

1 AND THE PALM BRAND ON THERE, THOSE ARE STRONG BRAND MARKS. AND  
2 THAT HAS THE PROBLEM OF OVERWHELMING US IN THE MARKETPLACE.

3 WE ARE A BRAND NEW, YOUNG COMPANY. WE ARE TRYING TO  
4 PENETRATE THIS MARKETPLACE SINCE MAY WITH OUR AD CAMPAIGN. WE  
5 BELIEVE WE ARE BECOMING SUCCESSFUL. WE ARE PUTTING OUR SLOGAN  
6 INTO THE MINDS OF THE CONSUMERS.

7 **THE COURT:** SO WHAT ABOUT THE DIFFERENCE IN THE  
8 COLOR SCHEMES AND THE FONTS?

9 **MR. TROCK:** THERE IS A DIFFERENCE BETWEEN THOSE TWO  
10 THINGS, BUT THE PROBLEM WITH THIS CONFUSION IS THAT THE SLOGAN  
11 MAKES PEOPLE THINK THAT THERE'S SOME RELATIONSHIP BETWEEN THESE  
12 TWO COMPANIES, WHEN THERE IN FACT IS NONE; THAT EITHER WE ARE A  
13 LICENSEE OF THEM OR THEY ARE A LICENSEE OF US, OR SOMEHOW  
14 THERE'S SOME RELATIONSHIP, THE FACT WE USED TO SELL TREOS AND  
15 WE SERVICE TREOS.

16 **THE COURT:** YOU'RE SAYING THAT AS A MATTER OF FACT.

17 **MR. TROCK:** YES.

18 **THE COURT:** I AM ASKING YOU, ARE YOU JUST SAYING IT  
19 OR IS THERE SOME EVIDENCE?

20 **MR. TROCK:** THERE'S NO DISPUTE THAT WE USED TO SELL  
21 THOSE.

22 **THE COURT:** NO, NO. READ BACK WHAT HE JUST SAID SO  
23 HE CAN SEE WHAT I AM ASKING.

24 (READ BACK AS FOLLOWS:

25 THERE IS A DIFFERENCE BETWEEN THOSE TWO THINGS,

1 BUT THE PROBLEM WITH THIS CONFUSION IS THAT THE  
2 SLOGAN MAKES PEOPLE THINK THAT THERE'S SOME  
3 RELATIONSHIP BETWEEN THESE TWO COMPANIES, WHEN  
4 THERE IN FACT IS NONE; THAT EITHER WE ARE A  
5 LICENSEE OF THEM OR THEY ARE A LICENSEE OF US,  
6 OR SOMEHOW --)

7 **MR. TROCK:** YES.

8 **THE COURT:** THAT IS WHAT I AM ASKING YOU ABOUT, THAT  
9 STATEMENT YOU JUST MADE, WHETHER THERE IS ANY -- WHETHER YOU  
10 ARE JUST SAYING THAT BECAUSE THAT IS WHAT YOU ASSUME OR WHETHER  
11 THERE REALLY IS SOME BASIS FOR THAT ASSERTION.

12 **MR. TROCK:** THERE ARE COMMENTATORS IN THE MEDIA WHO  
13 HAVE INDICATED IN PUBLICATIONS ABOUT THE SIMILARITY BETWEEN THE  
14 AD CAMPAIGNS AND THE SLOGANS. THAT SIMILARITY IS AN INDICATION  
15 THAT THEY ARE CREATING AN AFFILIATION OR RELATIONSHIP IN THE  
16 MARKETPLACE IN THE MINDS OF CONSUMERS BETWEEN US AND THEM  
17 BECAUSE THEY HAVE PICKED A SLOGAN WHICH IS SO SIMILAR TO OURS.  
18 THAT'S THIS ISSUE OF ASSOCIATION CONFUSION THAT'S GOING ON  
19 HERE. WE ARE NOT CLAIMING --

20 **THE COURT:** YOU SUBMITTED SOME EVIDENCE OF THAT?

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

22 **THE COURT:** ACTUALLY MR. HANCOCK HIMSELF, FROM THE  
23 DEFENDANT, ACKNOWLEDGED THE SIMILARITY.

24 **MR. CANNON:** IN A VERY, VERY DIFFERENT FASHION, YOUR  
25 HONOR. IF --

1           **THE COURT:** HE BASICALLY -- WHAT HE SAID WAS HANCOCK  
2 ACKNOWLEDGED -- OKAY -- THE SIMILARITY TO THE POSITIONING OF  
3 RIVAL HELIO, WHICH IN ADS FROM IPG'S DEUTSCH BILLS ITSELF AS  
4 MORE THAN JUST A CELL PHONE, BUT NOTED THAT THE TWO DEVICES  
5 PURSUED DIFFERENT MARKETS.

6           SO, YOU'RE SAYING THAT HE DID NOT, IN FACT,  
7 ACKNOWLEDGE A SIMILARITY BETWEEN THE TWO MARKS?

8           **MR. CANNON:** THE MOST THAT HE DID WAS ACKNOWLEDGE  
9 THAT THE CONCEPT OF A CELL PHONE HAVING MORE FEATURES IS WHAT  
10 THEY WERE BOTH GOING AFTER.

11           THERE IS NO EVIDENCE OF ACTUAL CONFUSION. FOR A  
12 COUPLE OF COMMENTATORS TO DISTINGUISH TWO COMPANIES AND SAY,  
13 HEY, THEY ARE USING THE SAME CONCEPT IS VERY DIFFERENT THAN  
14 SAYING CONSUMERS WERE CONFUSED. IF THE COMMENTATORS WERE  
15 CONFUSED THAT WOULD BE EVIDENCE OF CONFUSION, BUT THE  
16 COMMENTATORS GOT IT EXACTLY RIGHT. THEY SAW THERE WAS TWO  
17 DIFFERENT COMPANIES, AND THEY JUST ACKNOWLEDGED THAT THE TWO  
18 COMPANIES RESUMED THE CONCEPT OF ADDITIONAL FEATURES TO SELL  
19 THEIR PHONES.

20           AND IF YOU LOOK AT WHAT MR. HANCOCK ACTUALLY SAYS OR  
21 AT LEAST WHAT THE REPORTER SAYS HE SAYS, HE NOTED THAT TWO  
22 DEVICES PURSUED DIFFERENT MARKETS.

23           **THE COURT:** WE ARE NOT TALKING ABOUT THE MARKETING.  
24 I HAVE ALREADY MADE A FINDING ON THAT. WE ARE TALKING ABOUT  
25 WHETHER OR NOT DEFENDANTS HAVE MADE A STATEMENT THAT IS

1 ESSENTIALLY A CONCESSION WITH RESPECT TO THIS FACTOR.

2 MR. CANNON: THE CONCESSION IS NOT TO CONFUSION,  
3 YOUR HONOR. I THINK I HAVE TO BE CRYSTAL CLEAR ON THAT.

4 THE COURT: YOU KEEP WANTING TO GO TO THE ULTIMATE  
5 ISSUE. I AM WALKING THERE. I AM DEALING WITH EACH PARTICULAR  
6 FACTOR AS WE GO ALONG.

7 THE QUESTION IS WHETHER MR. HANCOCK, WHO WAS  
8 ASSOCIATED WITH THE DEFENDANTS, HAS MADE A STATEMENT CONCERNING  
9 THE SIMILARITY, THAT SINCE -- THE COURT SHOULD CONSIDER IN  
10 DETERMINING WHETHER OR NOT THERE IS A SIMILARITY.

11 MR. CANNON: I THINK THE MOST THAT CAN BE SAID IS  
12 THAT HE DID SAY OR IT IS REPORTED THAT HE SAID THAT ADDRESSING  
13 THE ADDITIONAL FEATURES IS A SIMILAR CONCEPT.

14 NOW, WHETHER THE MARK, WHETHER THESE, YOU KNOW,  
15 WHETHER THE ADS THAT WE ARE TALKING ABOUT IS SIMILAR, THAT'S  
16 NOT WHAT HE MADE A CONCESSION ABOUT. SOMETHING DIFFERENT.

17 MR. TROCK: IF I MIGHT ALSO --

18 THE COURT: I AM SORRY. HIS CONCESSION IS WHAT?

19 MR. CANNON: IT IS NOT DIRECTED TO THE ADS. HE DID  
20 NOT SAY THE ADS ARE SIMILAR. HE DID NOT SAY THAT --

21 THE COURT: WE ARE NOT TALKING ABOUT SIMILARITY OF  
22 THE ADS. WE ARE TALKING ABOUT SIMILARITY OF THE MARKS. THE  
23 PHRASES THAT WE ARE TALKING ABOUT.

24 MR. CANNON: YES, YOUR HONOR, BUT THE CASE LAW IS  
25 CLEAR IN TRADEMARK, YOU HAVE TO LOOK AT HOW IT IS PRESENTED TO

1 THE PUBLIC. YOU CAN'T PULL THE SLOGAN OUT OF CONTEXT. THAT IS  
2 ABSOLUTELY CRUCIAL. WE CITED THE CASE ON THIS. I DON'T HAVE  
3 IT AT THE TIP OF MY TONGUE, BUT I CAN GET IT FROM THE BRIEF.  
4 YOU HAVE TO LOOK AT HOW THE SLOGAN IS PRESENTED TO THE  
5 MARKETPLACE. HOW THE CONSUMER WOULD INTERPRET IT.

6 THE COURT: RIGHT.

7 MR. CANNON: YOU CAN'T PULL THAT SLOGAN OUT AND  
8 COMPARE THE SLOGANS. YOU HAVE TO LOOK AT IT IN CONTEXT.

9 THE COURT: SO WHEN MR. HANCOCK ACKNOWLEDGES  
10 SIMILARITY, THEN HE'S INCORPORATING ALL OF IT BASICALLY.

11 MR. CANNON: WELL, HE'S ACKNOWLEDGING THAT THE  
12 CONCEPT OF FOCUSING ON ADDITIONAL FEATURES IS SIMILAR. AND IT  
13 CERTAINLY IS. LOTS OF CELL PHONE COMPANIES ARE DOING THAT NOW.

14 MR. TROCK: I DON'T THINK HE REFERS TO FEATURES.  
15 HE'S --

16 (SIMULTANEOUS COLLOQUY.)

17 THE COURT: SIMILARITY TO THE POSITIONING OF RIVAL  
18 HELIO.

19 WHERE ARE YOU GETTING YOUR INTERPRETATION OF WHAT  
20 MR. HANCOCK --

21 MR. CANNON: BECAUSE I AM INTERPRETING -- IT'S  
22 REPORTED HERE WHAT HE SAID.

23 THE COURT: WHEN YOU SAY "HERE", WHAT ARE YOU  
24 LOOKING AT?

25 MR. CANNON: THE EXHIBIT THEY PROVIDED.

1           **THE COURT:** WHAT SPECIFICALLY? WHAT IS THE EXHIBIT?  
2           **MR. CANNON:** IT IS EXHIBIT TO THE WEEKS'  
3           DECLARATION.  
4           **THE COURT:** OKAY. WHICH ONE?  
5           **MR. CANNON:** G, H.  
6           **THE COURT:** H?  
7           **MR. CANNON:** YES.  
8           **THE COURT:** THAT'S THE SAME THING. "HANCOCK  
9           ACKNOWLEDGED THE SIMILARITY TO THE POSITIONING OF RIVAL HELIO."  
10           **MR. CANNON:** BUT TO SAY THAT THE -- TO HAVE IT  
11           STATED IN A BRAND PUBLICATION THAT THE SIMILAR POSITIONING IS  
12           NOT TO SAY THAT THE ADS ARE CONFUSING. IT IS NOT TO SAY THAT  
13           THE ADS --  
14           **THE COURT:** THEY HAVE ACKNOWLEDGED THAT THERE IS NO  
15           EVIDENCE OF ACTUAL CONFUSION. THAT IS NOT -- I DON'T WANT TO  
16           GET OFF TRACK.  
17           **MR. CANNON:** I AM SORRY.  
18           **THE COURT:** WHAT WE ARE LOOKING AT ARE THE FACTORS  
19           SO I CAN DETERMINE WHETHER OR NOT THERE IS LIKELIHOOD OF  
20           CONFUSION, BECAUSE THE PLAINTIFF HAS ADMITTED THAT THERE  
21           BASICALLY IS NO EVIDENCE OF ACTUAL CONFUSION.  
22           **MR. CANNON:** YES.  
23           **THE COURT:** SO THAT'S NOT THE ISSUE HERE.  
24           **MR. CANNON:** YES.  
25           **THE COURT:** I AM AT THE SIMILARITY, IN WHICH I FOUND

1 KIND OF STRIKING THAT DEFENDANTS HAVE ALREADY BASICALLY MADE  
2 PUBLIC STATEMENTS ACKNOWLEDGING THE SIMILARITY, AND UNLESS  
3 MR. HANCOCK IS NOT ASSOCIATED WITH DEFENDANT --

4 **MR. CANNON:** HE IS ASSOCIATED, BUT I THINK YOU HAVE  
5 TO READ WHAT HE SAID AND THEN INTERPRET -- THEY INTERPRET IT A  
6 CERTAIN WAY. I WOULD INTERPRET IT A DIFFERENT WAY. HE IS NOT  
7 HERE. WE CAN BRING HIM IN AND HAVE A PRELIMINARY INJUNCTION  
8 HEARING AND ASK HIM ABOUT IT.

9 **THE COURT:** SINCE THERE SEEMS TO BE NO DISPUTE THAT  
10 HE IS IN A POSITION OF RESPONSIBILITY TO MAKE THAT STATEMENT --

11 **MR. CANNON:** YES.

12 **THE COURT:** -- LOOK AT THE ENTIRE CONTEXT OF ALL THE  
13 WORDS HE USED HERE, WHY SHOULDN'T I ASSUME, BASED UPON ALL THE  
14 WORDS HE USED, THAT HE HAD IN MIND THIS ANNOUNCEMENT THAT I AM  
15 GOING THROUGH RIGHT NOW, JUST BY VIRTUE OF THE FACT THAT THE  
16 LAST, THE DISTINGUISHING COMMENTS THAT HE MADE WAS DESIGNED TO  
17 DISTINGUISH WHY IT'S OKAY TO BE SIMILAR BUT BECAUSE YOU ARE IN  
18 DIFFERENT MARKETS. WE ARE LOOKING AT THE SAME FACTORS. HE'S  
19 LOOKING AT THE SAME FACTORS WE'RE LOOKING AT IN THE SENTENCE  
20 THAT HE'S GIVEN.

21 WHAT IT SUGGESTS TO ME IS A PERSON WHO IS  
22 KNOWLEDGEABLE ABOUT TRADEMARK RESPONSIBILITIES HAS REACHED A  
23 CONCLUSION THAT, YES, OUR MARKS ARE OUR POSITIONING OR OUR ADS,  
24 OR WHATEVER, I ACKNOWLEDGE IS SIMILAR, BUT BECAUSE WE USE  
25 DIFFERENT MARKETS, HE IS CONCLUDING, FOR WHATEVER REASON, THAT

1 PERHAPS IT'S NOT AN ISSUE.

2 NOW, IF IT WEREN'T FOR THE FACT THAT HE IS SAYING WE  
3 PURSUE DIFFERENT MARKETS, I WOULD THINK MAYBE THE STATEMENT  
4 TAKEN OUT OF CONTEXT IS NOT SOMETHING THAT WOULD BE OF ANY  
5 SIGNIFICANCE FOR PURPOSES OF MY ANALYSIS, BUT WE HAVE A PERSON  
6 WHO IS IN A POSITION OF RESPONSIBILITY IN YOUR COMPANY WHO IS  
7 MAKING A STATEMENT, A TRADEMARK EVALUATION STATEMENT THAT IS  
8 DISTINGUISHING WHY THE SIMILARITY IS NOT A PROBLEM BECAUSE ONE  
9 OF THE OTHER FACTORS, FROM HIS PERSPECTIVE, IS NOT MET.

10 MR. CANNON: YOUR HONOR, I RESPECTFULLY DISAGREE  
11 THAT THAT ASSUMPTION CAN BE MADE, THAT HE WAS MAKING A  
12 TRADEMARK ANALYSIS.

13 THE COURT: WHAT'S THE IMPORT OF "BUT NOTED THAT THE  
14 TWO DEVICES PURSUE DIFFERENT MARKETS"? WHY WOULD A PERSON SAY  
15 THAT IN CONJUNCTION WITH THE FIRST STATEMENT THAT HE MADE?

16 MR. CANNON: I DON'T KNOW EVERYTHING HE SAID TO THIS  
17 REPORTER, BUT IF YOU READ THE SENTENCE, "HANCOCK ACKNOWLEDGED  
18 THE SIMILARITY TO THE POSITIONING OF RIVAL HELIO, WHICH IN ADS  
19 FROM IPG DEUTSCH BILLS ITSELF AS MORE THAN JUST A CELL PHONE --

20 THE COURT: RIGHT WHICH IS TAKING IN NOT ONLY THE  
21 CONCEPT --

22 MR. CANNON: BUT THE --

23 THE COURT: BUT THE WORDS, AND THEN IT GOES ON TO  
24 DISTINGUISH THE MARKETS.

25 MR. CANNON: THE IDEA THAT YOU CAN OWN THE CONCEPT



1 OF ADVERTISING THE ADDITIONAL FEATURES ON YOUR PRODUCT, I THINK  
2 IS EXTREME. I DON'T THINK HE WAS DOING A TRADEMARK ANALYSIS.  
3 HE WAS SAYING, YES, WE ARE ADVERTISING THE ADDITIONAL FEATURES  
4 ON OUR PRODUCT. YES, HELIO APPEARS TO BE ADVERTISING THE  
5 ADDITIONAL FEATURES ON ITS PRODUCT. WE ARE GOING AFTER  
6 DIFFERENT MARKETS. IT'S NOT --

7 **THE COURT:** WHY WOULD -- OKAY. GO ON.  
8 DID YOU WANT TO RESPOND?

9 **MR. TROCK:** THE OTHER THING, IN ADDITION TO  
10 MR. HANCOCK'S STATEMENTS, IS THAT TO THE WHEBLE DECLARATION,  
11 AND THEN EXHIBIT H, THIS SHOWS THAT OTHER PEOPLE BESIDES  
12 MR. HANCOCK HAVE NOTED THE SIMILARITY OF NOT JUST THE  
13 ADVERTISEMENTS AND NOT JUST THE CAMPAIGN, BUT THE SLOGANS  
14 THEMSELVES.

15 THIS IS A PUBLICATION MOBILE MAGAZINE, PUBLISHED  
16 DECEMBER 11TH, RIGHT IN THE MIDDLE OF -- THE MIDDLE PARAGRAPH,  
17 IT SAYS: INTERESTINGLY THE TAGLINE "NOT JUST THE CELL PHONE.  
18 A TREO" IS A LITTLE TOO MUCH LIKE HELIO'S "DON'T CALL US A  
19 PHONE COMPANY, DON'T CALL IT A PHONE."

20 **THE COURT:** I SEE THAT.  
21 DO YOU HAVE ANY RESPONSE TO THAT?

22 **MR. CANNON:** WELL, YOUR HONOR, THIS PERSON CERTAINLY  
23 WASN'T CONFUSED. HE KNEW EXACTLY WHERE THE SOURCE WAS COMING  
24 FROM. I DON'T KNOW WHO THIS PERSON IS. THEY SUPPLIED THIS OFF  
25 OF THE INTERNET, APPARENTLY. THIS PERSON WAS NOT CONFUSED.

1 YOU CAN HAVE SIMILAR SLOGANS. IT'S OKAY UNDER THE LAW TO GO TO  
2 USE THE SAME MARKETING CONCEPTS TO ADVERTISE YOUR FEATURES.  
3 WHAT'S NOT ALLOWED IS TO CONFUSE CONSUMERS. THIS CONSUMER WAS  
4 NOT CONFUSED.

5 MR. TROCK: SO, I TAKE IT THAT MIGHT BE AN ADMISSION  
6 THAT THEY ARE SIMILAR BECAUSE THIS IS NOT AN ISSUE OF ULTIMATE  
7 CONFUSION WE ARE ANALYZING RIGHT HERE IF THE ISSUE IS THIS  
8 FACTOR, SIMILARITY OF SLOGANS.

9 THE COURT: THIS FACTOR, SIMILARITY OF THE MARK, IS,  
10 I THINK IT'S A CLOSE QUESTION, BUT -- ALTHOUGH THE APPEARANCE  
11 OF THE MARKS IS DIFFERENT, PALM AND HELIO USE DIFFERENT COLOR  
12 SCHEMES. SINCE HELIO USES BLUE AND PALM USES ORANGE AND THE  
13 FONTS ARE DIFFERENT, THEY SOUND VERY SIMILAR AND CONVEY SIMILAR  
14 MESSAGES, THE PROPER TEST FOR DETERMINING THE LIKELIHOOD OF  
15 CONFUSION IS NOT WHETHER CONSUMERS WOULD BE CONFUSED BY A  
16 SIDE-BY-SIDE COMPARISON OF THE PRODUCTS, BUT WHETHER THE  
17 CONFUSION IS LIKELY WHEN A CONSUMER FAMILIAR WITH ONE PARTY'S  
18 MARK IS PRESENTED WITH THE OTHER PARTY'S GOODS ALONE.

19 AND SO I AM INCLINED TO AGREE WITH PLAINTIFF THAT  
20 MARKS ARE SIMILAR ENOUGH TO CAUSE CONFUSION UNDER THIS TEST  
21 PARTICULARLY GIVEN THE FACT THAT SEVERAL INDUSTRY COMMENTATORS  
22 NOTED SIMILARITIES SHORTLY AFTER PALM LAUNCHED ITS CAMPAIGN IN  
23 DECEMBER.

24 YOU KNOW, ALTHOUGH THE ULTIMATE QUESTION OF  
25 SIMILARITY IS GOING TO BE APPROPRIATE FOR A JURY TO RESOLVE, I

1 TEND TO THE PLAINTIFF'S POINT THAT THE -- I CAN'T FIND THE  
2 MARKS ARE SO DISSIMILAR THAT THERE IS LITTLE LIKELIHOOD OF  
3 CONFUSION. SO THIS FACTOR WEIGHS IN FAVOR OF PLAINTIFF.

4 BEFORE I MOVE TO NUMBER FOUR, THE MARKING CHANNELS,  
5 MR. CANNON, DID YOU KNOW IN OCTOBER 2006 ABOUT HELIO'S CAMPAIGN  
6 WHICH WAS LAUNCHED IN MAY OF 2006?

7 **MR. CANNON:** I AM NOT AWARE THAT WE DID. THERE IS  
8 NO EVIDENCE THAT WE DID. HELIO IS NOT CONSIDERED A COMPETITOR.

9 **THE COURT:** SO YOU ALL -- YOU SAID YOU DON'T KNOW  
10 ONE WAY OR THE OTHER, OR YOU DIDN'T KNOW IN OCTOBER OF 2006  
11 ABOUT THEIR CAMPAIGN THAT WAS LAUNCHED IN MAY?

12 **MR. CANNON:** I CANNOT REPRESENT TO THE COURT WITHOUT  
13 EVIDENCE THAT NO ONE AT THE COMPANY KNEW ABOUT HELIO, JUST AS  
14 COUNSEL CANNOT REPRESENT TO THE COURT THAT NO ONE FROM HELIO  
15 WAS AT THE TRADE SHOW AND SAW THE TREC BOOTH. I HAVE NO  
16 EVIDENCE, NO DISCOVERY. I HAVE NO ABILITY TO SAY --

17 **THE COURT:** I AM NOT ASKING YOU TO ASK THEM FOR  
18 DISCOVERY. I AM ASKING WHETHER YOU KNEW WHETHER YOUR  
19 COMPANY -- NOT YOU AS A PERSON, I MEAN WHETHER PALM KNEW IN  
20 OCTOBER OF 2006 ABOUT HELIO'S CAMPAIGN WHICH WAS LAUNCHED IN  
21 MAY OF 2006.

22 **MR. CANNON:** I HAVE NO EVIDENCE ON THAT ONE WAY OR  
23 THE OTHER.

24 **THE COURT:** YOU HAVEN'T CHECKED WITH YOUR CLIENT ONE  
25 WAY OR THE OTHER.

1           **MR. CANNON:** ONE WAY OR THE OTHER I DON'T KNOW. I  
2 CAN'T REPRESENT.

3           **THE COURT:** SO WHY WOULDN'T YOU KNOW? YOU HAVEN'T  
4 HAD TIME TO CHECK WITH THEM?

5           **MR. CANNON:** YOUR HONOR, WE GOT THIS 24 HOURS AGO,  
6 SO THERE SIMPLY WAS NOT TIME.

7           I HAVE CHECKED WITH THE CLIENT. I ASKED THEM ARE  
8 THESE COMPANIES COMPETITORS? NO. DO YOU TRACK THIS COMPANY?  
9 NOT REALLY. WE ARE AWARE OF THEM, WE'RE AWARE OF THE NAME, BUT  
10 WE ARE NOT AWARE. WE ARE NOT CONSIDERED RIVALS, WE DON'T TRACK  
11 THEM. WE'RE GOING AFTER DIFFERENT BUSINESS SEGMENTS. THAT IS  
12 THE INFORMATION I GOT FROM THE CLIENT.

13           **MR. TROCK:** YOUR HONOR, IF THEY KNOW US, THEY KNOW  
14 OUR NAME, THEN THEY HAVE TO KNOW OUR ADVERTISING CAMPAIGN.  
15 THIS IS THE ONLY ADVERTISING CAMPAIGN WE HAVE.

16           **THE COURT:** OKAY. NUMBER FOUR, THE MARKETING  
17 CHANNELS.

18           **MR. TROCK:** HERE, YOUR HONOR, I THINK WE ACTUALLY  
19 PRETTY MUCH DISCUSSED THE MARKETING CHANNELS WHEN WE TALKED  
20 ABOUT RELATEDNESS TO SERVICE. HERE, WE ARE TALKING ABOUT  
21 ADVERTISING THE SAME MAGAZINES, USING THE SAME STRATEGIC  
22 PARTNERS.

23           I THINK THAT IN TAKING A LOOK AT THAT, YOU KNOW,  
24 THEY CLAIM WE ARE NOT A COMPETITOR, BUT WHEN MR. HANCOCK IS  
25 CONFRONTED WITH THE SIMILARITY OF THE AD CAMPAIGNS AND THE

1 ARTICLE TALKS ABOUT RIVAL HELIO, HE DOESN'T WE'RE NOT RIVALS,  
2 HE BASICALLY SAYS WE ARE AFTER A DIFFERENT MARKET.

3 SO, I THINK THE MARKETING CHANNELS, IN OTHER WORDS,  
4 THE CHANNELS WE USE TO ADVERTISE TO OUR CONSUMERS ARE OBVIOUSLY  
5 THE SAME BECAUSE I DON'T THINK THEY CAN DISPUTE THAT THEY ARE  
6 ADVERTISING IN GENTLEMAN'S QUARTERLY, ROLLING STONE,  
7 ENTERTAINMENT WEEKLY, LUCKY, AND THEIR STRATEGIC PARTNERS ARE  
8 GOOGLE, YAHOO, UNION, FANDANGO AND MY SPACE.

9 MR. CANNON: NOT MY SPACE.

10 MR. TROCK: I AM SORRY, WE CAN TALK LATER ABOUT THE  
11 RELATIONSHIP BETWEEN CINGULAR AND MY SPACE AND THE RELATIONSHIP  
12 BETWEEN CINGULAR AND PALM.

13 THE COURT: OKAY. WE HAVE DISCUSSED THIS.

14 MR. CANNON: I WOULD JUST ADD THAT THE DEVICES THAT  
15 WE SELL, WE DO NOT -- THIS AD IS NOT ON TV. IT'S NOT IN  
16 NIGHTCLUBS. IT'S NOT ASSOCIATED WITH CELEBRITIES.

17 THE STYLIZED STORES THAT THEY HAVE IS A DIFFERENT --  
18 YES, WE ADVERTISE IN MAJOR PUBLICATIONS, BUT THOSE ARE -- THOSE  
19 HAVE LOTS OF ADS IN THEM. THOSE ARE THE TYPES OF PUBLICATIONS  
20 THAT ARE IN DENTIST OFFICES.

21 I MEAN, THEY HAVE WIDE ACCESS. THEY ARE NOT -- IT'S  
22 NOT A SUPER FOCUSED SORT OF PUBLICATION.

23 THE COURT: THE KIND OF PUBLICATIONS THAT ARE IN  
24 DENTIST OFFICES? I HAVE NEVER HEARD ANYONE SAY THAT. WHAT  
25 KIND OF PUBLICATIONS ARE IN DENTIST OFFICES?

1           **MR. CANNON:** YOU KNOW, PUBLICATIONS THAT ANYONE  
2 MIGHT READ. THEY'RE WIDELY READ, APPLICABLE TO LOTS OF  
3 DIFFERENT TYPES OF PEOPLE.

4           **THE COURT:** ARE THERE OTHER PUBLICATIONS LIKE  
5 BUSINESS WEEK OR -- ADVERTISE IN BUSINESS WEEK OR --

6           **MR. CANNON:** I AM PRETTY SURE WE ADVERTISE IN ALL OF  
7 THOSE, LIKE WALL STREET JOURNAL AND THOSE SORTS OF OUTLETS.

8           **THE COURT:** I AM TALKING ABOUT BUSINESS WEEK OR  
9 BUSINESS KIND OF PUBLICATIONS.

10          **MR. CANNON:** I BELIEVE WE DO.

11          **MR. TROCK:** AND THE KEY WOULD BE THIS ADVERTISING  
12 CAMPAIGN, NOT THEIR PRIOR ONES.

13          **MR. CANNON:** I DON'T HAVE THE EVIDENCE THAT WE DO.  
14 I MEAN, I CAN CHECK WITH THE CLIENT ON THAT. IT IS A  
15 BUSINESS-ORIENTED PRODUCT --

16          **THE COURT:** YOU WOULD THINK --

17          **MR. CANNON:** I WOULD THINK.

18          **THE COURT:** -- BUT YOU DON'T KNOW.

19          **MR. CANNON:** NOT BUSINESS WEEK. I JUST DON'T KNOW.

20          **THE COURT:** WE DISCUSSED ABOUT THIS ONE.

21                 I THINK, OBVIOUSLY, WHERE THE PARTIES USE SIMILAR  
22 MARKETING CHANNELS AND ADVERTISING METHODS THE LIKELIHOOD OF  
23 CONFUSION IS INCREASED, AND THE MARKETING CHANNELS THAT YOU ALL  
24 USE, MANY OF THEM ARE THE SAME, SAME MAGAZINES, AND EVEN THOUGH  
25 THERE ARE A COUPLE THAT YOU DON'T SHARE, BUT FOR THE MOST PART,

1 I THINK THIS FACTOR WEIGHS IN FAVOR OF FINDING LIKELIHOOD OF  
2 CONFUSION BECAUSE I DO BELIEVE THAT THE MARKETING CHANNELS USED  
3 ARE SIMILAR AND THE ADVERTISING METHODS ARE SIMILAR.

4 SO THIS FACTOR NUMBER FOUR ALSO WEIGHS IN FAVOR --

5 **MR. CANNON:** YOUR HONOR, I HAVE RECEIVED SOME  
6 INFORMATION --

7 **THE COURT:** EXCUSE ME -- OF THE LIKELIHOOD OF  
8 CONFUSION.

9 AND SO NEXT IS NUMBER FIVE, DEFENDANT'S INTENT.

10 **MR. TROCK:** HERE, YOUR HONOR, I DISCUSSED THIS A  
11 LITTLE BIT, BUT I THINK I CAN -- I LIST THE FACTORS HERE THAT I  
12 THINK ARE IMPORTANT --

13 **THE COURT:** OH, I AM SORRY. YOU SAID -- LISA?

14 (DISCUSSION HELD WITH CLERK.)

15 **THE COURT:** JUST A SECOND. LET ME SEE HOW MUCH  
16 FURTHER WE HAVE TO GO.

17 WE ARE GOING TO NEED TO TAKE ABOUT A TEN-MINUTE  
18 BREAK. I NEED TO SEE SOMEONE IN CHAMBERS.

19 WE WILL BE IN RECESS FOR TEN MINUTES.

20 (RECESS TAKEN AT 2:37 P.M.)

21 (PROCEEDINGS RESUMED AT 3:00 P.M.)

22 **THE CLERK:** BACK ON THE RECORD IN CIVIL 06-7754,  
23 HELIO LLC V. PALM, INC.

24 **THE COURT:** THE RECORD WILL REFLECT THAT BOTH  
25 COUNSEL ARE PRESENT, MR. TROCK AND MR. CANNON ARE AT THE

1       PODIUM.

2                   WE ARE ON FACTOR NUMBER FIVE, DEFENDANT'S INTENT.

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

4           **THE COURT:**   OKAY.

5           **MR. TROCK:**   AND I WAS GOING TO LIST THE DIFFERENT  
6       ELEMENTS THAT I SEE HERE IN THIS CASE, WHICH LEAD US TO BELIEVE  
7       THAT THERE WAS NOT ONLY KNOWLEDGE OF OUR CAMPAIGN, BUT ALSO  
8       KNOWLEDGE OF OUR SLOGAN AND AWARENESS BY PALM THAT THEIR SLOGAN  
9       WAS SIMILAR TO OURS.

10                   AND THIS GOES TO A NUMBER OF THINGS.   I THINK  
11       BASICALLY WE CAN TAKE A LOOK AT, AND TAKE A LOOK AT THE  
12       POSITION THAT THEY HAVE MADE THAT THEY INVENTED THIS SLOGAN TWO  
13       YEARS AGO BEFORE WE WERE EVEN IN EXISTENCE.   I DON'T THINK THAT  
14       THERE IS ANY DISPUTE IN THE RECORD THAT THEY ARE THE JUNIOR OR  
15       THE SECOND USER IN COMMERCE OF THIS SLOGAN, WHICH MEANS THAT  
16       THEY USED THIS IN THE MARKETPLACE AFTER WE WERE USING IT,  
17       WHICH --

18                   **THE COURT:**   THIS IS INTENT.   YOUR ASSERTION IS THEY  
19       INTENTIONALLY ADOPTED THIS TAGLINE TO CONFUSE CONSUMERS.

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

21           **THE COURT:**   SO WHAT EVIDENCE DO YOU HAVE TO SUGGEST  
22       THAT THEY INTENTIONALLY ADOPTED THE TAGLINE TO CONFUSE  
23       CONSUMERS?

24           **MR. TROCK:**   IF WE TAKE A LOOK AT THE SIMILARITY OF  
25       THE SLOGANS, PALM COULD HAVE PICKED ANY SLOGAN IT WANTED, BUT



1 FOR SOME REASON IT PICKED A SLOGAN THAT WAS VERY SIMILAR TO  
2 OURS.

3 THERE IS NO -- I HAVE NOT SEEN ANY EVIDENCE THAT  
4 THEY DIDN'T KNOW ABOUT OUR CAMPAIGN. FOR THEM TO TAKE THE  
5 POSITION THAT WE SHOULD BE AWARE OF THEIR ANNOUNCEMENT IN  
6 OCTOBER IN A SMALL TRADE SHOW IN NEW YORK, I THINK WOULD BE  
7 DISINGENUOUS THAT IF WE CANNOT TURN THAT SAME AWARENESS AROUND,  
8 AND SAY, THEN YOU SHOULD BE AWARE OF OUR ADVERTISING CAMPAIGN,  
9 IN WHICH WE SPENT \$25 MILLION ON OR \$40 MILLION ON SINCE MAY OF  
10 2006.

11 I BELIEVE COUNSEL HAS REPRESENTED THAT PALM WAS  
12 AWARE OF US AND WHO WE WERE, AND I THINK THAT THE ONLY WAY THEY  
13 CAN DO THAT IS TO UNDERSTAND -- IS TO KNOW OUR ADVERTISING  
14 CAMPAIGN BECAUSE IT'S THE ONLY ONE WE HAVE EVER DONE.

15 IF WE TAKE A LOOK AT THE OVERALL POSITIONING AND  
16 STRATEGY OF OUR MARKETING PROGRAM, WE CAN SEE THAT THERE ARE  
17 ELEMENTS OF IT THAT WE BELIEVE THEY ADOPTED DELIBERATELY. THE  
18 SIMILARITY OF THE SLOGAN, THE CHOICE OF MAGAZINES AND MEDIA  
19 CHANNELS THAT ARE IDENTICAL TO OURS, GENTLEMAN'S QUARTERLY AND  
20 ENTERTAINMENT WEEKLY AND ROLLING STONE AND LUCKY. THAT ALSO  
21 INDICATES THAT THERE WAS AN INTENT TO COPY OUR MARKETING  
22 CAMPAIGN.

23 WE ALSO THEN TAKE A LOOK AT THE STRATEGIC PARTNERS  
24 THAT WE USE, GOOGLE, YAHOO, UNION, FANDANGO. THEY CHOSE THE  
25 EXACT SAME ONES. THEY DON'T HAVE THOSE PARTNERS IN THEIR PRIOR

1 PHONES.

2 **THE COURT:** IF THEY HAVE BEEN IN EXISTENCE A LOT  
3 LONGER THAN YOU --

4 **MR. TROCK:** YES.

5 **THE COURT:** -- THEN OSTENSIBLY THEY HAVE BEEN USING  
6 THOSE CHANNELS LONG BEFORE YOU WERE.

7 **MR. TROCK:** WELL, THERE'S NO EVIDENCE --

8 **THE COURT:** SO I WOULDN'T -- OR WOULD I? I MEAN, IS  
9 THERE SOME WAY THAT I CAN NECESSARILY CONCLUDE THAT THEY HAVE  
10 ADOPTED THESE PARTICULAR CHANNELS BECAUSE OF YOU?

11 **MR. TROCK:** THERE IS NO EVIDENCE TO SHOW THAT THEY  
12 USED THESE CHANNELS PRIOR TO OUR CAMPAIGN. THERE IS NO  
13 EVIDENCE --

14 **THE COURT:** IS THERE ANY EVIDENCE TO SHOW THAT THEY  
15 DID NOT USE THEM BEFORE YOUR CAMPAIGN?

16 **MR. TROCK:** I DO NOT HAVE EVIDENCE ONE WAY OR THE  
17 OTHER.

18 **THE COURT:** I MEAN, CAN YOU REALLY IN GOOD FAITH  
19 TAKE THE POSITION, I MEAN, REALLY, DO YOU FEEL THAT YOU CAN IN  
20 GOOD FAITH TAKE THE POSITION THAT GIVEN THE AGE OF THEIR  
21 COMPANY AND YOUR COMPANY, THAT THEY REALLY ONLY USED THOSE  
22 CHANNELS BECAUSE YOU ALL WERE USING THOSE CHANNELS?

23 **MR. TROCK:** I BELIEVE THAT'S VERY CLEAR AND TRUE  
24 WITH THE STRATEGIC PARTNERS. THERE IS ABSOLUTELY NO REASON ON  
25 THIS PLANET WHY A BUSINESS COMPANY WOULD EVER HAVE A STRATEGIC

1 RELATIONSHIP WITH THE ONION.

2           **THE COURT:** YEAH, BUT I MEAN IN TERMS OF ALL THE  
3 OTHER CHANNELS.

4           **MR. TROCK:** THAT'S CORRECT. RIGHT. IF I TAKE A  
5 LOOK AT THE ENTIRE PICTURE, WHICH I THINK IS APPROPRIATE FOR  
6 DETERMINING INTENT, AND I SEE A COMPANY WHICH SHOULD HAVE BEEN  
7 AWARE OF OUR ADVERTISING CAMPAIGN, WHICH IS CHOOSING MARKETING  
8 CHANNELS WHICH ARE IDENTICAL TO OURS, AND CHOOSING STRATEGIC  
9 PARTNERS, WHICH THEY WOULD NEVER CHOOSE.

10           **THE COURT:** THE MARKET, THAT'S THE QUESTION I ASKED  
11 YOU, ABOUT THE MARKETING CHANNELS. YOUR POSITION IS -- FROM  
12 YOUR PERSPECTIVE, THEY ARE CHOOSING THESE MARKETING CHANNELS  
13 THAT YOU ALL HAVE SELECTED, AND I AM ASKING YOU WHETHER YOU  
14 REALLY BELIEVE THAT THEY ARE CHOOSING THESE MARKETING CHANNELS  
15 BECAUSE OF YOU OR THEY HAVE ALREADY BEEN USING THOSE MARKETING  
16 CHANNELS AND YOU USE THEM AS WELL, SO THERE IS A COINCIDENCE  
17 THERE, BUT -- AS OPPOSED TO DOING IT BECAUSE YOU ALL ARE DOING  
18 IT WITH THE INTENT TO CAUSE THE CONFUSION.

19           **MR. TROCK:** MY CONCLUSION ON INTENT IS TO STEP BACK  
20 AND TAKE A LOOK AT ALL OF THESE ELEMENTS. WHEN I LOOK AT ALL  
21 THE ELEMENTS, I COME TO THE CONCLUSION THAT THEY ARE DOING THIS  
22 ON PURPOSE; THAT THIS IS MUCH MORE THAN MERE COINCIDENCE.

23           SO I INCLUDE THE SIMILARITY OF THE SLOGANS, THE SAME  
24 MAGAZINES, AND ESPECIALLY THE SAME STRATEGIC PARTNERS. IT'S AS  
25 IF THEY SAW OUR ADVERTISING CAMPAIGN, THEY SAW HOW SUCCESSFUL

1 IT WAS, THEY SAID, WE WANT TO GO AND COMPETE AGAINST THESE  
2 GUYS, SO LET'S COPY THEIR MARKETING PLAN, LET'S GO AFTER THE  
3 SAME STRATEGIC PARTNERS, LET'S ADVERTISE IN THE SAME MEDIA  
4 OUTLETS, LET'S GO AFTER THESE GUYS HEAD TO HEAD BECAUSE WE'VE  
5 GOT A MULTIMEDIA DEVICE, TOO.

6 THAT'S WHAT IT TELLS ME WHEN I LOOK AT THIS, THAT  
7 THAT'S THE LEVEL OF INTENT HERE.

8 **THE COURT:** OKAY.

9 MR. CANNON?

10 **MR. CANNON:** YOUR HONOR, THERE IS ABSOLUTELY NO  
11 EVIDENCE OF INTENT HERE. IN FACT, ON LESS THAN 24 HOURS'  
12 NOTICE COMING UP TO CHRISTMAS WEEKEND, WE HAVE SUBMITTED  
13 EVIDENCE OF THE OPPOSITE.

14 WE HAVE SUBMITTED THE EVIDENCE OF THE PERSON IN  
15 CHARGE OF THIS AD CAMPAIGN, SCOTT HANCOCK WHO CATEGORICALLY  
16 DENIES ANY INTENT TO COPY THIS AD CAMPAIGN. IN FACT, HE  
17 DEMONSTRATES THAT WE CAME UP WITH THIS, THIS PHRASE, THIS  
18 DESCRIPTIVE PHRASE BEFORE THEY EVEN WERE IN EXISTENCE.

19 WE HAVE SUBMITTED A DECLARATION OF SCOTT HANCOCK,  
20 WHICH WE GOT IN RESPONSE TO THIS TRO, WORKED THROUGH THE NIGHT  
21 TO GET EVIDENCE IN FRONT OF YOUR HONOR, AND WE HAVE EVIDENCE  
22 THAT THERE WAS NO INTENT.

23 COUNSEL HAS NO EVIDENCE OF INTENT. HE IS TRYING TO  
24 DRAW AN ARGUMENT OUT OF ELEMENTS THAT THEY HAVE CULLED  
25 TOGETHER. THEY HAVE THE BURDEN TO COME FORWARD AND PROVE THIS

1 CASE. IT'S A TRO. THEY HAVE NOT MET --

2 **THE COURT:** I THINK YOU'RE RIGHT. AT BEST THIS  
3 FACTOR IS NEUTRAL, BUT I DON'T THINK THEY HAVE DEMONSTRATED ANY  
4 INTENT. SO THIS FACTOR FAVORS -- WEIGHS AGAINST A FINDING.

5 OBVIOUSLY, THIS IS -- THE NINTH CIRCUIT HAS  
6 EMPHASIZED THAT THIS IS, I GUESS, AMENABLE -- IMPORTANCE OF  
7 THIS PARTICULAR FACTOR, BUT IN ANY EVENT, I FIND THAT THIS  
8 FACTOR WEIGHS AGAINST A FINDING OF INFRINGEMENT, CONFUSION.

9 THE NEXT ONE IS, THE SIXTH ONE IS EVIDENCE OF ACTUAL  
10 CONFUSION.

11 **MR. TROCK:** ON ACTUAL CONFUSION, YOUR HONOR, IN THE  
12 VAST MAJORITY OF TRADEMARK INFRINGEMENT CASES, EVIDENCE OF  
13 ACTUAL CONFUSION IS VERY RARE.

14 **THE COURT:** RIGHT.

15 **MR. TROCK:** I THINK IN THIS CASE IN PARTICULAR, IT'S  
16 GOING TO BE ALMOST IMPOSSIBLE TO GET THIS RIGHT NOW BECAUSE  
17 THEY HAVE ONLY BEEN ADVERTISING IN THE MARKETPLACE BASED UPON  
18 THEIR PRESS RELEASE SINCE DECEMBER 12TH.

19 **THE COURT:** SO IS THERE REALLY A CONCESSION ON BOTH  
20 SIDES THAT THERE IS -- THIS FACTOR WEIGHS AGAINST THE FINDING  
21 OF LIKELIHOOD OF CONFUSION BECAUSE THERE IS NO ACTUAL  
22 CONFUSION?

23 **MR. TROCK:** WE DO NOT HAVE ANY EVIDENCE OF ACTUAL  
24 CONFUSION. WE BELIEVE THEY HAVE BEEN ADVERTISING FAR TOO SHORT  
25 FOR US TO ACTUALLY GATHER THAT EVIDENCE FROM THE MARKETPLACE.

1           **THE COURT:** THIS FINDING WEIGHS AGAINST A FINDING OF  
2 LIKELIHOOD OF CONFUSION.

3           THE NEXT ONE, NUMBER SEVEN, IS TYPE OF GOODS AND  
4 DEGREE OF CARE LIKELY TO BE EXERCISED BY CONSUMERS.

5           **MR. TROCK:** HERE, YOUR HONOR, THE ADVERTISING  
6 CAMPAIGN THAT PALM BROUGHT OUT WAS -- IS POSITIONED TO COME OUT  
7 JUST IN THE MIDDLE OF THE HOLIDAY BUYING SEASON. THIS IS A  
8 CRITICAL TIME OF YEAR FOR MOST CONSUMER GOODS MANUFACTURERS  
9 ESPECIALLY US. THIS IS THE TIME OF YEAR WHERE WE EXPECTED TO  
10 INCREASE OUR SUBSCRIBER BASE BY 30 PERCENT.

11           CONSUMERS ARE RUSHED DURING THIS SEASON. THEY HAVE  
12 A LOT OF GIFT-BUYING NEEDS THAT THEY MUST FULFILL. THEY GET  
13 EASILY DISTRACTED. THEY ARE BOMBARDED BY ADVERTISING, BY ALL  
14 SORTS OF CONSUMERS.

15           AND BECAUSE OF THAT, IT IS VERY LIKELY THAT  
16 CONSUMERS ARE NOT PAYING AS MUCH ATTENTION AS THEY NORMALLY  
17 WOULD. THEIR OWN EXECUTIVE HAS ADMITTED THAT THEIR DEVICE, THE  
18 ONE THAT THEY ARE ADVERTISING, HAS NOW DROPPED TO THE PRICE  
19 POINT OF A GIFT, UNDER \$200.

20           SO, WE BELIEVE THAT THE DEGREE OF CARE THAT IS BEING  
21 EXERCISED BY CONSUMERS AT THIS TIME OF YEAR FOR THESE TYPES OF  
22 DEVICES IS A VERY LOW DEGREE OF CARE BECAUSE THEY ARE BEING  
23 RUSHED, THEY ARE BEING DISTRACTED, THERE'S LOTS OF  
24 ADVERTISEMENTS, THERE'S COMPETING ADVERTISEMENTS OUT THERE.  
25 THESE DEVICES ARE PRICED AT A GIFT PRICE POINT.

1           **THE COURT:** SO CONFUSION BETWEEN THE MARKET  
2 GENERALLY WHERE THE GOODS AT ISSUE INVOLVE RELATIVELY  
3 INEXPENSIVE IMPULSE PRODUCTS TO WHICH THE AVERAGE  
4 UNSOPHISTICATED CONSUMER DOES NOT DEVOTE A GREAT DEAL OF CARE  
5 IN CONSIDERATION OF PURCHASING.

6           MR. CANNON?

7           **MR. CANNON:** YOUR HONOR, THAT WAS A VERY SPECULATIVE  
8 ARGUMENT OF COUNSEL. THERE IS NO EVIDENCE. HE IS ASSUMING  
9 WHAT CONSUMERS DO. IN FACT, IF YOU LOOK AT THE -- IF YOU LOOK  
10 AT THIS, IT IS THE OPPOSITE. CONSUMERS ARE HYPERAWARE OF WHAT  
11 THEY ARE BUYING WHEN THEY ARE BUYING CELL PHONES AND SIGNING UP  
12 FOR COVERAGE. REMEMBER, YOU'RE BUYING A DEVICE AND VERY OFTEN  
13 SIGNING UP FOR A YEAR OR TWO OF COVERAGE.

14           PEOPLE DON'T GO IN AND ACCIDENTALLY BUY A TREO AS  
15 OPPOSED TO BLACKBERRY OR ACCIDENTALLY BUY A SAMSUNG VERSUS  
16 MOTOROLA. PEOPLE ARE VERY AWARE OF WHAT THEY'RE BUYING. THESE  
17 ARE NOT CHEAP GIFTS. THE LOWEST PRICE TREO IS 199. THEY GO UP  
18 TO OVER \$500 EACH. THEY ARE EXPENSIVE. THEY ARE VERY  
19 TECHNOLOGICALLY, YOU KNOW, ORIENTED AT THE TECH-SAVVY PEOPLE.

20           YOU HAVE EVIDENCE IN THE RECORD THAT HELIO IS GOING  
21 AFTER TECH-SAVVY PEOPLE. THESE ARE SOPHISTICATED CONSUMERS.  
22 IT'S NOT LIKE BUYING A NONGADGET. THESE ARE TECHNICAL DEVICES.  
23 TO SAY THAT CONSUMERS ARE HECTIC AND WILL MAKE ACCIDENTS WHEN  
24 THEY ARE BUYING, I THINK IS JUST THE WRONG APPROACH.

25           IF YOU ACTUALLY LOOK AT THE ADS, THERE ARE LOTS OF

1 BRANDS ON THESE ADS. CONSUMERS KNOW WHAT THEY ARE DOING. ON  
2 THE HELIO AD, THE SAMSUNG BRAND IS RIGHT ON THE PHONE. SAMSUNG  
3 HEAVILY ADVERTISES ITS PHONES. CONSUMERS ARE AWARE OF THE  
4 BRANDS ON CELL PHONES. THEY ARE AWARE OF THE SERVICES. IT'S A  
5 DECISION THAT THEY CAREFULLY MAKE.

6 THESE ARE NOT CHEAP PRODUCTS. THESE ARE EXPENSIVE  
7 INDIVIDUAL ITEMS. YOU DON'T BUY THEM EVERY WEEK. YOU USUALLY  
8 HAVE ONE, MAYBE TWO. IT'S A SIGNIFICANT PURCHASE FOR A  
9 CONSUMER. AND THE PEOPLE WHO ARE BUYING THESE ARE TECH-SAVVY  
10 PEOPLE. THERE IS EVIDENCE IN THE RECORD OF THAT.

11 **MR. TROCK:** WE ARE SAYING IT'S THE HOLIDAY SEASON  
12 WHICH IS CAUSING THE PROBLEM. THEY ARE LAUNCHING IN THE MIDDLE  
13 OF THE HOLIDAY SEASON WHEN CONSUMERS HAVE A LARGE AMOUNT OF  
14 GIFT BUYING OBLIGATIONS TO FULFILL, THE STORES ARE CROWDED --

15 **THE COURT:** PEOPLE DON'T USUALLY IMPULSE -- PEOPLE  
16 DON'T GENERALLY IMPULSE BUY SOMETHING THAT COSTS ABOUT \$200.  
17 THAT'S SOMETHING THAT IS NOT INEXPENSIVE.

18 **MR. TROCK:** I DON'T DISAGREE WITH THAT, YOUR HONOR,  
19 THAT'S TRUE. BUT WHAT WE ARE SAYING HERE IN THIS CASE IS THAT  
20 THE DEGREE OF CARE THAT A CONSUMER WOULD NORMALLY EXHIBIT IS  
21 REDUCED BECAUSE IT IS BEING ADVERTISED IN THE MIDDLE OF THE  
22 HOLIDAY BUYING SEASON. CONSUMERS ARE NOT EXERCISING THE DEGREE  
23 OF CARE IN CHOICES AND AWARENESS OF WHAT'S GOING ON DURING THIS  
24 SEASON THAT THEY NORMALLY WOULD IN JUNE OR JULY.

25 **THE COURT:** I UNDERSTAND THE POSITION. I DON'T



1 EMBRACE IT. I THINK THE DEFENDANTS ARE CORRECT. I DON'T THINK  
2 THIS IS ONE OF THE CASES, IN MY VIEW, THE PRODUCTS ARE SO  
3 INEXPENSIVE AS TO QUALIFY AS IMPULSE PURCHASES. I THINK PEOPLE  
4 WHO PAY THAT AMOUNT OF MONEY FOR THESE PRODUCTS OR ANY  
5 PRODUCTS, EXERCISE A CERTAIN DEGREE OF CARE REGARDLESS OF WHEN  
6 THEY ARE BEING SOLD.

7 SO THIS FACTOR WEIGHS AGAINST THE FINDING OF  
8 LIKELIHOOD OF CONFUSION.

9 SO, THE NEXT ONE IS THE LIKELIHOOD OF EXPANSION ON  
10 THE PRODUCT LINES, WHICH I GUESS IS NOT RELEVANT HERE SINCE IT  
11 DOESN'T WEIGH IN EITHER PARTIES' FAVOR SINCE THE PARTIES SELL  
12 DIRECTLY COMPETING PRODUCTS. THAT IS WHAT I AM CONCLUDING.

13 SO, SINCE I HAVE CONCLUDED THE PARTIES' PRODUCTS ARE  
14 CLOSE PROXIMITY IN THE MARKET, THIS FACTOR IS NOT RELEVANT.

15 EIGHT IS KIND OF NEUTRAL.

16 SO WE HAVE THREE AND THREE, AND THEN STRENGTH OF THE  
17 MARK I HAVEN'T -- JUST A SECOND.

18 (PAUSE IN THE PROCEEDINGS.)

19 **THE COURT:** LET'S MOVE ON TO THE IRREPARABLE HARM  
20 BECAUSE OBVIOUSLY, RIGHT NOW, AS I SAID, THIS IS A CLOSE CASE  
21 AND I AM STILL -- I HAVEN'T REACHED THE POINT WHERE I CAN FIND  
22 A LIKELIHOOD OF CONFUSION THAT WOULD TRIGGER THE REBUTTABLE  
23 PRESUMPTION.

24 LET ME ASK YOU, ONE OF THE -- IN TERMS OF DELAY,  
25 THERE IS AUTHORITY THAT SUPPORTS THE -- A FINDING THAT WHEN THE

1 CEASE AND DESIST LETTERS ARE SENT, THAT THAT WOULD ARGUE  
2 AGAINST THE DELAY IN THE CONTEXT OF IRREPARABLE HARM, BUT IN  
3 THIS CASE, DEFENDANT'S ARGUMENT IS THAT THERE WAS NO CEASE AND  
4 DESIST LETTER SENT, THERE WAS NO EFFORT ON THE PART OF THE  
5 PLAINTIFFS TO COMMUNICATE DIRECTLY WITH PALM TO TRY TO TAKE  
6 CHARGE OF OR RESOLVE THIS MATTER SOONER THAN LATER. THERE WAS  
7 NO COMMUNICATION AT ALL BEFORE THIS LAWSUIT WAS FILED.

8 AND SO, I KNOW I ASKED THE QUESTION BEFORE, I DON'T  
9 REMEMBER WHAT YOUR ANSWER WAS, BUT WHY IS IT THAT YOU DIDN'T  
10 SEND A CEASE AND DESIST LETTER AS SOON AS YOU BECAME AWARE OF  
11 THE PROBLEM TO SEE IF YOU WERE ABLE TO EVEN AVOID THE TIME  
12 INHERENT IN THIS PROCESS?

13 **MR. TROCK:** BECAUSE THE CEASE AND DESIST LETTER  
14 WOULD DO ABSOLUTELY NO GOOD IN THE REAL MARKETPLACE. THEIR  
15 CAMPAIGN WAS ALREADY GONE. IT WAS ALREADY OUT THERE. THEY HAD  
16 SPENT THE MONEY. THE BILLBOARDS WERE UP. THE MAGAZINE ADS  
17 WERE PLACED --

18 **THE COURT:** HOW DO YOU KNOW IT WOULDN'T HAVE DONE  
19 ANY GOOD?

20 **MR. TROCK:** COMPANIES NEVER PULL THEIR ENTIRE  
21 ADVERTISING CAMPAIGN OUT OF THE MARKETPLACE ON THE BASIS OF A  
22 LETTER FROM A LAWYER. IT JUST DOESN'T HAPPEN. AND WE JUST  
23 FOUND OUT ABOUT THIS A WEEK AGO.

24 **THE COURT:** WHAT PROBLEM WOULD IT HAVE DONE FOR YOU  
25 TO AT LEAST TRY?

1 MR. TROCK: TO TRY? IT WOULD HAVE DONE NO GOOD.

2 THE COURT: YOU FOUND OUT ABOUT --

3 MR. TROCK: IT WAS A FUTILE EFFORT.

4 THE COURT: YOU FOUND OUT ABOUT IT A WEEK AGO.

5 MR. TROCK: THAT'S CORRECT.

6 THE COURT: WHAT DATE?

7 MR. TROCK: I BELIEVE IT WAS AFTER THE PUBLICATION  
8 OF THIS BUSINESS WEEK ARTICLE ON THE 12TH OF DECEMBER.

9 THE COURT: SO THE 12TH OF DECEMBER YOU FOUND OUT  
10 ABOUT THIS?

11 MR. TROCK: THAT'S CORRECT.

12 THE COURT: AND ON THE -- WHAT DAY IN DECEMBER DID  
13 YOU FILE THIS?

14 MR. TROCK: LAST THURSDAY I FOUND ABOUT IT  
15 PERSONALLY, AND I BELIEVE IT WAS FILED ON MONDAY.

16 THE COURT: WHAT'S THE DATE ON MONDAY?

17 MR. CANNON: TUESDAY IS THE 19TH.

18 MR. TROCK: THE 19TH?

19 THE COURT: THE 19TH.

20 YOU FOUND OUT ABOUT IT ON THE 12TH, YOU FILED THIS  
21 ON THE 19TH, YOU DIDN'T -- I STILL DON'T UNDERSTAND WHY YOU  
22 COULDN'T HAVE SENT A CEASE -- FRANKLY, I HAVE TO SAY IN THE 15  
23 YEARS PLUS I HAVE BEEN HERE, I HAVE NEVER HAD A CASE, AT LEAST  
24 IN MY COURT, WHERE A CEASE AND -- AT LEAST ONE -- I MEAN, MOST  
25 OF THE TIME YOU HAVE LOTS OF LETTERS AND LOTS OF ANGRY

1 COMMUNICATIONS BACK AND FORTH, AND FINALLY THEY END UP FILING  
2 SUIT OUT OF EXASPERATION.

3 BUT THIS IS THE FIRST CASE, FRANKLY, THAT I HAVE  
4 EVER HAD THAT THERE HAS BEEN NO ATTEMPT AT ALL TO AVOID THE  
5 LITIGATION PROCESS, AND JUST KIND OF WALK INTO COURT.

6 SO I AM JUST INTERESTED IN KNOWING WHY, PARTICULARLY  
7 GIVEN THE FACT THAT YOU FOUND OUT ABOUT IT DECEMBER 12TH YOU  
8 DIDN'T FILE THIS TRO UNTIL THE 19TH, AND THERE WAS SEVEN DAYS  
9 IN BETWEEN. SOMETHING COULD HAVE HAPPENED IF FOR NOTHING MORE  
10 THAN A TELEPHONE CALL SAYING, YOU KNOW WHAT? THIS IS A PROBLEM  
11 FOR US. IS THERE SOMETHING YOU CAN DO; OTHERWISE SEVEN DAYS  
12 FROM NOW WE ARE GOING TO FILE A LAWSUIT.

13 **MR. TROCK:** WE HAVE -- HELIO HAS NEVER FILED ANOTHER  
14 LAWSUIT BEFORE. THIS IS THE FIRST TIME THEY HAVE DONE THIS IN  
15 THE TRADEMARK CONTEXT. THIS IS NOT WHAT WE WANT TO DO.

16 **THE COURT:** RIGHT. WHICH IS WHY I WANT YOU TO  
17 ANSWER THE QUESTION I JUST ASKED YOU. WHY WOULDN'T YOU PICK UP  
18 THE TELEPHONE AND SAY, LOOK, THIS IS A PROBLEM. WE'VE NEVER  
19 FILED A LAWSUIT BEFORE. WE DON'T WANT TO FILE THIS LAWSUIT  
20 NOW. WE REALLY WOULD LIKE YOU TO TAKE THIS OFF THE MARKET, BUT  
21 IF YOU DON'T, WE ARE GOING TO FILE A LAWSUIT.

22 **MR. TROCK:** AND THE ANSWER TO THEM WAS, WILL ALWAYS  
23 BE, WE ARE NOT TAKING THIS OFF THE MARKETPLACE.

24 **THE COURT:** HOW DO YOU KNOW?

25 **MR. TROCK:** BECAUSE I HAVE BEEN IN THIS SITUATION

1 BEFORE WITH A NATIONAL CORPORATION FINDING AN ADVERTISING  
2 CAMPAIGN THAT JUST CAME OUT BEFORE CHRISTMAS, SAME SCENARIO, WE  
3 CONTACTED THEM AND THEIR ANSWER WAS, YOU'VE GOT TO BE KIDDING.  
4 THIS IS THE CHRISTMAS BUYING SEASON, WE'RE NOT PULLING A SINGLE  
5 AD. YOU'VE GOT A PROBLEM WITH IT? GO TALK TO A JUDGE.

6 THAT'S EXACTLY WHAT THE RESPONSE WOULD HAVE BEEN.

7 **THE COURT:** THAT'S RIDICULOUS. THAT IS ABSOLUTELY  
8 RIDICULOUS TO ME. I FIND THAT ARGUMENT RIDICULOUS BECAUSE  
9 LITIGATION, LITIGATION, YOU KNOW, REALLY REQUIRES LAWYERS TO  
10 BEHAVE AS LAWYERS, REGARDLESS OF WHETHER OR NOT YOU THINK IT IS  
11 GOING TO BE PRODUCTIVE. I MEAN, THERE OFTENTIMES WHEN COURTS  
12 EXPECT YOU TO MEET AND CONFER AND TRY TO DO SOMETHING EVEN IF  
13 YOU HAVE NO CONFIDENCE IN YOUR ABILITY TO DO IT. WE EXPECT YOU  
14 TO UNDERSTAND THAT THESE ARE YOUR ISSUES AND YOUR PROBLEMS, AND  
15 IN THE FIRST INSTANCE, IT IS YOUR RESPONSIBILITY TO TRY TO  
16 RESOLVE YOUR PROBLEMS PRIOR TO SEEKING THE INTERVENTION OF THE  
17 COURT. THAT IS AN EXPECTATION WHETHER OR NOT YOU HAVE  
18 CONFIDENCE THAT YOU WILL BE ABLE TO DO IT BECAUSE ULTIMATELY  
19 YOU ALWAYS HAVE THIS AS A RESORT IF YOU CAN'T RESOLVE YOUR OWN  
20 PROBLEMS, THE COURT IS OBLIGATED TO RESOLVE THEM.

21 YOU OBVIOUSLY WAITED A WEEK --

22 **MR. TROCK:** WE DIDN'T WAIT. WE WERE --

23 **THE COURT:** YOU MUST HAVE IF YOU LEARNED ON THE 12TH  
24 AND YOU FILED THIS ON THE 19TH, BETWEEN THE 12TH AND 19TH THERE  
25 IS SEVEN DAYS.

1           **MR. TROCK:** IT DOES TAKE TIME TO PREPARE THE  
2 MATERIALS FOR THE COURT.

3           **THE COURT:** AND IT WOULD HAVE TAKEN LESS TIME TO  
4 MAKE A TELEPHONE CALL AND PROBABLY EVEN LESS TIME THAN THAT TO  
5 DRAFT A LETTER.

6           **MR. TROCK:** YOU ARE CORRECT, YOUR HONOR, AND IN  
7 HINDSIGHT MAYBE WE SHOULD HAVE DONE THAT. BUT THE REALITY IS  
8 WE DIDN'T. NOW THEY KNOW ABOUT THE DISPUTE. ARE THEY WILLING  
9 TO PULL THEIR ADVERTISING CAMPAIGN NOW? ARE THEY WILLING TO  
10 TAKE THE ADS OFF AND REMOVE THE SLOGAN NOW? I THINK THEY HAVE  
11 TOLD US THAT THEIR ANSWER IS NO.

12           **THE COURT:** THAT STILL DOES NOT JUSTIFY YOUR  
13 POSITION JUST BECAUSE AT THIS POINT YOU CAN LOOK BACK AND SAY,  
14 WELL, THEY WOULDN'T HAVE DONE IT THEN BECAUSE THEY ARE NOT  
15 DOING IT NOW. BECAUSE RIGHT NOW WHAT THEY'RE DOING IS SAYING  
16 YOU DON'T HAVE A BASIS FOR A TRO AND THE REASON YOU DON'T IS  
17 BECAUSE THERE'S NO IRREPARABLE HARM. THE REASON WE CAN TELL  
18 YOU THERE'S NO IRREPARABLE HARM IS BECAUSE THEY DIDN'T VIEW IT  
19 AS IRREPARABLE HARM BECAUSE IF THEY HAD, THEY WOULDN'T HAVE SAT  
20 ON THEIR LAURELS AND WAITED ALL THIS TIME RATHER THAN TRYING TO  
21 TAKE CHARGE OF THE SITUATION IMMEDIATELY UPON LEARNING OF THE  
22 PROBLEM.

23           THE JUDGE, THEY SAT AND WAITED FOR SEVEN DAYS, SO  
24 WHY SHOULD YOU, THE JUDGE, DROP EVERYTHING YOU SHOULD BE DOING  
25 RIGHT NOW, WHICH IS WHAT WE HAVE DONE, AND TRY TO RESOLVE IN

1 TWO DAYS SOMETHING THAT THEY WAITED SEVEN DAYS BEFORE THEY EVEN  
2 BROUGHT TO YOUR ATTENTION AND NEVER TOLD US ABOUT.

3 **MR. TROCK:** YOUR HONOR, WE DID NOT WAIT SEVEN DAYS.  
4 SEVEN DAYS --

5 **THE COURT:** WHAT HAPPENED THEN IF YOU DIDN'T WAIT  
6 SEVEN DAYS? IF YOU LEARNED ON THE 12TH AND YOU FILED ON THE  
7 19TH, YOU DIDN'T WAIT SEVEN DAYS, SO WHAT DID YOU DO?

8 **MR. TROCK:** WE GATHERED THE EVIDENCE OF WHAT WE  
9 BELIEVE WAS THE CASE AGAINST PALM; THAT WE HAD TO DISCOVER WHAT  
10 WE HAVE DONE. WE HAD TO GATHER THE EXHIBITS YOU SEE HERE,  
11 PREPARE THE DECLARATIONS, MAKE A DECISION AS TO WHETHER OR NOT  
12 WE HAD A CLAIM AGAINST PALM.

13 WE KNEW WE WERE BEING HARMED IN THE MARKETPLACE.  
14 THAT'S WHY WE ARE HERE SO QUICKLY.

15 **THE COURT:** THAT'S NOT QUICK IF IT IS REALLY THAT  
16 URGENT. AND, ACTUALLY, THROUGH THIS GATHERING PROCESS, IT  
17 WOULD HAVE TAKEN YOU LESS TIME TO MAKE A TELEPHONE CALL.

18 **MR. TROCK:** REALITY IS, YOUR HONOR, WE DID NOT.  
19 PERHAPS IN HINDSIGHT WE SHOULD HAVE.

20 **THE COURT:** I DON'T KNOW WHAT PERHAPS.

21 LET ME -- MR. CANNON? IN TERMS OF THIS  
22 PARTICULAR -- I MEAN, THE AUTHORITY THAT TALKS ABOUT CEASE AND  
23 DESIST, THEY MAKE IT CLEAR THAT WHEN THOSE LETTERS ARE SENT  
24 THAT OBVIOUSLY DELAY IS NOT A BIG ISSUE, BUT WHY -- MR. TROCK,  
25 I DON'T KNOW. I AM LISTENING TO WHAT YOU ARE SAYING, MAYBE I

1 AM NOT HEARING YOU.

2 I DON'T KNOW WHAT THE ANSWER IS. WHY SHOULDN'T I  
3 CONSIDER THAT DELAY IN NOT SENDING A CEASE AND DESIST LETTER  
4 AND EVEN THE SEVEN-DAY DELAY IN FILING FOR THIS TRO IN THE  
5 CONTEXT OF WHETHER OR NOT I SHOULD HAVE A FINDING THAT THERE IS  
6 IRREPARABLE HARM.

7 **MR. TROCK:** BECAUSE I BELIEVE THE CASE LAW INDICATES  
8 THAT TIME PERIODS LAPSING OF 30 TO 60 DAYS DO NOT INDICATE A  
9 SITUATION WHERE SOMEBODY IS WAITING TOO LONG TO ADDRESS THE  
10 COURT ON IRREPARABLE HARM.

11 **THE COURT:** I WOULDN'T AGREE WITH THAT AT ALL. IT  
12 CERTAINLY HAS TO BE FACT SPECIFIC BECAUSE I CERTAINLY WOULD NOT  
13 AGREE THAT SOMEBODY WAITING 60 DAYS OR MAYBE EVEN 30 DAYS,  
14 DEPENDING ON WHAT THE EMERGENCY IS, WOULD NOT BE A DELAY THAT  
15 WOULD SUGGEST THAT THERE IS NOT IRREPARABLE HARM.

16 **MR. TROCK:** WE CAN PROVIDE THOSE CASES TO YOUR  
17 HONOR.

18 **THE COURT:** IT WOULD HAVE TO BE FACT SPECIFIC.

19 **MR. TROCK:** THE POINT IS, WE GOT HERE SO THAT WE  
20 COULD PUT THE CASE TOGETHER FOR YOU TO CONSIDER AS QUICKLY AS  
21 WE POSSIBLY COULD, BECAUSE WE ARE BEING IRREPARABLY HARMED IN  
22 THE MARKETPLACE. WE ARE A BRAND NEW COMPANY, WE'RE SMALL,  
23 RELATIVELY UNKNOWN, ONLY TWO YEARS OLD. WE ARE STRUGGLING TO  
24 BE PROFITABLE HERE.

25 THIS SLOGAN IS THE HEART AND SOUL OF OUR COMPANY.



1 IT'S THE IDENTITY OF OUR IMAGE. WE SPENT \$30 MILLION CREATING  
2 CONSUMER GOODWILL. AND PALM IS A MUCH LARGER, OLDER, BETTER  
3 FINANCED COMPANY. THE REVENUES THIS LAST YEAR WERE  
4 \$1.6 BILLION. THEY HAVE VERY STRONG BRAND IDENTITY. THEY CAN  
5 CRUSH US IN THIS MARKETPLACE. THIS IS A CRITICAL BUYING SEASON  
6 FOR US. WE ARE LOOKING TO INCREASE OUR SUBSCRIBER BASE BY  
7 30 PERCENT THIS BUYING SEASON.

8 **THE COURT:** AT THIS POINT, I HAVE NOT -- I HAVE NOT  
9 MADE FINDINGS ON THE FACTORS THAT WOULD TRIGGER THE PRESUMPTION  
10 SINCE I HAVE NOT MADE A FINDING WITH RESPECT ONE WAY OR THE  
11 OTHER WITH RESPECT TO LACK OF SUCCESS ON THE MERITS, AND RIGHT  
12 NOW, YOU GUYS ARE EVENLY BALANCED. SO, JUST LOOKING AT THE  
13 BALANCE OF HARDSHIPS -- SO LET'S DISCUSS THE BALANCE.

14 **MR. TROCK:** WE BELIEVE HERE THAT THE HARDSHIP FOR  
15 THEM IS MINIMAL BECAUSE WE ARE SEEKING ONLY VERY NARROWLY  
16 TAILORED RELIEF.

17 **THE COURT:** YOU SAY THAT, YOU SAY NARROWLY TAILORED  
18 RELIEF, BUT IF YOU'RE NARROWLY TAILORED RELIEF DOESN'T  
19 REQUIRE -- YOU SAY TAKE DOWN THE ADS, BUT EVERY PLACE THEY HAVE  
20 AN AD, ANYWHERE THAT HAS THIS SLOGAN, THEY HAVE TO EITHER IN  
21 SOME WAY PUT SOMETHING OVER IT OR GET RID OF IT. SO HOW IS  
22 THAT NARROWLY TAILORED?

23 **MR. TROCK:** BECAUSE IT ONLY GIVES US THE RELIEF THAT  
24 WE NEED. WE ARE NOT ASKING THEM TO PULL THEIR ADVERTISEMENTS.  
25 WE ARE NOT ASKING THEM TO TAKE THEM DOWN. WE ARE NOT ASKING

1 THEM TO RECALL THEM. THOSE ARE MEASURES THAT WE ARE NOT  
2 REQUESTING.

3 FOR EXAMPLE, THE ELECTRONIC ADVERTISEMENTS THAT THEY  
4 HAVE ON THE INTERNET. A FEW PHONE CALLS, A FEW KEY STROKES,  
5 THAT'S GOING TO COME DOWN. THAT'S NOT GOING TO BE A HUGE  
6 EXPENSE.

7 **THE COURT:** YOU ARE ASKING THEM TO TAKE IT DOWN  
8 THEN.

9 **MR. TROCK:** NO, NO. THE SLOGAN. THEY CAN GO RIGHT  
10 ON TO THOSE WEBSITES, AND SIMPLY GO INTO THE COMMANDS THAT ARE  
11 THERE FOR DISPLAYING THAT SLOGAN ON THE WEBSITE AND JUST KNOCK  
12 THAT LINE OF TEXT OUT, AND IT'S GONE.

13 **THE COURT:** I AM LOOKING AT THE BALANCE OF THE  
14 HARDSHIPS, FROM YOUR PERSPECTIVE, HOW -- WHAT DOES THAT DO?  
15 YOU'RE SAYING THAT'S NARROWLY TAILORED. YOU WANT THEM TO GO  
16 THROUGH THE INTERNET AND THROUGH ALL OF THEIR ADS WHEREVER THEY  
17 ARE LOCATED IN THE PUBLICATIONS, MAGAZINES, BILLBOARDS, BUSES,  
18 TRAINS, AND WHEREVER ELSE --

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

20 **THE COURT:** -- AND GO FIND THEM AND PUT SOMETHING  
21 OVER --

22 **MR. TROCK:** MASKING TAPE, PAINT, WHATEVER IS  
23 NECESSARY.

24 **THE COURT:** HOW DOES THAT EFFECT THE BALANCE OF  
25 HARDSHIPS?

1           **MR. TROCK:** BECAUSE IT'S AN INCREMENTAL COST FOR  
2 THEM RIGHT NOW.

3           **THE COURT:** WHAT DO YOU MEAN "INCREMENTAL COST"?

4           **MR. TROCK:** IN OTHER WORDS, THEY ARE NOT HARMED BY  
5 NOT BEING ABLE TO SELL THEIR DEVICES OR THEIR PHONES OR BEING  
6 ABLE TO ADVERTISE THEM.

7                       SO WE ARE NOT ASKING TO HARM THEM ECONOMICALLY HERE.  
8 THERE WILL BE A COST ASSOCIATED WITH THIS. WE BELIEVE IT WILL  
9 BE A SMALL INCREMENTAL COST COMPARED TO THE \$25 MILLION THEY  
10 ARE SPENDING ON THIS ADVERTISING CAMPAIGN. IT WILL BE MINOR  
11 COMPARED TO THAT.

12                      BUT, YES, THERE WILL BE SOME EFFORT REQUIRED. THEY  
13 WILL HAVE TO MAKE SOME PHONE CALLS. AND THEIR MEDIA BUYERS  
14 WILL HAVE TO CONTACT THE MEDIA OUTLETS AND COME UP WITH A  
15 REMEDY IN WHICH THEY CAN COVER OVER THE SLOGAN. THAT'S GOING  
16 TO BE A VERY TINY COST COMPARED TO THE SIZE OF THIS CAMPAIGN.  
17 SO THEY CONTINUE TO BENEFIT FROM THEIR ADS. THE ADS ARE NOT  
18 TAKEN DOWN. THE SPACE IS NOT REMOVED. NONE OF THOSE THINGS  
19 OCCUR. THE ONLY THING THAT HAPPENS IS THE CONSUMER CAN NO  
20 LONGER SEE THAT SLOGAN. THAT'S IT.

21           **THE COURT:** SO HOW IS THAT BALANCED AGAINST WHAT  
22 WITH RESPECT TO YOU?

23           **MR. TROCK:** WE ARE LOOKING AT THE COMPLETE LOSS OF  
24 THE HEART AND SOUL OF OUR COMPANY HERE. WE'VE JUST SPENT  
25 \$30 MILLION TRYING TO ACQUIRE CONSUMER GOODWILL, AN INTANGIBLE

1 ASSET THAT ONCE IT'S GONE, WE CAN'T EVER GET BACK. NO AMOUNT  
2 OF MONEY IS GOING TO GET THAT BACK FOR US.

3 THAT'S WHY THAT KIND OF HARM THAT'S GOING TO OCCUR  
4 HERE IS GOING TO BE IRREPARABLE TO US. WE NEED TO HAVE THAT  
5 CONSUMER GOODWILL IN ORDER TO SURVIVE IN THIS MARKETPLACE. WE  
6 ARE STRUGGLING TO BECOME PROFITABLE. THEIR COMPANY IS SO  
7 LARGE, SO WELL-KNOWN, SO MUCH MORE BETTER FINANCED THAN WE ARE,  
8 THEY WILL CRUSH US IN THE MARKETPLACE IF THEY'RE ALLOWED TO  
9 CONTINUE TO DO THIS.

10 THE COURT: THEIR POSITION IS THAT YOUR CLAIM OF  
11 IRREPARABLE INJURY IS SPECULATIVE.

12 MR. TROCK: WHEN THERE'S A LIKELIHOOD OF CONFUSION  
13 IT'S NOT SPECULATIVE, IT'S PRESUMED.

14 THE COURT: I HAVE NOT FOUND THAT. I HAVE NOT FOUND  
15 THAT.

16 MR. TROCK: I UNDERSTAND.

17 THE COURT: SO THERE IS NO PRESUMPTION.

18 MR. TROCK: I UNDERSTAND THAT.

19 THE COURT: THAT'S WHY I ASKED YOU TO DISCUSS THE  
20 RELATIVE BALANCE OF HARDSHIP --

21 MR. TROCK: I UNDERSTAND THAT. BECAUSE OF THE  
22 SIZE --

23 THE COURT: IF YOU UNDERSTAND IT, THEN JUST DO IT.

24 MR. TROCK: OKAY.

25 THE SIZE OF THEIR COMPANY, THE QUANTITY OF

1 ADVERTISEMENTS THEY HAVE OUT THERE, THE USE OF THAT SLOGAN IS  
2 GOING TO TAKE CONSUMERS AWAY FROM US AND BRING THEM INTO THEIR  
3 STORES, AND THEY ARE GOING TO PURCHASE THEIR SERVICES AND THEIR  
4 DEVICES INSTEAD OF OURS. THAT'S GOING TO BE THE HARM. WE ARE  
5 GOING TO LOSE THAT. WE'RE GOING TO LOSE OUR CONSUMER GOODWILL  
6 BECAUSE WE ARE TRYING TO --

7 **THE COURT:** DO YOU KNOW THAT YOU HAVE CONSUMER  
8 GOODWILL?

9 **MR. TROCK:** YES. WE DID A SURVEY IN OCTOBER THAT  
10 INDICATED 60 PERCENT OF THOSE WHO WE TALKED TO COULD IDENTIFY  
11 OUR SLOGAN AS US, AND THEY COULD GIVE US BACK WHAT THE MESSAGE  
12 MEANT TO THEM.

13 **THE COURT:** THAT'S WHAT YOU CONSIDER GOODWILL?

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

15 **THE COURT:** RECOGNITION?

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

17 THAT'S WHAT WE ARE GOING TO LOSE HERE BECAUSE THEY  
18 HAVE CREATED THE CONFUSION IN THE MARKETPLACE, THIS ASSOCIATION  
19 BETWEEN THEM AND US. WE ARE GOING TO LOSE THOSE CONSUMERS.  
20 WE'RE GOING TO LOSE THAT GOODWILL THAT WE ARE TRYING TO GET  
21 DEVELOPED. WE'RE GOING TO LOSE THAT MOMENTUM IN THE MOST  
22 CRITICAL PART OF THE SEASON FOR US.

23 WE WANTED TO INCREASE OUR SUBSCRIBER BASE BY  
24 30 PERCENT THIS BUYING SEASON. IT IS NOT GOING TO HAPPEN  
25 BECAUSE OF THIS.

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

2           **MR. CANNON,** BALANCE OF HARDSHIPS.

3           **MR. CANNON:** YOUR HONOR, THE REMEDY THAT THEY SEEK  
4 IS DEVASTATING --

5           **THE COURT:** IRREPARABLE HARM, TOO, I GUESS. HE  
6 DISCUSSED BOTH.

7           **MR. CANNON:** COMBINED BOTH. WHICH WOULD YOU LIKE --

8           **THE COURT:** EITHER ONE. IT DOESN'T MATTER.

9           **MR. CANNON:** THE IRREPARABLE HARM YOU HAVE TO LOOK  
10 AT THE BALANCE HERE. AND THE BALANCE TO US TIPS IN OUR FAVOR  
11 SIGNIFICANTLY. EVERY DAY THEY DELAYED, EVERY DAY THEY DIDN'T  
12 PICK UP THE PHONE, IT GOT CLOSER AND CLOSER TO CHRISTMAS DAY,  
13 THE ADS WENT OUT THROUGHOUT THE COUNTRY, THERE IS SOMETHING  
14 LIKE 20,000 --

15           **THE COURT:** THE ADS AREN'T OUT ALREADY.

16           **MR. CANNON:** THEY FILTERED OUT. IT TAKES TIME TO  
17 PUT THEM UP. THEY'RE OUT THERE NOW. EVERY DAY -- THEY WERE  
18 SPREAD OUT COMING UP TO CHRISTMAS DAY. THERE'S SOMETHING LIKE  
19 20,000 ADS OUT THERE. HE'S ASKING --

20           **THE COURT:** HE DIDN'T BECOME AWARE OF IT UNTIL  
21 DECEMBER 12TH, WHICH IS AFTER YOU ALL HAD --

22           **MR. CANNON:** THAT'S WHEN -- IT WAS LAUNCHED  
23 NOVEMBER 27TH. THE PRESS RELEASE WAS DECEMBER 12TH. BUT IT  
24 TAKES PHYSICAL TIME TO PAINT POSTERS ON BUILDINGS, PUT THEM ON  
25 THE TOP OF TAXI CABS, PUT THEM ON THE SIDES OF BUSES.

1           **THE COURT:** IT WAS STILL GOING ON AT THE TIME.

2           **MR. CANNON:** IT WAS STILL GOING ON AT THE TIME AND  
3 IT CONTINUED TO GO ON BECAUSE WHAT WE DO IS WE HIRE COMPANIES  
4 TO HELP US, MEDIA COMPANIES TO PUT THIS UP, SO WE DON'T HAVE  
5 CONTROL OVER THEM. SO THAT FILTERED OUT INTO THE MARKET.  
6 EVERY DAY MORE AND MORE FILTERED OUT INTO THE MARKET.

7           NOW, ON THE EVE OF CHRISTMAS WITH LESS THAN 24  
8 HOURS' NOTICE, THEY WANT US TO SOMEHOW GET MASKING TAPE AND  
9 PAINT AND GO UP ON THE SIDES OF BUILDINGS IN NEW YORK CITY TO  
10 PAINT OUT A LINE, IT IS JUST, IT IS AN IMPOSSIBLE TASK. AND IT  
11 WOULD BE --

12           **THE COURT:** HE SAID IT WOULD ONLY BE TAILORED TO  
13 ADDRESS THEIR CONCERN, YET MINIMIZE YOUR PREJUDICE, I GUESS.

14           **MR. CANNON:** I JUST DON'T SEE HOW THAT IS POSSIBLE.  
15 THEY ARE ASKING FOR A PHYSICAL -- THEY'RE ASKING US TO GO OUT  
16 THERE TO 20,000 KIOSKS, BUILDINGS, AND CABS, FIND THE CABS AND  
17 THEN SOMEHOW REMOVE A LINE.

18           AND, YOUR HONOR, THAT IS A TREMENDOUS BURDEN THAT I  
19 THINK WILL ALMOST BE IMPOSSIBLE TO COMPLY WITH IN ANY  
20 REASONABLE AMOUNT OF TIME.

21           I THINK THE OTHER KEY ISSUE IS THE OUTDOOR ADS END  
22 DECEMBER 31ST. THIS ENDS DECEMBER 31ST. SO THE BALANCE OF  
23 HARDSHIPS HERE IS THESE ADS ARE OUT THERE. THEY WAITED DAY  
24 AFTER DAY AFTER DAY. AS YOUR HONOR POINTED OUT, THIS IS A  
25 CRITICAL TIME PERIOD COMING UP TO CHRISTMAS --

1           **THE COURT:** I DIDN'T SAY THAT. HE DID.

2           **MR. CANNON:** OKAY. WELL, YOU SAID THAT -- WHEN HE  
3 SAID 30 DAYS IS A PRESUMPTION, HE SAID IT IS VERY FACT  
4 SPECIFIC, AND THE FACTS HERE ARE WE HAVE CHRISTMAS DAY COMING  
5 UP. EVERY DAY THE BALANCE TIPPED IN OUR FAVOR.

6           **THE COURT:** I DIDN'T SAY THAT. HE DID.

7           **MR. CANNON:** I AM ARGUING THAT. I AM NOT TRYING TO  
8 PUT WORDS IN YOUR HONOR'S MOUTH. THE IRREPARABLE HARM TO US IS  
9 VERY GREAT TO HAVE TO TRY TO FIX THIS CAMPAIGN --

10          **THE COURT:** I DID SAY IT WAS FACT SPECIFIC.

11          **MR. CANNON:** YES.

12          **THE COURT:** SO WHAT HAPPENS ON DECEMBER 31ST? YOU  
13 SAID ON DECEMBER 31ST YOUR OUTSIDE ADS COME DOWN. WHAT DOES  
14 THAT MEAN?

15          **MR. CANNON:** WHAT THAT MEANS IS WE LEASED THE SPACE  
16 UNTIL DECEMBER 31ST. SO THE WAY IT WORKS, WE DON'T OWN THE  
17 SPACE ON TOP OF THE TAXI CAB. WE DON'T OWN THE SPACE ON THE  
18 SIDE OF THE BUS. WE LEASE THAT. SO ON DECEMBER 31ST, THE  
19 OWNER OF THAT SPACE PUTS UP A NEW AD. SO OUR LEASE FOR THAT  
20 SPACE RUNS THROUGH DECEMBER 31ST.

21          **MR. TROCK:** SOMEHOW OR OTHER THEY WERE ABLE TO GET  
22 THE ADS UP --

23          **MR. CANNON:** AND, YOUR HONOR --

24          **MR. TROCK:** WE THINK --

25                   (SIMULTANEOUS COLLOQUY.)



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**THE REPORTER:** EXCUSE ME, COUNSEL.

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

CAN I JUST FINISH? WE HAVE NO INTENTION OF CONTINUING THIS PASSED DECEMBER 31ST.

**THE COURT:** "THIS" MEANING?

**MR. CANNON:** THE SLOGAN, THIS AD CAMPAIGN FOR THE TREQ 680. THIS IS TO A SPECIFIC NEW PRODUCT. SO WE HAVE NO INTENTION OF MOVING THIS CAMPAIGN PASSED DECEMBER 31ST.

THERE ARE SOME MAGAZINES THAT WILL COME OUT IN, I BELIEVE, JANUARY AND FEBRUARY AND MARCH, BUT THOSE PUBLICATIONS HAVE ALREADY BEEN BOOKED. THE COPY HAS ALREADY BEEN PROVIDED TO THE PUBLICATIONS.

**THE COURT:** OKAY.

**MR. CANNON:** AGAIN, YOUR HONOR, I WOULD COME BACK TO THE EQUITIES OF THIS, ON A TRO TO COME IN, AND THEY HAVE NOT PROVIDED EVIDENCE OF INJURY. WE HAVE SEEN NO EVIDENCE OF SALES, WE'VE SEEN NO EVIDENCE OF ANY DROP OF SALES WHEN OUR CAMPAIGN CAME OUT.

THEY NEED TO, I THINK, COME IN WITH SOME EVIDENCE THAT THEIR SALES WERE EFFECTED. WE HAVE ATTORNEY SPECULATION AND ARGUMENT ABOUT THEIR GOODWILL, BUT THERE IS REALLY NO EVIDENCE. THERE'S A HEARSAY STUDY THAT WAS REFERRED TO IN THEIR DECLARATION, WHICH WE HAVEN'T SEEN. BUT APART FROM THAT, THERE IS NO EVIDENCE OF INJURY.

**THE COURT:** OKAY.

1           **MR. TROCK:** THEN THE INJURY OCCURS, IT'S TOO LATE TO  
2 REPAIR. THAT'S THE REASON WHY WE ARE HERE.

3           AND THAT'S THE SERIOUS NATURE OF THIS PROBLEM  
4 BECAUSE CONSUMER GOODWILL IS AN INTANGIBLE ASSET THAT WE JUST  
5 SPENT \$30 MILLION TRYING TO CREATE. ONCE IT'S GONE --

6           **THE COURT:** HE HAS A HEARSAY OBJECTION TO YOUR  
7 CONSUMER SURVEY, WHICH YOU SAY THE COURT SHOULD CONSIDER, BUT  
8 EVEN ASSUMING THAT -- I AM SORRY, GO ON.

9           **MR. TROCK:** THE COURT CAN CONSIDER THE SURVEY. THE  
10 HEARSAY ISSUE IS NOT A PROBLEM FOR THE COURT.

11           BUT WAITING UNTIL AFTER CHRISTMAS, THE HARM IS DONE.  
12 IT'S OVER WITH. IT WILL NEVER BE REPAIRABLE. THAT'S THE WHOLE  
13 EMERGENCY NATURE OF THIS SITUATION. SO THAT'S WHY WE ARE HERE  
14 TO TRY TO FIND THIS SOLUTION, TO GET A SOLUTION IN THE  
15 MARKETPLACE SO THAT THE CONFUSION THAT'S OCCURRING OUT THERE  
16 GETS STOPPED AND GETS STOPPED NOW.

17           THIS CAMPAIGN IS NOT OVER FOR THEM. HE'S SAYING  
18 THAT SOME OF THIS STUFF IS GOING TO EXPIRE AT THE END OF THE  
19 MONTH, BUT THERE'S A LOT OF IT THAT'S NOT GOING TO EXPIRE.  
20 THEY'VE GOT BUYS IN MAGAZINES THAT ARE GOING TO CONTINUE ON IN  
21 JANUARY, FEBRUARY, MARCH AND SO ON.

22           THAT STUFF IS NOT STOPPING. THEY ARE GOING TO  
23 CONTINUE TO DO THAT UNLESS YOUR HONOR DIRECTS THEM TO REMOVE  
24 THE SLOGANS FROM THOSE ADVERTISEMENTS THAT ARE OUT THERE IN THE  
25 MARKETPLACE.

1 AND, YOUR HONOR, I DID WANT TO GIVE THE COURT THIS  
2 ONE CITATION ON THE ISSUE OF DELAY IN ISSUING A TEMPORARY  
3 RESTRAINING ORDER. THE CASE IS NOVA WINES VERSUS ALDERFELS  
4 WINERY. IT'S THE NORTHERN DISTRICT OF CALIFORNIA 2006. THE  
5 CITATION IS WESTLAW CITATION, 2006, WESTLAW 3498574, WHERE THE  
6 COURT FOUND THAT THERE WAS NO UNDUE DELAY WHERE THE PLAINTIFF  
7 SOUGHT A TEMPORARY RESTRAINING ORDER OVER THREE MONTHS AFTER  
8 THE DEFENDANT USED CONFUSINGLY SIMILAR MARK, AND OVER ONE MONTH  
9 AFTER THE PLAINTIFF ACTUALLY LEARNED OF THE USE.

10 **THE COURT:** YOU WERE READING KIND OF FAST. SAY THAT  
11 AGAIN?

12 WHO WAS THE JUDGE IN THE NORTHERN DISTRICT?

13 **MR. TROCK:** I DO NOT KNOW. I DO NOT HAVE THAT IN  
14 FRONT OF ME, YOUR HONOR.

15 **THE COURT:** OKAY.

16 **MR. TROCK:** BUT THE HOLDING OF THE CASE IS THAT  
17 THERE WAS NO UNDUE DELAY WHERE THE PLAINTIFF SOUGHT A TEMPORARY  
18 RESTRAINING ORDER OVER THREE MONTHS AFTER DEFENDANT USED A  
19 CONFUSINGLY SIMILAR MARK AND OVER ONE MONTH AFTER THE PLAINTIFF  
20 ACTUALLY LEARNED OF THE USE.

21 **THE COURT:** SO, WHAT WAS THE USE OF WHAT? WHAT WAS  
22 THE FACTS? WHAT WERE THE ISSUES? WHAT WAS THE CONTEXT?

23 **MR. TROCK:** THIS IS AN OPINION BY JUDGE PATEL,  
24 DECEMBER 4TH.

25 **THE COURT:** WHAT WAS THE FACTS?

1           **MR. TROCK:** I DON'T KNOW SPECIFICALLY, YOUR HONOR.

2           **THE COURT:** I MEAN, ISN'T THAT IMPORTANT? I MEAN,  
3 IF YOU ARE DEALING WITH SUPPOSEDLY SOMETHING THAT IS  
4 SUFFICIENTLY URGENT TO REQUEST A TRO, DOESN'T IT MATTER WHAT  
5 THE FACTS ARE?

6           I MEAN, THERE ARE CERTAIN THINGS THAT CERTAINLY LEND  
7 THEMSELVES TO MAYBE BEING URGENT IN THREE MONTHS AND THERE ARE  
8 SOME THINGS THAT IF YOU WAIT TWO DAYS IT'S CLEAR THAT YOU'RE  
9 NOT HANDLING IT AS AN URGENT MATTER.

10           YOU DON'T KNOW WHAT THE FACTS OF THE CASE ARE?

11           **MR. TROCK:** NOT SPECIFICALLY, YOUR HONOR.

12           **THE COURT:** NOT SPECIFICALLY, GENERALLY?

13           **MR. TROCK:** NOT GENERALLY EITHER.

14           **THE COURT:** WHAT VALUE ARE YOU -- YOU ARE GOING TO  
15 CITE TO ME A HOLDING OUT OF CONTEXT, WHAT AM I TO DO WITH THAT?  
16 I MEAN, I AM NOT GOING TO MAKE ANY ASSUMPTION. IF I KNEW WHAT  
17 THE FACTS ARE, I WOULD BE ABLE TO TELL WHETHER THE FACTS ARE  
18 SIMILAR TO THIS OR WHETHER THEY ARE DISSIMILAR TO THIS, AND  
19 THEN I COULD GIVE THAT HOLDING THE DEGREE OF --

20           **MR. TROCK:** I UNDERSTAND.

21           **THE COURT:** -- CONSIDERATION IT DESERVES.

22           **MR. TROCK:** THE ONLY THING I KNOW ABOUT THE CASE IS  
23 THAT JUDGE PATEL DECIDED THAT A PLAINTIFF WHO CAME IN 30 DAYS  
24 AFTER THEY HAD KNOWLEDGE OF THE DEFENDANT'S INFRINGING USE DID  
25 NOT THINK THAT THAT WAS UNDUE DELAY.

1           **THE COURT:** THAT GIVES ME NOTHING. ZERO.

2           **MR. TROCK:** MR. DAVIS APPARENTLY KNOWS THE SPECIFIC  
3           FACTS.

4           **THE COURT:** OKAY. THAT WILL BE HELPFUL. THANK YOU,  
5           MR. DAVIS.

6           **MR. DAVIS:** THANK YOU, YOUR HONOR.

7           THE FACTS IN THIS CASE WAS A CASE INVOLVING IMAGES  
8           AND LOGOS ON WINE BOTTLES. IT WAS A MARILYN MONROE IMAGE IN  
9           THIS SITUATION. THERE WAS NOTICE GIVEN TO THE OWNER, THE  
10          TRADEMARK HOLDER, AND THE TRADEMARK HOLDER --

11          **THE COURT:** NOTICE FROM THE PLAINTIFF?

12          **MR. DAVIS:** THE PLAINTIFF FOUND OUT, DISCOVERED THAT  
13          THERE WAS AN INFRINGING USE, A SIMILAR MARK ON WINE BOTTLES.  
14          DURING -- IT TOOK A MONTH-LONG PERIOD FOR THEM TO ACTUALLY FILE  
15          THEIR TEMPORARY RESTRAINING ORDER --

16          **THE COURT:** IN THE INTERIM, WERE THEY COMMUNICATING  
17          WITH THE INFRINGER TRYING TO SEE IF THEY COULD RESOLVE IT?

18          **MR. DAVIS:** THERE WAS NO DISCUSSION AS FAR AS CEASE  
19          AND DESIST LETTERS GO --

20          **THE COURT:** OR COMMUNICATION?

21          **MR. DAVIS:** THERE MAY HAVE BEEN COMMUNICATION. THE  
22          CASE IS, I THINK, UNCLEAR DIRECTLY ON THAT POINT, YOUR HONOR,  
23          BUT IT IS CLEAR THAT THERE WAS AN ENTIRE MONTH PERIOD BEFORE  
24          THEY ACTUALLY FILED THEIR TRO. AND, IN FACT, THERE WAS A  
25          THREE-MONTH DELAY FROM WHEN THE DEFENDANT'S USE BEGAN IN THAT

1 CASE.

2 **THE COURT:** A THREE-MONTH DELAY --

3 **MR. DAVIS:** FOR WHEN THE DEFENDANT'S FIRST USED --  
4 WITH THEIR FIRST INFRINGING USE AND THE FILING OF THE TRO.

5 **THE COURT:** THAT'S WHY I AM ASKING YOU A QUESTION  
6 BECAUSE IT IS NOT UNUSUAL FOR THERE TO BE A DELAY, BUT MY  
7 EXPERIENCE, AT LEAST IN THE CASES I HAVE HAD HERE, IS THAT  
8 SOMETIMES THERE IS A DELAY BECAUSE THE PARTIES ARE TRYING IN  
9 GOOD FAITH TO SEE IF THEY CAN AVOID FILING THE TRO. AND  
10 SOMETIMES THE COMMUNICATIONS ARE APPARENTLY SUCCESSFUL AND THEN  
11 THEY TURN TO BE OTHERWISE, WHICH MEANS THAT THE DELAY IS NOT  
12 NECESSARILY ATTRIBUTABLE TO THE PERSON WHO FILED THE SUIT  
13 BECAUSE THEY ARE TRYING TO RESOLVE IT SHORT OF THAT.

14 I DON'T KNOW IF THAT HAPPENED IN THIS CASE.

15 **MR. DAVIS:** RIGHT. THE BEST INDICATION IS ON PAGE 3  
16 OF THIS CASE. AND WHAT IT SAYS IS THAT THE PLAINTIFF'S  
17 RECEIVED NOTICE FROM AN ADVERTISEMENT, LIKE A PRESS RELEASE IN  
18 THIS CASE, AND THEN THEY FILED THE COMPLAINT. THAT IS ALL THAT  
19 IS NOTED IN THE FACTS OF THIS CASE.

20 **THE COURT:** WAIT. THAT MUST NOT HAVE HAPPENED  
21 BECAUSE YOU SAID THERE WAS A 30-DAY DELAY.

22 **MS. BAILEY-WELLS:**

23 **MR. DAVIS:** IT SAYS IN SEPTEMBER 2006, PLAINTIFF'S  
24 RECEIVED AN ANNOUNCEMENT THAT THE DEFENDANT'S WERE USING THE  
25 MARK. AND THEN 30 DAYS LATER IN NOVEMBER, THEY FILED A

1 COMPLAINT -- OR SEPTEMBER 29TH, EXCUSE ME, NOT NOVEMBER.  
2 BEGINNING OF SEPTEMBER THEY RECEIVED AN ANNOUNCEMENT,  
3 SEPTEMBER 29TH THEY FILED A COMPLAINT.

4 **THE COURT:** AND NOTHING HAPPENED IN BETWEEN?

5 **MR. DAVIS:** IT'S NOT INDICATED IN THE FACTS OF THIS  
6 CASE. I CAN'T REPRESENT ONE WAY OR THE OTHER BECAUSE THE CASE  
7 DOESN'T REPORT EITHER WAY.

8 **MR. TROCK:** YOUR HONOR, COULD I MAKE ONE LAST POINT  
9 ABOUT THE COMMENT MR. HANCOCK MADE, WHO IS THE  
10 REPRESENTATIVE -- MARKETING REPRESENTATIVE FOR PALM.

11 IF YOU RECALL THE ARTICLE IN WHICH HE WAS CONFRONTED  
12 WITH THE SIMILARITY OF PALM'S CAMPAIGN TO HELIO'S CAMPAIGN, HE  
13 RESPONDED TO THAT REPORTER'S QUESTIONS. MR. HANCOCK AT THAT  
14 POINT HAD ALREADY LAUNCHED THE CAMPAIGN. HE WAS THEN NOTIFIED  
15 BY THIS REPORTER OF THE SIMILARITY OF THE CAMPAIGN, SO  
16 MR. HANCOCK KNEW ABOUT IT.

17 WHAT WAS HIS RESPONSE? HIS RESPONSE WAS, WELL, I  
18 AGREE THAT THERE ARE SIMILARLY POSITIONED, BUT I THINK WE ARE  
19 IN DIFFERENT MARKETS, THEREFORE, IT IS NOT A PROBLEM.

20 SO, PALM HAS ALREADY DECIDED THAT IT'S NOT A  
21 PROBLEM.

22 AND SO, I UNDERSTAND, YOUR HONOR, IT'S, YOU KNOW, WE  
23 SHOULD HAVE SENT THEM A CEASE AND DESIST LETTER, BUT I THINK  
24 GIVEN THE FACT HERE THAT WE ARE HERE TODAY AND I THINK IT IS  
25 CLEAR THAT THEY DO NOT WANT TO PULL THEIR ADVERTISING CAMPAIGN,

1                   **MR. CANNON:** -- MAKE TWO POINTS?

2                   BRIEFLY, WITH RESPECT TO THE CASE THAT COUNSEL  
3 CITED, I HAD A CHANCE TO TAKE A LOOK AT IT, AND THERE'S  
4 ABSOLUTELY A CEASE AND DESIST LETTER SENT IN THAT CASE. IT IS  
5 CLEAR FROM THE FACTS OF THE CASE THAT THERE WERE, IN FACT, TWO  
6 COMMUNICATIONS BETWEEN THE PLAINTIFF AND DEFENDANT BEFORE THE  
7 COMPLAINT WAS FILED.

8                   **THE COURT:** OKAY.

9                   **MR. CANNON:** THAT'S THE FACTS OF THAT CASE.

10                  **THE COURT:** SO IT IS UNDERSTANDABLE THERE IS GOING  
11 TO BE A DELAY.

12                  **MR. DAVIS:** YOUR HONOR, IT'S A LITTLE BIT DIFFERENT  
13 THAN THAT, AND THAT'S WHAT I WAS TRYING TO CLARIFY.

14                  **THE COURT:** NO. YOU SAID YOU DIDN'T KNOW ONE WAY OR  
15 THE OTHER BECAUSE THE CASE DIDN'T SAY.

16                  **MR. DAVIS:** IT SAYS, AFTER THEY COMMUNICATED  
17 INITIALLY ABOUT IT, THERE WAS NOT A CEASE AND DESIST LETTER,  
18 THERE WAS A COMMENT TO ASKING THEM TO STOP AFTER THEY --

19                  **THE COURT:** I ASKED YOU IF THERE WERE COMMUNICATIONS  
20 DURING THE INTERIM. BECAUSE MY EXPERIENCE IS THAT SOMETIMES  
21 THERE IS A DELAY, BUT THE DELAY IS ATTRIBUTABLE TO THE PARTIES  
22 TRYING TO RESOLVE THE MATTER THEMSELVES. COMMUNICATING THROUGH  
23 CEASE AND DESIST LETTERS OR COMMUNICATING BY PHONE. THAT  
24 HAPPENS ALL THE TIME.

25                  WHEN THE COMMUNICATIONS BREAK DOWN OR FAIL, THEN A



1 PERSON HAVING TO FILE A LAWSUIT, IT IS NOT HELD AGAINST THEM IN  
2 TERMS OF THE DELAY BECAUSE THEY HAVE BEEN IN GOOD FAITH TRYING  
3 TO RESOLVE THE MATTER.

4 THAT WAS WHAT I ASKED YOU.

5 **MR. DAVIS:** RIGHT. YOUR HONOR, AFTER THEY HAD THESE  
6 COMMUNICATIONS, AFTER THE DEFENDANTS THEN WENT AND USED THE  
7 MARK AFTER THEY HAD SOME INITIAL COMMUNICATIONS BACK AND FORTH,  
8 DEFENDANTS WENT AND USED THE MARK. THESE COMMUNICATIONS  
9 OCCURRED DURING WHEN THERE WAS A MARKETING PLAN, BEFORE THE USE  
10 OCCURRED, USE OCCURS, AND THEN THERE IS NO COMMUNICATION FROM  
11 THE MOMENT OF USE BY THE DEFENDANTS UNTIL THE FILING OF THE  
12 LAWSUIT.

13 IN FACT, THE LINE SAYS, THIS WAS THE LAST --

14 **THE REPORTER:** EXCUSE ME, COUNSEL.

15 **THE COURT:** YOU'RE READING TOO FAST.

16 **MR. DAVIS:** I APOLOGIZE.

17 IT SAYS, THIS WAS THE LAST COMMUNICATION BETWEEN THE  
18 PARTIES BEFORE PLAINTIFF FILED ITS COMPLAINT ON SEPTEMBER 29TH.

19 NOW, THAT COMMUNICATION THAT IT'S REFERRING TO IS  
20 JULY 5TH COMMUNICATION. THE USE OCCURRED IN SEPTEMBER 2006  
21 PLAINTIFF RECEIVED AN ANNOUNCEMENT THAT THE DEFENDANTS IN THAT  
22 CASE HAD STARTED USING, AND THEN THERE WAS NO COMMUNICATION  
23 FROM THE MOMENT THE DEFENDANTS DECIDED TO ACTUALLY USE THE  
24 INFRINGING MARK UNTIL THE POINT THAT THEY FILED THE LAWSUIT.

25 **THE COURT:** THAT'S WHY I AM ALWAYS BACK TO THE FACTS

1 OF THE CASE REALLY DETERMINE WHETHER OR NOT THERE HAS BEEN A  
2 DELAY THAT SHOULD BE ATTRIBUTABLE TO THE -- EQUITABLY TO THE  
3 PERSON WHO FILED SUIT.

4 SINCE THERE HAD BEEN COMMUNICATIONS IN AN EFFORT TO  
5 TRY TO AVOID THIS, THE NEXT THING THAT COMES TO MIND, AS I  
6 LISTEN TO YOU, IN TERMS OF SCENARIO IS THE QUESTION WHETHER OR  
7 NOT THERE WAS AN INVESTIGATION THAT PRECEDED THE FILING OF THE  
8 TRO BECAUSE I'M -- I MEAN, IT'S NOT INFREQUENT THAT WHEN  
9 PARTIES ENGAGE IN COMMUNICATIONS IN AN ATTEMPT TO RESOLVE A  
10 PROBLEM, THAT THEY WANT TO MAKE SURE THAT SINCE THEY HAD THOSE  
11 DISCUSSIONS AND BEFORE THEY PURSUE ANY ACTIONS, THAT THEY  
12 CONFIRM THAT WHAT IS OCCURRING REALLY IS IN CONTRAVENTION TO  
13 WHAT THEY HAVE BEEN DISCUSSING. AND EVEN AN INVESTIGATION TO  
14 ENSURE GOOD FAITH BEFORE THEY FILE SUIT THAT THEY ARE CORRECT  
15 TAKES TIME.

16 SO MY NEXT QUESTION THEN IS, SINCE THERE WERE  
17 PRELIMINARY DISCUSSIONS THAT FAILED, THEN DEFENDANTS BEGAN  
18 USING THIS PRODUCT, WAS THERE -- DID THE PLAINTIFFS, PRIOR TO  
19 FILING SUIT, UNDERTAKE ANY KIND OF AN INVESTIGATION OF WHAT THE  
20 DEFENDANTS WERE DOING TO DETERMINE WHETHER OR NOT TO CONFIRM OR  
21 NEGATE THEIR UNDERSTANDING THAT THERE WAS SOME VOLATILE  
22 CONDUCT?

23 **MR. DAVIS:** THAT'S WHAT I CAN DEFINITELY STATE.  
24 THE OPINION JUST SAYS IN THE SINGLE PARAGRAPH THAT THE  
25 PLAINTIFF RECEIVED NOTICE OF USE IN SEPTEMBER OF 2006 AND THAT

1 NOTICE OF USE SAID ENCOURAGED CUSTOMERS TO BUY THE PRODUCT BY  
2 SEPTEMBER 15TH. AFTER RECEIVING THAT NOTICE OF USE, THE  
3 PLAINTIFF THEN WAITED 30 DAYS, OR 29 DAYS, CLOSE TO 30 DAYS IN  
4 THAT CASE BEFORE IT THEN FILED ITS TRO. EVEN THOUGH IT KNEW  
5 VERY WELL AND HAD PRIOR DISCUSSIONS IN THAT CASE BEFORE TAKING  
6 ANY ACTION, USE OCCURRED IN THE MARKET FOR 30 DAYS.

7 IN THIS CASE WE HAVE A SITUATION WHERE USE HAS ONLY  
8 OCCURRED FOR A WEEK. AND WE TRIED TO COME OUT WITHIN A WEEK  
9 AND TRIED TO TAKE ACTION. IN THAT CASE, THE PLAINTIFF WAITED  
10 30 DAYS BEFORE IT DECIDED TO TAKE ACTION AGAINST INFRINGING USE  
11 AND HAD NO COMMUNICATION WITH COUNSEL FROM THE MOMENT IT  
12 LEARNED OF THE USE.

13 **MR. TROCK:** YOUR HONOR BRINGS UP A GOOD POINT  
14 BECAUSE WE DO HAVE AN OBLIGATION TO INVESTIGATE AND FIND OUT  
15 WHETHER OR NOT WHAT'S ACTUALLY OCCURRING IN THE MARKETPLACE  
16 IS -- GIVES US A CAUSE OF ACTION.

17 THE ARTICLE THAT WE SAW IN BRAND WEEK WHICH ALERTED  
18 US TO THEIR ADVERTISING CAMPAIGN SIMPLY SAYS THAT THEY LAUNCHED  
19 IT ON DECEMBER 12TH OR DECEMBER 11TH. WE THEN HAD TO GO AND  
20 FIND OUT WHAT ARE THEY ACTUALLY DOING IN THE MARKETPLACE. WE  
21 HAD TO FIND THEIR BILLBOARDS, PHOTOGRAPH THEIR BILLBOARDS, FIND  
22 THEIR ADS IN MAGAZINES, GET COPIES OF THOSE ADS IN MAGAZINES TO  
23 SEE WHAT THEY'RE DOING, WHAT THE SLOGAN LOOKS LIKE, HOW IT IS  
24 BEING POSITIONED IN THE MARKETPLACE. TO FIND OUT WHO THEIR  
25 STRATEGIC PARTNERS ARE, AND ALL THIS OTHER INFORMATION.

1 REALLY THIS ARGUMENT IS ABOUT THIS CASE. IT'S ABOUT THE TRO  
2 THAT THEY BROUGHT WITH THREE DAYS BEFORE CHRISTMAS ASKING FOR  
3 US AN ESSENTIALLY IMPOSSIBLE REMEDY.

4 AND THE ARGUMENT ABOUT INVESTIGATION, THERE IS  
5 NOTHING IN THE BRIEFS OR THE DECLARATIONS. THERE IS NO  
6 EVIDENCE THAT AN INVESTIGATION WAS UNDERTAKEN WHATSOEVER.

7 SIMPLY PUT, THEY WAITED SEVEN DAYS WHILE THEY  
8 PREPARED THEIR PAPERS, NOT A PHONE CALL, NOT AN E-MAIL, OUT OF  
9 THE BLUE, LITERALLY OUT OF THE BLUE, A TRO LANDED ON PALM'S  
10 DESK ON DECEMBER 19TH WITH JUST A FEW SHORT DAYS TO GO BEFORE  
11 CHRISTMAS, AND THAT IS THE SITUATION WE FIND OURSELVES IN.

12 THE TIMING COULD NOT BE WORSE. THE BALANCE OF THE  
13 HARDSHIPS COULD NOT TIP MORE STRONGLY IN FAVOR OF US IN TERMS  
14 OF US TRYING TO COMPLY WITH IT. IF THEY HAD CALLED, THEY MIGHT  
15 HAVE -- THEY WOULD HAVE FOUND OUT, THIS CAMPAIGN ENDS  
16 DECEMBER 31ST. THEY DIDN'T CALL. THERE WAS NO COMMUNICATION.  
17 EVERY DAY THAT WENT BY BELIES THEIR ARGUMENT THAT THEY ARE  
18 SUFFERING IRREPARABLE HARM.

19 **THE COURT:** YOU SAID "AN IMPOSSIBLE TASK." WHEN YOU  
20 SAY "IMPOSSIBLE", WHAT DO YOU MEAN?

21 **MR. CANNON:** WELL, THERE'S 20,000, AT LEAST 20,000  
22 OUTDOOR ADS OUT THERE. NOW, THEY ARE ON THE TOP OF TAXIS,  
23 THEY'RE ON BUSES, CHRISTMAS DAY IS JUST A FEW SHORT DAYS AWAY.  
24 TO GET MASKING TAPE AND PAINT, AND TRY TO COVER THOSE UP IS  
25 PHYSICALLY AND LOGISTICALLY CLOSE TO IMPOSSIBLE.

1            THAT'S ESSENTIALLY WHAT I UNDERSTAND THE REMEDY THEY  
2 ARE ASKING FOR, IS TO GO OUT THERE AND TRY AND DO THIS --

3            **THE COURT:** THAT'S WHAT HE SAID.

4            **MR. CANNON:** IT IS IMPOSSIBLE TO -- GIVEN THAT  
5 PEOPLE ARE ON VACATION. WE HAVE -- WE WOULD HAVE AN INCREDIBLY  
6 SHORT AMOUNT OF TIME TO TRY TO COMPLY WITH WHAT THEY ARE  
7 REQUESTING.

8            **THE COURT:** COUNSEL, MR. TROCK, I DO OBSERVE THAT  
9 HIS ARGUMENT IS CORRECT. THIS IS THE FIRST TIME YOU SAID  
10 ANYTHING ABOUT INVESTIGATION. I HAVE ASKED YOU SEVERAL  
11 QUESTIONS THAT WOULD HAVE ELICITED THAT HAD THAT INVESTIGATION  
12 PRECEDED THIS, BUT IT IS ONLY IN THE CONTEXT OF MY INDICATING  
13 IN RESPONSE TO THIS CASE THAT MR. DAVIS WAS CITING THAT NOW ALL  
14 OF A SUDDEN THERE IS THIS INVESTIGATION THAT IS FILLING THE  
15 SEVEN-DAY VOID. I AM NOT SURE WHAT I AM TO MAKE OF THAT.

16            **MR. TROCK:** WELL, I THOUGHT THAT THE FACT THAT WE  
17 DID OUR WORK, DID OUR JOB BEFORE WE FILED THIS IS OBVIOUS FROM  
18 THE MATERIALS WE PROVIDED TO OPPOSING COUNSEL AND THE COURT.

19            THE PHOTOGRAPHS THAT ARE IN HERE ON THE DECLARATIONS  
20 JUST DIDN'T MATERIALIZE OUT OF THIN AIR. WE TOOK THOSE  
21 PHOTOGRAPHS. PEOPLE IN TIME SQUARE TOOK THOSE PHOTOGRAPHS AND  
22 SENT THEM TO US. WE, THE MAGAZINE ADS THAT WE PROVIDED TO THE  
23 COURT CAME OUT OF MAGAZINES THAT WE GOT AHOLD OF SO THAT WE CAN  
24 SATISFY OUR OBLIGATIONS TO DETERMINE WHETHER OR NOT THERE IS A  
25 LEGITIMATE CAUSE OF ACTION HERE.

1 THIS STUFF DOESN'T MATERIALIZE OUT OF THIN AIR.  
2 PEOPLE HAVE TO GO TO THE STORES, THEY HAVE TO TAKE THE  
3 PHOTOGRAPHS, THEY HAVE TO FIND THE BILLBOARDS, TAKE THE  
4 PHOTOGRAPHS. THEY HAVE TO FIND THE MAGAZINES, GET COPIES OF  
5 THE ADS AND PULL ALL THIS STUFF TOGETHER.

6 DURING THAT TIME PERIOD WE SATISFIED OURSELVES THAT  
7 THERE IS A LEGITIMATE CAUSE OF ACTION HERE. SO, IF I USED THE  
8 TERM "INVESTIGATION," CLEARLY YOUR HONOR'S TERM, BUT I THOUGHT  
9 IT WAS IMPLICIT IN THE MATERIALS THAT WE PROVIDED TO THE COURT  
10 THAT WE DIDN'T GET THIS STUFF FROM PALM, WE HAD TO GO AND FIND  
11 THIS STUFF OURSELVES.

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

13 MR. CANNON.

14 **MR. CANNON:** THEY DIDN'T ASK. THEY DIDN'T CALL.  
15 THEY DID NOTHING. THEY LET IT SIT UNTIL THE LAST POSSIBLE  
16 MOMENT, WHICH MAXIMIZES THE DIFFICULTY AND THE INJURY, THE  
17 IRREPARABLE HARM THAT WE WILL HAVE TO SUFFER IN ORDER TO TRY TO  
18 RESPOND TO THIS.

19 **THE COURT:** YOU KNOW, THIS HAS BEEN VERY HELPFUL, I  
20 WILL TELL YOU.

21 AS I TOLD YOU, I READ THE PAPERS THAT YOU ALL  
22 SUBMITTED AND IT WAS A VERY CLOSE QUESTION FOR ME, AND WHICH IS  
23 WHY I DECIDED TO KEEP IT ON. I THOUGHT IT WOULD BE HELPFUL TO  
24 ME TO LISTEN TO YOU AND TO WALK THROUGH THE FACTORS AND SEE IF  
25 MAYBE IT IS ANY EASIER, PARTICULARLY GIVEN THE FACT THAT I WAS

1 GOING TO BE IN A MEETING, WHICH WOULD BE THROUGH BY THIS  
2 AFTERNOON WHICH WAS FREE FOR ME TO HAVE THIS MEETING.

3 AND I UNDERSTAND BOTH OF YOUR POSITIONS VERY CLEARLY  
4 FROM THE PAPERS AND FROM YOUR ARGUMENTS, AND IT IS STILL VERY  
5 CLOSE FOR ME.

6 THE FACTORS ARE THREE, THREE AND TWO NEUTRAL, SO THE  
7 PRESUMPTION IS NOT TRIGGERED FROM MY PERSPECTIVE. LOOKING AT  
8 THE BALANCE OF HARDSHIPS, BASED ON THE BALANCE OF HARDSHIPS,  
9 THE WHOLE CONCEPT THAT THE GOODWILL VERSUS THE IRREPARABLE  
10 DAMAGE IS NOT PERSUASIVE TO ME.

11 I DON'T THINK THAT THEIR DAMAGES ARE MINIMIZED AT  
12 ALL BY WHAT YOU ARE SUGGESTING, MR. TROCK. I JUST, I JUST -- I  
13 MEAN, IT'S CLOSE. IT'S JUST CLOSE. AND SINCE THE PLAINTIFF  
14 HAS REQUESTED THE TRO, I CAN ONLY SAY YOU JUST HAVE NOT MET  
15 YOUR BURDEN.

16 I AM JUST NOT PERSUADED THAT THE BALANCE OF  
17 HARDSHIPS TIPS IN YOUR FAVOR GIVEN THE FINDINGS THAT I MADE  
18 BASED UPON THE EVIDENCE THAT YOU ALL HAVE PRESENTED THIS FAR.

19 THE ONLY OTHER OPTION IS SETTING A HEARING FOR  
20 PRELIMINARY INJUNCTION WHEN YOU BOTH CAN COME FORWARD WITH MORE  
21 EVIDENCE. RIGHT NOW IT'S JUST A CLOSE QUESTION FOR ME. AND  
22 CLOSE QUESTIONS, PARTICULARLY WHEN I -- WHEN THERE IS NO  
23 PRESUMPTION THAT HAS BEEN TRIGGERED BECAUSE OF THE FINDINGS  
24 THAT I AM COMFORTABLE MAKING, YOU KNOW, IT'S JUST WHO HAS THE  
25 BURDEN.

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**MR. TROCK:** YOUR HONOR --

**THE COURT:** YOU HAVEN'T MET IT.

**MR. TROCK:** JUST TWO POINTS.

NUMBER ONE, THE COURT DOES NOT HAVE TO TREAT EACH OF THE FACTORS WITH EQUAL WEIGHT.

**THE COURT:** THAT'S TRUE.

**MR. TROCK:** THE COURT CAN USE WHATEVER WEIGHT IT BELIEVES IS APPROPRIATE --

**THE COURT:** EVEN THE ONES THAT I FOUND ARE WEAK. THEY ARE NOT STRONG. THE WHOLE CASE IS JUST CLOSE.

**MR. TROCK:** SECONDLY, THE EXPENSES, WE BELIEVE, THAT'S THE REAL HARM WE ARE TALKING ABOUT HERE TO THEM. NOT IRREPARABLE, BUT EXPENSES CAN BE COVERED BY A BOND.

**THE COURT:** I UNDERSTAND WHAT YOU ARE SAYING. I AM JUST SAYING THAT MY ANALYSIS OF WHAT YOU ALL HAVE SUBMITTED AND THE ARGUMENTS THAT YOU HAVE MADE JUST LEAVE ME IN A POSITION WHICH I DON'T FIND MYSELF IN VERY OFTEN IN THAT THIS IS JUST, IT'S JUST A CLOSE QUESTION, AND I CAN'T SAY THAT YOU MET YOUR BURDEN.

I JUST DON'T KNOW THAT THE EVIDENCE THAT I HAVE IN FRONT OF ME ALLOWS ME TO COMFORTABLY ISSUE A TRO BASED UPON WHAT I HAVE RIGHT NOW.

SO, THE TEMPORARY RESTRAINING ORDER IS DENIED.

AND WE CAN SET A HEARING FOR THE PRELIMINARY INJUNCTION IF YOU ALL WANT, AT WHICH POINT YOU ALL WILL PERHAPS



1 HAVE EVIDENCE THAT WILL BE A LITTLE MORE PERSUASIVE AND  
2 CLARIFYING FOR THE COURT TO MAKE A DECISION.

3 BUT WITH RESPECT TO THE TRO, GIVEN MY FINDINGS AND  
4 DISCUSSION THAT WE HAVE HAD, I JUST AM NOT ABLE TO FIND THAT  
5 PLAINTIFFS HAVE MET THE BURDEN OF DEMONSTRATING TO THE COURT  
6 THE LIKELIHOOD -- THERE MAY BE SOME LIKELIHOOD OF SUCCESS, I  
7 JUST HAVE NOT -- I MEAN, ULTIMATELY, BASED UPON THE EVIDENCE  
8 THAT YOU ALL MAY COME FORWARD WITH, I AM JUST NOT ABLE AT THIS  
9 POINT TO MAKE THE ASSESSMENT THAT THERE IS NECESSARILY A BASIS  
10 FOR THE ISSUANCE OF A TRO AT THIS JUNCTURE.

11 MR. TROCK: AT THIS POINT WE WOULD LIKE TO GET A  
12 DATE FOR PRELIMINARY INJUNCTION AS WELL AS AN OPPORTUNITY TO  
13 TAKE SOME EXPEDITED DISCOVERY.

14 THE COURT: OKAY. YOU ALL WANT TO TALK AND SEE WHEN  
15 YOU WANT THE PRELIMINARY INJUNCTION HEARING?

16 MR. CANNON: JUST TALK?

17 THE COURT: YES.

18 (PAUSE IN THE PROCEEDINGS WHILE COUNSEL CONFER.)

19 MR. TROCK: SO, YOUR HONOR, OUR SUGGESTION WOULD BE  
20 THAT WE HAVE A HEARING ON YOUR, I BELIEVE YOU HAVE A MOTION  
21 DATE ON THE 30TH OF JANUARY; IS THAT CORRECT?

22 THE COURT: I DON'T KNOW IF THE 30TH IS AVAILABLE.  
23 IS IT?

24 THE CLERK: NO.

25 THE COURT: SO WHAT'S THE NEXT --

1           **THE CLERK:** THE NEXT AVAILABLE DATE IS FEBRUARY 6TH.

2           **MR. TROCK:** OKAY. SO THAT WOULD BE TUESDAY, THE  
3 6TH. THEN WE HAVE BRIEFS FILED WITH THE COURT A WEEK PRIOR TO  
4 THAT --

5           **THE COURT:** TELL THEM WHAT THE BRIEFING SCHEDULE  
6 WOULD BE FOR A HEARING ON FEBRUARY 6TH, LISA.

7           **THE CLERK:** OKAY. THE REPLY BRIEF WOULD BE DUE ON  
8 JANUARY 23RD. THE OPPOSITION BRIEF WOULD BE DUE ON  
9 JANUARY 16TH, AND THE MOVING BRIEF WOULD BE DUE ON JANUARY 2ND.

10           **THE COURT:** THAT'S IF YOU WANT THE HEARING ON  
11 FEBRUARY --

12           **MR. TROCK:** RIGHT.

13           **THE COURT:** JANUARY 7TH, IF YOU ARE TALKING ABOUT  
14 GETTING DISCOVERY, THAT'S NOT GOING TO GIVE YOU ENOUGH TIME.

15           **THE CLERK:** JANUARY 2ND.

16           **THE COURT:** JANUARY 2ND?

17           **THE CLERK:** 2ND.

18           **MR. TROCK:** MY SUGGESTION, YOUR HONOR, AND I DON'T  
19 KNOW IF THE COURT IS AMENABLE TO THIS, BUT BECAUSE OF THE  
20 EMERGENCY NATURE OF THIS --

21           **THE COURT:** THERE'S NOT AN EMERGENCY. I JUST RULED  
22 ON THE EMERGENCY.

23           **MR. TROCK:** I UNDERSTAND, BUT THE FACT IS THAT THEIR  
24 ADVERTISEMENTS ARE GOING TO CONTINUE TO GO OUT, AND I REQUESTED  
25 FROM COUNSEL IF THEY WOULD MODIFY THEIR ADS IN SOME WAY TO GIVE

1 US SOME ADDITIONAL LEEWAY HERE, AND APPARENTLY THEY NEED --

2 THE COURT: WE NEED TO WRAP THIS UP. I HAVE A  
3 4:00 O'CLOCK THAT'S GOING TO BE CALLING --

4 MR. TROCK: MY SUGGESTION --

5 THE COURT: NO, NO. I DON'T CARE WHAT YOUR  
6 SUGGESTION IS RIGHT NOW.

7 LET ME JUST SAY THIS: I HAVE EVALUATED FOR THE LAST  
8 THREE HOURS THE EMERGENCY NATURE OF THIS AND I FOUND THERE IS  
9 NO EMERGENCY AT THIS POINT. NOW, YOU CAN'T HAVE IT BOTH WAYS.  
10 IF YOU ARE GOING TO SUGGEST WE ARE GOING TO HAVE A HEARING IN  
11 FEBRUARY, THEN YOU HAVE TO FILE YOUR BRIEFS IN JANUARY.

12 IF YOU EXPECT ME TO BEAR THE BURDEN OF YOUR ISSUE AT  
13 THIS POINT, I HAVE TO TELL YOU THAT THIS IS NOT THE ONLY CASE  
14 ON MY DOCKET. I HAVE PRIORITIZED MY SCHEDULE TODAY TO  
15 ACCOMMODATE WHAT I THOUGHT WAS AN EMERGENCY NATURE. I'VE SPENT  
16 THE LAST THREE HOURS EVALUATING IT.

17 IT IS NOT AN EMERGENCY FOR ME AT THIS JUNCTURE, NOT  
18 TO THE POINT WHERE I AM GOING TO SUBORDINATE OTHER THINGS FOR  
19 IT, PARTICULARLY WHEN YOU ARE TALKING ABOUT, I AM ASSUMING WHAT  
20 YOU ARE ABOUT TO SAY IS TO HAVE AN ABBREVIATED BRIEFING SO THAT  
21 I AM GOING TO BEAR THE BURDEN OF HAVING YOU ALL FILE EVERYTHING  
22 AT ONE TIME AND THEN HAVE A HEARING IMMEDIATELY.

23 I AM NOT GOING TO DO THAT. OKAY? WE DID IT FOR THE  
24 TRO BECAUSE IT'S IMPORTANT, BUT I HAVE EVALUATED THE EMERGENCY  
25 NATURE. IT'S NOT AN EMERGENCY ANYMORE. AS A MATTER OF FACT, I

1 AM WONDERING IF THE WHOLE ISSUE IS MOOT. MAYBE IT IS NOT IF  
2 YOU ALL DISCUSSED IT AND YOU STILL WANT TO HAVE A HEARING,  
3 PARTICULARLY GIVEN THE FACT THAT COUNSEL INDICATED THEY ARE  
4 GOING TO STOP THE WHOLE CAMPAIGN DECEMBER 31ST, BUT YOU DID SAY  
5 ON THE CABS AND BUSES, AND SO I DON'T KNOW WHETHER THAT APPLIES  
6 TO THE PUBLICATIONS OR NOT.

7 TO THE EXTENT THE ISSUE IS STILL ALIVE, WE CAN SET A  
8 DATE FOR PRELIMINARY HEARING INJUNCTION, BUT IT IS GOING TO BE  
9 A REGULAR BRIEFING SCHEDULE. SO, IF YOU WANT FEBRUARY 6TH,  
10 IT'S AVAILABLE, BUT THEN THAT'S THE BRIEFING SCHEDULE THAT YOU  
11 HAVE.

12 SO, THE BRIEFING SCHEDULE IS THE PAPERS ARE FILED,  
13 THE OPPOSITION TWO WEEKS LATER, THE REPLY ONE WEEK LATER, AND  
14 THEN TWO WEEKS AFTER THAT IS THE HEARING.

15 WHEN DO YOU WANT TO HAVE THIS PRELIMINARY INJUNCTION  
16 HEARING?

17 **MR. TROCK:** IS FEBRUARY 27TH AVAILABLE?

18 **THE CLERK:** NO, ACTUALLY IT IS NOT. THE NEXT ONE  
19 WOULD BE MARCH 6TH.

20 **MR. TROCK:** AFTER FEBRUARY 6, THE NEXT AVAILABILITY  
21 IS MARCH 6TH?

22 **THE COURT:** AFTER FEBRUARY 6, THAT'S THE NEXT ONE?

23 **THE CLERK:** YES.

24 **MR. TROCK:** MARCH 6TH IT IS.

25 **THE COURT:** GIVE THEM THE BRIEFING SCHEDULE, LISA.

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**THE COURT:** IT'S FINE WITH ME.

OKAY. ANY OTHER ISSUES?

**MR. TROCK:** I BELIEVE THAT IS IT, YOUR HONOR.

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

**MR. CANNON:** THANK YOU, YOUR HONOR.

**MR. TROCK:** THANK YOU FOR THE COURT'S TIME.

**THE COURT:** YOU ARE WELCOME. IT HAS BEEN HELPFUL.

IS THAT OUR 4:00 O'CLOCK ON THE LINE?

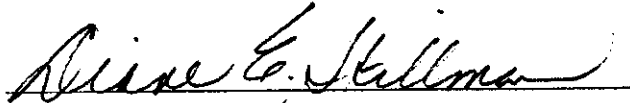
**THE CLERK:** YES.

(PROCEEDINGS CONCLUDED AT 4:10 P.M.)

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C-06-7754 SBA, HELIO LLC V. PALM, INC., PAGES NUMBERED 1 THROUGH 113, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE INTEGRITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON REMOVAL FROM THE COURT FILE.



DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

# **EXHIBIT 2**

**Golden Gate Reporting**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

--oOo--

HELIO LLC,	)	
	)	
	)	Plaintiffs,
	)	
vs.	)	No. C 06-7754
	)	
	)	
PALM INC.,	)	
	)	
	)	Defendants.
	)	

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DEPOSITION OF SCOTT HANCOCK

DATE: Tuesday, February 27, 2007

TIME: 9:54 a.m.

LOCATION: Kirkpatrick & Lockhart  
55 Second Street  
Suite 1700  
San Francisco, CA 94105-3493

REPORTED BY: Kenneth T. Brill  
Registered Professional Reporter  
Certified Shorthand Reporter No. 12797



### Golden Gate Reporting

1 Helio.  
 2 MR. STERN: Paul Stern of Quinn Emanuel,  
 3 on behalf of the defendant Palm, and along with me  
 4 is Associate General Counsel Bob Booth.  
 5 THE VIDEOGRAPHER: Thank you. Would the  
 6 court reporter please administer the oath.  
 7 SCOTT HANCOCK, after having been  
 8 first duly sworn, was examined and  
 9 testified as follows:  
 10 ---  
 11 EXAMINATION  
 12 ---  
 13 BY MR. TROCK:  
 14 Q. Mr. Hancock, could you spell your name for  
 15 the record?  
 16 A. Sure. H-A-N-C-O-C-K is my last name.  
 17 Q. I'm not feeling very well today, so I'm  
 18 kind of hoarse. So if you have difficulty  
 19 understanding any of my questions, just let me know,  
 20 I'll do my best to try to rearticulate that.  
 21 Have you been deposed before?  
 22 A. No.  
 23 Q. Just to go over a couple of ground rules,  
 24 I'm sure your attorneys have already done this with  
 25 you, we're taking this deposition outside of court,

1 A. It's a Bachelor of Science in Business.  
 2 Q. What's your current position at Palm?  
 3 A. I'm director of Marketing Communications.  
 4 Q. What are your duties at that position?  
 5 A. I have several duties.  
 6 Q. Can you explain them to us?  
 7 A. Well, one of which is to oversee the  
 8 advertising for Palm as well as for printed  
 9 materials in support of product launches.  
 10 Q. Anything other than overseeing the  
 11 advertising that you're responsible for?  
 12 A. Collateral support for product launches.  
 13 Q. What does that mean, collateral support?  
 14 A. Packaging, data sheets, marketing  
 15 materials in support of product launches.  
 16 Q. Who do you report to at Palm Palm?  
 17 A. I report to Rose Rodd.  
 18 Q. What is her position, or is it him?  
 19 A. Her.  
 20 Q. Sorry.  
 21 A. She's a senior director for corporate  
 22 marketing.  
 23 Q. When did you obtain the position of  
 24 director of marketing communications?  
 25 A. I was promoted to director, I'm not sure

1 but it serves the same purpose as if you were  
 2 testifying in court, given -- you've been given an  
 3 oath, the court reporter is taking down everything  
 4 everybody is saying in the room. So it's important  
 5 that only one person speak at a time.  
 6 So if you give me a chance to complete my  
 7 question, give your attorney a chance to interject  
 8 an objection, and then if you could make your  
 9 answers audible, nodding your head, shaking your  
 10 head, the court reporter can't take those down as  
 11 answers. So if you would say yes or no, or give  
 12 your full answer verbally, we'd appreciate that.  
 13 If you need a break during any time of the  
 14 day, just let us know, we can take a break. If you  
 15 don't understand my question, or you need me to  
 16 explain it further, just let me know, and I'll try  
 17 to do that. Okay?  
 18 A. Okay.  
 19 Q. Could you give us your educational  
 20 background after high school?  
 21 A. I attended a junior college in Sacramento,  
 22 and then attended Cal Poly in San Louis Obispo.  
 23 Q. Do you have any degree from those?  
 24 A. I have a degree from Cal Poly.  
 25 Q. What is it in?

1 exactly when.  
 2 Q. What's your best estimate?  
 3 A. Eight months ago.  
 4 Q. So sometime during the summer of 2006?  
 5 A. Or early fall, yeah.  
 6 Q. Early fall, okay. What was your position  
 7 prior to that?  
 8 A. Senior manager, marketing communications.  
 9 Q. And what were your duties as senior  
 10 manager?  
 11 A. Very similar to what they are now, oversaw  
 12 the advertising.  
 13 Q. How have your duties changed between the  
 14 two positions?  
 15 A. I have additional responsibilities beyond  
 16 advertising now.  
 17 Q. Is that the collateral support?  
 18 A. Correct.  
 19 Q. I take it you're familiar with the phrase  
 20 "Not just a cell phone, a Treo"; is that correct?  
 21 A. Yes.  
 22 Q. And that's a phrase that Palm has used in  
 23 its advertising; is that right?  
 24 A. Yes.  
 25 Q. Now, in the advertised materials that you

3 (Pages 6 to 9)

### Golden Gate Reporting

1 publish in the marketplace, is there a term of art  
 2 that you use to describe that phrase?  
 3 A. I'm sorry, I don't understand.  
 4 Q. Well, do you call it something other than  
 5 a phrase?  
 6 A. We call it either a theme line, something  
 7 called a campaign line.  
 8 Q. How about a tag line, are you familiar  
 9 with that term?  
 10 A. I am familiar with that term.  
 11 Q. What does that mean to you, tag line?  
 12 A. A tag line means something that's a  
 13 sign-off for a company. It's a sign-off for a  
 14 company.  
 15 Q. Would you consider the phrase "Not just a  
 16 cell phone, a Treo" when used in Palm's advertising  
 17 to be a tag line?  
 18 A. No.  
 19 Q. Are you familiar with the term "slogan"?  
 20 A. Yes.  
 21 Q. Would you consider the phrase "Not just a  
 22 cell phone, a Treo" when used in Palm's advertising  
 23 to be a slogan?  
 24 A. Some people equate a slogan with a  
 25 campaign line or a theme line, so yes.

Page 10

1 at Palm?  
 2 A. I'm not sure of the exact date.  
 3 Q. What's your best estimate?  
 4 A. Early 2004.  
 5 Q. Did you ever work directly with AKQA while  
 6 you were at Palm?  
 7 MR. STERN: Objection. The question is  
 8 vague.  
 9 THE WITNESS: What do you mean by "work  
 10 with"?  
 11 BY MR. TROCK:  
 12 Q. Well, you're familiar with them as -- as  
 13 Palm's former advertising agent, is that right, and  
 14 part of your duties at Palm involve overseeing  
 15 Palm's advertising; is that right?  
 16 A. Yes.  
 17 Q. So did you ever work with anyone at AKQA  
 18 directly?  
 19 A. Yes.  
 20 Q. Okay. When did you first start doing  
 21 that?  
 22 A. At the time I started at Palm as a  
 23 contractor.  
 24 Q. In 2001; is that right?  
 25 A. Correct.

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1 Q. So you would consider it to be a slogan;  
 2 is that right?  
 3 A. Sure.  
 4 Q. Okay. I take it you're also familiar with  
 5 a company by the designation AKQA; is that right?  
 6 A. Yes.  
 7 Q. Could you explain to me who they are?  
 8 A. They are our former advertising agency.  
 9 Q. During what period of time did Palm use  
 10 AKQA as its advertising agency?  
 11 A. I'm not sure of the exact start date.  
 12 Q. What's your best estimate?  
 13 A. I believe it was over six years.  
 14 Q. When did you first start working at Palm?  
 15 A. October of 2001.  
 16 Q. What was your first position at Palm?  
 17 A. I was a contractor.  
 18 Q. What does that mean?  
 19 A. It means I was not an employee of Palm. I  
 20 was a -- employed through a third party.  
 21 Q. What were your duties for Palm at that  
 22 time? In other words, what kind of work were you  
 23 doing for them?  
 24 A. Managing the advertising development.  
 25 Q. And when did you first become an employee

Page 11

1 Q. When did you first become aware of the  
 2 slogan "Not just a cell phone, a Treo"?  
 3 A. The slogan or theme line was used as part  
 4 of a creative presentation, not in those exact  
 5 words, but the idea behind that, in January of 2005.  
 6 Q. What were the exact words in January of  
 7 2005?  
 8 A. "Not a cell phone, a Treo".  
 9 Q. And when did you first hear the slogan,  
 10 "Not just a cell phone, a Treo"?  
 11 A. I'm not sure of the exact date.  
 12 Q. What's your best estimate?  
 13 A. June or July of 2006.  
 14 THE COURT REPORTER: I'm sorry, June or  
 15 July of?  
 16 THE WITNESS: 2006.  
 17 MR. STERN: Let me just, if I could  
 18 interject to the court reporter. So I don't know if  
 19 this is court reporter code or not, but the witness  
 20 said that in response to the question what were the  
 21 exact words in January of 2005, his response was  
 22 "Not a cell phone, a Treo".  
 23 I just want to make sure that we have that  
 24 down, because that's not what I am looking at, and  
 25 it may just be code issues.

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### Golden Gate Reporting

1 You don't have to respond; I'm just making  
 2 a record.  
 3 (Discussion off the record.)  
 4 BY MR. TROCK:  
 5 Q. Did you participate in this presentation  
 6 in January of 2005?  
 7 A. Yes.  
 8 Q. Who gave the presentation?  
 9 A. I'm not sure exactly who.  
 10 Q. Well, who else besides yourself was  
 11 present?  
 12 A. I'm not sure of all the parties.  
 13 Q. Well, are you sure of anyone other than  
 14 yourself being there?  
 15 A. Yes.  
 16 Q. Okay. Who are you sure was there, or who  
 17 can you recall being there, that's the better  
 18 question.  
 19 A. Page Murray and Rose Rodd.  
 20 Q. Anyone else?  
 21 A. And the agency personnel.  
 22 Q. By agency, who are you referring to?  
 23 A. I don't know exactly who from the agency  
 24 was there.  
 25 Q. No, but you used the term agency. Who --

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1 Q. But you can't recall an individual who  
 2 made that statement to you, or was that just an  
 3 assumption that you took away from the presentation?  
 4 A. It was an assumption.  
 5 Q. What was this a presentation about in  
 6 January of 2005?  
 7 A. A ad campaign that was -- that they were  
 8 developing for us.  
 9 Q. Were any other slogans presented to Palm  
 10 at that time by AKQA?  
 11 A. I believe so.  
 12 Q. Can you recall what they were?  
 13 A. No.  
 14 Q. At that time did Palm give its approval to  
 15 AKQA to move forward with the development of this ad  
 16 campaign?  
 17 MR. STERN: Objection, foundation.  
 18 THE WITNESS: At which time?  
 19 BY MR. TROCK:  
 20 Q. At that time in January of 2005 when it  
 21 was presented, did Palm give its approval to AKQA to  
 22 go forward with developing the campaign?  
 23 MR. STERN: Same objection.  
 24 THE WITNESS: Not at that time.  
 25 BY MR. TROCK:

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1 what agency are you referring to?  
 2 A. AKQA.  
 3 Q. Okay. So am I correct in my assumption  
 4 that AKQA gave the presentation?  
 5 A. Correct.  
 6 Q. All right. Can you recall anyone from  
 7 AKQA who was at the presentation?  
 8 A. Yes.  
 9 Q. Who?  
 10 A. Julie Patterson, Bob Pullum, Adam Lau, and  
 11 I believe there is one other, but I can't remember  
 12 who.  
 13 Q. This phrase, "Not a cell phone, a Treo",  
 14 do you know who conceived it?  
 15 A. As an individual?  
 16 Q. Yes.  
 17 A. No.  
 18 Q. Do you know whether anyone at AKQA  
 19 conceived it?  
 20 A. We were told that someone from AKQA did  
 21 conceive it.  
 22 Q. Who told you that?  
 23 A. It was presented as such.  
 24 Q. By whom?  
 25 A. The team that was mentioned from AKQA.

Page 15

1 Q. When did Palm give its approval to go  
 2 forward with developing the ad campaign?  
 3 A. I'm not exactly sure when.  
 4 Q. What's your best estimate?  
 5 A. I believe it was in the Spring of 2006.  
 6 Q. Why didn't Palm give its approval to go  
 7 forward with the development of the ad campaign back  
 8 in January of 2005?  
 9 MR. STERN: Objection, foundation.  
 10 THE WITNESS: Can you repeat that  
 11 question, I'm sorry?  
 12 MR. TROCK: Sure, can you repeat it.  
 13 ---  
 14 (The court reporter read back as  
 15 follows:  
 16 "QUESTION: Why didn't Palm give  
 17 its approval to go forward with the  
 18 development of the ad campaign back in  
 19 January of 2005?")  
 20 ---  
 21 THE WITNESS: At that time the team felt  
 22 that the products that we had upcoming didn't match  
 23 that line.  
 24 BY MR. TROCK:  
 25 Q. When you're referring to the team, who are

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5 (Pages 14 to 17)