Defendant has indicated an intention to

09:13:00

1 call Larry Sagarin and Steven Mercadante as witnesses.

2 Plaintiff intends to use the depositions of those witnesses
3 from the New York" --

4 THE COURT: I've read that. I can read and I did --

5 MR. CROWN: I'm sorry. 09:13:00

6 THE COURT: -- read that, but I'm not quite sure why
7 you think that that just automatically supersedes my
8 requirements.

9 MR. COLEMAN: Your Honor, I would also -- I didn't
10 stipulate to anything that's in that paragraph. That's the 09:13:00
11 plaintiffs' paragraph. That's not a stipulated section of the
12 pretrial order.

13 THE COURT: Well, part of the reason that I require
14 that is so that we don't waste time that is looking to be now
15 about to be taken up with designations and counterdesignations. 09:13:00

16 MR. CROWN: Your Honor --

17 THE COURT: Have you worked out with Mr. Coleman what
18 portions you're going to read?

19 MR. CROWN: We have not as of yet. I believe we can
20 do that efficiently. Again, our hope was that I would -- we 09:13:00
21 would have either Mr. Sagarin --

22 THE COURT: You're an experienced litigator and it is
23 no mystery, no mystery at all, in any lawsuit where folks are
24 out of state that if -- absent an ironclad agreement that the
25 opposing counsel is going bring that witness here and make them 09:14:00

1 available, that you've got to subpoena them. And as you
2 pointed out, you can't subpoena them across state lines so
3 you've got to take their deposition and expect to use their
4 deposition unless miraculously and fortuitously they show up,
5 and even if they live in state you've got to subpoena them and
6 if by the time of trial you haven't subpoenaed them and haven't
7 taken their deposition, this is what happens.

09:14:00

8 So I --

9 MR. CROWN: Your Honor --

10 THE COURT: I mean, I'm just trying to say this is not
11 a shock and surprise that somebody's not here in the courtroom.

09:14:00

12 MR. CROWN: Your Honor, we would ask under the
13 circumstances and for good cause and for the Court's discretion
14 to allow us to put in a limited portion, and if nothing else,
15 if I can make this representation or request of the Court, in
16 the interest of justice, there is -- if I -- if we put nothing
17 else in other than portions of two pages of Mr. Sagarin's
18 testimony, which go directly to profits as damages.

09:15:00

19 And I will show this Court, it's literally page 71 and
20 72 of Mr. Sagarin's deposition, that if we do nothing else that
21 will allow us with the evidence we do have from our witnesses
22 and what is going to be admitted through the stipulation
23 allowing us to, I think, easily meet a directed verdict
24 standard.

09:15:00

25 And while I'm asking for this Court to allow us under

09:15:00

1 good cause to put in more transcript pages, and we did not
2 specify them in advance, if we do nothing else, I'm asking for
3 page 71 and 72 of Mr. Sagarin's deposition to avoid any
4 argument that the evidence fails to meet the profits damages,
5 and I can make a proffer what that testimony is if the Court
6 wants.

09:16:00

7 THE COURT: Well, what we'll do is we'll take a brief
8 break after this next witness. You can show counsel what you
9 propose to offer, and maybe there's no objection, but we'll
10 have a limited break to, in essence, do homework that should
11 have been done a long time ago.

09:16:00

12 MR. CROWN: Thank you, Judge.

13 THE COURT: We'll bring the jury in.

14 (Jury in at 9:17 a.m.)

15 THE COURT: Please be seated.

09:17:00

16 The record will reflect the presence of the parties,
17 counsel and the ladies and gentlemen of the jury.

18 Good morning.

19 We don't have a witness -- we had a witness on the
20 stand. I think you were in the middle of your -- in your
21 cross-examination.

09:17:00

22
23 BETH FELKER ROMERO,
24 called as a witness herein, having been previously duly sworn,
25 was examined and testified as follows:

CROSS-EXAMINATION (Cont'd)

BY MR. COLEMAN:

Q. Good morning, Miss Romero.

A. Good morning.

Q. You didn't discuss your testimony with your attorneys over night, did you?

09:18:00

Did you discuss your testimony with your attorneys over night?

A. My testimony that what I said yesterday?

Q. About any aspect of what you might -- of your -- of yesterday's testimony, yes, because this is cross-examination.

09:18:00

A. I reviewed some numbers last night.

Q. With your attorneys?

A. No. On my own. Transcripts and so forth.

Q. Okay.

09:18:00

So we were talking about the product development information, and again, working with this figure of \$6.2 million for all product development for five years for all products.

A. Right.

09:18:00

Q. And I think we agreed, obviously between you and your counsel I'm sure I'll be corrected if I'm mistaken, that that includes some number of products that are not among those that S & L sells. Those are your costs, right, for all brands, including non-S & L brands? How much of that expense has been

09:19:00

1 affected by the sales by S & L of your product?

2 A. Okay. I want to try to answer this accurately so bear with
3 me, because I want to make sure I understand exactly what
4 you're saying.

5 The \$6.2 million, which we said occurred over a 09:19:
6 five-year period, which was for the product development, the
7 marketing and the advertising, you'd like to know what I feel
8 that S & L has reduced the market value of the products?

9 Q. Well, no, and I'll tell you why. Because this isn't --
10 this number is not related to market value. It's related to -- 09:20:
11 it's just an expense number, right?

12 A. The -- the part that I'm -- well, I mean -- I guess it
13 depends on how you look at it, sir, because I believe every
14 type of expense that we do in building our brand and creating
15 our brand integrity within the marketplace does lead toward the 09:20:
16 market value. So for me that's kind of hard to separate. But
17 I --

18 Q. Well, when you're telling -- when the jury goes back to the
19 jury room to try to look at the damages question, what part of
20 that \$6.2 million should they associate with the activities of 09:20:
21 S & L if they find that S & L has done something wrong here?

22 A. And again, I want to make sure I answer this correctly. In
23 my humble opinion, and I don't know if it's a correct
24 definition, I would think that the damages would be associated
25 not to my expenses per se, even though some of them being in 09:21:

1 this courtroom are expenses that we're trying to protect our
2 products but more so to what they have done in sales as a
3 function of using our renderings. Does that make sense?

4 Q. You would rather -- in other words, is it your testimony
5 that the expenses and the --

09:21:00

6 A. I think it's both.

7 Q. -- salaries --

8 A. I'm sorry.

9 Q. I'm sorry.

10 If it's both -- and I don't want to kill this. I need
11 to know whether -- if it's both, then for the component of
12 expenses I need to know what those -- how those expenses are a
13 useful gauge for the jury to understand the damages, not -- the
14 mere fact that -- the product development is still -- is
15 beneficial to the company today, isn't it, all the work you've
16 done in product marketing and advertising?

09:21:00

09:21:00

17 A. Correct.

18 May I ask a question?

19 Q. No.

20 A. Oh, I can't. Sorry.

09:22:00

21 Q. Let's move to a different topic.

22 A. Okay.

23 Q. You testified that your customer target -- you used the
24 word "sophisticated". Is that an accurate description?

25 A. Yes.

09:22:00

1 Q. Can you again explain for the jury what that means?

2 A. Because we are a high-end, premium product line that prides
3 itself -- if you recall, we said nutrition for the skin and
4 skin care vitamins and so forth -- it tends to cater to a
5 customer who is not only concerned about the color that they're
6 going to achieve in the tanning bed but the quality of their
7 skin, thus the reason they'd be willing to pay more money for
8 the products.

9 Q. More than what? You said they pay more money. More than
10 the sales price for S & L for the same products?

11 A. How -- what I mean by that is that there are products, say,
12 in a Walgreen's that you can use in an indoor tanning bed that
13 cost \$15. They don't have the same amount of vitamins and so
14 forth within it, and it's positioned by its MSRP and so forth
15 which indicates that, whereas our average price point is
16 \$50-plus because of the premium. And that's why I'm saying
17 that's why they pay more for the product.

18 Q. Can you explain to the jury, just to be clear for the
19 record, what MSRP is?

20 A. That's the manufacturer's suggested like retail price of --
21 that you suggest for a product.

22 Q. Does Designer Skin have MSRPs?

23 A. Correct. We have suggested MSRPs.

24 Q. Does S & L sell at the MSRP?

25 A. No.

1 Q. They sell a lot cheaper, don't they?

2 A. In -- by over 50 percent. And I -- I mean, in my opinion,
3 part of our MSRP is what establishes our market value and
4 creates it as a premium, so when they reduce that by 50 percent
5 they're reducing our perceived market value in the marketplace.
6 It doesn't have a premium of an association or connotation with
7 it at the exclusivity of being Designer Skin skin.

09:24:

8 Q. Is part of the reason you brought this lawsuit to get
9 lower-priced Designer Skin off the market?

10 MR. CROWN: Objection.

09:24:

11 THE COURT: I'm sorry. I heard -- I heard the word
12 "objection".

13 MR. CROWN: Yes. Objection, Your Honor.

14 THE COURT: I heard that.

15 MR. CROWN: Relevance. Legal conclusion.
16 Argumentative.

09:24:

17 THE COURT: Overruled.

18 THE WITNESS: We brought this lawsuit to protect our
19 copyright abilities, which I understand is according to the
20 law.

09:24:

21 Q. You two claims in this case, right? There's also an unfair
22 competition claim? Is the unfair competition that Designer
23 Skin has in mind, based on what you just told us about the MSRP
24 and the market value, is the unfair competition, in part at
25 least, the fact that S & L sells your product a lot cheaper

09:25:

1 than other outlets?

2 A. What I find galling, the unfair competition, is that they
3 use our images. They use our images, our copyrighted images,
4 to what I believe to give them a level of authenticity as one
5 of our distributors, which they're not. So by that I feel like
6 they're bringing an unfair association with our company.

09:25:

7 Q. So it has nothing -- so the price issue is not a concern.
8 You don't mind that they're selling -- you have no legal claim
9 here based on the fact that S & L sells your lotion cheaper on
10 the Internet. Is that correct?

09:26:

11 MR. CROWN: Objection. Relevance.

12 THE COURT: Overruled.

13 THE WITNESS: I -- according -- again, I want to make
14 sure I don't misspeak outside the definitions of the unfair
15 competition and the copyright and so forth.

09:26:

16 The unfair competition is because they use our images
17 to sell their products and the fact that the manner in which
18 they do so, which I truly believe violates our copyright
19 rights, the manner in which they do so, ultimately by them then
20 selling it at less, reduces other perceived market value.

09:26:

21 Q. What's -- and -- and what is it about the manner -- because
22 it's important that -- as a legal matter that we understand the
23 difference between the copyright claim and the unfair
24 competition claim. What is it about the manner that is unfair
25 competition besides the fact that S & L is allegedly using your

09:27:

1 images?

2 A. Because -- if I understand -- I -- can I just give my
3 opinion of this?

4 Q. I need actually a factual answer, not an opinion answer.

5 A. Oh. Okay. About --

09:27:00

6 Q. What is it about the manner that is a cause of damages for
7 Designer Skin?

8 A. Because by them using our images, our copyrighted images,
9 it is misrepresenting that they are associated with us or an
10 authorized distributor.

09:27:00

11 Q. Just --

12 A. It -- I'm -- can --

13 Q. I understand.

14 Okay. So it's the use of the images?

15 MR. CROWN: Excuse me, Your Honor. May the witness be
16 allowed to finish the answer before Mr. Coleman asks another
17 question?

09:27:00

18 THE COURT: Sustained.

19 Did you finish your answer?

20 THE WITNESS: It's -- it's kind of bringing about an
21 authenticity that's not accurate. I mean, I realize I can take
22 my watch off, take a picture of it and sell it on eBay. But
23 you know what? I can't take this manufacturer's images in
24 advertising and do so, and I believe, in my understanding,
25 that's the law.

09:28:00

09:28:00

1 Q. Okay. Thank you.

2 Do the brand names of your products support your --
3 the concept that you've just discussed about a premium kind
4 of -- what do you call it? A high-class or a prestige or elite
5 branding positioning?

09:28:

6 A. Those are your words. I mean, I called them -- I called
7 them premium.

8 Q. Premium. So would -- so elite would not be appropriate, is
9 that correct?

10 A. I personally don't like the adjective elitist. You know,
11 it sounds like it's -- so, I mean -- premium.

09:29:

12 Q. Premium. How about prestige?

13 A. High end.

14 Q. High end.

15 So brands like Shameless and Secret Rapture, Ultimate
16 Love Junkie, Big O, Bronze Bondage, these are consistent with
17 the high-end market positioning?

09:29:

18 A. We have a spectrum -- Designer Skin is the big house brand,
19 and then we have Boutique, which is our other high premium
20 brand, and then we have a value brand, which is our Splash
21 tanning tonics, which ranges from about 18 to 25 dollars. Part
22 of the -- the majority of the names that you listed were part
23 of Designer Skin and Boutique, and I believe one of the names
24 you listed was part of the Splash value brand, and we do that
25 because there's some people who won't use a lotion at all and

09:29:

09:30:

1 if we can start them on a value and with education they can
2 move up in the skin care.

3 Q. Designer Skin would be more comfortable with the brand
4 equity or the market positioning point if these products were
5 only sold in tanning salons? Is that correct? 09:30:.

6 A. Per our distribution contract --

7 Q. I'm sorry. Before -- you can answer but I'm not asking you
8 a question about the distribution contract. I'm --

9 A. But that's -- I'm sorry.

10 THE COURT: Listen to his question and answer just his 09:30:.
11 question.

12 Q. An important part of this case that you have enunciated in
13 your testimony is that there's a brand equity issue and there's
14 a market positioning and there's a sort of negative association
15 with my client's sale of your product. Is that accurate? Is 09:31:.
16 that fair?

17 A. What I said was the use of their copyrights -- of our
18 copyrights was not correct to selling products.

19 Q. So is it your testimony now that you have no -- there's no
20 issue of a negative connotation or association with a lower 09:31:.
21 marketing level, it's merely the use of the copyrights? Is
22 that your testimony?

23 A. No. I mean, copyright's part of it and then there's the
24 unfair competition.

25 Q. Are tanning salons -- is the environment in a tanning salon 09:31:.

1 the kind of -- is that -- is that the kind of association that
2 is appropriate -- is that the policy of your company? Is that
3 the brand equity policy, that tanning salons are the kind of
4 high-class association that is appropriate?

5 A. The tanning salons have people working there who offer 09:32:
6 education and information on the proper usage of these
7 products, and that's why we spend so much money on the training
8 of these people, so that can be furnished in conjunction. It
9 leads to a happier customer and a satisfied customer.

10 Q. So that -- I'm sorry. Please finish. 09:32:

11 A. You and I are bad at that. Sorry.

12 Q. So the tanning salons -- the only -- your only preference
13 for tanning -- Designer Skin's only preference for tanning
14 salons is the training, is that correct?

15 A. Twofold. They offer the training and the education and 09:32:
16 then they offer tanning as an on-premise service. That's what
17 we consider an account, a salon account.

18 Q. Is it also true that also they sell the MSRP? Isn't that a
19 reason to have that preference?

20 A. We can't dictate that. That's price fixing. 09:33:

21 Q. Okay. That would be against the law, right? Price fixing.
22 Is that your understanding?

23 A. We can give suggested MSRPs.

24 Q. You mentioned -- you -- you've raised the topic now of the
25 training in the tanning salons. We thought you said in your 09:33:

1 direct testimony something about certification of salons. Is
2 there such a thing -- what does it mean certification -- what
3 does that term mean?

4 A. Oftentimes tanning salons go through -- there's different
5 types of certifications with our industry. Some of them is a 09:33:
6 Smart Tan certificate and so forth, and that's where they learn
7 all about the differences in the skin typing and so forth.

8 Q. Does Designer Skin itself offer any certification?

9 A. No. Just -- nothing is certified where they hang a little
10 diploma up what we do in the training. 09:34:

11 Q. Does Designer Skin require any kind of certification?

12 A. No.

13 Q. Does Designer Skin know what percentage of salons that
14 carry its products have certification?

15 A. I would not feel comfortable hazarding a guess at that 09:34:
16 unless I was able to go back and look at facts, so...

17 Q. Does Designer Skin know for a fact that the people who sell
18 tanning lotion in tanning salons themselves have been trained?

19 A. I would say given the fact that we attend hundreds of
20 seminars a year and the trade shows and all the phone calls 09:34:
21 that we would get for our training DVDs and our training
22 manuals, that, yes, there is a large percentage that engages in
23 the training of their customers.

24 MR. COLEMAN: Can I ask the court reporter to please
25 read the question back, and I'm going to ask the witness to 09:35:

1 please listen closely to what I asked.

2 THE WITNESS: Okay. Sorry.

3 (Question read back.)

4 THE WITNESS: I mean, can I give an opinion or if --
5 if it's an absolute, I mean, an absolute is hard to say because
6 could there be some girl out there who has not gone through
7 training? Yes. So that's a hard -- difficult -- I don't --

8 Q. Is "I don't know" the right answer here?

9 A. I don't want to misspeak so...

10 Q. So you don't know, do you?

11 A. Again, going back to my previous answer, given our
12 experience with the salons I would say a majority does. Can I
13 say absolutely a hundred percent all of them? No.

14 Q. When you say a majority, what percentage do you mean?

15 A. If I had time I would gladly go back and research. I could
16 take our database. I could go and inquire and so forth. But I
17 don't want to give you a pull-out-of-the-hat percentage.

18 Q. But without doing that research you are confident to
19 testify that it's a majority, right?

20 A. I feel that I've been in the industry for ten years and a
21 great portion of my time was on the road as a trainer and I've
22 met thousands upon thousands of salon employees and trained
23 them myself so if I am allowed to speak out of my own
24 experience then yes.

25 Q. Does Designer Skin survey accounts, in other words, these

1 tanning salons, to find out which of their employees have been
2 trained?

3 A. No.

4 Q. You mentioned in your testimony something about the salary
5 of someone who has responsibility for what you call diversion. 09:37:00
6 What percentage of that person's time and duties is spent on
7 matters relating to -- or even if you want to call it
8 diversion -- relating to sales by S & L?

9 A. These diversion people were a hundred percent diversion and
10 you'd like to know which portion was for S & L? 09:37:00

11 Q. Well, the only reason I understood you were telling us the
12 number was because it's -- it's -- it goes to the damages
13 incurred as a result of S & L's activities.

14 A. Okay. Then I would -- given the fact that this has been
15 going on for several years and we have been working this 09:38:00
16 diversion -- people, whether it was Jackie or Blake, have been
17 working with Elan's firm on S & L, considering we have
18 printouts of websites going back to 2005, 2006, so forth, if I
19 would have to say out of all of the diversion sites that they
20 have worked on, since this was one that was actually involved 09:38:00
21 in a litigation it was a greater proportion than the other
22 ones. So if -- I just --

23 Q. Do you know?

24 A. It would be a greater proportion than the other ones
25 because we haven't been in lawsuits with the other ones. So I 09:38:00

1 would say 30 percent, then, if we're looking at all of the
2 diversion sites.

3 Q. And you're including time spent preparing for this lawsuit
4 in that percentage?

5 A. No.

6 Q. I'm sorry. I thought --

7 A. Not for me.

8 Q. But for the diversion person.

9 A. What I'm saying is that in the past going back from 2005,
10 2006, so forth, they spent a good deal of time printing out the
11 websites, sending the letters, working with Elan, so forth,
12 about that and so when it came to those Internet sites that
13 they were researching and monitoring that S & L, given its
14 prominence, took up a greater portion than some of the other
15 ones.

16 Q. How about -- is there any way to measure the amount of
17 sales by S & L that have occupied the proportional efforts
18 spent by the diversion personnel at Designer Skin?

19 A. I don't -- can you rephrase that, please? I didn't --

20 Q. It's withdrawn.

21 What's the basis of your testimony that Designer Skin
22 has -- that if Designer Skin continued doing what it's doing
23 we're going to lose our market value and customer base? How
24 much of your market value will Designer Skin lose if S & L
25 continues selling your lotion on the Internet?

1 A. Again, one of the things that I believe is what your market
2 value is is how you position yourself in the marketplace, and
3 again, we positioned ourself as a designer brand.

4 So if you look at the fact that they're reducing that
5 by half, I would think by 50 percent they've reduced the market 09:40:
6 value. The value -- and the value of it in the marketplace --
7 I mean, my Louis Vuitton bag, if I could buy it for \$20 would
8 not have the same perceived value to me.

9 Is that --

10 Q. So it's your testimony that the percentage off the 09:41:
11 manufacturer's suggested retail price represents the percentage
12 of reduction in the market value of the shares of Designer
13 Skin?

14 A. I want to make sure I answer this correctly.

15 In the perceived market value -- and by market value I 09:41:
16 understand that definition to be its value in the marketplace,
17 and there's a -- numerous factors that go into the value in the
18 marketplace, some of which are subjective. You and I could
19 disagree on the definition of it, but for a premium product, if
20 it retails for 50 and it's available for 25, that is one of the 09:41:
21 contributing factors of its positioning.

22 Q. Okay. So I think now I understand your testimony. You
23 don't mean the market value of the company. You mean the
24 market value of a given bottle -- a given product. Because --
25 in other words, it's being discounted. Is that what you mean? 09:42:

1 A. Aren't we talking about the market value of our products?

2 Q. I wasn't sure. I thought you meant the market value of the
3 company. In other words, the -- so what's -- so, in other
4 words, you're saying 50 percent of the market val -- because --
5 if they're selling your product at half price, then you've been 09:42:..
6 damaged in an amount of how much, that is, Designer Skin's been
7 damaged?

8 A. In terms of that, are you talking about what we think it
9 has reduced the market value of our products or --

10 Q. I'm inviting you, actually, to give us a number that tells 09:43:..
11 the jury how much Designer Skin has been damaged by the alleged
12 actions of S & L Vitamins. What's the number?

13 A. Okay. Well, I mean, it can be what I think.

14 Q. You'll tell me what you think and then we'll talk about it.

15 A. Okay. 09:43:..

16 When they sold Designer Skin, and based on their
17 2004-2005 tax returns, they were --

18 MR. COLEMAN: Your Honor --

19 THE WITNESS: Do you want me to give --

20 MR. CROWN: Objection, Your Honor. 09:43:..

21 THE WITNESS: -- a number --

22 MR. COLEMAN: She's testifying to facts not --

23 THE COURT: Wait a minute. Let her finish her answer.
24 If the answer is -- if there's an appropriate motion to strike
25 the answer, then that can be made and I will then instruct her 09:43:..

1 to answer the question, but we're not going to interrupt.

2 MR. CROWN: That was my objection.

3 THE COURT: All right.

4 THE WITNESS: Based on their tax returns for 2004 and
5 2005, they did 1.4 to 1.6 million each year. So based on a
6 percentage of what those sales were based on indoor tanning
7 lotions and then based on a percentage of what that percentage
8 would be due Designer Skin is most likely where you would come
9 up with a figure.

09:44:

10 Now, I -- I don't know if you can add in the expenses
11 that we have done in terms of diversion or legal fees or so
12 forth. I'm not sure if that goes to damages. Because there's
13 more than just that. It's an ongoing process. But I think if
14 you would start there as some sort of formula you could come
15 out to a number.

09:44:

09:45:

16 MR. COLEMAN: I ask the Court to strike the answer as
17 unresponsive and based on hearsay.

18 THE COURT: I think the question was you tell me what
19 you think and then we'll talk about it. I think she did that.
20 So the motion is denied.

09:45:

21 BY MR. COLEMAN:

22 Q. Let's talk about that \$1.4 million. What was the year in
23 which total sales for my client were \$1.4 million?

24 A. 2004.

25 Q. Has your market value declined since 2004, by the way?

09:45:

1 A. You -- I need to be clear on your definition of market
2 value, because if you mean the company -- has the company's
3 sales declined?

4 Q. Have they?

5 A. Is that what you're asking?

09:45:00

6 Q. Yeah. Let's ask that. Have the companies's sales
7 declined?

8 A. Have the company's sales declined? No.

9 Q. Have the company's revenues declined?

10 A. No.

09:45:00

11 Q. Have the company's net profits declined?

12 A. No.

13 Q. What has declined?

14 A. Again, if I can give my answer to that, the perceived
15 market value has declined and we have been able to do well in
16 spite of that but I always think exponentially how much more
17 could we have done? So it's kind of like --

09:46:00

18 Q. Do you know firsthand what -- and I'm asking you not to
19 answer based on something you've seen on a document or
20 testimony that's not evidence in this case. Do you know
21 firsthand what percentage of the \$1.4 million in sales that
22 you've just quoted was of Designer Skin merchandise in 2004?

09:46:00

23 A. And what can I not give that answer based on again?

24 Q. On anything that you don't know personally.

25 A. Okay.

09:47:00

1 Well, given the fact that when they started -- because
2 I told you I know the tax returns and I saw those, so that's
3 something that I know personally.

4 Q. Do the tax returns break out the different brands?

5 A. I was going to finish --

09:47:00

6 Q. Please.

7 A. -- my answer.

8 Q. Do finish.

9 A. So given the fact that you see a significant jump in their
10 sales from when they brought on tanning lotions to the fact
11 that it went from like 800,000 to 1.4 the next year and then it
12 went even higher when Designer Skin kept going and I went
13 back -- and I wanted to make sure that I was correct on my
14 answers, because I said yesterday a vast majority, and I went
15 back to the printouts of November 2005 and February 2006 and at
16 that time S & L carried both, respectively, 80 and 86 percent
17 of Designer Skin's products.

09:47:00

09:47:00

18 Now, I know that, okay, their sales increased
19 dramatically when they started carrying tanning lotions, and
20 then from that I know that Designer Skin is roughly 25 to 30
21 percent of the marketplace, of the indoor tanning lotion
22 marketplace.

09:48:00

23 So you can take those numbers and factor in that 25 to
24 30 percent of it because the buying patterns are replicative.
25 It's not an -- an industry standard is an industry standard and

09:48:00

1 the indoor tanning lotion is a certain percentage, a certain
2 total amount, and this is what our slice of that pie was.

3 So I would imagine that if we're at 30 percent, 25 to
4 30 percent of the industry, we would also be 25 to 30 percent
5 of S & L's lotion sales. It's -- it's just applying one to the
6 other.

7 Q. You're finished with that answer?

8 MR. COLEMAN: I'm asking the Court again to strike
9 that answer as nonresponsive based on hearsay and speculation.

10 THE COURT: Sustained.

11 BY MR. COLEMAN:

12 Q. Do you know from firsthand information what percentage of
13 this supposed \$1.4 million in gross revenues was sales of
14 Designer Skin merchandise? Not -- do you know?

15 A. I read the transcripts. Can I give that as an answer or
16 no?

17 Q. The only person who can answer questions like this in this
18 room is the judge, but my question is, for firsthand, not for
19 what you've read someone else say, do you yourself know?

20 MR. CROWN: Objection.

21 THE COURT: Overruled.

22 THE WITNESS: I only know based on the transcripts.

23 BY MR. COLEMAN:

24 Q. You -- isn't it true that you cannot tell me what the
25 dollar figure and financial loss by Designer Skin, separate and

1 apart from sales by S & L -- let's -- I could revisit that in a
2 second if you want to -- that you cannot give the jury a number
3 as to dollars lost by your company as a result of what S & L
4 has done?

5 A. Well, I thought I tried to come up with that formula before 09:50:
6 when you asked me. You know, I'm --

7 Q. So what's the number?

8 A. I guess I'd have to go back and calculate it based on those
9 percentages.

10 Q. Is there -- you realize that this is your last opportunity, 09:50:
11 right? This is the trial. Is there any -- do you have a
12 number or not?

13 A. If we're talking about -- are you talking about damages?

14 Q. Yeah.

15 A. Again, I would go reference back to that 1.4 to 1.6. 09:50:

16 MR. COLEMAN: Your Honor, can I -- could the Court
17 instruct the witness to give a direct answer?

18 MR. CROWN: Objection.

19 THE WITNESS: I'm trying to.

20 THE COURT: Listen to the question and -- because I 09:51:
21 think the question was, "Do you have a number?"

22 But you can rephrase the question.

23 BY MR. COLEMAN:

24 Q. Without consideration of the sales by S & L, do you have a
25 number as to damages sustained by Designer Skin? 09:51:

1 A. I was going to let that up for our attorneys and counsel to
2 decide because they know all the legal parameters of the
3 definition of --

4 THE COURT: He's just asking you if you have a number.
5 He's not asking what other people have or what other people can
6 do.

09:51:00

7 THE WITNESS: Not with me at the moment, no.

8 BY MR. COLEMAN:

9 Q. One more question about the sales of Designer Skin since
10 you've raised it over my objection.

09:51:00

11 Aren't the sales by Designer Skin of Designer Skin --
12 I mean by S & L of Designer Skin products that you -- that
13 Designer Skin already sold?

14 A. Meaning we sold it to a manufacturer?

15 Q. Well, you manufacture it yourself, correct?

09:52:00

16 A. Yeah.

17 Q. You sell it to a distributor.

18 A. Can you repeat your question? I just want to make sure I
19 understand it.

20 Q. The merchandise sold by S & L was already sold by Designer
21 Skin to a distributor, wasn't it?

09:52:00

22 A. Correct. Yes.

23 Q. So why would sales by S & L be a loss to Designer Skin when
24 you've -- all they're selling is merchandise you've sold
25 already.

09:52:00

1 A. Because it diminishes our market value.

2 Q. By how much?

3 A. Again, in my opinion, by 50 percent.

4 Q. Okay. 50 percent of what?

5 A. Our market value is how we position ourselves within the
6 marketplace, and if you position it differently it diminishes
7 it. And I'm not looking to step over dollars to pick up
8 nickels. I mean, we have a long-sight vision for the company
9 in protecting its integrity. So yes, indeed, we may have sold
10 it to a manufacturer but just because I have the sale today
11 doesn't mean I'm like not concerned about the future.

09:52:00

09:53:00

12 Q. What's the value of that concern in dollar figures?

13 A. If our market value is degraded and so forth, it loses its
14 premium quality and it -- it could be exponential.

15 MR. COLEMAN: No further questions subject to recross,
16 if necessary.

09:53:00

17 THE COURT: Redirect?

18 MR. CROWN: Yes, Your Honor. Thank you very much.

19 Your Honor, before I ask my first redirect question, I
20 would like to move into evidence the tax returns that have been
21 stipulated to between the parties, and they are submitted to
22 the Court as Exhibit 6, and they would be the tax returns for
23 S & L Vitamins for the years 2000, 2001, 2002, 2003, 2004 and
24 2005.

09:54:00

25 THE COURT: All right. Exhibit 6 is received in

09:55:00

1 evidence.

2 MR. COLEMAN: Your Honor, may I just make a record of
3 an objection?

4 THE COURT: You may. What's your objection?

5 MR. COLEMAN: Relevance, foundation and hearsay.

09:55:00

6 THE COURT: None of which are registered in the final
7 pretrial order, are they?

8 MR. COLEMAN: Yes, Your Honor. They are. As we
9 discussed yesterday, these were on the list of stipulated
10 exhibits. I erroneously thought they were on the list of
11 plaintiffs' exhibits, but in 3(a)(6) exhibit I did object on
12 the grounds of relevance and undue prejudice.

09:56:00

13 In fact, the Court granted leave to amend that
14 objection to account for a cut off sentence, notwithstanding
15 the fact the Court seems to have ruled that these objections
16 are of no consequence by virtue of the stipulations.

09:56:00

17 THE COURT: The ruling stands.

18
19 REDIRECT EXAMINATION

20 BY MR. CROWN:

09:56:00

21 Q. Ms. Romero, yesterday when we adjourned Mr. Coleman was
22 asking you various questions and you were pointing over to our
23 table where you've been sitting and you have your own file and
24 you have a number of documents and records that you have
25 compiled in preparation for this trial and your testimony. Am

09:57:00

1 I correct?

2 A. Yes.

3 Q. And there was some specific questions that he's asked you,
4 and I'm going to kind of reference them because he's asked you
5 in a number of different places can you give the jury precise
6 amounts or exact amounts, and at times yesterday you had
7 pointed over to documents. So let me ask you: Did you have a
8 chance when we adjourned last night to review the documents you
9 were pointing to and refresh your memory in anticipation that
10 your testimony would be continuing today?

09:57:00

09:57:00

11 A. Yes.

12 Q. Would you tell the jury the types of documents that you
13 reviewed to refresh your memory for today's testimony.

14 MR. COLEMAN: Your Honor, relevance. This doesn't --
15 I didn't ask her on direct what documents she reviewed. And
16 what's the relevance of this?

09:58:00

17 THE COURT: Overruled.

18 THE WITNESS: I reviewed -- when I made reference
19 yesterday to the \$6.2 million that we spent on the creation,
20 marketing and advertising of our products, I reviewed again all
21 those income statements. I reviewed all of the websites from
22 S & L from 2005 and 2006 and 2008 to make sure that the
23 percentages were in line with what I had said to be a vast
24 majority, because I was getting asked for numbers, numbers,
25 numbers, numbers so I wanted to say yes, it was 80 percent,

09:58:00

09:58:00

1 yes, it was 86 percent and so forth.

2 I reviewed the tax returns of S & L last evening.

3 Let's see. I reviewed a bunch of stuff. I
4 reviewed -- I went back in time and I was looking at all of our
5 product offerings at the time I was viewing that in comparison 09:59:
6 to the 13 product specimens that were submitted yesterday and
7 so forth.

8 And so I was just reviewing everything to refresh my
9 memory.

10 Q. So you reviewed profit statements and sales statements and 09:59:
11 expense records of Designer Skin financial data in part?

12 A. What it -- I want to make sure I give the correct
13 definition of it. It was a summary of our financial income
14 statements for five years starting back from 2007.

15 Q. So in addition to looking at financial records and 09:59:
16 summaries and data of Designer Skin, you also looked at
17 financial records, specifically, the tax returns that have just
18 been admitted into evidence, of S & L Vitamins, correct?

19 A. Correct. I looked at every single return they had in
20 there. 09:59:

21 Q. And you also looked at sworn testimony of any of the
22 principals of S & L Vitamins to allow you to answer
23 Mr. Coleman's questions?

24 A. I looked at the testimonies of Mr. Sagarin and
25 Mr. Mercadante. 10:00:

1 Q. And when you looked at that testimony it allowed you to
2 then look at seeing what they stated was their percentage of
3 Designer Skin sales to allow you to then answer the question
4 about the reduction in market value and the damage to Designer
5 Skin.

10:00:

6 MR. COLEMAN: Objection. Your Honor, it appears
7 that --

8 THE COURT: Give me your legal objections.

9 MR. COLEMAN: Hearsay. The use of -- asking whether a
10 document was reviewed in preparation for testimony does not
11 render nonhearsay that which otherwise would be hearsay.

10:00:

12 THE COURT: Sustained.

13 MR. CROWN: Your Honor, may I make a brief response?

14 THE COURT: No. You can ask your next question.

15 MR. CROWN: Thank you.

10:01:

16 BY MR. CROWN:

17 Q. The amount of \$6.2 million -- taking these items now that
18 Mr. Coleman addressed with you on cross-examination point by
19 point, the \$6.2 million is a five-year total representing the
20 costs that Designer Skin spent in its product development.

10:01:

21 A. That's the expenses, yes. And that's -- that does not mean
22 manufacturing. That -- it was -- I had Jerry break it down
23 solely for the advertising, developing and marketing.

24 Q. And that \$6.2 million is going to include the development
25 of the electronic renderings that are the creative copyrighted

10:01:

1 works in this case that become an integral and dominant part of
2 the marketing and branding and selling of the Designer Skin
3 products.

4 MR. COLEMAN: Objection. Leading.

5 THE COURT: Sustained.

10:02:00

6 BY MR. CROWN:

7 Q. Tell us how that cost relates to the integration of these
8 creative electronic copyrighted renderings.

9 A. As I mentioned yesterday, we have a lengthy development on
10 just the creative side, virtually nine months that goes into
11 coming up with that final rendered image, and so -- I mean, we
12 include in that cost everything from our trend-spotting trips
13 to everything that we do to come up with that final image.

10:02:00

14 So...

15 Q. Do you know the total revenue on an annual basis within
16 this relevant time period, '05 through '08, of the indoor
17 tanning lotion industry?

10:02:00

18 A. Industry standards based on trade magazines and so forth of
19 what they'll say the indoor tanning lotions only, not beds, is
20 about a hundred million dollar industry and it has been for a
21 few years because it hasn't really grown much.

10:03:00

22 Q. And Designer Skin, you've said, now occupies a 30 percent
23 position of that industry?

24 A. Correct.

25 Q. Has that always been Designer Skin's percentage of the

10:03:00

1 industry during this ten years that you've been involved?

2 MR. COLEMAN: Relevance.

3 THE COURT: The relevance is?

4 MR. CROWN: The relevance is again it goes to the
5 value of these electronic images, why Designer Skin goes to the
6 lengths that they do to develop the creative work, copyright
7 it, protect it, and ultimately this question is going to lead
8 to giving the basis for the jury to calculate actual damages
9 pursuant to the jury instruction on actual damages. It's the
10 reduction in market value.

11 THE COURT: Well, on that avowal that it's
12 foundational, overruled.

13 THE WITNESS: We've incrementally grown in what we
14 consider to be our percentage of the pie in the past ten years,
15 and around the time that we're talking, around 2004, 2005,
16 2006, we're around 20 percent or so and we've been
17 incrementally growing.

18 MR. CROWN: Your Honor, may I ask if Exhibit 7 may be
19 given to Ms. Romero?

20 BY MR. CROWN:

21 Q. Ms. Romero, Exhibit 7 has been placed in front of you, and
22 I believe there are four parts that are designated specifically
23 as 7-1, 7-2, 7-3, and 7-4. You've had a chance to review those
24 exhibits prior to this moment, correct?

25 A. Right.

1 Q. And you actually reviewed those exhibits prior to the start
2 of this jury trial, correct?

3 A. Right.

4 Q. All right.

5 Among the documents that you reviewed last night to
6 refresh your memory to give the testimony you're giving here
7 now, were these documents part of what you reviewed last night?

10:05:00

8 A. Yes.

9 Q. And within these documents you see S & L Vitamins websites.
10 These are copies that were taken off of the S & L website for
11 the years 2005, 2006, in that time frame, correct?

10:06:00

12 A. Correct.

13 Q. Within these Exhibit 7 documents, do you see displayed the
14 images of Designer Skin indoor tanning lotions?

15 A. Yeah. Yes.

10:06:00

16 Q. And within those images are included the 13 copyrighted
17 images that were discussed during Mr. Shawl's testimony
18 yesterday, correct?

19 A. I went back to verify that particularly, yes.

20 Q. And those images, as you've said, were copied and placed by
21 S & L Vitamins on the S & L Vitamins website without Designer
22 Skin's authority.

10:07:00

23 MR. COLEMAN: Your Honor, objection. This exceeds the
24 scope of cross-examination.

25 THE COURT: Sustained.

10:07:00

1 BY MR. CROWN:

2 Q. Yesterday when Mr. Coleman was asking you about the amount
3 of Designer Skin indoor tanning lotion products that S & L
4 Vitamins had put on the S & L website you used the phrase "the
5 vast majority", correct? 10:07:00

6 A. Yes.

7 Q. Mr. Coleman then asked you can you give me a specific
8 percentage, whether it be a 60 percent or 70 or higher, to
9 quantify your answer vast majority, correct?

10 A. Correct. 10:08:00

11 Q. Based on your review of Exhibit 7, are you able to quantify
12 for the jury the percentage of Designer Skin products that were
13 available in 2005 and the percentage of those products that
14 S & L had placed on S & L's website?

15 A. So that I could be absolutely exact, I went through the 10:08:00
16 November 2005, February 2006 and I counted everything that was
17 printed off of S & L and then I cross-referenced it with our
18 manuals for that year and I took the number that they had
19 versus the number that we had and I came to the percentage, and
20 in 2005 it was 80 and in 2006 it was 86. 10:08:00

21 Q. So now we --

22 A. I -- I'm sorry.

23 Q. So vast majority for 2005 is 80.5 percent of Designer
24 Skin's products were copied and placed on S & L's website.

25 A. Correct. 10:08:00

1 Q. And then 86 percent of Designer Skin's products were placed
2 by S & L on its website in 2006.

3 A. Correct.

4 Q. And so now we know what you mean by vast majority.

5 A. Yes.

10:09:

6 Q. Mr. Coleman has asked you about giving the jury a dollar
7 amount or the method for the jury to ultimately calculate the
8 actual damage claim in this case, and you said you referenced
9 the tax returns.

10 Correct?

10:09:

11 A. Correct.

12 MR. CROWN: Your Honor, am I able to ask that Exhibit
13 6, which is now admitted in evidence, be given to Ms. Romero?

14 BY MR. CROWN:

15 Q. Can we start -- did you look at the 2000 tax return for
16 S & L Vitamins?

10:10:

17 A. Yes.

18 Q. And did you -- and to make it simple, I'm just going to ask
19 you to tell us if you reviewed on each of these years basically
20 two numbers. One would be gross sales, also known as gross
21 revenue, and the second number, as S & L has reported on its
22 tax returns, gross profit.

10:10:

23 Okay?

24 MR. COLEMAN: Objection. Relevance and hearsay.

25 THE COURT: Overruled.

10:11:

1 BY MR. CROWN:

2 Q. Can you tell the jury what S & L's gross sales were in the
3 year 2000?

4 A. \$220,782.

5 Q. What was S & L's gross profits in the year 2000?

10:11:

6 A. \$34,045.

7 Q. What were in the year 2001 S & L's gross sales?

8 A. \$286,664.

9 Q. In the year 2001 what were S & L's gross profits?

10 A. \$58,717.

10:11:

11 Q. In the year 2002, what were S & L's gross sales?

12 A. \$348,681.

13 Q. In 2002 what were S & L's gross profits?

14 A. \$70,755.

15 Q. In the year 2003 what were S & L's gross sales?

10:12:

16 A. \$8 -- do you want me to just round up or do you want the
17 exact number?

18 Q. Exacts.

19 A. \$898,758.

20 Q. In 2003 what were S & L's gross profits?

10:12:

21 A. \$111,174.

22 Q. In the year 2004 what were S & L's gross snail's?

23 A. \$1,443,705.

24 Q. In the year 2004 what were S & L's gross profits?

25 A. \$222,212.

10:12:

1 Q. In the year 2005 what were S & L's gross sales?

2 A. \$1,680,617.

3 Q. What were S & L's gross profits?

4 A. \$156,552.

5 Q. Among the deposition transcripts that you read, did you
6 read the testimony of Larry Sagarin?

10:13:00

7 MR. COLEMAN: Your Honor, objection. This is the same
8 objection we already --

9 MR. CROWN: May I -- I didn't respond then and --

10 THE COURT: I don't need a response. This calls for a
11 yes-or-no answer. The objection is overruled.

10:13:00

12 THE WITNESS: Yes.

13 BY MR. CROWN:

14 Q. Did you read it specifically to see when S & L Vitamins
15 began to sell Designer Skin products and what percentage of
16 their sales was Designer Skin products?

10:13:00

17 MR. COLEMAN: Your Honor, I'm objecting again because
18 although this may --

19 THE COURT: Tell me your legal objection.

20 MR. COLEMAN: The legal objection is it's leading.

10:14:00

21 THE COURT: Sustained.

22 BY MR. CROWN:

23 Q. Why did you read Larry Sagarin's deposition testimony?

24 A. I wanted to get a clear understanding as to when they
25 brought lotions on overall to sell at S & L and when they said

10:14:00

1 that they brought Designer Skin on as part of that and then to
2 see what percentages they said were their tanning lotion sales
3 and what percentages were their Designer Skin lotion sales.

4 Q. And having read the answers of Larry Sagarin to those
5 inquiries of yours, did that allow you to use as a basis their 10:14:
6 answers to tell the jury what the damages are in the reduction
7 of the market value of Designer Skin's electronic renderings?

8 MR. COLEMAN: Objection. Calls for hearsay and
9 speculation. The question was asked and answered. And as a
10 result of the leading by counsel she's being -- 10:15:

11 THE COURT: Sustained.

12 BY MR. CROWN:

13 Q. Was it significant for you to confirm the percentage of
14 S & L's sales of Designer Skin products?

15 MR. COLEMAN: Objection. Vague. Speculation. 10:15:

16 THE COURT: Sustained.

17 BY MR. CROWN:

18 Q. Did you rely in part -- of all the materials you reviewed
19 last night, did part of your reliance to be able to tell the
20 jury the reduction in the market value of Designer Skin's 10:15:
21 electronic renderings in part rely on your reading of the sworn
22 testimony of Larry Sagarin?

23 MR. COLEMAN: Your Honor, can we perhaps discuss this
24 at sidebar?

25 THE COURT: What's your legal objection? 10:15:

1 MR. COLEMAN: The legal objection is that counsel is
2 leading, asking --

3 THE COURT: Sustained.

4 BY MR. COLEMAN:

5 Q. How is Mr. Sagarin's testimony on the percentage of
6 Designer Skin products compared to total S & L sales used by
7 you so that you can tell the jury Designer Skin's damages?

10:16:00

8 MR. COLEMAN: Objection. Leading. Hearsay.

9 THE COURT: Sustained.

10 BY MR. CROWN:

10:16:00

11 Q. How does Designer Skin set the manufacturer's suggested
12 retail price?

13 A. We do that really based on what goes in and out of the
14 packaging, based on what type of skin care ingredient's in it,
15 what type of level bronzes are in it and so forth is what we do
16 to come up with what that figure is, because historically it
17 has a higher cost of goods, so the -- again, we have a spectrum
18 of prices offered, and the ones that have the most amount of
19 skin care or bronzing tend to be the highest.

10:16:00

20 Q. If -- I take it that the salons will sell Designer Skin
21 products consistent with the manufacturer's suggested retail
22 price?

10:17:00

23 A. Yes.

24 Q. From your personal knowledge in the position you have with
25 Designer Skin, willing buyers will come to willing salon

10:17:00

1 sellers and those buyers will pay the manufacturer's suggested
2 retail price.

3 A. Yes.

4 Q. When S & L Vitamins sells a Designer Skin product on the
5 Internet for half or more of Designer Skin's suggested retail
6 selling price, does that reduce the market value of Designer
7 Skin's electronic renderings by 50 percent?

8 A. Yes.

9 Q. On the products that S & L Vitamins has copied that were
10 copyrighted, which they actually used those copyright images to
11 sell products on the Internet, is that where in this case there
12 is a reduction in market value by 50 percent?

13 MR. COLEMAN: Your Honor, this exceeds the scope of
14 cross.

15 THE COURT: Sustained.

16 BY MR. CROWN:

17 Q. On Exhibit 7 in those various pages of the S & L website
18 from different points in time, is there logos of S & L
19 Vitamins' that are placed in contact with the Designer Skin
20 products?

21 MR. COLEMAN: Your Honor, leading and exceeds the
22 scope.

23 THE COURT: Sustained.

24 BY MR. CROWN:

25 Q. Can you tell us on the Designer Skin images that are in

1 Exhibit 7, which is the S & L website, if anything has been
2 added to the Designer Skin images?

3 MR. COLEMAN: Same objection. Same question.

4 THE COURT: Sustained.

5 BY MR. CROWN:

10:19:00

6 Q. Tell us -- describe the images of Designer Skin's products
7 on Exhibit 7.

8 MR. COLEMAN: Exceeds the scope. Same objection.
9 Same question.

10 THE COURT: Sustained.

10:19:00

11 BY MR. CROWN:

12 Q. Mr. Coleman was asking you specifically about the unfair
13 competition claim and the association that the presentation by
14 S & L of Designer Skin's products has made, and I believe your
15 testimony was it creates the false impression that there's an
16 association between S & L and Designer Skin or that S & L is
17 authorized to sell Designer Skin products.

10:20:00

18 A. Yes.

19 Q. To further go into Mr. Coleman's line of inquiry on
20 cross-examination, can you tell us how the website portrayal by
21 S & L makes that false association?

10:20:00

22 A. On some of the images they have their logo right next to
23 the products, and these are the ones that were our renderings,
24 so -- and I believe this goes back to Mike Shawl's testimony of
25 where they -- you're able then to take our rendering and add to

10:21:00

1 it in Photoshop.

2 Q. Can you describe the appearance of their logo?

3 A. Like this triangular type of logo that they have in the
4 upper left-hand corner of the rendering.

5 Q. Is there a name of S & L Vitamins' website that we know
6 they've used as a d/b/a that is also part of that logo?

10:21:00

7 A. Uh-huh.

8 Q. What is the name of their d/b/a that is part of that logo?

9 A. This one -- okay. These little thumbnails are so small.

10 You know what? I'd have to go back and reference the computer
11 images that were generated just because these little printouts
12 are so tiny.

10:21:00

13 Q. At the top of their website what is the name of their --

14 A. Body Source.

15 Q. So Body Source or Body Source on Line is S & L Vitamins'
16 name that they've used on the Internet.

10:22:00

17 A. It's -- they've -- throughout the years they -- at one
18 point they were TheSuppleNet and then it was Body Source, so --
19 I mean, that's why we -- a lot of times with our -- these
20 Internet sites they use multiple different types of names so --
21 but yes, it's Body Source.

10:22:00

22 Q. You have personally gone on your computer to view the
23 S & L Vitamins website at different points during this period
24 of time, correct?

25 A. Yes.

10:22:00

1 Q. Is one of the website addresses that you've used to view
2 the S & L Vitamins website www.TheSuppleNet.com?

3 MR. COLEMAN: Your Honor --

4 THE WITNESS: That's --

5 MR. COLEMAN: -- relevance, leading. 10:22:00

6 MR. CROWN: It's a stipulated fact.

7 THE COURT: Sustained.

8 BY MR. CROWN:

9 Q. Tell the jury what the website address is or addresses are
10 to access the S & L Vitamins website. 10:23:00

11 MR. COLEMAN: Your Honor, relevance.

12 I don't object to --

13 THE COURT: Overruled.

14 I'm sorry?

15 MR. COLEMAN: I have no objection to the fact. I 10:23:00
16 don't understand where the testimony is going.

17 THE COURT: Overruled.

18 THE WITNESS: [SuppleNet.com](http://www.SuppleNet.com). And then more recently
19 when I've been accessing it it's been [BodySourceOnline.com](http://www.BodySourceOnline.com).
20 They both direct you into the same ultimate site. 10:23:00

21 Q. As part of the unfair competition claim that Mr. Coleman
22 was questioning you about, he talked about the phrase "a
23 satisfied customer is a happy customer", correct?

24 A. Right.

25 MR. COLEMAN: I'm sorry. Object. Already asked and 10:24:00

1 answered.

2 THE COURT: I couldn't hear you.

3 MR. COLEMAN: She answered already, Your Honor, so
4 there's no objection.

5 BY MR. CROWN:

10:24:00

6 Q. Explain what you mean by a satisfied customer is a happy
7 customer.

8 MR. COLEMAN: Your Honor, relevance. Leading. Beyond
9 the scope.

10 MR. CROWN: He asked --

10:24:00

11 THE COURT: Sustained. Relevance.

12 BY MR. CROWN:

13 Q. How does the phrase "a satisfied customer is a happy
14 customer" go to your testimony regarding the damages in this
15 case?

10:24:00

16 MR. COLEMAN: Your Honor, relevance.

17 MR. CROWN: He asked it on cross.

18 THE COURT: Wait a minute.

19 MR. CROWN: I'm sorry.

20 THE COURT: If I want a response I'll ask for it.

10:24:00

21 Objection?

22 MR. COLEMAN: Relevance.

23 THE COURT: Overruled.

24 THE WITNESS: When I say a happy customer, one of --
25 Designer Skin -- we've never been short-sighted in our business

10:25:00

1 plan or our goals, so it was never to make the quick buck or
2 anything like that, and -- because we believe a happy
3 customer -- because it is a repeat type of business, it's not
4 something where you buy a copier and you don't buy a copier
5 for another 20 years or something like that, it leads to 10:25:
6 exponential sales, what we consider a lifetime of sales.

7 So when we have unhappy customers due to either --
8 due to either having bad experiences with our products because
9 it was purchased from -- a way that wasn't given with
10 authorized information and direction on how to use the product 10:25:
11 or if it's spoiled or expired product, we would try to fix it,
12 even though we didn't sell it to them, by giving them a
13 replacement product, but oftentimes once tainted it's hard to
14 recoup that.

15 And then moreover, salons have told me personally, so 10:26:
16 it's not hearsay and it's easily available on our tanning
17 bullet -- the Internet bulletin boards, where they have dropped
18 our product line because of it being on the Internet and
19 diverted.

20 And that's heart-breaking, because we spent years 10:26:
21 trying to get that customer, that salon as a customer, and so
22 when they drop our product line as a function of it, again,
23 that's -- the loss just isn't that immediate dollar. It's
24 exponential. It's a lifetime, in my opinion.

25 MR. COLEMAN: Your Honor, I'm going to move that 10:26:

1 response be struck as hearsay.

2 THE COURT: Sustained.

3 BY MR. COLEMAN:

4 Q. Have you, in your review of the S & L Vitamins website,
5 seen products of Designer Skin that are expired at the time
6 they're being listed for sale?

10:26:00

7 MR. COLEMAN: Objection. Relevance. Scope.

8 THE COURT: Sustained.

9 BY MR. CROWN:

10 Q. Are there safety issues that go to the diminution in the
11 market value --

10:27:00

12 MR. COLEMAN: Objection.

13 Q. -- that --

14 MR. COLEMAN: I'm sorry.

15 Relevance. Scope.

10:27:00

16 THE COURT: Wait a minute.

17 MR. COLEMAN: Leading.

18 THE COURT: Did you finish your question?

19 MR. CROWN: I'm going to withdraw it and ask it in a
20 different way.

10:27:00

21 BY MR. CROWN:

22 Q. How can -- does safety issues with misuse or an expired
23 product to a specific customer affect the diminished market
24 value?

25 MR. COLEMAN: Objection to scope. Leading.

10:27:00

1 Relevance.

2 THE COURT: Sustained on all three.

3 BY MR. CROWN:

4 Q. As you look at Exhibit 7 and you see Designer Skin's
5 copyrighted images and the Body Source triangular logo next to
6 those images, is that a violation of Designer Skin's
7 copyrights?

10:28:00

8 MR. COLEMAN: Objection. Calls for a legal
9 conclusion.

10 THE COURT: Sustained.

10:28:00

11 BY MR. CROWN:

12 Q. Did they have the authority and are those images with their
13 logo there with or without Designer Skin's authority?

14 A. Without our authority.

15 MR. CROWN: Thank you. No further questions.

10:28:00

16 THE COURT: All right. You may step down.

17 MR. COLEMAN: Judge, no redirect?

18 THE COURT: I'm sorry?

19 MR. COLEMAN: No recross?

20 THE COURT: No recross?

10:28:00

21 MR. COLEMAN: I would like to --

22 THE COURT: Denied.

23 THE WITNESS: I can leave?

24 THE COURT: You may step down.

25 THE WITNESS: Thank you.

10:28:00

1 THE COURT: You may call your next witness.

2 MR. CROWN: Your Honor, at this point may I suggest
3 that we take our morning break and bring a couple matters to
4 the Court's attention?

5 THE COURT: Are these the depositions you're talking
6 about?

7 MR. CROWN: Yes.

8 THE COURT: Well, I'm going to let you decide what
9 you're going to offer and see what kind of issues I have and
10 then if I have to deal with that I'll take it up outside the
11 presence of the jury.

12 So we will take our mid-morning break, then, for 20
13 minutes.

14 (Proceedings recessed at 10:29 a.m.)

15 10:29:00

16 (Proceedings reconvened at 10:53 a.m.)

17 THE COURT: Thank you. Please be seated.

18 The record will reflect the presence of the parties
19 and counsel outside the presence of the jury.

20 Issues? 10:54:00

21 MR. CROWN: Your Honor, we are at the point of
22 depositions. We don't have any more live witnesses.

23 THE COURT: I understood that.

24 MR. CROWN: So we met with Mr. Coleman during the
25 break and Mr. Coleman is going to raise both relevance to the 10:54:00

1 areas that he knows we're going to go to, which is as much an
2 argument for directed verdict as it is here and now. That
3 apart, on the procedural point, Mr. Coleman has told me he's
4 fully cognizant of the focused areas that I want to get from
5 his clients in their two transcripts, the reasons for it, that 10:55:
6 there is no objection to form or that it's hearsay, because
7 it's sworn testimony, they are admissions of party opponents,
8 he's got none of that, and what he shared with me -- I said,
9 "Do you want me to give you the specific page and line?" He
10 said, "No, I don't need that. I know these transcripts. I've 10:55:
11 read these depositions. I have one procedural point to take up
12 with the Court, and that is the formal technical requirement
13 under the submission of the final pretrial order."

14 So it's not that he's saying surprise or anything like
15 that. 10:55:

16 So where we're at is -- and if I could really ask this
17 Court -- and I guess it's fundamental discretion with the Court
18 and fundamental justice. I believe that the focused areas,
19 which go directly to profit damages as framed in the stipulated
20 jury instruction, comes -- based on the limitations of what the 10:56:
21 rulings were with Ms. Romero, I need from their client the
22 sworn testimony of what their percentage of their total
23 profits, which is part of the tax returns, comes from their
24 mouth. They're saying it's -- they said 10 percent Designer
25 Skin products. 10:56:

1 With that testimony and a few other backgrounds points
2 that Mr. Coleman understands so there's no surprise, we move
3 in, and I will do this very, very efficiently.

4 THE COURT: Give me --

5 MR. CROWN: I'm sorry, Your Honor. 10:56:

6 THE COURT: You were about to finish your sentence.

7 MR. CROWN: Yes.

8 Mr. Coleman's position is going to be -- and again,
9 I'm not speaking for him but I'm just sharing with you what the
10 meet and confer was. 10:56:

11 MR. COLEMAN: So far so good.

12 MR. CROWN: Is that if there's a technicality and it
13 can -- candidly, if it's going to benefit me, I'm going to use
14 it. I'm asking this Court -- and I appreciate what I'm saying.

15 In the interests of the fundamental fairness, if there is -- 10:57:

16 and again, if I misstate why you have the procedural rules --

17 and I understand what the specifications are in your order

18 scheduling the final pretrial and designating transcripts,

19 which includes delivering to the Court highlighted copies in

20 different colors by plaintiff and defendant. We understand 10:57:

21 that. But if the point of all that is so that there is no

22 surprise to the other side and to give the Court an opportunity

23 to make evidentiary type objections and to avoid any delays

24 with the jury, then those procedural requirements, and

25 hopefully I'm not missing the main purpose of that requirement 10:57:

1 in advance, they don't exist here, and it would be, in our
2 judgment -- that's why we urge the Court -- something wrong, if
3 the justice of the case, the merits of the case are somehow
4 limited by some technicality, and I'm not -- I don't -- I'm not
5 in any way belittling the importance of that requirement, but 10:58:
6 I'm saying those main reasons don't exist here, and so it's a
7 technicality under these circumstance Mr. Coleman is going to
8 raise, and we ask this Court under the limited reasons and the
9 importance of the evidence -- again, this is not just some --
10 that -- that you allow us to do that. And then if you look at 10:58:
11 how the parties frame the issue in the final pretrial where we
12 fully expected -- and we can't ignore the whole issues with
13 Mercadante. I mean, at some point, as I say, justice and
14 fundamental fairness concerns would hopefully weigh in favor of
15 the Court allowing limited publication of sworn testimony to 10:58:
16 meet these burden type issues.

17 THE COURT: As I understand it, the evidence you would
18 seek to present by way of this deposition would be the
19 percentage of S & L's profit as reflected on the tax returns.
20 The tax returns reflect a profit for each of the years in 10:59:
21 question. You would seek to present by way of deposition
22 testimony what percentage of that profit for each of those
23 years is attributable to --

24 MR. CROWN: Designer Skin.

25 THE COURT: To what? 10:59:

1 MR. CROWN: To the sale of Designer Skin products.

2 THE COURT: To the sale of Designer Skin products.

3 That's what you --

4 MR. CROWN: Yes.

5 THE COURT: -- would prove.

10:59:

6 Now, for the record, the pages of the -- and -- the
7 deponents and the page numbers would be what?

8 MR. CROWN: Your Honor, that would be Larry Sagarin,
9 page 71 from his deposition taken on March 30th, 2006 in a
10 related New York case styled S & L Vitamins against Australian
11 Gold, and it's a case in which Mr. Coleman produced Mr. Sagarin
12 for deposition in New York City, New York, 71, line 21, through
13 72, line 21.

11:00:

14 That's the core and that's what I hope would be --
15 now, there are some other background aspects that further flesh
16 that out, but -- and that's why I say, very candidly, within
17 that page, basically, the end of 71 and the end of 72 -- like I
18 said, there's more that I would offer for background that --
19 and again, I'm not trying to --

11:00:

20 THE COURT: Stay focused on my question.

11:01:

21 MR. CROWN: Okay.

22 THE COURT: And my question was deponents and page and
23 line number. Was there another deponent?

24 MR. CROWN: Yes.

25 Well, if I stay with Sagarin -- that -- that's the

11:01:

1 most important, and I want to emphasize how important that page
2 is, and I -- and I do make that avowal to the Court. If I read
3 it to you I would explain just the -- what I believe, on behalf
4 of my client, the importance.

5 Then if I went additional for Sagarin, there is page 11:01:
6 49, line 18 to page 50, line 2, which just confirms their two
7 website addresses that gets us to the website that's Exhibit 7.

8 Page 53-5 to 53-9, which is Larry Sagarin stating he
9 knows how to right click and copy images from a website.

10 Page 54-16 to 54-24, where Mr. Sagarin says, "Only 11:02:
11 Steve Mercadante and I put product photographs on S & L's
12 website."

13 Line 72-6 to 72-9 -- well, I've already mentioned that
14 so -- and that's where they said Designer Skin is ten percent
15 of their indoor suntanning lotion sales. 11:02:

16 They also talk about tanning lotion revenue is 30
17 percent of their total sales.

18 So you could you see why I can take the tax returns
19 and through their admissions.

20 And then the -- and then under Steve Mercadante, at 11:03:
21 page 72, line 12, to 72, line 19, talked about the gross sales
22 that year when they start being increased over the previous
23 year due to Internet sales and that they started selling indoor
24 tanning lotion products on their website in late 2003, early
25 2004. 11:03:

1 At page 74, line 15, 35 percent of their revenue's
2 tanning lotion, just like I mentioned with Larry Sagarin.

3 MR. COLEMAN: I'm sorry. The previous designation
4 before 74 was what?

5 MR. CROWN: Was 72, line 12, to 72, line 25. 11:04:00

6 MR. COLEMAN: 74 and --

7 MR. CROWN: And 74-15 to 75-18.

8 And then page 97, line 4, to 97, line 9, where Steve
9 Mercadante says, "Larry and me add products to the S & L
10 website." 11:04:00

11 And then page 161, line 10. To 161-16, that S & L's
12 profit margin on indoor tanning lotion products is 25 to 30
13 percent.

14 Page 189, line 15, to 189, line 24, they place S & L's
15 logo with Designer Skin photographs. 11:05:00

16 Page 196, line 4, to 196, line 5, they said that
17 Australian Gold, another product, represents 25 percent of all
18 of their tanning lotion sales. I will tell you that's also
19 within the key page from the Sagarin deposition.

20 And what Mr. -- that would be it. 11:05:00

21 So what I've tried to do is to frame to the Court --
22 and I can do this -- I would get all that to the jury and I
23 would be the one reading it. I believe that I can
24 accomplish -- if you gave -- if you granted our request to put
25 all those pages in for those reasons, I will accomplish that 11:05:00

1 reading in less than ten minutes to the jury. If you are
2 inclined to not allow us to do all, I would certainly ask for
3 some to give the flavor of what I'm saying, but in absolute
4 minimum, again, Judge, the strongest words I can urge is that
5 that key page 71 to page 72 of the Larry Sagarin deposition I
6 think is that fundamentally important to our case.

11:06:00

7 Thank you.

8 THE COURT: Mr. Coleman?

9 MR. COLEMAN: Do you mind if --

10 THE COURT: You can remain seated.

11:06:00

11 MR. COLEMAN: Thank you.

12 THE COURT: Just pull that microphone up.

13 MR. COLEMAN: Thank you.

14 Mr. Crown is completely accurate in his
15 characterization, which is merely that in this case both sides
16 have lived and died by the orders that have been entered in
17 terms of pretrial procedure and both sides have lived a little
18 bit by them, died a little bit by it, and I would suggest that
19 the -- actually, notwithstanding the arguments as to equity and
20 justice, that -- those arguments obviously can be applied to
21 any of the decisions the Court has made to depart from the
22 pretrial orders. If the Court is inclined, nonetheless, to
23 give leave in this case, then I would make substantive motions
24 objecting to the evidence on substantive grounds.

11:06:00

11:06:00

25 THE COURT: And what would those be?

11:07:00

1 MR. COLEMAN: There are two claims here. One is the
2 Arizona law claim for unfair competition. Unfair competition
3 is described in the Kaibob Shop versus Desert Sun case where --

4 THE COURT: I'm sorry. I thought you were making an
5 evidentiary objection. 11:07:.

6 MR. COLEMAN: I am, Your Honor. Please. I'm not
7 making a motion to dismiss.

8 The Arizona courts have made it clear that unfair
9 competition is a palming-off claim. To the extent that it is
10 anything other than a trademark claim, the only damages that 11:07:.
11 have ever been awarded under unfair competition have been for
12 labeling instruction.

13 And I refer to Fairway Constructors, Inc. which
14 discusses this at great length, 970 Pacific 2d 954.

15 So I believe it's not relevant -- that profits are not 11:08:.
16 relevant on the unfair competition claim.

17 On the copyright claim, we've already brought to the
18 Court's attention both the John Paul Mitchell Systems case, 106
19 F.Supp.2d at 475, and Lexmark INTERNATIONAL, the Sixth Circuit,
20 which says that the focus in a copyright claim where software 11:08:.
21 has been copied is on the -- is -- is on the -- not the sales
22 of the merchandise with which the copyright is associated but
23 with the actual copyright itself.

24 In other words, there's no evidence in this case about
25 the value of these renderings that we've been hearing about. 11:08:.

1 It is not an appropriate measure of damages to talk about gross
2 sales or even profits of the merchandise. The merchandise is
3 not the copyright.

4 So I would move on that basis on grounds of relevance
5 that lost sales -- especially here, by the way, where the lost 11:09:
6 sales do not in any way reflect -- I'm sorry -- where the
7 profits of my client do not in any way reflect loss sales of
8 the copyright holder. In fact, the merchandise was sold by the
9 copyright holder at the price at which it chose to sale them.

10 So -- usually infringer's profits are an appropriate measure of 11:09:
11 damages because we're saying you made money we should have made
12 money. Here, Designer Skin made its money.

13 THE COURT: Did you want to respond to the substantive
14 arguments?

15 MR. CROWN: Well, I do. 11:09:

16 That's not the jury instruction and that's not the
17 testimony. The value, and it's been quite clear, is that the
18 electronic renderings are integral component parts of the
19 product. The value is all of those components, not just the
20 lotion inside the bottle, the bottle, the image. They all 11:10:
21 create the value, and they are inextricably intertwined, if I
22 could borrow that phrase from other settings, that they are
23 all one and the same and overlapping, and it is that integral
24 part.

25 If Mr. Coleman is correct, the Court then would have 11:10:

1 to then say then why did I deny summary judgment? Because that
2 very issue was argued and this Court already considered and
3 denied it.

4 And then if we look at the damages, which are
5 stipulated, and these are damages for both unfair competition 11:10:
6 and the copyright, it says, "You may make an award of the
7 defendants' profits only if you find that plaintiff showed a
8 causal relationship between the infringement and the profits
9 generated indirectly from the infringement and/or defendants'
10 gross revenue. Defendants' profit is determined by subtracting 11:11:
11 all expenses from defendants' gross revenue."

12 Now, the tax returns and two figures that we focused
13 the jury on through Ms. Romero's testimony and it's in
14 evidence, we focus is in on gross revenues, which is sales, and
15 the gross profit. They've already done that calculation, and 11:11:
16 now with the proffered testimony, if ten percent of -- if the
17 gross profit of all indoor tanning products is 30 percent,
18 Designer Skin is ten percent of that number, it's very
19 calculatable by the jury.

20 And it doesn't talk about at all -- and that's why -- 11:11:
21 it's really an erroneous argument because it's not about
22 whether or not we sold our product to our distributor at the
23 agreed price. The profits argument or the damages is whether
24 we prove this causal relationship and the profits generated
25 indirectly from the infringement. So it really is going to 11:12:

1 their profit.

2 And, Your Honor, clearly the evidence is quite strong
3 in that regard. They copyrighted our image. Not copyrighted.
4 They copied our copyrighted images. They put it on their
5 website. They put their triangular logo next to it. That is 11:12:00
6 the infringement. We've done that with a number of products.
7 By a preponderance of the evidence, we have showed a causal
8 relationship.

9 And the language is not directly. It is profits
10 generated indirectly. 11:12:00

11 Now, let's drop down another paragraph because these
12 words are quite soft, and that's why I'm saying it's how you
13 prove the damages under the profits section for copyright
14 infringement.

15 We go to the fourth paragraph of the stipulated 11:12:00
16 instruction. The defendants' gross revenue is all of the
17 defendants' receipts from the sale of a product associated with
18 the infringement. Associated with the infringement. Again,
19 kind of similar to the indirect relationship associated with, a
20 very soft word. Easily, the record supports that. 11:13:00

21 Then the burden kind of shifts now -- well, the
22 plaintiff has the burden of proving the defendants' gross
23 revenue by a preponderance of the evidence.

24 I submit to the Court when I publish Larry Sagarin's
25 testimony, which is what we're arguing here, and he says ten 11:13:00

1 percent of the indoor tanning lotion sales of S & L is Designer
2 Skin products, I've now met this instruction. That gets me to
3 the jury.

4 Because we're kind of doing both here. We're arguing
5 evidence. We're also -- it has a lot of the flavor of a 11:13:
6 directed verdict here.

7 Now, if we move down to the next paragraph, this is
8 where the burden now shifts to the defendant.

9 Expenses are all overheard costs and production costs
10 incurred in producing the defendants' gross revenue. And the 11:13:
11 defendants have the burden of proving the defendants' expenses
12 by a preponderance of the evidence.

13 That's been done in the tax returns. We have the two
14 numbers. Gross revenue, gross profits. And if you look on the
15 tax returns, which we've got for several years, what they've 11:14:
16 deducted is the cost of goods sold. That's a fundamental item
17 on the tax return.

18 Now we come to the last paragraph, which would be the
19 charge to the jury. And again, these are stipulated
20 instructions. 11:14:

21 Unless you find that a portion of the profit from the
22 sale of a product containing or using the copyrighted work is
23 attributable to factors other than the use of the copyrighted
24 work, all of the profit for the sale of a product associated
25 with the infringement is to be attributed to the infringement. 11:14:

1 The defendants have the burden of proving the percentage of the
2 profit, if any, attributable to factors other than infringing
3 the copyrighted work.

4 Now the evidence is so strong and on this record at
5 this point in the trial there's nothing to refute that. We 11:15:
6 have met on this record the burden that there is a portion of
7 this profit that is associated with the copyrighted work and is
8 attributable and associated with the infringement. On this
9 record, it is even a stronger factual basis than what was
10 presented to you at summary judgment. 11:15:

11 I submit to you that when you denied summary judgment
12 on these claims you did so based on the evidence. The record
13 today is even stronger. And that's why -- that's all
14 Mr. Coleman has. We believe you can allow us to publish what
15 we've asked for and move the trial through to conclusion. 11:15:

16 THE COURT: All right. The objections to the
17 deposition testimony will be sustained. There's been no
18 showing of good cause. Indeed, the failure to comply with this
19 Court's order is breathtaking in its scope, and indeed, the now
20 45 minutes that have been consumed dealing with an issue that 11:16:
21 should have consumed virtually no time is simply indicative of
22 why this Court expects, as the order provides, that the parties
23 identify by page and line number and then identify
24 counterdesignations and, of course, provide the Court with
25 copies and highlighting that allow for the facilitation. 11:16:

1 And any suggestion that somehow it was a shock and
2 surprise that the witness or witnesses were not here or could
3 not be brought here to testify live is a shock and -- a hollow
4 shock and surprise because one cannot assume the presence of
5 those witnesses.

11:17:00

6 Now, alternatively, I sustain the objections to this
7 proffered testimony on substantive grounds. This testimony
8 that would take the form of a percentage of profits that are
9 attributable to the sale of this product simply is a further
10 perpetuation of the conflation that has taken place throughout
11 this trial between the sale of goods and the technical
12 infringement that occurred when the image was apparently
13 lifted from the designer website and pasted on the website of
14 S & L.

11:17:00

15 But to suggest that somehow the jury should be allowed
16 to speculate over the damages that would be -- the profits made
17 by S & L that would be attributable to the copyright as opposed
18 to the lawful sale of these goods would be, in the Court's
19 judgment, rank speculation.

11:18:00

20 Do you have any other evidence or any other witnesses,
21 counsel?

11:18:00

22 MR. MIZRAHI: Judge, we don't have any other evidence.
23 What we would do is we would read the stipulated facts that are
24 set forth in the final pretrial order, with the Court's
25 permission, and then we would also -- and I can do that at this

11:18:00

1 time. I move to amend the complaint pursuant to our discussion
2 yesterday morning to conform to the evidence with respect to
3 the copyright registrations.

4 Yesterday morning we obviously had that very long
5 conversation about subject matter jurisdiction, and since that 11:19:
6 time those registrations have been placed in evidence and
7 there's been testimony about those, and so to conform to the
8 evidence with respect to those issues we would move to amend to
9 reflect that evidence.

10 So beyond -- and then the other thing that we would do 11:19:
11 is we would move to admit the entirety of Exhibit 7. I think
12 portions of Exhibit 7 are already in evidence. We would move
13 to admit the balance of Exhibit 7.

14 And that's -- we don't have any other live witnesses
15 or evidence. 11:19:

16 THE COURT: All right. Any response?

17 MR. COLEMAN: No objection on the evidentiary motion,
18 Your Honor.

19 In terms of the motion to amend, I think we've -- my
20 impression, actually, had been that the Court had deemed the 11:20:
21 complaint amended. So it seems to me that's an issue that's
22 already been decided. I just do want the record to reflect
23 regarding, I guess, both points that all the registrations that
24 are exhibits have been -- are in evidence, but that would
25 exclude the registration for the website itself. 11:20:

1 THE COURT: Well, the motion to amend the complaint to
2 conform to the evidence will be granted. Exhibit 7 in its
3 totality will be received.

4 We'll bring the jury back in.

5 You can read from the stipulated facts and at that
6 time, presumably, rest in front of the jury.

11:21:00

7 MR. MIZRAHI: Your Honor, just in the interest of
8 time, when I read all of the parts of C(1)(g) I'm going to
9 avoid reading the registration numbers if that's okay. It's in
10 there and we put them in there but I don't want to bore the
11 jury with reading a bunch of registration numbers if that's
12 okay.

11:21:00

13 THE COURT: Any objection to that?

14 MR. COLEMAN: No.

15 THE COURT: All right.

11:21:00

16 MR. COLEMAN: I might object if he hadn't offered to
17 do it that way, in fact.

18 THE COURT: Well, are you proposing not to read the
19 contents of G or --

20 MR. MIZRAHI: No. I'm proposing to read the contents
21 of G but to the omission of what's in the parentheses so --

11:22:00

22 THE COURT: I can't hear you. To omit what?

23 MR. MIZRAHI: I'm sorry.

24 To omit the -- basically, the stuff in the parentheses
25 where it says registration number VA-1-418-041. I'm not going

11:22:00

1 to read all those registration numbers because I think it will
2 get a little boring.

3 THE COURT: Very well.

4 (Jury in at 11:22 a.m.)

5 THE COURT: Please be seated.

11:22:00

6 The record will now reflect the presence of the jury
7 along with counsel and the parties.

8 Counsel, you at this point, I believe, are prepared to
9 read to the jury those stipulated facts from the final pretrial
10 order.

11:23:00

11 You may proceed.

12 MR. MIZRAHI: Thank you, Your Honor.

13 These are facts that were stipulated to before the
14 case.

15 The following facts are admitted by the parties and
16 require no proof:

11:23:00

17 Designer Skin is an Arizona limited liability company.

18 S & L is a New York corporation.

19 Larry Sagarin owns and operates S & L.

20 S & L owns and operates an Internet website located at
21 www.thesupplenet.com.

11:23:00

22 Designer Skin manufactures, distributes, promotes,
23 markets, advertises and sells indoor tanning and other skin
24 care and health-related products for use and/or retail sale in
25 tanning salons in the United States and internationally.

11:24:00

1 Through its Internet website, S & L sells Designer
2 Skin products along with products manufactured by other skin
3 care and nutritional supplement companies.

4 Designer Skin has federal copyright registrations for
5 the following:

6 Designer Skin.

7 Boutique Bronzing Ambiance.

8 Splash Tanning Tonics.

9 Ultimate Love Junkie.

10 The Big O.

11 Secret Rapture.

12 Revival.

13 Sheer Wisdom.

14 Ray of Light.

15 Vanishing Act.

16 Designer Skin Intrigue.

17 Tao.

18 Designer Skin Mood.

19 Pure Intentions.

20 Designer Skin Worship.

21 Worship Me.

22 Freedom.

23 Designer Skin Goddess.

24 Halo.

25 Designer Skin Spellbound.

11:24:..

11:24:..

11:24:..

11:25:..

11:25:..

1	Designer Skin Speed of Light.	
2	Designer Skin Shine.	
3	Designer Skin Saving Face.	
4	Amazing Face.	
5	Addicted to Love.	11:25:00
6	Designer Skin Drama Queen.	
7	Enamor.	
8	Flare.	
9	Undercover Angel.	
10	Choc-o-holic.	11:25:00
11	Daddy-O.	
12	Designer Skin Bombshell.	
13	Designer Skin Believe.	
14	Splash Get Down Brown.	
15	Floozy.	11:25:00
16	Fortune.	
17	Ritual.	
18	Shrine.	
19	Dolce.	
20	Whisper.	11:25:00
21	Veritas.	
22	Boutique Bloom.	
23	Boutique Bronze Camouflage.	
24	Bohemia.	
25	Bronze Bondage.	11:25:00

1 Smolder.

2 Siren.

3 Angel.

4 Secret Stash.

5 Try Me.

11:25:00

6 Gold Digger.

7 Ego Maniac.

8 Faker.

9 Triple Play.

10 Splash Hustle.

11:26:00

11 Shameless.

12 And Bipolar.

13 Designer Skin is the exclusive creator of these
14 products and names and the unique artwork and labels through
15 which they are marketed. Designer Skin has also copyrighted
16 its website and product menu.

11:26:00

17 Designer Skin advertises and markets its products
18 through its website www.designerskin.com.

19 Designer Skin products can't be purchased by the
20 public via the Designer Skin website.

11:26:00

21 Designer Skin has never authorized S & L to utilize
22 any of its intellectual property rights for any purpose.

23 S & L has never requested that Designer Skin authorize
24 it to use its intellectual property rights for any purpose.

25 S & L has displayed and continues to display images of

11:26:00

1 Designer Skin's products on its website in connection with the
2 sale and marketing of said products.

3 THE COURT: I think you -- you said -- I heard you
4 say, I think, connection. It reads conjunction. Maybe I just
5 didn't hear it right. 11:27:0

6 MR. MIZRAHI: I'm sorry. I think I did say connection
7 and it does say conjunction. I apologize.

8 I'll read that sentence over again.

9 S & L has displayed and continues to display images of
10 Designer Skin's products on its website in conjunction with the 11:27:0
11 sale and marketing of said products.

12 S & L has placed and continues to place its logo on
13 the images of Designer Skin's products.

14 Thank you.

15 THE COURT: Any further evidence? 11:27:0

16 MR. MIZRAHI: At this point the plaintiffs rest.

17 THE COURT: All right.

18 Ladies and gentlemen, the evidence is in from the
19 plaintiffs. At this time the Court has matters to take up with
20 counsel. So we're going to be in recess until two o'clock. 11:27:0
21 We'll take a longer noon hour.

22 And I expect that we should be ready to start at two
23 but when we reach this phase of the trial sometimes my ability
24 to estimate the length of time I have to take matters up with
25 counsel is -- well, is about as good as it was this last hour 11:28:0

1 when I told you it was going to be 20 minutes. But -- so --
2 but if we're running a little late we will start as close two
3 as we can.

4 So we'll be in recess until then. You have a long
5 lunch. 11:28:

6 And remember the admonition.

7 I'll see counsel.

8 So you're excused until two.

9 (Jury out at 11:28 a.m.)

10 THE COURT: All right. The record will reflect the 11:28:
11 presence of counsel and the parties outside the presence of the
12 jury.

13 Are there any matters to be taken up at this point in
14 the trial?

15 MR. COLEMAN: A number of legal matters, Your Honor. 11:29:

16 THE COURT: Why don't you come to the podium and make
17 it easier on your neck and back and make Mr. German's and my
18 hearing better.

19 MR. COLEMAN: First off, we move to strike the
20 testimony of Ms. Romero. A number of times counsel 11:29:
21 represented that she would -- that the extensive testimony
22 that she gave would result in the delivery to the fact finder
23 of testimony that would give them a rational or coherent basis
24 on which to make a damages calculation. I submit that that
25 never happened, and for that reason, in retrospect, I believe 11:29:

1 we can say that, in addition to whatever other liabilities that
2 they have, it seems that virtually all of that testimony was
3 irrelevant.

4 Should I make all the motions at once?

5 THE COURT: Let me deal with that one first and hear a 11:30:
6 response.

7 MR. CROWN: Your Honor --

8 THE COURT: At the podium, please.

9 MR. CROWN: I've brought to the podium with me the
10 stipulated jury instructions. 11:30:

11 THE COURT: I'm sorry?

12 MR. CROWN: I've brought to the podium with me the
13 stipulated --

14 THE COURT: And I have read them and reread them, so
15 why don't you just address his point. 11:30:

16 MR. CROWN: And that's what I was going to do.

17 Miss Romero's testimony is relevant on both the
18 elements that we need to prove on both of our claims, copyright
19 infringement as well as unfair competition, and the two types
20 of damages that we will be seeking the jury to award. 11:31:

21 When it comes to the elements of copyright
22 infringement, we need to prove access --

23 THE COURT: I'm sorry, but you're about to educate me
24 on that which I already know, so I --

25 MR. CROWN: Okay. 11:31:

1 THE COURT: I just want you to respond to his --

2 MR. CROWN: Her testimony addressed all those issues,
3 but in terms of the damages, her testimony established what
4 goes into the integration of these copyrighted electronic
5 renderings, how they are inextricably intertwined with the 11:31:
6 value of the product.

7 The product just doesn't have value with lotion, no
8 more so than the liquid in a Coca-Cola bottle is just the
9 liquid and Coca-Cola has no way to protect the shape of its
10 bottle or its name. These are associated with. 11:32:

11 And what she testified to, within this actual damages,
12 when you bring it all forward from design, conception,
13 creation, manufacturing, then launching and placing on the
14 website, then the distribution, then the training, then the
15 salons, the type of salon, what takes place, the consumer going 11:32:
16 there, and ultimately you get to this very instruction which
17 says that we are allowed to recover as actual damages the
18 amount of money adequate to compensate the copyright owner for
19 the reduction of the fair market value of the copyrighted work
20 caused by the infringement. 11:32:

21 The reduction of the fair market value of the
22 copyrighted work is the amount a willing buyer would have been
23 reasonably required to pay a willing seller at the time of the
24 infringement for the actual use made by the defendants of the
25 plaintiffs' work. 11:33:

1 That is what her testimony ultimately led to and what
2 her points -- I mean, the questions literally used parts of
3 this instruction, the willing buyer that Designer Skin has done
4 all of these extensive efforts, and that's why all of that
5 testimony in terms of what goes into the development and the 11:33:
6 expense and then the -- even the policing to detect the
7 infringement.

8 THE COURT: Who was the willing buyer for the
9 copyrighted work?

10 MR. CROWN: The purchaser of the suntan lotion 11:33:
11 products.

12 THE COURT: That's a purchaser of the product, but
13 who would have been the willing buyer of the copyrighted image?

14 MR. CROWN: The renderings on the bottle. When you
15 buy the product you are buying that rendering. 11:34:

16 If you're asking me does Designer Skin, in the context
17 of this type of copyright infringement case, sell its image
18 standing alone, no. There is no art store. There is no piece
19 of work. There is no T-shirt. You're not buying the rendering
20 alone. The rendering is part of the bottle. 11:34:

21 When the customer goes in, it is an integrated and
22 integral component part of that product, and people buy it as
23 much for the bottle as they buy it for the product. They go
24 hand in hand and they are an integral component.

25 And the standard is association. If the -- if a 11:34:

1 copyright case of this nature requires there to be a distinct
2 purchase of the copyrighted work, like you buy -- you know, you
3 buy a CD, which is the work, versus the package that goes as
4 part of that.

5 It's not a stand-alone. They're not in the business 11:35:
6 to sell their creative copyrighted renderings. They sell them
7 as an integral component part of their product. And the
8 product in the bottle, if they put it in a plain white bottle,
9 it doesn't sell. If they put it in a plastic bag, it doesn't
10 sell. They go hand in hand. 11:35:

11 So the ultimate purchaser is buying this copyrighted
12 work. That's what this instruction is depending on. And this
13 instruction doesn't say that you have to only or uniquely buy
14 it as a stand-alone item. It's like, "How much for the
15 lotion?" "How much for the bottle?" "And, by the way, why 11:35:
16 don't you throw the rendering in."

17 I'm not trying to be trite. I'm trying to say that
18 different types of protected copyright work will present
19 themselves differently in litigation, and that's why when you
20 have something of this nature, or lotion, which is a -- you 11:35:
21 know, it's a lotion. It's like a translucent product. By
22 itself, that's not sold. When you go and buy and you pay \$50
23 or \$60 for a specific product you are buying as part of that
24 price this copyrighted image. They go inextricably together
25 hand in hand. 11:36:

1 And that's why the language here --

2 THE COURT: I think you're starting to repeat
3 yourself --

4 MR. CROWN: Okay.

5 THE COURT: -- but --

11:36:00

6 MR. CROWN: Anyway, the bottom line is, it is that
7 willing buyer.

8 And so when Ms. Romero testified, if we use
9 hypothetically a \$50 bottle that a willing buyer would pay a
10 willing seller, and there's clear evidence in the record of
11 that, at the salon, but then we have the infringement that
12 copies copyrighted images and we put that -- and S & L puts it
13 on its website and it sells directly -- that's what they're
14 saying; it's uncontested -- and they sell it for \$25, they have
15 reduced the fair market value of the copyrighted work by that
16 much.

11:36:00

11:37:00

17 Also along the line, you've got the unfair competition
18 claim, and unfair competition, and her testimony went to both
19 damages and meeting the element, and there's again a stipulated
20 instruction, it's when a person falsely advertises a product or
21 creates a false impression and/or association concerning the
22 product.

11:37:00

23 Like copyright infringement, the burden of proof is by
24 a preponderance, and you may refer to the damages instruction,
25 the actual damage instruction, to award damages.

11:37:00

1 So the parties have stipulated that the measure of
2 damages becomes the same.

3 And again, as Ms. Romero clearly testified, when
4 someone can go on S & L's website, see our copyrighted images
5 and see their logo, a false association has been made in two 11:37:
6 ways. They are either going to think, the public, that there
7 is an authorization to S & L or, alternatively, that there is
8 some type of legitimacy to it, that they're associated with the
9 company.

10 And that takes us back to the reduction in market 11:38:
11 value. Because they are very clear with their customers. It's
12 not like the retail salons are themselves discount-type retail
13 stores. They are very clear in how they've established their
14 ultimate point of sale to the willing buyer from the willing
15 seller. 11:38:

16 And when you have a company on the Internet who
17 unlawfully, not lawfully -- I appreciate that there's a
18 category that is a lawful way to resell in our system of
19 commerce, but there is an unlawful way that it can be done, and
20 that's what's been done here on the evidence. We've been very 11:38:
21 clear. And so you have the elements of copyright infringement,
22 you certainly have the elements of the unfair competition with
23 false association and false impression, and it goes to those
24 damages claim.

25 At the same time, we have a second category of 11:39:

1 damages. So there's two different types of damages the jury
2 can award. And the profits.

3 And I appreciate what the Court just ruled with that
4 testimony, but that's not fatal. I represented to the Court
5 that it was important and I -- we certainly believe that. But 11:39:
6 the stipulated fact that should survive this challenge and
7 eventually the directed verdict is a stipulated fact at
8 Paragraph F.

9 Paragraph F of the stipulated facts says:

10 "Through its Internet website, S & L sells Designer 11:39:
11 Skin products along with products manufactured by other skin
12 care and nutritional supplement companies."

13 So we know that they are selling Designer Skin. And
14 right now the record is absolutely uncontradicted that certain
15 images were infringed upon that were copyrighted. We have the 11:39:
16 copyright protections in evidence. We have Mr. Shawl and
17 Miss Romero both, and Mr. Shawl specifically, as the creator,
18 has said, "My exact images were copied on the website." And
19 it's stipulated that they didn't have the authority.

20 What was offered in the opening statement, which is 11:40:
21 not evidence, is that the distinction in this case will be
22 whether there was unlawful infringement, i.e., copying
23 copyrighted images without authority, and the unfair
24 competition that goes with that as well, versus lawful
25 photographs that they took of the products themselves, put 11:40:

1 those on their website and sold.

2 There's absolutely no record at all to support an
3 alternative way for these copyrighted images to have become on
4 their website.

5 And then if you establish the fact that for the same 11:40:
6 things I said a little while ago on what we need to prove the
7 profits component, the tax returns are in evidence, the
8 profits. And it's their profits. It's not our profits that's
9 the issue when it comes to this damage instruction. It's their
10 profits that we've proven. We know they've sold it. If they 11:41:
11 sold at least one bottle, that's at least a dollar. It's not
12 zero.

13 If you follow the point I'm making.

14 It is uncontradicted that they have sold our products,
15 and we've proven that part of the products they sold were in 11:41:
16 association with the infringed-upon copyrighted electronic
17 renderings.

18 And so, again, and I pointed out, this instruction
19 uses soft language, when it's indirectly related to the
20 infringement, which in part addresses what the Court asked me a 11:41:
21 little while ago. You said, "Are they buying the image?" We
22 don't do that. We don't sell the image. The image is part of
23 the overall product. When you buy the bottle you've bought, in
24 part, the image. That's protected.

25 And then you have the next, which is if the 11:41:

1 defendants' gross revenue is associated with the infringement.
2 Of course it is.

3 And then thirdly, unless the defendant proves, which
4 again, no evidence from the defense at this stage, that the
5 copyrighted work is attributable to factors other than the 11:42:
6 copyrighted work, then the jury is directed to say that all of
7 the profit from the sale of the product is associated with the
8 infringement and is to be attributed to the infringement.

9 That's the stipulated law.

10 And so on this record, Ms. Romero's testimony, this 11:42:
11 Court ruled on the specific questions, went to allow the
12 testimony in, went to sustain, and we believe that what was
13 left by the Court to be admissible to the jury should be upheld
14 right now.

15 Thank you. 11:42:

16 THE COURT: Thank you.

17 It's ordered granting the motion to strike that
18 portion of Ms. Romero's testimony bearing on damages that was
19 avowed to be connected with something that would eventually be
20 probative of the issue of damages, and her testimony was, 11:43:
21 again, of the nature that would have simply invited rank
22 speculation on the part of the jury, much less bereft of any
23 connection to the copyright infringement or any alleged unfair
24 competition.

25 Did you have another motion? 11:43:

1 MR. COLEMAN: Yes, Your Honor.

2 These are interrelated and I think it would be
3 appropriate for the Court to consider them at the same time.

4 One is a motion to dismiss Larry Sagarin as a
5 defendant based on the plaintiffs' case. 11:44:00

6 An individual, including a corporate officer, who has
7 the ability to supervise infringing activity and has a
8 financial interest in that activity or who personally
9 participates in that activity is personally liable for the
10 infringement. 11:44:00

11 There's no evidence in this case that Larry Sagarin,
12 the defendant, is a corporate officer, has the ability to
13 supervise the activity, has a financial interest in the
14 activity, or personally participated in the activity. So on
15 those grounds I would move that the copyright claim against him 11:44:00
16 be dismissed.

17 And as regarding the unfair competition claim, I
18 think, frankly, there's no evidence whatsoever regarding
19 anything Larry Sagarin did regarding unfair competition.

20 And then I move regarding both defendants that the 11:45:00
21 Court dismiss the complaint based on the evidence, based on the
22 complete lack of damages evidence, the fact that the plaintiff
23 is not entitled to statutory damages because the infringement
24 began prior to the registration of the copyrights.

25 I just would bring to the Court's attention the fact 11:45:00

1 that it was about a month ago the Ninth Circuit ruled
2 definitively in a case called Derek Andrew, Inc. versus Poof
3 Apparel Corp, which at the moment is found at 2008 USAPP. Lexis
4 12408, Ninth Circuit, 2008, June 11th, that no statutory
5 damages are available for a continuing infringement that 11:46:
6 occurred prior to the effective copyright registration date.

7 Denying the suggestion that had been made in that
8 case, and elsewhere perhaps, that although infringements that
9 take place before registration may not entitle a party to
10 statutory damages, subsequent infringements, even if they're 11:46:
11 in the same nature, could be a grounds for statutory damages,
12 the Ninth Circuit rejected that concept entirely saying that
13 that would -- to so rule would be to completely upend the
14 purpose of Section 412 of the Copyright Act where Congress
15 sought to provide copyright owners with an incentive to 11:46:
16 register their copyrights promptly, and where that same act
17 encourages potential infringers to check the Copyright Office's
18 database.

19 I think it's clear there are no statutory damages as a
20 matter of law. There is no evidence in the case at this time, 11:47:
21 nor has there ever been, of any damages.

22 There was some discussion a brief time ago about the
23 idea that Designer Skin doesn't sell its pictures, doesn't sell
24 its renderings. That's exactly right. It doesn't. That's why
25 this case should be dismissed. This case is about the 11:47:

1 renderings.

2 In fact, this is a very long version of the same
3 conclusion that Judge Seybert came to in the identical fact
4 pattern case involving my client and Australian Gold in the
5 Eastern District of New York where Judge Seybert said it seems 11:47:
6 as if plaintiffs -- I'm not quoting directly -- it seems as
7 if -- in that case it was counterclaim plaintiffs -- are
8 attempting to use copyright to remedy a harm that is not a
9 copyright harm.

10 That is precisely the case here. Plaintiffs have now 11:48:
11 had every opportunity to find a way to enunciate a claim of how
12 the tort of copyright infringement has harmed their client.
13 They failed to do so.

14 Similarly, regarding the claim of unfair competition,
15 not a single one of the elements has been met. There's been no 11:48:
16 testimony regarding confusion, no testimony regarding false
17 association, no testimony regarding what actual effect may
18 possibly have arisen from the juxtaposition of my client's
19 company logo with images of plaintiffs' bottles in the sale of
20 those bottles. 11:49:

21 In fact, in all likelihood, the only inferential
22 damage that -- the only inferential economic effect of my
23 client's activities, the only intuitively obvious one is that
24 my client has profoundly benefitted the plaintiff by selling
25 lots of tanning lotion, and in order to rebut that logical 11:49:

1 deduction it would appear that there need to be the testimony
2 of an economics expert or a person with the ability to
3 demonstrate by reference to very specific financial, economic
4 or accounting data.

5 To the contrary, absent that, it would appear that the 11:49:
6 appropriate thing to do would be to apply logic, acknowledge
7 that nothing has happened to plaintiff here besides that it
8 has failed to prove any damages, failed to prove that any more
9 time of the jury or the Court should be spent on the other
10 claims. 11:50:

11 THE COURT: Thank you.

12 Response?

13 And let me just ask a question. I haven't seen -- let
14 me get the right names here. I haven't seen anything that
15 connects any claim in this case with Splash Tanning Products, 11:50:
16 LLC, an Arizona limited liability company, and Boutique Tanning
17 Products, LLC, an Arizona limited liability company.

18 MR. MIZRAHI: Judge, obviously, some of the products,
19 as stated in the registration, are products that are under the
20 Splash line. For efficiency in moving forward through the 11:51:
21 trial and to avoid confusing the jury and because Splash and
22 Boutique are subsidiaries of Designer Skin, we've been
23 proceeding under the general name of Designer Skin. If that's
24 something that we need to do, obviously, we can parse out which
25 of the products that we've talked about fall under the lines of 11:51:

1 which of the particular --

2 THE COURT: Well, obviously, in jury instructions the
3 issue becomes more than just -- we could just lump plaintiffs
4 together and call them plaintiffs but, on the other hand, we
5 have -- you know, we have -- most of the evidence -- in fact, 11:52:
6 to my memory, in terms of the only party referred to -- the
7 only plaintiff party referred to is Designer Skin. So I'm not
8 quite sure how you --

9 MR. MIZRAHI: Well, Judge, I mean, we -- in the
10 opening, I mean, we talked about how -- 11:52:

11 THE COURT: Openings don't mean -- I mean, openings
12 are exactly what we say they are; they're telling the jury what
13 you hope to prove, but they're not the proof.

14 MR. MIZRAHI: I understand that.

15 And, again, for efficiency and to avoid confusion, 11:52:
16 because Splash and Boutique are both owned by Designer Skin,
17 it's all under the Designer Skin umbrella anyway, and so to
18 avoid confusion with respect to the different products we've
19 been referring to it generally as Designer Skin.

20 I'm sure on some of the products that we've been 11:53:
21 talking about when we've been talking about Designer Skin
22 generally, you know, I'm sure that the witnesses, like Mike and
23 Beth, Mr. Shawl and Miss Romero, when they're talking about
24 Designer Skin's products they're talking about the products
25 that are owned by Designer Skin and its subsidiaries, which 11:53:

1 include Splash and Boutique, and obviously those -- the
2 registrations are in evidence, the products have been testified
3 about, the -- it would just be a matter of going back and
4 parsing through between the registrations and the testimony the
5 products that were identified and then tie them to the specific 11:53:
6 company or --

7 THE COURT: Do the subsidiaries actually -- are they
8 the holders of certain of those registrations?

9 MR. MIZRAHI: Some of them.

10 THE COURT: Yeah. That's my question. 11:54:

11 MR. MIZRAHI: Some of them.

12 Like, for example, Splash Get Down Brown, Get Down
13 Brown is the product that's under the Splash brand. They're
14 all distributed by Designer Skin. Designer Skin is the company
15 that is distributing all of those brands. 11:54:

16 THE COURT: All right.

17 Someone was about to respond to Mr. Coleman's
18 argument.

19 Was there going to be a response to Mr. Coleman's
20 argument? 11:54:

21 MR. CROWN: Yes, Your Honor.

22 Your Honor, we're not going to have a response on the
23 statutory damages and we would remove statutory damages because
24 based on the evidence we're -- like I said, there's nothing
25 more to offer, and in the interest of the record and time, the 11:54:

1 statutory damage claim should be removed.

2 THE COURT: Dismissed?

3 MR. CROWN: Yes.

4 THE COURT: It's ordered granting the defendants'
5 unopposed Rule 50 motion to dismiss the claim for statutory
6 damages.

11:55:00

7 And you may continue.

8 MR. CROWN: Your Honor, as submitted, the parties have
9 stipulated to two damage instructions, actual damages and
10 profits.

11:55:00

11 THE COURT: Well, you know, you've made several
12 references to the, quote, stipulated nature of the
13 instructions. I'm not sure what significance that has.
14 Because just as parties can't stipulate to jurisdiction,
15 parties cannot stipulate to law, and the Court is the ultimate
16 decider of the law and the Court must ultimately decide in
17 instructing the jury whether the evidence warrants a particular
18 legal instruction.

11:55:00

19 Obviously, you know that, but just so that any action
20 this Court takes is not based on the notion that it's
21 stipulated; it's based on the Court's own determination as to
22 what the law is and whether or not the law should be given in
23 the form of a particular jury instruction and whether or not
24 the evidence warrants it.

11:56:00

25 Anyway, go ahead.

11:56:00

1 MR. CROWN: I appreciate that, Your Honor. I also
2 appreciate that we're arguing this at a point in the trial
3 before we've had our jury instruction conference. I also
4 understand that the Court is mindful of what it is inclined to
5 be instructing the jury on in the event that some or all of the 11:56:
6 claims survive this Rule 50 motion.

7 On the element of copyright infringement, clearly that
8 would survive, because monetary damages is only one element and
9 it's only one of the items of relief that are before the Court.
10 We also have a prayer for injunctive relief, which would be an 11:57:
11 issue for the Court and not the jury.

12 So when you look at the record of copyright
13 infringement, it is uncontradicted. We have evidence that, if
14 accepted by the jury, they've infringed on copyrighted
15 electronic renderings. The copyright registrations are in the 11:57:
16 record. Mr. Shawl was the author and the creator and his
17 testimony is uncontradicted.

18 He went through in detailed fashion about what goes
19 into creating his artwork, which is what it is. Electronic
20 rendering is a form of art. It is copyrightable and it was 11:57:
21 copyrighted by the United States Copyright Office and it is
22 original. And he talked about the many different ways he
23 creates these images, the bottles, the caps, the lighting, all
24 products of his mind, original work.

25 And -- 11:58:

1 THE COURT: I don't think it's disputed, is it, that
2 it's a copyrightable and indeed a copyrighted image?

3 MR. CROWN: I don't believe so, but my point then is
4 that he's also then testified that on S & L's website a copy of
5 his original work was there, and that's without the authority
6 of the law. 11:58:

7 THE COURT: I think that's stipulated as well, isn't
8 it?

9 MR. CROWN: No. No. No, it's not. They've
10 challenged that. If that was it, then I'd like to -- if that's 11:58:
11 stipulated to, Judge, then we're entitled to a directed verdict
12 on that point.

13 THE COURT: Well, I'm -- you know, I'm just the judge,
14 but at page 5 it says S & L -- you read this to the jury.
15 S & L has displayed and continues to display images of Designer 11:59:
16 Skin's products on its website in conjunction with the sale and
17 marketing of said products. Am I missing something?

18 MR. CROWN: Again, Your Honor, while I know that
19 opening statements are not evidence, as neither closing
20 arguments -- 11:59:

21 THE COURT: I'm talking about something that's in the
22 pretrial order.

23 MR. CROWN: Your Honor, we have never missed that. I
24 mean, I -- our position is that it is clear, it is
25 uncontradicted, and as the -- but if you look at the disputed 11:59:

1 issues of fact and law -- I don't want to speak for
2 Mr. Coleman -- I don't believe they've ever stated or admitted
3 that we copied your images. Their case, but there's no
4 evidence of it at this point and, candidly, I doubt that they
5 will offer any evidence, is that they took photographs. 12:00:00

6 So -- and when this Court denied their motion for
7 summary judgment it framed the issue very clearly: Is this
8 infringement of copyrighted works, which would be a copy, or is
9 this a photograph of the bottle?

10 The only evidence in the record, and as the Court's 12:00:00
11 pointed out what is a stipulated fact, is that our copyrighted
12 images, our protected electronic renderings, have been copied,
13 and frankly, they were copied identically, which is higher than
14 the burden we need to show, because as the Court has the law,
15 the issue is, are there substantial similarities? What we 12:00:00
16 produced is an identical copy.

17 And we've also shown not only the access but the easy
18 means, which is the right click of a mouse. It is a basic
19 computer technique, but in our modern world of technology in
20 dealing with this electronic rendering, if you just put your 12:01:00
21 mouse on a website that has accessible images and you right
22 click it and then you then put it into your website. And
23 that's the testimony of Mike Shawl.

24 So I think the record is very, very clear, and the
25 observation the Court's making, frankly, just adds to the 12:01:00

1 strength of the point that we've proven at this stage that
2 there was an infringement of our copyrighted work.

3 We've also proven that there has been unfair
4 competition. I'm just talking about liability. And again, I'm
5 looking at the ruling that the Court made and the jury 12:01:
6 instruction, that there is, with the way they present our
7 copyrighted image, they put it on their web page, which S & L
8 uses the d/b/a of Body Source on line, it's Exhibit 7, and then
9 they've got a very clear placement of their triangular logo
10 right at our copyrighted image. And that is a deliberate, 12:02:
11 intentional infringement, and the way they do it with their
12 logo creates what is a false association and/or impression to
13 the buying public.

14 When this Court ruled on summary judgment it denied
15 defendants' motion on the unfair competition claim, and so 12:02:
16 based on this record and what you have before you, on liability
17 we have met the elements and met our burden by a preponderance
18 of the evidence on both copyright infringement and unfair
19 competition.

20 Now, then moving to damages, which is another element, 12:03:
21 and again, as I say, this trial is also about our request for
22 this Court to issue injunctive relief in this case, but when
23 you look at actual damages there is also issues of defendant
24 selling our product and being able themselves to make a profit
25 and doing so with a violation of our copyright, our protection, 12:03:

1 both in terms of actual damages, and I've spent a lot of time
2 arguing those instructions already and I don't want to repeat
3 and I appreciate that the Court's rulings have been contrary to
4 what the position is I'm urging, but this motion is different
5 and so those arguments now in terms of directed verdict on this 12:03:
6 record should allow this case to survive and to go to the jury,
7 but there's additional elements for the unfair competition,
8 because as this Court has said, these instructions don't end
9 the inquiry.

10 Miss Romero is the person for Designer Skin, and 12:04:
11 really the knowledgeable person, not just some member of a
12 corporate bureaucracy but the hands-on person with a very, very
13 high level of responsibility, who has given the jury both the
14 amounts spent in creating the products and getting them to
15 market that goes into the electronic renderings as well as 12:04:
16 specific expense items on the diversion protection.

17 And so as a cost and expense that has been caused
18 directly to them by the infringement and the unfair
19 competition, we know that they hired a diversion protector
20 person, we know that part of her time and other staff has had 12:05:
21 to spend the time and the money to take steps to protect the
22 copyright, stop the diversion, field the complaints of the
23 salons, field the complaints of the customers, give out
24 replacement samples, and we've got specific monetary amounts in
25 the record that this jury, without speculation and without 12:05:

1 conjecture, can award. They can say there's been an
2 infringement, there's been unfair competition, one or both of
3 those claims, and they can say here's a direct damage as a
4 result of their unlawful efforts.

5 That should go to the jury.

12:05:00

6 And in unfair competition, there's also the element of
7 royalties. It's uncontradicted that they have used -- they're
8 selling our product and they're taking our images without our
9 authority. That's uncontradicted on the record. And they are
10 selling and Designer Skin does not receive anything in return.

12:06:00

11 So the unfair competition claim and the copyright
12 image claim --

13 THE COURT: All right. We're going to have to take a
14 recess. I've got a meeting that I've got to preside over. So
15 we'll be in recess until 1:15. And I would expect by then you
16 to package up whatever else you have to say in about five
17 minutes, and I'll give Mr. Coleman about five minutes to
18 respond.

12:06:00

19 MR. CROWN: Thank you, Judge.

20 (Proceedings recessed at 12:06 p.m.)

12:06:00

21
22 (Proceedings reconvened at 1:17 p.m.)

23 THE COURT: Thank you. Please be seated.

24 The record will reflect the presence of the parties
25 and counsel outside the presence of the jury.

01:17:00

1 You had some additional points to make?

2 MR. CROWN: Thank you, Your Honor.

3 Your Honor, the case of *On Davis versus The Gap, Inc.*,
4 246 F.3d 152, Second Circuit, 2001, involved the case where a
5 person had designed jewelry. The Gap clothing store had used
6 that image as a part of its marketing. The court held that
7 under those circumstances a reasonable royalty would be the
8 proper measure of damage.

01:18:

9 I submit to you that that is an analogous fact
10 pattern and therefore a holding that is instructive to this
11 Court.

01:18:

12 We do believe, and I'm not going to belabor it because
13 you've given me limited time, which we appreciate, we've met on
14 the evidentiary record actual damages and the profit damage,
15 but our actual damages also is tied to this element. The
16 amount of actual damages can also be represented by lost
17 license fees the plaintiffs would have received for the
18 defendants' unauthorized use of plaintiffs' work.

01:18:

19 Now, royalties and license are, to be sure, synonymous
20 and related in this context. A license would be when someone
21 lawfully obtains in advance the permission to use a product and
22 they pay a fee for it. A royalty is the situation here where
23 we are being asked -- we are trying to ask the jury and for the
24 Court to allow us to ask after the improper use to pay a fair
25 amount.

01:19:

01:19:

1 Now --

2 THE COURT: I'm sorry. Was there any evidence as to
3 the amount of license fees that were lost and/or royalties that
4 were lost?

5 MR. CROWN: Well, it is in the terms of the amount 01:19:
6 that's spent, and this is something that can be calculated and
7 ultimately determined by the jury.

8 We've heard testimony that over a five-year period the
9 cost of developing the rendering and then achieving the whole
10 marketing use and the brochures and the artwork is \$6.2 million 01:20:
11 over five years, and that \$6.2 million represented the total
12 cost for 40 products. These products are done year in, year
13 out. If we divide the \$6.2 million by five, the math on that
14 is \$1.24 million per year. If we further divide the \$1.24
15 million cost per year by 40, you are left with \$31,000 per 01:20:
16 product.

17 I mean, specifically that their products, as
18 Miss Romero testified, 80 percent, 86 percent, were on S & L's
19 website used to sell directly our product without our
20 authority. 01:21:

21 This case involves our clear proof that they violated
22 the law, and in so doing violated our rights. We have
23 protected copyright.

24 And to -- after this, to say that because of the
25 dynamic of an image that is inextricably tied to the sale of a 01:21:

1 product, and we can give you the cost for the development of
2 that image, that it's a no-harm-no-foul, that means that
3 there's absolutely no way to address what would be an unjust
4 enrichment and an inequity in favor of S & L.

5 There has to be some level of damage that -- if we
6 can't prove the larger amount, in the Court's judgment, there's
7 got to be, under a royalty analysis supported by the law, the
8 ability to prevent this unlawful use and unjust enrichment,
9 whether it be a small damage amount, whether there be some
10 formula that the jury will take that \$31,000 figure and in and
11 of itself determine what would be a fair royalty under the
12 circumstances, that ultimately is a jury question.

13 But if we can on this record construct no measure of a
14 damage under any of the available theories, then it really will
15 be a wrong without a remedy. They will basically be able to
16 have a free unlawful use.

17 And so I submit, as this Court has said, you
18 ultimately will decide the law and the jury instruction and the
19 measure of damage. The record and the information that's in
20 this record supports this Court identifying a proper measure to
21 address what is an unlawful and what they're trying to argue a
22 free use, and even if there's a nominal measure, when you
23 multiply that over the number of products involved and over the
24 period of time, and we know that it's been going on from 2004
25 to the present, and that's in the record, there's got to be

1 some measure. And on this record, under the analysis supported
2 by *On Davis versus The gap, Inc.*, we survive a directed
3 verdict.

4 A second point to consider is the expense that we have
5 incurred as a damage item that is directed to S & L, because as 01:23:
6 Miss Romero said, they employed a specific diversion detection
7 person at a salary of \$40,000 per year over this relevant time
8 period. She said that person, and in addition, other
9 resources, including Miss Romero's time, Mr. Shawl's time, but
10 specifically there is a person who is dedicated by Designer 01:23:
11 Skin, a hundred percent, to go after the S & L Vitamins and to
12 detect when there's been infringement of copyright.

13 If we then look to what Miss Romero said, 30 percent
14 of that person's time was devoted to the S & L violation
15 specifically, that is another calculable measure of damage 01:24:
16 without speculation that goes to the jury, a direct damage
17 incurred by Designer Skin as a result of S & L's wrongdoing.

18 Thirdly, there needs to be a verdict on liability. As
19 I said before we broke, we have asked this Court for injunctive
20 relief. Ultimately, if there is a finding that there has been 01:24:
21 copyright infringement and if there's a finding of unfair
22 competition, then in turn, and even if there's no damages
23 awarded by the jury, there still needs to be that determination
24 so that this Court, then, can address the injunctive relief
25 that we are seeking. That would be the equitable powers of 01:25:

1 this Court.

2 THE COURT: As to injunctive relief, that's
3 equitable --

4 MR. CROWN: Yes.

5 THE COURT: -- in nature. Does that entitle you --
6 well, a claim in equity, at least the last time I checked,
7 provided for an advisory jury as opposed to a jury by right.
8 Am I misrecalling that?

9 In other words, if all we had left was the injunctive
10 issue, would that entitle you to a jury decision or would that
11 be simply an advisory jury?

12 MR. CROWN: Your Honor, I would hope that you would
13 let this jury, having heard the evidence, decide the
14 fundamental questions of whether there was copyright
15 infringement and whether or not there was unfair competition,
16 and then with those findings of fact this Court can then
17 decide. I mean, that's where we are here. Whether that is by
18 right or by just the process of what we've been doing, at this
19 point I would defer to the Court.

20 And that being said, Judge, we're here at directed
21 verdict and the case is uncontradicted that they violated the
22 law. Copyright infringement is about basically taking
23 something that was developed and created by someone else and
24 basically stealing it. While this is a civil action, that's
25 exactly what they did. Without authority, without permission,

1 they took something we owned, we created, spent a lot of time
2 and money and effort in using it, protecting it, and they stole
3 it.

4 And we've proven that. They have no contradictory
5 evidence on liability. They have falsely associated and 01:26:
6 created false impressions. They put their logo with ours. And
7 that's also unfair competition. This is wrongdoing on their
8 part that we've proven and there has to be accountability for
9 that. The accountability will come, if we look at the *On Davis*
10 *versus The Gap* analysis, through royalty. 01:27:

11 If you believe that our arguments have established
12 other items of potential damage as defined in actual damage for
13 the profits, we will present that to the jury and let the jury
14 decide, but under no circumstances would fairness, on this
15 record, be that they just are allowed to walk out and say we 01:27:
16 took your images, you copyrighted these images, you did a
17 wrong, but you know what? You're going to get away with it.
18 That would be the worst result when we've proven that they've
19 done wrong.

20 And so on that record, we believe that we survive the 01:27:
21 directed verdict and that there is levels of damages that as
22 hopefully we'll be talking to you at the instruction conference
23 that we can then create the right instruction that you will
24 approve that will let this jury decide what the damage actually
25 was as a result of their wrongdoing. 01:28:

1 Thank you.

2 THE COURT: Thank you.

3 Mr. Coleman?

4 MR. COLEMAN: Briefly.

5 The reference to *On Davis versus The Gap, Inc.* is very 01:28:00
6 interesting. The court says two things there. One of them is
7 that there actually had been testimony to the effect that there
8 was licensing of the image in question, including the amount
9 for which licenses had been granted.

10 That didn't happen here. There never have been 01:28:00
11 licenses. This company's not in the business of generating
12 images, something that it does incidental to its sale of
13 merchandise to whoever buys it.

14 There's something else that the court in that case
15 from the Second Circuit said. 01:29:00

16 The de minimus doctrine essentially provides that
17 where unauthorized copying is sufficiently trivial the law will
18 not impose legal consequences.

19 I'm not asking the Court to make a ruling of
20 triviality. I am asking the Court to -- I would rather respond 01:29:00
21 to the suggestion that if something supposedly wrong has taken
22 place it has to go to the jury, there has to be a liability
23 ruling. That's not the case. You've got to have a reason to
24 trouble the people of this district on a jury and the Court and
25 the parties. 01:29:00

1 Regarding the issue of equitable relief, I've urged
2 this a few times. I understand the Court has not actually
3 ruled on it in either direction. There are basically two
4 species of copyright in this case. One is the copyright in the
5 labels. Plaintiffs have already said, and I've reminded 01:30:
6 everyone several times, if you took pictures of the labels we
7 wouldn't have an objection. The renderings that we constantly
8 hear about, protected by one copyright registration, maybe.
9 That registration is not in the record.

10 Stipulated facts of the existence of copyrights is not 01:30:
11 the same as a stipulation to the existence or the timing of a
12 registration. That registration is not in the record. And
13 notwithstanding the Court's amendment to the complaint, as the
14 Court pointed out earlier, the amendment to the complaint does
15 not create jurisdiction. There is no registration in the 01:30:
16 record. Therefore, there cannot be jurisdiction over
17 complaints based on infringement of the copyright protected in
18 that registration.

19 Very quickly, no royalty, no license evidence, no real
20 inequity. We sold stuff that they had already sold. They made 01:31:
21 their money on it.

22 I do just want to address the concept that the
23 expenses incurred because a company hired people to monitor
24 someone who, in effect, was a business competitor and to
25 prepare what is increasingly clear was meritless litigation is 01:31:

1 hardly a basis for damages.

2 I have no further comments.

3 THE COURT: Thank you.

4 All right. The Court has, obviously, heard the
5 evidence and heard the arguments of counsel and I have 01:32:00
6 previously granted the motion to strike certain of the damage
7 evidence from Miss Romero and set forth my reasons why. The
8 Court has now granted the unopposed motion to dismiss the claim
9 for statutory damages. I now grant the Rule 50 motion with
10 respect to actual damages on the bases that there has been no 01:32:00
11 showing of actual damages suffered as a result of the alleged
12 copyright infringement.

13 As I pointed out earlier, there has been a witting or
14 unwitting conflation between the alleged lifting of the
15 electronic image from Designer's website and pasting it on the 01:33:00
16 S & L website, and yet we've heard virtually all the evidence,
17 in fact, I think it's fair to say all the so-called damage
18 evidence, directed at product.

19 In other words, the difference here is between the
20 alleged copyright infringement in connection with the image 01:33:00
21 and the product distribution issues. It is clear that the
22 beef, if you may, on the part of the plaintiffs is the selling
23 of product by S & L, and we've heard evidence in terms of how
24 much money Designer has spent in their product development,
25 how much they've spent in their product image, the money 01:34:00

1 they've spent in their diversion program, and it would appear
2 that is all directed at seeking out product distributors such
3 as S & L.

4 But even if one could assume that somehow it is to
5 seek out and take action against a copyright infringement of 01:34:
6 its images, there is no basis for this jury or any reasonable
7 jury to attempt to connect how much of those expenditures are
8 connected to the images themselves as opposed to the product
9 distribution issues.

10 Likewise, the references to S & L's profits are 01:35:
11 simply, again, gross references to revenues and ultimately to
12 profits without any reasonable basis to differentiate how much
13 of that is attributable to the copyright infringement as
14 opposed to the product sales.

15 It has been argued, but I believe without basis, that 01:36:
16 the mere fact that the image that has been lifted is now
17 associated with a product, that somehow that, if you may,
18 attaches to the product, infects that product such that all
19 sales of that product can now be made the subject of a damage
20 calculation. 01:36:

21 This is not a case where an image was lifted and then
22 was actually placed on somebody else's product and there's an
23 attempt to force a disgorgement of profits made by that
24 product. Indeed, as we've said several times, if S & L had
25 simply photographed the product and used the photograph of the 01:37:

1 product in connection with its advertisement, that would not be
2 actionable.

3 There is the argument that there have been lost
4 licensing fees and/or royalties. There is obviously no
5 evidence of the quantification of either of those, nor how they
6 might be connected to the alleged infringement.

7 And the suggestion, setting aside the lack of
8 connection to the infringement, the suggestion that somehow the
9 jury could take the box car numbers that are in evidence and
10 somehow calculate what a license fee might be or a royalty
11 might be would simply be to invite them to engage, again, in
12 the rankest form of speculation and literally creating out of
13 whole cloth some type of damage number.

14 So for these reasons, the Court concludes that there
15 is simply an absence of evidence to connect the infringement
16 with actual damages that would allow a reasonable jury to have
17 a legally sufficient basis to award damages.

18 Now, with respect to the unfair competition claim, I
19 would remind the parties that -- well, and let me just back up
20 to say the plaintiffs' obvious theory is that there was unfair
21 competition that -- in the form of S & L -- by S & L's
22 affixing its logo to or next to Designer Skin's copyrighted
23 images, S & L has created a false association of itself with
24 Designer Skin, and I would remind the parties that basically
25 this same theory was argued in connection with the trademark

1 claims and at oral argument the plaintiffs conceded, as I
2 believe they should, that the affixing of defendants' logo on
3 or near the marks did not create a likelihood of customer
4 confusion. And if that is the case, then I do not see how it
5 can be argued that affixing of the logo on or near the images
6 could either. 01:40:00

7 Alternatively, and now having heard the evidence and
8 seen the evidence and seen the website presentations, it is
9 clear to me that the portraying of Designer Skin's product
10 images on the website next to the S & L logo cannot cause any
11 confusion that somehow S & L is associated with Designer Skin
12 or is a so-called authorized distributor. 01:40:00

13 And again, we must remind ourselves that S & L --
14 though much to the chagrin of Designer, S & L had a perfect
15 right to sell this product, and the mere fact the S & L logo is
16 next to the product does not and I believe could not result in
17 any bases for confusion. 01:41:00

18 In my judgment, this is no different than if this
19 product had been sold on the Macy's or Nordstrom's website with
20 Nordstrom's and Macy's logos sprinkled throughout. That would
21 not be the basis for a claim of confusion. And obviously,
22 retailers and Internet purveyors of products are doing this
23 regularly and it cannot and should not be actionable. 01:42:00

24 I would just also let the record reflect the, perhaps,
25 applicability of the first sales doctrine that basically says 01:43:00

1 once a sale is made the holder of the copyright cannot hold
2 downstream consumers liable for infringement, and that doctrine
3 may or may not be applicable here, but again, clearly, clearly
4 S & L had a right to sell this product with its -- in its
5 Designer bottle with its Designer label on it.

01:43:00

6 So again, the only issue in front of this jury and
7 before this Court is that narrow issue of the electronic image
8 being lifted and pasted on the website, and there's been simply
9 no connection between that and any ascertainable damages.

10 Now, having said that, that still leaves the
11 injunction issue unresolved, and presumably, that issue --
12 well, I'll ask counsel if that -- how we proceed, then, in
13 terms of submitting that issue to the jury. I think I've
14 basically heard from plaintiffs on that, but, Mr. Coleman, are
15 you prepared to go forward with evidence? What's your view on
16 this issue?

01:44:00

01:44:00

17 MR. COLEMAN: Well, my view number one is that there's
18 no jurisdiction over the issue. My view number two is I,
19 frankly, don't see a need for a jury, I would not seek an
20 advisory jury, and I would be happy to resolve it, frankly,
21 with the Court. Again, I think there are legal reasons why
22 they may or may not be entitled to any relief of that nature
23 and evidentiary problems as well, but I don't see the jury
24 being involved in this at all.

01:45:00

25 THE COURT: Okay. Well, let's assume that we do let

01:45:00

1 it go to the jury. Do you have any evidence to present?

2 MR. COLEMAN: No.

3 THE COURT: All right. Plaintiffs?

4 MR. MIZRAHI: Can I have a moment to confer with my
5 client?

01:45:00

6 THE COURT: You may.

7 MR. MIZRAHI: Thank you.

8 THE COURT: Let's take a five-minute recess.

9 MR. MIZRAHI: Thank you, Your Honor.

10 (Proceedings recessed at 1:45 p.m.)

01:45:00

11
12 (Proceedings reconvened at 1:54 p.m.)

13 THE COURT: Thank you. Please be seated.

14 The record will reflect the presence of the parties
15 and counsel outside the presence of the jury.

01:56:00

16 MR. MIZRAHI: Judge, obviously, we had a lot to talk
17 about in light of your rulings just now, and so the question
18 pending is, I think -- I'll -- may I approach?

19 I think in fairness, the question pending is where do
20 we go from here in light of the rulings and the fact that the
21 injunction issue's still on the table, and candidly, I think
22 that the appropriate thing to do -- and I appreciate
23 Mr. Coleman's statement that he's not offering any evidence,
24 and so I guess the formality of standing up and saying the
25 defense rests we would have to go through. I don't think

01:56:00

01:57:00

1 that --

2 MR. CROWN: Judge, may I have a moment with
3 Mr. Mizrahi?

4 THE COURT: You may.

5 MR. MIZRAHI: Thank you, Judge.

01:57:00

6 I'm sorry, Your Honor.

7 I guess my suggestion is is at this point I -- first
8 of all, we are not in a position to do a Rule 50 motion at this
9 point because they still have to stand up and --

10 THE COURT: Let me ask. Does the defense rest?

01:57:00

11 MR. COLEMAN: Yes.

12 THE COURT: All right.

13 MR. MIZRAHI: I guess we could make a Rule 50 motion
14 at this point. I'm not going to make a Rule 50 motion at this
15 point. I think that the appropriate thing to do,
16 notwithstanding the fact that the evidence of copyright
17 infringement is uncontroverted, I think under the
18 circumstances, having impaneled the jury and having the subject
19 of the nature and scope of what will ultimately be what we
20 request as an injunctive order is going to come into play, I
21 think that the appropriate thing to do would be to then go
22 ahead and put that issue to the jury to come up with findings
23 with respect to the nature and scope of the infringement and
24 what they find based on the evidence. Because I think that
25 that's going to be -- it's not -- it's not a very narrow issue

01:57:00

01:58:00

01:58:00

1 and I'm sure that there will be plenty of debate between
2 Mr. Coleman and our side with respect to what the scope of that
3 injunction is going to be, and so I think that it would be
4 appropriate to have the jury make some findings on that issue.

5 And so that -- that would be the position from our
6 side.

7 MR. COLEMAN: Your Honor, I haven't heard from my
8 client but I do feel very confident that I'm authorized to make
9 the following suggestion:

10 My client will enter into a voluntary stipulation not
11 to utilize any electronic images, electronic renderings of the
12 nature described by the plaintiff here immediately. I mean, it
13 would need, obviously, a certain amount of time to comply.

14 That's not what this case is about for us. We don't
15 see the need to go any further. If, in fact -- I mean, the
16 record is what it is. And I -- I'm not taking the position and
17 S & L Vitamins does not take the position that it has prima
18 facie a right to use their electronic renderings.

19 So we would enter -- we would stipulate to that
20 injunction right here and now.

21 MR. MIZRAHI: May I be heard?

22 Judge, obviously, this case has been going on for a
23 long time, and throughout the entire course of this litigation
24 the defense has always been, oh, no, we didn't use any of your
25 images, we didn't take anything from your website, we made

1 photographs of everything and we took our own photos, and so on
2 and so forth.

3 THE COURT: All right. I'm prepared to go forward
4 with the jury and if at some point before the jury returns with
5 a verdict I have in my hands an appropriate stipulated
6 injunction or order or something that will dispose of the case
7 with finality then I'll consider it.

02:00:00

8 Now, you've been handed proposed jury instructions. I
9 think they are -- well, let's talk about them.

10 MR. MIZRAHI: Judge, I -- because it does -- I mean,
11 at first blush it does sound like it would be a reasonable
12 request by Mr. Coleman to say, hey, why don't we don't just
13 stipulate that we won't infringe any of your copyrights moving
14 forward, and I guess my hesitation in that regard to say that
15 is that based on the conduct that we've gone through to date
16 that the hesitation is from a policing standpoint. We would be
17 trying this case over and over and over again possibly or
18 within the scope of injunction hearings.

02:01:00

02:01:00

19 And so I -- that's why I -- I just wanted to say that
20 just because of --

02:01:00

21 THE COURT: And what I'm saying is even if you said,
22 "That sounds great to me, we've got a deal," unless I've got
23 documentation that unequivocally, unambiguously disposes of the
24 case I'm not going to run the risk of having set this time
25 aside, imposed on this jury, only to have to do it all over

02:02:00

1 again.

2 So we're going to move now to settling jury
3 instructions.

4 MR. MIZRAHI: Thank you.

5 THE COURT: And I think you'll find in front of you,
6 first of all, pages 1 through 6 to be pretty much the standard
7 instructions. And again, I realize you all have agreed to
8 these.

9 I believe that page 7 is unmodified from what you have
10 stipulated to and -- and I'm just going to go through these and
11 tell you that I plan to give them and then if there's some
12 reason to interrupt me please do so.

13 Page 7 I plan to give.

14 Page 8 I would plan to give.

15 Page 9 has been modified, because it seems to me --
16 well, you'll see I've added a paragraph after paragraph 2 to
17 say:

18 "In this case, the Court has determined that the
19 plaintiff is the owner of valid copyrights in the electronic
20 images that appear on its website. The only issue you must
21 decide is whether the defendant copied original elements from
22 these copyrighted works.

23 "If you find that plaintiff has met its burden of
24 proof on this issue, your verdict should be for plaintiff. If,
25 on the other hand, the plaintiff has failed to meet its burden

1 of proof on this issue, your verdict should be for the
2 defendant."

3 As modified, any problem with that from the
4 plaintiffs?

5 MR. MIZRAHI: Yes, Your Honor.

02:03:11

6 THE COURT: Is there a problem or --

7 MR. MIZRAHI: No. I'm sorry. I thought you said is
8 that okay.

9 THE COURT: Mr. Coleman?

10 MR. COLEMAN: No.

02:04:11

11 THE COURT: All right. No problem?

12 MR. COLEMAN: Like he said.

13 THE COURT: No problem? Yes okay?

14 MR. COLEMAN: No problem, Your Honor.

15 THE COURT: The next one is page 10, which I believe
16 is unmodified from what you've given me.

02:04:11

17 Then page 11.

18 Page 12.

19 And page 13.

20 Which then gets is to the verdict form, and I've
21 forgotten where we are on that, then.

02:04:11

22 I suppose the verdict form, then, would be we, the
23 Jury, duly impaneled, et cetera, do hereby find on the claim
24 for copyright infringement: First blank for -- well, let me
25 just digress for a moment.

02:05:11

1 I neglected but I will reflect this on the record, but
2 I neglected to specifically grant the Rule 50 motion with
3 respect to the individual defendant Sagarin.

4 MR. COLEMAN: Sagarin.

5 THE COURT: Huh?

02:05:00

6 MR. COLEMAN: Sagarin.

7 THE COURT: Sagarin.

8 On the basis that under any of the damage theories or
9 the injunction theory there's no evidence to implicate him.

10 That having now been added to the record, the
11 defendant -- the verdict form, then, I believe, would say for
12 defendant S & L Vitamins, Inc. and against plaintiffs, or for
13 plaintiffs and against defendant S & L Vitamins, Inc., and then
14 at this point I guess we -- maybe -- maybe we list the -- we
15 list the particular --

02:05:00

02:06:00

16 MR. MIZRAHI: Judge, may I ask a question at this
17 point about Mr. Sagarin as an individual? I understand he
18 wasn't at trial. It is stipulated that he is the owner and
19 operator of S & L. And so the question is for purposes of
20 being bound by the ultimate injunction are you dismissing the
21 claim against him so as that he will not be bound by the
22 injunction, assuming that if an injunction is entered?

02:07:00

23 MR. COLEMAN: Your Honor, my understanding is that
24 every injunction is defined both under the rules and typically
25 by its language to include all people acting in concert in

02:07:00

1 association with. So that should not be an issue.

2 THE COURT: That would be an issue that would go to
3 the form of the injunction at such point as we reached that
4 issue, I think.

5 MR. MIZRAHI: And that's -- and that's fine. I'm just 02:07:
6 saying for purposes of either Rule 50 or the verdict forms.
7 And so I just wanted to clarify that for the record. But that,
8 I think that satisfies my question.

9 Thank you.

10 THE COURT: But don't we have to have the jury decide 02:07:
11 which particular copyrights were infringed on?

12 MR. MIZRAHI: I think that that would be -- I think
13 that that would be appropriate, and I think it would probably
14 be appropriate to put in, whether by interrogatory, a special
15 interrogatory on a verdict form, do you find copyright 02:08:
16 infringement? If you find copyright infringement, as to which
17 products? And then they can list them based on the evidence.

18 THE COURT: That would be my thought.

19 MR. COLEMAN: I like that.

20 THE COURT: All right. 02:08:

21 Let's -- let's -- we'll take a few minutes to craft
22 that part of the verdict form and get it out to you. We'll
23 take another 15-minute break or so to do that so that you can
24 see that form.

25 Ms. Bengtson, if you can tell the jury we're about 02:09:

1 to -- well, tell the jury it will be another 20 minutes or so.

2 You had another point?

3 MR. MIZRAHI: Yes.

4 Just in terms of ease for the jury so that they're not
5 handwriting a bunch of stuff and to avoid the possibility of 02:09:00

6 error in that regard, obviously we've listed all of the

7 copyright registrations. They're in the joint pretrial that's

8 probably easy to WordPerfect access them. My suggestion would

9 be to have a list of those products and then it's either a yes

10 no. If you find copyright infringement, okay, here are the 02:09:00

11 products, check off if you find infringement. I think that

12 that's probably --

13 THE COURT: That's what I plan to do.

14 MR. MIZRAHI: Thank you, Judge. Sorry.

15 (Proceedings recessed at 2:09 p.m.) 02:09:00

16
17 (Proceedings reconvened at 2:35 p.m.)

18 THE COURT: Thank you. Please be seated.

19 The record will reflect the presence of the parties
20 and counsel outside the presence of the jury. 02:35:00

21 I've given you a verdict form, and as I understand,
22 there was just one small change.

23 Is that right, counsel?

24 MR. MIZRAHI: Yes, Your Honor.

25 We're just -- in -- in looking over this, Your Honor, 02:35:00

1 when we initially compiled the list, not to belabor you with
2 the history or anything, there were copyrights and trademarks,
3 and so the first three should probably not be on there.

4 Designer Skin Bronze, Boutique Bronzing Ambience and
5 Splash Tanning Products are all trademark names but they're
6 not -- those aren't products necessarily at issue. And so my
7 suggestion is that we just take off the first three. The rest
8 would stand.

9 THE COURT: All right. And the rest of the form of
10 verdict, then, with those three removed is without objection?
11 Is that correct?

12 MR. COLEMAN: Yes, Your Honor.

13 THE COURT: The plaintiffs?

14 Once we delete those three that you've referenced,
15 then the rest of the form of verdict is acceptable?

16 MR. MIZRAHI: Looks good to me, Your Honor.

17 THE COURT: All right. Then we'll make that change
18 during the course of argument, and we can bring the jury in.

19 (Jury in at 2:37 p.m.)

20 THE COURT: All right. You may be seated.

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

23 Ladies and gentlemen, the evidence is now in. Both
24 parties have rested. You're about to hear closing arguments
25 from counsel, following which I will instruct you with respect

1 to the law.

2 The plaintiffs may proceed.

3 MR. MIZRAHI: Thank you, Your Honor.

4 Good afternoon, ladies and gentlemen.

5 From the beginning of this case it's been about 02:38:..
6 copyright infringement. We talked about that at the beginning
7 of the opening statement, we showed you evidence on it, and
8 that evidence has been uncontroverted. The defendants stole
9 Designer Skin's copyrights. They've used those and continued
10 to use those copyrights on their website. That's what this 02:38:..
11 case is about.

12 There's two elements to a copyright infringement case,
13 and they're both established in this case and they're very
14 simple.

15 Element number one: Do you own the copyrights? 02:38:..

16 Stipulated fact. That's been in this case since day
17 one. It's been conclusively established. And you're going to
18 get back in the jury room a copy of a big exhibit that's going
19 to show all the copyright certificates, and attached to those
20 copyright certificates are going to be copies of the labels 02:39:..
21 and the images that Designer Skin copyrighted. There's no
22 quarrel in this case about that. There's been no -- there's
23 been no contrary evidence about that. Designer Skin owns its
24 images.

25 Those images were the genesis of months and months of 02:39:..

1 work, a lot of energy, creativity. They were born in the mind
2 of Mike Shawl, and from there they wound up becoming a product.
3 From the womb to the tomb, I think, is what Miss Romero said.

4 And so the bottom line is that the first element of
5 copyright infringement is met and it's undisputed. 02:39:.

6 Equally undisputed is the second element. You have to
7 establish that somebody copied your image or substantial
8 similarity to your image.

9 Now, where do we get that from in this case?

10 First of all, you haven't seen any contrary evidence 02:40:.
11 from defendants. Defendants didn't put together any evidence
12 in this case whatsoever. You heard that when we came back here
13 they rested. They haven't presented any evidence to controvert
14 what we've presented, what Designer Skin's presented in terms
15 of copying. 02:40:.

16 From there, you heard the testimony of Mike Shawl.
17 Mike Shawl created these images. Again, they were born in his
18 mind, of his own creativity, of years and years of experience,
19 of months of research, of blood, sweat and toil to create an
20 image and a name and an entire identity for each and every 02:40:.
21 product, each and every individual product that's created.

22 And he went through and he told you about the
23 websites -- and, by the way, the websites you're going to see
24 as Exhibit 7, it's going to be in evidence and it's going to be
25 something you're going to be able to consider, are different 02:41:.

1 printouts from S & L's website at different points in time
2 containing those images. And again, there's been no contrary
3 evidence on that.

4 So you're going to have the images of what S & L
5 Vitamins has basically been doing from back in at least 02:41:
6 2005 up through very, very recently.

7 Now, what Mr. Shawl talked about on the stand was
8 establishing exactly why he knows that these are his images.

9 Can everybody see that?

10 All of these, ladies and gentlemen, are images that 02:41:
11 Mr. Shawl created on behalf of Designer Skin. They're all
12 images that he created in the same manner. They're all
13 individual, they all have individual names and are the genesis
14 and results of his creative effort. Every one of these has a
15 copyright. They're all protected. 02:42:

16 What Mr. Shawl then did was he went through and he
17 looked at particular images that he saw on S & L's website,
18 TheSuppleNet.com, at different points in time and he was able
19 to say with certainty, a hundred percent certainty -- and
20 again, remember the burden of proof in this case is more 02:42:
21 probable than not. And we've heard it couched different ways.
22 It's this much. It's 51 percent. It's 50.00001 percent.
23 Slightly more probable than not is the standard that we're
24 using and that you're using to evaluate this case and that
25 you're going to be relying upon to render your decision. 02:43:

1 But Mr. Shawl was not using that standard in his
2 testimony when it came to the first 13 products that he talked
3 about. He said, "Those are my images." And he said it to a
4 hundred percent degree of certainty.

5 And he was able to point out Veritas, the similarity 02:43:00
6 of the caps and the lighting features, the bottles, the
7 coloring, particular unique points that each product has that
8 exists on his computer, in the eye of his computer. The
9 shading of the caps. Exactly the same.

10 And again, you know, when you blow up a smaller image 02:43:00
11 from a computer sometimes it gets a little grainy, but again,
12 what you're seeing is exact copying of an image that Mr. Shawl
13 created on behalf of Designer Skin. And again, the evidence of
14 that is uncontroverted.

15 Ritual. The caps are the same. He even said, "Look, 02:44:00
16 when I made that rendering the cap didn't even come out the
17 same in real life." He said the proportionality is different.

18 These are all images that Mr. Shawl said, testified
19 under oath that he created to a hundred percent degree of
20 certainty. 02:44:00

21 Tao.

22 Smolder, a product with an accoutrement as it's
23 called. I think he called it a wine bottle dressing, and he
24 said that when you look at it not only are the caps the same
25 but you can even see in the way that the physical wine bottle 02:45:00

1 is sitting on the image it's got to be something that's done by
2 a computer.

3 And it's something that he knows and he can say to a
4 hundred percent degree of certainty. Because these are not
5 real life. These are images that are created on a computer. 02:45:00

6 Particular lighting points.

7 And again, Mr. Coleman told you in opening statement,
8 posited to you about photographs. Have we heard any evidence
9 in this case that any one of these things were products that
10 Mr. Coleman's client took out, placed on a dresser or something 02:45:00
11 like that and photographed? No.

12 Again, Ray of Light's another product that has the cap
13 and the lighting points. Everything is exactly the same.

14 Base. Another one. Particular lighting points. The
15 cap. Again, all uncontroverted. 02:46:00

16 Sheer Wisdom.

17 If I recall his testimony correctly, he said he even
18 used the same cap for each one of the renderings.

19 So how do you know this is a copyright? It's not just
20 because Mike Shawl testified to that under oath to a hundred 02:46:00
21 percent degree of certainty. It's because they look exactly
22 the same.

23 These images, each one is worth a thousand words.

24 Angel.

25 Now, again, this is a product that he said was 02:46:00

1 actually posted on the website initially as a photograph, but
2 it was a photograph that he created, and in looking at both of
3 these images, again, exactly the same.

4 Angel. Same thing.

5 Bipolar. Same thing. Particular lighting points.

02:47:00

6 Caps.

7 Bronze Bondage.

8 Now, again, we recall the testimony and the actual
9 physical image of the product. This corset exists on the
10 computer. This is an image. The real corset doesn't look like
11 this. The real corset has texture. The real corset has a real
12 bow. The bow doesn't sit like this. The cap is different. In
13 fact, they only manufactured this cap for a short period of
14 time before they replaced it with the other cap.

02:47:00

15 Dolce. Same issue with the cap. Same issue with the
16 lighting points. And how about the -- how about the bow. Even
17 the little hairs that come off the bow are exactly the same.

02:48:00

18 How do you know that these are thefted images, stolen
19 images, rather than anything else? Not just because Mike Shawl
20 testified under oath to a hundred percent degree of certainty,
21 not just because the evidence on this point is completely
22 uncontroverted. You know because you're seeing it with your
23 own two eyes and your eyes are not deceiving you.

02:48:00

24 Now, Mr. Shawl also said that he reviewed the website
25 and reviewed images and concluded that the other images that he

02:49:00

1 saw on the website were most likely copies of his works. What
2 he wasn't able to say was to say was to a hundred percent
3 degree of certainty, like these, that they were his work
4 because they didn't have the exact same telltale features, but,
5 nevertheless, you're going to have those images in evidence and 02:49:
6 you're going to be able to form your own conclusions about
7 that.

8 And again, the standard is not the standard that
9 Mr. Shawl testified about where you have to say I'm concluding
10 this to a hundred percent certainty. You don't even have to 02:49:
11 say it's definite. What you have to say or what you have to be
12 able to conclude is that it's more probable than not that they
13 took the images.

14 You can conclude that a number of ways. Obviously,
15 you can conclude that based on your own review. You can 02:50:
16 conclude that based on the testimony. You can conclude that
17 based on comparison. You can infer that, well, they're
18 stealing these, they probably stole the others. It's the
19 easiest thing in the world to do. Two clicks. Copy and
20 paste. 02:50:

21 And guess what? If you're not called out on it, it's
22 free.

23 Now, you've heard about the products. You've heard
24 about the inside of the bottle. You've heard about the outside
25 of the bottle. What's being placed to you to decide right now 02:50:

1 are the issues concerning the outside of the bottle, the
2 protection of the unique original artistic works created by an
3 individual on behalf of a company through blood sweat and tears
4 and the theft of that by another company.

5 We are now at the conclusion of this case. You are to 02:51:00
6 decide based on what you've seen, uncontroverted evidence,
7 whether or not there's infringement and, if so, with respect to
8 which products.

9 You will receive a verdict form that's going to look
10 like this, and I'll come a little closer even though it's going 02:51:00
11 to be hard to see.

12 What you need to do with this verdict form over here,
13 what you're going to be charged to do is fill it out. And
14 there's really two questions on there. Did S & L Vitamins --
15 did defendant S & L Vitamins, Inc. infringe any of plaintiff 02:52:00
16 Designer Skin's copyrights? Yes or no?

17 If you answer no, then that obviously ends the
18 inquiry, but we submit that based on the uncontroverted
19 evidence it's absolutely clear that at minimum it's been
20 established by undisputed evidence to a degree that satisfies 02:52:00
21 the preponderance of the evidence standard that they have
22 infringed copyrights, a lot of them.

23 So assuming you find copyright infringement, the next
24 question is which copyrights were infringed by defendant S & L
25 Vitamins, Inc.? 02:52:00

1 And for that you will be receiving a list. The list
2 is going to contain all the product names for which you will
3 have registrations for. What you will have in evidence is you
4 will have not just the testimony but you're also going to have
5 copies of those websites, and it's going to be to you to 02:53:
6 essentially determine which of the images that you believe were
7 copyrighted were established by a preponderance of the
8 evidence.

9 Again, on that point, we submit that Mr. Shawl's
10 testimony was by his standard to a hundred percent degree of 02:53:
11 certainty where he said, "I know for these, to a hundred
12 percent degree of certainty, that those are my images, and I'll
13 tell you for the other ones I think that the rest of them are,
14 too. I can't say to a hundred percent degree of certainty;
15 there aren't as many telltale signs, but those sure look like 02:53:
16 my images."

17 They certainly meet the substantial similarity test
18 that you're going to have -- or the substantial similarity
19 requirement that you're going to see in the jury instruction.

20 So, ladies and gentlemen of the jury, on behalf of 02:54:
21 Designer Skin, I thank you for your service here. I thank you
22 for taking time out of your busy schedule, out of your busy
23 lives to come to court to sit as a panel of jurors and to
24 consider the situation that my client, Designer Skin, has been
25 involved in as being the victims of a theft, of having their 02:54:

1 copyrights infringed upon, and to have you, as a jury, redress
2 the harm that's been attributed to them. And again, for that I
3 thank you.

4 We ask, again, that you find in favor of Designer
5 Skin, that you find that their copyrights were infringed, and 02:54:
6 that you find -- to the extent that those images appeared on
7 S & L's website, that you find infringement.

8 Thank you.

9 THE COURT: Thank you.

10 Mr. Coleman? 02:55:

11 MR. COLEMAN: Good afternoon.

12 Pictures of bottles of tanning lotion. The evidence
13 is unrebutted in this case and we've never denied it. My
14 client sells their product on his website using pictures of
15 bottles of tanning lotion. 02:56:

16 Unrebutted evidence is not the same as a legal fact.
17 You decide the legal facts. You have to decide whether the
18 pictures on the website that you will see on the exhibits that
19 you take back with you to the jury room really were copies.
20 You'll take a good look at Exhibit 7 and ask yourself that 02:56:
21 question.

22 I will point out that for all the unrebutted evidence
23 there are a couple of things that never were proved.

24 There is no proof that the images that Designer
25 Skin -- let me withdraw that. 02:56:

1 There's no documentary proof that the images that
2 Designer Skin says were copied by S & L by right clicking
3 actually were on the Designer Skin website at the time that the
4 S & L website was made.

5 Now, Mike Shawl did testify that to the best of his
6 recollection probably during the fall it was the case that they
7 were. You can weigh his testimony as you choose to.

8 You have to decide whether the copies were definitely
9 copies. You have to decide whether as -- and the Judge will
10 instruct you on the legal standards for copyright
11 infringement -- whether original elements of the originals, in
12 other words, of the protected copyright, were copied. Original
13 elements.

14 There are basically two kinds of copyrights that we've
15 been talking about in this case, and you could be forgiven for
16 not being entirely clear on the distinction between them. The
17 copyright registrations you're going to take with you into the
18 jury room are registrations for the labels of the bottles
19 themselves.

20 Now, the plaintiff has stipulated and the Court has
21 ruled that if someone were to take a picture of these bottles
22 with these labels on them there would be no copyright
23 infringement. The law permits that, just as you would expect
24 it to.

25 Therefore, you have to -- in order to find for the

1 plaintiffs, you have to -- you have to determine two things:
2 Is there a difference between taking a picture of the bottle
3 and using it as a thumbnail to sell the genuine merchandise or
4 is there a -- and using one of the electronic renderings that
5 Mr. Shawl testified about.

02:59:00

6 That difference cannot depend on -- and if you find
7 that there is a difference, a legally significant -- a
8 factually significant difference, you have to then decide
9 whether that constitutes copyright infringement. You'll look
10 at the registrations and say, "How can I understand that it
11 would be okay to take a picture of this label but not okay to
12 use the rendering that includes the label?"

02:59:00

13 MR. CROWN: Objection. That's not the legal standard
14 that the Court's going to instruct the jury on.

15 THE COURT: The instructions the Court will give will
16 speak for themselves. Overruled.

02:59:00

17 MR. COLEMAN: There is another copyright that has been
18 vaguely discussed in this case, and that's the copyright for
19 the website itself.

20 Now, I mentioned a couple of minutes ago that there is
21 no evidence in this record that those renderings actually were
22 on the Designer Skin website at any time. No. Again, his
23 testimony was that they were. No documentary evidence.

03:00:00

24 Arguably, that's the copyright that you -- that's the
25 copyright that would cover the renderings, because the

03:00:00

1 renderings could only have been gotten, according to the
2 testimony and the inferences that Mr. Mizrahi has asked you to
3 make, the inference from the facts that he's put in front of
4 you is that the copying took place off of the Designer Skin
5 website. When you go back to the jury room you will not find a 03:00:
6 registration for the website.

7 Finally, the Judge will speak to a legal standard that
8 it's necessary for me to discuss with you. I mentioned it at
9 the outset. Whether the alleged copying was of original
10 elements of the creative work. 03:01:

11 So based on looking at the evidence you're going to
12 have, you'll have to keep Mr. Shawl's testimony in mind. He
13 talked about the distinctions between the bottles as they would
14 have been photographed -- and, in fact, he was -- if you
15 recall, he was only able to speculate about what they would 03:01:
16 have looked like if they had been photographed because he
17 didn't actually compare photographs with the renderings.

18 Taking him at his word, though, he went through a
19 great deal of trouble explaining to you shading, exact
20 proportion of the caps, all the sorts of things that the 03:02:
21 plaintiffs would like you to feel demonstrate that copying must
22 have taken place, but at the same time he also demonstrated to
23 you what plaintiff seems to be arguing are the original
24 creative elements of a copyright.

25 You have to ask yourself, looking at Exhibit 7, 03:02:

1 whether copyright infringement took place by virtue of those
2 issues that Mr. Shawl raised.

3 We believe you will find that the copyright for the
4 electronic renderings created by Mike Shawl, those computer
5 pictures that plaintiff tells you are very, very different from 03:03:
6 the photographs, are a little bit different and that those
7 differences are the ones that you have to decide were infringed
8 when you look at Exhibit 7, and then decide whether or not in
9 this case a finding of copyright infringement is appropriate.
10 I ask you to find that it is not appropriate. 03:03:

11 Thank you for your time.

12 THE COURT: Rebuttal?

13 MR. CROWN: Thank you, Judge.

14 May it please the Court, Judge Teilborg. Counsel.
15 Members of the jury. 03:04:

16 This case and the evidence you've heard is clear, it
17 is uncontradicted, and infringement of Designer Skin's
18 copyrights have been proved and that's what your verdict should
19 be. The issue before you is a focused one and on this evidence
20 a clear one for you to find. 03:04:

21 Much of the argument that we heard was asking you to
22 do something that the Judge in a moment is going to already
23 instruct you has been decided upon and it's a given. And let
24 me tell you what Judge Teilborg is going to read to you in a
25 moment. 03:04:

1 He is going to tell you, quote:

2 "In this case, the Court has determined that the
3 plaintiff is the owner of valid copyrights in the electronic
4 images that appear on its website."

5 This is not a place, in light of that command from the
6 Court, for you then to look at the manner in which these
7 original creative works of art that were done in the computer
8 process is somehow not protected by the copyrights that are
9 admitted herein through that group exhibit that you heard was
10 1-1 through 1-54.

11 54 copyright registrations in evidence state very
12 clearly what the Judge has now found, and again, you will be
13 told, "The plaintiff Designer Skin is the owner of valid
14 copyrights in the electronic images that appear on its
15 website."

16 Thus, the question really before you is such: With
17 access to our public website and then access to the defendants'
18 website, so that you have seen the side-by-side comparisons,
19 did the defendant copy in such a way that their images on the
20 S & L website are substantially similar to the images that were
21 originally placed by Designer Skin through valid copyrights on
22 its website?

23 The only testimony in this case is from the creator
24 himself, Mike Shawl, the artist who told you about the unique
25 aspects on a multifactorial basis that put into his work such

1 that when you see the identical image on their website the only
2 way that could have been completed was the simple computer
3 technique of the right click.

4 Some of you showed during voir dire that you
5 understand how to right click, and you've learned it's simple 03:07:
6 because Mike Shawl told you. You place the mouse over an image
7 on Designer Skin's website. On the right button you click it
8 and that copies that. At that moment in time you have
9 accomplished what the law says you can't do on that image
10 you're clicking is copyrighted. 03:07:

11 And then when you click it again and upload it to your
12 website you have completed your infringement. You have at that
13 point infringed our copyrights. Candidly, that is the way you
14 reach your verdict in favor of Designer Skin on the issue that
15 will be presented to you. 03:08:

16 Now, the jury instructions will tell you what you
17 already learned at the start of this case, that copyright is
18 the exclusive right to copy.

19 MR. COLEMAN: Your Honor, objection. This seems to go
20 beyond the scope of rebuttal. It's basically a second closing. 03:08:

21 THE COURT: Overruled.

22 MR. CROWN: The right to copy includes the exclusive
23 right to display publicly a copyrighted work. Designer Skin
24 has that exclusive right.

25 And specifically, you heard that S & L Vitamins did 03:08:

1 not have any right, any permission, any authority to copy our
2 copyrighted images and put them on their website. That's
3 infringement. The owner is Designer Skin.

4 Now, there are two and only two elements that we have
5 to prove for your verdict to be in favor of Designer Skin that 03:09:
6 S & L committed copyright infringement of one or more of these
7 copyrighted images.

8 Element 1. The plaintiff is the owner of a valid
9 copyright. And that's stipulated to and it's found by the
10 Court. 03:09:

11 And two, the defendant copied original elements from
12 the copyrighted work.

13 As I've read already a couple times and Judge Teilborg
14 is going to tell you, the first element is already found by the
15 Court. That is not a point of discussion or disagreement among 03:09:
16 you.

17 So the real issue now is, did they copy, as opposed to
18 this unsupported allegation of photographing, an actual bottle
19 and that's the alternate explanation for why the images on
20 their website are substantially similar or identical to the 03:10:
21 images originally put on -- in Designer Skin's website.

22 One of the ways that the plaintiff is allowed to prove
23 this copying, this unlawful copying, is something else the
24 Judge will tell you.

25 He will say the plaintiff may show the defendant 03:10:

1 copied from the work by a preponderance of the evidence, which
2 is more likely than not, not proof beyond a reasonable doubt,
3 as Judge Teilborg told you, not clear and convincing, a higher
4 standard, preponderance of the evidence, more likely than not,
5 one, that the defendant has access to the plaintiffs'
6 copyrighted work, and two, that there are substantial
7 similarities between the defendants' work, which is their
8 website, and original elements of plaintiffs' work, the
9 Designer Skin website.

03:10:00

10 Now, access is also a clear and easy issue on this
11 evidence. Designer Skin has told you it maintained the
12 website, and both Mike Shawl and Beth Romero told you that all
13 of the Designer Skin images are on the Designer Skin website
14 and is well available to the public.

03:11:00

15 All of those images are susceptible to infringement by
16 this simple act of a company like S & L Vitamins who takes
17 their mouse on a computer screen anywhere they choose to access
18 Designer Skin's website, they right click and that's the copy,
19 and when they put it on their website that's the infringement.

03:11:00

20 Now, Mike Shawl did more than just talk about
21 substantial similarities. He told you in the case of 13
22 specific copyrighted images that he created they were identical
23 copies.

03:12:00

24 And let me tell you, you can't photograph those type
25 of identical comparisons or similarities because they don't

03:12:00

1 exist in the real world. They are products of Michael's mind.
2 He created them. That's what the artist does.

3 And in computers you're able to do the things that a
4 photographer would have to spend tedious hours in trying to
5 create something that is substantially similar to what was in 03:12:
6 the artist's mind.

7 Through the computer, Michael Shawl told you with the
8 products how he creates lighting. It's his lighting on the
9 computer. It's not real lighting in the world. If I put the
10 bottle of any of these products on this desk, I could create 03:13:
11 different lighting in the courtroom, but what I could not do is
12 create what Michael Shawl did in his own mind. He creates the
13 shading and the shadowing. They're not real. They're an
14 artist's creation. He creates the cap, the shape, the size,
15 the scope in the artist's world, not a real world where the 03:13:
16 photographer must live. He creates the bottle shape. He
17 creates the dimension. He creates the overall shape of his
18 image. He creates a scale. He moves in angles of view. He
19 puts in the clarity. He puts in the highlights.

20 And as you heard from him and Beth Romero, it is a 03:13:
21 process that builds from the ground up and it takes extensive
22 effort and revision and looking again and judging and all the
23 things you heard in this case.

24 And to think that a photographer can just with blind
25 luck put a bottle, position it correctly, in some setting in 03:14:

1 New York and then all of a sudden say I have achieved it with a
2 photograph, and for an attorney to tell you that's another
3 explanation without a single bit of evidence, it is clear what
4 you do with that argument. You reject it, because you know
5 it's not believable, it's not plausible, and there's no
6 evidence to support it, because the only evidence in this case
7 is that original works of art were infringed upon.

03:14:.

8 There was some discussion about registering these
9 products when they appeared on the website as opposed to
10 registering them as part of the label, and you heard the
11 testimony and you heard how they are copyrighted as component
12 parts of the label.

03:14:.

13 Again, the point of that argument is not in any of the
14 things that you will be asked to find when you deliberate,
15 because, as I've said now repeatedly and because of the
16 argument I'm emphasizing again, the Court has already found
17 that Designer Skin owns the copyrights of these images, and
18 that was completed when these images were integral components
19 of the labels.

03:15:.

20 You also heard that the website with these images were
21 also copyrighted. There is dual and overlapping copyrighting
22 of the original works of art and it is not an issue, and the
23 argument that was made about that has no basis and it should be
24 quickly rejected.

03:15:.

25 So it brings us to what you will be asked to do. You

03:15:.

1 will receive a verdict form, and while the verdict form becomes
2 somewhat lengthy because of the 54 products that were
3 copyrighted and that we have shown you by a preponderance of
4 the evidence were infringed upon by their unlawful copying, the
5 first question is, did defendant S & L Vitamins infringe any -- 03:16:
6 any -- that's one or more -- of plaintiff Designer Skin's
7 copyrights? And then there's a box either yes or no.

8 Clearly, you must check the yes box. When you check
9 the yes box it is your collective finding that at least one of
10 these 54 protected images were unlawfully copied by S & L 03:16:
11 Vitamins.

12 And then after you check that yes box you then will
13 get on the next three pages the various 54 products. You will
14 be able to compare them. You will note out the 13 that were a
15 hundred percent certain, and then when you drop back to the 03:17:
16 preponderance standard we're confident that you will see that
17 all of these or a substantial part were clearly met by this
18 evidence on a copyright infringement basis.

19 A couple of these comparisons are worth mentioning.

20 The Dolce product. This has both original creations 03:17:
21 as well as using what you heard was an accoutrement. On the
22 actual bottle, this round ball that's kind of like a textured
23 ball, would be placed on the actual bottle. The strands that
24 come out on both sides, how it would appear on a real bottle
25 could vary, wind would blow or a hand might touch it. But on 03:17:

1 these works of art, this is a Mike Shawl creation, a unique way
2 to suspend the strands, the fur, if you will. It's an example
3 of art and not photography of a real image.

4 MR. COLEMAN: I'm going to repeat my objection that I
5 made about 15 or 20 minutes ago about the scope of this 03:18:
6 rebuttal.

7 THE COURT: Overruled.

8 MR. CROWN: The cap, in scale, the lighting on part of
9 the cap, the shading on another part, the clarity, dimension,
10 and miraculously when it appears from the S & L Vitamin website 03:18:
11 the same exact distinct features. Not a photograph. Not
12 something that a real bottle placed in position with lighting
13 can be done. Only and easily achieved, for those that
14 understand the right click, right click on this, copy on the
15 website and you will get the same image, and in this case 03:19:
16 that's copyright infringement.

17 The same thing with so many of these other examples,
18 such as the Bronze Bondage bottle. In the real bottle, the
19 lacing has texture to it. And again, you appreciate the
20 lettering, the color of the lettering. It's not real. You can 03:19:
21 look right at it and know an artist created this.

22 For S & L to not be liable for infringement of this
23 particular image, you'd see something different in the lacing.
24 You wouldn't see this color for the word bronze. You wouldn't
25 see the cap to be identical. You wouldn't see the position of 03:19:

1 this corset exactly where the word bondage starts and where
2 this description begins. This corset moves up and down. If a
3 photographer was to take it and put it on a stage set to
4 photograph, this could not be identical to this. The only way
5 that this image could be identical to this is by copyright 03:20:
6 infringement, the right click and copy.

7 The evidence produces this type of comparison in all
8 of these, some more obvious than others because some are more
9 complex than others. Bronze Bondage is a good example because
10 of the extra detail and unique features, just like Dolce, but 03:20:
11 it's all the same, and that's the testimony.

12 And so as you look at this verdict form and if you
13 think about the evidence and how the Judge is already going to
14 tell you what has been decided and what is the law, your
15 verdict on this evidence should be clear and you should find in 03:20:
16 favor of Designer Skin by checking the yes box there was
17 infringement and check all or most or a significant number of
18 these products to show that S & L infringed their copyright,
19 S & L violated the law, and the verdict in this case should be
20 for Designer Skin. 03:21:

21 Thank you.

22 THE COURT: Thank you, counsel.

23 Members of the jury, now that you've heard all the
24 evidence and the arguments of the attorneys, it's my duty to
25 instruct you as to the law of the case. 03:21:

1 A copy of these instructions will be sent with you to
2 the jury room when you deliberate.

3 It is your duty to find the facts from all the
4 evidence in the case. To those facts you will apply the law as
5 I give it to you. You must follow the law as I give it to you 03:21:
6 whether you agree with it or not. And you must not be
7 influenced by any personal likes or dislikes, opinions,
8 prejudices or sympathy. That means that you must decide the
9 case solely on the evidence before you. You recall you took an
10 oath to do so. 03:22:

11 In following my instructions, you must follow all of
12 them and not single out some and ignore others. They're all
13 important.

14 The evidence you're to consider in deciding what the
15 facts are consists of: 03:22:

16 1. The sworn testimony of any witness, including
17 depositions.

18 2. Exhibits which are received into evidence.

19 And 3. Any facts to which the parties have agreed.

20 In reaching your verdict, you may consider only the 03:22:
21 testimony and exhibits received into evidence. Certain things
22 are not evidence and you may not consider them in deciding what
23 the facts are. I'll list them for you.

24 1. Arguments and statements by lawyers are not
25 evidence. The lawyers are not witnesses. What they have said 03:22:

1 in their opening statements, closing arguments and at other
2 times is intended to help you interpret the evidence but it is
3 not evidence. If the facts as you remember them differ from
4 the way the lawyers have stated them, your memory of them
5 controls.

03:23:

6 Questions and objections by lawyers are not evidence.
7 Attorneys have a duty to their clients to object when they
8 believe a question is improper under the rules of evidence.
9 You should not be influenced by the objections or the Court's
10 ruling on it.

03:23:

11 3. Testimony that has been excluded or stricken or
12 that you have been instructed to disregard is not evidence and
13 must not be considered. In addition, sometimes testimony and
14 exhibits have been received only for a limited purpose. When I
15 have given a limiting instruction, you must follow it.

03:23:

16 4. Anything you may have seen or heard when the court
17 was not in session is not evidence. You have to decide the
18 case solely on the evidence received at the trial.

19 Evidence may be direct or circumstantial.

20 Direct evidence is direct proof of a fact, such as
21 testimony by a witness about what the witness personally saw or
22 heard or did. Circumstantial evidence is proof of one or more
23 facts from which you could find another fact.

03:24:

24 You should consider both kinds of evidence. The law
25 makes no distinction between the weight to be given either

03:24:

1 direct or circumstantial evidence. It is for you to decide how
2 much weight to give to any evidence.

3 In deciding the facts in this case, you may have to
4 decide which testimony to believe and which testimony not to
5 believe. You may believe everything a witness says or part of 03:24:
6 it or none of it.

7 In considering the testimony of any witness, you may
8 take into account:

9 1. The opportunity and the ability of the witness to
10 see or hear or know the things testified to. 03:24:

11 2. The witness's memory.

12 3. The witness's manner while testifying.

13 4. The witness's interest in the outcome of the case
14 and any bias or prejudice.

15 5. Whether other evidence contradicted the witness's 03:25:
16 testimony.

17 6. The reasonableness of the witness's testimony in
18 light of all the evidence.

19 And 7. Any other factors that bear on believability.

20 The weight of the evidence as to a fact does not 03:25:
21 necessarily depend on the number of witnesses who testify about
22 it.

23 When a party has the burden of proof on any claim by a
24 preponderance of the evidence it means you must be persuaded by
25 the evidence that the claim is more probably true than not 03:25:

1 true.

2 You should base your decision on all of the evidence
3 regardless of which party presented it.

4 The plaintiff has the burden of proof on all issues
5 except where otherwise indicated. 03:25:00

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 03:26:00
11 derivative works, that is, prepare -- let's me restate that
12 sentence.

13 Recast, transform, adapt the work, that is, prepare
14 derivative works based upon the copyrighted work.

15 Or 3. Display publicly a copyrighted work. 03:26:00

16 It is the owner of a copyright who may exercise these
17 exclusive rights to copy.

18 The term, quote, owner, end quote, includes the author
19 of the work.

20 In general, copyright law protects against adaptation 03:26:00
21 or display of substantially similar copies of the owner's
22 copyrighted work without the owner's permission.

23 An owner may enforce these rights to exclude others in
24 an action for copyright infringement.

25 The works involved in this trial are known as 03:27:00

1 pictorial works, graphics works, such as two-dimensional and
2 three-dimensional works of fine graphic and applied art,
3 photographs, and computer images.

4 Anyone who copies original elements of a copyrighted
5 work during the term of the copyright without the owner's
6 permission infringes the copyright. 03:27:.

7 On the plaintiffs' copyright infringement claim, the
8 plaintiff has the burden of proving both of the following by a
9 preponderance of the evidence:

10 1. The plaintiff is the owner of a valid copyright,
11 and 2, the defendant copied original elements from the
12 copyrighted work. 03:27:.

13 In this case, the Court has determined that the
14 plaintiff is the owner of valid copyrights in the electronic
15 images that appear on its website. The only issue you must
16 decide is whether the defendant copied original elements from
17 these copyrighted works. 03:28:.

18 If you find that the plaintiff has met its burden of
19 proof on this issue, your verdict should be for the plaintiff.
20 If, on the other hand, the plaintiff has failed to meet its
21 burden of proof on this issue, your verdicts should be for the
22 defendant. 03:28:.

23 The Court has instructed you that the plaintiff has
24 the burden of proving that the defendant copied original
25 elements from the plaintiffs' copyrighted work. 03:28:.

1 The plaintiff may show the defendant copied from the
2 work by showing by a preponderance of the evidence that the
3 defendant has access to the plaintiffs' copyrighted work and
4 that there are substantial similarities between the defendants'
5 work and original elements of the plaintiffs' work.

03:29:00

6 When you begin your deliberations you should elect one
7 member of the jury as your presiding juror. That person will
8 preside over the deliberations and speak for you here in court.
9 You will then discuss the case with your fellow jurors to reach
10 agreement if you can do so. Your verdict must be unanimous.

03:29:00

11 Each of you must decide the case for yourself, but you
12 should do so only after you have considered all of the
13 evidence, discussed it fully with the other jurors and listened
14 to the views of your fellow jurors. Do not hesitate to change
15 your opinion if the discussion persuades that you should. Do
16 not come to a decision simply because the other jurors think it
17 is right.

03:29:00

18 It is important that you attempt to reach a unanimous
19 verdict, but, of course, only if each of you can do so after
20 having made your own conscientious decision. Do not change an
21 honest belief about the weight and effect of the evidence
22 simply to reach a verdict.

03:29:00

23 If it becomes necessary during your deliberations to
24 communicate with me, you may send a note through the bailiff
25 signed by your presiding juror or by one or more members of the

03:30:00

1 jury. By signing I mean with your juror number.

2 No member of the jury should ever attempt to
3 communicate with me except by a signed writing. I will
4 communicate with any member of the jury on anything concerning
5 the case only in writing or here in open court.

03:30:00

6 If you send out a question, I will consult with the
7 parties before answering it, which may take some time. You may
8 continue your deliberations while waiting for the answer to any
9 question.

10 Remember that you're not to tell anyone, including me,
11 how the jury stands, numerically or otherwise, until after you
12 have reached a unanimous verdict or have been discharged.

03:30:00

13 Do not disclose any vote count in any note to the
14 Court.

15 A verdict form has been prepared for you to use in
16 recording your verdict. After you have reached unanimous
17 agreement on a verdict, your presiding juror will fill in the
18 form that has been given to you, sign by writing the presiding
19 juror's number, and date it and notify the bailiff that you
20 have reached your verdict.

03:31:00

03:31:00

21 The verdict form which you have now heard discussed
22 says:

23 We, the Jury, duly impaneled and sworn in the
24 above-entitled action, upon our oaths, do hereby find as
25 follows:

03:31:00

1 1. S & L Vitamins, Inc. infringe any of plaintiff
2 Designer Skin, LLC's copyrights? Yes or no. A blank to check.
3 Obviously, check only one of those two.

4 If you answered one no, please sign and return the
5 verdict form without answering any further questions. 03:32:00

6 If you answered Question 1 yes, please proceed to
7 Question 2.

8 Question 2 says:

9 Which copyrights were infringed by defendant S & L
10 Vitamins, Inc.? 03:32:00

11 And in parentheses it says place an X on the
12 applicable line, paren, S, end paren.

13 And then follows what I haven't counted but counsel
14 has counted is, I think, 54, but whatever they are, there are
15 those names next to which is a blank, and you have to put an 03:32:00
16 X in those blanks where applicable and otherwise leave the
17 blank blank.

18 And then on page 5 is a place to sign by writing the
19 presiding juror's number and a blank for the date.

20 Any errors or corrections to the instructions or 03:33:00
21 verdict form, counsel?

22 MR. CROWN: No, Your Honor.

23 MR. COLEMAN: No.

24 THE COURT: Then at this time I will swear the
25 bailiffs. 03:33:00

1 (The bailiffs were duly sworn.)

2 THE COURT: Ladies and gentlemen, you've met
3 Mr. Hodges. You've not met my senior law clerk, Elicia Giroux,
4 who will serve as the third bailiff. So all three that I have
5 just sworn will serve as bailiffs.

03:34:00

6 And at this time you'll be escorted to the jury room
7 to commence your deliberations. I would ask that you
8 deliberate at least until 4:30. If you wish to deliberate a
9 bit longer than that, you may. If you're up able to reach a
10 verdict tonight before you decide to conclude for the evening,
11 then I would ask that you return not later than 9 a.m. tomorrow
12 morning.

03:34:00

13 (Jury out at 3:34 p.m.)

14 THE COURT: Please be seated.

15 The record will reflect the presence of counsel and
16 the parties outside the presence of the jury.

03:35:00

17 Please leave your phone numbers with Ms. Bengtson, and
18 if we have a question come up I typically will get counsel on
19 the phone by way of a conference call to discuss the question,
20 because quite often we can decide over the phone what the
21 answer to the question should be. I can craft that answer,
22 tell you on the phone what it will be and then proceed to send
23 the answer to the jury without necessarily having to require
24 you to come down to court.

03:35:00

25 I'm assuming, but I'll leave it to you, that you'll

03:35:00

1 probably be around until at least close of business today.

2 Anything else, either counsel?

3 MR. MIZRAHI: No, Your Honor.

4 MR. COLEMAN: Nothing we haven't discussed already.

5 THE COURT: All right. Thank you.

03:36:

6 We're in recess.

7 (Proceedings recessed at 3:36 p.m.)

8
9 (Proceedings reconvened at 4:48 p.m.)

10 THE COURT: Thank you. Please be seated.

04:48:

11 The record will reflect the presence of the parties
12 and counsel outside the presence of the jury.

13 You've been handed each a copy of two questions
14 proposed by Juror Number 5, the first of which is:

15 Can we have the poster boards used in closing
16 arguments?

04:49:

17 And I don't -- unless the parties both agree that
18 those can go into the jury room, I presume the answer is no,
19 they are not evidence, they're not in evidence.

20 MR. COLEMAN: That's our position, Judge.

04:49:

21 MR. MIZRAHI: We would agree to it.

22 THE COURT: All right. Well, you agree they're not in
23 evidence.

24 MR. MIZRAHI: I agree that the poster boards are not
25 in evidence.

04:49:

1 THE COURT: The second question:

2 Can we review the computer graphics presented as
3 evidence again?

4 And I -- I'm not positive what that's a reference to.
5 I assume that's what Mr. Shawl was -- had on the screen, but 04:50:
6 that's not -- refresh my memory as to what mechanism he was
7 using.

8 MR. MIZRAHI: Judge, if you remember, we had a
9 gentleman here named Paul Steele who was working on a computer
10 and what he did was he pulled up the images that are basically 04:50:
11 those images right there, the ones that we made into poster
12 boards, and we were able to publish those with the Court's
13 permission to the jurors, and so as a result of that all of the
14 computer screens had the publication of those same images that
15 we then made poster boards out of. 04:51:

16 And so I'm guessing that when they're -- when the
17 question refers to can we review the computer graphics
18 presented as evidence again I'm speculating that the jury is
19 referring to those images that we were presenting via the
20 computer system during Mike Shawl's testimony. 04:51:

21 And our position on this is that that's not something
22 that we have right here, although we can certainly bring Paul
23 back here and show that again if that's permissible, and we
24 don't have an objection to that.

25 THE COURT: But they're not in evidence, either. 04:51:

1 MR. MIZRAHI: They're not in evidence, but our
2 position is that we would agree to do that.

3 MR. COLEMAN: We would not.

4 THE COURT: All right.

5 All right. I have penned the answers on the sheets.
6 I'll give them to Ms. Bengtson.

04:52:00

7 You can be satisfied that what I have said is -- well,
8 that's what I intend to -- why don't you just show counsel and
9 then that's what will go in to the jury.

10 I think it's -- what I've written on there is
11 consistent with what I said I would do, but let me just give
12 you a chance to put your eyes on it.

04:52:00

13 MR. CROWN: May I ask the Court a question? It said
14 Juror Number 5. Is that a new numbered 5? Because --

15 THE DEPUTY CLERK: According to their seat number.

04:52:00

16 MR. CROWN: Gotcha.

17 THE COURT: Then we're --

18 MR. MIZRAHI: Judge, actually --

19 MR. CROWN: I'm sorry. May I see that real quick?

20 THE COURT: I think I know what you're about to say.

04:53:00

21 The computer graphics, I said they're not in evidence but
22 they're -- but, of course, they are in evidence testimonially.

23 MR. CROWN: Uh-huh. And they are also -- those -- and
24 the exact images that were both put on a computer screen as
25 well as the board was actual evidence just put into

04:53:00

1 demonstrative forms for the purpose of illustration of
2 testimony, to explain testimony and closing arguments.

3 So my concern is if the jury thinks it's not evidence
4 at all then they might not consider it. So I would ask the
5 Court's --

04:53:00

6 THE COURT: I think it's a point well taken.

7 MR. CROWN: Thank you.

8 THE COURT: I'm just trying to figure out how to
9 rephrase it.

10 MR. COLEMAN: Perhaps by saying the images are not in
11 evidence.

04:54:00

12 MR. CROWN: No.

13 MR. COLEMAN: I mean, I would point this out, Judge.
14 All I said when the Court asked my view of the matter was no.
15 I'll expand a little bit on that.

04:54:00

16 These images are not on the exhibit list. That's one
17 reason they're not in evidence. They were never produced in
18 advance of trial. That's another reason they're not in
19 evidence. They're not exhibits. They were used -- and -- by
20 the way, I would suggest that we were -- we were very
21 cooperative regarding their use. In fact, the computer
22 graphics man was drawing arrows without really regard --

04:54:00

23 THE COURT: I know what you're saying.

24 MR. COLEMAN: -- to -- so I -- I understand their
25 concern but --

04:54:00

1 THE COURT: Can I say this: They are not in evidence
2 as such except insofar as supporting the testimony -- except
3 insofar as utilized by Mr. -- by the witness with regard to his
4 testimony?

5 MR. CROWN: I think -- I think in -- I think maybe 04:55:
6 we're trying to be a little bit more cryptic than what the jury
7 needs. What they should be told is, they were -- these were
8 demonstrative exhibits for purposes of illustrating evidence
9 during the trial. They are based on evidence but not such that
10 they go back to you during your deliberations. 04:55:

11 MR. COLEMAN: That sounds --

12 MR. CROWN: I think that's the better way to do it so
13 that they know that they are based on evidence and that they
14 illustrated testimony during trial, no different than what you
15 said you're not going to get a transcript. It's kind of that 04:55:
16 flavor.

17 MR. COLEMAN: I think, frankly, the statement that
18 they are not -- that the images are not in evidence is accurate
19 and that the suggestion from Mr. Crown is more partisan but it
20 tends to actually reinforce the importance of these 04:56:
21 non-exhibits.

22 MR. CROWN: That's not true because the images are
23 evidence. We couldn't produce demonstrative evidence if it
24 wasn't based on actual evidence. We just put it in a form that
25 was illustrative for the jury. That's all. And if they're 04:56:

1 told that, then there will be no confusion.

2 THE COURT: Well, here's what I've written:

3 No, they are not in evidence as such and cannot be
4 re-created now but they were utilized as demonstrative exhibits
5 in connection with a witness's testimony, which is evidence. 04:57:

6 MR. CROWN: And further, images that they do have.
7 Because there's -- there is evidence in these other exhibits,
8 such as Exhibit 7, and also we have the Exhibits 1. So it's
9 not just testimony. Those images exist in the admitted
10 evidence and then, again, we took them and created easy 04:58:
11 comparison forms as demonstrative exhibits.

12 MR. COLEMAN: Judge, I like the current version. I --
13 like Mr. Crown, I'd like to sit down in the jury room and walk
14 them through the exhibits, but I -- it sounds to me that that's
15 what he's suggesting. 04:58:

16 THE COURT: What about simply the answer no?

17 MR. COLEMAN: I vote for no.

18 THE COURT: No it will be. But now I've messed up --
19 do we have another copy?

20 MR. COLEMAN: Maybe you want to put no for both so 04:58:
21 they -- I don't know how this would -- maybe it's better to say
22 no for both so that the jury doesn't get the impression that
23 one no means more than the other no.

24 MR. MIZRAHI: I would agree with that.

25 THE COURT: All right. 04:59:

1 MR. MIZRAHI: If it's going to be no for one, it
2 should be no for both.

3 THE COURT: Just say no.

4 Ms. Bengtson, can I have my other version? Do you
5 have another copy of --

04:59:..

6 THE DEPUTY CLERK: I don't have -- I don't have
7 another copy.

8 THE COURT: I'm sorry. Maybe I do.

9 I have it. I do have it.

10 All right. So be it.

04:59:..

11 Off the record?

12 (Off-the-record discussion.)

13 THE COURT: Thank you. Have a nice evening.

14 (Proceedings recessed at 5:00 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 24th day of November, 2008.

s/David C. German
DAVID C. GERMAN, RMR, CRR