

EXHIBIT 1

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SAUNDRA BROWN ARMSTRONG, JUDGE

HELIO LLC,)
)
)
PLAINTIFF,)
)
VS.)
)
PALM, INC.,)
)
DEFENDANT.)

CERTIFIED COPY

NO. C-06-7754 SBA
THURSDAY, DECEMBER 21, 2006
OAKLAND, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM
FOUR EMBARCADERO CENTER, 10TH
SAN FRANCISCO, CALIFORNIA 94111
BY: KEVIN C. TROCK, ESQUIRE
HAROLD H. DAVIS, JR., ESQUIRE
DEBORAH BAILEY-WELLS, ESQUIRE

FOR DEFENDANT: QUINN EMANUEL
555 TWIN DOLPHIN DRIVE, STE. 560
REDWOOD SHORES, CALIFORNIA 94065
BY: BRIAN C. CANNON, ESQUIRE
CHARLIE VERHOEVEN, ESQUIRE
DOUG COLT, ESQUIRE
CATHERINE COLE, ESQUIRE

REPORTED BY: DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

1 THURSDAY, DECEMBER 21, 2006

1:15 P.M.

2
3 **THE CLERK:** CALLING CIVIL 06-7754 HELIO, LLC VERSUS
4 PALM, INC.

5 **THE COURT:** GOOD AFTERNOON.

6 **THE CLERK:** COUNSEL, YOU WILL NEED TO STATE YOUR
7 APPEARANCES FOR THE RECORD.

8 **MR. TROCK:** GOOD AFTERNOON, YOUR HONOR, KEVIN TROCK
9 FOR THE PLAINTIFF HELIO.

10 **THE COURT:** KEVIN?

11 **MR. TROCK:** TROCK.

12 **THE COURT:** GOOD AFTERNOON, MR. TROCK.

13 **MS. BAILEY-WELLS:** GOOD AFTERNOON, YOUR HONOR,
14 DEBORAH BAILEY-WELLS FOR HELIO, PLAINTIFF.

15 **THE COURT:** GOOD AFTERNOON, MS. BAILEY-WELLS.

16 **MR. DAVIS:** GOOD AFTERNOON, YOUR HONOR, HAROLD DAVIS
17 FOR HELIO.

18 **THE COURT:** GOOD AFTERNOON, MR. DAVIS.

19 **MR. CANNON:** GOOD AFTERNOON, YOUR HONOR, THIS IS
20 BRIAN CANNON FOR DEFENDANT PALM.

21 **THE COURT:** GOOD AFTERNOON, MR. CANNON.

22 **MR. VERHOEVEN:** CHARLES VERHOEVEN FOR DEFENDANT.

23 **THE COURT:** CHARLES VERHOEVEN?

24 **MR. VERHOEVEN:** VERHOEVEN.

25 **THE COURT:** HOW DO YOU SPELL THAT?

1 **MR. VERHOEVEN:** V- AS IN VICTOR, E-R-H-O-E-V- AS IN
2 VICTOR, E-N.

3 **THE COURT:** OKAY. GOOD AFTERNOON, MR. VERHOEVEN.

4 **MR. COLT:** GOOD AFTERNOON, YOUR HONOR, DOUG COLT FOR
5 THE DEFENDANT.

6 **THE COURT:** GOOD AFTERNOON, MR. COLT.

7 **MS. COLE:** CATHERINE COLE FOR THE DEFENDANT.

8 **THE COURT:** COLE?

9 **MS. COLE:** C-O-L-E.

10 **THE COURT:** OKAY. GOOD AFTERNOON, MS. COLE.

11 OKAY. IS THAT EVERYONE?

12 OKAY. THIS MATTER IS ON THE COURT'S CALENDAR FOR A
13 TEMPORARY RESTRAINING ORDER THAT WAS FILED ON BEHALF OF HELIO
14 THE OTHER DAY, AND I RECEIVED THE PAPERS THAT YOU ALL HAVE
15 SUBMITTED AND SUPPORT IN OPPOSITION TO THE TRO.

16 AND I UNDERSTAND THAT SOMEONE REQUESTED TO HAVE THIS
17 REMAIN FOR ORAL ARGUMENT, WHICH IS WHY I KEPT IT ON. I ALSO
18 UNDERSTAND THAT SOMEONE CALLED TODAY WANTING TO BRING IN
19 SOMETHING, AND FORTUNATELY I WAS IN A MEETING IN THE FEDERAL
20 BUILDING IN SAN FRANCISCO ALL DAY SO I DIDN'T GET BACK IN TIME,
21 BUT I HAVE NO OBJECTION TO THE PRESENTATION, WHATEVER IT IS.
22 MY CLERK WAS NOT ABLE TO GET IN CONTACT WITH ME.

23 WAS IT YOU THAT MADE THE PHONE CALL?

24 **MR. CANNON:** WE MADE THE PHONE CALL AND WE HAVE --

25 **THE COURT:** THAT IS MR. --

1 MR. CANNON: MR. CANNON.

2 THE COURT: MR. CANNON.

3 MR. CANNON: AND WE HAVE THE EQUIPMENT IN THE
4 COURTROOM, ALTHOUGH I DON'T THINK WE WILL BE USING IT.

5 THE COURT: OKAY. OKAY. THANK YOU.

6 MR. CANNON: THANK YOU.

7 THE COURT: SO, WHY DON'T WE START WITH -- PLAINTIFF
8 MADE THE REQUEST FOR THE ORAL ARGUMENT, RIGHT?

9 MR. TROCK: THAT'S CORRECT.

10 THE COURT: WE WILL START WITH YOU.

11 WHAT I WOULD LIKE TO DO, AND I WILL SAY I HAVE READ
12 THE PAPERS YOU ALL HAVE SUBMITTED AND I -- THIS IS A CLOSE
13 CALL. I WILL BE -- VERY CLEARLY A CLOSE CALL. SO, I WANT TO
14 LET YOU DISCUSS WHAT YOU WANT TO DISCUSS. AND SINCE THE ISSUE
15 SEEMS TO BE -- THE HEART OF THE ISSUE SEEMS TO BE THE CONFUSION
16 HERE OF -- THROUGH ALL, EVERYTHING THAT HAS BEEN FILED, THE
17 CONFUSION SEEMS TO BE THE HEART OF THE ISSUE. IF THAT IS, I
18 PROBABLY WILL THEN HAVE YOU ALL FOCUS AFTER YOU SAY WHATEVER
19 GENERAL COMMENTS YOU WANT TO SAY ON THE FACTORS THAT THE COURT
20 IS TO BE CONSIDERING IN DETERMINING WHETHER OR NOT THERE IS OR
21 IS NOT A LIKELIHOOD OF CONFUSION AND SUPPORTED BY WHATEVER
22 EVIDENCE YOU HAVE OR DON'T HAVE, AND THEN I WILL HOPEFULLY BE
23 ABLE TO MAKE A DECISION AT THAT TIME.

24 I WANT TO LET YOU START WITH WHATEVER YOUR
25 PRELIMINARY COMMENTS ARE THAT YOU WOULD LIKE TO MAKE.

1 THAT IS MR. TROCK, RIGHT?

2 MR. TROCK: YES, THAT'S CORRECT. THANK YOU, YOUR
3 HONOR.

4 THE COURT: UH-HUH.

5 MR. TROCK: I WANTED TO START OUT BY ADDRESSING TO
6 THE COURT EXACTLY WHAT WE'RE TRYING TO ACCOMPLISH HERE.

7 WE ARE LOOKING FOR A VERY NARROWLY TAILORED
8 RESTRAINING ORDER. THE ONLY THING THAT CONCERNS US ABOUT THEIR
9 ADVERTISING CAMPAIGN IS THAT SLOGAN. THE REST OF THEIR
10 ADVERTISING CAMPAIGN DOES NOT CONCERN US.

11 THE COURT: WELL, THE SLOGAN IS THE ADVERTISING
12 CAMPAIGN, ISN'T IT?

13 MR. TROCK: IT'S PART OF IT. WHAT THEY HAVE -- IT'S
14 A LARGE ADVERTISING CAMPAIGN. MY UNDERSTANDING IT'S
15 \$25 MILLION. THEY HAVE A LOT OF PRESS, A LOT OF BILLBOARDS, A
16 LOT OF OTHER THINGS GOING ON OUT THERE. WE ARE NOT ASKING THE
17 COURT TO HAVE THEM TAKE DOWN OR PULL APART OR WITHDRAW THEIR
18 ENTIRE ADVERTISING --

19 THE COURT: SO YOU'RE ASKING THEM TO GO THROUGH WITH
20 SOME BLACK TAPE OR SOMETHING AND JUST PUT TAPE OVER THAT PART
21 OF ALL THOSE ADS THAT -- ALL OVER THAT THEY'VE DISTRIBUTED ALL
22 OVER THE COUNTRY?

23 MR. TROCK: THAT'S CORRECT.

24 THE COURT: SO NO ONE CAN SEE THAT --

25 MR. TROCK: THAT'S CORRECT. THE REST OF THE

1 ADVERTISING DOESN'T BOTHER US AT ALL.

2 I WOULD LIKE TO START OUT BY SAYING WHO WE ARE.

3 **THE COURT:** WHAT IS THE SIGNIFICANCE OF THAT? I
4 MEAN, LEGALLY, YOU SAY THAT TO SAY WHAT? TO SAY THAT THEIR
5 DAMAGES WOULD THEN BE MINIMIZED BECAUSE YOU ARE NOT ASKING THEM
6 TO TAKE THEM DOWN, YOU'RE ONLY ASKING THEM TO MODIFY ALL OF THE
7 ADS THAT THEY HAVE --

8 **MR. TROCK:** THAT'S CORRECT. AND WE'RE TRYING TO
9 FOCUS JUST ON THE RELIEF THAT WE NEED. RELIEF THAT WE NEED IS
10 TO REMOVE THE SLOGAN FROM THE MARKETPLACE, NOT TO STOP THEIR
11 ADVERTISING CAMPAIGN.

12 **THE COURT:** OKAY.

13 **MR. TROCK:** WE THINK THAT THAT WOULD REDUCE ANY KIND
14 OF BURDEN ON THEM OR ANY KIND OF HARM TO THEM BECAUSE NOW WE
15 ARE JUST TALKING ABOUT SOME INCREMENTAL COSTS TO MODIFY THE
16 ADVERTISING THAT THEY CURRENTLY HAVE IN PLACE.

17 **THE COURT:** THIS IS KIND OF ANTICIPATING QUESTIONS I
18 AM GOING TO BE ASKING. LET ME JUST ASK YOU, WHY DIDN'T YOU
19 SEND THEM A LETTER OR MAKE A PHONE CALL BEFORE YOU FILED THIS
20 LAWSUIT? WOULDN'T THAT HAVE MINIMIZED NOT ONLY YOUR POSSIBLE
21 HARM, BUT ALSO MINIMIZED WHAT -- DEPENDING ON WHEN YOU WERE
22 AWARE OF IT, I GUESS THAT'S THE CRITICAL THING.

23 I KNOW THAT THEY -- I DO WANT YOU TO GIVE YOUR
24 COMMENTS, BUT MAYBE YOU CAN ANSWER THIS QUESTION. I KNOW THAT
25 THEY INDICATED THEY WERE, THEY HAD RELEASED THEIR ADVERTISING

1 CAMPAIGN OCTOBER 12TH OF THIS YEAR. IF YOU DID NOTHING -- BUT
2 THEY DIDN'T SAY THAT YOU WERE THERE AND HAD KNOWLEDGE OF IT
3 OCTOBER 12TH, BUT I KNOW THEY ONLY RELEASED IT PUBLICLY WITHIN
4 THE LAST WEEK OR SO.

5 **MR. TROCK:** THAT'S CORRECT.

6 **THE COURT:** SO I GUESS THE QUESTION -- THE PREMISE
7 OF MY QUESTION AS TO WHY YOU DIDN'T SEND A CEASE AND DESIST
8 LETTER IS, MY ASSUMPTION, WHICH WAS IMPLICIT IN THEIR STATEMENT
9 THAT YOU WERE AWARE IN OCTOBER THAT THIS CAMPAIGN WAS BEING
10 LAUNCHED, AND DID NOTHING.

11 IS THAT FAIR?

12 **MR. TROCK:** THAT'S THEIR POSITION. AND WE HAD NO
13 KNOWLEDGE WHATSOEVER OF THEIR ADVERTISING CAMPAIGN UNTIL THEY
14 LAUNCHED THE CAMPAIGN ON DECEMBER 12TH OF THIS YEAR.

15 **THE COURT:** A WEEK AGO.

16 **MR. TROCK:** YES. A WEEK AGO.

17 **THE COURT:** GO ON WITH YOUR PRESENTATION.

18 **MR. TROCK:** SO, HELIO IS A BRAND NEW COMPANY. IT'S
19 VERY YOUNG. IT'S ONLY TWO YEARS OLD. WE ARE LOCATED IN LOS
20 ANGELES.

21 AND WE CAME UP WITH A SLOGAN AND A CAMPAIGN, AD
22 CAMPAIGN, OUR FIRST AD CAMPAIGN TO COME INTO THE MARKETPLACE TO
23 INTRODUCE US TO OUR MARKET AND TO SELL OUR DEVICES TO THEM.

24 AND WE FOCUS THIS AROUND A CAMPAIGN BASED UPON
25 "DON'T CALL IT A PHONE, DON'T CALL US A PHONE COMPANY."

1 WE SELL HANDHELD WIRELESS DEVICES, MULTIMEDIA
2 DEVICES. OUR TARGET MARKET IS FOR -- IT'S A YOUNG LIFESTYLE
3 MARKET FOR PEOPLE WHO ARE INTERESTED IN VIDEO, AUDIO, MUSIC,
4 VOICE, GAMES, CAMERAS. OUR DEVICES INCORPORATE ALL THOSE
5 ELEMENTS AS DOES THE DEFENDANTS.

6 SO WE HAVE THREE DEVICES THAT ARE CURRENTLY IN THE
7 MARKETPLACE, AND THIS CAMPAIGN WAS LAUNCHED BY US IN MAY OF
8 THIS YEAR, MAY 2ND. IT'S A \$30 MILLION CAMPAIGN. IT IS A
9 SIGNIFICANT EXPENDITURE FOR US. WE ARE ESSENTIALLY OUT THERE
10 IN THE MARKETPLACE TRYING TO DEVELOP GOODWILL WITH THIS
11 CAMPAIGN WITH OUR CONSUMERS.

12 WE THINK IT'S WORKING. WE HAVE GONE THROUGH IN
13 PRINT MAGAZINES, SUCH AS GENTLEMAN'S QUARTERLY, ROLLING STONE,
14 ENTERTAINMENT WEEKLY, BILLBOARDS, TELEVISION, RADIO, AND
15 SPECIAL EVENTS. WE HAVE STRATEGIC PARTNERSHIPS WITH COMPANIES
16 SUCH AS GOOGLE, YAHOO, UNION, FANDANGO AND MY SPACE. WE
17 BELIEVE THAT OUR CAMPAIGN AND THE SLOGAN IS RESONATING WITH OUR
18 MARKETING, WITH OUR CONSUMERS.

19 WE HAD COMMISSIONED A STUDY IN OCTOBER OF 2006 THIS
20 YEAR, AND WE --

21 **THE COURT:** BEFORE OCTOBER 12TH?

22 **MR. TROCK:** I BELIEVE THAT WAS THE CASE. BEFORE
23 THERE WAS ANY ANNOUNCEMENT. I BELIEVE THE OCTOBER DATE THEY
24 ARE TALKING ABOUT IS A MERE ANNOUNCEMENT.

25 **THE COURT:** INDUSTRY-WIDE, BUT NOT PUBLIC.

1 **MR. TROCK:** I WOULDN'T CALL IT INDUSTRY-WIDE EITHER.
2 I WOULD TAKE ISSUE WITH THAT. I BELIEVE IT WAS AT A TRADE SHOW
3 SOMEWHERE. WE WERE NOT AT THAT TRADE SHOW.

4 **THE COURT:** ANYWAY, THAT POINT, 61 PERCENT OF THE
5 PEOPLE RECOGNIZED --

6 **MR. TROCK:** THAT'S CORRECT. THAT'S RIGHT. AND MORE
7 IMPORTANTLY THAN THE 60 PERCENT RECOGNIZING THE SLOGAN --

8 **THE COURT:** I THOUGHT IT WAS 61. IS IT 60?

9 **MR. TROCK:** 61, ROUGHLY.

10 **MR. CANNON:** THERE ARE SEVERAL POINTS THAT I WOULD
11 LIKE TO ADDRESS. I WANT TO LET HIM COMPLETE. THERE ARE
12 OBVIOUSLY THINGS WE DISPUTE VIGOROUSLY.

13 **THE COURT:** YOU WILL BE ABLE TO VIGOROUSLY DISPUTE
14 THEM WHEN THE TIME COMES.

15 **MR. TROCK:** I THINK MORE IMPORTANTLY FROM THAT STUDY
16 WAS THE 45 PERCENT OF THE PEOPLE STUDIED WHO WERE ABLE TO
17 REITERATE A MESSAGE THAT THAT SLOGAN WAS GIVING THEM IN THEIR
18 OWN WORDS. AND WHAT THEY WERE SAYING IS, IT'S NOT JUST A
19 PHONE. THAT'S THE MESSAGE.

20 AND AS PART OF THE ANALYSIS IN A LIKELIHOOD OF
21 CONFUSION CASE, IT IS RELEVANT TO CONSIDER THE MESSAGE THAT
22 CONSUMERS ARE GETTING, NOT JUST THE SLOGAN ITSELF.

23 NOW, PALM'S CAMPAIGN IS BASED UPON THE SLOGAN "NOT
24 JUST A CELL PHONE." WE FOUND OUT ABOUT THIS ON DECEMBER 12TH
25 WHEN THEIR OWN PRESS RELEASE ANNOUNCED THAT THEY WERE PUTTING

1 OUT THIS ADVERTISING CAMPAIGN INTO THE MARKETPLACE.

2 WE BELIEVE THAT THEY ADMITTED --

3 **THE COURT:** HOW DID YOU FIND OUT ABOUT IT? HOW DID
4 YOU LEARN?

5 **MR. TROCK:** THERE WAS A PRESS RELEASE THAT WAS
6 ISSUED, AND I BELIEVE EITHER SOMEONE FROM OUR ADVERTISING
7 AGENCY OR ONE OF OUR PARTNERS NOTICED THIS ARTICLE THAT WAS
8 DISCUSSING THE PRESS RELEASE AND SENT IT TO US AND GAVE IT TO
9 OUR ATTENTION AND ASKED IF WE HAD HEARD ABOUT THIS.

10 THAT WAS THE FIRST THAT IT CAME TO OUR ATTENTION. I
11 JUST FOUND OUT ABOUT IT MYSELF PERSONALLY JUST LAST THURSDAY.
12 SO IT'S VERY NEW TO ME.

13 WE BELIEVE THAT THEY -- ONE OF THEIR EXECUTIVES HAS
14 ADMITTED THAT THEIR ADVERTISING CAMPAIGN IS SIMILARLY
15 POSITIONED AS OURS IS.

16 **THE COURT:** MR. HANCOCK.

17 **MR. TROCK:** MR. HANCOCK, YES.

18 **THE COURT:** I WANT TO ASK ABOUT THAT, TOO.

19 **MR. TROCK:** WE BELIEVE THE SLOGANS ARE SIMILAR TO
20 EACH OTHER. OURS IS "DON'T CALL IT A PHONE"; THEIRS IS "NOT
21 JUST A CELL PHONE."

22 **THE COURT:** HIS POINT WAS THAT HE BELIEVED THAT YOU
23 ALL ARE FACING DIFFERENT MARKETING GROUPS.

24 **MR. TROCK:** THAT'S CORRECT.

25 **THE COURT:** SO THAT --

1 **MR. TROCK:** THAT IS HIS POINT. BUT WHEN YOU LOOK AT
2 THE REALITY, WHAT THEY ARE ACTUALLY DOING IS THEY ARE
3 ADVERTISING IN THE SAME MAGAZINES WE'RE ADVERTISING IN.
4 GENTLEMAN'S QUARTERLY, ROLLING STONE, ENTERTAINMENT WEEKLY,
5 LUCKY. THEY HAVE THE SAME STRATEGIC PARTNERS AS US, GOOGLE,
6 YAHOO, UNION, FANDANGO, MY SPACE.

7 SO, THE GOODS AND SERVICES ARE ALMOST IDENTICAL TO
8 EACH OTHER. THEY HAVE HANDHELD WIRELESS DEVICES; SO DO WE.

9 **THE COURT:** LET ME JUST -- I DON'T WANT YOU TO HAVE
10 TO SPEND -- BE HERE ALL DAY LONG. I AM GOING TO LET YOU BOTH
11 MAKE GENERAL COMMENTS, BUT I ACTUALLY DO WANT TO WALK YOU BOTH
12 THROUGH EACH OF THE FACTORS. YOU'RE ADDRESSING THE FACTORS --

13 **MR. TROCK:** THAT'S CORRECT.

14 **THE COURT:** -- NOW, AND RATHER THAN HAVE YOU ADDRESS
15 THEM NOW AND THEN IN THE CONTEXT OF WHAT I ENGAGE YOU BOTH IN
16 DISCUSSION ON THE FACTORS, BECAUSE I HAVE SOME INCLINATIONS,
17 TOO, AND I WANT TO SHARE THOSE WITH YOU SO YOU CAN TELL ME WHAT
18 YOUR VIEWS ARE ONE WAY OR THE OTHER, AND THEN I CAN, IN MY OWN
19 MIND, MAKE A FINDING WITH RESPECT TO EACH OF THE FACTORS.

20 SINCE -- EVEN THOUGH I KNOW PLAINTIFF HAD A NUMBER
21 OF, YOU HAVE A NUMBER OF CAUSES OF ACTION THAT YOU RAISE HERE,
22 IT APPEARS THAT BASED UPON --

23 **MR. TROCK:** IT'S ALL BASED --

24 **THE COURT:** -- PAPERS, ALL ARE BASED ON THE LANHAM
25 ACT.

1 **MR. TROCK:** TRADEMARK INFRINGEMENT OR UNFAIR
2 COMPETITION.

3 **THE COURT:** SO, IT'S JUST THE LANHAM ACT VIOLATION
4 THAT YOU'RE FOCUSING ON AND IN THAT THE ONLY THING IS THE
5 CONFUSION THAT WE'RE CONCERNED ABOUT HERE.

6 **MR. TROCK:** THAT IS CORRECT.

7 **THE COURT:** SO I DO WANT TO JUST KIND OF WALK YOU
8 THROUGH THOSE EIGHT FACTORS THE NINTH CIRCUIT ESTABLISHED, SO
9 IF YOU WANT TO MAKE YOUR PRELIMINARY REMARKS, THEN I WILL LET
10 COUNSEL, MR. CANNON, MAKE HIS PRELIMINARY REMARKS, AND THEN
11 WE'LL KIND OF GO THROUGH THE FACTORS.

12 **MR. TROCK:** SO BEFORE I GET TO GO THROUGH THE
13 ANALYSIS AND JUST IN GENERAL, I THINK WHAT IS IMPORTANT HERE
14 AND I NOTICED IN THEIR PAPERS IS THAT THEY TAKE THE POSITION
15 THAT THEY CREATED THIS SLOGAN OR THAT THEY INVENTED IT THREE
16 YEARS AGO.

17 THE PROBLEM I HAVE WITH THIS IS THAT THEY HAVE BEEN
18 SELLING TREOS FOR THREE YEARS. IT WASN'T UNTIL DECEMBER OF
19 THIS YEAR THAT THEY USED THAT SLOGAN IN COMMERCE. THAT'S THEIR
20 FIRST TRADEMARK USE OF THE SLOGAN.

21 THE FACT THAT THEY'RE ADVERTISING IN OUR -- IN THE
22 SAME MEDIA OUTLETS AS US AND HAVE THE SAME STRATEGIC PARTNERS
23 AS US AND THE SLOGANS ARE SO SIMILAR, STRIKES ME AS SOMETHING
24 THAT'S FAR MORE THAN JUST COINCIDENTAL.

25 IF THEY EXPECT US TO BE AWARE OF THEIR ADVERTISING

1 CAMPAIGN BECAUSE OF AN ANNOUNCEMENT THEY MADE AT A TRADE SHOW
2 IN NEW YORK IN OCTOBER, THEN I THINK IT'S FAIR FOR US TO EXPECT
3 THAT THEY KNOW ABOUT OUR ADVERTISING CAMPAIGNS SINCE WE HAVE
4 BEEN USING IT SINCE MAY OF THIS YEAR, AND HAVE SPENT
5 \$25 MILLION ADVERTISING OUR SLOGAN.

6 IF THAT'S THE CASE AND IF THEY HAD THIS SLOGAN ON
7 THE SHELF FOR THE LAST THREE YEARS, WHY DIDN'T THEY USE IT
8 EARLIER? WHY DIDN'T THEY FILE FOR A TRADEMARK APPLICATION AND
9 TO REGISTER THAT SLOGAN? WHY DIDN'T THEY --

10 **THE COURT:** OCTOBER OF '03?

11 **MR. TROCK:** '06.

12 **THE COURT:** HOW IS THAT THREE YEARS AGO?

13 **MR. TROCK:** THEY HAVE BEEN SELLING TREOS FOR THREE
14 YEARS. THEY SAY THEY INVENTED THIS SLOGAN OVER TWO YEARS AGO
15 AT THE BEGINNING OF 2005. THAT'S THEIR POSITION.

16 WHY DIDN'T THEY OPPOSE ANY OF OUR APPLICATIONS TO
17 REGISTER THIS SLOGAN WITH THE PATENT AND TRADEMARK OFFICE? NOT
18 A SINGLE ONE DID THEY OPPOSE.

19 THEY HAVE NEVER DONE THAT BECAUSE THEY TOOK THE
20 SLOGAN, DUSTED IT OFF THE SHELF, THEY WERE AWARE OF OUR AD
21 CAMPAIGN WHEN THEY INITIATED THEIR CAMPAIGN IN DECEMBER, AND
22 THAT'S WHERE WE FIND OURSELVES TODAY. I FIND THAT THOSE
23 SIMILARITIES ARE SO STRIKING THIS CANNOT BE COINCIDENCE.

24 **THE COURT:** OKAY. THANK YOU.

25 OKAY MR. CANNON.

1 **MR. CANNON:** YOUR HONOR, WHAT'S INCREDIBLE TO ME IS
2 WE HAVE THREE DAYS BEFORE CHRISTMAS, THREE SHOPPING DAYS BEFORE
3 CHRISTMAS. AND WE HAVE HEARD A LOT OF ATTORNEY ARGUMENT. WE
4 HAD ABOUT 12 HOURS' NOTICE OF GETTING THESE PAPERS BEFORE
5 APPEARING -- BEFORE PREPARING OUR OPPOSITION.

6 THERE IS ABSOLUTELY NO EVIDENCE SUPPORTING WHAT
7 COUNSEL IS ARGUING. THIS -- THE TRADE SHOW THAT HE DISMISSES,
8 THIS WAS THE MAJOR ANNUAL TRADE SHOW FOR CONSUMER ELECTRONICS
9 IN NEW YORK. IT'S OCTOBER 12 IN NEW YORK CITY. HUNDREDS OF
10 THOUSANDS OF PEOPLE WENT THROUGH IT. WE HAVE SUBMITTED SOME
11 EVIDENCE THAT DESCRIBES THE AMOUNT OF PEOPLE THAT WERE GOING
12 THROUGH IT.

13 THIS SLOGAN THAT THEY ARE SO CONCERNED WITH WAS
14 ADVERTISED PUBLICLY, BOTH AT THE INDUSTRY SHOW AND PUBLIC --
15 PUBLIC CAN ATTEND THE SHOW. IT WAS OUT THERE IN OCTOBER. FOR
16 THEM TO SAY --

17 **THE COURT:** LET'S BE SPECIFIC BECAUSE YOUR PAPERS --
18 YOU HAVE ONE SENTENCE YOU BASICALLY SAY THAT YOU RELEASED IT IN
19 OCTOBER AT A TRADE SHOW AND THEN THE NEXT SENTENCE IS YET
20 PLAINTIFF DID NOTHING.

21 AND WHAT IS STRIKING TO ME AS I READ IT WAS THAT
22 THERE WAS NO AFFIRMATIVE ASSERTION THAT PLAINTIFFS WERE THERE,
23 AND THAT I AM BEING ASKED TO BASICALLY FILL THE VOID WITH AN
24 ASSUMPTION THAT THEY WERE THERE AND THEY HAD KNOWLEDGE BECAUSE
25 OBVIOUSLY THEY CAN'T BE HELD CULPABLE FOR DOING NOTHING UNLESS

1 IT'S CLEAR THAT THEY WERE -- HAD KNOWLEDGE AND WERE IN A
2 POSITION TO DO SOMETHING.

3 SO, DO I HAVE ANY -- THEIR POSITION IS THEY DIDN'T
4 KNOW.

5 **MR. CANNON:** WELL, YOUR HONOR, THAT'S NOT WHAT THEIR
6 PAPERS SAY. THAT IS WHAT COUNSEL ARGUED. THEIR PAPERS, IF YOU
7 ACTUALLY LOOK AT THE EVIDENCE THAT SUPPORTS THEIR PAPERS, THEY
8 SUBMITTED A DECLARATION FROM A SINGLE INDIVIDUAL AT HELIO, I
9 BELIEVE IT'S MS. WEEKS, AND SHE SAYS -- IT'S PARAGRAPH 22. SHE
10 SAID, I FIRST BECAME AWARE OF TREOS CAMPAIGN ON SUCH AND SO
11 DATE --

12 **THE COURT:** JUST A SECOND. MS. WHEBLE YOU'RE
13 SAYING?

14 **MR. CANNON:** MS. WEEKS.

15 **THE COURT:** JESSICA WEEKS?

16 **MR. CANNON:** YES.

17 **THE COURT:** OKAY.

18 **MR. CANNON:** IT'S PARAGRAPH 22.

19 YOUR HONOR, I MIGHT ADD THAT I PRESUME, I AM NOT
20 GOING TO MAKE STATEMENTS WITHOUT EVIDENCE, YOUR HONOR, BUT I
21 PRESUME THAT HELIO, IF THEY ARE A YOUNG COMPANY AND IF THEY ARE
22 IN THIS BUSINESS WHICH THEY CLAIM TO BE, THEY WOULD HAVE BEEN
23 AT THAT TRADE SHOW.

24 **THE COURT:** I DON'T PRESUME THAT WHEN I AM BEING
25 ASKED TO ISSUE A TRO. BUT THE ONLY THING I PRESUME THAT THE

1 PARTIES HAVE EVIDENCE FOR THEIR RESPECTIVE POSITION. IF THEIR
2 POSITIONS ARE SOLIDLY BASED, THEN THEY ARE IN A POSITION TO
3 COME HERE AND SHOW ME THAT THE POSITIONS ARE SOLIDLY BASED.

4 **MR. CANNON:** I UNDERSTAND.

5 **THE COURT:** THAT'S ALL I AM CONCERNED ABOUT.

6 I'M LOOKING AT PARAGRAPH 22 AND IT SAYS:

7 "I FIRST BECAME AWARE OF PALM'S YOUTH TAGLINE

8 "NOT JUST A CELL PHONE" ON OR ABOUT

9 DECEMBER 12TH, 2006 WHEN I READ AN ARTICLE FROM

10 THAT DAY'S EDITION OF BRANDWEEK.COM ENTITLED

11 "FRESH PUSH BEGINS FOR PALM'S TREO 680."

12 NOW, THAT'S DECEMBER 12TH, 2006. THAT'S ONLY A

13 COUPLE OF WEEKS AGO.

14 **MR. CANNON:** I UNDERSTAND. THAT'S ONE INDIVIDUAL.

15 SHE DOESN'T SAY -- THERE'S NO EVIDENCE THAT OTHER PEOPLE AT

16 HELIO WEREN'T AT THE -- HELIO DOES NOT PROVIDE EVIDENCE IN

17 THEIR PAPERS THAT OTHER PEOPLE AT HELIO WERE NOT AWARE OF THIS.

18 **THE COURT:** NO, NO, NO, NO. OKAY. BACK UP.

19 I AM ASKING YOU FOR CLARIFICATION OF POSITIONS THAT

20 YOU HAVE TAKEN IN YOUR PAPERS.

21 **MR. CANNON:** YES.

22 **THE COURT:** A POSITION THAT YOU TOOK IN YOUR PAPERS.

23 WAS -- WOULD BE PERSUASIVE IF WHAT IS IMPLIED IS REALITY. AND

24 THAT IS, YOU INDICATE BASICALLY THAT THERE IS THE DELAY, AND

25 THE DELAY BASICALLY IN SOME WAY DETRACTS FROM THE SUGGESTION

1 THAT THERE IS IRREPARABLE HARM BECAUSE OBVIOUSLY IF PEOPLE ARE
2 GOING TO BE HARMED IRREPARABLY, THEY WOULD MOVE MORE
3 DILIGENTLY.

4 **MR. CANNON:** YES.

5 **THE COURT:** SO, YOUR POSITION IS THAT YOU ALL
6 ANNOUNCED YOUR POSITION IN OCTOBER OF THIS YEAR, YET THEY DID
7 NOTHING, WHICH I THINK IS PERSUASIVE.

8 BUT WHAT I DON'T KNOW IS WHETHER OR NOT YOUR -- THE
9 INFERENCE IS CORRECT. AND THAT'S WHAT I AM ASKING YOU TO SHOW
10 ME, YOU KNOW, SOMETHING THAT WOULD SUGGEST THAT YOUR POSITION
11 IS WELL-TAKEN, THAT THEY DELIBERATELY DELAYED BY VIRTUE OF NOT
12 TAKING ACTION ON INFORMATION THAT THEY WERE AWARE OF.

13 WHAT YOU DIRECTED ME TO IS MS. WEEKS' DEPOSITION
14 DOES NOT SUPPORT YOUR POSITION.

15 **MR. CANNON:** I UNDERSTAND. I WAS ADDRESSING A
16 DIFFERENT POINT. I WAS ADDRESSING THE POINT THAT COUNSEL MADE
17 WHEN HE REPRESENTED TO THE COURT THAT NO ONE AT HELIO KNEW
18 ABOUT THIS CAMPAIGN UNTIL THIS, UNTIL MID-DECEMBER.

19 **THE COURT:** A COUPLE OF WEEKS AGO. THAT'S WHAT SHE
20 IS SAYING HERE.

21 **MR. CANNON:** THAT'S ONE PERSON AT HELIO.

22 **THE COURT:** WELL, YOU DIRECTED ME TO THIS PERSON.

23 **MR. CANNON:** BECAUSE I WANTED TO EXPLAIN THAT THEY
24 DON'T HAVE THE EVIDENCE THAT -- THEY HAVE NOT SUBMITTED
25 EVIDENCE ON THIS REALLY EXTRAORDINARY REQUEST FOR EX PARTE

1 RELIEF. THEY DON'T HAVE EVIDENCE THAT THEY WEREN'T AT THE
2 SHOW. THEY'VE NEVER DENIED THAT THEY WERE NOT AT THE SHOW.

3 **THE COURT:** MR. CANNON, YOU DON'T UNDERSTAND. WE
4 OBVIOUSLY ARE NOT -- THERE'S NO MEETING OF THE MINDS HERE. YOU
5 DON'T UNDERSTAND MY -- THEY HAVE FILED FOR A TRO.

6 **MR. CANNON:** YES.

7 **THE COURT:** OKAY? AND THEIR TRO IS BASED UPON THE
8 FACT THAT APPARENTLY YOU ARE IN SOME WAY INFRINGING THEIR
9 PRODUCT AND CAUSING CONFUSION. AND TO THE EXTENT THAT THOSE
10 FACTORS ARE MET, THEN, OF COURSE, THERE'S THE PRESUMPTION OF
11 HARM.

12 I UNDERSTOOD YOUR ARGUMENT TO BE EITHER IN THE
13 CONTEXT OF REBUTTING THEIR PRESUMPTION OF IRREPARABLE HARM OR
14 IN THE CONTEXT OF BALANCING OF HARM. IN SOME WAY, YOU ARE
15 ARGUING THAT THE COURT SHOULD FIND THAT THERE IS NO IRREPARABLE
16 HARM BECAUSE REASONABLE PEOPLE WHO ARE MADE AWARE OF CERTAIN
17 CIRCUMSTANCES DON'T SIT ON THEIR LAURELS. THEY GENERALLY WILL
18 MOVE MUCH MORE EXPEDITIOUSLY.

19 IN THIS CASE, WE, PALM, ANNOUNCED OUR POSITION IN
20 OCTOBER, YET THEY DID NOTHING. NOW, THAT'S A PERSUASIVE
21 ARGUMENT IF THERE IS SOME EVIDENCE THAT YOU HAVE TO SUGGEST TO
22 ME THAT THEY WERE, IN FACT, THERE, THAT THEY DID, IN FACT, KNOW
23 ABOUT IT, AND THAT THEY CHOSE THEN EITHER THROUGH NEGLIGENCE OR
24 THROUGH DELIBERATE OMISSION NOT TO PURSUE IT UNTIL TODAY. THAT
25 LINK IS MISSING HERE.

1 **MR. CANNON:** YOUR HONOR, WE HAVE HAD NO DISCOVERY
2 FROM THEM.

3 **THE COURT:** OKAY. BUT WHETHER YOU HAVE DISCOVERY OR
4 NOT, WHEN YOU TAKE POSITIONS IN THE COURT, YOU SHOULD HAVE A
5 BASIS FOR THEM.

6 **MR. CANNON:** THE BASIS, YOUR HONOR, IS THAT THIS WAS
7 A PUBLIC TRADE SHOW, THE ANNUAL INDUSTRY TRADE SHOW. SO, THE
8 ASSUMPTION, BASED UPON THE TIME THAT WE HAD TO PUT THESE PAPERS
9 TOGETHER, WHAT OUR POSITION WAS AND I AM NOT TRYING TO MISLEAD
10 THE COURT --

11 **THE COURT:** NO, I AM NOT SUGGESTING YOU ARE TRYING
12 TO MISLEAD THE COURT.

13 **MR. CANNON:** OUR POSITION IS THIS SLOGAN, THIS AD
14 CAMPAIGN WAS OUT THERE.

15 **THE COURT:** OKAY.

16 **MR. CANNON:** THAT'S THE POSITION.

17 **THE COURT:** I AM NOT SUGGESTING YOU ARE TRYING TO
18 MISLEAD THE COURT. I AM NOT EMBRACING THE ASSUMPTION THAT
19 YOU -- THAT UNDERLIES THAT POSITION, SO I GUESS WE SHOULD MOVE
20 ON TO THE NEXT ARGUMENT.

21 **MR. CANNON:** RIGHT.

22 SO WE HAVE SUBMITTED A DECLARATION FROM PALM'S
23 DIRECTOR OF MARKETING THAT THIS CAMPAIGN, THE PRESS RELEASE IS
24 DECEMBER 11TH OR 12TH, BUT THE ACTUAL CAMPAIGN, THE BILLBOARDS
25 WENT OUT NOVEMBER 27TH. SO, IT WAS PUBLICLY ON THE TAXIS, ON

1 THE SIDES OF BUILDINGS NOVEMBER THE 27TH. SO THAT'S MORE THAN
2 JUST LAST WEEK. WE HAVE SUBMITTED DECLARATION TO SUPPORT THAT
3 POSITION.

4 SO, BUT, YOUR HONOR, WHAT REALLY IS AT THE HEART OF
5 THIS IS CONFUSION. ARE THE CONSUMERS GOING TO BE CONFUSED?
6 THAT IS WHAT TRADEMARK LAW IS ALL ABOUT. THEY DON'T GET TO OWN
7 SLOGANS, THEY DON'T GET TO OWN DESCRIPTIONS THEY GET TO OWN
8 TRADEMARKS. AND THE POINT OF TRADEMARK LAW IS TO AVOID
9 CONSUMERS BEING CONFUSED ABOUT THE ORIGINS OF THE PRODUCTS
10 BEING SOLD.

11 **THE COURT:** YOU ARE ABSOLUTELY CORRECT.

12 **MR. CANNON:** THAT, TO ME, IS THE TOUCHSTONE. THAT'S
13 WHERE I THINK THIS CASE TRULY FALLS APART.

14 **THE COURT:** OKAY. SO YOU ALL --

15 **MR. CANNON:** I HAVE A COUPLE MORE POINTS, YOUR
16 HONOR.

17 **THE COURT:** OKAY. GO ON.

18 **MR. CANNON:** IN THEIR PAPERS, IT'S REALLY NOT FAIR
19 FOR THEM TO SAY THAT PALM'S CAMPAIGN IS "NOT JUST A CELL
20 PHONE." PALM'S CAMPAIGN IS "NOT JUST A CELL PHONE. A TREO."
21 THAT PHRASE IS CRUCIAL. TREO IS THE PALM PRODUCT. THE ORIGIN
22 OF THE GOODS IS IN THE PHRASE. THE PALM PHRASE IS "NOT JUST A
23 CELL PHONE. A TREO." THOSE PHRASES ARE INEXTRICABLY LINKED.

24 YOUR HONOR, I HAVE A COUPLE OF THINGS I WOULD LIKE
25 TO SHOW YOUR HONOR. THEY ARE IN THE RECORD.

1 **THE COURT:** LET ME ASK YOU ABOUT THE POINT, THE
2 POINT YOU ARE JUST MAKING BECAUSE I ALSO FOUND IT KIND OF
3 INTERESTING. IRRESPECTIVE OF THE -- THE PHRASE KIND OF HAVE
4 THE SAME SOUND, BUT I GUESS MORE IMPORTANTLY THE SUBSTANCE OR
5 THE CONCEPT THAT IS EMBRACED IN BOTH SEEMS TO BE THE SAME, SO
6 THAT THE CONSUMERS ARE, EVEN IF THEY DON'T REMEMBER THE PHRASE
7 ITSELF, THE DIFFERENCE IN THE PHRASE "DON'T CALL IT A PHONE AND
8 DON'T CALL US A PHONE COMPANY," OR, YOU KNOW, THE OTHER PHRASE,
9 THE POINT IS THAT THE TELEPHONE, CELL PHONES OFFER MANY
10 SERVICES THAT ARE NOT TRADITIONALLY OFFERED BY TELEPHONE
11 SERVICES. AND BOTH OF THOSE -- BOTH OF THOSE PHRASES BASICALLY
12 MAKE THAT POINT.

13 SO, FROM YOUR PERSPECTIVE, WHY WOULDN'T THAT ALSO BE
14 SOMETHING THAT WOULD MILITATE IN FAVOR OF POSSIBLE CONFUSION OF
15 CONSUMERS?

16 **MR. CANNON:** TWO POINTS, YOUR HONOR. FIRST, THAT
17 PHRASE IS PURE DESCRIPTION. YOU CAN'T OWN A DESCRIPTION. A
18 CELL PHONE HAS FEATURES --

19 **THE COURT:** IS THIS -- IS THEIR PHRASE STILL GOING
20 THROUGH THE TRADEMARK OFFICE BEING PROCESSED FOR --

21 **MR. CANNON:** IT IS NOT REGISTERED, YOUR HONOR.

22 **THE COURT:** I KNOW. HAS THERE BE AN OBJECTION ON
23 THAT BASIS THAT IT'S DESCRIPTIVE?

24 **MR. TROCK:** YOUR HONOR, THE ANSWER IS NO. THEY HAVE
25 ALL CLEARED OPPOSITION.

1 **MR. CANNON:** YOUR HONOR, THOSE MARKS HAVE NOT
2 REGISTERED.

3 **THE COURT:** I KNOW THEY HAVEN'T REGISTERED.

4 **MR. CANNON:** WHAT IS SIGNIFICANT TO ME --

5 **THE COURT:** LET'S DEAL WITH YOUR FIRST POINT FIRST
6 AND THEN WE'LL DEAL WITH YOUR SIGNIFICANT POINT SECOND.

7 **MR. CANNON:** OKAY.

8 **THE COURT:** YOU MADE THE POINT TO ME THAT IT'S
9 DESCRIPTIVE --

10 **MR. CANNON:** YES.

11 **THE COURT:** -- IN RESPONSE TO MY ASKING YOU WOULD IT
12 MILITATE IN FAVOR OF CONFUSION OF THE CONSUMERS IF THE
13 CONSUMERS DIDN'T REMEMBER THE PRECISE WORDS THAT ARE EMPLOYED
14 BY EITHER ONE OF YOU BUT REMEMBER THE CONCEPT, WHICH THERE
15 SEEMS TO BE NO DISPUTE, AND IT IS THE SAME IN BOTH CASES.

16 **MR. CANNON:** BUT, YOUR HONOR, EVERY -- THERE'S NO
17 CONNECTION BETWEEN THAT STUDY -- BY THE WAY, I'VE NEVER SEEN
18 THE STUDY. THEY DID NOT SUBMIT IT IN EVIDENCE. WE DON'T HAVE
19 IT. THEY DIDN'T GIVE THE STUDY TO THE COURT OR TO US.

20 SO, I AM JUST GOING OFF OF WHAT COUNSEL ARGUED AND
21 WHAT SOMEONE SAID IN A DECLARATION THE STUDY SAID. SO THAT
22 STUDY IS NOT IN EVIDENCE.

23 SECOND, THE STUDY DID NOT GO TO CONFUSION. THERE IS
24 NO EVIDENCE THAT CONSUMERS WERE CONFUSED. THEY HAVE SAID --

25 **THE COURT:** WAIT, WAIT. BACK UP. OKAY. I DON'T

1 KNOW WHICH POINT TO DEAL WITH FIRST.

2 YOU ARE NOT ANSWERING MY QUESTION. SINCE WE ARE
3 DEALING WITH SOMETHING ELSE, THE STUDY, MY UNDERSTANDING WAS
4 THE STUDY THAT WAS MADE PRECEDED THIS DISPUTE. AND THE STUDY
5 THAT WAS MADE WAS DESIGNED TO ASSESS THE RECOGNITION OF THE
6 CONSUMERS WITH RESPECT TO THEIR SLOGAN, NOT YOURS, OR NOT
7 COMPARATIVELY.

8 MR. CANNON: RIGHT.

9 THE COURT: AND SO MY UNDERSTANDING WAS THAT THE
10 STUDY THEN JUST DEMONSTRATED THAT 61 PERCENT OF THE CONSUMERS
11 RECOGNIZED THEIR SLOGAN ATTRIBUTABLE TO THEM. IT WASN'T FOR
12 THE PURPOSE OF COMPARING, ALTHOUGH I HAVE TO TELL YOU, AS I WAS
13 REVIEWING THIS STUFF I WAS THINKING IT SURE WOULD HAVE BEEN
14 NICE IF THERE WAS TIME TO DO ANOTHER SURVEY NOW TO SEE IF THERE
15 WAS SOME DIFFERENCE, BUT OBVIOUSLY --

16 MR. CANNON: I HAVEN'T SEEN THE SURVEY.

17 THE COURT: I GUESS YOU CAN ASK FOR IT. I DON'T
18 KNOW IF YOU ALL TALK. THAT IS ONE POINT.

19 THE SECOND, I STILL WANT TO GET BACK TO THE POINT I
20 ASKED YOU.

21 MR. CANNON: I AM SORRY, I WANT TO ANSWER YOUR
22 QUESTIONS.

23 THE COURT: OH, I KNOW. I WAS ASKING YOU WOULDN'T
24 IT MILITATE IN FAVOR OF CONSUMERS BEING CONFUSED SINCE THERE
25 SEEMS TO BE NO DISPUTE FROM EITHER OF YOU THAT THE CONCEPT THAT

1 WAS EMBRACED BY BOTH OF THE PHRASES THAT ARE USED BY YOUR
2 RESPECTIVE COMPANIES BASICALLY IS THE SAME, SO WHY WOULDN'T
3 THAT MILITATE IN FAVOR OF CONFUSION?

4 **MR. CANNON:** BECAUSE THE PHRASES ARE DIFFERENT. IF
5 YOU LOOK AT THE ADS --

6 **THE COURT:** THEY SAY THEY DON'T REMEMBER THE
7 PHRASES, THE PRECISE WORDS THAT ARE BEING USED.

8 **MR. CANNON:** THE TEST IS HOW DOES THE AD LOOK IN THE
9 MARKETPLACE TO THE CONSUMER. THESE ARE THE ADS (INDICATING).
10 THEY ARE VERY, VERY DIFFERENT. AND I CAN GET INTO THE DETAILS
11 OF THE COPY.

12 **THE COURT:** AS WE GO THROUGH THE FACTORS?

13 **MR. CANNON:** YES. THERE WILL BE NO CONFUSION WITH
14 THESE ADS. THERE IS NO EVIDENCE THERE HAS BEEN ANY CONFUSION.
15 SO TO TAKE OUR PRODUCT, TO TAKE OUR CAMPAIGN DOWN THREE DAYS
16 BEFORE CHRISTMAS WITHOUT ANY EVIDENCE OF ACTUAL CONFUSION OR A
17 SURVEY SUBMITTED IN EVIDENCE THAT SAYS THERE'S A LIKELIHOOD OF
18 CONFUSION, ON A TRO IS, I THINK, AN EXTRAORDINARY REQUEST.

19 **THE COURT:** OKAY. THANK YOU.

20 SO NOW, HOPEFULLY NOW WE HAVE THE PRELIMINARY
21 COMMENTS, WE CAN GO THROUGH THIS PRETTY QUICKLY.

22 SO, THE EIGHT FACTORS THAT THE NINTH CIRCUIT HAS
23 DETERMINED WILL GUIDE THE COURT'S ASSESSMENT OF THE LIKELIHOOD
24 OF CONFUSION. START WITH -- THE EIGHT FACTORS INCLUDES THE
25 STRENGTH OF THE MARK, THE PROXIMITY OF THE GOODS OR RELATEDNESS

1 OF THE TWO COMPANY SERVICES, THE SIMILARITY OF THE MARKS, THE
2 MARKETING CHANNELS, THE DEFENDANT'S INTENT IN SELECTING THE
3 MARK, EVIDENCE OF ACTUAL CONFUSION, THE TYPES OF GOODS AND THE
4 DEGREE OF CARE LIKELY TO BE EXERCISED BY THE PURCHASER AND
5 LIKELIHOOD OF EXPANSION OF THE PRODUCT LINE.

6 SO LET'S START WITH STRENGTH OF THE MARK. AND AS WE
7 GO THROUGH THIS, I WILL TELL YOU WHAT MY INCLINATION IS. I AM
8 INTERESTED IN YOUR VIEW.

9 SO, THIS ONE, I AM INCLINED TO -- BECAUSE PLAINTIFF
10 HAS OFFERED EVIDENCE THAT ITS MARK HAS BEEN RECOGNIZED AND
11 ASSOCIATED WITH THIS PRODUCT, AND I THINK PERSUASIVELY ARGUES
12 THAT THE MARKET SUGGESTED. I AM INCLINED TO FIND THAT THE MARK
13 IS STRONG WHICH WEIGHS IN FAVOR OF FINDING INFRINGEMENT.

14 YOU KNOW, THE MARK SEEM TO BE SIMILAR AND THE GOODS
15 ARE CLOSELY RELATED, SO THE STRENGTH OF THE MARK IS SOMEWHAT OF
16 IMPORTANCE, BUT I AM INCLINED TO FIND THAT IT'S -- THAT THE
17 MARK IS STRONG.

18 **MR. TROCK:** IF I MIGHT ALSO ADD, YOUR HONOR, GOOD
19 INDICATION OF THE STRENGTH OF THE MARK IS THAT THE SLOGAN
20 ITSELF IS DISTINCTIVE. THAT'S THE JOB THAT THE TRADEMARK
21 OFFICE DOES WHEN YOU FILE AN APPLICATION FOR REGISTRATION.

22 ONE OF THE ANALYSES THEY DO IS DETERMINE WHETHER OR
23 NOT THAT MARKET IS DISTINCTIVE BEFORE THEY WILL REGISTER IT.
24 AND ALL OF WHAT WE HAVE, WE HAVE SIX APPLICATIONS.

25 **THE COURT:** IT HASN'T BEEN REGISTERED AT THIS POINT.

1 **MR. TROCK:** THAT IS CORRECT. THEY HAVE ALL BEEN
2 EXAMINED. NOT ONE EXAMINER HAS EVER INDICATED THAT THE MARKS
3 WERE ANYTHING BUT DISTINCTIVE.

4 **THE COURT:** WELL --

5 **MR. TROCK:** THEY HAVE ALL CLEARED OPPOSITION AS
6 WELL. SO, THE PATENT AND TRADEMARK OFFICE --

7 **THE COURT:** DID YOU SUBMIT EVIDENCE OF THAT?

8 **MR. TROCK:** YES, THERE IS.

9 **THE COURT:** HIS POINT IS HE HAS RECEIVED NO
10 DISCOVERY, SO HE'S KIND OF TAKING YOU AT YOUR WORD.

11 **MR. TROCK:** IT'S ATTACHED TO MS. WHEBLE'S
12 DECLARATION.

13 **MR. CANNON:** WHAT IS ATTACHED TO THE DECLARATION IS
14 A PRINTOUT FROM A WEBSITE THAT SAYS THAT A NOTICE OF ALLOWANCE
15 IS ISSUED. WHAT IS NOT SUBMITTED IN EVIDENCE IS THE ACTUAL
16 APPLICATION.

17 THE CONFUSION HERE IS PLAINTIFF IS TRYING TO OWN THE
18 WORDS, BUT REALLY WHAT WE ARE TALKING ABOUT IS A MARK. IF
19 THERE'S WORDS THAT ARE VERY DISTINCTIVE STYLIZED WAY -- THIS IS
20 WHAT WE ARE TALKING ABOUT (INDICATING). THIS IS HELIO'S AD.
21 NOW, IT'S GOT A WORD ON IT, IT'S GOT PHRASES ON IT. TRADEMARK
22 LAW YOU DON'T OWN THE WORDS PER SE. WE HAVE NOT SEEN THEIR
23 TRADEMARK APPLICATION. WE --

24 **THE COURT:** IN TERMS OF THE FORMULATION OF THE
25 WORDS.

1 **MR. CANNON:** THE STYLE, THE FONT, THE COLOR, THOSE
2 SORTS OF THINGS. WE HAVEN'T SEEN THE APPLICATION. IT IS NOT
3 IN EVIDENCE. SO WE DON'T -- THEY ARE MAKING REPRESENTATIONS
4 ABOUT HOW THE EXAMINER HAS INTERPRETED THE MARK. WE DON'T KNOW
5 WHAT THE EXAMINER HAS INTERPRETED.

6 **THE COURT:** THAT PUTS YOU AT A DISADVANTAGE.

7 **MR. TROCK:** YOUR HONOR, THOSE WERE FILED AS WORD
8 MARKS. WORD MARKS ARE NOT FILED AS DESIGNS --

9 **THE COURT:** DO YOU HAVE THE APPLICATION?

10 **MR. TROCK:** ON THE WHEBLE DECLARATION, THE MARK THAT
11 HAS BEEN SUBMITTED FOR REGISTRATION IS INDICATED AS PART OF THE
12 RECORD ON THE PATENT AND TRADEMARK OFFICE. IF YOU TAKE A LOOK
13 AT EXHIBIT A, I BELIEVE IT IS, TO THE WHEBLE DECLARATION.

14 YOU WILL SEE AN INDICATION OF THE MARK RIGHT THERE
15 IN THE RECORD. IT'S IN LARGE CAPS "DON'T CALL IT A PHONE."

16 SO THE WORDS ARE BEING REGISTERED AS A SLOGAN.
17 NOTICE THAT JUST BELOW IT IT SAYS, "WORDS ONLY." THAT MEANS
18 THERE'S NO DESIGN, NO STYLIZATION, NO LOGOS, NOTHING OTHER THAN
19 THAT SLOGAN.

20 AND THE PATENT AND TRADEMARK OFFICE DOES NOT ISSUE
21 AN ALLOWANCE UNLESS THEY HAVE DETERMINED THAT THAT MARK IS
22 REGISTRABLE, MEANING THAT IT IS DISTINCTIVE. AND THAT'S THE
23 INDICATION THAT IT'S A STRONG MARK.

24 **THE COURT:** OKAY. THANK YOU.

25 IS THAT ALL YOU HAD TO SAY WITH RESPECT TO THE

1 STRENGTH OF THE MARK BEFORE WE MOVE TO MR. CANNON AND THEN WE
2 CAN MOVE ON TO THE NEXT ONE?

3 MR. TROCK: THAT'S CORRECT.

4 THE COURT: OKAY.

5 MR. CANNON: I WOULD LIKE TO ADDRESS THE STRENGTH OF
6 THE MARK.

7 YOUR HONOR, THIS IS A DESCRIPTIVE MARK AT BEST. IT
8 DESCRIBES FEATURES. THERE IS A LOT OF CELL PHONES OUT THERE
9 THAT HAVE FEATURES. IN FACT, PRACTICALLY EVERY CELL PHONE
10 MAKER OUT THERE IS TOUTING THE FEATURES OTHER THAN PHONE
11 SERVICE, SUCH AS FEATURING A CAMERA, VIDEO TECHNOLOGY, THINGS
12 LIKE THAT.

13 WE HAVE SUBMITTED EVIDENCE THAT SHOWS THAT THIS IS
14 USED. TO CALL SOMETHING -- TO DESCRIBE THE CELL PHONE AS
15 HAVING FEATURES MORE THAN PHONE SERVICE IS NOT A FANCIFUL AND
16 ARBITRARY OR A SUGGESTIVE MARK. IT SIMPLY DESCRIBES THE
17 PRODUCT.

18 AND THERE'S A COUPLE OF CASES -- GIVEN -- THAT I
19 WOULD LIKE TO CITE TO YOUR HONOR THAT REALLY GO TO THE HEART OF
20 THIS ISSUE, WHICH IS, IF YOU HAVE A SLOGAN THAT DESCRIBES THE
21 SERVICES OR THE FEATURES THAT YOU HAVE, IT IS A WEAK MARK AND
22 SHOULD NOT BE THE GROUNDS FOR INJUNCTION.

23 WITH YOUR HONOR'S PERMISSION, I WOULD LIKE TO CITE
24 TWO CASES FOR YOU THAT WE HAD FOUND AFTER WE GOT OUR PAPERS IN.

25 THE COURT: UH-HUH.

1 **MR. CANNON:** THAT REALLY GO TO THE HEART OF THIS.
2 FIRST IS THE UNITED STATES SHOE CORPORATION V. BROWN
3 GROUP. THAT'S 740 F.SUPP. 196 --

4 **THE COURT:** WHAT DISTRICT COURT IS THAT?

5 **MR. CANNON:** THAT IS SOUTHERN DISTRICT OF NEW YORK.
6 AND IN THAT CASE, THE MARK WAS FEELS -- "LOOKS LIKE A PUMP,
7 FEELS LIKE A SNEAKER." THE DEFENDANT'S MARK, THE DEFENDANT'S
8 ADVERTISEMENT INCLUDES THE PHRASE "FEELS LIKE A SNEAKER". SO
9 IT WAS A SLOGAN THAT DESCRIBED THE PRODUCT BEING OFFERED AND
10 NO --

11 **THE COURT:** WHAT WAS THE PRODUCT? WAS ONE A TENNIS
12 SHOE AND ONE WAS SOMETHING ELSE?

13 **MR. CANNON:** THEY WERE BOTH SHOES.

14 **THE COURT:** BOTH SHOES?

15 **MR. CANNON:** BOTH SHOES.

16 SO IT WAS A SLOGAN CASE, WHICH IS WHAT THIS IS, A
17 SLOGAN CASE WHERE THE MARKS WERE DESCRIBED. THE MARKS
18 DESCRIBED ESSENTIALLY THE POSITIVE FEATURES OF THE PRODUCT.
19 AND IN THAT CASE --

20 **THE COURT:** I AM SORRY, WHAT WERE THE SLOGANS AGAIN?

21 **MR. CANNON:** THE SLOGANS WERE -- THE PLAINTIFF'S WAS
22 "LOOKS LIKE A PUMP, FEELS LIKE A SNEAKER" AND THE DEFENDANT'S
23 WAS, "FEELS LIKE A SNEAKER."

24 **THE COURT:** WHAT KIND OF SHOES WERE THEY?

25 **MR. CANNON:** THEY WERE COMFORTABLE DRESS SHOES, I

1 BELIEVE.

2 **THE COURT:** SO NEITHER ONE OF THEM WERE SNEAKERS?

3 **MR. CANNON:** NO. "FEELS LIKE A SNEAKER" WAS THE
4 ISSUE.

5 **THE COURT:** SO THE ONE THAT LOOKED LIKE THE PUMP
6 LOOKED LIKE A SNEAKER WAS ALSO A DRESS SHOE?

7 **MR. CANNON:** I BELIEVE THEY WERE BOTH DRESS SHOES,
8 PUMPS.

9 AND THE COURT -- AND IT'S A VERY INTERESTING AND
10 THOUGHTFUL OPINION TALKING ABOUT THAT SOCIETY WOULD BE DEPRIVED
11 OF USEFUL INFORMATION ABOUT COMPETING PRODUCTS IF SOMEONE COULD
12 JUST REMOVE A DESCRIPTIVE SLOGAN IN THIS FASHION FROM THE
13 MARKETPLACE.

14 AND ONE OF THE COURT SAYS, THERE IS NO JUSTIFICATION
15 FOR PERMITTING PLAINTIFF TO MONOPOLIZE AN ESSENTIALLY
16 DESCRIPTIVE PHRASE WHICH CLAIMS VIRTUES SIMPLY BECAUSE
17 PLAINTIFF MAY HAVE BEEN THE FIRST TO EMPLOY IT IN A WIDELY
18 DISTRIBUTING ADVERTISEMENT.

19 AND THEN THERE'S --

20 **MR. TROCK:** I DON'T DISAGREE WITH THAT LAW, YOUR
21 HONOR, BUT I WILL TELL YOU THIS. THE PATENT AND TRADEMARK
22 OFFICE ARE EXPERTS IN DETERMINING WHETHER OR NOT SLOGANS OR
23 MARKS ARE DESCRIPTIVE. THEY HAVE RULED ON OUR APPLICATION.
24 THEY HAVE ALLOWED IT. THAT MEANS IT'S NOT DESCRIPTIVE. THEY
25 CANNOT REGISTER A DESCRIPTIVE MARK.

1 **MR. CANNON:** YOUR HONOR, THIS IS NOT A PATENT
2 EXAMINATION. A PATENT EXAMINATION IS VERY DIFFERENT FROM A
3 TRADEMARK EXAMINATION. THIS IS NOT AN INVENTION THAT COMES OUT
4 OF THE PATENT OFFICE LIKE A PATENT WOULD. THIS IS A TRADEMARK.

5 WE CAN -- IT'S A VERY LOW THRESHOLD. WE CAN PROVE
6 THIS IN COURT. WE CAN COME IN AND SAY, HEY, THAT'S A
7 DESCRIPTIVE MARK. IT'S NOT LIKE A PATENT THAT COMES OUT OF THE
8 PATENT OFFICE. A VERY DIFFERENT PROCESS.

9 I HAVE ANOTHER CASE WITH A VERY SIMILAR FACT PATTERN
10 I WOULD LIKE TO CALL TO YOUR HONOR'S ATTENTION, AND THIS CASE
11 IS TRUSTCO BANK V. GLEN FALLS NATIONAL BANK. AND THE CITATION
12 HERE IS 903 F.SUPP. 335.

13 **THE COURT:** WHAT DISTRICT COURT IS THAT?

14 **MR. CANNON:** ALSO THE NORTHERN DISTRICT OF NEW YORK.
15 AND THE MARK --

16 **THE COURT:** NORTHERN AS OPPOSED TO SOUTHERN?

17 **MR. CANNON:** NORTHERN DISTRICT OF NEW YORK. 1995.
18 TRADEMARK INFRINGEMENT ACTION, VERY SIMILAR, VERY SIMILAR TO
19 THIS, PRELIMINARY INJUNCTION HEARING. THE PLAINTIFF'S MARK WAS
20 "HOMETOWN BANK." AND IT WAS FOR A BANK. THE DEFENDANT'S MARK,
21 DEFENDANT'S ADVERTISEMENT SLOGAN WAS "THE ORIGINAL HOMETOWN
22 BANK."

23 SO, IT'S A SLOGAN, TWO SLOGANS "HOMETOWN BANK" AND
24 "THE ORIGINAL HOMETOWN BANK". AND THE COURT RULED THAT IT WAS
25 DESCRIPTION. PLAINTIFF -- DEFENDANT COULD USE THE MARK BECAUSE

1 THAT'S WHAT THEY WERE DOING. THEY HAD A HOMETOWN BANK. THEY
2 WERE IN THE TOWN. AND IT WAS A DESCRIPTIVE MARK. IT WAS NOT
3 LIKE A STYLIZED SORT OF ADVERTISEMENT.

4 SO, THOSE ARE TWO CASES I WOULD LIKE TO BRING TO
5 YOUR HONOR'S ATTENTION, THEY'RE SLOGAN CASES, AND THAT'S WHAT
6 PLAINTIFF IS FOCUSING ON.

7 AND IN TERMS OF THE MARK THAT IS ACTUALLY USED, YOUR
8 HONOR, AGAIN, I WOULD REALLY EMPHASIZE HOW THIS LOOKS TO
9 CONSUMERS BECAUSE THAT'S THE TOUCHSTONE FOR THIS.

10 **THE COURT:** I AM LOOKING AT THE STRENGTH OF THE MARK
11 NOW. AND IN TERMS OF THAT FACTOR, OBVIOUSLY THE STRENGTH OF
12 THE MARK IS JUDGED BY THE LIKELIHOOD THAT IT WILL BE REMEMBERED
13 AND ASSOCIATED IN THE PUBLIC MIND WITH THE MARK'S OWNERS,
14 RIGHT?

15 IN THIS CASE, I DO HAVE EVIDENCE THAT PLAINTIFFS
16 HAVE PRESENTED THAT THE -- THAT ITS MARK HAS AT LEAST BEEN
17 RECOGNIZED AND ASSOCIATED WITH THIS PRODUCT.

18 **MR. CANNON:** YOUR HONOR, I WOULD SUBMIT THAT IS
19 HEARSAY EVIDENCE SINCE THE STUDY HAS NOT BEEN SUBMITTED TO THE
20 COURT. THERE IS NO ADMISSIBLE EVIDENCE ON THAT. WE DON'T HAVE
21 THE SURVEY.

22 **THE COURT:** I DON'T RECALL SEEING ANY OBJECTIONS YOU
23 SUBMITTED.

24 **MR. CANNON:** WELL, YOUR HONOR, WE GOT THESE PAPERS
25 AT 5:00 O'CLOCK ON TUESDAY. OUR OPPOSITION WENT IN WEDNESDAY

1 MORNING AT 9:00.

2 **THE COURT:** WE DIDN'T GET IT WEDNESDAY MORNING AT
3 9:00 BECAUSE I WAS LOOKING FOR IT WEDNESDAY MORNING AT 9:00.

4 **MR. TROCK:** EVEN IF IT IS HEARSAY, YOUR HONOR, THE
5 COURT CAN CONSIDER HEARSAY EVIDENCE.

6 **THE COURT:** IN THE CONTEXT OF THE TRO, YOU ARE
7 SAYING?

8 **MR. TROCK:** THAT'S CORRECT, YOUR HONOR.

9 **THE COURT:** IN ANY EVENT --

10 **MR. TROCK:** I BELIEVE THE STRONGEST EVIDENCE IS THE
11 ALLOWANCE BY THE PATENT AND TRADEMARK OFFICE OF THESE SLOGANS
12 FOR REGISTRATION WITH NO OBJECTION AS TO DESCRIPTIVENESS
13 WHATSOEVER.

14 **THE COURT:** OKAY. JUST A SECOND.

15 (PAUSE IN THE PROCEEDINGS.)

16 **MR. CANNON:** YOUR HONOR, I HAVE BEEN INFORMED THAT
17 OUR PAPERS DID OBJECT TO THE STUDY AS HEARSAY. IT WAS IN THE
18 PAPERS THAT WE FILED.

19 **THE COURT:** IT WASN'T A SEPARATE OBJECTION.

20 **MR. CANNON:** IT WAS IN THE PAPERS THAT WERE FILED,
21 YES.

22 **THE COURT:** OKAY.

23 JUST A SECOND.

24 (PAUSE IN THE PROCEEDINGS.)

25 **THE COURT:** OKAY. I AM GOING TO CONSIDER THIS, THE

1 FIRST FACTOR, SO I AM GOING TO MOVE TO THE SECOND FACTOR.

2 THE PROXIMITY, THE RELATEDNESS OF THE GOODS AND
3 SERVICES. ARE EITHER OF YOU ARGUING THAT HELIO AND PALM OFFER
4 DIFFERENT SERVICES? IT SEEMS TO ME THAT THEY ARE VERY SIMILAR.

5 **MR. CANNON:** WE DISPUTE THEY ARE EVEN COMPETITORS.

6 **THE COURT:** OKAY. TELL ME WHAT YOUR POSITION IS.

7 DON'T YOU BOTH -- IT APPEARS THAT YOU BOTH
8 MANUFACTURE AND MARKET DEVICES, WHICH, IN ADDITION TO THE
9 WIRELESS TELEPHONE SERVICES THAT YOU OFFER, YOU OFFER AUDIO,
10 VIDEO, DATA, INTERNET SERVICES TO CONSUMERS. AND BASED ON WHAT
11 I HAVE IN FRONT OF ME, THERE DOESN'T SEEM TO BE ANY REAL
12 QUESTION AS TO WHETHER PALM AND HELIO ARE DIRECT MARKET
13 COMPETITORS, AND IN YOUR PAPERS YOU DON'T -- I DIDN'T SEE ANY
14 ARGUMENT OTHERWISE.

15 **MR. CANNON:** YOUR HONOR, I WOULD LIKE TO ADDRESS
16 THAT DIRECTLY.

17 HELIO DOES NOT MANUFACTURE DEVICES. PALM IS A
18 DEVICE MANUFACTURER. IF YOU LOOK AT HELIO'S AD, THIS IS THE
19 AD, YOUR HONOR (INDICATING). THEY SELL A SERVICE AND THE
20 DEVICE HAS THE SAMSUNG BRAND ON IT. HELIO PURCHASES DEVICES
21 FROM MANUFACTURERS, HAS -- AND CO-BRANDS THEM WITH THEIR OWN
22 WIRELESS SERVICE. THIS IS THE AD. IT'S GOT SAMSUNG BRAND ON
23 IT.

24 THIS IS THE TREO AD FROM PALM (INDICATING). PALM IS
25 A MANUFACTURER.

1 **THE COURT:** FROM YOUR PERSPECTIVE, WHAT IS THE COURT
2 TO ASSESS IN DETERMINING THE RELATEDNESS OR THE PROXIMITY OF
3 THE GOODS AND SERVICES BETWEEN THE TWO? WHAT DO YOU THINK I AM
4 EVALUATING?

5 **MR. CANNON:** I THINK IT ALL RELATES BACK TO THE
6 CONSUMER. ARE WE TALKING ABOUT THE SAME CONSUMERS? ARE THEY
7 LIKELY TO BE CONFUSED BY THE ORIGIN. YOU LOOK AT WHAT'S
8 GETTING SOLD, WHAT THE TARGET IS FOR THIS. I WOULD LIKE TO
9 ADDRESS THE TARGET AUDIENCE.

10 **THE COURT:** UNDER THE SECOND FACTOR, THE PROXIMITY
11 AND RELATEDNESS OF THE GOODS AND SERVICES. THAT'S THE FACTOR.

12 **MR. CANNON:** YES. BECAUSE ARE THEY COMPETING? ARE
13 THEY GOING TO THE SAME TARGET CONSUMERS?

14 **THE COURT:** OKAY.

15 **MR. CANNON:** COULD I ADDRESS --

16 **THE COURT:** IN YOUR PAPERS YOU DIDN'T ARGUE, YOU
17 DIDN'T ARGUE OTHERWISE THAT YOU'RE NOT DIRECT MARKET
18 COMPETITORS.

19 **MR. CANNON:** I BELIEVE WE DID SAY THAT WE HAVE A
20 DIFFERENT -- WE ARE A BUSINESS -- OUR PRODUCTS ARE
21 BUSINESS-ORIENTED PRODUCTS. THEIR PRODUCTS ARE YOUTH SERVICE
22 TYPE PRODUCTS. MY SPACE. WE DON'T DEAL WITH MY SPACE, WHICH
23 IS A TEENAGER'S WEBSITE.

24 **THE COURT:** THAT'S JUST ONE FEATURE.

25 **MR. CANNON:** THAT'S A KEY FEATURE FOR THEM.

1 AND THEY SUBMITTED THEIR MARKETING PLAN, AND WITH
2 YOUR HONOR'S PERMISSION, I WOULD LIKE TO REFER YOU TO IT AND
3 THEY DESCRIBE WHO THEIR TARGET AUDIENCE IS.

4 IF YOU READ WHAT THEY SAY THEIR TARGET AUDIENCE IS
5 AND COMPARE IT TO OUR AD, I THINK YOUR HONOR WILL AGREE THAT
6 THESE ARE MARKETED TO VERY DIFFERENT PEOPLE.

7 LET ME JUST READ -- THIS IS THEIR DEVICE. IT'S ALL
8 WHITE. I MEAN, THIS IS THEIR MARK. IT'S ALL WHITE,
9 CHARACTERISTIC BLUE, AND THIS IS THE COPY. SO THIS IS HOW THEY
10 ARE ADVERTISING IT.

11 THIS IS OBVIOUSLY AIMED AT A MUCH YOUNGER CROWD.
12 "DROP YOURSELF SOME KNOWLEDGE WITH OUR EXCLUSIVE NEW DRIFT."

13 **THE COURT:** SPEAK SLOWLY.

14 **MR. CANNON:** I'M SORRY.

15 "DROP YOURSELF SOME KNOWLEDGE WITH OUR EXCLUSIVE NEW
16 DRIFT. OUR ONE-OF-A-KIND BUDDY BEACON. JUST FLIP ON THE
17 BEACON WHEN YOU WANT YOUR PEOPLE TO FIND YOU AND THE DANCE
18 FLOOR. THEN TURN IT OFF WHEN YOU SLIP AWAY TO THE V.I.P."

19 THAT'S A VERY YOUTH-ORIENTED TARGET. AND, IN FACT,
20 IN THE WEEKS' DECLARATION, THERE'S ATTACHMENTS THAT DEMONSTRATE
21 THAT HELIO'S ENTIRE PLAN WAS TO TARGET THE YOUTH MARKET. AND I
22 CAN DIRECT YOUR HONOR TO THOSE, IF YOU WISH.

23 **THE COURT:** OKAY.

24 **MR. CANNON:** THIS IS EXHIBIT A TO THE WEEKS'
25 DECLARATION, AND IT IS HELIO'S MARKETING PLAN. AND ON --

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THE COURT: YES.

MR. CANNON: IF YOU GO TO PAGE 9 OF THE MARKETING PLAN.

THE COURT: OKAY. OKAY.

MR. CANNON: I AM SORRY, PAGE 8 TO BEGIN WITH?

THE COURT: UH-HUH.

MR. CANNON: PAGE 8 STATES THE PLAN IS WHERE LIFESTYLE/FASHION MEET TECHNOLOGY.

THE COURT: POSITIONING.

MR. CANNON: THAT IS THEIR POSITIONING. THEN PAGE 9, WHO THEY ARE TARGETING, YOUNG, TECH-SAVVY CONSUMERS, NOT SOCCER MOM'S, BUSINESSMEN AND GRANDPAS.

THE COURT: PAGE 9?

MR. CANNON: PAGE 9 OF EXHIBIT A TO THE WEEKS' DECLARATION. THAT'S WHO THEY'RE TARGETING.

THE COURT: OH, UNDER FOCUS.

MR. CANNON: YES. I AM SORRY. THE TOP BLUE BULLET POINT THERE.

SO THEY ARE TARGETING YOUNG, TECH-SAVVY CONSUMERS, NOT BUSINESSMEN OR SOCCER MOM'S. AND THAT COPY THAT I JUST READ TO YOU IS TARGETED VERY MUCH AT A YOUTH NIGHT CLUB TYPE OF SCENE.

THE COURT: SO YOU DISPUTE THAT THEY ARE A DIRECT MARKET COMPETITOR OF YOURS?

MR. CANNON: CAN I READ THE COPY FROM TREQ? I THINK

1 THIS WILL MAKE IT CRYSTAL CLEAR. THIS IS OUR PRODUCT. THIS IS
2 THE TREO (INDICATING).

3 SO AS YOU CAN SEE, HERE IS THE SLOGAN, AND IT ALWAYS
4 DEPICTS THE ORIGIN. "NOT JUST A CELL PHONE. A TREO." HERE IS
5 THE COPY. HERE IS WHAT THE AD SAYS.

6 "OPEN AN E-MAIL ATTACHMENT, UPDATE A MEETING TIME,
7 OR EDIT AN EXCEL SPREADSHEET. ACCESS MULTIPLE E-MAIL
8 ACCOUNTS." THIS IS A BUSINESS-ORIENTED DEVICE. THIS --

9 **THE COURT:** IT DOESN'T SAY THAT. IT SAYS WHAT YOU
10 JUST READ.

11 **MR. CANNON:** YES.

12 **THE COURT:** JUST A SECOND.

13 (PAUSE IN THE PROCEEDINGS.)

14 **THE COURT:** GO ON.

15 **MR. CANNON:** YOUR HONOR, IF YOU LOOK AT THESE ADS,
16 AND BY THE WAY, THEY HAVE NOT SUBMITTED A DECLARATION FROM AN
17 EXPERT THAT SAYS HERE IS HOW A CONSUMER WOULD INTERPRET THEM.
18 BUT IF YOU LOOK AT THESE ADS, I THINK IT'S PRETTY APPARENT ON
19 THEIR FACE THAT THESE ARE DIRECTED -- THAT TREO IS A
20 BUSINESS-ORIENTED PHONE. IT'S AIMED AT MOBILE PROFESSIONALS AT
21 AN OLDER SEGMENT THEN THE HELIO.

22 THE HELIO SERVICE, REMEMBER, HELIO DOESN'T MAKE
23 PRODUCTS. HELIO SELLS A SERVICE. THEY CO-BRAND EACH OTHERS --
24 THEY CO-BRAND OTHER MANUFACTURERS. AND, IN FACT, TREO USED TO
25 SELL ITS DEVICES TO HELIO AND HELIO CO-BRANDED WITH TREO. THAT

1 HAS SINCE ENDED.

2 TREO MAKES PRODUCTS THAT ARE DESIGNED FOR BUSINESS
3 PEOPLE. THEY HAVE FULL KEYBOARDS. NONE OF THE HELIO PRODUCTS,
4 THE PRODUCTS USED WITH THE HELIO SERVICE HAVE KEYBOARDS.
5 THEY'RE CELL PHONES THAT HAVE OTHER FEATURES. THEY'RE VERY
6 DIFFERENT PRODUCTS. THEY'RE AIMED AT DIFFERENT MARKETS. THIS
7 IS SORT OF THE YOUNG, HIP IMAGE CONSCIOUS MARKET. TREO IS A
8 BUSINESS MARKET. IT TALKS ABOUT EXCEL SPREADSHEETS, IT TALKS
9 ABOUT BUSINESS PLANS, OPENING ATTACHMENTS.

10 **THE COURT:** OKAY.

11 SO, MR. TROCK, WOULD YOU RESPOND TO HIS COMMENTS
12 THAT THE HELIO DEVICE IS DIFFERENT FROM THE TREO?

13 **MR. TROCK:** I THINK PART OF WHAT COUNSEL JUST SAID
14 IS VERY INSTRUCTIVE AND IT MIGHT GET LOST IN ALL OF THESE
15 PAPERS.

16 HELIO USED TO SELL TREOS. TEN PERCENT OF OUR
17 SUBSCRIBER BASE, WE STILL SUPPORT IT, ARE TREOS. THAT'S PART
18 OF THE SINISTER PROBLEM THAT'S GOING ON HERE.

19 LET ME READ YOU AN OBSERVATION. THIS IS
20 EXHIBIT K --

21 **THE COURT:** SO WHAT'S THE SIGNIFICANCE OF THAT, THE
22 FACT YOU USED TO SELL TREOS?

23 **MR. TROCK:** THAT WE'RE SELLING OUR DEVICES IN THE
24 SAME MARKET. ANYBODY WHO'S GOT TO COME IN TO A HELIO STORE IS
25 THAT TARGET MARKET, AND THEY'RE GOING TO BE BUYING A TREO FROM

1 US, TOO.

2 **THE COURT:** ARE YOU STILL SELLING TREO?

3 **MR. TROCK:** WE DON'T SELL IT ANYMORE. IT STOPPED A
4 FEW MONTHS BACK, BUT WE STILL SERVICE THE TREO. 10 PERCENT OF
5 OUR SUBSCRIBER BASE STILL USES TREO.

6 **THE COURT:** OH, I SEE.

7 **MR. TROCK:** SO, EXHIBIT K --

8 **THE COURT:** LET ME MAKE SURE I FOLLOW YOUR ARGUMENT.
9 SO BECAUSE YOU USED TO SELL TREOS, YOU'RE SAYING
10 YOUR SUBSCRIBER BASE, THE PEOPLE THAT COME IN TO PURCHASE YOUR
11 TELEPHONES ARE THE SAME PEOPLE THAT YOU WERE SELLING TREOS
12 TO --

13 **MR. TROCK:** THAT'S CORRECT.

14 **THE COURT:** -- SO THE MARKETING BASE IS THE SAME.

15 **MR. TROCK:** THAT'S CORRECT.

16 SO, EXHIBIT K TO THE WEEKS' DECLARATION HAS AN
17 OBSERVATION ON AN ARTICLE FROM MEDIAPOST PUBLICATIONS. AND I
18 THINK THE LAST PARAGRAPH THAT THIS MEDIA WRITER DISCUSSES HERE
19 IS QUITE INSTRUCTIVE. EXHIBIT K. DOWN AT THE BOTTOM IT SAYS:

20 "PALM SEEKS TO WIDEN THE APPEAL OF ITS TREO 680
21 SMARTPHONE BEYOND ITS TRADITIONAL CUSTOMER BASE
22 OF BUSINESS USERS AND NARROW THE COMPETITION
23 BETWEEN ITSELF AND BLACKBERRY WHOSE TOP-SELLING
24 PEARL HAS TARGETED THE SAME HYBRID BUSINESS
25 LIFESTYLE WIRELESS CONSUMER FOR WHOM THE TREO

1 680 IS DESIGNED."

2 SO THIS IS A LIFESTYLE PHONE FOR THEM. THAT'S WHY
3 IT INCLUDES VIDEO. THAT'S WHY IT INCLUDES MUSIC. THAT'S WHY
4 IT INCLUDES A CAMERA BECAUSE THOSE ARE LIFESTYLE SERVICES THAT
5 THEY ARE PROVIDING WITH THIS PARTICULAR DEVICE.

6 I DON'T DISPUTE THAT THE PRIOR TREOS, WHICH ARE NOT
7 PART OF THIS ADVERTISING CAMPAIGN, WERE FOCUSED ON THE BUSINESS
8 USER, BUT THIS IS A LIFESTYLE DEVICE. THEY ARE MOVING INTO
9 THIS LIFESTYLE MARKET.

10 AND ACTIONS SPEAK LOUDER THAN WORDS. WHAT MAGAZINES
11 ARE THEY ADVERTISING THIS DEVICE IN? THEY ARE ADVERTISING THE
12 DEVICE IN THE EXACT SAME MAGAZINES WE ARE ADVERTISING. IN SOME
13 CASES, THE ADS ARE ONLY THREE PAGES APART. THEY ADVERTISE IN
14 ROLLING STONE. THEY ADVERTISE IN ENTERTAINMENT WEEKLY. THEY
15 ADVERTISE IN LUCKY. THOSE ARE NOT BUSINESS TRADES. THEY ARE
16 FOCUSED ON LIFESTYLE. GENTLEMEN'S QUARTERLY.

17 LOOK AT THEIR STRATEGIC PARTNERS. THE SAME
18 STRATEGIC PARTNERS THAT WE HAVE. FANDANGO, MY SPACE, ONION.
19 WHY WOULD A BUSINESS ENTITY PARTNER UP WITH THE ONION? IT'S A
20 LIFESTYLE PUBLICATION. THAT'S WHERE THEY ARE GOING WITH THIS
21 ADVERTISING CAMPAIGN. YOU CAN TELL BY THE MEDIA THEY HAVE
22 CHOSEN TO ADVERTISE IN.

23 **THE COURT:** WHAT IS ONION?

24 **MR. TROCK:** IT'S A SATIRICAL MAGAZINE. IT'S
25 TYPICALLY READ BY YOUNG, HIP, URBAN PEOPLE. AND THAT'S WHERE

1 THEY ARE GOING WITH THIS PHONE. THAT'S WHY THEY HAVE A
2 PARTNERSHIP WITH THE ONION. THEY HAVE A PARTNERSHIP WITH MY
3 SPACE NOW WITH THEIR SUBSCRIBERS.

4 **MR. CANNON:** THAT IS COMPLETELY WRONG.

5 **MR. TROCK:** CINGULAR JUST SIGNED A DEAL TWO DAYS AGO
6 WITH MY SPACE. THAT'S THEIR SERVICE PROVIDER. AND WE HAD A
7 DEAL WITH MY SPACE WHERE OUR DEVICES YOU COULD CONNECT
8 IMMEDIATELY TO MY SPACE AND PUT YOUR FRIENDS UP THERE AND SO ON
9 AND SO FORTH. THEY HAVE ADOPTED THE EXACT SAME MARKETING
10 STRATEGY WE HAVE BECAUSE THEY ARE GOING AFTER OUR CONSUMERS.

11 **THE COURT:** YOU SAID CINGULAR JUST SIGNED AND --

12 **MR. TROCK:** THAT'S CORRECT. IF YOU TAKE A LOOK AT
13 THE CO-BRANDED ADS HE'S GOT, IT'S TREC, CINGULAR. THAT'S THEIR
14 SERVICE PROVIDER.

15 **MR. CANNON:** WE HAVE ABSOLUTELY NO RELATIONSHIP WITH
16 MY SPACE. CINGULAR IS A MAJOR, MAJOR U.S. PHONE CARRIER. WHAT
17 THEY DO -- WE ARE NOT CINGULAR.

18 **THE COURT:** OKAY. MY DECISION IS NOT GOING TO REST
19 ON THIS PARTICULAR MY SPACE ISSUE.

20 **MR. CANNON:** THE CHANNELING, THOUGH, IS IMPORTANT
21 BECAUSE WE ARE NOT USING THEIR CAMPAIGN. YES, WE ADVERTISE ON
22 THE INTERNET. YES, WE ADVERTISE IN MAJOR, MAJOR
23 U.S. PUBLICATIONS.

24 **THE COURT:** AND IT'S CLEAR THAT THESE
25 PUBLICATIONS -- YOUR MARKETING STRATEGY IS NOT LIMITED TO

1 BUSINESSSES. I MEAN, JUST BASED ON WHAT YOU ALL HAVE SUBMITTED.
2 AND WHAT HE SAID, IT SEEMS TO BE IN THE SAME SORT OF THE SAME
3 MARKET. MY SPACE MAY BE THE EXCEPTION, BUT ALL THE OTHER ONES
4 ARE --

5 MR. CANNON: WE ARE NOT ON MTV. WE ARE NOT ON ANY
6 TV. WE ARE NOT IN NIGHTCLUBS. WE DON'T HAVE CELEBRITIES.
7 THEY PUSH THE CELEBRITIES THAT THEY ASSOCIATE WITH THEIR PHONE.
8 THAT'S NOT WHAT WE'RE DOING.

9 GQ, LUCKY, ROLLING STONE, THOSE ARE MAJOR NATIONALLY
10 PUBLISHED MAGAZINES. AND FOR US TO HAVE AN AD IN ENTERTAINMENT
11 WEEKLY, THAT DOESN'T MAKE US GOING AFTER THE YOUTH COOL IMAGE
12 MARKET.

13 THE COURT: IT'S NOT WHAT YOU ARE GOING AFTER MAYBE
14 WHEN YOU USE UNION AND THOSE KIND OF DEVICES. IT'S WHAT YOU
15 ARE LIKELY TO GET.

16 SO, IF YOU DECIDE THAT YOU WANT TO ADVERTISE IN
17 THOSE PUBLICATIONS, THE PUBLICATIONS ARE NOT DESIGNED FOR A
18 POPULATION OTHER THAN, YOU KNOW, A GROUP BETWEEN 12 AND 32, ARE
19 PEOPLE WHO ARE NOT BUSINESS PEOPLE, THEN WHETHER YOU INTEND TO
20 FOCUS ON THAT GROUP OR NOT IS NOT NECESSARILY DISPOSITIVE OF
21 WHETHER YOU ARE IN DIRECT MARKETING COMPETITION WITH OTHERS
22 WHOM ARE ALSO USING THAT SAME VENUE FOR PURPOSES OF MARKETING
23 THEIR PRODUCT.

24 MR. CANNON: YOUR HONOR, THOSE VENUES ARE MAJOR
25 VENUES. WE ARE NOT IN NIGHTCLUBS, WE ARE NOT IN THE SORTS OF

1 THINGS THAT WOULD GO DIRECTLY -- GENTLEMAN'S QUARTERLY,
2 ENTERTAINMENT WEEKLY ARE MAJOR MAGAZINES.

3 THE COURT: LET'S TAKE ONION, THE ONE HE JUST
4 MENTIONED.

5 MR. CANNON: YES.

6 THE COURT: NOW, DID YOU -- I DIDN'T HEAR YOU OBJECT
7 TO --

8 MR. CANNON: THERE IS A RELATIONSHIP WITH ONION.
9 THAT, TOO, IS A PRETTY SIGNIFICANT PUBLICATION.

10 THE COURT: IT IS?

11 MR. CANNON: IT IS.

12 THE COURT: FOR BUSINESSMEN OR WOMEN?

13 MR. CANNON: I READ THE ONION OCCASIONALLY.

14 THE COURT: YOU SAID A PRETTY SIGNIFICANT -- SO
15 READING IT OCCASIONALLY AND BEING A SIGNIFICANT PUBLICATION
16 DON'T SEEM TO ME TO BE THE SAME THING.

17 MR. CANNON: I THINK THAT THAT PUBLICATION IS NOT ON
18 THE LEVEL OF ENTERTAINMENT WEEKLY, BUT IT IS THE SORT OF
19 PUBLICATION THAT IS NATIONALLY DISTRIBUTED. IT'S GOT AN
20 INTERNET SITE.

21 THE COURT: YOU CAN FIND RAGS THAT ARE NATIONALLY
22 DISTRIBUTED. THAT DOESN'T MEAN THAT THEY ARE FOR BUSINESS
23 PEOPLE AND IT DOESN'T MEAN BUSINESS PEOPLE USE THEM.

24 MR. CANNON: YOUR HONOR, I THINK WHAT THIS REALLY
25 COMES DOWN TO IS WE ARE NOT ON TV, OKAY. WE ARE NOT IN

1 NIGHTCLUBS. WE DON'T HAVE THAT SORT OF EXPOSURE.

2 BUT IF YOU LOOK AT THE ADS, IF YOU LOOK AT THE
3 SCREEN SHOT ON THESE ADS OF THE TREO, THESE SCREEN SHOTS ARE
4 ALMOST ALL BUSINESS-ORIENTED SCREEN SHOTS. Q1 PRESENTATIONS,
5 BUDGETS, THINGS LIKE THAT. THE HELIO ADS ARE VERY DIFFERENT.

6 AGAIN, YOUR HONOR, I BRING YOU BACK TO WHAT THESE
7 LOOK LIKE. THE WHOLE TOUCHSTONE OF THIS IS ARE THE CONSUMERS
8 CONFUSED?

9 IF THEY LOOK AT THE ADS, TREO IS ALWAYS WITH THIS
10 ORANGE COLOR. IT ALWAYS SHOWS THIS DEVICE, WHICH IS DIFFERENT
11 FROM THEIR DEVICE. WE MAKE THE DEVICE. THEY DON'T MAKE THE
12 DEVICE. IT ALWAYS USES THE ORIGIN A TREO, WHICH THEY OMIT IN
13 THEIR PAPERS. THESE ARE VERY DIFFERENT ADS.

14 **THE COURT:** RIGHT NOW WE ARE AT THE PROXIMITY,
15 RELATEDNESS OF THE GOODS AND SERVICES.

16 **MR. CANNON:** YES.

17 (PAUSE IN THE PROCEEDINGS.)

18 **THE COURT:** LET'S -- IN TERMS OF THE NUMBER TWO,
19 AGAIN, PROXIMITY, RELATEDNESS OF THE GOODS OF SERVICES, LET'S
20 LOOK AT MR. HANCOCK'S DECLARATION, EXHIBIT B, WHICH ARE SOME OF
21 YOUR ADS WHICH ARE OSTENSIBLY DESIGNED TO REACH THE BUSINESS
22 AUDIENCE, AS YOU SAY. AND START WITH NUMBER ONE.

23 YOU HAVE TWO, LOOKS LIKE --

24 **MR. CANNON:** YOUR HONOR, THESE WERE NEVER PUBLICLY
25 DISSEMINATED. THESE WERE MARKUPS FROM THE AD AGENCY.

1 **MR. TROCK:** IT DOES SHOW YOU THEIR INTENT AND WHERE
2 THEY WANT TO GO.

3 **THE COURT:** YEAH, BECAUSE THESE ARE NOT BUSINESSMEN.
4 THEY DON'T APPEAR TO BE. AND CERTAINLY THE LANGUAGE THAT'S
5 HERE IS NOT -- WELL, IT DOESN'T APPEAR TO BE DESIGNED TO REACH
6 A BUSINESS PERSON AUDIENCE.

7 **MR. CANNON:** YOUR HONOR, THE POINT OF THIS, THE
8 POINT OF THIS EXHIBIT WAS NOT TO SAY THIS WAS A -- THE IMAGES
9 WERE A PLANNED MARKETING CAMPAIGN.

10 THE POINT OF THIS WAS TO SHOW THERE WAS NO INTENT TO
11 TAKE THIS SLOGAN. AND THIS SLOGAN IS NOT THAT ORIGINAL BECAUSE
12 WE HAD IT BACK IN TWO YEARS AGO. SO THESE IMAGES WERE NEVER
13 PUBLICLY DISSEMINATED. IT'S NOT CLEAR TO ME THESE IMAGES WERE
14 EVER INTENDED TO BE PUBLICLY DISSEMINATED.

15 **THE COURT:** IT IS NOT CLEAR --

16 **MR. CANNON:** THIS WAS NEVER RELEASED.

17 **THE COURT:** WHY DID YOU SUBMIT THIS? WHY WAS THIS
18 SUBMITTED?

19 **MR. CANNON:** BECAUSE OF THE SLOGAN AT THE BOTTOM.
20 TO SHOW THAT OUR AD AGENCY CAME UP WITH THIS SLOGAN SEVERAL
21 YEARS AGO.

22 **THE COURT:** WHY?

23 **MR. CANNON:** BECAUSE INTENT IS A FACTOR. AND THEY
24 CLAIM -- IN THEIR OPENING PAPERS, THEY CLAIM OUR INTENT WAS TO
25 COPY THEIR SLOGAN. AND WE WANTED TO BRING EVIDENCE TO YOUR

1 HONOR THAT OUR AD AGENCY PROVIDED A SLOGAN TO US BEFORE THEY
2 EVEN EXISTED. THE SLOGAN THAT THEY COMPLAIN ABOUT THAT WE
3 COPIED FROM THEM.

4 **THE COURT:** WITH RESPECT TO THE SECOND FACTOR, I AM
5 INCLINED TO FIND THAT IT IS CLEAR, AT LEAST FROM THE COURT'S
6 PERSPECTIVE AND BASED ON WHAT I HAVE IN FRONT OF ME THAT HELIO
7 AND PALM OFFER VERY SIMILAR GOODS AND SERVICES, AND THAT PALM
8 AND HELIO ARE DIRECT MARKET COMPETITORS, SO THE FACTOR NUMBER
9 TWO WEIGHS IN FAVOR OF FINDING CONSUMER CONFUSION.

10 LET'S GO TO FACTOR NUMBER THREE, SIMILARITY OF THE
11 MARKS.

12 **MR. TROCK:** I THINK HERE, YOUR HONOR, ALL WE HAVE TO
13 DO IS TAKE A LOOK AT THE SLOGANS. "DON'T CALL IT A PHONE",
14 "NOT JUST A CELL PHONE." PERSONALLY, I HAVE BEEN STRUGGLING
15 FOR THE LAST WEEK TO KEEP THESE TWO THINGS SEPARATED IN MY
16 MIND. "DON'T CALL IT A PHONE", "NOT JUST A CELL PHONE."

17 AND WHEN WE LOOK AT THE SIMILARITY, THE THINGS WE
18 WANT TO LOOK AT IS HOW IT APPEARS --

19 **THE COURT:** YOU ARE LEAVING OUT "A TREO".

20 **MR. TROCK:** WE CAN ADD THAT ON BECAUSE THAT HAS A
21 WHOLE DIFFERENT CONTEXT AND A WHOLE DIFFERENT PROBLEM FOR THEM
22 ON REVERSE CONFUSION, AND WE CAN GET TO THAT.

23 BUT THE SIMILARITY OF SLOGANS, WE LOOK AT THE
24 APPEARANCE, WE LOOK AT THE SOUND, AND WE LOOK AT THE MEANING TO
25 THE CONSUMER.

1 AND WHEN WE LOOK AT THOSE THINGS, I THINK IT'S
2 PRETTY OBVIOUS TO ANYBODY WHO TAKES A LOOK AT THESE SLOGANS AND
3 HOW THEY APPEAR TO THE CONSUMER IN THE MARKETPLACE, THAT THEY
4 HAVE A SIMILAR APPEARANCE, THAT THEY HAVE A SIMILAR SOUND, AND
5 THEY HAVE AN ALMOST IDENTICAL MEANING TO EACH OTHER; THAT THE
6 DEVICE THAT YOU ARE GOING TO GET TO PURCHASE OR WANT IS
7 SOMETHING THAT IS NOT JUST A CELL PHONE. IT IS SOMETHING
8 DIFFERENT THAN A CELL PHONE. IT HAS THESE ADDITIONAL FEATURES
9 THAT TYPICAL CELL PHONES DON'T HAVE. MUSIC, VIDEO, DATA, WEB,
10 CAMERA, SO ON AND SO FORTH.

11 I THINK WHEN YOU TAKE A LOOK AT THIS, THAT YOU NEED
12 TO COME OUT TO THE POINT WHERE THEY ARE SIMILAR TO EACH OTHER.
13 AND, NOW LET'S ADDRESS THE POINT THEY MAKE IN THEIR BRIEF, THAT
14 WHEN THEY USE THE SLOGAN, THEY CALL IT A TREO. THAT'S GREAT.

15 THIS IS NOT A SOURCE CONFUSION CASE. THIS IS A CASE
16 OF ASSOCIATION. THIS IS A CASE OF CONFUSION OF ASSOCIATION AND
17 AFFILIATION. AND, BECAUSE THEY HAVE PUT THE TREO BRAND ON
18 THERE AND THE PALM BRAND ON THERE, THEY HAVE TURNED IT INTO A
19 REVERSE CONFUSION CASE.

20 SO NOW PEOPLE WHO HAVE A RECOLLECTION OR MEMORY OF
21 OUR SLOGAN AND THEY ARE FACED WITH THEIR ADVERTISEMENTS, NOW
22 THINK THAT WE'RE THE ONES WHO ARE THE INFRINGERS EVEN THOUGH WE
23 ARE THE SENIOR USERS OF THE SLOGAN. THEY ARE THE JUNIOR USERS.
24 FACT, THE STRENGTH OF THAT MARK, THE STRENGTH OF THE TREO AND
25 THE PALM WEIGHS AGAINST THEM.

1 **THE COURT:** WHAT EVIDENCE ARE YOU SUGGESTING THAT
2 PEOPLE THINK YOU ARE THE JUNIOR USERS AND THEY ARE THE SENIOR
3 USERS?

4 **MR. TROCK:** NO, NO. WE'RE THE SENIOR USERS.

5 **THE COURT:** YOU JUST SAID --

6 **MR. TROCK:** IN FACT, WE ARE BECAUSE THEY'RE --

7 **THE COURT:** NO. YOU ARE SAYING, YOU JUST INDICATED,
8 I THINK YOU SAID IN YOUR PAPERS, TOO, THAT THERE IS SOME
9 CONFUSION THAT PEOPLE THINK THAT YOU'RE THE JUNIOR USERS AND
10 THEY ARE THE SENIOR USERS.

11 **MR. TROCK:** CORRECT. THIS IS HOW THE CONFUSION
12 OPERATES.

13 **THE COURT:** NO. BUT WHAT EVIDENCE ARE YOU POINTING
14 TO THAT WOULD SUGGEST TO ME THAT THAT'S OCCURRING HERE?

15 **MR. TROCK:** THEY ARE OLDER. THEY ARE 15 YEARS OLD.
16 THEY ARE A DOMINANT PLAYER IN THIS MARKETPLACE.

17 **THE COURT:** WHAT EVIDENCE DO YOU HAVE TO SUGGEST TO
18 ME THAT THAT IS OCCURRING HERE?

19 **MR. TROCK:** THERE IS NO EVIDENCE OF ACTUAL CONFUSION
20 IN THIS CASE. I WILL ADMIT THAT. ACTUAL CONFUSION IS VERY,
21 VERY RARE.

22 **THE COURT:** I THOUGHT YOU HAD --

23 **MR. TROCK:** THERE ARE SOME EXAMPLES OF PEOPLE
24 TALKING ABOUT THE SIMILARITIES OF THE SLOGANS, AND I WILL GET
25 TO THAT IN A SECOND, BUT THE FACT THAT THEY ARE USING THE TROCK