

**Doc. 129**

**Excerpts of Jury Trial Discussion Re:  
Jury Charges and Motions**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

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ROGER CLEVELAND GOLF	)	C/A No. 2:09-2119-MBS
COMPANY, INC.,	)	
	)	
	)	
Plaintiff,	)	
	)	
VERSUS	)	Columbia, SC
	)	March 8 & 9, 2011
	)	
CHRISTOPHER PRINCE, PRINCE	)	
DISTRIBUTION, LLC, and	)	
BRIGHT BUILDERS, INC.,	)	
	)	
Defendants.	)	
-----	)	

EXCERPTS OF JURY TRIAL  
DISCUSSIONS RE JURY CHARGES AND MOTIONS  
BEFORE THE HONORABLE MARGARET B. SEYMOUR  
UNITED STATES DISTRICT JUDGE, and a jury.

Appearances:

For the Plaintiff:	JEFFREY S. PATTERSON, ESQ. JOHN C. MCELWAIN, ESQ. 151 Meeting Street, Sixth Floor Charleston, SC 29401
For Defendant Prince:	CHRISTOPHER D. LIZZI, ESQ. 36 Broad Street Charleston, SC 29401
For Defendant Bright Builders:	PAUL J. DOOLITTLE, ESQ. DOUGLAS M. FRASER, ESQ. P.O. Box 2579 Charleston, SC 29401

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6 \* \* \* \* \*

7 (Excerpts of proceedings from March 8, 2011.)

8 THE COURT: This morning we are here for the trial of  
9 the case of Roger Cleveland Golf Company versus Christopher  
10 Prince, Prince Distribution, LLC, and Bright Builders. This is  
11 Civil Action Number 2:09-2119.

12 At this time I would like to find out from the  
13 lawyers if you are prepared for trial and if you have any  
14 motions or any matters that need to be heard before the jury  
15 comes in? Plaintiff's counsel?

16 MR. PATTERSON: Your Honor, there is only one issue  
17 that I do think we should address before the plaintiff -- I  
18 mean, before the jury comes in, and that relates to the  
19 defendant who is in default in this case, Sheldon Shelley.

20 He's already been defaulted in the case. We didn't  
21 move for a damages hearing as to Mr. Shelley, nothing was  
22 discussed as to him in jury selection. It's the plaintiff's  
23 position that the case to be tried relates to the two  
24 defendants who have appeared in the case, Bright Builders and  
25 the Prince defendants.

And what we would request is, depending on how that  
plays out, we may not -- we may just dismiss as against

1           Also, when Bright Builders submitted the domain name  
2 to search engines so that people could find copycatclub, they  
3 would be acting as an agent for Mr. Prince in that context. So  
4 while the predominant focus will be on contributory liability,  
5 there is some evidence of an agency relationship which could  
6 establish the vicarious direct infringement.

7           THE COURT: Is there an allegation that Bright  
8 Builders intentionally induced Prince defendants to infringe  
9 the trademark?

10           MR. PATTERSON: Is there an allegation that they  
11 intentionally induced?

12           THE COURT: Is that an element with regard to your  
13 contributory infringement claim?

14           MR. PATTERSON: No, I don't believe that's an element  
15 with regard to the contributory infringement claim. Again, my  
16 understanding of contributory infringement is -- there are  
17 really two elements I guess, as I would say it, knew or should  
18 have known.

19           Bright Builders had to know or should have known that  
20 the product or service they were -- services they were offering  
21 Mr. Prince were being used to infringe, and that those services  
22 were actually used to infringe on the trademark and  
23 intellectual property rights of a third party, which in this  
24 case would be Cleveland.

25           THE COURT: All right. Yes, sir?

1 MR. DOOLITTLE: Your Honor, if you care to hear from  
2 Bright Builders with regard to that position, we agree that the  
3 standard is knew or should have known, but we do think the case  
4 law further defines what is should have known. Because there  
5 is no issue about did we know. There is not actual knowledge  
6 involved in this case, and counsel and I have talked about  
7 that. And so you have to look at the should have known prong.

8 In order to find out how you analyze the should have  
9 known prong, you look at the Tiffany versus eBay case, and you  
10 find that under that case they talk about willfulness.

11 And specifically they discuss the Inwood case. In  
12 the Tiffany case they go through the Inwood analysis and they  
13 point out Hard Rock Cafe's analysis that what is required to be  
14 shown is a willful blindness under the reason -- or had reason  
15 to know standard, is a willful blindness.

16 And in Hard Rock in the Seventh Circuit the willful  
17 blindness is equivalent to actual knowledge for purposes of the  
18 Lanham Act. So we do believe that they have to show actual  
19 knowledge by Bright Builders --

20 THE COURT: My question wasn't addressing knowledge  
21 at this time, I was just trying to find out exactly what it was  
22 that the plaintiffs were alleging with regard to vicarious  
23 liability and contributory infringement liability.

24 With regard to the contributory liability, there are  
25 alternate ways to prove it, one requires inducement and one

1 does not. For contributory liability, you have to show that  
2 either Bright Builders intentionally induced the Prince  
3 defendants or you have to show that Bright Builders continued  
4 to supply services. Is that what you --

5 MR. PATTERSON: Yes, Your Honor, it would be the  
6 continue to supply services after knowledge that those  
7 services -- again, they should have known that those services  
8 were being used to infringe on a third party's intellectual  
9 property rights, it's not the intentional inducement that we  
10 are attempting to prove.

11 THE COURT: All right. Are you going to require any  
12 special equipment or devices to assist with any of your  
13 exhibits that you are going to be using for the trial?  
14 Anything from the plaintiff or defendants?

15 \* \* \* \* \*

16 THE COURT: All right. We are going to give you some  
17 draft charges. One of the issues that seems to have come up as  
18 a result of the testimony is whether or not it would be a  
19 defense to a trademark infringement if the person -- the  
20 infringer did not know whether or not he or she was violating  
21 the trademark law. Is that --

22 MR. PATTERSON: I don't believe that's a defense,  
23 that ignorance of the law is a defense.

24 THE COURT: We don't have a charge, and I'm going to  
25 include a charge to that effect.

1 THE COURT: Other bases?

2 MR. DOOLITTLE: Then we have motions under the Lanham  
3 Act.

4 MR. FRAZER: It's clear that you have to show a  
5 continuing issuance of supply of products and he knew or should  
6 have known. Under the Tiffany case it says when you are  
7 dealing with a service provider that there must be actual  
8 knowledge of the specific listing that infringed on the  
9 trademark.

10 There has been no -- copycatclubs is a general web  
11 site, there's nothing indicating the existence of a specific  
12 listing dealing with Cleveland, because Cleveland's trademark  
13 is the one that is at issue. There is nothing to show that  
14 the -- specific listing of what's listed. There were multiple  
15 listings of Callaway, Ping, and there's been no showing of  
16 actual knowledge on the specific listing.

17 THE COURT: Okay.

18 MR. DOOLITTLE: We have also had no testimony from  
19 any expert of what the should have known standard would be. As  
20 we have stated earlier to Your Honor, we certainly believe that  
21 the case law supports the should have known language that they  
22 are relying on because I don't think there is any actual  
23 knowledge here. I haven't heard any actual knowledge  
24 testimony.

25 MR. PATTERSON: Actually -- may I respond?

1 tomorrow but it looks like we will not be able to start until  
2 10 o'clock tomorrow. So you are excused for the evening and  
3 you will report back at 10 o'clock tomorrow morning.

4 Again, I'm going to remind you not to do any  
5 independent research, to leave your notepads in the jury room.  
6 You can write your name on the top and turn them face down to  
7 protect your privacy, but just leave your notepads in the  
8 room. Don't discuss the case with anyone or allow anyone to  
9 discuss the case with you. Any questions?

10 All right. Thank you very much and have a good  
11 evening.

12 (Jury not present)

13 THE COURT: Take a short recess and I will come back  
14 and hear the motions.

15 (Short recess)

16 THE COURT: Are there any motions at this time?

17 MR. PATTERSON: None from the plaintiff, Your Honor.

18 MR. DOOLITTLE: Your Honor, Defendant Bright Builders  
19 would move for a directed verdict on both causes of action, the  
20 Lanham Act as well as the South Carolina Unfair Trade Practices  
21 Act. I can address the Lanham Act allegations first.

22 THE COURT: That's fine.

23 MR. DOOLITTLE: First, I don't believe that there is  
24 any actual knowledge. As we know, the standard, we discussed  
25 at length, it's knew or should have known. I don't think that



1 there is any testimony of the actual knowledge by Bright  
2 Builders of a counterfeit product being sold by Christopher  
3 Prince through his web site copycatclubs.com.

4 There's been no testimony that we had anybody at  
5 Bright Builders that had actual knowledge that those in fact  
6 were counterfeit clubs. In fact, the testimony was the images  
7 looked just exactly like the Cleveland Golf Clubs when you went  
8 to the web site. There was no way for us to know that he was  
9 selling copycat clubs, and there is no direct knowledge.

10 There is nobody that has taken the stand and said,  
11 "Yes, Bright Builders had direct knowledge that Mr. Prince was  
12 selling counterfeit golf clubs through their web site." So  
13 that's the first part on the direct knowledge.

14 Then we move into the knew or should have known  
15 standard. And as we discussed previously with the court, we  
16 believe that the key language that needs to be looked at is  
17 in -- found in both the Tiffany-eBay case, the Inwood case, as  
18 well as the Hard Rock Cafe case.

19 Specifically Tiffany does a great job of outlining  
20 and explaining how you analyze the should have known standard,  
21 and does a very thorough job of explaining that.

22 Particularly it goes in and discusses the Supreme  
23 Court's observations in the Inwood case and how they analyzed  
24 the knew -- excuse me, the should have known prong.

25 If you -- once you get down through it, the plaintiff

1 has to show that Bright Builders, in order to have aided and  
2 abetted and contributed to Mr. Prince's violation of the Lanham  
3 Act, that we should have known that he was selling counterfeit  
4 golf clubs.

5           And the language that is required for should have  
6 known, as pointed out in Inwood and it's explained fully in  
7 Hard Rock Cafe, deals with willful blindness. That's what you  
8 basically -- a service provider, and I'm quoting now from  
9 Tiffany, "A service provider is not, we think, permitted  
10 willful blindness when it has reason to suspect that users of  
11 its service are infringing a protected mark. It may not shield  
12 itself from learning of the particular infringing transaction  
13 by looking the other way."

14           And they describe and go on to say that willful  
15 blindness, in the words of the Seventh Circuit, "Willful  
16 blindness is the equivalent to actual knowledge for purposes of  
17 the Lanham Act," and they cite Hard Rock Cafe.

18           So, again, we don't have my actual knowledge that was  
19 received by Bright Builders that those are counterfeit clubs  
20 that were being sold.

21           THE COURT: Is that the willful blindness standard  
22 for the Seventh Circuit?

23           MR. DOOLITTLE: It's the willful blindness -- it's  
24 the only willful blindness definition I can find, Judge,  
25 dealing with the contributory infringement of a copyright

1 case -- trademark case. It's the only one I can find that  
2 deals with aiding and abetting the counterfeiting.

3 That's the language that's dealing with it. That's  
4 the only case that I can find that cites and deals and tells  
5 you how to deal with the language of knew or should have  
6 known. What do you do and -- what does the plaintiff have to  
7 prove in order to show that we should have known, that we  
8 should have known something.

9 And because Mr. Prince -- and you recall the  
10 testimony, Your Honor, Mr. Prince can change his web site at  
11 any time. So, you know, I don't know what the plaintiff's  
12 position is about what we are supposed do, what Bright Builders  
13 is supposed to do to police each and every web site that is out  
14 there.

15 And the fact is, if we police that web site at 10  
16 o'clock in the morning, at 10:05 he can post and place whatever  
17 other copyright infringements or counterfeit golf clubs or  
18 counterfeit -- whatever he wants to place on there -- and we  
19 would have no ability to know about that. We depend on the  
20 contractual language that he signed that says, "We will -- I  
21 will not commit any illegal activity on your web site."

22 But getting back to, again, what do we have to know,  
23 what does the plaintiff have to do to show that we should have  
24 known? It's something more than just holding up the word  
25 copycat. It's something more than just saying what the word

1 copycatclub.com tells you.

2           It's got to be something more than just simply  
3 hosting a web site. We didn't receive any profits. We didn't  
4 make any money. We didn't get any sales. The sale didn't go  
5 through our web site. The sale didn't occur through our Pay  
6 Pal account. The sale didn't happen with us. We are simply  
7 hosting his site.

8           We did coach him and we taught him how to use the  
9 internet. We did, we taught him how to use the internet.  
10 Apparently from the testimony, reading it in the light most  
11 favorable to the plaintiff, you would have to say -- beforehand  
12 Mr. Prince says he just knew how to turn it on. All he knew  
13 how to do was turn on the computer.

14           THE COURT: Why isn't that a question for the jury?  
15 I mean, the jury has to decide whether Bright Builders  
16 intentionally induced the Prince defendants to infringe the  
17 trademark or that Bright Builders continued to supply services  
18 to the infringer after it knew or had means or reason to know  
19 that the services were being used or would be used to infringe  
20 the mark, and it had sufficient control over the means of  
21 infringing conduct to merit liability. That's what the jury  
22 has to decide based on -- has to make a determination based on  
23 the evidence in this case.

24           Are you saying there is no evidence presented by the  
25 plaintiff to support either one of those positions?

1 MR. DOOLITTLE: I am saying that. And I'm also  
2 saying that in addition, Your Honor, under the should have  
3 known prong we do believe, and we are going to take this up in  
4 the charge conference, under this should have known prong, we  
5 do believe that you have to charge the language that is  
6 included in the Tiffany case and cited in the Tiffany --

7 THE COURT: Why do I have to charge language from a  
8 Seventh Circuit case?

9 MR. DOOLITTLE: Your Honor, you do not have to charge  
10 language from any circuit other than the Fourth Circuit.  
11 Obviously it's not binding precedence upon you. I apologize, I  
12 did not mean to insinuate such.

13 But if you are going -- we desperately urge you that  
14 if you are going to stretch the law into this area that has  
15 never been stretched, where a web hoster, such as this  
16 gentleman and Bright Builders Inc., what they are asking you to  
17 do is expand the law in a way, in an effort that has not been  
18 done before.

19 And we are asking you, if you are going to do that,  
20 you have got to do it on a strict basis. And you need to tell  
21 the jury what they have to decide. My opinion would be, they  
22 have got to have something other than should have known.  
23 Should have known leaves it up to them to decide, without any  
24 basis of what should have known means.

25 We don't define should have known for them at all in

1 the jury charge that I have read so far. And we think it's  
2 perfectly appropriate and proper for you to take notice of the  
3 Tiffany case and the Hard Rock case and charge the language  
4 about willful blindness and what willful blindness means.

5           And if Your Honor finds that that's an appropriate  
6 charge, then I would say to you that no reasonable juror can  
7 say that -- there is no evidence in the record that allows a  
8 reasonable juror to say that Bright Builders had the equivalent  
9 of actual knowledge of counterfeit products being sold by  
10 Mr. Prince to third parties, including -- I guess you could  
11 include Cleveland as a purchaser.

12           But certainly I believe we have evidence of two other  
13 sales -- I could be incorrect about the number of other sales  
14 that were made to somebody other than Cleveland. But we do  
15 believe that if you are going to tell the jury that they can  
16 hold the web hoster liable for teaching him how to use the  
17 internet, and then he goes out and does something that he  
18 admits is illegal, that he said Bright Builders did not know  
19 about -- Mr. Prince said "Bright Builders didn't know about  
20 it. They didn't know I was selling illegal golf clubs."

21           I think we need to have -- to have to put some  
22 language in there, if we are going to expand the law into this  
23 area, because there is no case in the Fourth Circuit that comes  
24 anywhere close to these facts, Your Honor, that expands it to  
25 an internet company who is hosting, and charging them with the

1           THE COURT: All right. I'm going to deny the  
2 motion. I think there is sufficient evidence to send it to the  
3 jury. If the defendant knew or should have known that its  
4 conduct was infringing, or is reckless in not knowing that  
5 fact, then I think that the jury -- there is sufficient  
6 evidence to send it to the jury on the willful issue.

7           Anything else?

8           MR. PATTERSON: Nothing from the plaintiff, Your  
9 Honor.

10          THE COURT: All right.

11          MR. LIZZI: Nothing, Your Honor.

12          MR. DOOLITTLE: Nothing from the Defendant Bright  
13 Builders, Your Honor.

14          THE COURT: All right. At this time I would like to  
15 address the jury charges. First of all, let me find out,  
16 Mr. Patterson, are you pursuing your claim for unfair  
17 competition under South Carolina common law?

18          MR. PATTERSON: No, Your Honor, I don't believe so.  
19 Unfair competition under South Carolina common law we are not  
20 pursuing. We believe it's duplicative of the Lanham Act and  
21 the UTPA claim.

22          THE COURT: All right. Before we do that I'm going  
23 to have to run back to my office. I think I left my notes on  
24 my desk on the jury instructions, so we will take a quick break  
25 and go get those and come right back.

1 names of the two in there.

2 MR. DOOLITTLE: Thank you, Your Honor.

3 THE COURT: Anything else?

4 MR. DOOLITTLE: No, Your Honor.

5 THE COURT: 10.3, contributory vicarious trademark  
6 counterfeiting liability.

7 MR. MCELWAIN: No objection, Your Honor.

8 MR. DOOLITTLE: Obviously we think it's an improper  
9 instruction, Judge. We do believe that you would need to add  
10 the willful language that we discussed from the Tiffany-eBay  
11 case. I understand the court's -- excuse me, I apologize for  
12 sitting -- I understand the court's view on that and don't wish  
13 to reargue with you. But I just wanted my objection to the  
14 charge noted, that we think it should include the language from  
15 the Hard Rock Cafe defining what should have known means,  
16 meaning willful blindness, and willful blindness being defined  
17 as actual knowledge.

18 THE COURT: I think I have already addressed your  
19 objection in my ruling on your directed verdict motion. I  
20 think that the way it's presented here is an accurate statement  
21 of the law. Unless you can show me some Fourth Circuit law to  
22 the contrary, I think this is what the charge should be.

23 MR. DOOLITTLE: I understand the court's position.

24 THE COURT: Okay. Now also it's not on the draft but  
25 we talked about it, prior to 10.3, just above that where it



1 for contributory or vicarious trademark infringement?" Number,  
2 and then make the same changes that you did on the first page,  
3 adding per mark to the paragraphs in what was old number 4.

4 "What amount of statutory damages per mark do you  
5 assess against this defendant for trademark counterfeiting and  
6 infringement?" And the same thing in the second paragraph in  
7 what was the old number 4.

8 THE COURT: All right. Anything else on the verdict  
9 forms?

10 MR. DOOLITTLE: Your Honor, the only other thing I  
11 would point out is that for a matter of consistency and  
12 consistency in the verdict, I don't see how the jury could come  
13 back and find that Christopher Prince and/or Prince  
14 Distribution, LLC, violated the Unfair Trade Practices Act, if  
15 they checked no to that box, I don't see how they could check  
16 yes to whether or not the web hoster, of his activities,  
17 somehow was a violation of the Unfair Trade Practices Act. So  
18 we think similarly to --

19 THE COURT: Refer me to the specific number you are  
20 talking about. The number here, not the new numbers, but the  
21 old numbers.

22 MR. DOOLITTLE: I apologize. The old number would be  
23 question number 8. I apologize, Your Honor.

24 THE COURT: All right.

25 MR. DOOLITTLE: And this is dealing with the Unfair

1 Trade Practices Act. And we believe that as you did in  
2 question number 1 where you stated, "If the answer to this  
3 question is no, then skip to question number 5," we think the  
4 same language ought to be in after question number 5.

5 If the answer to that question is no, then you skip  
6 to the end of the verdict form. Because if the jury finds that  
7 Prince's conduct did not violate the South Carolina Unfair  
8 Trade Practices Act, then surely our conduct of hosting his  
9 conduct couldn't violate the Unfair Trade Practices Act.

10 THE COURT: So you are just saying, "If your answer  
11 is no, go to the end and sign it and don't answer the next two  
12 questions"? Is that what you are saying?

13 MR. DOOLITTLE: It would be after number 5. "If your  
14 answer to question 5 is no, then you would go to the end and  
15 sign."

16 THE COURT: Because you don't get to the issue of  
17 whether Bright Builders violated the South Carolina Unfair  
18 Trade Practices Act if they determine that Christopher Prince  
19 or Prince Distribution did not?

20 MR. DOOLITTLE: That's correct.

21 MR. PATTERSON: As a practicable matter I agree that  
22 that would probably be the result, but I don't think as a  
23 matter of law that's correct. There's different conduct that's  
24 alleged against both of them. It's theoretically possible the  
25 jury could say -- not hold Mr. Prince liable and hold Bright

1 Builders liable.

2           That's not true under the Lanham Act, and that's the  
3 way you have got it set up where it's vicarious. But under the  
4 UTPA, there are different acts, and while I agree very unlikely  
5 that a jury could let off one and do the other, it's at least  
6 legally possible that they could do that. And so I don't think  
7 you can take -- you are in effect taking that question from the  
8 jury.

9           MR. DOOLITTLE: I don't see how they can say that he  
10 didn't violate the South Carolina Unfair Trade Practices Act by  
11 selling counterfeit golf clubs but we, Bright Builders,  
12 violated the South Carolina Unfair Trade Practices by hosting  
13 counterfeit golf clubs. That would be inconsistent.

14           THE COURT: Under what theory, Mr. Patterson, could  
15 Bright Builders be liable and Prince not?

16           MR. PATTERSON: Because under the Lanham Act it is  
17 vicarious liability where they are being held accountable.  
18 Under the UTPA there are separate actions that both engaged in  
19 which could lead to direct liability. The jury could conclude  
20 for some reason that what Mr. Prince did was not unfair, or  
21 deceptive, for whatever reason.

22           There are separate acts that Bright Builders has  
23 engaged in that could lead to their direct liability. We are  
24 not saying the only way they are liable under the UTPA is for  
25 vicarious liability, as we are under the Lanham Act. We are

1 saying they committed independent unfair and deceptive acts  
2 that could subject them to liability.

3 THE COURT: And I think that the argument is not just  
4 the hosting that Bright Builders is accused of, I think there  
5 is some other --

6 MR. DOOLITTLE: Yes, Your Honor, it's the hosting and  
7 the coaching. But if you have a verdict that comes back that  
8 finds Christopher Prince did not violate the Unfair Trade  
9 Practices Act, that he didn't do anything wrong, our only  
10 involvement in this case is through him. So if he didn't do  
11 anything wrong, then we didn't coach him wrong. We didn't tell  
12 him what to do wrong. We didn't do anything wrong.

13 THE COURT: I understand Mr. Patterson's point, the  
14 jury could come back and say Mr. Prince didn't do anything  
15 wrong by developing his web site, but they could come back and  
16 say Bright Builders did something wrong because they didn't  
17 have a process for -- I don't know, going through and finding  
18 out that people knew the difference between counterfeit goods  
19 and not -- whatever the testimony they choose -- I mean, that's  
20 possible.

21 MR. DOOLITTLE: I understand your position, but it  
22 would be an inconsistent verdict. If my conduct, all the  
23 conduct that we did was assisting -- and it's alleged by the  
24 plaintiff -- is assisting Mr. Prince in selling, distributing,  
25 teaching him how, instructing him to sell counterfeit golf

1 clubs, that's what this case is about.

2           So if the jury comes back and says he didn't do  
3 anything in violation -- Mr. Prince didn't do anything in  
4 violation of the Unfair Trade Practices Act, then by  
5 definition, all the help, coaching, assistance, and everything  
6 else that we did for him could not subject us to liability  
7 where he is not subject to liability.

8           THE COURT: So what other independent actions are you  
9 alleging that Bright Builders did other than assist Mr. Prince?

10           MR. PATTERSON: They failed to maintain any  
11 appropriate procedures for their 20,000 web sites to determine,  
12 in addition to Cleveland Golf, how many hundreds of other  
13 companies they are screwing up their intellectual property  
14 rights for. And that is something that Mr. Prince doesn't have  
15 anything to do with.

16           MR. DOOLITTLE: And there is no expert testimony that  
17 has been in this courtroom that says they are required to do  
18 that, Your Honor. There is nothing that has been testified  
19 that says they are required to go out and police all these  
20 internet sites. There is nothing that says they are required  
21 to do that. There is no law that says that. We have had no  
22 expert testimony that says they are required to go out and do  
23 that.

24           MR. PATTERSON: We don't need an expert, we can make  
25 an argument that's an unfair and deceptive trade practice act

1 reasonable or not sound.

2 MR. DOOLITTLE: But this case is not about the  
3 policies and procedures we have to protect everybody else's  
4 trademarks from all the other pages and all the other web sites  
5 and all our other clients, that's not what this case is about.

6 The case is about whether or not we did something  
7 wrong with regards to Mr. Prince and the products that he sold.  
8 It's not about all of our other clients, it's not about  
9 everybody else and what we did and what policies and procedures  
10 we had to protect and make sure the other 10,000 web sites that  
11 we host had actual -- have any kind of counterfeit products on  
12 there, or nudity, or anything else that was discussed. That's  
13 not what this case is about and that's not the allegations.

14 The jury can't come back and find us liable under  
15 South Carolina Unfair Trade Practices Act for failing to  
16 protect somebody else's web site -- somebody else's  
17 intellectual property that is not even part of this lawsuit.

18 THE COURT: Since it is possible for them to come  
19 back with that verdict I'm going to leave the form like it is,  
20 and if it happens we will address it at that time.

21 MR. PATTERSON: The only other issue which  
22 Mr. McElwaine, my IT counsel pointed out that I screwed up a  
23 second ago, the jury would not actually need to find the marks  
24 twice. Because under the Lanham Act it's vicarious liability.  
25 If they find the number of marks infringed under number 1, they

1 Honor. We had agreed to leave the marks that were on the  
2 board, during the Cole testimony, on the board, just wanted to  
3 ask to make sure that nobody else in the court cleans it up --

4 THE COURT: Nobody erases it?

5 MR. DOOLITTLE: Thank you.

6 THE COURT: What are you going to use it for?

7 Closing or something?

8 MR. DOOLITTLE: Going to use it with Mr. Cole because  
9 I didn't question him at all, I just wanted to make sure I can  
10 refer to the same exact chart.

11 THE COURT: That's fine. All right, thank you.

12 \* \* \* \* \*

13 (Excerpts of proceedings from March 9, 2011.)

14 THE COURT: All right. Are there any matters that we  
15 need to address this morning before we bring the jury in?

16 MR. PATTERSON: The only issue that may simplify the  
17 verdict form, I think the parties have agreed that the answer  
18 to question number 2 on the verdict form is actually going to  
19 be stipulated as 11. It's, "How many marks do you find were  
20 infringed?" We talked about it this morning and I think that  
21 we all agree that there are 11 marks at issue.

22 THE COURT: Okay.

23 MR. LIZZI: That's correct for the Defendant Prince.

24 MR. DOOLITTLE: Absolutely agreed by Bright Builders  
25 as well, Your Honor.

1 3, we have agreed to remove the words "unfair competition and  
2 false designation of origin" from that paragraph above  
3 instruction number 3. And that's all from Bright Builders.

4 THE COURT: All right. Anything else? You can bring  
5 the jury in.

6 \* \* \* \* \*

7 THE COURT: All right. Any motions at this time?

8 MR. DOOLITTLE: Your Honor, we renew our directed  
9 verdict motions.

10 THE COURT: All right. Having heard the arguments  
11 earlier on the directed verdict motions, my ruling remains the  
12 same, the motion is denied. Any other motions?

13 MR. PATTERSON: Yes, Your Honor. We would move for  
14 directed verdict as to liability against both defendants. I  
15 believe Mr. Prince has admitted liability and so we would move  
16 for directed verdict as to him based on the admissions of the  
17 sale of the counterfeit clubs. We previously stipulated to the  
18 number of marks. The damages issue would still need to go to  
19 the jury.

20 And our position very quickly as to Bright Builders  
21 is, if he gets to should have known, we know that's got to go  
22 to the jury. Our argument is, we have proven actual  
23 knowledge. We believe a copied club is illegal, and on the web  
24 site it said, "Your source for copied clubs," and therefore  
25 that would be actual knowledge. It would be sufficient.



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MR. PATTERSON: You are not waiving anything --

MR. DOOLITTLE: Right, I don't waive.

(Off record discussion)

MR. PATTERSON: Also, Your Honor, in order to simplify things and hopefully insure that the jury can deliberate as efficiently as possible, we are going to ask that the charge on vicarious liability be deleted so that all you are really charging the jury is contributory liability.

And I think everyone was okay with that. I have got a marked up version where we deleted that.

THE COURT: We will return in a moment.

(Short recess)

\* \* \* \* \*

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from my stenographic notes in the above-entitled matter.

s/ Gary N. Smith

April 10, 2011

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Gary N. Smith, CM  
Official Court Reporter  
United States District Court  
District of South Carolina