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Proceeding/Serial No: 92049332

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Title: DEPOSITIONS OF STEVE SETTEDUCATI
WITHOUT EXHIBITS.

Part 1 of 1

92049332

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 TRADEMARK TRIAL AND APPEAL BOARD

3 **Certified**
4 **Transcript**

4	STK, LLC,	)	Mark:	BACKRACK
)		
5	Petitioner,	)	Registration No.	3,014,986
)		
6	v.	)	Filed:	February 24, 2004
)		
7	BACKRACK, INC.,	)	Registered:	November 15, 2005
)		
8	Registrant.	)	Cancellation No.	92-049,332

9
10 DEPOSITION OF STEVE SETTEDUCATI (VOLUME II)

11
12 TRANSCRIPT of the stenographic notes of
13 the proceedings in the above-entitled matter as taken
14 by and before MARY ANN ADAMS, a Certified Court
15 Reporter and Notary Public of the State of New
16 Jersey, held at the office of ARMOR DECK, 280 North
17 Midland Avenue, Building S-1, Saddle Brook,
18 New Jersey 07663, on Thursday, June 24, 2010,
19 commencing at 6:38 p.m.
20
21
22
23
24

25 Job No. NJ266872

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CONFIDENTIAL PORTIONS

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1 STEVE SETTEDUCATI, having been previously sworn,
2 testified as follows:

3 CROSS EXAMINATION BY MR. LOVENSHEIMER:

4 Q. So before I get too far into the
5 catalog, let's just take a step back. We've been
6 discussing Armor Deck's print catalogs. Can you tell
7 me, are you involved in any of Armor Deck's Internet
8 websites?

9 A. Yes, to some extent.

10 Q. And to what extent are you involved with
11 that?

12 A. I supervise or monitor what goes on with
13 them.

14 Q. And do you review ads for any of the
15 product lines before they go onto the website?

16 A. No.

17 Q. What precisely do you do with regard to
18 the content on the Armor Deck website?

19 A. Review budget, see how much we're
20 spending, look at the competitive search terms, look
21 at how much we spend on them, see what kind of return
22 on spend that we have on them. I think that
23 summarizes it.

24 Q. Now, with regard to competitive search
25 terms, what do you mean by that term?

1 A. We talked about competitive search terms
2 earlier whereby someone may advertise the word
3 BackRack. That would be a competitive search term.

4 Q. Do you, on behalf of Armor Deck,
5 purchase or have you purchased a competitive search
6 term BackRack?

7 A. I believe we -- I don't know for
8 certain, but I believe, yes, we have.

9 Q. And do you recall when that was?

10 A. I think it's an ongoing thing.

11 Q. It's an ongoing thing.

12 A. Yes.

13 Q. So if we were to run a Google search --
14 well, first of all, was it through Google?

15 A. Yes, it is through Google, among others.

16 Q. And what others are you currently using?

17 A. I can't even keep track of them. I
18 don't know. I'm sure MSN and Yahoo.

19 Q. Okay. So if one were to run a search
20 through one of the search engines you've just named
21 for the trademark BackRack, would Armor Deck show up
22 as one of the sponsored links?

23 A. I have a problem with answering the
24 question in respect that what Adrian Jayne would do
25 with the information that I provide you.

1 Q. I don't know how you can have an issue
2 with that, because if one did run a search, wouldn't
3 the result be evident by running the search?

4 A. Again, I have a problem with answering
5 that because of the way Adrian Jayne would use the
6 information from this deposition as evidenced by the
7 way he tried to use information in the past against
8 Armor Deck.

9 Q. Why would you be concerned about what he
10 could do with information concerning your purchase of
11 an ad word? Why would you be concerned about that?

12 A. I can't go into it, you know, unless we
13 have some sort of a protective order on what is
14 discussed.

15 MR. ADAMS: Can we put this under a
16 confidential seal for attorneys' eyes only?

17 MR. LOVENSHEIMER: I don't think that
18 there's a reason to put it under confidential seal,
19 since the results of the search would indicate
20 whether an ad word had been purchased or not.

21 A. It's not quite that simple. It's a
22 little more detailed.

23 MR. ADAMS: Answer the question to the
24 best you can with the information that you can,
25 Mr. Setteducati, without revealing what you believe

1 to be any confidences.

2 A. Once I answer the question, then he has
3 that information that could hurt us, and he has used
4 it in the past. So again, if we can have a
5 protective -- again, I'm not a --

6 MR. ADAMS: Well --

7 A. I'm not a professional, but if we could
8 have some sort of protective order that Mr. Jayne is
9 not going to turn around and broadcast this
10 information like he has already tried to do in the
11 past in other matters --

12 MR. ADAMS: Okay.

13 A. -- then I'd be more than happy to.

14 MR. ADAMS: Let me ask you this. What
15 is -- I'll object to this line of questioning for
16 relevance insofar as the issue of cancellation.
17 You're going to have to establish relevance to this
18 line of questioning.

19 MR. LOVENSHEIMER: Well, the relevance
20 to this line of questioning is that Mr. Setteducati
21 has made it a point of testifying that the purchase
22 of an ad word for a product that he does not sell or
23 that one does not sell somehow or another makes the
24 term generic. And what I'm concerned with is that
25 the purchase of an ad word for goods that are -- that

1 you're -- when you're actually selling competitive
2 product and you're purchasing the ad word as a basis
3 for developing foot traffic for your competing
4 product, that -- that apparently seems to be the
5 concern that he has regarding the potential backlash
6 that he might get from BackRack.

7 But with regard to this, it's -- I need
8 to find out if he is indeed purchasing the ad word
9 for BackRack, and if so, is he then out there trying
10 to create the evidence that somehow or another he's
11 now trying to use to create a genericide of the term
12 BackRack.

13 A. I could tell you that that is not the
14 case, but at which point that I reveal the genesis of
15 why I'm concerned, then the cat will be out of the
16 bag, and Mr. Jayne has evidenced in the past how he
17 would go on a PR campaign to hurt Armor Deck with the
18 information that I would reveal. It has happened in
19 the past as recently as two years ago. I do not want
20 to answer that question.

21 MR. ADAMS: I'm going to instruct my
22 client not to answer that question.

23 A. Unless we have some sort of -- I don't
24 know if it's called a protective order or some sort
25 of -- I'm guaranteed that that information -- I'm

1 more than happy to let you and even Mr. Jayne have
2 it, but I need some sort of -- I don't even know if
3 Mr. Jayne should have it, but I need some sort of
4 assurances that he's not going to turn around and use
5 it as a negative PR campaign against Armor Deck as he
6 has done in the past.

7 Q. And what -- well, I think the -- the
8 concern that I've got is that we don't really have a
9 way to really assess the validity of that point if we
10 don't know. And the problem is that I think that
11 we're under an obligation in the Board proceeding to
12 limit the use of the information. But to some
13 extent, if the information is evident from running a
14 search, I don't know what confidences you're
15 concerned with.

16 MR. ADAMS: Well, he has a concern, and
17 I think that's the only thing that's relevant. And
18 you may not share in that concern.

19 A. I think once I reveal the concern, it
20 will become quite evident to you. I don't have a
21 problem revealing it. I just need an assurance that
22 Mr. Jayne will not use it for anything else that is
23 not germane to this proceeding.

24 MR. ADAMS: Can you provide that
25 assurance?

1 A. And in that context, I don't believe you
2 should have a problem with it, unless Mr. Jayne is
3 going to take that information and run with it and
4 create a negative PR campaign against us, which,
5 again, he has demonstrated in the past, I can clearly
6 show you.

7 MR. ADAMS: Okay. This falls into the
8 range of confidential business information, which I
9 believe is beyond the scope of the cancellation
10 proceeding, notwithstanding how you've characterized
11 it as being relevant.

12 MR. LOVENSHEIMER: Well, I think that
13 Mr. Setteducati should just answer the question. And
14 we have in place, I believe, just under the fact that
15 we're actually before the Board in this proceeding,
16 an obligation to limit the use of what we -- what's
17 used to the proceedings in place. I can't sit here
18 right now and tell you that I can control what
19 Mr. Jayne may or may not do down the road.

20 MR. ADAMS: Well, if --

21 A. Then I have a problem with that.

22 MR. ADAMS: Yeah.

23 A. I'll be more than willing to talk about
24 it, but I have a problem with that.

25 MR. LOVENSHEIMER: Can we go off the

1 record for a second?

2 (Discussion off the record.)

3 MR. LOVENSHEIMER: We're back on the
4 record.

5 Q. Mr. Setteducati, just to reiterate what
6 we've just discussed, we are going to put the -- this
7 next portion of testimony, we're going to treat it as
8 attorneys' eyes only for the purposes of this
9 proceeding. And if at any point we feel that we need
10 to -- BackRack needs to challenge that designation,
11 that issue will be addressed to the Board to make a
12 decision as to that status.

13 A. And as you said a moment ago, it is the
14 burden on the challenging party, which will be you,
15 to prove otherwise that you'd have to have it
16 unsealed.

17 Q. Correct.

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1 (This concludes the portion of the
2 transcript designated confidential.)

3 BY MR. LOVENSHEIMER:

4 Q. Okay. Let's see, where were we?

5 So then we were discussing your relation --
6 your role with the Internet website run by Armor
7 Deck. So other than the budget and your role in
8 purchasing competitive search terms, do you have any
9 other duties or role that you play with respect to
10 the Armor Deck website?

11 A. Not that I can think of.

12 Q. Okay. With regard to the competitive
13 search terms, can you tell me, does Armor Deck
14 purchase competitive search terms?

15 A. Off the record a minute. Can I do that?

16 Q. No. No. We're on the record.

17 The question was, does Armor Deck purchase
18 competitive search terms?

19 A. Again, I don't want to answer that for
20 the same reason, it puts us into the same light.

21 MR. ADAMS: Okay. We're going to go
22 back to the confidential.

23 Q. No, this can't be, because of the fact
24 that you've made quite a production earlier today
25 about why in the world would anyone purchase a

1 trademark if they don't sell those products. And
2 really, we need to find out if, indeed, you might be
3 able to shed some light on that by virtue of the fact
4 that Armor Deck may, in fact, be purchasing trademark
5 search terms for products that they do not sell.

6 So the question is, first, does Armor Deck
7 purchase competitive search terms?

8 A. I'd be glad to provide that information
9 so long as it's used for the purposes of this matter
10 and not as a negative PR campaign by Adrian Jayne at
11 BackRack, Inc.

12 Q. Okay. This is not something that really
13 is at issue here, because I believe you testified
14 earlier that if one were to purchase -- if a company
15 purchases an ad word, regardless of what that ad word
16 is, that company would show up as a sponsored link.
17 Is that correct?

18 A. Whatever company that it was purchased
19 for or whatever the name of that Internet retailer is
20 would show up.

21 Q. Now, Armor Deck -- does Armor Deck sell
22 products through the Internet?

23 A. I'm in the same territory.

24 Q. Armor Deck has a website, does it not?

25 A. Yes, it does.

1 Q. Does Armor Deck provide access for
2 consumers to make purchases of the products offered
3 for sale on the Armor Deck website?

4 A. In a roundabout way.

5 Q. So Armor Deck does not directly sell
6 products through the Internet. Is that correct?

7 A. Not on the Armor Deck website.

8 Q. Okay. And how does Armor Deck sell
9 products through the Internet?

10 A. I'm in the same position.

11 Q. Okay.

12 A. I'm not going to --

13 MR. ADAMS: He can't answer the
14 question.

15 A. I'm not going to put this on record --

16 MR. ADAMS: Yeah.

17 A. -- where I am in a position where I
18 could be hurt by Adrian Jayne.

19 THE WITNESS: Can you go off the record
20 for a second?

21 MR. LOVENSHEIMER: Sure. Can we go off
22 the record.

23 (Discussion off the record.)

24 MR. LOVENSHEIMER: Okay. Can we go back
25 on the record.

1 Can you repeat the last question,
2 please?

3 (The record is read by the reporter.)

4 Q. Okay. So it's your -- you're
5 maintaining that you cannot answer that question
6 unless we go back under attorneys' eyes only. Is
7 that accurate?

8 A. Yes.

9 MR. LOVENSHEIMER: Okay. We will agree
10 then to go back under attorneys' eyes only from this
11 point on until we state that we're officially off of
12 that designation.

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1 (This concludes the portion of the
2 transcript designated confidential.)

3 Q. Okay, Mr. Setteducati. Outside of your
4 role with regard to the Armor Deck website and the
5 limited role that you now have in sales and
6 marketing, do you have any other roles or duties with
7 Armor Deck?

8 A. Yes.

9 Q. And what are those?

10 A. Typical duties of a president/CEO who is
11 active in the company.

12 Q. And do you maintain an office in the
13 Armor Deck headquarters?

14 A. Yes.

15 Q. What about STK, what are your primary
16 duties with STK?

17 A. Advisory to a managing partner, Kent
18 Buckingham.

19 Q. And do you maintain an office there as
20 well?

21 A. No.

22 Q. Between 1994 and 2007, Armor Deck was a
23 distributor for BackRack. Is that correct?

24 A. That is correct.

25 Q. And during that time, Armor Deck

1 distributed BackRack products throughout the
2 northeast. Is that accurate?

3 A. Primarily throughout the northeast, but
4 not limited to.

5 Q. Okay. And with regard to the catalogs
6 that we've gone through earlier today and now through
7 the ones that we just identified, I believe you
8 testified that the ones that you referred to as the
9 generic catalogs, the version that doesn't have the
10 Armor Deck heading on it, those were essentially
11 limited to the Armor Deck thirteen-state region. Is
12 that correct?

13 A. Yes.

14 Q. And those that are marked with Armor
15 Deck on the heading, those were sent outside of the
16 thirteen-state region. Is that correct?

17 A. More so than the generic.

18 Q. Okay. And do you have any indication as
19 to what volume of these catalogs were shipped outside
20 of the thirteen-state region?

21 A. I honestly don't know.

22 Q. Do you know that it has been increasing
23 since the first catalog in 1994?

24 A. Yes.

25 Q. Do you have any idea with the most

1 recent catalog what the extent of distribution was?

2 A. I think it was 25,000.

3 Q. 25,000 total?

4 A. I think.

5 Q. And --

6 A. I don't have that at my fingertips. I
7 think it was 25,000.

8 Q. And of that 25,000, how many of those
9 were outside of the thirteen-state region?

10 A. I have no idea. More so now than it was
11 in the past, and every year it would grow.

12 Q. And is it 10 percent, 15 percent, could
13 you estimate the percentage?

14 A. I would guess, it would purely be a
15 guess, somewhere between 5 and 10 percent.

16 Q. So it's a relatively small portion of
17 the --

18 A. Yes.

19 Q. -- 25,000.

20 Is Armor Deck primarily still a regional
21 entity, the thirteen-state region?

22 A. As far as next-day service through our
23 trucks or via our own trucks, yes. However, our
24 business has grown, you know, beyond those thirteen
25 states that we UPS to, and we send product via common

1 carrier.

2 Q. And of the product that you ship outside
3 of the thirteen-state region, do you have a feel
4 for -- an understanding of about what percentage of
5 the business that represents?

6 A. I have no idea.

7 Q. Once again I'll ask, is it 5 percent,
8 10 percent, 20 percent?

9 MR. ADAMS: If you don't know, tell him
10 you don't know.

11 A. I don't know.

12 Q. Now, in 2007, you indicated that you
13 learned that use of a trademark as a noun is an
14 improper use. Is that correct?

15 A. That's correct.

16 Q. That was late 2007. Right?

17 A. That's correct.

18 Q. And that's based on your conversation
19 with Mr. Adams. Is that accurate?

20 A. That's correct.

21 Q. Do you recall approximately when you had
22 this conversation with Mr. Adams?

23 A. I would guess in December of 2007.

24 Q. Okay. Now, prior to that conversation
25 with Mr. Adams, had you had any contact with

1 Mr. Adams?

2 A. Yes.

3 Q. And when did you first have contact with
4 Mr. Adams?

5 A. I would guess in 2002 or 2001. That
6 would be a pure guess.

7 Q. And what was the purpose of that
8 contact?

9 A. A patent infringement lawsuit.

10 Q. And was -- did that involve Armor Deck?

11 A. No, STK.

12 Q. Okay. And did Mr. Adams represent STK
13 in this patent infringement lawsuit?

14 A. Yes.

15 Q. And who was the plaintiff in that
16 action?

17 A. Penda Corporation.

18 Q. Excuse me?

19 A. Penda Corporation, P-E-N-D-A.

20 MR. ADAMS: I don't believe he indicated
21 who the plaintiff was. I don't really believe there
22 was a plaintiff.

23 MR. LOVENSHEIMER: I'm sorry, could you
24 repeat that?

25 MR. ADAMS: Did he indicate that he was

1 a defendant?

2 MR. LOVENSHEIMER: No. I asked who was
3 the plaintiff.

4 MR. ADAMS: Yes.

5 MR. LOVENSHEIMER: And that could very
6 well have been STK.

7 MR. ADAMS: Would you repeat the
8 question?

9 (The record is read by the reporter.)

10 Q. And once again, that plaintiff could
11 have been STK, could it have not?

12 A. It could have been.

13 Q. However, it was not. It was Penda
14 Corporation. Correct?

15 A. That's correct.

16 Q. Outside -- after that representation by
17 Mr. Adams, did you have any other contact with
18 Mr. Adams prior to the 2007 meeting?

19 A. Yes.

20 Q. And during that time period from your
21 first contact with Mr. Adams through the 2007 contact
22 that you had with him in December, had Mr. Adams been
23 the outside counsel for STK?

24 A. A general outside counsel, no. For STK
25 the only thing he did was represent us in that -- I

1 believe the only thing he did that I can recall is
2 represent us in the Penda litigation.

3 Q. Okay. And now, with regard to Armor
4 Deck, did he represent Armor Deck during that time
5 period?

6 A. No.

7 Q. Between the Penda patent infringement
8 lawsuit and the contact in December of 2007, did you
9 have any other contact with Mr. Adams?

10 A. Yes.

11 Q. And what was the nature of that contact?

12 A. Nexstream.

13 Q. And Nexstream is your Internet -- or
14 your intellectual property venture. Is that correct?

15 A. That's correct.

16 Q. And prior to 2007, did Mr. Adams provide
17 any counseling to you regarding proper use of
18 trademarks in Armor Deck's catalogs?

19 A. No.

20 Q. Did he provide any counsel to you
21 regarding proper trademark usage on the Armor Deck
22 website?

23 A. No.

24 Q. So prior to 2007, you had no reason to
25 believe that Armor Deck was improperly using any

1 trademarks in their catalogs. Is that accurate?

2 A. That's correct.

3 Q. In December of 2007, you learned that
4 that use of a trademark as a noun constitutes
5 improper trademark use. Is that correct?

6 A. Again, believing it was December of
7 2007, yes.

8 Q. Okay.

9 A. It may have been November of 2007. I
10 don't recall exactly when.

11 Q. Okay. And now, when -- when did your --
12 when did Armor Deck's relationship with BackRack
13 cease in 2007?

14 A. I'm not sure how to quantify that in
15 that the relationship deteriorated in perhaps as
16 early as September right on through October and into
17 November.

18 Q. So roughly between September and
19 November of 2007, the relationship between Armor Deck
20 and BackRack deteriorated and eventually in --
21 roughly by the end of November had ceased. Is that
22 correct?

23 A. Yes, for the most part.

24 Q. Okay. And is -- what precipitated you
25 to contact Mr. Adams concerning Armor Deck's use of

1 trademarks in Armor Deck catalogs?

2 A. I do not recall exactly what
3 precipitated it. It might have been just nonchalant
4 conversation about what we were going into. And I
5 think -- I'm certain that what spurred my education
6 onto improper use of trademark was me sending John
7 Adams a brochure that we made for the new Pro Rack.
8 It may have been just as simple as take a look at our
9 new product line. Certainly nothing was planned,
10 nothing was -- I didn't even think we needed anyone
11 to -- I didn't think we needed anyone as a trademark
12 counsel.

13 I did speak with him, I'm remembering now as
14 I'm speaking to you, about the patent on the
15 BackRack, that it was expired, but that information
16 was mainly provided to me by my partner, Scott
17 Muirhead.

18 Q. And you just indicated that you had
19 spoken to Mr. Adams concerning the BackRack patent.
20 Did that occur after the deterioration of the
21 relationship between Armor Deck and BackRack?

22 A. I don't recall.

23 Q. Just so we're clear, your testimony is
24 that your first contact with Mr. Adams in 2007 was
25 maybe as early as November 2007 but probably in

1 December 2007. Is that accurate?

2 A. With regard to the trademark issue.

3 Q. Okay. And prior to that, when was your
4 prior -- previous contact with Mr. Adams?

5 MR. ADAMS: I think he's already
6 testified to that, sir.

7 Q. So with regard to anything BackRack
8 related.

9 A. I don't recall. I speak with Mr. Adams
10 on a regular basis regarding Nexstream business. As
11 far as it pertains to BackRack on a non-trademark
12 issue, I really don't recall.

13 Q. Okay. And did BackRack file a lawsuit
14 against Armor Deck?

15 A. Yes.

16 Q. Do you remember what the claim was that
17 BackRack raised in that case?

18 A. They were owed some monies, and it was
19 regarding nonpayment of an invoice -- invoices.

20 Q. Do you remember when that case was
21 filed?

22 A. No.

23 Q. Was it before Armor Deck -- or sorry,
24 strike that.

25 Was it before STK filed the cancellation

1 proceedings that we're here for today?

2 A. I don't recall. I don't even recall
3 when we filed for these proceedings, and I don't
4 recall when the -- when the BackRack litigation that
5 you just referenced that was filed against us was
6 initiated. I would imagine it was sometime in
7 December or January or February. I'm guessing.

8 Q. How much did Armor Deck owe BackRack
9 according to BackRack's claims in the lawsuit they
10 filed against Armor Deck?

11 A. Somewhere in the neighborhood of
12 \$170,000.

13 Q. And is that case ongoing?

14 A. It's been settled.

15 Q. It's been settled. And why did STK file
16 the cancellation proceeding against BackRack?

17 A. Because we made a competing product, and
18 we believe that that is a generic name in light of my
19 education as to trademarks.

20 Q. I'm sorry, were you finished with that
21 answer?

22 A. Yes.

23 Q. Okay. Let's unpack that for a second
24 then.

25 A. What does that mean, unpack?

1 Q. There was a lot that we need to go
2 through in that statement.

3 A. Oh.

4 Q. So STK makes a competing product to
5 BackRack. That's accurate?

6 A. STK makes a competing product to
7 BackRack, that is correct.

8 Q. Okay. The product that -- we'll just
9 show you actually. Let's go to Exhibit 63. Probably
10 these are the better pictures. Just take a look at
11 the last page of Exhibit 63. Why don't you start at
12 the top. In this first picture, we see what Howard
13 Lichtman earlier today testified to as a mesh style
14 headache rack or cab guard. And is this a BackRack
15 product that's depicted here?

16 A. It looks like it.

17 Q. Okay. And this mesh style headache rack
18 or cab guard that appears in the BackRack product
19 guide that's marked as Exhibit 63, does STK make a
20 product that is similar to that product?

21 A. Yes, we do.

22 Q. And what is that product called?

23 A. Pro Guard.

24 Q. Okay. And when did STK first introduce
25 the Pro Guard?

1 A. December of '08 or January of '09 -- I'm
2 sorry, December of '07 or January of '08, I believe.
3 I can't be sure.

4 Q. Okay.

5 A. But it was after the -- basically after
6 the termination of our relationship or after -- it
7 was sometime in very late 2007. I don't know when we
8 formally introduced the Pro Guard.

9 Q. Okay. Now, if you look at the picture
10 below that, that was a style that was testified to by
11 Mr. Lichtman earlier today as a rack style headache
12 rack or cab guard. And is that product a BackRack
13 brand --

14 A. Yes.

15 Q. -- headache rack?

16 A. Yes.

17 Q. Okay.

18 A. I believe so.

19 Q. Okay. And -- well, you've testified
20 earlier that you sold them for thirteen years, so
21 surely you recognize them as a BackRack headache
22 rack/cab guard. So --

23 A. But I'm 99.9 percent sure. As sure as I
24 was when I saw something for sale for 3.99 and I had
25 a buy box right next to it.

1 Q. Except that it was actually 39.95 but I
2 didn't want to correct you.

3 A. Okay.

4 Q. So actually then --

5 A. But you can never be sure of anything I
6 learned earlier today.

7 Q. Right. So then the question is, then
8 does STK offer a product that's similar to the
9 BackRack headache rack that's depicted in the second
10 picture?

11 A. Yes, they do.

12 Q. And what is that product called?

13 A. Pro Rack.

14 Q. And when was the Pro Rack introduced?

15 A. There was a prototype of the Pro Rack
16 that was displayed at the 2007 SEMA show in the
17 beginning of November 2007.

18 Q. Okay. And that was the SEMA show in --
19 was that in Las Vegas?

20 A. That's correct.

21 Q. Do you know if Adrian Jayne from
22 BackRack saw that prototype?

23 A. I'm sure he did.

24 Q. Did he ever speak to you about the
25 display of that prototype by STK at the SEMA show in

1 2007?

2 A. Yes.

3 Q. Was he upset with you?

4 A. Very.

5 Q. And what was your reaction to his being
6 upset?

7 A. My reaction was to try and calm him
8 down.

9 Q. Okay. And how did you try and calm him
10 down?

11 A. By asking him to calm down.

12 Q. Okay. And did STK continue in the
13 development of the prototype?

14 A. Yes, we did.

15 Q. And ultimately it was introduced by STK
16 in December of 2007. Is that about the same time
17 frame as the Pro Guard?

18 A. I don't recall if we introduced them
19 both together, and I'm not certain by introduced what
20 we're talking about. There was a couple of
21 applications ready, I believe, in late December of
22 2007, if my memory serves me correct.

23 Q. And by application, what do you mean?

24 A. By applications, fitments on certain
25 vehicles. BackRack, for instance, has -- BackRack,

1 Inc., for their BackRack, has a different application
2 for each truck out there, an older Ford, a newer
3 Ford, a Ford Super Duty. Each one is an application.

4 Q. Okay. So each application, for example,
5 for the BackRack headache rack is tailored to fit
6 specific truck models. Is that correct?

7 A. That is correct.

8 Q. And STK's Pro Rack is also similarly
9 tailored to fit certain trucks. Is that accurate as
10 well?

11 A. That's correct.

12 Q. And so by applications, you mean that
13 the first versions of the Pro Rack were ready in
14 2007. Is that accurate?

15 A. I believe -- again, I can't swear to
16 this definitively, but I believe by late December, we
17 had a couple of applications for Pro Rack. That's
18 the way I remember it. I could be wrong, but that's
19 what I believe.

20 Q. Okay. So it's fair to say then that STK
21 and BackRack are direct competitors?

22 A. Yes.

23 Q. And they've been so since 2007?

24 A. Yes.

25 Q. And that competition is direct between

1 the BackRack headache rack, the rack style headache
2 rack, and the Pro Rack, and also in the BackRack
3 safety rack and the STK Pro Guard. Is that accurate?

4 A. Yes, but I'm not sure what you meant by
5 rack style.

6 Q. The style that we had previously
7 discussed in the second picture.

8 A. Okay.

9 MR. ADAMS: Second picture of what?

10 MR. LOVENSHEIMER: The second picture on
11 the last page of Exhibit 63.

12 A. Yeah, you may have said rack style, but
13 I glossed over it. I really don't know what you mean
14 by rack style.

15 Q. Well, that was the testimony of
16 Mr. Howard Lichtman earlier today.

17 A. Oh. I wasn't there for that.

18 Q. So that might be a term that those in
19 the industry would recognize?

20 A. No, not that I'm familiar with.

21 Q. So Howard Lichtman doesn't -- isn't
22 accurately stating that that's a rack style?

23 A. There are a lot of different ways to
24 quantify what these products are. Rack style may be
25 one of them. I'm not as close to the street as I

1 used to be. But that might very well be accurate.
2 To me it's a BackRack or a cab rack or a headache
3 guard or a truck rack.

4 Q. Now, by being -- you just stated that
5 you're not close to the street anymore. Do you
6 not -- do you not deal with direct consumers anymore?

7 A. I personally don't deal directly with
8 consumers.

9 Q. I'm sorry, just when was the last time
10 you, yourself, actually dealt with the direct end
11 users of these products?

12 A. I do not recall. Over the years, we've
13 had consumers come to our showroom, and I had dealt
14 with them directly. More so I had dealt with our
15 dealer accounts, but not over the last couple of
16 years.

17 Q. Okay. With regard to the showroom, what
18 showroom is that?

19 A. The one you walked in through this
20 afternoon -- this morning.

21 Q. Oh, in this office?

22 A. Yeah.

23 Q. That's the showroom?

24 A. Yeah. Occasionally retail customers
25 will make it to our establishment and -- not lately,

1 not as of late, but in the past, and, you know, we
2 would speak with them.

3 Q. Would they schedule appointments?

4 A. No.

5 Q. They would just wander in?

6 A. Yes.

7 Q. How frequently did that happen?

8 A. Once a day, five times a day. I can't
9 really tell you. There's a sign on the building, and
10 sometimes people wander in.

11 Q. When was the last time someone wandered
12 in?

13 A. I don't know. Perhaps today.

14 Q. But if they did wander in, you didn't
15 deal with them directly.

16 A. No.

17 Q. Is that correct?

18 A. No.

19 Q. Okay. And do you recall the last time
20 that you did deal with any end user directly?

21 A. No, I don't recall.

22 Q. What about the retail -- your retailers,
23 do you deal directly with your retailers?

24 A. I can't think of any right now. The
25 information I get is generally from my salespeople.

1 Q. So you deal with your salespeople, who
2 then go out beyond these four walls and deal with
3 people in the field. Is that accurate?

4 A. Yes.

5 Q. And was there ever a time that you dealt
6 directly with the retailers?

7 A. Yes.

8 Q. And when was that?

9 A. It was some years ago. I don't recall
10 exactly when. As the business built and grew, I got
11 off the phone with our dealers and tended to other
12 matters.

13 Q. Okay. And did that happen in the last
14 ten years?

15 A. Probably fifteen years ago.

16 Q. Fifteen years ago?

17 A. I'm guessing. It's a pure guess.

18 Q. Okay. But it's been more than ten. Is
19 that fair?

20 A. Probably.

21 Q. Okay. Now, just getting back to this
22 statement that you made before. You made a reference
23 to your education, your trademark education. Can you
24 just tell me what you meant by your education in
25 trademarks?

1 A. John Adams explained to me meanings --
2 I'm sorry, explained to me proper usage of trademark.
3 He sent me several publications that identified what
4 the proper usage is and what are some of the pitfalls
5 that some of the companies, some very well-known
6 companies, like Kleenex -- or well-known products
7 like Kleenex or Coke or cellophane, some of the
8 examples where trademarks were used improperly, and
9 hence I think cancelled is the word for it, I'm not
10 really sure. But I read several publications that he
11 sent to me.

12 Q. Do you recall what any -- the title of
13 any of these publications?

14 A. No, I don't.

15 Q. So outside of your conversations with
16 John Adams and any publications he may have sent you,
17 you have no other outside trademark training. Is
18 that correct?

19 A. I believe so, yes.

20 Q. Now, I believe earlier today you
21 testified that you don't have a college diploma. Is
22 that correct?

23 A. That's correct.

24 Q. You have a degree from a computer --
25 computer school. Is that --

1 A. Yes.

2 Q. -- accurate?

3 Was it a two-year program or a four-year
4 program? What kind of program was that?

5 A. I think it was one year.

6 Q. So it was a one-year program. What was
7 the -- first of all, what school was that?

8 A. Computer Programming Institute.

9 Q. And where was that located?

10 A. Paramus, New Jersey.

11 Q. And what was the diploma in?

12 A. Computer programming.

13 Q. Computer programming. And when did you
14 earn that?

15 A. I'm going to guess, 1981 or 1982. It's
16 a guess. It's certainly before 1984 when I started
17 the business.

18 Q. So was that the last formal education
19 that you had?

20 A. I also attended colleges, and I don't
21 recall which was first, the Computer Programming
22 Institute or the colleges.

23 Q. And what colleges did you attend?

24 A. Bergen Community College.

25 Q. Where is that located?

1 A. Paramus, New Jersey.

2 Q. Okay. Any others?

3 A. William Paterson College.

4 Q. Where is that located?

5 A. I think it's in Paterson or Haledon.

6 Q. And what courses did you study there?

7 A. From what I recall, law, business.

8 That's all I recall. I took a law course.

9 Q. What law course?

10 A. Intro to law, or something like that.

11 Q. Okay. It wasn't a trademark law class
12 though, was it?

13 A. No.

14 Q. Okay. Let's see here. So as of 2007
15 then, you realized that if you use a trademark as a
16 noun, then it's an improper use. Is that accurate?

17 A. I think so.

18 Q. And that's your current understanding,
19 that use of a trademark as a noun is an improper
20 usage. Correct?

21 A. Yes.

22 Q. And what is your understanding that the
23 result of such an improper usage is?

24 A. That the result can be a canceling of
25 that trademark.

1 Q. And what is the basis for that
2 understanding?

3 A. What I've read and what I was -- my
4 conversations with John Adams.

5 Q. Who was the subcontractor that
6 manufactures STK's Pro Rack and Pro Guard?

7 A. McHone Industries.

8 Q. Where are they located?

9 A. Salamanca, New York.

10 Q. And do you have any ownership interest
11 in that company?

12 A. No.

13 Q. Did Armor Deck have any ownership
14 interest in that company?

15 A. No.

16 Q. Does STK have any ownership interest in
17 that company?

18 A. No.

19 Q. Let's take a look at the document that
20 we previously marked as Exhibit number 97. This is
21 your first declaration that you submitted in support
22 of --

23 A. Right.

24 Q. -- summary judgment. Correct?

25 A. Yes.

1 Q. Now, you took it upon yourself to search
2 for the terms "back" and "rack." Is that accurate?

3 A. Yes.

4 Q. Did you search for the term BackRack,
5 all one word?

6 A. I don't recall.

7 Q. Do you know if any dictionary entries
8 exist for the term BackRack, all one word?

9 A. No. I don't know.

10 Q. And now, in the definitions that you --
11 that we went through earlier today, do you see any
12 references to the term BackRack, all one word?

13 A. No.

14 Q. Okay. Do you see any references -- as
15 you've just reviewed the entries again, did you see
16 any references -- for example, I'm looking at the
17 page that's -- it begins on the bottom of 200, I
18 believe, it's labeled 1 of 9, on to page 2 of 9. Do
19 you see where -- at the bottom of that page where it
20 says phrasal verbs?

21 A. Yes.

22 Q. Okay. Do you see how that lists
23 various -- you know, back down, back off, back up.
24 Right?

25 A. Yes.

1 Q. And then below that, you see other
2 entries for, you know, back and fill, back to back,
3 behind one's back, on back, off back, backless. Do
4 you see any combinations of the word "back" and
5 "rack" in any of these entries?

6 A. No.

7 Q. Are you familiar with any other products
8 out there that are known by the name BackRack?

9 MR. LOVENSHEIMER: Go off the record.

10 (Brief interruption.)

11 A. I believe that there is some sort of
12 product for a chiropractor, back pain or something,
13 maybe called a BackRack that I've seen.

14 Q. Any other products that use the term
15 BackRack?

16 A. I don't recall.

17 Q. Are you familiar with a device that is
18 attached to the bike -- to the back wheel of a bike
19 that goes by the name BackRack?

20 A. I'm not sure. Maybe I've seen that as
21 well. I really don't know. I can't recall.

22 Q. Are you familiar with a product that's a
23 device that attaches to the back of a van or a truck
24 that -- attached to which you can attach bikes that
25 goes by the name of BackRack?

1 A. I don't think I've ever seen that.

2 Q. Okay.

3 A. I don't recall.

4 Q. Okay. Now, let's see, let's take a
5 quick look at your second declaration here. I
6 believe this is the second declaration that you
7 submitted in support of the summary judgment motion.
8 Is that correct?

9 A. Yes.

10 Q. Okay. Let's see. Actually, you know
11 what, before I get to this, I want to go to another
12 document that we looked at earlier today.

13 MR. LOVENSHEIMER: Are these copies
14 or -- I'm looking actually for Exhibit 66. It should
15 be the actual -- oh, there we go.

16 MR. ADAMS: These are extras, Tony.

17 MR. LOVENSHEIMER: They would be the
18 Trucking Times.

19 Yeah, let's see here. Yeah, I think,
20 once again, it was -- I needed the whole catalog and
21 not the -- John, do you mind if we mark this as an
22 exhibit?

23 MR. ADAMS: Yes, but you can't take it
24 with you.

25 MR. LOVENSHEIMER: No, that's fine.

1 We'll mark it and leave it with the originals.

2 MR. ADAMS: I'll mark it as my exhibit.

3 MR. LOVENSHEIMER: Okay.

4 MR. ADAMS: 'Cause that's sort of an
5 historic document.

6 MR. LOVENSHEIMER: Yeah.

7 (Discussion off the record.)

8 Q. Okay. Mr. Setteducati, I'm actually
9 going to show you once again a document that we went
10 over earlier today that was Exhibit 66. Do you
11 recall addressing this document earlier today?

12 A. Yes.

13 Q. Okay. I'm actually going to show you
14 the full copy of Trucking Times, Volume IV, Issue IV,
15 dated December 1993. I want to show you -- if you
16 would, just take a look at the section that begins
17 here on page 12 of the magazine. At the top -- no,
18 the product listings.

19 A. Yes.

20 Q. Do you see the term BackRack listed in
21 the product listings there?

22 A. I don't see it.

23 Q. Okay. Do you see the term headache
24 racks?

25 A. I would have to turn the page. Right?

1 Q. You may turn the page, yes.

2 A. Yes.

3 Q. Okay. Do you see the term -- let's see.
4 Actually, can I see it again?

5 Now, let's take a quick look in the next --
6 flip to page 19, which -- I'll just make sure I've
7 got this right. Actually, I'm going to skip ahead
8 here. If you look at page 37. What does the heading
9 of that page state?

10 A. Headache Racks.

11 Q. Okay. And the first section underneath
12 that is also called Headache Racks. Is that correct?

13 A. Yes.

14 Q. And do you see BackRack, Inc., listed
15 there?

16 A. Yes.

17 Q. Okay. So do you see other manufacturers
18 listed below there?

19 A. Yes.

20 Q. Do you have an understanding as to what
21 that list of manufacturers means?

22 A. Would you repeat the question?

23 MR. LOVENSHEIMER: Can you read back the
24 question.

25 (The record is read by the reporter.)

1 A. I'm a little puzzled, because it has
2 some manufacturers here and some distributors here.

3 Q. Okay. So who were the distributors?

4 A. Blacksmith Distributing, Inc. Keystone
5 Automotive Warehouse. Leer Specialty Products.
6 Truck & Van Land. Weathers Auto Supply. That is
7 under the section that says Headache Racks.

8 Q. Right. And the other entities that are
9 listed there, are they -- which ones are -- what
10 other entities are listed there?

11 A. Aluminum Fabricated Products/Daws
12 Manufacturing.

13 Q. Okay.

14 A. Better Built Company/Daws Manufacturing.

15 Q. Uh-hum.

16 A. Hi-Lift Jack. I think they're a
17 manufacturer. I'm not really sure.

18 Q. Okay.

19 A. Vanguard Manufacturing, Inc.

20 Q. Okay.

21 A. That's it.

22 Q. So those that are not distributors, is
23 it fair to say that those are manufacturers?

24 A. I believe they are.

25 Q. Okay. And are they manufacturers of

1 headache racks?

2 A. I believe they must be.

3 Q. Okay. And just if you would, just take
4 a look back in this document. It starts here on
5 page -- it starts here I believe on page 18 -- or no,
6 actually starting here on 19, Accessories. It's the
7 start of the various products. If you would just
8 leaf through there. Do you see BackRack listed as a
9 product in that magazine?

10 A. You mean under any of the --

11 Q. As a --

12 A. -- headings?

13 Q. As a heading, yes.

14 A. I don't know what you mean by as a
15 product, but I'm -- on a cursory review here, I'm not
16 seeing BackRack.

17 Q. Okay. And you can flip the page.

18 A. If it's here, you can point me towards
19 it and I'll acknowledge it.

20 Q. Well, by products, I mean, if you look
21 at the categories, there's like antennas here,
22 there's alarm security systems, there's air
23 compressors, there's bed protectors, bed rail
24 protector tape.

25 MR. ADAMS: I object. Are you

1 testifying as to the content of this article --

2 MR. LOVENSHEIMER: No, I'm just --

3 MR. ADAMS: -- or are you allowing him
4 to review it as you asked him?

5 MR. LOVENSHEIMER: He asked me what I
6 meant by products, and I'm informing him that the
7 products seem to be the titles in bold.

8 Q. So based on that, do you see BackRack
9 listed as a bold item in this magazine, in this
10 listing? As a heading.

11 A. No, I do not see BackRacks listed as a
12 heading, nor do I see cab guards or truck racks
13 either. I find that odd.

14 Q. Okay. But you do see headache racks
15 though. Correct?

16 A. Headache racks seems to be the one
17 heading that would pertain to that type of product,
18 but again, not cab guards, not window guards, not
19 truck racks, not cab protectors, not BackRacks.

20 Q. Okay. And in this case actually,
21 BackRack is listed as a source of the particular type
22 of product that this magazine has referred to as
23 headache racks. Is that correct?

24 A. That's correct.

25 MR. ADAMS: Objection. If you're going

1 to ask him a question, ask it. Don't testify for
2 him.

3 MR. LOVENSHEIMER: I'm on cross. I can
4 lead the witness.

5 MR. ADAMS: Yes, I realize that, but
6 you're leading him.

7 MR. LOVENSHEIMER: After today, I don't
8 think that you're in a position to talk about
9 leading. But anyway, that's it. That's all I have
10 for this.

11 Q. All right. Now, the second declaration,
12 we went through this in just painstaking detail
13 earlier today, going through each and every listing
14 of the -- I'm sorry, not this one, but for each of
15 the exhibits to this -- to this declaration.
16 Correct?

17 A. I believe we did, yes.

18 Q. And these were the Armor Deck -- the
19 various Armor Deck catalogs. Correct?

20 A. I believe we did, yes.

21 Q. Well, we've looked through those. We
22 may go back to that for a couple of questions. I'm
23 more concerned about the additional portions of the
24 Armor Deck catalogs which were not produced and not
25 part of your declaration.

1 In particular, I'll just start with the one
2 that we've marked as BackRack Exhibit 113, which is
3 the fall/winter 1994. The index. If you don't mind,
4 would you just take a look at the index, which is
5 listed here as -- I don't really think it's numbered
6 as a page, but it's identified at the top as the
7 index for the 1994/'95 catalog.

8 A. Okay.

9 Q. Are you familiar with the index to this
10 document?

11 A. As much as I'm looking at it right now,
12 I can see it, yes.

13 Q. And do you have an understanding why
14 certain entries are in a boldface while others are
15 not in a boldface?

16 A. Yes.

17 Q. Why are some in boldface?

18 A. Because they're manufacturers.

19 Q. And the ones that are in non-boldface
20 type, what are those entries?

21 A. More or less types of products or
22 categories of products.

23 Q. Okay. So in the 1994/'95 catalog that
24 you're looking at there, was BackRack, Inc., or --
25 I'm sorry, was it BackRack or BackRack, Inc.?

1 BackRack. Was BackRack in bold?

2 A. Yes.

3 Q. Okay. So that means BackRack was listed
4 as a manufacturer. Correct?

5 A. Yes.

6 Q. And then below that, do you see an entry
7 for headache racks?

8 A. Yes.

9 Q. Okay.

10 A. Actually to the right of it, not below
11 it.

12 Q. Okay. So headache racks are listed in a
13 non-boldface font. Correct?

14 A. Right.

15 Q. Do you see an entry for cab guards?

16 A. No.

17 Q. Okay. So in this 1994/'95 catalog, the
18 type of product described, as you indicated, if it's
19 in the non-boldface font, that's a type or a category
20 of product. Is that correct?

21 A. Yes.

22 Q. The type or category of product that's
23 listed is headache racks. Is that correct?

24 A. Headache racks is one type that is
25 listed, yes.

1 Q. Okay. And do you see the term BackRack
2 in a non-boldface font?

3 A. No.

4 Q. Okay. Let's take a look at the 1996
5 catalog, BackRack-112. Once again, I'm more
6 concerned about the index here. And on this one, I
7 think there's actually some color added. Once again,
8 do you see some entries are in a color -- colored
9 font and others are in black font. Is that correct?

10 A. Yes.

11 Q. What -- why are the ones in color font
12 in a color font?

13 A. The colored ones are the manufacturers.

14 Q. Okay. And is BackRack in a colored
15 font?

16 A. Yes.

17 Q. Okay. Do you see the term headache
18 racks?

19 A. Yes.

20 Q. Okay. And is headache racks in a color
21 font?

22 A. No.

23 Q. And if it's in a black font, what does
24 that indicate?

25 A. Same as earlier, it's a type of a

1 product or -- more or less a category or type of
2 product.

3 Q. Okay. Thank you. The catalog that we
4 marked as BackRack Exhibit 111, once again more
5 concerned with the index here. Okay. And it appears
6 on this one it's -- there are some entries in a bold
7 font and others in a non-bold font. If an article
8 is -- if an entry is in a bold font, what does that
9 indicate?

10 A. That is a manufacturer.

11 Q. Okay. And if it's in a non-bold font,
12 what does that indicate?

13 A. That it is that category or product
14 type.

15 Q. Okay. And is BackRack in a bold font?

16 A. Yes.

17 Q. And is headache rack in a bold font?

18 A. No.

19 Q. And does that indicate that it's a type
20 or a category of goods?

21 A. Yes.

22 Q. And that was the 1998/1999 catalog. Is
23 that correct?

24 A. Yes.

25 Q. Let's move on to the next one then that

1 we marked as BackRack-10, which was the 2000/2001
2 catalog. Once again we're back to color here. If
3 you would, there appears to be certain entries in a
4 colored font --

5 A. Yes.

6 Q. -- while others are in a black-and-white
7 font. If an article is -- if an item is listed in a
8 colored font, what does that indicate?

9 A. It's a manufacturer.

10 Q. Okay. And if it's in a black and white
11 font, what does that indicate?

12 A. A black font indicates it's a category
13 or type of product.

14 Q. Okay.

15 A. They put cab guard in this one.

16 Q. So you're ahead of me on that one. So
17 do you see the term cab guard?

18 A. Yes.

19 Q. And is that listed as a -- in a colored
20 font?

21 A. No.

22 Q. So that means -- does that mean it's a
23 category or type of good?

24 A. Yes. It's not a manufacturer.

25 Q. Okay. And BackRack, is BackRack in a

1 colored font?

2 A. Yes, it is.

3 Q. Does that mean that it's a manufacturer
4 of a product?

5 A. Yes.

6 Q. Okay. And if the entry under cab guards
7 included the pages referred to here for BackRack,
8 would it be fair to say then that BackRack is a
9 manufacturer of products within that category?

10 A. Yes.

11 Q. Let's see. Next one, BackRack-109.
12 This is the 2002/2003 catalog. Once again, in
13 colored font. Some of these are in color, some are
14 in black. If it's in color, what does it indicate?

15 A. That it's a manufacturer.

16 Q. Correct. And the -- if it's in black,
17 what does that indicate?

18 A. That it's a product type or category.

19 Q. And do you see the term cab guards in
20 this?

21 A. Yes.

22 Q. And is that in a colored font?

23 A. No.

24 Q. And now you see the term BackRack?

25 A. Yes.

1 Q. And is that in a colored font?

2 A. Yes.

3 Q. Thank you. Let's see, BackRack-108.

4 It's the 2003/2004 catalog. Take a look at this.

5 Some entries are in color, some are in black. If

6 it's in color, what does it indicate?

7 A. Manufacturer.

8 Q. And if it's in black?

9 A. Category or product type.

10 Q. And is the term BackRack in colored
11 font?

12 A. Yes.

13 Q. And what does that indicate?

14 A. It's a manufacturer.

15 Q. And is the term cab guards listed?

16 A. Yes, it is.

17 Q. And is that in color?

18 A. No, it isn't.

19 Q. What does that indicate then?

20 A. It's a product type or category.

21 Q. Okay. Next, BackRack-107, the 2005/2006

22 catalog. I'm just going to show you once again the

23 index on this. And if an entry is in color, what

24 does that indicate?

25 A. It's a manufacturer.

1 Q. And if it's in black and white?

2 A. It's a product category -- or a product
3 or a type or a category.

4 Q. Okay. And the term BackRack, does that
5 appear?

6 A. Yes, it does.

7 Q. And is it in color?

8 A. Yes.

9 Q. Now, the term cab guards, does that
10 appear?

11 A. Yes.

12 Q. And is that in color?

13 A. Yes.

14 Q. Are you sure about that?

15 A. No, I'm wrong. It's in black and white.
16 I think I need a break.

17 Q. We've got one more to go. Then if you
18 want a break, we can take it.

19 Finally, BackRack-106, the 2006/2007 catalog.
20 Once again, if an entry is in color, what does that
21 indicate?

22 A. It's a manufacturer.

23 Q. Okay. And if it's in black font, what
24 does that mean?

25 A. It's a product type or a category.

1 Q. Okay. And the term BackRack, does that
2 appear?

3 A. Yes.

4 Q. And is it in color?

5 A. Yes.

6 Q. And the term cab guards, does that
7 appear?

8 A. Yes.

9 Q. And is it in color?

10 A. No.

11 Q. Okay. So based on our review of the
12 catalogs that were in -- that were included in
13 your -- part of which were included -- or these
14 catalogs which were part of the declaration exhibits
15 to your second declaration, based on our review of
16 those catalogs, was there ever a time that Armor Deck
17 listed BackRack in its catalog as a product type or
18 category?

19 A. In the index?

20 Q. In the index.

21 A. It appears not.

22 Q. And was there ever a time outside of the
23 catalog that Armor Deck ever referred to BackRack as
24 a product type or category?

25 A. What do you mean by outside of the

1 catalog?

2 Q. Well, you said in the catalog -- or I'm
3 sorry, in the index. Outside of the index, rather,
4 is there ever a time where BackRack was listed as or
5 referred to as a product type or category? Between
6 1994 and 2007.

7 A. As opposed to what?

8 Q. Well, you specified as to my question
9 when I asked you if there was ever a time that Armor
10 Deck referred to BackRack as a -- anything other than
11 a source of product, you said, well, in the index,
12 no. So then my question was, outside of the index,
13 based on our review of the two thousand -- I'm sorry,
14 1994 through 2007 catalogs, was there any other part
15 of the catalog where Armor Deck referred to BackRack
16 as anything other than a source of goods?

17 A. I think we referred to it as a product,
18 as a -- the BackRack, you know, however you would
19 quantify that, as a type of a product. The BackRack
20 does this, the BackRack is that. So I'm not really
21 sure if that falls within the scope of what you're
22 asking.

23 Q. Well, that's interesting that you say
24 "we referred to it as." So --

25 A. We meaning the company, Armor Deck.

1 Q. So Armor Deck then -- is it your
2 testimony that Armor Deck is responsible for the copy
3 that's used in the catalogs from 1994 to 2007?

4 A. I would say ultimately Armor Deck is
5 responsible for the copy. However, the copy was
6 taken -- much of the copy was taken directly from
7 BackRack literature, its styling, and what have you,
8 and it was, once again, always approved and never
9 disproved, never -- it was never -- we were never
10 told by BackRack or Adrian Jayne specifically that he
11 did not approve of the way we listed the copy there.

12 Q. But BackRack did not write the copy as
13 it appears in the Armor Deck catalogs. Is that
14 correct?

15 A. Well, it would depend on, you know, how
16 you would quantify that again. BackRack wrote the
17 copy for their own literature, which we copied.
18 Sometimes we would modify it a little bit, lay it out
19 differently on a page, but, you know, we got our
20 information for the catalog from BackRack's
21 literature. If you look indeed at our catalog pages
22 and BackRack's own brochures, you're going to see
23 that they're very similar. The wording sometimes is
24 identical. And just sometimes they're laid out
25 differently on the page.

1 Q. Okay. That's great. It doesn't answer
2 my question. My question is, who was responsible for
3 the ad as placed in these catalogs?

4 A. Well, Armor Deck, of course. We
5 produced the catalog.

6 Q. Okay. Thank you. That's all I had.

7 But ultimately, even though you just said that
8 you treated BackRack as a product, you referred to it
9 in the ad as the BackRack, in the index you never
10 referred to the BackRack as a product type. Correct?

11 A. BackRack is the name of the
12 manufacturing company. We named all manufacturing
13 companies in the index.

14 Q. Okay.

15 A. The name of BackRack is BackRack.

16 Q. And BackRack made cab guards and
17 headache racks according to the indexes there. Is
18 that correct?

19 A. They fit within the scope of the index
20 under cab guards and --

21 Q. But you -- Armor Deck referred to the
22 products made by BackRack as cab guards and headache
23 racks from 1994 to 2007, did they not?

24 A. I'm not really sure. I'd have to look
25 at the pages. I think mostly it was not used

1 correctly.

2 Q. No. I'm dealing with the indices here
3 we've just gone through.

4 A. Oh, okay. So repeat the question.

5 MR. LOVENSHEIMER: Can you read back the
6 question.

7 (The record is read by the reporter.)

8 A. I'm not sure that I can answer that
9 question. BackRack in the indices had a listing for
10 the name BackRack under its manufacturer -- because
11 it was a manufacturer, as all did -- as other
12 manufacturers did, and there were separate listings
13 for product type categories that BackRack fit under,
14 such as cab guards and headache racks.

15 Q. But there was no product type or
16 category ever included for the term BackRack.
17 Correct?

18 A. That's correct. Is that what you
19 originally asked me?

20 Q. That's what I asked.

21 MR. LOVENSHEIMER: Did you want to take
22 a break?

23 THE WITNESS: Five minutes. I'm just
24 getting punchy.

25 (A break was taken.)

1 Q. Let's take a look back at your -- what
2 we marked as Exhibit number 99, which is your third
3 declaration. Now, you previously testified that you
4 ran these -- you ran these searches. Correct?

5 A. Yes.

6 Q. I'm interested to know if you --

7 A. I'm not -- okay. I'm sorry.

8 Q. Actually, let's do it exhibit by
9 exhibit. Let's take a look at Exhibit A. Okay. Did
10 you run this search on Yahoo?

11 A. Yes, I did.

12 Q. And do you know when you ran this
13 search?

14 A. I'm sure that I specified when I ran it
15 in the text of the declaration.

16 Q. But it's not -- it's not -- there's no
17 marking on the actual screenshot to indicate when it
18 was captured. Correct?

19 A. I don't believe there is. I didn't
20 learn that I should do that until a later date.

21 Q. Okay. Now, let's see, looking at the
22 sponsor results, you've got -- if you look at the two
23 across the top, BackRack, the heading is BackRack,
24 then the link appears to be
25 www.speedytruck.com/BackRack. Is that correct?

1 A. I see that.

2 Q. Did you click on that link to see what
3 was found?

4 A. I don't recall.

5 Q. Okay. And the one below that truck
6 headache racks and guards at
7 www.BuyAutoTruckAccessories.com, did you click on
8 that link to see what was there?

9 A. No. And I think you understand why.

10 Q. And so then where it says, cab guards
11 and headache racks at the guaranteed lowest possible
12 price, what terms are they using then to describe
13 these types of products in that ad?

14 A. In that particular ad?

15 Q. Yeah.

16 A. They are using truck headache racks and
17 guards. They're using cab guards and headache racks.

18 Q. Okay. So they're not using the term
19 BackRack in that ad. Is that correct?

20 A. In that particular ad, no.

21 Q. Okay. But they are referring to the
22 types of goods as cab guards and headache racks.
23 Correct?

24 A. Yes.

25 Q. Okay. Just looking at the other

1 listings along the side here, did you follow -- did
2 you click on all the sponsored results to see what
3 the -- what you actually would find in each result?

4 A. No.

5 Q. Okay. And let's see. So you didn't
6 follow -- you didn't necessarily link on
7 truckchamp.com?

8 A. I am aware that they sell the BackRack,
9 so I likely did not.

10 Q. Okay. And I'm assuming you didn't
11 follow any of the links, like the premium backpacks
12 for dogs?

13 A. That's correct, for obvious reasons.

14 Q. Okay. So, for example, the premium
15 backpacks for dogs, if they're showing up in the
16 sponsored results, does that mean that this
17 www.onlynaturalpet.com purchased BackRack as a term
18 for an ad word?

19 A. Yes.

20 Q. Okay. And they don't sell BackRack
21 products, do they?

22 A. No, but they sell backpacks, and quite
23 often someone will spell the word wrong, so that's
24 why they likely bought the phrase.

25 Q. Okay. So that's one reason why a

1 company would purchase an ad word for -- that was a
2 trademark for a product they didn't sell. Is that
3 correct?

4 A. Yes.

5 Q. So they didn't -- so this company
6 purchased the trademark term BackRack even though
7 they don't sell BackRack products. Correct?

8 A. It would be my opinion that they did.

9 Q. Okay. And so for the rest of these, you
10 didn't go through -- I know we already discussed the
11 JC Whitney website. And when you go to the
12 JC Whitney website, I know that you made a point
13 about how they don't sell BackRack products. Is that
14 correct?

15 A. That's correct.

16 Q. But what terms do they use to describe
17 that type of product in the actual ads that are --
18 appear on the JC Whitney website?

19 A. Bed and cab rack, contract rack black
20 long/short, quick truck rack system, Garage Pro
21 industrial-grade cab racks.

22 Q. Okay. And I know you only had a
23 screenshot here, but it appears that there's one
24 through fifteen of fifteen products indicated in the
25 screenshot. Is that correct?

1 A. Yes.

2 Q. And did you review all those products?

3 A. I believe I did.

4 Q. And now, granted, we can't tell because
5 this is not a complete listing of those products, but
6 do you recall if any of them used the term BackRack
7 to describe the type of product that they were
8 selling?

9 A. I don't recall.

10 Q. Okay.

11 A. I am certain that they don't sell
12 BackRack by BackRack, Inc.

13 Q. Okay. So then we'll take a look at the
14 next exhibit, Exhibit B, which appears to be a Google
15 search for the term BackRack. Is that correct?

16 A. Yes.

17 Q. And did you run this search?

18 A. Yes.

19 Q. And when was this search run?

20 A. On or about the same time as the one
21 right before it.

22 Q. Okay.

23 A. Really it was -- I'm sure it was done at
24 the same time.

25 Q. Okay. And so there, the sponsored

1 links, we have, what, one, two, three, four different
2 entries. Is that correct?

3 A. In this screenshot, yes.

4 Q. Okay. And did you follow the links to
5 all these -- all these entries?

6 A. I believe I would have looked at
7 utilityracks.com, though I don't recall. I believe I
8 would not have looked at TruckChamp or TruckAddons,
9 because I know they both carry the BackRack by
10 BackRack, Inc.

11 Q. Okay.

12 A. I believe I did choose Shopzilla as it
13 says deals on BackRack.

14 Q. Okay. And is that the screenshot that
15 appears below, the link from the Shopzilla?

16 A. Yes.

17 Q. Okay. And when you look at the link
18 from the Shopzilla that appears on the next page,
19 what headings do you see for the various products
20 that are listed?

21 A. Stores selling BackRack, headache racks,
22 buy cab racks, ladder racks, truck/bike racks and
23 more, truck headache racks.

24 Q. The next entry is headache racks?

25 A. Headache racks, BackRack.

1 Q. Actually that's rack back.

2 A. I'm sorry, rack back. Headache racks,
3 natural headache remedy.

4 Q. Okay. So none of those appears to use
5 the term BackRack as the identification for the type
6 of good that's actually being sold. Correct?

7 A. Correct.

8 Q. Okay. Now, this next entry here at the
9 top of the next page is JC Whitney. Is that the link
10 that you followed from the JC Whitney entry on the
11 bottom of page 493?

12 A. Yes.

13 Q. Okay. And is that the same JC Whitney
14 that we just discussed as the link result in the
15 Yahoo search?

16 A. Yes.

17 Q. That's the same -- the same page, and
18 once again we see the one through fifteen of fifteen
19 products. And I believe you testified that you don't
20 recall precisely what all those fifteen entries were.
21 Is that correct?

22 A. Yes, I do not recall what they all were,
23 but I went -- I recall going through them, and I am,
24 again, certain that JC Whitney does not sell
25 BackRack, Inc.'s BackRack.

1 Q. But do you know if JC Whitney uses the
2 term BackRack to identify the type of product that
3 they do offer for sale?

4 A. I don't know.

5 Q. Okay. Now, on the next entry, I'll note
6 that it appears to be the Google search, and there
7 it's for back rack, two words. Is that correct?

8 A. That's correct.

9 Q. And did you run this search?

10 A. Yes.

11 Q. Okay. And once again I'll ask, did you
12 go through all of the sponsored links that that
13 appeared in the search results?

14 A. No.

15 Q. Okay. And --

16 A. 'Cause I knew where they would lead.

17 Q. And you knew that based on the fact that
18 you know who the Internet retailers for BackRack
19 products are?

20 A. That's correct.

21 Q. Okay. So those that actually -- those
22 who actually in this list who do sell the BackRack
23 brand, a headache rack and cab guard, you did not
24 follow those links. Correct?

25 A. That's correct.

1 Q. Okay. So it appears that you went to
2 the next page, I believe you're at
3 TruckHeadacheRacks.com. Is that correct?

4 A. Correct. That was the bottom link on
5 the previous page.

6 Q. Okay. And on that page, do you see any
7 indication of the term BackRack being used to
8 describe the type of product that they do sell?

9 A. No.

10 Q. And let's take a look at the next
11 exhibit, which is Exhibit C. This appears to be
12 another Google search for the terms, two words, back
13 and rack. Correct?

14 A. Yes.

15 Q. And there there appear to be three
16 sponsored links that are across the top and then
17 additional sponsored links along the side. Is that
18 correct?

19 A. That's correct.

20 Q. And the sponsored links at the top
21 there, we have buy BackRack racks at w -- and then
22 that's by www.BuyAutoTruckAccessories.com. Correct?

23 A. Correct.

24 Q. Do you know if BuyAutoTruckAccessories.com
25 offers BackRack brand headache racks and cab guards?

1 A. Yes, they do.

2 Q. Okay. And as a result, you wouldn't
3 have followed that link then to see if they were
4 selling the product because you know they do sell
5 that product. Correct?

6 A. That's correct.

7 Q. Now, the next one down, BackRack window
8 guards at www.utilityracks.com, did you follow that
9 link?

10 A. I don't recall.

11 Q. Do you know utilityracks.com?

12 A. I don't -- I don't remember whether they
13 do or not.

14 Q. Okay. And --

15 A. I didn't -- I didn't use every
16 example -- when I did this, I tried to stay with
17 companies that I knew sold truck racks or cab guards
18 or back racks, or what have you. I didn't do the
19 obvious ones, which were pet products, or whatever.
20 But I did stick with the companies that I knew sold,
21 you know, truck accessories and types of headache
22 racks.

23 Q. Okay.

24 A. But I did not track down every single
25 instance of a company -- or I didn't provide

1 screenshots of every single instance of a company
2 that advertised for BackRack but didn't actually sell
3 one, because it was just so much of it, and it was
4 just too voluminous, so I limited it to what I
5 thought were the better brand or more popular
6 retails, like a JCWhitney.com.

7 Q. Okay. And you didn't -- and when you
8 went to JCWhitney.com, you didn't see any reference
9 to the term BackRack at all, did you?

10 A. I don't recall. I don't recall.

11 Q. And as we look at the ads here, for
12 example, utilityracks.com, it says BackRack window
13 guards. Correct?

14 A. Yes.

15 Q. And then the one below that at
16 TruckAddons.com, BackRack headache racks. Correct?

17 A. Yes.

18 Q. And TruckAddons.com, do they sell
19 BackRack brand headache racks?

20 A. Yes, they do.

21 Q. So you wouldn't have followed that link
22 either, would you?

23 A. Correct.

24 Q. And any of the other entries here, did
25 you follow any of the other entries here besides the

1 JC Whitney?

2 A. I followed the Truck Accessories Direct.

3 Q. Okay. And Truck Accessory Direct --

4 A. And the Shopzilla.

5 Q. Okay. So let's take a look at -- let's
6 just discuss quickly the actual ad as it appears in
7 the sponsored link section. Truck -- for the
8 TruckAccessoriesDirect.com, the heading of that reads
9 truck headache racks. Correct?

10 A. Correct.

11 Q. Is there any reference in the text of
12 that sponsored link to the term BackRack?

13 A. No.

14 Q. And instead, what terms do they use to
15 describe the products?

16 A. Truck headache racks.

17 Q. Okay. And then just straight headache
18 racks. Correct? In other words heavy-duty quality
19 headache racks?

20 A. Yes.

21 Q. Okay. No reference to BackRack.
22 Correct?

23 A. Correct.

24 Q. And then the Shopzilla, is that the same
25 Shopzilla link that you followed in response to

1 other -- the other searches that we've already
2 discussed?

3 A. Yes.

4 Q. Okay. So that basically leads back to
5 the same JC Whitney and the Truck Accessories Direct,
6 which I believe actually you did print out over here.
7 Correct?

8 A. Right.

9 Q. On the next page?

10 A. And the ad says BackRack - Deals on
11 BackRack --

12 Q. Okay.

13 A. -- in the sponsor section.

14 Q. For which one now?

15 A. For Shopzilla.

16 Q. For Shopzilla, yeah. Okay. And the
17 actual next entry that you went to though was the
18 TruckAccessoriesDirect.com. Correct?

19 A. Yes.

20 Q. And there the -- what term do they use
21 for the types of products that are depicted here?

22 A. Headache racks.

23 Q. Okay. And that's -- if we look across
24 the bottom here, at the very top, where it lists
25 grill guards, rear bumpers, front bumper replacement,

1 headache racks, toolboxes, miscellaneous items, do
2 you understand those terms to mean the general types
3 of products that are being sold at this website?

4 A. Yes.

5 Q. Okay. And throughout this website, they
6 refer to a headache rack. Correct?

7 A. It appears that way.

8 Q. Okay. No reference to BackRack.
9 Correct?

10 A. That appears correct.

11 Q. Okay. Now, let's take a look at Exhibit
12 D. These were the eBay searches that you ran. Is
13 that correct?

14 A. That is correct.

15 Q. Now, one entry that you have here is on
16 page 510 at the top?

17 A. Yes.

18 Q. The ad title appears pickup headache
19 rack Back Rack Ford GMC Dodge Chevy. Is that
20 correct?

21 A. Yes.

22 Q. But you testified that the image
23 depicted there in the image was not an actual
24 BackRack brand product. Correct?

25 A. That's correct.

1 Q. Now, the seller on this is Highway
2 Products. Correct?

3 A. I'm not certain who the seller is.

4 Q. Well, it appears to be identified here
5 as Highway_Products. Correct?

6 A. Yes, I apologize, it is.

7 Q. Okay.

8 A. I didn't see that part. Sometimes --
9 never mind.

10 Q. That's fine. Now, in that title for the
11 ad, there are several terms listed. Is that correct?

12 A. Which title?

13 Q. The pickup headache rack BackRack -- I'm
14 sorry, Back Rack appearing two words, capital B,
15 capital R, Ford GMC, Dodge Chevy. Correct?

16 A. Yes.

17 Q. Okay. Is it your understanding -- you
18 testified that you -- that you are familiar with
19 eBay. Correct?

20 A. Somewhat.

21 Q. And is it possible on eBay to search the
22 titles for -- of the items that are being offered?

23 A. I believe it is.

24 Q. Okay. So if one were trying to sell a
25 headache rack for different types of cars -- or

1 different types of trucks, rather, it would be
2 reasonable for that person to throw basically
3 anything and everything into that title to try to
4 capture as many hits as possible. Is that accurate?

5 A. I wouldn't think that they would throw a
6 phrase such as BackRack if they understood it to mean
7 it was a trademark term for a BackRack by BackRack,
8 Inc., because the ad is not -- they were not actually
9 looking to sell that, so they wouldn't really want to
10 attract that type of buyer. As a matter of fact, I
11 think they would avoid it, because it would be
12 wasting time.

13 Q. Okay. But there are instances of -- all
14 the time on eBay, are there not, where people
15 misidentify the goods that they're actually selling
16 in order to try to get people to look at the goods
17 they are selling. Is that correct?

18 A. I'm not certain of that. I don't know.

19 Q. Okay. But you are familiar with eBay.
20 Correct?

21 A. Somewhat.

22 Q. And how often are you on eBay?

23 A. Not often.

24 Q. So you're not that familiar with eBay
25 then?

1 A. Not -- I'm not -- what does that mean?

2 Q. Well --

3 A. I'm not an expert on eBay.

4 Q. You're not on eBay more than -- how
5 often are you on eBay?

6 A. Not often.

7 Q. Once a week, twice a week?

8 A. Not even.

9 Q. Outside of doing the searches for this
10 cancellation proceeding, how often have you been on
11 eBay?

12 A. Once a month.

13 Q. And once again, we'll just say the
14 seller here was Highway Products. Correct?

15 A. You pointed that out and I do agree with
16 that.

17 Q. Okay. That's what it appears to state
18 on its face. Correct?

19 A. Yes.

20 Q. Okay. And now, below that is just -- is
21 that a continuation of the ad?

22 A. That is what -- a screenshot when you
23 click on the ad for this item.

24 Q. Okay. And when you look -- when you
25 follow down on that entry, what term is actually used

1 to identify the products that are being sold? I'll
2 just point out that it's on page 511, the top
3 screenshot.

4 A. Headache racks, Silverback headache
5 racks.

6 Q. Okay. So it's not referred to as a
7 BackRack in this description, is it?

8 A. Not in this particular description for
9 the Highway Products truck rack.

10 Q. Okay.

11 A. But in others it has been.

12 Q. All right. Let's take a look then --
13 and just for the record, in -- as we -- I know that
14 earlier today in going through your Exhibit F, where
15 you went through the BackRack website pages that you
16 have screenshots for, and you were asked for
17 instances where BackRack was used in conjunction with
18 another generic term, such as window guard, there was
19 one that I think you didn't notice, and that's on --
20 let's try to count here. One, two, three, four -- I
21 think it's the ninth page on the bottom,
22 pickupspecialties.com.

23 A. Yes.

24 Q. Okay. Now, there it indicates BackRack
25 headache rack for trucks. Correct?

1 A. Yes, it does.

2 Q. Okay. And actually, if you look at the
3 UR --

4 A. And on that particular screenshot, it
5 does quantify it directly -- I mean, it does describe
6 it in my opinion correctly. But as you go further on
7 down the page on the other screenshots, it does not.
8 I think I stated that earlier in testimony.

9 Q. Okay. Well, you may have. It's been a
10 very long day. But just if you look at the URL on
11 the bottom of that entry, it says
12 www.pickupspecialties.com/headache_racks/backrack.jpg.

13 A. Right.

14 Q. Do you have an understanding as to what
15 that URL means in terms of how it's structured?

16 A. It's -- it's structured that it goes to
17 the BackRack page under headache racks under
18 pickuptruckspecialties.com. It's further broken down
19 with every slash.

20 Q. So each slash means that it's another
21 step further into the web page. Is that correct?

22 A. Correct.

23 Q. Okay. So at this point, one has gone to
24 pickupspecialties.com, gone to the section for
25 headache racks, and then clicked on BackRacks.

1 Correct?

2 A. Yes, I would think so.

3 Q. Okay. So by that point, whoever is
4 looking at that knows that they're looking at a
5 headache rack that is known as a BackRack product.

6 Correct?

7 A. Yes.

8 Q. And BackRack is the source of that
9 product. Correct?

10 A. I would think so. They're looking at
11 the BackRack trademark, the BackRack TM, and they're
12 looking at a picture of the BackRack by BackRack
13 manufacturer.

14 Q. Okay. So when it has BackRack TM and
15 the picture with the BackRack, you know, labeled on
16 the headache rack, that's enough to let consumers
17 know that they're looking at a product whose source
18 is BackRack. Correct?

19 A. You know, I would think so.

20 Q. Okay. Let's take a look at Exhibit G
21 then. It appears to be another search that was run
22 also on Google, again on BackRack, the term BackRack,
23 one word. Now, you ran this search earlier to this,
24 didn't you? We saw this search run in an earlier
25 exhibit. Correct?

1 A. I think so.

2 Q. Okay. And why did you run it again on
3 June 1st?

4 A. When you run searches on search terms,
5 you get -- you could run a search -- you will get
6 different results every time you click it.

7 Q. Okay.

8 A. You can run the search for BackRack, one
9 word, and you'll see certain results. You can click
10 it again and run it two seconds later and you will
11 get different results.

12 Q. Okay. And now, here we have the
13 sponsored links across the top, and the banner being
14 truckchamp.com/truckracks. Correct?

15 A. Yes.

16 Q. And do you know if they sell BackRack
17 brand headache racks?

18 A. Yes, they do.

19 Q. So you didn't click on that site.
20 Right?

21 A. That's correct.

22 Q. And below that, BackRack headache rack
23 at TruckAddons.com, do they sell the BackRack brand
24 headache racks?

25 A. Yes. As I testified earlier, yes, they

1 do.

2 Q. That's right. They were in the same
3 position on the earlier search. Right?

4 A. I'm not sure if they were in the same
5 position.

6 Q. But they showed up --

7 A. You mean positioning on the page.

8 Q. But they showed up in the original
9 search?

10 A. Yes.

11 Q. Okay. Were there any entries here then
12 that you did follow through to see what you could
13 find?

14 A. usrack.com.

15 Q. Okay. So that's the next entry down
16 here. Right?

17 A. Yes, it is.

18 Q. Okay. So -- and when you looked at
19 that, did you see the term BackRack on that website
20 at all? And once again, I know that we only have the
21 screenshots here, but in your search through the
22 website, did you find any instances of the use of the
23 term BackRack?

24 A. I don't recall. I'm searching right
25 now, a cursory review. It appears not.

1 Q. Okay. Let's -- I think we may have
2 discussed this earlier today, I'm not sure, but on
3 the last screenshot from that website, where it says,
4 Purchase half a rail rack to use as a headache rack.
5 Correct? Below the --

6 A. Second to last screen -- oh, yeah,
7 second to last screenshot.

8 Q. I'm talking about the last for that
9 website, I'm sorry.

10 A. Isn't this the last one?

11 Q. The last screenshot.

12 A. Oh, okay.

13 Q. The second to last picture, yes. So
14 purchase half a rail rack to use as a headache rack.
15 Correct?

16 A. Right.

17 Q. So to describe this type of product,
18 they used the term headache rack. Correct?

19 A. They use rail rack and headache rack.

20 Q. Rail rack is their trademark. Correct?

21 A. I don't know that.

22 Q. Okay.

23 A. They don't seem to put a TM there, so I
24 don't know that.

25 Q. Okay.

1 A. The term rail rack came up I think a
2 little while ago with you.

3 Q. I don't recall that one, but -- let's
4 see, the next one down is another search on Google
5 for BackRack. Is that the same search that you ran
6 that we -- above the usrack?

7 A. It is the same search, but apparently
8 clicked on again, because the results are slightly
9 different.

10 Q. Okay. But truckchamp.com is there --

11 A. Yes.

12 Q. -- as it was before. TruckAddons is
13 there?

14 A. Yes.

15 Q. What about streetsideauto.com?

16 A. They sell BackRack.

17 Q. Okay.

18 A. BackRack truck racks.

19 Q. When you --

20 A. BackRack manufacturing BackRack.

21 Q. Okay. So like TruckAddons uses the
22 terms in the ad BackRack headache rack. Correct?

23 A. Correct.

24 Q. And below that, StreetSideAuto uses
25 BackRack truck bed racks. Correct?

1 A. Correct.

2 Q. And then also BackRack ladder racks,
3 headache rack.

4 What about CrysteelTruck.com?

5 A. I believe they sell BackRack.

6 Q. Okay.

7 A. Manufacturing's BackRack.

8 Q. And the entry below that,
9 rackandshelf.com, do you know if they sell BackRack
10 products?

11 A. I don't recall.

12 Q. Okay. But they don't use the term
13 BackRack in the ad itself, do they?

14 A. No.

15 Q. Okay. And below that, it's cut off, so
16 I don't know what website it is, but --

17 A. TruckHeadacheRacks.com.

18 Q. TruckHeadacheRacks.com. Okay. Is that
19 the next link that you followed?

20 A. Yes.

21 Q. Okay. So let's take a look at
22 TruckHeadacheRacks.com. So the first entry there is
23 for a product offered by GO Industries. Is that
24 correct?

25 A. That's correct.

1 Q. And what term do they use to describe
2 the product depicted in this picture?

3 A. Round headache rack, truck and van
4 racks, headache racks.

5 Q. Okay. And below that one, another GO
6 Industries, this appears to be an ad for the optional
7 light bar for the steel headache rack. Correct?

8 A. That's correct.

9 Q. Do they use headache rack also to
10 describe the type of product again?

11 A. Yes.

12 Q. And in either of those ads, is the term
13 BackRack used?

14 A. It does not appear that way.

15 Q. And did you review any other parts of
16 that website?

17 A. Yes, I did, because this
18 TruckHeadacheRacks.com is what you would call a CSE,
19 or comparison shopping engine. It's like a
20 Shopzilla. It takes you to someone else's site, in
21 this case Auto Anything. AutoAnything.com is an
22 Internet reseller or an Internet retailer and they do
23 not sell BackRacks.

24 Q. So which one -- what --

25 A. Here, Auto Anything.

1 Q. We've partnered with Auto Anything to
2 bring you the best deals on custom headache racks for
3 your truck. Correct?

4 A. Right.

5 Q. Okay. But they -- they even --
6 TruckHeadacheRacks.com, Auto Anything, they both only
7 use the term headache racks. Correct? Along with,
8 I'm sorry, truck racks and van racks. Correct?

9 A. Yes, after paying for the search term
10 BackRack.

11 Q. The next one on the very last entry
12 sponsored links again for a search on BackRack, is
13 this just another list of the sponsored links?

14 A. Yes, it is.

15 Q. Okay. And were there any sponsored
16 links that you followed?

17 A. Yes. I believe I followed four of them
18 here that I testified to earlier.

19 Q. Okay. And let's see, the first one,
20 what is that, FindInstantDeals.net?

21 A. Yes.

22 Q. Okay. And that's another one of
23 these -- essentially a comparison shop site. Right?

24 A. Comparison shopping engine.

25 Q. Engine. Correct. And that just

1 basically leads us back to, for example, websites
2 such as MyLadderRacks.com, rackattack.com,
3 streetsideauto.com/Backrack, for some reason
4 target.com, smarter.com, JCWhitney.com. And the next
5 page down, is that just a continuation of the one
6 above it?

7 A. Yes.

8 Q. Okay.

9 A. No, I'm sorry. That is after you click
10 on Find Instant Deals or -- let's see. I believe
11 it's not a continuation. I believe --

12 Q. It's cut off, so I can't really see what
13 the URL is.

14 A. Yeah.

15 Q. But -- so looking at this, you can't
16 really tell exactly what website that is. Right?

17 A. I believe it was rack.pronto.com.

18 Q. Rack.pronto.com?

19 A. Yeah. It's the one in the middle top.

20 Q. Okay. Then you also went to -- if you
21 flip the page, you went to MyLadderRacks.com.

22 Correct?

23 A. That is correct.

24 Q. And none of those products appear to use
25 the term BackRack to describe the type of products

1 that they're selling. Correct?

2 A. That's correct.

3 Q. And you wouldn't classify those goods as
4 headache racks or cab guards. Correct? The ones
5 depicted on there?

6 A. Yes. Well, under TracRac, the picture
7 in the middle, under MyLadderRacks.com, some people
8 would call that a cab guard or a headache rack.

9 Q. Okay.

10 A. Since it's hollow, I wouldn't actually
11 call it that, but some people do.

12 Q. Right. Okay. And we -- but you
13 wouldn't say that it's similar to the headache rack
14 or cab guard that's offered by BackRack, Inc., or
15 that's offered by STK. Correct?

16 A. That's correct.

17 Q. Okay. Now, the next one down,
18 rackattack.com, it appears to be, do you have any
19 idea what kind of products they sell here?

20 A. They sell bike racks, they sell kayak
21 and canoe racks, ski and snowboard racks, cargo and
22 luggage racks, van and truck racks, which would in my
23 opinion encompass cab guards or headache racks or
24 BackRacks.

25 Q. But you don't see any use of the term

1 BackRack on the website to describe a type of
2 product, do you?

3 A. No, but that link -- this is the page
4 that the link took me to, Rack Attack, and then they
5 go further on to list the categories.

6 Q. Okay.

7 A. But they do not sell the BackRack by
8 BackRack, Inc.

9 Q. And they don't lay it out by category of
10 goods by BackRack, do they?

11 A. It does not appear in this screenshot.

12 Q. And do you remember exploring that
13 website at all?

14 A. I explored it, and they do not sell the
15 BackRack by BackRack, Inc.

16 Q. Do they sell any products that are
17 similar to the BackRack brand headache rack or the
18 STK Pro Rack?

19 A. They sell headache racks and cab guards,
20 but not one that looks like the STK Pro Rack or the
21 BackRack by BackRack, Inc.

22 Q. Okay. And we're talking about
23 rackattack.com. Correct?

24 A. That's correct.

25 Q. Okay. And then we have another link to

1 the JC Whitney website. Correct?

2 A. Correct.

3 Q. Okay. And I think we've already
4 discussed that, that there's no reference to a
5 BackRack at all on that website. Correct?

6 A. That's correct.

7 Q. And instead it uses terms like cab rack
8 or contract rack or ladder rack. Correct?

9 A. And cab rack, yes.

10 Q. Right, and cab rack.

11 A. I think you said that, I'm sorry.

12 Q. Yeah. All right. And then the next
13 listing is for a website Northern Tool and Equipment.
14 Is that correct?

15 A. Yes.

16 Q. Do you have any idea who they are?

17 A. Yeah. They are an Internet reseller.
18 They're quite large. And they sell a lot of
19 different products, a lot of tools and equipment, but
20 they also sell some automotive things, like truck
21 toolboxes and truck racks.

22 Q. Okay.

23 A. Cab racks.

24 Q. And do you recall looking to see if they
25 sell the BackRack brand headache rack?

1 A. Yes.

2 Q. And do they sell the BackRack brand
3 headache rack?

4 A. No, they don't.

5 Q. Do they sell the STK Pro Rack?

6 A. No.

7 Q. Do they sell any products like those two
8 products?

9 A. They sell cab guards, but they do not
10 sell products that look very similar to the STK
11 Pro Rack or the BackRack manufacturing BackRack.

12 Q. Do you remember looking at the listing
13 of categories at NorthernToolandEquipment.com -- or
14 NorthernTool.com rather?

15 A. I remember clicking on truck racks and I
16 remember doing a search for truck racks. I entered
17 the term truck racks and cab guards.

18 Q. Okay. And this screenshot actually
19 appears to indicate a search result for utility truck
20 rack. Is that correct?

21 A. Yeah. But this is the screen that
22 was -- you were taken to from the ad on --

23 Q. Okay.

24 A. -- two pages prior.

25 Q. So that was not your search then?

1 A. No.

2 Q. Okay. But once you got to this website
3 you searched?

4 A. Yes.

5 Q. And you didn't find any products that
6 are similar to the BackRack brand headache rack or
7 the STK Pro Rack. Correct?

8 A. As I said earlier, no.

9 Q. Okay. I believe you also testified
10 earlier today that no one really understands the
11 Google algorithms that generate search results. Is
12 that fair?

13 A. That generates natural search results, I
14 think that's a fair statement. I think if you talk
15 to anyone well-versed in the industry, everyone says
16 the same thing, they wish they knew, because there
17 are whole industries that depend on trying to better
18 natural search rankings for companies.

19 Q. Right. And you indicated that you've
20 done extensive research into this area. Is that
21 correct?

22 A. Yes.

23 Q. And you still don't understand how the
24 natural search results come up. Is that accurate?

25 A. I understand a lot of it, but not -- no

1 one will ever figure -- no one that I know, other
2 than the designers or the engineers at Google,
3 understand, you know, what the perfect procedures are
4 to be ranked amongst the top ranking natural search.

5 Q. Now, with regard to Google, let's
6 discuss it, since most of the time today we've
7 discussed Google, but this really applies also to
8 Yahoo and the other search engines. Do you have an
9 understanding of their policies regarding the
10 purchase of trademarks as ad words?

11 A. I can't say that I'm clear on that, no.

12 Q. Okay. Have you ever had a chance to
13 review their policies on that issue?

14 A. I seem to remember looking at it a
15 couple years ago, but I don't recall.

16 Q. Do you recall what context caused you to
17 look into that issue?

18 A. I wanted to know if -- if a company
19 could advertise for a product line that they don't
20 carry. Such as we carry Delta toolboxes or JOBOX or
21 we carry the Deflecta-Shield toolboxes or Owens
22 toolboxes. We don't carry Weatherguard toolboxes.

23 So the -- what the research showed, and now
24 it's coming back to me as I'm speaking, I don't know
25 if you want to call it a trademark or the actual

1 brand, the branding of it, I don't know if they're
2 one and the same, they may be, if you don't carry the
3 product, you can't advertise for the product. That's
4 what my research showed. And consequently, we don't
5 do that. They won't let you do that. I believe that
6 the way their engine works in terms of pay per click
7 search, if you don't have certain words on the page
8 that match the manufacturer, and I may be off on this
9 a little bit, they will not allow that ad to run.

10 And certain words are hidden that you don't see
11 with your eye. They're hidden in what they call meta
12 tags. And there's different areas where the words
13 are not seen. But if we sold Delta toolboxes and we
14 were going to do some pay per click advertising, we
15 can't advertise for Weatherguard toolboxes.

16 Q. That's your understanding?

17 A. That's my understanding. And this was a
18 couple years ago. I've not visited the subject
19 since. And it stands to reason that they wouldn't
20 want people to do that.

21 Q. And -- but you're not familiar with case
22 law that's out there that indicates that that
23 practice may, in fact, be acceptable?

24 A. No, I'm not aware.

25 Q. Okay. And are you aware of -- you just

1 testified you're not aware of Google's policies
2 concerning this issue. Correct?

3 A. I'm not aware of their current policy.
4 I'm aware of the policy at the time. And the policy
5 at the time, again, was you could not do it. And
6 they actually -- if you tried to do it, they had ways
7 of preventing it. And what I described a little bit
8 earlier was something about you had to have certain
9 things showing on the page in order to qualify for
10 advertising that brand name. That's the way I
11 remember it.

12 Q. Okay. But as we sit here today, you
13 don't know for a fact Google's policies towards that?

14 A. Today? No.

15 Q. Yeah. Nor do you understand Yahoo's
16 policies towards that issue. Correct?

17 A. No.

18 Q. As we sit here today.

19 A. As we sit here today, no, I have not
20 researched that as of late.

21 Q. Okay. And earlier today, you testified
22 that -- just when you were talking about the
23 searches -- search engines that were out there, you
24 mentioned Bing, as well, but I don't see any search
25 reviews for Bing in here. Have you actually done any

1 searches on Bing?

2 A. Bing is MSN. They're the same.

3 Q. Right. But as it's now known as Bing,
4 their new name, did you do any searching for the term
5 BackRack in the course of this proceeding?

6 A. I don't recall. I don't recall if I did
7 any on Bing. I think that what I thought was
8 Google -- Google controls something like 85 percent,
9 I'm guessing, that's my estimate, of the search
10 market. So Google is the big one. Yahoo is second,
11 and then Bing or MSN was third. So I'm thinking that
12 I just limited my searches to those two engines. And
13 indeed, when I did this, I didn't even pull all the
14 results. I pulled some of them.

15 Q. Right. You didn't pull the search
16 results for those entities that actually do sell the
17 BackRack brand headache rack. Correct?

18 A. Right. And I did not -- in addition,
19 there were others that advertise under the name and
20 didn't sell it, and I didn't include all of them,
21 because, again, depending on how you went and where
22 you went, there were just so many of them. Shopzilla
23 we talked about a little bit earlier. I testified
24 about there's also a NexTag, PriceGrabber, I believe
25 Become.com. There's two or three other comparison

1 shopping engines, CSEs, and I just didn't bother,
2 because it was so voluminous.

3 Q. Right. But we don't have --

4 A. And I think they would have shown the
5 same results as a Shopzilla.

6 Q. But we don't have those results here to
7 look at.

8 A. No.

9 Q. So we can't really discuss that.

10 A. I'm sorry, you asked me about the Bing,
11 and I kind of got into a tangent.

12 Q. You answered that. That's fine.

13 THE WITNESS: Excuse me one second.

14 (Brief pause in proceedings.)

15 Q. Oh, just one wrap-up question. You
16 indicated earlier today that Adrian Jayne is
17 well-versed in who advertises his products online.
18 Is that correct? You stated that?

19 A. I believe that he is.

20 Q. Okay. What's the basis for your belief?

21 A. While we still had a good relationship,
22 I would talk to him about certain Internet websites
23 that was advertising his product and selling it
24 cheap, and he -- it was evident to me that he scoured
25 the Internet for people selling his product.

1 Q. Okay. Do you remember any of the
2 websites that were selling his product cheap?

3 A. TruckAddons.com is one that I recall I
4 believe was selling it cheap. Maybe Pickup Truck
5 Specialties. I don't recall what others. I'm pretty
6 sure it was TruckAddons.com was the main one.

7 Q. But they're selling -- they were selling
8 BackRack brand headache racks and cab guards.
9 Correct?

10 A. Yes.

11 Q. Now, we're just going to take a quick
12 look at what was previously marked as BackRack
13 Exhibit 68, which was your fourth declaration in
14 support of the summary judgment. This is one of the
15 declarations that you submitted in support of the
16 summary judgment motion. Correct?

17 A. Yes.

18 Q. And this is -- I believe you testified
19 that this is the universe of results from the second
20 e-mail survey that was sent out to Armor Deck
21 customers. Is that correct?

22 A. If what you mean by universe of results
23 is all the results, yes, I believe that's correct,
24 these are all the results.

25 Q. Okay. And by -- yes, and by universe, I

1 meant all. So this is it?

2 A. Yes.

3 Q. Outside of this, there are no other
4 results that Armor Deck received in response to the
5 second e-mail request?

6 A. I don't believe so. At least none that
7 were forwarded to me, and I asked my salesperson to
8 forward everything to me.

9 Q. So the process then, just so I'm
10 understanding this properly, was you crafted the two
11 questions. Correct?

12 A. Yes.

13 Q. And you then forwarded these to your --
14 the Armor Deck salespeople. Correct?

15 A. Yes.

16 Q. With instructions for them to then
17 forward it to their customers. Correct?

18 A. With instructions to them to send it to
19 a cross-view of their customers, yes.

20 Q. But send it to their -- the customers
21 that they dealt with on a regular basis. Is that
22 correct?

23 A. Yes.

24 Q. Now, the way -- just help me understand
25 one thing is that the way it works with Armor Deck,

1 do the salespeople have dedicated accounts that they
2 service?

3 A. For the most part. Sometimes
4 salespeople service other accounts, accounts that
5 aren't theirs, so to speak. But for the most part,
6 they service the same accounts. There is a little
7 sharing that goes on of accounts occasionally.

8 Q. Okay.

9 A. If someone's not in, someone else will
10 take that call. But for the most part.

11 Q. And just in looking at the e-mails
12 themselves, they seem to be pretty familiar. There's
13 always a, like, Bill or Tony or they're addressed to,
14 like, Howie. They're addressed on a first name basis
15 to their customers. So is it fair to say that the
16 salespeople from Armor Deck have a close working
17 relationship with these customers?

18 A. I don't know that that's fair to say.

19 Q. Okay. How would you describe their
20 relationship with the customers?

21 A. I would describe their relationship as a
22 business relationship. Certainly when the customers
23 call in, they don't identify themselves in a formal
24 manner, this is Mr. Smith, or anything like that.
25 This is Bill at Truck and Van, and that's how they

1 know them by their name, that's how they're
2 addressed.

3 To the best of my knowledge, no one -- none of
4 our salespeople socialize with any of our accounts.
5 Do they get to know them over time? I guess they get
6 to know them a little bit in speaking with them on a
7 regular basis. Are there exceptions? Are some of
8 them very close? I really don't think so. As a
9 matter of fact, Howie from Cyclevan, it's the first
10 time in my life I ever spoke with him or met him
11 today.

12 Q. Right.

13 A. I've been dealing with him for twenty
14 some odd years.

15 Q. Once again, the question is not
16 regarding your relationship with the customers.
17 Also, it wasn't about a close personal relationship.
18 It was more as to what you testified just now about
19 the regular contact, the regular working relationship
20 that the salesperson has with the people they sent
21 these e-mails to. Is that fair?

22 A. They have a regular working relationship
23 with these people.

24 Q. Right. Right. So they're not --

25 A. I'm not sure that's the way you asked

1 that a moment ago.

2 Q. I think the phrase was close working
3 relationship, but I'll accept your relationship of
4 exactly what the nature of the relationship and
5 contact of the relationship is.

6 So then after you sent the e-mail to your
7 salespeople who then sent it to their customers, what
8 did the customers do with these e-mails?

9 A. From the looks of the results, they
10 filled them out and sent them back to the
11 salespeople.

12 Q. Okay. And do you have any understanding
13 as to exactly what, if any, efforts the
14 respondents -- what efforts they undertook to respond
15 to these e-mails?

16 A. I would imagine that they read the
17 question and answered them.

18 Q. Okay. But you -- I'm not asking you to
19 imagine what they do. I'm asking you, do you know
20 what they did?

21 A. They read the questions and they
22 answered them. I'm sure they didn't answer them
23 without reading them.

24 Q. How can you be sure they didn't answer
25 them without reading them?

1 A. How could you answer it if you didn't
2 read it?

3 Q. You have multiple choice here. You
4 could plug in anything.

5 A. I would not anticipate that they would
6 do that. Why -- I can't see why someone would be
7 posed a multiple choice question and choose to just
8 pick an answer and send it back.

9 Q. So I'll just get to the chase. You have
10 no direct knowledge of exactly what these individuals
11 did in response to this e-mail. Correct?

12 A. I certainly have a direct knowledge. I
13 have the result of -- they sent back their answers,
14 which were forwarded to me.

15 Q. Sir, I'm not asking you for what the
16 results were. I'm asking you what they did in order
17 to respond to this e-mail. That you have no direct
18 knowledge of. Correct?

19 A. My direct knowledge is the results were
20 sent to our salespeople and then sent to me. Maybe
21 I'm not answering the question correctly or the way
22 you want, but that's the way I understand it.

23 Q. That's fine.

24 A. And I'm answering it the best I can.

25 Q. So what you do know is results came

1 back. That's all you know. Is that correct?

2 A. The results came back and they were
3 complete.

4 Q. Okay. And the questions themselves, and
5 we'll just take a look at the e-mail, is the same to
6 each of these recipients. Correct?

7 A. I believe it was, unless a salesperson
8 modified it. But I didn't see any evidence of that.

9 Q. You don't -- you're not aware of any
10 modification. Correct?

11 A. No, I'm not.

12 Q. So if I read the first question, When
13 customers come into your store or call you on the
14 phone looking to buy a BackRack truck rack, do they
15 most often ask for a BackRack or do they most often
16 ask for a BackRack truck rack or BackRack cab guard?

17 And just for the record, each of those
18 BackRacks are one word, capital B, capital R.

19 What exactly are you asking the recipients of
20 this e-mail to report to you?

21 A. I wanted to get an idea of how consumers
22 regard and refer to BackRacks by BackRack
23 Manufacturing.

24 Q. Okay. So the recipient of this e-mail
25 is reporting what their customers may -- what they

1 say to the seller. Is that correct?

2 A. The intention of it was for the
3 retailers to indicate how their customers, which are
4 the consumers, refer to BackRack manufacturing's
5 BackRack.

6 Q. Okay. So once again, it goes -- I'm
7 just trying to conceptualize this. It goes you
8 creating the document or the question, sending the
9 e-mail with instructions to your salespeople, who
10 then sent it to their customers, who then responded
11 on behalf of their customers. Is that accurate?

12 A. I don't know that the last part is
13 accurate, on behalf of their customers. I'm sure --
14 I'm not sure if I would quantify it that way. I
15 wanted them to report their experiences with the
16 customers. Customer walks in, what does he say?

17 Q. Okay. So -- okay. So let's just --

18 A. And what is the resaler's experience
19 with their customers when they come in and they're
20 looking for a BackRack Manufacturing BackRack.

21 Q. Okay. So the premise here is that first
22 of all, the customers are looking for BackRack brand
23 headache rack or cab guard. Correct?

24 A. Yes.

25 Q. That's the premise. You're only

1 concerned with those instances in this first
2 question. Right?

3 A. Yes, that's what I believe I'm
4 attempting to do.

5 Q. Okay. So then what we're looking at
6 then is the respondent is responding based on what
7 his customers or her customers states when they enter
8 the store looking for a BackRack brand headache rack,
9 cab protector, cab guard. Correct?

10 A. That's correct.

11 Q. And then that got reported then, the
12 respondent -- the respondents then reported that back
13 up to the salespeople, who then gave it back to you.
14 Is that correct?

15 A. That's correct. They actually filled
16 out the questionnaire and e-mailed it back to the --
17 the Armor Deck salesperson, who in turn forwarded me
18 the e-mail.

19 Q. Okay. And on the second question, it's
20 also a situation where the respondent, who is
21 actually the retailer or the reseller out in the
22 field, is reporting back their experiences based on
23 what their customers, the end users, are saying to
24 them. Is that correct?

25 A. I'm sorry, can you say that again?

1 Q. In the second question as well, the
2 respondent is responding based on their experiences
3 with their customers. Is that correct?

4 A. Yes.

5 Q. And it's reporting back up the chain to
6 you essentially what the end user said to the
7 reseller. Is that correct?

8 A. Yes.

9 Q. Okay. In that second question, when you
10 say, For instance, this could mean a different type
11 of cab guard or a full truck rack, what do you mean
12 by that statement?

13 A. Well, let's read the whole question. Do
14 some customers on occasion come into your store or
15 call you asking for a BackRack when they really don't
16 actually want a BackRack at all?

17 And I put in quotes, BackRack meaning BackRack
18 by BackRack Manufacturing. Rather they want another
19 type of truck rack. For instance, this could mean a
20 different type of cab guard or a full truck rack.

21 I -- you know, I think it's pretty explanatory
22 what I asked there. Do customers call up looking for
23 or stating that they want a BackRack but they're not
24 really looking for BackRack -- a BackRack by BackRack
25 Manufacturing, maybe they're looking for a cab guard

1 by or a cab rack from or a headache rack from Highway
2 Products or from Weatherguard or from, you know,
3 someone else's, not BackRack Manufacturing. Or are
4 they looking for maybe a full ladder rack truck rack
5 that goes all the way to the back and maybe over the
6 cab. That was the very latter part of the question.

7 Q. Okay. So the last sentence then could
8 be interpreted to mean a different brand of a
9 headache rack or cab guard --

10 A. Yes.

11 Q. -- or a completely different type
12 altogether. Correct?

13 A. Of truck rack, yes.

14 Q. Of truck rack. Okay.

15 A. So cab rack, BackRack, cab guard could
16 fit under the description of a truck rack. But a
17 full truck rack could not fit under the description
18 of a cab guard or BackRack.

19 Q. Okay. But you have no direct knowledge
20 of any of the actual underlying results reported in
21 this survey. Is that correct?

22 A. The only knowledge I have is the
23 questionnaires that were returned to me by the
24 salespeople who, in turn, got it by -- from our
25 customers.

1 Q. But, for example, if someone says they
2 most often ask for a BackRack in response, you have
3 no firsthand knowledge of whether that's true.
4 Correct?

5 A. I don't know what you mean by firsthand
6 knowledge, but I don't imagine that our customers
7 would lie to us. They would have no reason to.

8 Q. Okay. But -- well, let's just -- you
9 testified earlier that you're not out on the street,
10 you're not down on the ground with the consumers and
11 you haven't been for fifteen years. Correct?

12 A. I'm not sure about the number of years.

13 Q. Roughly ten to fifteen we'll say.

14 A. Yeah.

15 Q. But -- and obviously you're not on the
16 ground at each of these companies dealing with their
17 customers. Correct?

18 A. That's correct.

19 Q. So you have no firsthand knowledge of
20 whether, in fact, the results reported here are
21 accurate. You can't verify or deny it, you can only
22 state what's in this report. Correct?

23 A. I was not -- I'm not in the customer's
24 retail store witnessing people asking for it. I'm
25 dependent on the questionnaire that was sent to our

1 customers --

2 Q. Okay.

3 A. -- and their truth. And we didn't --
4 when we sent this, we didn't ask anyone to exaggerate
5 anything. We didn't explain to them why we were
6 looking for this. We didn't ask them to lie. We
7 didn't -- you know, we just -- we got a couple of
8 results that were, in my opinion, not in our favor.
9 I was very careful to include all the results.

10 Q. Now, why did you run a second set of
11 questions?

12 A. As I stated earlier, I was not
13 getting -- I was not getting answers that were -- I
14 don't even recall what the responses were, but I was
15 not getting answers to the question. They didn't
16 really understand what I was asking or they did not
17 elaborate it in an answer. I found it necessary to
18 really spell it out for them and give them multiple
19 choice questions. This way I could have a definitive
20 answer. Again, I'm sorry, I can't recall what the
21 responses were, but they were nonconclusive either
22 way. You know, they were just not good answers. I'm
23 sure there were a couple of answers that were
24 responsive, but by far and large, it was not
25 conclusive.

1 Q. Okay. And you've never conducted a
2 consumer survey before. Correct?

3 A. I don't recall ever conducting a
4 consumer survey. That's probably why I did a bad job
5 with the first set of questions.

6 Q. And have you ever done a trademark
7 infringement or any other kind of survey report?

8 A. No.

9 Q. Have you any experience in interpreting
10 survey results or offering any kind of analysis of
11 surveys?

12 A. Experience in it? No.

13 Q. Do you have any -- in the classes that
14 you took in college, did you take any marketing or
15 advertising classes?

16 A. I don't recall.

17 Q. And did you ever -- I just have to ask.
18 Have you ever testified as an expert before in a
19 trademark case?

20 A. No.

21 Q. Okay. Do you feel you're qualified to
22 act as a trademark expert in this case?

23 A. No.

24 Q. Okay.

25 A. I can only -- I could only testify to

1 what I've done, what I believe was right, what I
2 believe makes common sense, and that certainly would
3 not make me a trademark expert.

4 Q. Okay.

5 A. But common sense does carry to a certain
6 degree.

7 Q. Okay. Let's take a look at I think
8 we're up to the fifth declaration now. It was marked
9 as Exhibit 100. And I believe you testified earlier,
10 it's your fifth declaration in support of the summary
11 judgment. Correct?

12 A. Yes.

13 Q. Did you run any of the craigslist
14 searches?

15 A. Yes, I did.

16 Q. And what about the eBay searches?

17 A. I did some eBay searches. I'm not sure
18 if they're the ones encompassed here. I just have to
19 look at it for a moment. Are there eBay searches in
20 this document? Maybe you can save me some time.

21 MR. ADAMS: I think there is.

22 Q. It's after all the craigslist material.

23 A. I'm sorry, Tony, could you just point
24 that out to me?

25 Q. I thought there were eBay -- oh, you

1 know what, actually scratch that.

2 A. Thanks.

3 Q. Not eBay. It's all of the PlowSite and
4 LawnSite let's just say exhibits, all the blog
5 conversations that --

6 A. No. No, I did not.

7 Q. You didn't search any of those.

8 Correct?

9 A. You know, I did, but I just looked
10 around, and I pretty much left that up to Romeo.

11 Q. Okay. And the results that are depicted
12 there in all of the blog entries that we went through
13 today from it looks like Exhibit S to the end of your
14 declaration -- of this declaration, those are just
15 selections from the blog. Correct?

16 A. I believe they are, yes.

17 Q. Okay. And those were selected for what
18 purpose?

19 A. There were multiple purposes. In some
20 instances to show the consumer's or the general
21 public's misuse, in my opinion, of the trademark --
22 of the BackRack Manufacturing BackRack improper
23 trademark use. Some were to show that the public
24 advertised a BackRack for sale or BackRack type
25 product and it wasn't indeed a BackRack by BackRack

1 Manufacturing. As we ran through it earlier today,
2 there were a couple different -- a couple -- there
3 were a couple different reasons.

4 Q. Well, we don't have to rehash all that.

5 A. Thank you.

6 Q. But the -- with regard to these ads, did
7 you or anyone at Armor Deck contact any of these
8 individuals directly?

9 A. No. I did not. I don't know if -- I
10 don't know if Romeo did. I did not.

11 Q. Did you instruct Romeo to contact any of
12 these individuals?

13 A. I don't recall instructing him. I'm not
14 sure. I may have asked him did he have contact with
15 him. I honestly don't know. I tell you what, I
16 don't know.

17 Q. Okay.

18 A. I retract my answer to that. No, I
19 really don't know.

20 Q. And when -- I know that you've already
21 testified extensively about use of the trademark term
22 as a noun as an improper use. But the question I
23 have is that in some of these blog entries, when a
24 reference is made just to a BackRack, you have no
25 direct knowledge of exactly what the author of that

1 statement meant by use of the term BackRack.

2 Correct? And I'm only talking about instances where
3 the word BackRack is just used on its own.

4 A. Without a picture of a non-BackRack?

5 Q. Right.

6 A. In the instances where you don't know
7 whether they're referring to a BackRack or not
8 because there's no picture, the answer to the
9 question is correct.

10 Q. Okay. And even with regard to the ones
11 where pictures are used, you didn't access this
12 website, so you have no real firsthand knowledge of
13 exactly -- scratch that.

14 You didn't contact the authors of these sites,
15 so you don't know for a fact whether what's depicted
16 is accurate in these -- in those instances. Correct?

17 A. I did not contact the authors of these,
18 no.

19 Q. So if a picture is there, you have no
20 idea that that's exactly what they're referring to.
21 Correct?

22 A. I have an idea based on what they --
23 what they're advertising, you have a price next to a
24 picture and it's the only thing here. You know, I
25 think it's pretty obvious.

1 Q. But once again you didn't contact any of
2 these individuals. Correct?

3 A. I did not contact any of the people who
4 wrote the ads -- who created these ads.

5 Q. Okay. And with regard to the craigslist
6 ads, is that the same, did you contact any of the
7 individuals who posted these craigslist ads?

8 A. I did not.

9 Q. Do you know if anyone at Armor Deck
10 contacted these individuals?

11 A. Again, I don't think so. Romeo may have
12 contacted some people. I'm not sure. I know he was
13 on it for a while, and I'm not sure of the extent of
14 what he did.

15 Q. Okay. But he didn't report back to you
16 that he had, indeed, contacted any of these
17 individuals, did he?

18 A. I don't recall that he did.

19 Q. Okay. You didn't pass along any names
20 of any of these individuals to your counsel for this
21 matter, did you?

22 A. I don't believe I did.

23 Q. Okay. If we could just take a look at
24 Exhibit A to this declaration. Is this an ad that
25 you accessed?

1 A. Yes.

2 Q. And when did you access this?

3 A. In the first -- I think it was in the
4 first or second week of March.

5 Q. Okay. So, like, where it says
6 3/17/2009, is that the date it was printed or the
7 date --

8 A. I think it was the date it was printed.

9 Q. Okay.

10 A. I don't think -- I don't think that
11 necessarily means the date I accessed it.

12 Q. Okay. I believe earlier today you
13 testified that the use of BackRack as it appears in
14 this ad was improper. Correct?

15 A. If that's what I said earlier, yes, I
16 believe so.

17 Q. Okay. Because the question I have for
18 you is, the use of BackRack, all one word with a
19 capital B, capital R, you have no firsthand knowledge
20 of exactly what this author means by use of the term
21 BackRack. Correct?

22 A. I have an idea that he means a BackRack
23 or headache rack or cab guard.

24 Q. But you don't know firsthand what he
25 means by that term BackRack. Correct?

1 A. From the ad, on the face of it, he means
2 a cab guard or headache rack or BackRack, again,
3 because it's written on a headboard or BackRack. I
4 mean, why would you limit yourself to a BackRack by
5 BackRack, Inc.?

6 Q. But you don't know this for a fact.
7 Correct?

8 A. I've never -- if you're asking if I've
9 ever spoken with this person, no, I haven't.

10 Q. Right. And you can't verify whether or
11 not he's referring to a BackRack or a headache rack.
12 Correct?

13 A. I can't verify that fact.

14 Q. Right. And the next, Exhibit B, the ad
15 states, BACKRACK, all caps, as a matter of fact, the
16 ad is all in caps, BACKRACK FOR A 2004 GMC TRUCK,
17 GREAT CONDITION, also under the rail bed liner for
18 sale for same truck. You don't know if -- you don't
19 know for a fact if this is a BackRack brand headache
20 rack. Correct?

21 A. No, I don't.

22 Q. You've not contacted that individual.
23 Correct?

24 A. No, I haven't. I haven't contacted
25 anyone here --

1 Q. Okay.

2 A. -- in these exhibits.

3 Q. We'll save some time by not asking that
4 question again.

5 A. That would be great.

6 Q. Okay. The next one, Exhibit C, it
7 states, Also have a BackRack, all one word, capital
8 B, capital R, in great condition with hardware from
9 the same truck. You have no firsthand knowledge of
10 exactly what the term BackRack means in that context,
11 do you?

12 A. No. I simply included it there for what
13 I believe the public's misuse of the trademark name.

14 Q. Right. But the person actually could be
15 referring to a BackRack brand headache rack.
16 Correct?

17 A. He may be.

18 Q. And you don't know for a fact one way or
19 another?

20 A. I don't know. But either way, I don't
21 think it's the proper usage of the BackRack trademark
22 being used by the general public.

23 Q. Because it's used as a noun. Correct?

24 A. That's correct.

25 Q. Okay.

1 A. And the fashion in which it's used, yes.

2 Q. You mean capital B, capital R, all one
3 word?

4 A. No, just -- it doesn't say BackRack
5 truck rack, it says BackRack.

6 Q. Right.

7 A. Or BackRack cab guard. It just says
8 BackRack.

9 Q. Okay. Let's see here then. Exhibit C,
10 once again you have no understanding -- you have no
11 firsthand knowledge of exactly what's being sold in
12 this case, do you?

13 A. In viewing the ad on the face of it, a
14 BackRack by BackRack, Inc., is being sold.

15 Q. Right, because of the image. Correct?

16 A. That's correct.

17 Q. The logo that's there. Right?

18 A. That's right. And again, I included it
19 in the fashion that they used the name -- the
20 trademark name BackRack.

21 Q. Now, when you see that logo there,
22 that's enough to let you know that what's being
23 depicted is a BackRack brand headache rack?

24 A. Yes. And then it's got our name on
25 there as well.

1 Q. So it must have been an old one.

2 A. It isn't that old. 2007 is not that
3 long ago.

4 Q. Right. Now, just generally, with regard
5 to these craigslist ads, what made you select these
6 geographic areas?

7 A. The majority of -- the majority of
8 BackRack products, in my opinion, is in these areas.
9 Not necessarily Indianapolis, but throughout the
10 northeast.

11 Q. So outside of the northeast, you don't
12 really know how the term BackRack is understood. Is
13 that correct?

14 A. No. I -- as being in the industry, I
15 think that throughout the whole country, the name
16 BackRack is used a certain way. But in terms of the
17 craigslist ad, I did run it around the country in
18 different way, shapes and fashions, and not a lot
19 of -- not a lot of postings came up.

20 Q. Okay.

21 A. I didn't do -- you have to actually
22 break it down on craigslist by -- you can't just say
23 Nebraska or California. You have to give -- you
24 know, so I did selections around the country, not
25 extensive, but selections, and I ran it -- I ran it

1 extensively in the northeast, because I knew there
2 were a lot of BackRacks within the northeast.

3 Q. Okay.

4 A. BackRack by BackRack Manufacturing.

5 Q. And these are the only results that you
6 found. Correct?

7 A. I believe so. If there was a -- I
8 believe so. I'm trying to think if there's any other
9 instances that I didn't include. I can't think of
10 any.

11 Q. Okay. Now, if we just flip ahead to
12 something like Exhibit K. It indicates, in all caps,
13 LIKE NEW BACKRACK, all one word. And it actually has
14 a picture of a BackRack brand headache rack below the
15 ad. Is it your contention that that's an improper
16 use of the trademark as well?

17 A. Like new BackRack I would think is an
18 improper use.

19 Q. Okay.

20 A. 'Cause it doesn't say BackRack truck
21 rack or BackRack cab guard.

22 Q. But it does include a picture of the
23 product installed on the truck. Correct?

24 A. Yes.

25 Q. And do you know who -- where that

1 picture actually came from?

2 A. The Youngstown area.

3 Q. No, no.

4 A. Craigslist.

5 Q. The picture itself.

6 A. It looks to me like it was one of Adrian
7 Jayne's pictures. I think we used to have one
8 hanging in here. It appears that it may be one
9 provided by BackRack, Inc. --

10 Q. Okay.

11 A. -- that someone may have pulled down
12 from a website somewhere.

13 Q. Okay.

14 A. My opinion. I don't have firsthand
15 knowledge of that though.

16 Q. But you don't have firsthand knowledge.
17 Of course. I think I'm finished with Exhibit 100.

18 Let's take a look at this Highway Products ad.
19 It's Exhibit 101. Have you seen -- before today, had
20 you seen this document?

21 A. Yes.

22 Q. And when had you seen this before today?

23 A. Yesterday.

24 Q. And did you print this up yesterday?

25 A. Yes.

1 Q. Do you know when this document was
2 actually created?

3 A. Created? No.

4 Q. Yeah.

5 A. Created in the sense that Highway
6 Products produced this?

7 Q. Yeah.

8 A. No.

9 Q. Do you know when it was produced?
10 There's no copyright notice on this document. Is
11 that correct?

12 A. I don't see one, but I haven't really
13 looked for it.

14 Q. Okay.

15 A. This was taken off their website.

16 Q. Okay. So as far as you know for a fact,
17 the earliest date that you can put this document into
18 existence is when you discovered it yesterday. Is
19 that correct?

20 A. I didn't actually discover it yesterday.
21 I knew it was there. I just printed it yesterday.

22 Q. When did you know it was there?

23 A. I had looked at it in the past, and I
24 don't recall when.

25 Q. And did you provide a copy of that to

1 your counsel?

2 A. I thought I had, and I'm not sure if
3 parts -- portions of this were part of the original
4 discovery.

5 Q. Do you have any other documents that
6 you're aware of that you've not printed? Do you know
7 of other documents that -- you were obviously aware
8 of this and didn't print it off until yesterday. Are
9 there other documents that you're aware of that
10 you've not printed yet?

11 A. I would have to start looking around in
12 various areas on my computer to see if there are
13 other documents that have not been included in part
14 of the discovery.

15 Q. If we could just take a quick look back
16 at -- I think it was Exhibit -- it's your third
17 declaration. We'll just take a quick look at -- I'll
18 just show it to you. It appears to be -- it's in the
19 exhibit identified -- within the third declaration,
20 it's Exhibit letter E. And I'm looking at the --
21 actually, no, it's in F. It's in F. And it's the
22 first page. Just showing you the first page of
23 Exhibit F, where it says, Steve's stuff. Is that
24 where you might have documents that have not yet been
25 produced?

1 A. Steve's stuff is everything on my
2 computer, and within Steve's stuff, there's many,
3 many, many folders and subfolders and subfolders and
4 subfolders.

5 Q. And when was the last time you looked
6 through Steve's stuff to make sure that you've
7 produced all the documents that might be relevant to
8 this matter?

9 A. I glanced at it last night. I did not
10 do a thorough search of it.

11 Q. And when you glanced at it last night,
12 is that when you printed this document, Exhibit 101?

13 A. I think what I did last night was I went
14 to the HighwayProducts.com website and printed this.
15 I don't think I discovered it in Steve's stuff --

16 Q. Okay.

17 A. -- or in my -- where I -- the folder
18 where I have --

19 Q. And what folder is that?

20 A. BackRack litigation, trademark.

21 Q. Is that this window here?

22 A. What does it say?

23 Q. BACKRACK, all caps, something. Is that
24 the -- or is that the actual website?

25 A. No, that's a website.

1 Q. Okay.

2 A. That's got a -- that's not -- that's got
3 an IE Explorer --

4 Q. Oh, yeah, you're right.

5 A. -- next to it.

6 Q. Okay. But do you have a specific folder
7 in which you keep documents related to this
8 litigation?

9 A. It's spread out within -- yeah, it's in
10 different areas on my computer. Not everything is in
11 one folder.

12 Q. And do you know that relevant documents
13 to this matter, have you turned them all over to your
14 counsel?

15 A. I believe I did.

16 Q. Okay. But not this one?

17 A. I don't think that was in there. I
18 think this was taken just from the Highway Products
19 website.

20 Q. And you took it yesterday?

21 A. Last night I took it directly from the
22 Highway Products website.

23 Q. But when did you first learn about this?

24 A. I believe -- I believe that Highway
25 Products literature in one form or another, maybe not

1 the whole catalog, was provided to counsel earlier,
2 and that's when I said, where is this, let me go to
3 the Highway Products website and print it out.

4 MR. LOVENSHEIMER: Okay. Obviously,
5 John, to the extent that that was not produced, we're
6 going to need to have a discussion off line about why
7 this wasn't produced.

8 A. I just don't --

9 Q. Okay. There's no question.

10 MR. ADAMS: I think he's testified, he's
11 given his answer, and --

12 MR. LOVENSHEIMER: That's fine.

13 Q. Now, the next question that I've got for
14 you is, let's see here, I believe with regard to
15 the -- if you look at the third page, if you look at
16 page 3 of this document -- or page 4, rather of
17 Exhibit 101.

18 A. You want me to find it here?

19 Q. No. Of that document.

20 A. Oh.

21 Q. Of Exhibit 101.

22 A. So it is there. Or it's not there.

23 Q. Right.

24 A. Okay.

25 Q. Just to clarify. Earlier today you

1 actually referred to this item that appears under the
2 ad for the Gull Wing saddle boxes, that's Gull,
3 G-U-L-L, saddle boxes. I believe you testified that
4 that was a BackRack product. Is that correct?

5 A. A BackRack.

6 Q. Right. So you indicated that --

7 A. Because Highway Products refers to their
8 truck racks as BackRacks.

9 Q. Right. I'll just point you to page 8 in
10 this document. What does the caption on top of this
11 page state?

12 A. Headache racks.

13 Q. Right. And in the parenthetical below
14 that first paragraph, could you read that for me?

15 A. Below headache rack features a
16 full-width tray.

17 Q. So they don't, in fact, refer to their
18 products as BackRacks. Is that right?

19 A. Not on this page.

20 Q. Not on this page. And not on page 4.
21 Is that correct?

22 A. That's correct.

23 Q. And at no point do they actually refer
24 to their product as a BackRack, all one word.

25 Correct?

1 A. On page 9, they refer to it as a Back
2 Rack in two words.

3 Q. Yes. We'll get to that page in a
4 second. Because what is -- on page 9 -- you're on
5 page 9 right now. Correct?

6 A. Yes.

7 Q. What is that product identified as above
8 the picture?

9 A. The Leopard.

10 Q. The Leopard. Correct? Okay. Now, if
11 you take a look back at page 7, could you read the
12 first two sentences for us?

13 A. You'll look like you're on safari with
14 this black powder coated beauty on your truck shown
15 with our Leopard headache rack.

16 Q. Okay. So the Leopard is actually
17 referred to as a headache rack. Correct?

18 A. In this area it is. In the other area
19 it's referred to as an open BackRack.

20 Q. Right.

21 A. They use them interchangeably.

22 Q. I'm going to just -- once again, we're
23 going to have to unpack that last statement, because
24 the ad actually states as follows:

25 Now you have a choice between our grill design

1 and our new open Back Rack. This unit was designed
2 for the newer trucks with roll-down rear windows and
3 for our customers that just don't need rear window
4 protection but want to be able to carry lumber, pipe,
5 or longer items. Either way, you get a great looking
6 unit that increases the performance of your truck and
7 adds knock-down, drag-out looks.

8 Is it possible that actually the way that that
9 sentence reads is open back refers to the fact that
10 there's no rear windows?

11 A. I don't think so, because Highway
12 Products refers in several instances in several
13 places, some of them discussed earlier in the eBay
14 ads, as BackRacks.

15 Q. Okay. We're not talking about those.
16 We're talking about this particular ad.

17 A. Well, then based on my knowledge, I
18 don't think so.

19 Q. Okay. What about based on page 7 where
20 they refer to the Leopard headache rack?

21 A. What about it?

22 Q. Does that indicate that they, in fact,
23 do refer to their product as the Leopard headache
24 rack and not a BackRack?

25 A. On this page, they refer to it as the

1 Leopard headache rack.

2 Q. Okay. Do they use the term BackRack or
3 the combination of the two words Back and Rack
4 anywhere else in their -- in this document?

5 A. I don't recall.

6 Q. I will just point out on page 14, on the
7 bottom of that page, there appears to be the use of
8 the term headache rack in connection with a product
9 that we've been discussing today as a headache rack
10 or a cab guard. Is that correct?

11 A. Yes. That's also one that was referred
12 to in other areas as a BackRack.

13 Q. In what other areas?

14 A. On some of those Internet ads that we
15 saw on eBay.

16 Q. Okay. But within this document, there
17 are no other uses of the term BackRack or the
18 combination of the words Back and Rack. Correct?

19 A. I believe that's correct.

20 Q. Okay. Are you aware of -- just moving
21 along now, have you heard of Westcan Manufacturing --

22 A. Yes.

23 Q. -- Limited? And do you know where
24 they're based?

25 A. In Canada somewhere.

1 Q. Do you know if they sell products in the
2 U.S.?

3 A. I'm not certain.

4 Q. Do you know if the document that we
5 marked today as Exhibit 102 was ever distributed in
6 the U.S.?

7 A. I don't know.

8 Q. Okay. Are you aware of the fact that
9 Westcan Manufacturing Limited received a cease and
10 desist letter from BackRack?

11 A. Yes.

12 Q. And do you know what the -- what is your
13 understanding of the -- what the basis of that cease
14 and desist letter was?

15 A. The Westcan Manufacturing literature was
16 provided earlier to -- what I remember, it was
17 provided earlier in this instant suit -- in this
18 instant case, the trademark litigation. And based on
19 that, I believe Adrian Jayne had that letter sent.
20 My partner, Scott Muirhead, who is up in Ontario --
21 I'm sorry, not Ontario, British Columbia, I believe
22 told me he had a conversation with -- he did have a
23 conversation with someone at Westcan who indicated
24 that they got a cease and desist letter. And
25 everyone in Canada refers to any type of headache

1 rack or even truck rack in the back as a BackRack.
2 But rather than go through all the trouble, he
3 decided to just change the name and take it out and
4 not refer to it as a BackRack anymore.

5 Q. Okay. And so that's based on the report
6 that you got from your partner, Scott Muirwood, in
7 British Columbia with an individual that you can't
8 identify from Westcan?

9 A. That's correct.

10 Q. And that's -- based on that, you know
11 that everyone in Canada uses the term BackRack?

12 A. I wouldn't say everyone. I would say --
13 I said everyone earlier, but it's a figure of speech.
14 Many people in Canada refer to truck racks as
15 BackRacks, racks that go anywhere in the back of a
16 cab of a truck. The way Scott Muirhead described it
17 to me was not just a cab guard, but even truck racks
18 that encompass the full bed of a truck is referred to
19 in Canada quite often as a BackRack.

20 Q. Okay.

21 A. So when I said everyone, I take that
22 back. It's just a figure of speech.

23 Q. Okay. But Westcan Manufacturing, as you
24 know, ceased using the phrase Back and Rack together.
25 Correct?

1 A. So I've been told.

2 Q. Okay.

3 A. And that was after --

4 Q. There's no question pending, sir.

5 Who were the manufacturers of products like --
6 of the type that we've discussed today, BackRack, the
7 BackRack headache rack, the STK Pro Rack, the
8 BackRack safety rack, the STK Pro Guard, who are the
9 other manufacturers of products like that that you're
10 aware of?

11 A. What do you mean products like that?
12 That are identical to those?

13 Q. Identical or serve similar purposes.

14 A. Well, there's a big range there.

15 Q. Okay. Tell me -- tell me -- in that big
16 range, tell me the manufacturers that you're aware
17 of.

18 A. I'll start naming the ones that I can.
19 Weatherguard, a company called Winbo, who is a
20 Chinese manufacturer, Westcan Manufacturing.

21 Q. Well, for purposes of this, let's limit
22 it to within the United States.

23 A. Okay. And again, this is just off the
24 top of my head, so I'm sure I'm going to miss a lot
25 of companies. GO Industries, Camo Rack, Cross Tread

1 Industries, Daws Manufacturing, U.S. Rack, GO
2 Industries. I'm not sure if I said that one already.

3 Q. You did.

4 A. I'm sure there's a lot that is not
5 coming to me easily, but there are many manufacturers
6 of these BackRacks.

7 Q. Are you familiar with a company by the
8 name of Vanguard?

9 A. Oh, Vanguard is another, yes.

10 Q. What about Rhino?

11 A. Rhino is another, yes.

12 Q. And Bulldog?

13 A. I'm not sure. I've heard the name. I
14 don't know.

15 Q. Okay. Are you aware of any of the -- if
16 any of these entities use the term BackRack to
17 identify the type of products that they sell?

18 A. I believe that Highway Products uses it.

19 Q. Right. Aside from the discussion we
20 just had about Highway Products, any other entities?

21 A. I'm not certain.

22 Q. Okay. Are you familiar with -- are you
23 generally -- as part of your job, do you look through
24 auto and truck -- auto/truck parts or accessories
25 catalogs?

1 A. Yes, I do.

2 Q. Do you look at, like, the Keystone
3 catalog?

4 A. Yes, I do. I don't look at it
5 regularly. I have flipped through it.

6 Q. Okay. Do you know if their index breaks
7 down products by product types and by manufacturers?

8 A. I don't know.

9 MR. LOVENSHEIMER: Okay. I think we
10 have one here. Can we just go ahead and mark that?
11 There's one right over here.

12 MR. ADAMS: No, because --

13 MR. LOVENSHEIMER: It's been produced.

14 MR. ADAMS: -- it's beyond production.

15 MR. LOVENSHEIMER: It's actually in our
16 production.

17 MR. ADAMS: What, the Keystone catalog?

18 MR. LOVENSHEIMER: Yeah.

19 MR. ADAMS: Then produce your catalog.

20 MR. LOVENSHEIMER: Okay. But I will
21 just indicate that --

22 Q. Are you aware of the index that's
23 included in the Keystone catalog?

24 A. I am aware -- I haven't looked through
25 their catalog in a year or two, and the last time I

1 looked through their catalog, I can't recall whether
2 they had an index or not. I would think that they
3 would, it would be my opinion that they would, but I
4 can't firsthand tell you in that current catalog that
5 they have whether or not there is an index.

6 Q. Right. And if an index -- or actually,
7 strike that.

8 If, in a catalog, the product guide listed a
9 category of goods, such as bed liners, and then
10 listed manufacturers under that, would that indicate
11 to you that the term bed liner was the type or
12 category of goods?

13 A. I would think so, yes.

14 Q. And then the manufacturers listed within
15 that section would be the sources of particular bed
16 liners. Is that correct?

17 A. I couldn't tell you what's correct in
18 the Keystone catalog.

19 Q. Well, this is just --

20 A. That may make sense. Some people would
21 probably do it that way.

22 Q. Okay. And how --

23 A. Some people may not do it that way.

24 Q. Do you know how Armor Deck does it?

25 A. I think we looked earlier on how Armor

1 Deck does it.

2 Q. Are you familiar with the Armor Deck
3 website?

4 A. Not as familiar as I should be. I
5 haven't reviewed it in quite some time.

6 MR. LOVENSHEIMER: Okay. I think I'm
7 going to go ahead and mark an exhibit here. I think
8 those are the -- my copies.

9 MR. ADAMS: I don't know. Well --

10 MR. LOVENSHEIMER: Yeah, I think those
11 are copies.

12 MR. ADAMS: I don't know if they're your
13 copies, but the copies that you're using, and they're
14 copies that we're going to take with us if they're
15 originals. I'll get copies for you if we can.

16 MR. LOVENSHEIMER: If we can? I think
17 that --

18 MR. ADAMS: I don't have a complete -- I
19 don't have two sets of full copies here.

20 MR. LOVENSHEIMER: We just went through
21 that whole set. These are documents that you just
22 gave me. You had one in your hand, gave one to the
23 witness, and gave me one. I think that we have extra
24 copies.

25 MR. ADAMS: We should, but I --

1 MR. LOVENSHEIMER: John, I think that
2 anything that you gave me today, I know for a fact,
3 except for the ones that we just copied, you had
4 three in your hand; you had one that you gave to the
5 witness, which was marked as original, and you kept
6 one for yourself and gave me one. I think that you
7 have extra copies that I can take with me.

8 MR. ADAMS: I hope so, but before we
9 leave, I want to make sure that everybody --

10 MR. LOVENSHEIMER: We'll get a complete
11 set together.

12 MR. ADAMS: -- everybody has copies.
13 Okay.

14 MR. LOVENSHEIMER: I wasn't here for the
15 first part, but --

16 MR. ADAMS: What first part?

17 MR. LOVENSHEIMER: Yesterday. So
18 anything that was marked yesterday I don't have a
19 copy of. Anything that I was here for --

20 MR. ADAMS: Yes.

21 MR. LOVENSHEIMER: -- I'm taking with
22 me. So -- and we can maybe run over and make a copy
23 if we need to, but hopefully it won't come to that.

24 Q. But I think you testified earlier that
25 Armor Deck does have a website. Correct?

1 A. Yes.

2 Q. And that's -- the website is
3 armordeck.us?

4 A. That's correct.

5 MR. LOVENSHEIMER: Okay. Actually, this
6 is -- what are we up to now? 113 I think was the
7 last one? Yeah, I think this was the last one,
8 wasn't it, '93/'94? Yeah, that was the last one that
9 we did.

10 MR. ADAMS: What?

11 MR. LOVENSHEIMER: The last exhibit that
12 we marked.

13 MR. ADAMS: Oh, no. You marked it as a
14 BackRack.

15 MR. LOVENSHEIMER: Right.

16 MR. ADAMS: Yes.

17 MR. LOVENSHEIMER: This is the last one
18 that was --

19 MR. ADAMS: But it was not the last --

20 MR. LOVENSHEIMER: The last exhibit that
21 has been marked today is --

22 MR. ADAMS: No. The highest consecutive
23 number?

24 MR. LOVENSHEIMER: Yes.

25 MR. ADAMS: No.

1 MR. LOVENSHEIMER: What is after 113?

2 MR. ADAMS: You're right. I'm wrong.

3 MR. LOVENSHEIMER: Okay. So this is
4 going to be BackRack-114.

5 (Exhibit BackRack-114, Printout from
6 armordeck.us website, was received and marked for
7 identification.)

8 Q. Okay. I'm showing you what's a printout
9 from the armordeck.us website that was printed
10 yesterday, 6/23/2010. If you could take a look
11 through this, the first couple of pages here.
12 Actually, I think the first three.

13 A. The third page is blank.

14 Q. Right. So then with regard to the
15 documents in the first three pages, what exactly are
16 the links or the items that are depicted there?

17 A. I believe that they're exterior
18 accessories and general categories of products,
19 similar to what we spoke about before in the Armor
20 Deck brochure.

21 Q. Okay.

22 A. The Armor Deck catalog, rather.

23 Q. Okay. So it says -- above the listing,
24 where it says exterior accessories, right above that,
25 browse each accessory by product type. Okay? Is

1 that correct?

2 A. Yes.

3 Q. Okay. So there are six overall
4 accessory categories, including exterior accessories,
5 horns and security, interior accessories, towing and
6 accessories, lighting, contractor and industrial. Is
7 that correct?

8 A. Yes.

9 Q. Okay. The products that we've been
10 discussing today, such as the BackRack headache rack
11 and BackRack cab guard and the BackRack safety rack,
12 the STK Pro Rack, the STK Pro Guard, into which
13 category would those be placed?

14 A. I would think under
15 contractor/industrial, under cab guards.

16 Q. Under cab guards. So the product type
17 there is cab guards. Correct?

18 A. That would be one of several different
19 product types it could fall under. In this instance,
20 it does fall under cab guards.

21 Q. Okay. And if we take a look then at the
22 next couple of pages, you appear to still be -- Armor
23 Deck website appears to still be advertising the
24 BackRack headache rack. Is that correct?

25 A. Yes.

1 Q. And after that, the BackRack safety
2 rack. Correct?

3 A. Yes.

4 Q. And it uses -- the website accurately
5 uses a TM next to the BackRack to indicate that it's
6 a trademark. Correct?

7 A. I believe it is a trademark, yes.

8 Q. Okay. And where it says BackRack truck
9 racks and cab guards, would you agree that that's a
10 proper use of the BackRack trademark. Correct?

11 A. Where?

12 Q. The title, BackRack truck racks and cab
13 guards.

14 A. What page?

15 Q. Under -- I'm sorry, page 1 of 2, the
16 first page of BackRack materials.

17 A. Okay. Yes, that's correct.

18 Q. Okay. And it also indicates below that
19 by BackRack. Correct?

20 A. That is correct.

21 Q. And it also shows a BackRack brand
22 headache rack picture installed on a truck with the
23 brand BackRack printed on it. Correct?

24 A. I'm sorry, could you point that out to
25 me?

1 Q. The picture immediately to the left of
2 the text where it says -- where it says BackRack TM,
3 truck racks and cab guards by BackRack TM. Next to
4 that there's a picture with a BackRack brand headache
5 rack installed on a truck, and that BackRack brand
6 headache rack is actually branded with the term
7 BackRack. Correct?

8 A. That's correct.

9 Q. Okay. And there are additional pictures
10 below that, sort of a montage, that also shows
11 BackRack brand products installed on a pickup truck
12 with the trademark BackRack appearing. Correct?

13 A. In each and every instance, I believe
14 that the trademark is used properly. We're very
15 deliberate about that.

16 Q. Okay. And just flip to the next entry
17 then.

18 A. What page?

19 Q. I'm sorry, the next -- I'm sorry, the
20 next section, page 1 of 2 of that where it says
21 safety rack by BackRack. Correct?

22 A. Correct.

23 Q. Okay. And that's indicating that
24 BackRack is the source of a product depicted here as
25 a safety rack. Correct?

1 A. I believe so.

2 Q. Okay. And once again, each -- on
3 this -- in this instance, and also with regard to the
4 other entries for BackRack truck racks and cab guards
5 that we looked at, they both include the BackRack
6 pickup truck logo. Correct? Underneath the --

7 A. Oh, yes.

8 Q. So both of the entries here include the
9 logo for a BackRack. Correct?

10 A. Yes.

11 Q. Okay. And that's another indication
12 that BackRack is the source of the products depicted
13 here. Correct?

14 A. Yes. We were very careful not to err in
15 representing it wrong. Although I'm not certain
16 about safety rack by BackRack. It doesn't say safety
17 rack truck rack.

18 Q. Yeah.

19 A. I'll have to address that if it's
20 incorrect. But I'm not even sure safety rack is a
21 trademark name. I don't think it is actually.

22 MR. LOVENSHEIMER: Okay. I've got
23 another exhibit here. We're going to mark it as 115.
24 I'm sorry, BackRack-115.

25 (Exhibit BackRack-115, Printout from

1 armordeck.us website, was received and marked for
2 identification.)

3 Q. I'm showing you a document that's a
4 printout from the Armor Deck website taken yesterday
5 at 6/23/2010. Can you identify the first two pages
6 of this document?

7 A. They're pages for Pro Rack truck racks
8 by STK.

9 Q. Okay.

10 A. And then the second page is really kind
11 of blank.

12 Q. Right. And then --

13 A. There's not much there.

14 Q. And then the next page?

15 A. Pro Guard truck racks by STK.

16 Q. Okay. And the next page is blank.

17 A. It's mostly blank.

18 Q. And then the next page?

19 A. Light bar brackets by STK.

20 Q. Okay. And is Pro Rack a registered
21 trademark by STK?

22 A. Yes, I believe it is.

23 Q. Okay.

24 A. Or it's -- I believe it is.

25 Q. Okay. And it's not -- I see that

1 there's a -- in the caption, it says Pro Rack truck
2 racks by STK, and the STK has an R and a circle next
3 to it. Right?

4 A. I think the R is in the wrong place.

5 Q. Okay. It should be above that in
6 Pro Rack?

7 A. Yes.

8 Q. Okay. I'm just going to read the next
9 line to you below that.

10 It states, STK Pro Racks offer stylish
11 protection against personal injury or cab damage
12 caused by shifting cargo. These racks provide a
13 sturdy structure to carry ladders, manage cargo, or
14 to mount lights, toolboxes, antennas and more. Pro
15 Racks come complete with installation hardware and
16 brackets in one box. Part numbers ending in a B
17 contain 21-inch brackets to accommodate most
18 cross-bed style toolboxes. Toolbox brackets may also
19 be purchased separately. Extra light toolboxes
20 require a 31-inch long toolbox bracket which can only
21 be purchased separately.

22 And that's -- in that ad, is Pro Rack being
23 used as a noun?

24 A. I believe it is. And I believe it's
25 used improperly --

1 Q. Okay.

2 A. -- as a trademark. Again, the Armor
3 Deck website I haven't viewed very often. We don't
4 maintain it very often. And this is clearly an
5 oversight that should be corrected right away.

6 Q. Okay. And to the best of your
7 knowledge, has that -- has this website used this
8 same ad for a period of years?

9 A. I'm not sure how long it has -- this
10 text has been up. I would probably say sometime
11 since 2008. But I know that we're real careful in
12 our literature not to improperly use the trademark
13 name, such as we have here. It appears in some areas
14 we did do it right and in other areas we didn't. And
15 I'm going to have to address that right away, because
16 to me it looks wrong.

17 Q. Okay. And just for further --

18 A. Thank you for pointing it out to me.

19 Q. Anytime.

20 The next ad for Pro Guard truck racks, it
21 reads, STK Pro Guards deliver the most safety
22 conscious window and cab guard design available.
23 These tough cab guards are ideal for use on work
24 trucks that carry large tools, equipment or
25 construction materials and will maintain a stylish

1 look on your truck. Both a main unit and install kit
2 must be purchased to install a Pro Guard.

3 That, too, is also an improper use as a noun?

4 A. Yes, that's correct. And in my opinion,
5 it's an improper use as a trademark, and it must be
6 immediately corrected.

7 Q. Right. And Pro Guards are a registered
8 trademark by STK, too, aren't they?

9 A. I believe they are. I believe the name
10 Pro Guard is registered or there's a -- we have
11 registered it.

12 Q. Okay. And then finally, on the last ad,
13 light bar brackets by STK. Light bar (accessory)
14 brackets allow mounting of most styles of warning
15 lights or antennas. Most light bar brackets bolt or
16 clamp right to the Pro Rack and Pro Guard without
17 drilling.

18 And then below that, it also says, Light bar
19 (accessory) brackets allow mounting of most styles of
20 warning lights and antennas. Most light bar brackets
21 bolt or clamp right to the Pro Rack and Pro Guard
22 without drilling.

23 So the same text is repeated twice. Correct?

24 A. Yes.

25 Q. And both of them use Pro Rack and

1 Pro Guard as a noun. Correct?

2 A. Yes. And there again is an improper
3 usage that must be corrected.

4 Q. Okay.

5 THE WITNESS: Can we take another
6 five-minute break?

7 MR. LOVENSHEIMER: Yeah, that's fine.

8 (A break was taken.)

9 MR. LOVENSHEIMER: I'm just going to
10 mark another exhibit. This is 116.

11 (Exhibit BackRack-116, STK brochure, was
12 received and marked for identification.)

13 Q. And first of all, I apologize, the copy
14 is not the best copy, but I'm showing you a document
15 that's been marked as BackRack-116. And it's Bates
16 labeled BR00210, and the second page is BR00211.

17 Mr. Setteducati, can you identify this document
18 for me?

19 A. Yes. This is a Pro Rack and Pro Guard
20 brochure produced by STK.

21 Q. Okay. And do you know when this was
22 produced?

23 A. I'm thinking that this was the brochure
24 that I referred to earlier that was produced likely
25 in November or December of 2007 whereby we improperly

1 used the trademark name -- we improperly used the
2 trademark Pro Rack and Pro Guard. And I know that
3 just by right off the bat I'm seeing several
4 instances where we inappropriately used it.

5 Q. Okay. Just for the sake of time, just
6 try to stay on task and answer the question asked.
7 Okay?

8 With regard to this advertisement, who created
9 this?

10 A. It was created here at Armor Deck.

11 Q. And do you know -- who did the -- so it
12 was an employee at Armor Deck that did the ad copy?

13 A. Yes.

14 Q. Okay. And who did the pictures?

15 A. It was that same employee at Armor Deck.

16 Q. Okay. Do you know who that employee
17 was?

18 A. Mark Maddalena.

19 Q. Can you spell that name?

20 A. M-A-D-D-A-L-E-N-A.

21 Q. Okay.

22 A. I believe he took the photographs, to
23 the best of my recollection.

24 Q. Okay. Do you have any -- did you have
25 any input into the creation of this ad?

1 A. The brochure?

2 Q. Yeah.

3 A. Yes.

4 Q. And what exactly was your input?

5 A. After Mark Maddalena laid it out, I went
6 over the -- you know, the layout and design of it,
7 and I gave some input.

8 Q. Okay. Do you know, at any point did STK
9 use the term BackRack to describe the type of
10 products they were selling in this brochure?

11 A. BackRack?

12 Q. Yeah.

13 A. To the best of my knowledge, no.

14 MR. LOVENSHEIMER: Okay. Mark this next
15 one as BackRack-117.

16 (Exhibit BackRack-117, Printout from
17 www.stkusa.com, was received and marked for
18 identification.)

19 Q. Mr. Setteducati, I'm showing you
20 documents that were taken from the website
21 www.stkusa.com, and they're printouts from 6/23/2010.
22 If you could just take a look through these pages for
23 me.

24 A. Okay.

25 Q. You previously testified that you're

1 really vigilant about making sure that the terms
2 Pro Rack and Pro Guard are not used as stand-alones
3 but instead in conjunction with generic descriptions
4 of the types of products that they are. Correct?

5 A. I try my best.

6 Q. Okay. And in looking through those
7 documents, is there any use of the term BackRack?

8 A. I didn't see any. This document that
9 we're looking at now?

10 Q. Right.

11 A. Exhibit 117?

12 Q. Right.

13 A. As far as I can see, no.

14 Q. And these are -- these are ads for the
15 Pro Guard and Pro Rack that appear on STK's website.
16 Correct?

17 A. Yes.

18 Q. What terms do you use in connection with
19 Pro Rack and Pro Guard on the website?

20 A. How do you mean?

21 Q. Well, I can go through it with you line
22 by line if you'd like, but you say that you don't --

23 A. I honestly don't know what you mean by
24 terms.

25 Q. What terms do you use in connection with

1 Pro Rack and Pro Guard to describe the type of
2 products they are?

3 A. Oh, truck racks. Mainly truck racks.
4 STK Pro Rack. Truck racks offer stylish protection.
5 Pro Rack truck racks come complete.

6 Q. And you've got cab protection as well.
7 Correct?

8 A. I think we use that as well, cab
9 protection.

10 Q. And at the top, you've got various items
11 listed there. One is bed liners, cab guards,
12 side-bar/bull bars, window visors, bug shields,
13 Pro Cover. Are all of those types of products that
14 STK makes?

15 A. Yes, with the exception of Pro Cover.
16 That's not really a type of cover. That's actually
17 the name of the product. It's a Pro Cover hard
18 tonneau cover. Hard tonneau cover would be the type.
19 But I see here it actually lists the name of the
20 cover.

21 Q. Okay. But other than the Pro Cover, the
22 rest of these items are the general identification of
23 the types of goods that are being sold. Correct?

24 A. Yes.

25 Q. At any time since STK launched the

1 Pro Rack and the Pro Guard, has STK ever used the
2 term BackRack to identify the type of product that
3 the Pro Rack and the Pro Guard are?

4 A. I don't believe so.

5 Q. Other than the exhibits that we went
6 through, which was your fifth, I believe -- or
7 fourth, rather, declaration, has STK undertaken any
8 consumer surveys in this matter?

9 A. No.

10 Q. Are you -- has SKF -- not SKF. Has STK
11 undertaken any search for newspaper or magazine
12 articles concerning use of the term BackRack?

13 A. Repeat the question, please?

14 MR. LOVENSHEIMER: Can you repeat the
15 question?

16 (The record is read by the reporter.)

17 A. Have we undertaken a search for the use
18 of the term -- I don't know what you mean by have we
19 undertaken a search.

20 Q. Has STK or Armor Deck, I'll expand it,
21 because they're essentially, as for your concern, one
22 and the same, has a search of newspapers and magazine
23 articles been undertaken to determine how the term
24 BackRack is used in the media?

25 A. I believe I looked for magazine articles

1 for the way the term BackRack -- you mean BackRack by
2 BackRack Manufacturing?

3 Q. You tell me what your search was.

4 A. I searched specifically for any ads in
5 magazines where BackRack advertised to see if they
6 used the trademark improperly.

7 Q. Okay. That search did not include
8 general articles that may have referenced the
9 BackRack brand product though, did it?

10 A. I don't think so, because what I did was
11 pick up trade industry publications and look through
12 them.

13 Q. Okay. And newspapers, you didn't
14 search --

15 A. No.

16 Q. -- newspapers either?

17 A. No, I don't think so.

18 Q. Okay. And dictionaries, did you search
19 dictionaries to determine if any of them had a
20 definition for the term BackRack?

21 A. No, I don't think so. I went on
22 freedictionary.com, and I don't recall if I put the
23 two together. I didn't identify it in an exhibit.

24 Q. Okay. Are you aware of any
25 manufacturers that are using the term -- the

1 trademark term BackRack, all one word, in connection
2 with the sale of headache racks or cab guards?

3 A. At the SEMA show in 2007, there was a
4 company Winbo Manufacturing, they were a Chinese
5 company, and I believe they called their copy of the
6 BackRack cab guard, I believe they called it BackRack
7 as well. I have not seen it since, though I've not
8 looked.

9 Q. And what year was that again?

10 A. 1997 -- I'm sorry, 2007 at the SEMA
11 show.

12 Q. And is that the same year that you --
13 that STK produced it's prototype for the Pro Rack?

14 A. Yes.

15 Q. Okay. And that was at that same SEMA
16 show. Correct?

17 A. Yes. And it was actually quite close to
18 the STK booth. They had a -- really a direct copy of
19 the BackRack by BackRack Manufacturing, and I believe
20 they called it -- they had it labeled BackRack, but I
21 have not researched it since.

22 Q. And you've not seen it in the
23 marketplace. Correct?

24 A. No.

25 Q. Okay. And just to confirm, neither STK

1 nor Armor Deck has used the term BackRack in
2 connection with its sale of STK products or any
3 third-party products to describe the type of products
4 being sold. Correct?

5 A. No, because it's a trademark.

6 Q. Okay.

7 A. And we don't want to take any chances.

8 Q. Okay. Thank you, but no question was
9 pending.

10 On Armor Deck's website, is there a section
11 entitled featured automotive-related links?

12 A. I think there is.

13 Q. Okay. What is -- what does the company
14 have to do to be listed as a featured
15 automotive-related link?

16 A. I don't know.

17 Q. Do you know who's on that list of
18 featured automotive-related links?

19 A. No.

20 Q. Is it available on the Armor Deck
21 website, the list?

22 A. You just said it was, so I assume you're
23 correct.

24 Q. Can you confirm for me?

25 A. I honestly don't go to the site, so I

1 don't know.

2 Q. Okay. So you're not --

3 A. I believe you if you tell me.

4 Q. Okay. So that's good. Unfortunately
5 I'm not here to testify.

6 A. Unfortunately I'm being truthful when I
7 say that I haven't been to the website in quite some
8 time.

9 Q. Okay. I know we've already discussed
10 BuyAutoTruckAccessories.com. Can you tell me
11 anything about Big Boy Custom Toys?

12 A. They are a customer -- or they were a
13 customer of Armor Deck.

14 Q. Were. So they no longer are a customer?

15 A. You know, they went out of business, and
16 then they came back, I think. I'm not quite sure if
17 they are even a customer anymore, if they're still in
18 business.

19 Q. Okay.

20 A. I'm not aware one way or the other. I
21 know that they were pretty good customers of ours,
22 and then I believe they went out of business and
23 closed their website down, and then I believe they
24 opened it again. And on this day as we speak, I'm
25 not sure if their website is open or not.

1 Q. Okay. Now, just to take a quick step
2 way back. At the beginning of the deposition, you
3 testified that you had been deposed before in
4 various -- in connection with the BackRack versus
5 Armor Deck case in New Jersey. Correct?

6 A. Yes.

7 Q. Have you been deposed in any other
8 instances involving a dispute between BackRack, Inc.,
9 and Armor Deck or STK?

10 A. Just so I understand the question, you
11 want to know, other than the deposition that I gave,
12 I think it was a two-day deposition in 2009,
13 between -- the litigation between BackRack and Armor
14 Deck, had I been deposed in any other related matter
15 between BackRack and STK and -- or Armor Deck. Is
16 that correct?

17 Q. That is correct.

18 A. No, I don't recall.

19 Q. Have you --

20 A. Maybe there is and I --

21 Q. Have you offered testimony in any other
22 setting involving a dispute between STK and BackRack
23 or Armor Deck and BackRack, other than the litigation
24 that we've already discussed?

25 A. This -- are you referring to this --

1 these proceedings?

2 Q. Not these proceedings. And not the
3 litigation in New Jersey.

4 A. Not that I can think of, but maybe --

5 Q. Did you offer testimony in the
6 proceeding that's currently pending in Canada
7 regarding the BackRack trademark?

8 A. Oh, I forgot all about that. I'm sorry,
9 yes. I did offer -- I did offer testimony.

10 Q. And was that --

11 A. I didn't know where you were leading,
12 and it's late.

13 Q. That's fine. And so when you testified
14 there in that proceeding, was that under oath?

15 A. I believe it was.

16 Q. And the testimony you offered was
17 truthfully offered?

18 A. Yes, I believe so.

19 Q. And you --

20 A. Yes.

21 Q. You have no reason to --

22 A. Correct.

23 Q. -- to say that you offered anything
24 other than truthful testimony in that proceeding.

25 Correct?

1 A. Correct.

2 MR. LOVENSHEIMER: Just one second, I
3 think I'm pretty much done.

4 Q. Oh, finally, just with regard to the
5 various exhibits that we went through in connection
6 with your third declaration, I believe it was, where
7 you went through the various advertisements on the
8 BackRack website and then also their -- the websites
9 of their distributors. Do you recall going through
10 those documents? Yeah, I think it's the third. It
11 picks up like Exhibit E on the third declaration. I
12 think it's E and F.

13 A. I have Exhibit E open.

14 Q. Okay. With regard to the -- this is
15 just a quick question, but with regard to the various
16 pages that are depicted here, how did you access
17 these web pages?

18 A. On my computer.

19 Q. And did you have to go to the -- for
20 example, in Exhibit E, did you have to go to the
21 BackRack website?

22 A. Yes.

23 Q. Okay. And then in order to get to the
24 screens depicted here, did you have to click through
25 other screens to get to this point?

1 A. Well, naturally I did, because these
2 screenshots are different pages, and you start out at
3 the home -- I believe I started out at the home page
4 and eventually wound up on these pages.

5 Q. Okay.

6 A. Through whatever means.

7 Q. Okay. So you did have to click through
8 to get to these particular pages. Correct?

9 A. Yes. I think I just answered that.

10 Q. Okay. And with regard to the links that
11 are depicted at, like, Addons.com -- TruckAddons.com
12 and the other links that are also depicted in that
13 exhibit, how did you access those pages?

14 A. By clicking the link on the BackRack
15 website.

16 Q. Okay. So you went to the BackRack
17 website, went through the BackRack website to get to
18 the list of distributors, and then clicked on that
19 link?

20 A. Yes. You could clearly see the one -- I
21 don't know what page it is. On Exhibit F, it looks
22 like page 2 of Exhibit F, you can see on the first
23 screenshot on the bottom, it shows TruckAddons, and
24 then it shows a link under the 800 number for
25 TruckAddons. I clicked that link and wound up on

1 TruckAddons' website.

2 MR. LOVENSHEIMER: All right. That's
3 all I have.

4 MR. ADAMS: No redirect on my part.

5 (Deposition adjourned at 10:36 p.m.)
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CERTIFICATE

1
2
3 I, MARY ANN ADAMS, a Certified Court Reporter and
4 Notary Public of the State of New Jersey, License No.
5 X101026, do hereby certify that prior to the
6 commencement of the examination, STEVE SETTEDUCATI
7 was duly sworn by me to testify as to the truth, the
8 whole truth, and nothing but the truth.

9 I DO FURTHER CERTIFY that the foregoing is a true
10 and accurate transcript of the testimony as taken
11 stenographically by and before me at the time, place,
12 and on the date hereinbefore set forth.

13 I DO FURTHER CERTIFY that I am neither a relative
14 nor employee nor attorney nor counsel of any of the
15 parties to this action, and that I am neither a
16 relative nor employee of such attorney or counsel,
17 and that I am not financially interested in the
18 action.

19
20
21
22 Mary Ann Adams mab

Notary Public of the State of New Jersey

23 My Commission expires August 10, 2014

24 Dated: July 7, 2010
25

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JURAT

I, Steve Setteducati, do

hereby certify that I have read the
foregoing transcript of my testimony,
taken on June 24, 2010, and have signed
it subject to the following changes:

PAGE	LINE	CORRECTION	REASON
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ORLANDO ROMAN
Notary
State of New Jersey
My Commission Expires Mar 19, 2015

Steve Setteducati

ORLANDO ROMAN
Notary Public
State of New Jersey
My Commission Expires Mar 19, 2015

Sworn and subscribed to before me on this

11 day of October, 2010.

NOTARY PUBLIC

ORLANDO ROMAN



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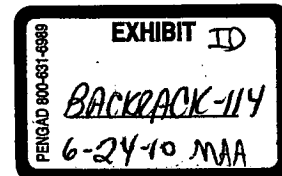
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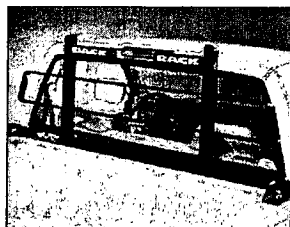


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Product Information

HOME > PRODUCTS > BACKRACK™ > BACKRACK™ TRUCK RACKS AND CAB GUARDS



Backrack™ Truck Racks and Cab Guards By BACKRACK™

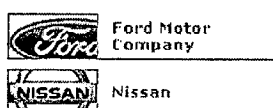
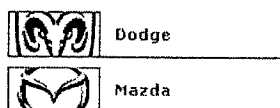
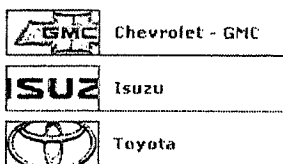
Our truck racks are built from strong durable steel tubing that is pickled and oiled which has a smooth finish and provides maximum rust resistance. The flat bar protecting the rear window of your pickup truck is scale free, and each intersection of material is fully welded for maximum strength. The backrack truck racks is finished with an attractive and long-lasting black powder coat, and all the fasteners used on the Backrack are plated with zinc dichromate, meeting automakers specifications. The Backrack truck cab guards provides strength, versatility and style that can not be matched by any pickup truck rack or cab guard on the market.

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CHEVROLET/GMC

Year	Model	With Standard Bracket	With 21" Tool Box Bracket	Rear Bars	Image
68-87	Pickup	10504	**	11504-C	N/A
99-05	Pickup (new body style)	10509	10509TB	11509	N/A
88-98	Pickup (old body style)	10503	10503TB	11503	N/A
04-05	Pickup, Colorado & Canyon	10316	10316TB		N/A
01-05	Pickup, Heavy-Duty Dually (new body style)	10590DW	10509TB	11509	N/A
82-03	Pickup, S-10	10312	10312TB		N/A
88-98	Pickup, Sportside (old body style)			11803	N/A

* Tacoma - The Safety Rack is preferred for this application; Backrack is not recommended as it obstructs the brake lights
** Tool Box Brackets must be ordered separately

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