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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GAMES WORKSHOP LIMITED,)	
)	
Plaintiff,)	Docket No. 10 C 8103
)	
vs.)	
)	
CHAPTERHOUSE STUDIOS, LLC,)	Chicago, Illinois
et al.,)	June 6, 2013
)	9:30 a.m.
Defendants.)	

VOLUME 4
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY AND A JURY

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1 (The following proceedings were had in open court out of
2 the presence and hearing of the jury:)

3 THE CLERK: 10 C 8108, Games Workshop v.
4 Chapterhouse.

5 THE COURT: All right. It's been a couple days since
6 I have had you put the lawyers' names on the record. So why
7 don't you put on the record the names of all the people who
8 are here.

9 MR. KEENER: For Games Workshop, Jason Keener, Foley
10 & Lardner; also Jonathan Moskin of Foley & Lardner; and at
11 counsel table is Gill Stevenson of Games Workshop.

12 MR. ALY: Here today, Imron Aly for Chapterhouse.
13 And with me also from Winston & Strawn is Bryce Cooper and
14 Jennifer Golinveaux and Tom Kearney.

15 And we also have from the Marshall Gerstein firm
16 Julianne Hartzell and Sarah Kalemeris.

17 THE COURT: I think you just said Marshall Gerstein
18 from Julianne Hartzell. She's not the name of the firm. I'm
19 just pulling your chain a little bit.

20 What were the issues that you needed to bring up?

21 MR. KEENER: Just two issues. The first was the
22 parties are going to try and work on a proposed verdict form
23 over the weekend --

24 THE COURT: Good, okay. Very good.

25 MR. KEENER: -- and so on Monday to be able to

1 address with the Court if we have any issues.

2 And the second is I think a scheduling issue.

3 MR. ALY: I will address that.

4 MR. KEENER: Yes, you can address that.

5 MR. ALY: So for the defendants' witnesses, we're not
6 sure how many minutes or hours we'll have tomorrow, and our
7 witnesses are not available to fly in. So I didn't want --

8 THE COURT: So tomorrow is going to be, we're going
9 to go from 9:00 to 5:00.

10 MR. ALY: I know. And so if we run short, your
11 Honor, we're just going to dock time from the Chapterhouse
12 presentation, and I wanted you to know that now.

13 THE COURT: So do you think you will be finished by
14 tomorrow with witnesses you're calling?

15 MR. KEENER: It depends how long their cross of Mr.
16 Villacci goes because they may put their whole case in. It
17 depends.

18 But it's expected that we may fill tomorrow with all
19 the witnesses that are planned for tomorrow and their
20 witnesses for tomorrow, but we may be a few hours short.

21 THE COURT: All right.

22 MR. KEENER: And they're willing --

23 MR. ALY: That will be on us. I just wanted you to
24 know that.

25 THE COURT: All right.

Jones - cross

1 MR. ALY: Thank you, your Honor.

2 THE COURT: So just do what you need to do. Talk
3 amongst yourselves or something. As soon as the person gets
4 here, we'll get going.

5 (Brief recess.)

6 THE COURT: The juror is here. They're on their way
7 out.

8 (The following proceedings were had in the presence and
9 hearing of the jury:)

10 THE COURT: All right, you can have a seat.

11 Mr. Jones, do you understand you are still under
12 oath?

13 THE WITNESS: Yes.

14 THE COURT: All right, you can proceed.

15 ANDREW JONES, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

16 CONTINUED CROSS EXAMINATION

17 BY MR. COOPER:

18 Q Good morning, Mr. Jones.

19 A Good morning.

20 Q Mr. Jones, we left off yesterday talking about the term
21 Exorcist; do you recall that?

22 A I do, yes.

23 Q And you understand that there are other miniature
24 companies besides Games Workshop that use the term Exorcist to
25 describe their products, correct?

Jones - cross

1 A I don't know about that, to be honest.

2 Q You haven't personally looked for other companies who use
3 the term Exorcist, right?

4 A Right.

5 Q Games Workshop did not consult any type of independent
6 expert to evaluate the term Exorcist in the market, correct?

7 A Correct.

8 Q And Games Workshop has not offered any consumer survey
9 regarding the term Exorcist, correct?

10 A Correct.

11 Q I think we talked earlier about where Games Workshop has
12 used the term assault cannon; do you recall that?

13 A Yes.

14 Q And the way that Games Workshop uses the term assault
15 cannon, it refers to a cannon that is used in an assault,
16 correct?

17 A It's a ranged weapon, yes.

18 Q So in the Warhammer universe, the product would be used to
19 assault someone, right?

20 A It will be in the Warhammer 40,000 universe, the science
21 fiction Warhammer fantasy environment.

22 Q So assault cannon is a pretty accurate term to describe
23 what the product is, is that fair to say?

24 A Well, assault is usually --

25 You would usually use the word "assault" in terms of

Jones - cross

1 like a hand-to-hand combat, an assault. If you assault
2 somebody, you typically hit them and so on and so forth.

3 An assault cannon, it's a ranged weapon. It's not
4 used in -- you know, it's not like a hand-to-hand weapon. You
5 don't use it to physically assault somebody. You don't hit
6 them with a gun. So it's a ranged weapon. It's a distance
7 weapon.

8 Q You use it to attack someone?

9 A Yes.

10 Q And you understand that the term assault cannon is used in
11 other science fiction contexts?

12 A Possibly. And, again, I haven't searched that.

13 Q You have heard of Star Wars.

14 A Yes.

15 Q So you know assault cannon is a term that is used in Star
16 Wars, right?

17 A No, I don't know. I know they have got iron cannons and
18 so on.

19 Q You have heard of the science fiction game Halo; yes?

20 A Yes.

21 Q And you know that assault cannon is also used in Halo?

22 A No. I'm not sure about that because I remember at my
23 deposition, you showed me one thing from Halo. I can't
24 remember if that was the assault cannon or not.

25 Q Would it surprise you to discover that other miniature

Jones - cross

1 companies also use the term assault cannon to describe their
2 products?

3 A Describe their products? I don't know actually. Would it
4 surprise me?

5 Given that if I go on to Google and search assault
6 cannon and I get pages and pages of our models and very little
7 else under an image search, yes, it is kind of surprising when
8 you go, there's somebody else doing it.

9 Q So have you done a Google search for the term assault
10 cannon?

11 A I'm not sure if it's for assault cannon. But when I was
12 waiting for hours and hours and hours at our last deposition
13 we did in London, as I told you at the time, I used that time
14 to look up some of those things just to make sure that I could
15 actually see some products using those trademarks.

16 Q So have you done a Google search of the term assault
17 cannon and miniatures?

18 A Yes -- well, given that I searched for quite a lot of
19 them, I will say yes.

20 Q And you didn't see any other miniature company using the
21 term assault cannon, is that right?

22 A Not to my memory.

23 Q Have you heard of the miniatures company EM4 Miniatures?

24 A Say it again.

25 Q EM4 Miniatures. Have you heard of them?

Jones - cross

1 A EM4. I haven't heard of EM4 Miniatures.

2 Q Games Workshop has asserted the term Terminator as a
3 trademark, correct?

4 A In our class of goods.

5 Q But there is no Games Workshop that's just called
6 Terminator, right?

7 A There is no Games Workshop?

8 Q Product. Excuse me.

9 There is no Games Workshop product that's just called
10 Terminator?

11 A You mean there are Terminator Space Marines?

12 Q So the product is not just called Terminator?

13 A No, I don't think so. It's Terminator Space Marine or
14 Wolf Guard Terminator or whatever.

15 Q You understand that the term Terminator is used outside of
16 tabletop miniature war games, right?

17 A In movies, yes.

18 Q There's a pretty famous movie called Terminator, and
19 that's a movie from the early 1980s?

20 A Yes.

21 Q And you understand in that movie, a Terminator is a super
22 strong soldier; is that a fair description?

23 A No, I don't think it is a fair description at all.

24 Q It's very strong, correct?

25 A The Terminator in the movies is actually a mechanical,

Jones - cross

1 robotic creature. It's not a human at all.

2 Q It is very strong?

3 A Well, yes, strong.

4 Q And Games Workshop's Terminator line of products are very
5 strong soldiers, correct?

6 A This feels very thin. It's true that Terminator -- I
7 think as I said earlier, that the Terminator Space Marines
8 individually as characters, they're no stronger than any other
9 Space Marines, but they're wearing the most powerful armor, if
10 that's what you mean.

11 So, no, individually as characters, they are no
12 stronger than any other Space Marine.

13 Q Have you personally looked whether there are any other
14 companies, miniatures companies, that use the term Terminator
15 to describe their products?

16 A No, I haven't.

17 Q And you haven't presented any consumer survey or expert
18 analysis regarding the mark Terminator, correct?

19 A No.

20 Q Thunder Hammer is another one of Games Workshop's
21 trademarks in this case, correct?

22 A Yes.

23 Q And it is not a registered trademark?

24 A No.

25 Q Thunder Hammer, it describes a type of Games Workshop

Jones - cross

1 hammer weapon, is that right?

2 A Correct.

3 Q Have you personally looked to see whether any other
4 miniature companies use the term Thunder Hammer to describe
5 any of their products?

6 A No, I have not.

7 Q So you don't know if any other miniature companies use the
8 term Thunder Hammer to describe their products? You don't
9 know that, right?

10 A Do I know that? I know that we have been selling Thunder
11 Hammers for many, many years, and I also know that we have got
12 a very wide net of our 400 stores and all of our trade
13 accounts, and, you know, those -- well, 1.2 million unique
14 visitors to our website every month, and they are very
15 diligent actually in reporting in to us when they think
16 somebody is copying us or using our trademarks.

17 That's our first line of defense really. They're
18 like our early warning system.

19 And so I can say that I heard nothing in my best part
20 of 30 years at Games Workshop to suggest that anybody else is
21 selling products called Thunder Hammers, and I know that we do
22 sell Thunder Hammers. But do I know how far --

23 Do I know that there is not somebody running a little
24 shop in Timbuktu somewhere making something called a Thunder
25 Hammer? No, I don't. I don't have an exhaustive knowledge of

Jones - cross

1 the entire world, no.

2 Q But not an exhaustive knowledge. You have never done a
3 personal -- you have never personally done an Internet search
4 to determine whether --

5 A But even if I had --

6 Q -- any other company --

7 A Even if I had, I still wouldn't know because I might not
8 find them.

9 Q You have never yourself done any Internet searching to
10 determine whether other companies, miniatures companies, have
11 products called Thunder Hammers, correct?

12 A Right.

13 THE COURT: You know, let's just answer it directly.
14 I think you will minimize your time on the witness stand that
15 way.

16 THE WITNESS: Okay, thank you.

17 BY MR. COOPER:

18 Q You haven't presented any consumer survey or expert report
19 discussing the term Thunder Hammer, correct?

20 A Correct.

21 Q The word drop pod, that's not a registered trademark of
22 Games Workshop, right?

23 A I don't think so, no.

24 Q And drop pod describes a Games Workshop product that drops
25 from the sky in the story, correct?

Jones - cross

1 A Yes.

2 Q And it's a pod-like shape, right?

3 A I don't know what you mean by pod.

4 Q Like an egg-like shape?

5 A Kind of, I guess.

6 Q And you said you have heard of the game Halo, right?

7 A Yes.

8 Q You understand there are drop pods in Halo?

9 A Yes, I think that's actually the one you pointed out.

10 Q And you have not presented any consumer survey or expert
11 report analyzing the term drop pod, right?

12 A No, we haven't.

13 Q Games Workshop is claiming the trademark jump pack, right?

14 A I do think I need to say on Halo, because Halo is a
15 computer game and what we do is tabletop hobby war games, so
16 there's a distinct difference.

17 Q Games Workshop is claiming the trademark jump pack?

18 A Sorry. Yes.

19 Q That's not a registered trademark, right?

20 A No.

21 Q And you know jump pack is also another term found in Halo?

22 A Yes.

23 Q Jump pack describes a Games Workshop product that goes on
24 a Space Marine's back, right?

25 A Yes.

Jones - cross

1 Q And jump packs are used to shoot them up into the air?

2 A Yes.

3 Q And you have not presented any consumer survey or expert
4 report on what tabletop miniatures customers think when they
5 hear the term jump pack, right?

6 A Correct.

7 Q Heavy flamer is another term Games Workshop claims as a
8 trademark; yes?

9 A Yes.

10 Q It's not a registered trademark?

11 A No.

12 Q This is a Games Workshop product that shoots flames,
13 correct?

14 A Yes.

15 Q And regular flamers, they just have one nozzle on them,
16 right?

17 A Yes.

18 Q And heavy flamers have two, right?

19 A Yes.

20 Q They're larger?

21 A Yes.

22 Q So heavy flamer is a pretty accurate description of what
23 that product is, wouldn't you say?

24 A It's a title of the product. You know, you keep saying
25 it's a description of a product. Jump pack, drop pod, they're

Jones - cross

1 the titles, the marks.

2 Q It's also an accurate description of the product, right?

3 A Yes.

4 Q And you haven't presented any consumer survey or expert
5 report on what tabletop miniature customers think of when they
6 hear heavy flamer, right?

7 A Correct.

8 Q Librarian is another term that Games Workshop claims?

9 A Yes.

10 Q And it's not registered?

11 A No.

12 Q You have not offered any consumer survey or expert report
13 on that term?

14 A Correct.

15 Q Lightning claw is another registered trademark of Games
16 Workshop. It's not -- excuse me.

17 Lightning claw is not a registered trademark of Games
18 Workshop?

19 A Correct.

20 Q And you haven't presented any consumer survey or expert
21 report on that term?

22 A No.

23 Q And land speeder is another term Games Workshop claims as
24 a trademark, right?

25 A Yes.

Jones - cross

1 Q It's not a registered trademark?

2 A Correct.

3 Q The land speeder in Warhammer 40K is a type of vehicle,
4 right?

5 A Yes.

6 Q It's a fast vehicle, is that true?

7 A Yes, pretty fast.

8 Q And it speeds across the land?

9 A Yes.

10 Q So land speeder, that's a pretty accurate description of
11 what that product does, right?

12 A It's the --

13 Well, it's a description of how it moves. It does
14 lots of other stuff. So it fights. It has a role in the
15 combat. It's not just a mode of conveyance.

16 Q So you're saying it's a product name?

17 A Yes.

18 Q But it also accurately describes what it does?

19 A Well, part of what it does, yes, part of what it does.

20 Obviously, like I say, it's not just a mode of conveyance. It
21 has guns and all sorts of other stuff.

22 Q You know there are land speeders in Star Wars, too, right?

23 A Yes.

24 Q And, of course, you know there are Star Wars miniatures
25 out there, right?

Jones - cross

1 A Yes.

2 Q And Games Workshop has not offered any consumer survey or
3 expert report on that term either?

4 A No.

5 Q I want to talk briefly about alternative product bits.

6 Do you remember testifying about those yesterday?

7 A Yes. You mean of shoulder pads and the like?

8 Q That Games Workshop sells, yes.

9 A Yes.

10 Q And you talked yesterday about how Games Workshop sells
11 these parts through its ForgeWorld website; do you remember
12 that?

13 A And through the main Games Workshop website as well. You
14 can say accessory parts there, too.

15 Q And you showed us PEX-416. Can we bring that up? You
16 talked about this exhibit yesterday, right?

17 A Yes.

18 Q And you talked specifically about seven alternative bits,
19 parts, that Games Workshop sells?

20 A Seven. If that's how many were shown yesterday, then
21 that's what we talked about.

22 Q Aside from those seven, for every other product accused in
23 this case, Chapterhouse is the only one who is selling that
24 replacement bit, correct?

25 A I don't know actually. We have looked at seven bits. I

Jones - cross

1 don't know the entire ForgeWorld or Games Workshop range.

2 Like I said, there's two or three thousand codes in Games
3 Workshop alone.

4 Q Let's take a look first at what you showed us.

5 Now, this is a replacement door that you showed us
6 yesterday, right?

7 A Yes.

8 Q They have the emblems of the Alpha Legion Space Marine on
9 them?

10 A Yes.

11 Q But Chapterhouse doesn't sell an Alpha Legion replacement
12 door product, right?

13 A You know, I can't remember what they called it. I don't
14 know. They may well. They sell so many things based on our
15 products that I can't remember them all.

16 Q There's not a Chapterhouse Alpha Legion replacement door
17 product on your claim chart?

18 A Okay.

19 Q Let's go to page 44 of the exhibit.

20 This shows a Games Workshop Thunder Hammer conversion
21 pack, is that right?

22 A Yes.

23 Q And you showed the jury this product yesterday because
24 Chapterhouse sells a type of Thunder Hammer bit product, too?

25 A Yes.

Jones - cross

1 Q If you blow up the Thunder Hammer conversion pack title
2 there, Games Workshop doesn't put a TM after Thunder Hammer in
3 there, does it?

4 A No, it doesn't. You don't have to.

5 Q If we can zoom back out.

6 Now, you know, Mr. Jones, that Games Workshop started
7 selling this alternative bit product after Chapterhouse
8 started selling its Thunder Hammer product; you know that?

9 A Right.

10 Q Let's go to page 37. And you showed us this product
11 yesterday, right?

12 A Yes.

13 Q It's called the Space Marine character conversion set?

14 A Yes.

15 Q And you said one of the parts in this kit has an
16 alternative arm product that you talked about, right?

17 A Well, I actually said there's four alternative arms on
18 there because I made the point that when you finished with
19 this kit, you would have some extra bits to go in your bits
20 box unless you're making some warrior with four arms. If you
21 remember, that's what I actually said.

22 Q There's more than just arm parts in this product?

23 A Evidently, yes.

24 Q You understand Chapterhouse sells a power arm product by
25 itself as a --

Jones - cross

1 A Sells?

2 Q A power arm product by itself as an alternative bit?

3 A Yes.

4 Q And you understand that Games Workshop started selling
5 this product after Chapterhouse started selling its power arm
6 replacement product?

7 A And -- yes, maybe. Actually I don't know that.

8 So what we were using this is to show Games Workshop
9 has, since I have been at the company, has been selling
10 accessory and add-on components.

11 That's what these were for, to show that actually
12 with a Games Workshop product, you get lots of choice in the
13 box. And then we also sell lots of other add-on things,
14 whatever they might be. And this is an example of one.

15 Q But this is an example of a product that Games Workshop
16 didn't sell until after Chapterhouse started selling its power
17 arm product, is that correct?

18 A It may well be, but that wasn't the point of the exhibit.

19 Q My point --

20 If that is true, then you will agree that
21 Chapterhouse couldn't have copied this particular product; you
22 will agree with that?

23 A No. I don't think we're saying Chapterhouse is copying
24 this specific product. We were using this as an example of
25 the fact that you can get many different extras and add-ons

Jones - cross

1 for our range.

2 Q Can we go to page 2?

3 A And actually I was talking about trademarks.

4 THE COURT: There is no question pending.

5 THE WITNESS: Sorry.

6 BY MR. COOPER:

7 Q You showed the jury this page, Games Workshop assault
8 squad shoulder pads?

9 A Yes.

10 Q And, again, you understand that Games Workshop started
11 selling this product after Chapterhouse started selling an
12 alternative bits shoulder pad product, right?

13 A You know, I'm not sure about that.

14 Q But do you know, if we go down to the bottom of the page
15 and blow up the date there, you see that that says
16 August 10th, 2011, right?

17 A Yes. That would be the date that that was printed out.
18 I'm not sure what that's supposed to prove.

19 Q And that's after this litigation started?

20 A Yes. That's when this piece of paper or document was
21 printed out. I don't know what that proves as regard to what
22 you're saying about the product, but --

23 Q There are 163 Chapterhouse products on the claim chart,
24 right?

25 A Something like that, yes.

Jones - cross

1 Q And you will agree that for 159 of them, Games Workshop
2 did not sell an alternative bit product before Chapterhouse
3 sold an alternative bit product, right, or do you know?

4 A I don't know.

5 Q But after two and a half years of litigation, you will
6 agree that the claim chart is what you talked about and are
7 offering into evidence today?

8 A Yes.

9 Q Games Workshop also claims that it has trademarks on
10 certain images, right?

11 A Yes.

12 Q Mr. Jones, you know you don't just get a trademark on any
13 picture you draw, right?

14 A Sure.

15 Q And you don't have a registered trademark on any of the
16 icons that you were shown and talked about yesterday, right?

17 A Actually, no, that's not true, is it, because if I
18 remember rightly, the Warhammer 40,000 logo and the Double-
19 Headed Eagle, the Warhammer 40,000 Aquilla logo, those are
20 registered trademarks. Yes, they are; so that's not correct.

21 Q My mistake. Other than those two, the other icons that
22 you talked about are not registered?

23 A Correct.

24 Q One of the images you are claiming is a trademark is for
25 what you have called the Soul Drinkers icon, right?

Jones - cross

1 A Right.

2 Q Let's take a look at your chart first, PEX-1019, and go to
3 page 7.

4 And the Soul Drinkers icon is there on the right side
5 of the chart, right?

6 A Yes.

7 Q And that is Games Workshop's image?

8 A Yes.

9 Q And this is a picture of a chalice or cup, is that fair?

10 A Yes.

11 Q And Games Workshop doesn't think it has a trademark on all
12 chalices?

13 A No.

14 Q And now this chart, it takes a snapshot, but that's not
15 the full page, correct?

16 A Sorry. Say that again.

17 Q This chart, it takes a little snippet from a Games
18 Workshop product, right?

19 A Yes.

20 Q And you can identify the Games Workshop product by looking
21 at PEX-325, is that right? If you look under the Games
22 Workshop picture, there is a citation.

23 A Okay, yes.

24 Q Now, this chart with the snippet, that was made for this
25 litigation?

Jones - cross

1 A Yes.

2 Q And it was made by your lawyers?

3 A Yes.

4 Q So let's take a look at where this image comes from PEX-
5 325.

6 And this is a book that is sold by Games Workshop,
7 right?

8 A Yes.

9 Q Now, if you're looking at this book cover, you see the
10 term Soul Drinker, right?

11 A Right.

12 Q That's the word Soul Drinker you see?

13 A Yes.

14 Q And if you are looking at it, you can see Ben Counter,
15 right?

16 A Yes.

17 Q You said that's a fairly famous author in the Warhammer
18 40K?

19 A Yes.

20 Q You can also see the Warhammer 40,000 logo down there at
21 the bottom, right?

22 A Correct, yes.

23 Q And that's easy to see on the cover?

24 A Yes.

25 Q And the Warhammer 40,000 logo, it's well-known in the war

Jones - cross

1 game community, right?

2 A Yes.

3 Q And Warhammer 40,000 there, that's a brand, right?

4 A Yes.

5 Q Warhammer 40,000, you said that's an actual registered
6 copyright -- trademark. Excuse me.

7 A Yes.

8 Q By the way, can you think of any other products that you
9 sell for Warhammer 40,000 that do not have that Warhammer
10 40,000 logo on it?

11 A Any products that we sell for Warhammer 40,000 that don't
12 have the Warhammer 40,000 logo on them. Probably most of --
13 I'm not sure actually. I would have to look at the
14 ForgeWorld Warhammer 40,000 products. I'm not sure that they
15 carry the Warhammer 40,000 logo. They will carry the
16 ForgeWorld logo.

17 Q All --

18 A As an example. Again, we have got two or three thousand
19 products. So I can't exhaustively remember every single one
20 of them and think, does that have the 40K logo on it or not.
21 But in general terms, Warhammer 40,000 products will bear the
22 Warhammer 40,000 logo.

23 Q Okay. So looking back at this book, you see that there is
24 some text at the top, right, that says, "In the grim darkness
25 of the far future, there's only war."

Jones - cross

1 Do you see that?

2 A Yes.

3 Q And that's kind of a Warhammer 40,000 slogan, right?

4 A Yes.

5 Q But you're not alleging that's a trademark, right?

6 A Well, what we said about -- where these logos and what
7 have you came in, we were talking about the fact that there
8 are some things that aren't specifically a trademark in terms
9 of words or icons. Some icons are trademarks and we actually
10 use them on products.

11 But we're holding that actually there are some icons
12 that rather like, if you remember the Daily Planet example we
13 gave, that they're uniquely associated in the minds of our
14 customers. When you combine this particular chalice with the
15 name Soul Drinker and a Space Marine shoulder pad, that it's
16 uniquely and irrevocably part of our universe, and our
17 customers will think of it in the same way.

18 They will see that chalice. They will see that
19 combination of elements and go, that's a Soul Drinker Space
20 Marine shoulder pad.

21 Q I'm sorry. Let me ask my question again just to make sure
22 that you heard it.

23 You're not claiming that that text I just read up
24 there is a trademark, correct?

25 A Correct.

Jones - cross

1 Q Now, if you look at this book cover, you see a Space
2 Marine, right?

3 A Yes.

4 Q And when you are looking at this book cover, you see that
5 that Space Marine has a skull icon on his knee. Do you see
6 that?

7 A Yes.

8 Q You're not claiming that that skull icon on his knee is an
9 icon, right? Excuse me. Is a trademark, correct?

10 A No.

11 Q And if you look, you can see that he has --

12 A Well, actually, I'm not so knowledgeable in our IP that I
13 would know necessarily what -- our customers may look at that
14 icon on his knee and go, that is immediately identified with a
15 particular part of the Warhammer 40,000 mythos in the same way
16 the Daily Planet may be associated with Superman. I'm not
17 sure about that.

18 But in this claim, we're not -- we're certainly -- I
19 don't believe we're saying that Chapterhouse are infringing
20 that particular mark, no, if a mark it is.

21 Q You can't know what your customers think, right?

22 A No.

23 Q And if you look on his chest, there's an Eagle-type icon.
24 Do you see that?

25 A That's under the chalice, winged chalice, I believe,

Jones - cross

1 because they're the Soul Drinkers. I think that's right.

2 Q Can we blow that up on his chest, please?

3 THE WITNESS: Yes.

4 BY MR. COOPER:

5 Q Do you see on --

6 A It's another version of the Soul Drinkers chalice mark.

7 Q Do you see on his gun, he's got a wing as well; do you see
8 that?

9 A Yes.

10 Q And that's not an icon that you're claiming is a
11 trademark, right?

12 A In this case, no.

13 Q And so if you look, you can also see an icon of a chalice
14 on his shoulder pad, right?

15 A Yes.

16 Q You haven't shown us any other examples of this Soul
17 Drinker icon on the covers of any Games Workshop products,
18 right?

19 A Right.

20 Q And you haven't shown, for example, a series of books
21 where this icon appears?

22 A There's a series of Soul Drinkers novels, and I know that
23 the icon appears on this one. And without seeing the
24 individual covers of the other ones, I'm not sure whether it's
25 on there or not.

Jones - cross

1 Q You haven't shown a series of books that have this icon?

2 A Okay, no.

3 Q And, Mr. Jones, you haven't presented any customer surveys
4 showing that customers buy this book because they see this
5 icon, right?

6 A We have not created customer surveys, no.

7 Q Let's go back to your chart a second at 1019. And I don't
8 want to walk through each one of these.

9 A Right.

10 Q I think that we'll all be happy about that.

11 But please feel free to refer to PX-1019 in your
12 binder because I'm going to ask you a couple general questions
13 about the chart.

14 Now, you talked about all of the icons in this chart
15 during your direct examination, right?

16 A No. We talked about the Blood Angels, I think it is, icon
17 on the right there. Isn't that the one we talked about?

18 Q I mean, in all of the pages, you walked through all of the
19 pages in this exhibit during the direct examination?

20 A Yes.

21 Q And this exhibit contains all of the Games Workshop icons
22 that you think are infringed in the right-hand column,
23 correct?

24 A Yes.

25 Q Now, Games Workshop is -- you think Games Workshop is

Jones - cross

1 proud of its Warhammer 40,000 icon that is registered, right?

2 A Right.

3 Q It's proud of its double Eagle icon as well, right?

4 A Yes.

5 Q And so that's why Games Workshop makes sure to put that
6 Warhammer 40,000 logo on its product covers, right?

7 A Yes.

8 Q And it makes sure to put the name Games Workshop on its
9 products?

10 A Yes.

11 Q Now, for each of the products that the Games Workshop
12 icons appear on in the right-hand column, do you know of any
13 that are sold without the Games Workshop name or without the
14 Warhammer 40,000 logo on them?

15 A Sorry. Say that again.

16 Q Yes.

17 Do you know for any of the products in the right-hand
18 column of any that are sold without the Games Workshop name on
19 the cover or without the Warhammer 40,000 icon on the cover?

20 A I can't definitely say either way. As I said, if
21 ForgeWorld is selling products with those icons, just as an
22 example, they're unlikely to have a Games Workshop logo or a
23 Warhammer 40,000 logo as well. So there may well be.

24 Q Do you know of any in the right-hand column?

25 A No.

Jones - cross

1 Q And for all of the icons that you talked about yesterday
2 in that right-hand side of the chart, you haven't presented
3 any consumer survey showing why the customers buy the products
4 that these icons appear in?

5 A No.

6 Q And you haven't talked about any evidence that you say
7 evidences that a customer who is buying a Chapterhouse product
8 in the left-hand side of the column actually thought it was a
9 Games Workshop product because it had one of those icons? You
10 didn't present any evidence like that?

11 A No, I didn't.

12 Q Okay. Let's talk about the way that Chapterhouse has
13 actually used some of the trademarks Games Workshop is
14 bringing in this case.

15 Now, Mr. Jones, do you recall yesterday giving an
16 example of replacement wiper blades for your Mercedes? Do you
17 recall that?

18 A I do.

19 Q And you agree that if Chapterhouse says in the description
20 of its product that it is compatible with Games Workshop, then
21 that would be fine with you?

22 A So long as -- we would be fine so long as it uses the
23 minimum that it needs to identify that. It's not an
24 opportunity to go, hey, this would be great to be used as this
25 or that, or you could try doing this with that.

Jones - cross

1 It's just that factual, like with the wiper blades,
2 you look down the charts and wiper blade 33B is compatible
3 with Mercedes X.

4 Q But Mr. Jones, that's exactly what Chapterhouse does,
5 isn't it?

6 A No.

7 Q Now, there is more than one way to say compatible; you
8 would agree with that?

9 A No. I would say compatible is fairly straightforward.

10 Q You don't think there is any other synonym or term that
11 would also mean compatible?

12 A Well, I would say the word "compatible with" is fairly
13 clear. That would certainly be my starting point. Compatible
14 with means compatible with.

15 Q That would be your starting point, but you understand that
16 there are other words in the English language that mean
17 compatible, right?

18 A Well, I would look at those on a case-by-case basis and
19 see do I think that's true or not.

20 Q And I think we'll do that, but just overall, you will
21 agree that there are words that mean compatible, right?

22 A Well, let's look at some, shall we? I'm not going to --

23 I think that the language "compatible with" is so
24 very, very clear that in terms of trademark usage, going
25 further than that is unnecessary. That's a perfectly

Jones - cross

1 acceptable and adequate way of doing it.

2 Q That would be one way of doing it, but there can be
3 others, too?

4 A I don't know. Let's have a look, shall we?

5 Q You talked about Chapterhouse's website yesterday, right?

6 A Correct.

7 Q And you specifically looked at PEX-690, page 51, if we
8 could take a look at that.

9 (Brief interruption.)

10 BY MR. COOPER:

11 Q Page 51, please. And if we could blow up the top half of
12 that page. Down a little more.

13 And you said you had a problem with the tabs on the
14 left because you said they're organized by your trademarks,
15 correct?

16 A Yes, by and large. Eldar and Imperial Guard and
17 Lizardmen, Space Marines, Tau, Tyranid. So by and large,
18 they're our trademarks.

19 Q So, for instance, Eldar is one of your trademarks,
20 correct?

21 A Yes.

22 Q Do you see where that tab says "Eldar compatible bits"?
23 You see that, right?

24 A Yes.

25 Q I think you also mentioned that you have a problem with

Jones - cross

1 Chapterhouse's icon at the top of the page, is that right?

2 A Well, only inasmuch as coincidentally. It's an Eagle
3 motif which is, of course, as you have said, the most
4 established registered Warhammer 40,000 icon, yes.

5 Q But are you saying that Games Workshop thinks that
6 Chapterhouse's Eagle infringes Games Workshop's icon? Are you
7 saying that?

8 A I think we're saying that it's -- no, we're not. It's
9 a -- it's just a part of that overall accumulation of
10 coincidence.

11 Q So you would agree that you didn't present any evidence
12 yesterday that Chapterhouse has infringed the Games Workshop
13 Aquilla or Eagle icon; you would agree with that?

14 A Yes.

15 Q Okay, let's talk about a few specifics. We have talked
16 about how you contend that Games Workshop owns a trademark of
17 the phrase Blood Angels, correct?

18 A Yes.

19 Q And you have accused Chapterhouse of infringing that mark?

20 A Right.

21 Q But you know Chapterhouse doesn't use the term Blood Angel
22 in the product names of any of its products, right?

23 A I would have to look at that and we'll see, yes.

24 Q Okay. Then let's take a look at PEX-1020 and go to
25 page 8, please.

Jones - cross

1 Now, product 4 here is called shoulder pads for Blood
2 Eagle Tactical. Do you see that?

3 A Yes.

4 Q And now, first, you have highlighted some terms in this
5 chart, right?

6 A Yes.

7 Q Or you haven't highlighted; the lawyers highlighted?

8 A They have been highlighted, yes.

9 Q And the words in the left-hand column are taken from
10 Chapterhouse's website?

11 A Yes.

12 Q But, of course, those words aren't highlighted in
13 Chapterhouse's website, right?

14 A Correct.

15 Q And, also, Blood Eagle, that's not a trademark that you
16 are alleging is infringed in this case?

17 A That's right. But what we are saying is that Blood Eagle
18 is a proxy for Blood Raven. It's a nod-nod-wink-wink -- it's
19 our Blood Ravens chapter.

20 Q You're not bringing a claim for trademark infringement for
21 a proxy, right?

22 A No.

23 Q And you would agree that the word "tactical" by itself is
24 not a trademark that is being alleged infringed in this case?

25 A No, that's right.

Jones - cross

1 Q And you testified yesterday that you're not using all of
2 the highlighted terms as trademarks, so you don't get too hung
3 up on that is what you said.

4 You recall that, right?

5 A Yes.

6 Q So this snippet in the Chapterhouse left-hand side of the
7 column, that doesn't show everything that customers would see
8 if they went to the Chapterhouse website, right?

9 A Sorry. Say that again.

10 Q This is just a snippet from the Chapterhouse website?

11 A Yes.

12 Q So this doesn't show everything that a customer would see
13 if they went to the Chapterhouse website, right?

14 A I guess not, no.

15 Q Let's go to the Chapterhouse website at PEX-435, page CHS
16 1541. Back just one more, please.

17 So this is a page from the Chapterhouse website,
18 right?

19 A Yes.

20 Q And you know that because it says Chapterhouse Studios at
21 the top?

22 A Yes.

23 Q And to the left of Chapterhouse Studios, you see what was
24 the old Chapterhouse Studios icon, correct?

25 if we can blow up the top, the Chapterhouse Studios

Jones - cross

1 header.

2 BY MR. COOPER:

3 Q Do you see where it says Chapterhouse Studios at the top
4 of the web page?

5 A Yes.

6 Q And to the left is the old Chapterhouse logo?

7 A Yes, the Eagle motif, yes.

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Jones - cross

1 Q And underneath it says "specializing in custom sculpts and
2 bits for Warhammer 40,000 and Fantasy." You see that?

3 A Yes.

4 Q If we zoom back out on this web page, Chapterhouse is
5 selling a product called Shoulder Pad for Blood Eagle
6 Tactical, right, and that corresponds with what we just looked
7 at in the chart?

8 A Yes.

9 Q And the term Blood Angel is not used in the name of the
10 Chapterhouse products, right?

11 A Correct.

12 Q The term Blood Angel is in the description that's below
13 the product's name?

14 A Yeah.

15 Q And in its description of this product Chapterhouse says,
16 "This is a shoulder pad with Eagle or Blood Raven on the face.
17 The wings of the bird are surrounding an inverted blood drop
18 or gem. This shoulder pad works well with Blood Raven or
19 Blood Angel themed armies." Do you see that?

20 A I do.

21 Q Do you see where it says "works well with"?

22 A Yes.

23 Q You'd agree, wouldn't you, that works with is synonymous
24 with compatible, right?

25 A No, I wouldn't. I think this goes -- what I was saying

Jones - cross

1 yesterday, I think this goes far beyond that. This is
2 saying -- all this needs to say is here's a shoulder pad, it's
3 compatible with Games Workshop Space Marines. I don't see why
4 it has to go into anymore detail and description on how it
5 works well with this or it works well with that. That's not
6 saying compatible. Compatible is about -- compatible is about
7 factual fit. Factual. Fact, this Space Marine, this shoulder
8 pad. I mean, apart from the copyright issues on shape and all
9 of that, the factual thing, which is what compatibility is
10 about, is factually this thing fits on the physical shape of a
11 particular model, a kit, a model soldier or a vehicle. Works
12 well as is going well past that.

13 Q So you just said that if it says works with Games
14 Workshop's Space Marine, that's okay?

15 A Compatible with Games Workshop Space Marines.

16 Q Because you think works with is different than compatible?

17 A Yes. Well, you're saying works well. You're not saying
18 works -- you know, you were saying works well with Blood Raven
19 or Blood Angel themed armies. The point of the compatibility
20 is literally to say does it physically fit, is it something
21 like a component from a vehicle, is it compatible with that
22 engine. You know, that's what it means. That's what
23 compatible means.

24 Q But if it says just works with without the well, that
25 would be okay?

Jones - cross

1 A No. Well, it depends on what the other bit is. If it's
2 works with, loads of crazy this, that and the other -- works
3 with isn't an excuse to then have that as a preface for a
4 whole lot of descriptive stuff coming after it. If it says
5 works with, and then what's the minimum you need to say?
6 Games Workshop Space Marine models.

7 Q Now, if you look at the bottom of this web page, if we
8 zoom out. And the bottom of the web page goes on to the next
9 page, if we could put that up. Thank you.

10 Do you see at the bottom of this web page -- let's
11 blow it up so it's a little larger.

12 You see there's a disclaimer here, right?

13 A Yeah.

14 Q Okay. Can we blow up the disclaimer.

15 You've seen this website before, right?

16 A Yes.

17 Q You've seen that there are disclaimers at the bottom of
18 Chapterhouse's website, right?

19 A Yeah.

20 Q Do you see at the top where it says, "This website is
21 completely unofficial and in no way endorsed by Games Workshop
22 Limited"? You see that, right?

23 A I do, yes.

24 Q And you agree that that statement is accurate?

25 A Yes.

Jones - cross

1 Q And then it goes on and it gives a long list of terms.

2 You see that?

3 A Yeah.

4 Q And in that first line, two thirds of the way through do
5 you see the term Blood Angels?

6 A Yeah.

7 Q So Blood Angels is in that disclaimer list, correct? And
8 if you look down at the end of that long list of items, yes,
9 right there, it says -- ends with "Warhammer 40,000 universe
10 are either R, with a circle around it, TM and/or C, with a
11 circle around it, copyright Games Workshop Limited, 2000 to
12 2010 variably registered in the UK and other countries around
13 the world. Used without permission. No challenge to their
14 status intended. All rights reserved to their respective
15 owners."

16 Do you see that?

17 A Yes.

18 Q Do you recognize that disclaimer?

19 A How do you mean do I recognize it?

20 Q The disclaimer was written by Games Workshop, correct?

21 A I'm not sure about that.

22 Q Okay. Let's take a look at --

23 A I think it comes from our IP policy.

24 Q Let's pull up DX 177.

25 Do you see DX 177 in the bottom sheet there?

Jones - cross

1 A I can't read it, to be honest.

2 Q Do you see where it says Games Workshop at the top?

3 A I can see the Games Workshop logo, yeah.

4 Q Do you see that's a Games Workshop web page?

5 A Yes.

6 Q Let's zoom out and look at the title of the page. Right
7 there, yes.

8 Do you see where it says disclaimers and trademark
9 lists?

10 A Yes.

11 Q Now, Games Workshop wrote this page, correct?

12 A Yes.

13 Q And the first line under disclaimers and trademark lists
14 says, "Please choose the relevant disclaimer out of the
15 following and place it on your site." Do you see that?

16 A I need to say here you're using this completely out of
17 context because this is a set of guidance for noncommercial
18 websites. This is for fan sites, and saying that if you've
19 got a fan site and you're not making any money, you don't sell
20 products on it, then we'll let you do that so long as you
21 follow these guides. That's what our I -- intellect -- if
22 that's where this is from, this is not -- we do not anywhere
23 on our website say if you want to set up a commercial website
24 selling products.

25 MR. COOPER: Can I ask -- I'm sorry. Could I ask you

Jones - cross

1 to instruct the witness to answer the question.

2 THE COURT: Okay. Please answer the question.

3 Put your question again so he has it in mind.

4 BY MR. COOPER:

5 Q My question is, do you see where it says, "Please choose
6 the relevant disclaimer out of the following and place it on
7 your site"? Do you see that?

8 A Yeah, I do see it.

9 Q And then under general it says, "This website is
10 completely unofficial and in no way endorsed by Games Workshop
11 Limited." Do you see that?

12 A I see that, yes.

13 Q And then there's a long list of names under that. Do you
14 see that?

15 A Yes.

16 Q And that's the language that we just looked at on the
17 Chapterhouse website, correct?

18 A Yes.

19 Q Now, Imperial Guard is another one of your trademarks that
20 you say Chapterhouse has infringed, right?

21 A Yes.

22 Q Let's look at PX 1020 at page 109. 109, please.

23 Now, product 115 here is called SCAR Rifle Variety
24 Set 28 Millimeters. Do you see that?

25 A Sorry, where were you --

Jones - cross

1 SCAR Rifle Variety Set 28 Millimeter, yeah.

2 Q And you see this product implicates trademark issues only,
3 not copyright, right?

4 A Yes.

5 Q Under the name of the Chapterhouse product there's a
6 description of that product. Do you see that?

7 A Yeah.

8 Q And, again, that's from the Chapterhouse website?

9 A Yes.

10 Q But that's not all that customers are going to see if they
11 go to the Chapterhouse website?

12 A No.

13 Q Let's take a look at the Chapterhouse website, PX 690 at
14 CHS 28721.

15 Okay. We'll move on for a second.

16 I want to talk to you about the word Space Marine
17 first.

18 A Okay.

19 Q Space Marine is one of the trademarks you say that
20 Chapterhouse has infringed?

21 A Um-hum, yes.

22 Q And the Warhammer Space Marine, the Warhammer 40K Space
23 Marine is a type of soldier, right?

24 A Yes.

25 Q Hence, the name marine?

Jones - cross

1 A Yeah.

2 Q And you know marine is a branch of the U.S. Navy?

3 A Yes.

4 Q You don't have a license from the Navy to use the term
5 marine?

6 A No.

7 Q You didn't ask permission from the U.S. government?

8 A No. I don't think they do tabletop fantasy war games.

9 Q And the Games Workshop space marine, they're futuristic
10 marines?

11 A Yes.

12 Q And they can travel through space?

13 A Hum.

14 Q Is that a yes?

15 A Yes.

16 Q So when people refer to space marine, they could just be
17 referring to marines in space and not your product, correct?

18 A They -- they could.

19 Q And Games Workshop is not the first company to use the
20 term space marine on product covers or packaging, right?

21 A Correct.

22 Q And you've not presented any consumer survey or expert
23 record analyzing the term space marine, correct?

24 A Correct.

25 Q Let's look at your chart, PX 1020, and turn to page 62.

Jones - cross

1 Product 70 you see is called Shield Compatible With
2 Iron Hands Style Armies? Do you see that?

3 A Yes.

4 Q And this product also implicates trademark, not copyright?

5 A Yes.

6 Q And under the name of the Chapterhouse product there's a
7 description of that product. Do you see?

8 A Yeah.

9 Q And that's taken from the website of Chapterhouse?

10 A Yeah. If you say so, yes. Yes, it is, yeah.

11 Q Let's take a look at the Chapterhouse website this is
12 from. Will we be able to pull up PX 435 at CHS 1527.

13 Okay. This is a page from Chapterhouse's website,
14 yes?

15 A Yes.

16 Q And you know that because it says Chapterhouse Studios
17 again on top?

18 A Yes.

19 Q And there's the Chapterhouse logo on the left.

20 In this website you don't see the Games Workshop logo
21 anywhere, right?

22 A Correct.

23 Q Now, Chapterhouse is selling the product Shield Compatible
24 With Iron Hands Style Armies on this page, right?

25 A Yeah.

Jones - cross

1 Q So you see that the product title here says compatible
2 with in it, correct?

3 A Yeah.

4 Q So you would not have a problem with that use of --

5 A Don't have a problem with the words compatible with, but
6 given that Chapterhouse say that their business is making a
7 wide range of things, accessories compatible with a wide range
8 of science fiction and fantasy war games, why they have to
9 then go straight to our IP and, rather than shield, compatible
10 with 28 millimeter scale models? That's what it's compatible
11 with.

12 Q What you said earlier is that you don't have a problem if
13 Chapterhouse uses the term compatible with. That's what you
14 said?

15 A I said compatible with the -- that if you're establishing
16 that as a matter of fact which kit it works with, and then I
17 said that does not then excuse, the words compatible with do
18 then not excuse any catalog of other people's trademarks or --

19 Q So what you're saying is you did say that compatible with
20 is okay, but now you're saying that you have to look at the
21 rest of the business? That's what you're saying now?

22 A I haven't changed anything I've said. What I said a few
23 minutes ago was compatible with is there so that you can say
24 it's compatible with and then matter of fact the actual
25 product that it's compatible with. So I've made it very clear

Jones - cross

1 that just saying the words compatible with does not then
2 excuse any list of nonspecific product other people's IP
3 references.

4 So in this case it's a shield that's compatible with
5 28 millimeter scale models. Fact. Done. That's all you need
6 to say.

7 Q Do you see where it says in the product name "Shield
8 Compatible With Iron Hands Style Armies." Do you see that?

9 A I do see it, yes.

10 Q And, now, below if you look in the description, you see in
11 the first sentence that it says this -- "a high detail 28
12 millimeter shield based on the mailed fist theme, useful for
13 fantasy models as well as Iron Hand or other hand-based Space
14 Marine models." You see that, right?

15 A Yes.

16 Q And after Space Marine it has the registered copyright
17 symbol?

18 A Yeah.

19 Q If you look at the bottom of the website, which goes on to
20 the next page, you see that same disclaimer, correct?

21 A The one you're using out of context. Yes, I do.

22 Q Do you see that same disclaimer?

23 A Yes, I do.

24 Q Now, you also showed the jury yesterday a couple of eBay
25 pages. Do you remember that?

Jones - cross

1 A I do, yes.

2 Q Okay. Let's take a look at PEX 5 and start with page 10.
3 You remember calling -- talking about this yesterday?

4 A I do, yes.

5 Q And you know how eBay works, right?

6 A Yeah.

7 Q So you can do a search on eBay and then a bunch of search
8 results come up, right?

9 A Yeah.

10 Q And those search results show the titles of products?

11 A Yes.

12 Q And then if you click on one of those titles, you get this
13 sort of listing page?

14 A Yeah.

15 Q It brings you to this type of page, I mean?

16 A Yes.

17 Q So what you showed us yesterday or what you talked about
18 yesterday was the title here, which says Resin Drop Pod For
19 40K Warhammer 40,000 Space Marines, right? You remember that?

20 A Yes.

21 Q Now, what you did not show yesterday was the whole
22 description box below, correct?

23 A Yes.

24 Q Let's blow that up.

25 You didn't talk about the description here, right?

Jones - cross

1 A No.

2 Q Okay. Now, this says, "This is a custom sculpt drop pod."
3 Do you see that?

4 A Yes.

5 Q "This is hand-sculpted and completely original." Do you
6 see that?

7 A I can see -- I can see it, yes.

8 Q "It can be used in any science fiction game. I used them
9 for my 40K Space Marine army." Do you see that?

10 A Yes.

11 Q And then do you see a couple of sentences later, "The one
12 shown" --

13 Sorry. I can't read that.

14 A It says, "The one shown is a Salamanders chapter pod."

15 Q Thank you.

16 And it goes on, "But you can use these for Blood
17 Angels, Dark Angels, Space Wolves, Ultramarines, Black
18 Templars and any other chapter of your choosing or creation."
19 Do you see that?

20 A Yes.

21 Q And a couple of other lines down it says, "This is not a
22 Forge World drop pod or a recast of one."

23 A Yes.

24 Q And then it says, parentheses, "That would be copyright
25 infringement," end parentheses. Do you see that?

Jones - cross

1 A I do.

2 Q It says, "This is an original sculpt," correct?

3 A Yes. Well, it says that, yes. I'm not saying that's
4 correct.

5 Q Now, if we zoom back out, if you look at the bottom right
6 of this page, you can see the date, hopefully, if we can zoom
7 in.

8 A Yep.

9 Q I think you can just barely see that that says June 30th,
10 2008, right?

11 A Yes.

12 Q And you haven't shown any eBay pages after the lawsuit was
13 filed in 2010, correct?

14 A I don't think so, no.

15 Q And Mr. Villacci now has a website to sell his products
16 on, right?

17 A Yes.

18 Q Okay. You also showed us page 7 of this exhibit
19 yesterday. Do you remember that?

20 A Yes, I do.

21 Q And you pointed out the title yesterday, correct?

22 A Yes.

23 Q You didn't talk about description, correct?

24 A No.

25 Q Okay. Let's blow up the description.

Jones - cross

1 First, you know that this product is not an accused
2 product in the lawsuit?

3 A Sure.

4 Q And do you see the first line, "Okay, folks, due to
5 overwhelming demand, I have made some custom Salamander Rhino
6 parts"? Do you see that?

7 A I can see that.

8 Q And then below that, "These can easily be used for any
9 Space Marine chapter out there." You see that?

10 A Yeah.

11 Q And a couple of paragraphs down it says, "The parts fit
12 right on where the regular Rhino parts would fit. Easy to
13 do." You see that?

14 A Yes.

15 Q Okay. Thank you. You can take that down.

16 Now, Mr. Jones, yesterday you suggested that if
17 Chapterhouse is selling something that's a shoulder pad, what
18 they need to say is here's a shoulder pad for use with 28
19 millimeter scale war games. That's what you suggested?

20 A Yes.

21 Q And that's all they should use?

22 A Yeah.

23 Q But, of course, you understand that Chapterhouse makes
24 dozens of different shoulder pad products, right?

25 A Yeah.

Jones - cross

1 Q So if they were all described as shoulder pad for use with
2 28 millimeter scale war games, that would not differentiate
3 them from each other, correct?

4 A Correct.

5 Q There needs to be more of a description to identify what
6 shoulder pad Chapterhouse is selling, correct?

7 A I'm not sure I agree with that. In fact, I don't.
8 Chapterhouse say they sell accessories and parts for use in a
9 wide range of games, which evidently they don't, and then they
10 have these shoulder pads. Well, they either are Games
11 Workshop based shoulder pads or they're not. And in terms of
12 that compatible with, they're just making shoulder pads.
13 Fact. And obviously there's some copyright issues there. But
14 compatible with science fiction 28 mill figures. That's the
15 minimum they need to say. That's the identifier. That's the
16 fact of the matter.

17 Q But Chapterhouse sells dozens of shoulder pads that are
18 compatible with 28 millimeter figurines; is that right?

19 A Yes.

20 Q Let's bring up your claims chart, PEX 1020.

21 Now, you walked through your claims chart at length
22 yesterday. You recall that?

23 A Yes, I do. Yes.

24 Q And I will try to make this as quick as possible.

25 A Thank you for that.

Jones - cross

1 Q Now, for almost every single trademark you talked about,
2 Chapterhouse used that trademark to describe compatibility
3 with a Games Workshop product, correct?

4 A No.

5 Q Let's look.

6 A We can -- yeah, sure.

7 Q Now, in this first product, and that's called Eagle
8 Thunder Hammer, and you talked about the title?

9 A Yes.

10 Q You didn't talk about description, which, if you look at
11 it, says, "It can be used as a power weapon or a thunder
12 hammer." Do you see that?

13 A Yes.

14 Q And it says, "It is well suited as an imperial thunder
15 hammer for 28 millimeter miniatures." Do you see that?

16 A Yes.

17 Q Let's go to page 4.

18 And, now, this product, you remember talking about
19 this one, right?

20 A Yes.

21 Q And, now, tactical, that's not a trademark that Games
22 Workshop is alleging is infringed?

23 A No.

24 Q And down there, Heresy, that's not one either, right?

25 A Yeah. But that's a clear reference to Horus Heresy, which

Jones - cross

1 is one of our trademarks.

2 Q Okay. And you see where it says, "This shoulder pad works
3 well with any Loyalist or Chaos Space Marine, copyright" --

4 A Yes.

5 Q -- "armies."

6 And it says, "works especially well with Black
7 Templars." Do you see that?

8 A Yeah. Which I think goes --

9 Q And this is --

10 A -- well beyond the compatible with.

11 Q Do you see where it says, "This is a pewter model that
12 fits on Tactical Space Marine, registered copyright"? Do you
13 see that?

14 A Yes.

15 Q If we could go to page 13.

16 And product 9, in the product title you see that it
17 says Shoulder Pads for Deathwatch Ruinic Terminator. Do you
18 see that?

19 A Yes.

20 Q And in the description it says, "It would look good in any
21 Deathwatch, Inquisition, or Dark Angels themed army. This is
22 the same scale as a 28 millimeter Space Marine, copyright,
23 Terminator." Do you see that?

24 A Yes, I do see it, yes.

25 Q If you could go to page 16, and in the 13th product it

Jones - cross

1 says Terminator shoulder pad for Flesh Tearers. You do see
2 that?

3 A Yes.

4 Q In the description down there it says, "This pad looks
5 spectacular on Flesh Tearer Space Marine, copyright"?

6 A Yes, that's what it says.

7 Q Trademark. Excuse me.

8 Page 17. Now, product 14, you talked about the
9 product title, correct?

10 A Yeah.

11 Q But if you look in the description, it says, "These work
12 perfectly for Howling Griffon Space Marines." Do you see
13 that?

14 A I do see that, yes.

15 Q And it says, "This fits standard Space Marine, registered
16 trademark, armored shoulder pads and should fit in with any
17 standard Space Marine, registered trademark," correct?

18 A I see that.

19 Q Go to page 20.

20 You don't have any problem with the title of this
21 product?

22 A No.

23 Q And if you look at the description, it says, "This
24 shoulder pad works well with any Loyalist Space Marine,"
25 copyright -- excuse me again -- "trademark, army." Do you see

Jones - cross

1 that?

2 A Yes.

3 Q And it would also fit on Tactical Space Marine, trademark,
4 correct?

5 A Which, again, goes well beyond is compatible, yeah.

6 Q If we go to page 23.

7 You see that Chapterhouse describes this product as a
8 shoulder pad, right?

9 A Um-hum. Yes.

10 Q You know Chapterhouse makes lots of shoulder pads, right?

11 A Yes.

12 Q So you see on this description where it says Shoulder Pad
13 for Chalice or Soul Drinker Tactical. You see that?

14 A Yes, I see that.

15 Q And in the description again it says the shoulder pad
16 works well with Soul Drinker themed armies, right?

17 A Um-hum. Yes.

18 Q It describes it as the standard size Space Marine tactical
19 shoulder pads, right?

20 A Yes.

21 Q And the standard size that we're talking about here is 28
22 millimeter?

23 A No. That's a scale. 28 millimeter is a scale of models.
24 Standard size, that refers to our copyright shape and size of
25 shoulder pad.

Jones - cross

1 Q You didn't write that sentence, though?

2 A No.

3 Q Page 25.

4 And you had a problem with the title, yeah?

5 A Sorry. Which one are we doing?

6 Q On product 27.

7 A Okay.

8 Q And but you didn't talk about the description?

9 A No.

10 Q And the description of this product says, "A left arm that
11 can be used as a power fist or lightning claw on regular
12 infantry size miniatures and works well on terminator or power
13 armor"?

14 A Yes.

15 Q Page 28.

16 On product 32 you see in the parentheses it says
17 "fits on Space Marine Land Raider," right?

18 A Yes.

19 Q And that describes where it is meant to be used?

20 A That's in the title of the product.

21 Q So in the description you see several things that are
22 included in the product, right?

23 A Yes.

24 Q And if you look at 33, the product title says Vehicle
25 Icons for Flesh Tearers, yeah?

Jones - cross

1 A Yes.

2 Q And it's described as good for Land Raiders or Rhinos,
3 right?

4 A Yes.

5 Q If you go to page 31.

6 Once again the title here is a Conversion Kit For
7 Farseer Jetbike Rider, right?

8 A Yes.

9 Q The title isn't conversion kit, right?

10 A Sorry?

11 Q The title isn't conversion kit, right?

12 A No. The title is Conversion Kit For Farseer, our
13 trademark, Jetbike, our trademark, Rider, yes. That's the
14 title, isn't it.

15 Q So the title is not just conversion kit?

16 A No.

17 Q There's lots of conversion kits in Chapterhouse's
18 inventory, right?

19 A Yeah.

20 Q So this describes that it's a conversion kit for Farseer
21 jetbike rider. Do you see that?

22 A Doesn't describe it. That's the title of the product.
23 He's using our trademarks in the title of the product.

24 Q You see that the title is a Conversion Kit For Farseer
25 Jetbike?

Jones - cross

1 A Yes.

2 Q And down in the description you see where it says that the
3 "Games Workshop jetbike kit, and not included as shown above
4 and for scale purposes only, parentheses, used without
5 permission"?

6 A I can see that, yes.

7 Q It says that on the website?

8 A Yes, it does.

9 Q And in the last sentence it says, "It is meant to aid
10 players in converting a regular jetbike kit inot a Farseer on
11 jetbike model."

12 A I don't think that's actually in English but --

13 Q There's a typo there.

14 It says what it is not for, though?

15 A I don't understand what it's saying, actually.

16 Q Let's go to page 36.

17 Oh, I'm sorry. Could we go back up one page.

18 The product here is a conversion -- once again, this
19 is another conversion kit, right?

20 A Yeah.

21 Q And it doesn't just say conversion kit full stop? It
22 doesn't say that?

23 A No, it doesn't.

24 Q So the product title is a Conversion Kit For Tyranid
25 Tervigon, right?

Jones - cross

1 A Yes.

2 Q And then in the description it says the "Chapterhouse
3 Studios resin set contains five high detail components that
4 fit with the Games Workshop Carnifex kit," right?

5 A Yes.

6 Q And Games Workshop is highlighted here, but that's not a
7 trademark that you say is infringed in this case?

8 A No.

9 Q And then in --

10 I'm sorry. Was that a yes?

11 A Sorry. I answered you.

12 Q I didn't hear you.

13 A And what was the question again?

14 Q Games Workshop is not a trademark that's alleged in this
15 case?

16 A Right.

17 Q And then it describes -- or do you see where it says "fits
18 in between the two side torsos of the Carnifex"?

19 A Yes.

20 Q And that's where this product is meant to go, correct?

21 A I guess, yes.

22 Q Let's go to page 36.

23 Oh, I'm sorry. Page 39.

24 The title of this is Female Heads Imperial Guard 28
25 Millimeter, right?

Jones - cross

1 A Yes.

2 Q And the description says that it looks great on imperial
3 guard figures, right?

4 A Yes.

5 Q Page 46.

6 Assault is not a trademark that's alleged infringed
7 in this case, right?

8 A Correct.

9 Q So looking at the description of this, at the last
10 sentence it says, "This is the standard size Space Marine
11 tactical shoulder pad." Do you see that?

12 A Yes.

13 Q Page 50.

14 Again, Devastator is not an alleged infringed
15 trademark?

16 A Right.

17 Q Page 61.

18 You see that product 69 is the Cog Shoulder Pad Power
19 Armor? Do you see that?

20 A The one at the very bottom.

21 Q At the very bottom.

22 A Yeah.

23 Q There's no problem with trademark in that title, right?

24 A No.

25 Q Let's go to the description on the next page of the

Jones - cross

1 product.

2 And again it describes this shoulder pad as looking
3 spectacular as an Iron Hand Space Marine, right?

4 A Yeah. And that goes far way than what it needs to say.
5 The title's great. The title's fine. It says what it is.

6 Q That's your opinion?

7 A Yes.

8 Q At page 68, please.

9 Now, MKV, that's not a trademark that's alleged
10 infringed in this case, right?

11 A I'm not sure, actually. If you say not, then okay.

12 Q You can look at page 10 -- Exhibit 1023 in your binder
13 real quick, if you will.

14 A This binder?

15 Q Yes.

16 A Yes.

17 Q MKV is not an alleged trademark in this case?

18 A No. That's correct.

19 Q And this is for product 75 --

20 A Yes.

21 Q -- in the Chapterhouse chart?

22 GW is also not an alleged --

23 A Yes.

24 Q -- trademark in this case.

25 And could we go to page 69.

Jones - cross

1 And this is product 76, right? Correct?

2 A Yes.

3 Q Heresy is not a trademark in this case, right?

4 A Correct.

5 Q And we've talked about jump packs as a trademark before?

6 A Yes.

7 Q And in the last sentence of this description it says,
8 "Compatible with the Games Workshop Assault Space Marines."

9 Do you see that?

10 A Yes.

11 Q Could we go to page 75.

12 This is Product 82. And you see in the description
13 where it says that this kit replaces components from the Games
14 Workshop Space Marine kit?

15 A Yes.

16 Q And it says it looks great when used for space wolf --

17 A See that, yes.

18 Q Page 81.

19 Product 88, do you see this?

20 A Yes.

21 Q And do you see in the description of the product that this
22 is a new armored predator kit for Space Marines? Do you see
23 that?

24 A Yes.

25 Q The last sentence says that it fits the standard Games

Jones - cross

1 Workshop Space Marine predator kit?

2 A Sorry. Where are we looking?

3 Q Do you see that?

4 A Yes.

5 Q Page 87.

6 Now, in product 96 you've got one term that --

7 Heresy, that's not a trademark, right?

8 A Sorry. Say that again.

9 Q 96, Heresy is not a trademark?

10 A Right.

11 Q And --

12 A It's a clear reference to our Horus Heresy trademark, but

13 yes.

14 Q The full title is Pre-Heresy Scarab Shoulder Pads for
15 Thousand Sons? Do you see that?

16 A Yeah.

17 Q And, again, Chapterhouse sells, as we've seen, a lot of
18 shoulder pads?

19 A Yeah.

20 Q So this one is described below as designed to replace the
21 current era Space Marine Terminator shoulder pads, right?

22 A Yes.

23 Q Go to page 101.

24 And product 109, the title is Rapid Response Wheeled
25 Kit For Chimera?

Jones - cross

1 A Yeah.

2 Q Now, and if you look at the last paragraph, it says that
3 it's "shown assembled model uses Games Workshop Imperial Guard
4 Chimera, which is not a Chapterhouse Studios product." It
5 says that?

6 A Yes.

7 Q And page 102.

8 Product 111 in the description says that it's a
9 TRU-Scale conversion kit, right?

10 A It says that, yes.

11 Q And there's a number of conversion kits that we've seen,
12 right?

13 A Yeah.

14 Q And so this isn't just conversion kit?

15 A Well, it is just a conversion kit, yeah. It's nothing
16 else.

17 Q It's not described as just a conversion kit?

18 A No.

19 Q Because there's a lot of conversion kits; is that right?

20 A Yeah.

21 Q So this one says in the description that it's a conversion
22 kit for the Games Workshop Space Marine Storm Raven. Do you
23 see that?

24 A I do see that.

25 And that's all it needs to say.

Jones - cross

1 Q So that sentence that I just read, that is okay with you?

2 A If it said conversion kit compatible for Games Workshop
3 Storm Raven kit, that would be fine because it's factually
4 saying this is a conversion kit to be used and it fits, it's
5 compatible with the Games Workshop Storm Raven kit.

6 Q It's a fact --

7 A You can change the words a little bit, but, you know,
8 you'd say compatible with and establish the fact that this
9 conversion kit is compatible with the specific kit that it's
10 compatible with, and that's it. That's what you need to do.

11 Q So that's a factually true statement, that TRU-Scale
12 conversion kit for the Games Workshop Space Marine Storm
13 Raven? That's a factually true statement?

14 A Yes.

15 Q Correct?

16 If we could go to PEX 1021, and go to page 3, please.

17 Product 129's title is Iconoclast Conversion Kit For
18 Space Marine Land Raider, right?

19 A Yes.

20 Q This is another conversion kit?

21 A Yes.

22 And what we were contesting there, of course, was the
23 iconoclast trademark. That's a title, yeah. If it just said
24 conversion kit compatible with Space Marine Land Raider in the
25 description, that would be okay.

Jones - cross

1 Q The statement conversion kit for Space Marine Land Raider,
2 that's a factually true --

3 A In the description.

4 Q I'm sorry.

5 A In the description.

6 THE WITNESS: Sorry.

7 THE COURT: You can't talk over each other, so wait
8 for him to finish the question.

9 THE WITNESS: Sorry.

10 BY MR. COOPER:

11 Q The statement conversion kit for Space Marine Land Raider,
12 that is a factually true statement, correct?

13 A I'm not sure whether it's supposed to be a statement or a
14 product title. And those things are different. We're talking
15 about trademarks, not --

16 Are you talking about a description or is this the
17 title of the product? So I don't quite understand what you're
18 saying.

19 Q That says Iconoclast Conversion Kit for Space Marine Land
20 Raider. That's right, yes?

21 A It does say that, yes.

22 Q And if you go to the next page, at the bottom in the
23 description it says that it is designed to be --

24 Oh, I'm sorry. That's the next page.

25 Do you see there where it says it's designed to be

Jones - cross

1 fully compatible with all plastic versions of Games Workshop
2 Space Marine Land Raider? Do you see that?

3 A I do see that.

4 Q And could we go to page 11.

5 And this is product 131. If you go back one page, I
6 think this is probably the title. Do you see this is the
7 magnetic turret kit for the Razorback, right?

8 A Yes.

9 Q And there are more than one Chapterhouse magnetic turret
10 kits? You know that, right?

11 A Yeah.

12 Q This one is for the Razorback, though? Yes?

13 A Yeah.

14 Q Could we go to page 14.

15 And product 132, the title is Open Fisted Power Claws
16 Compatible with Games Workshop Space Marine Model, right?

17 A Yes.

18 Q And if you see at the bottom of the page it says that,
19 "This is a pair of resin power claw arms for 28 millimeter
20 figures." You see that?

21 A Yes.

22 Q It says, "They are designed to be compatible with Games
23 Workshop Space Marine models." Do you see that?

24 A I do, yes.

25 Q Go to page 35.

Jones - cross

1 This is product 137. And Heresy era is not a
2 trademark in this case, right?

3 A Correct.

4 Q And this title is called Heresy Era Shoulder Pads For
5 Terminators.

6 A Yes.

7 Q And you understand that Chapterhouse sells multiple
8 shoulder pads, correct?

9 A Yes.

10 Q They sell multiple Heresy era shoulder pads, in fact,
11 right?

12 A Yes.

13 Q But this one is for Terminators, right?

14 A Sorry. For?

15 Q This one is for Terminators, right?

16 A Apparently so.

17 Q And if you look down at the description, it says that,
18 "This is a set of two pewter shoulder pads designed to fit on
19 Games Workshop's Space Marine Terminator figures." Do you see
20 that?

21 A I do, yes.

22 Q And it says, "Each pad is designed in a style that will
23 fit in with Heresy era collections." Do you see that?

24 A I do.

25 Q At very bottom it says, "The component comes unpainted and

Jones - cross

1 is designed to fit on Games Workshop Space Marine Terminator
2 figures," right?

3 A Yes.

4 Q Now, you have not accused any Chapterhouse product
5 packaging of trademark infringement, right?

6 A Correct.

7 Q All of your trademark infringement allegations are
8 entirely focused on how Chapterhouse markets its products on
9 its website?

10 A And if it does stuff on eBay and forums and so on and so
11 forth.

12 Q On the Internet?

13 A Yes.

14 Q And for the Chapterhouse website pages, anyway, you agree
15 that for all of the trademarks Chapterhouse is accused of
16 infringing on its website, there's a disclaimer at the bottom
17 of the web page, correct?

18 A There is.

19 Q And you understand that for every single mark Chapterhouse
20 is accused of infringing, when Chapterhouse uses the mark on
21 its website, at the top of the web page there's Chapterhouse
22 Studios and the Chapterhouse icon? You agree with that?

23 A I do agree with that, yes.

24 THE COURT: We're going to take a ten-minute break
25 right here.

1 (Jury entered the courtroom.)

2 THE COURT: You can resume.

3 BY MR. COOPER:

4 Q. Okay. Mr. Jones, I just have three more products.

5 The first one is going to be PDX 1020 at Page 12,
6 and this is product No. 7, right?

7 And you see in the product title it says, right arm
8 tactical shoulder pad for Celestial Lions players. Do you
9 see that?

10 A. Yes.

11 Q. Now, Chapterhouse sells a lot of right arm shoulder
12 pads, correct?

13 A. Correct.

14 Q. And so the statement right arm tactical shoulder pad for
15 Celestial Lions is a true statement. You agree with that?

16 A. It's a true -- yeah, it's a true statement.

17 Q. That's what that product underneath is?

18 A. If in the description of the -- it's a shoulder pad
19 compatible with 28-millimeter science fiction figures. Why
20 it has to have a raft of our trademarks in it, I'm at a loss.
21 That doesn't stop it obviously being factual, you're quite
22 right.

23 Q. The product title -- that's not a false statement,
24 correct?

25 A. Well, only -- I think even that's arguable, simply

1 because it -- anybody who is playing a science fiction war
2 game might want to use that particular pad. They might look
3 at it -- if indeed it's true, that what Chapterhouse is doing
4 is creating these great new add-ons and icons of their own
5 creation, then anybody, whether they're a Celestial Lion
6 player or whether they've got Star Wars models, might want to
7 use this. So it could be used by any number of people.

8 Q. You don't know what people might want to do?

9 A. No.

10 Q. Okay. So -- and there are Celestial Lions players in
11 the Games Workshop --

12 A. Yes.

13 Q. -- universe?

14 So you see where this product description --

15 A. Actually, again, I don't know -- and the same is I don't
16 -- I don't know -- I'm assuming they're Celestial Lions --

17 Q. Well, you've personally seen people play the Warhammer
18 40,000 who are Celestial Lions players, right, in your
19 experience?

20 A. No, I haven't, actually. I've not seen anybody -- I
21 don't know anybody who has a Celestial Lions army, if that's
22 what you're --

23 Q. That is one of the armies in Warhammer 40,000?

24 A. They are one of the Space Marine armies in the
25 mythology, yes.

1 Q. And so you see that product title says, right arm
2 tactical shoulder pad for Celestial Lions players? You see
3 that?

4 A. Yes, I do see that.

5 Q. Could we go to Page 60, please. And this is product 67,
6 right?

7 A. Yes, yeah.

8 Q. And the title is Salamander or Dragon head bit for
9 28-millimeter Marine? Do you see that?

10 A. Yes.

11 Q. And underneath is a picture of that product, right?

12 A. Yes.

13 Q. And it's a head, correct?

14 A. Yes.

15 Q. And that's a salamander, correct?

16 A. Salamander Space Marine head, yes.

17 Q. So the product title Salamander head bit for
18 28-millimeter Marine, that's also a true statement, correct?

19 A. Yes.

20 Q. Could we go to Page 63, and let's focus on product 71.

21 You see that the product title is shoulder pad
22 compatible with Iron Hands power armor, correct?

23 A. I can read that, yes.

24 Q. And then the picture below is the product, right?

25 A. Yes.

1 Q. So that product is compatible with Iron Hands power
2 armor, correct?

3 A. Well, the Iron Hands power armor is a fictional
4 invention, so how this particular thing can fit with Iron
5 Hands power armor I have no idea because it doesn't actually
6 exist. But it's compatible with 28-millimeter war gaming
7 figures, yes.

8 Q. Again, there are many shoulder pads that Chapterhouse
9 sells that are compatible with 28-millimeter --

10 A. So they say, yes.

11 Q. And Chapterhouse doesn't name them all the exact same
12 thing? Chapterhouse doesn't do that, right?

13 A. No.

14 Q. Mr. Jones, you have not presented any evidence that any
15 customer was ever confused and thought that a product
16 anywhere on the left-hand side of your chart was a Games
17 Workshop product, right? You haven't presented any evidence
18 of that?

19 A. I thought we had -- I haven't personally, no, in my
20 testimony.

21 Q. Now, you testified yesterday that Games Workshop has
22 been damaged by Chapterhouse in a number of ways. Do you
23 recall that testimony?

24 A. Yes.

25 Q. And you said --

1 A. Games Workshop -- I'm sorry. Carry on.

2 Q. You said that they're making money out of selling
3 products using your trademarks, and that's damage to you
4 because that should be your money, correct? You said that?

5 A. Yeah.

6 Q. And you said your reputation could be damaged because
7 you have no quality control over Chapterhouse's products. Do
8 you recall that?

9 A. I do.

10 Q. And you said that you're damaged because you're not
11 getting license fees from Chapterhouse, correct?

12 A. Yeah.

13 Q. And you said that you're damaged because Games Workshop
14 should be able to make figures that are in its books and --

15 A. Yes.

16 Q. -- other products, correct?

17 A. Yes.

18 Q. But -- so you listed all of those ways yesterday?

19 A. Yes.

20 Q. But in over two years Games Workshop has never said any
21 of that before yesterday. Did you know that, Mr. Jones?

22 A. No, I didn't.

23 Q. You understand that Chapterhouse asked you during the
24 case to describe the ways in which it was damaged? You did
25 know that, right?

1 A. No, I didn't, actually.

2 Q. Okay. Could you take a look at DX 149, please? And
3 we'll put it up here, too.

4 THE COURT: Is it in evidence?

5 MR. COOPER: Yes.

6 THE COURT: Okay.

7 BY THE WITNESS:

8 A. Where is that going to be? Sorry.

9 BY MR. COOPER:

10 Q. If you take a look in your binder first and we'll pull
11 up a --

12 A. D -- (Indicating.)

13 Q. No, the other one.

14 THE COURT: You're telling me this whole document
15 is in evidence?

16 MR. COOPER: No, it's not.

17 THE COURT: Take it off the screen. That's what I
18 asked you; you said yes.

19 MR. COOPER: Well, the document isn't, but we're
20 only going to show the --

21 THE COURT: I asked you whether it's in evidence
22 and you said yes. You can't put something on the screen
23 that's not in evidence. Now you just told me it's not in
24 evidence. So which is right?

25 MR. COOPER: There is no objection to the document

1 on the exhibit list, but we've agreed with counsel to only
2 show portions of the document.

3 MR. KEENER: He's only supposed to show us portions
4 without any legal objections whatsoever.

5 THE COURT: Yeah, which is the opposite of what was
6 just shown. So you got to get it fixed. You put up
7 something that had all sorts of other extraneous stuff on it.

8 Go look on his screen at what he just put up there.

9 (Brief pause.)

10 THE COURT: Do you see what I'm saying?

11 MR. COOPER: I do.

12 THE COURT: Okay.

13 BY MR. COOPER:

14 Q. I'm sorry about that.

15 Mr. Jones, if you could just personally look in
16 your binder at DX 149. I just want to ask you what the title
17 of this document is before we put anything up.

18 A. This one here?

19 Q. Okay, yes.

20 And you see the title of that document is Plaintiff
21 Games Workshop Studios LLC's Response to Interrogatories to
22 Games Workshop Limited Set Two (sic)? Do you see that?

23 A. Yes.

24 Q. You understand that interrogatories are a legal term
25 that mean questions to the parties?

1 A. Yes.

2 Q. And so you understand that these interrogatories are
3 exchanged in litigation, right?

4 A. Yes.

5 Q. Now, let's go to Interrogatory No. 7 -- I'm sorry.
6 Let's go to Page No. 7 under Interrogatory No. 13. And
7 that's what we'll put up on the screen here.

8 And we have it up here on the screen if you would
9 like to look at it.

10 A. Okay. I've got it, yeah.

11 Q. Okay. Do you see where it says: (Reading:)

12 Describe in detail, including a quantification, all
13 actual damages you claim to have suffered as a result of the
14 infringement you allege in this case?

15 Do you see that?

16 A. I do, yes.

17 Q. And then the response says: (Reading:)

18 Games Workshop objects that this request is a contention
19 interrogatory best deferred to the close of discovery,
20 including receipt of discovery from Chapterhouse regarding
21 its sales.

22 Do you see that?

23 A. I do.

24 Q. And Games Workshop didn't ever provide any other answer
25 at the end of the discovery to this question, right?

1 A. I don't know. I don't know whether we ever got the
2 receipts from Chapterhouse or anything else, for that matter.
3 This is quite a technical thing and I --

4 THE COURT: We need a sidebar. Can I have the
5 court reporter, please?

6 (Proceedings had at sidebar:)

7 THE COURT: I have to say, I'm not understanding,
8 A, what's going on here and, B, why there isn't an objection.

9 So you're trying to put up there an objection and
10 then the fact that there wasn't a further answer, and you're
11 trying to draw some sort of impeachment by omission out of
12 that?

13 MR. COOPER: Just that he disclosed yesterday for
14 the first time what the damages are.

15 THE COURT: Okay. So that's a yes?

16 MR. COOPER: Yes.

17 THE COURT: Okay, right. Better if you --

18 MR. KEENER: If that's where he's going, I would
19 object to --

20 THE COURT: Honestly, so where was the motion to
21 compel? I mean, I'm now going to have to explain to the jury
22 the process of interrogatories.

23 You know, it seems to me to be -- first of all,
24 it's a tiny point, No. 1. No. 2, if somebody says, you know,
25 I object, it's better suited for the end of discovery, nobody

1 comes in to me to ask to compel, I don't see how you can
2 legitimately get any kind of an admission out of it.

3 So now is your chance, otherwise I'm going to
4 strike it. I don't care who talks.

5 MR. ALY: Judge, I was involved in that idea as
6 well, so I apologize for that.

7 What I remember from your ruling is if it's on a
8 pretrial order in the exhibit list --

9 THE COURT: Yeah, I understand. But, I mean --

10 MR. ALY: In addition -- I'm sorry to cut you off,
11 your Honor.

12 But in addition, I also asked counsel to work it
13 out amongst themselves and that's where --

14 THE COURT: I'm striking it on my own motion.

15 MR. KEENER: One more issue I have --

16 THE COURT: Are you pretty close to done?

17 MR. COOPER: I am.

18 MR. KEENER: There was a motion for sanctions and
19 two hearings regarding the eBay pages and their failure to
20 preserve --

21 THE COURT: First of all, you're talking too fast.
22 Slow down. They're not listening to you. Listen.

23 Start over.

24 MR. KEENER: There was a motion for sanctions and
25 two hearings regarding their failure to preserve their

1 hundreds of eBay pages and --

2 THE COURT: Yes, I recall what you're talking
3 about.

4 MR. KEENER: You had ruled that, yes, they had a
5 duty to preserve those and failed, but you withheld an
6 adverse --

7 THE COURT REPORTER: Excuse me, can you repeat
8 that?

9 MR. KEENER: Now they have him on the stand and
10 saying, all you showed was the eBay pages from 2008. You
11 haven't shown the jury any eBay pages since then, have you?

12 THE COURT: But you're not going to be able to get
13 that in through this witness. I understand you may have an
14 issue, but what are you going to do with this witness --

15 MR. KEENER: We're asking for a limiting
16 instruction from you that the reasons we don't have these
17 hundreds of other pages --

18 THE COURT: What I would like you to do is I would
19 like it to be off-line, propose something to them, you know,
20 in terms of language. You'll argue whether, A, you think I
21 should give one and, B, whether you think the language is
22 right and we'll deal with it later. We don't have to deal
23 with it right at the moment.

24 MR. KEENER: Thank you.

25 (Proceedings had in open court)

1 THE COURT: I need to give the jury an instruction
2 here.

3 So, first of all, the discussion regarding the
4 interrogatory and what you saw on the screen and the
5 questions about it are stricken. You're directed to
6 disregard it. And the questioning about, you know, this
7 being the first time something was mentioned, you're also
8 directed to disregard that. You can't consider it as part of
9 the evidence.

10 Proceed.

11 BY MR. COOPER:

12 Q. Mr. Jones, we've talked at length about the term Space
13 Marines, correct?

14 A. Yeah.

15 Q. And have you seen this exhibit before, PX -- DX 415,
16 which has been admitted into evidence?

17 A. Yes.

18 Q. You see on the cover that it says Space Marines, right?

19 A. Yes.

20 Q. And see on the cover it says Science Fiction Miniatures
21 Rules, correct?

22 A. Yes.

23 MR. COOPER: May I approach?

24 THE COURT: Sure. You don't need to ask. It's
25 fine, just go ahead and do it.

1 BY MR. COOPER:

2 Q. Mr. Jones, could you just turn to the first copyright
3 page there? And do you see there where it says the copyright
4 is 1980?

5 A. Yes.

6 Q. So that is a book called Space Marines that was made in
7 1980, right?

8 A. Yeah.

9 Q. Now, if you look on the front cover, you see an image of
10 a Space Marine as well, correct?

11 A. Yes.

12 MR. COOPER: I have no further questions, your
13 Honor.

14 THE COURT: Redirect?

15 REDIRECT EXAMINATION

16 BY MR. KEENER:

17 Q. Can we go to PX 1023 at Page 2.

18 Now, yesterday do you recall being asked by counsel
19 for Chapterhouse whether or not Eldar by itself was anywhere
20 on this list on this page?

21 A. Yes.

22 Q. And it doesn't appear there, does it?

23 A. No.

24 Q. Will you turn back to Page 1, the list of the registered
25 trademarks of Games Workshop.

1 A. Oh, there it is.

2 Q. Does Eldar by itself appear on that page?

3 A. Yes, it does.

4 Q. Can we go to Plaintiff's Exhibit 690 at Page 101.

5 Do you recall being asked whether Chapterhouse uses
6 the terms Eldar and Farseer together?

7 A. Yes.

8 Q. And can you explain why Games Workshop believes they're
9 using Eldar and Farseer together?

10 You might need to scroll down a little bit, too. I
11 want the tab on the side. There you go.

12 A. So it's the Eldar tab and then the Farseer jetbike, the
13 use of the term Eldar and Farseer together there.

14 Q. Thank you.

15 Let's go to PX 865, Page 5. Do you remember
16 talking a lot about the sales spreadsheet?

17 A. Yes.

18 Q. Can we go to the line that says jetbike.

19 What was the example product you identified for
20 jetbike?

21 A. The Eldar jetbike.

22 Q. And we talked about how that's the actual title of the
23 product?

24 A. Yes.

25 Q. And do you remember questions about not showing the jury

1 pictures or packaging of these words?

2 A. Yes.

3 Q. Can we go to Plaintiff's Exhibit 491.

4 What do we see here?

5 A. That's the packaging of the -- our Eldar jetbike kit.

6 Q. So that's a product packaging that goes with the entry
7 we just saw?

8 A. Yes.

9 Q. And where do we find the title?

10 A. Well, right there, in -- under the Warhammer 40,000
11 logo, Eldar jetbike.

12 Q. And is that where Games Workshop typically puts the
13 titles on its products?

14 A. Yes.

15 Q. Can we go to Plaintiff's Exhibit 416 at Page 10.

16 What are we looking at here?

17 A. Again, that's the Eldar jetbike. It's a page from our
18 website.

19 Q. And on the website for this product, where is the title
20 put for the product?

21 A. Right there in big letters, Eldar jetbike.

22 Q. And is that where Games Workshop displays the titles of
23 its products on its website?

24 A. Yes.

25 Q. So if we went through the rest of the chart and the

1 names, would we find the names used similarly on the products
2 and packaging on the website of Games Workshop?

3 A. Yes.

4 Q. Do you recall being shown an exhibit with some other
5 companies using the word jetbike on their miniatures?

6 A. Yes, yes, I do.

7 Q. Can we go to Defendant's Exhibit 377, Page 9.

8 And this was one of them?

9 A. Yes.

10 Q. I see the website says Maxmini.eu. Do you see that?

11 A. Yes.

12 Q. Are they an American company?

13 A. No, they're not. They're European.

14 Q. Do you have any knowledge of them selling this to anyone
15 in the United States?

16 A. No.

17 Q. Can we go to Page 13.

18 This is another one that he showed you?

19 A. Yes.

20 Q. And the website there is listed as Kromlech.eu?

21 A. Yes.

22 Q. Are they an American company?

23 A. No, they're not.

24 Q. Do you have any knowledge of them selling this product
25 to anyone in the United States?

1 A. No.

2 Q. Do you know where either of these two companies are
3 located?

4 A. Oh, gosh! I think they're in Poland.

5 Q. And the other two companies he mentioned were Scibor and
6 Hitech Miniatures. Are either of those American companies?

7 A. No.

8 Q. Where are they located?

9 A. I think -- if I remember rightly, Hitech I think are
10 based in China and Scibor are another Polish company.

11 Q. So is there any evidence at all that these Polish or
12 Chinese companies are selling any products in the United
13 States with the word jetbike?

14 A. No.

15 Q. Do you remember counsel for Chapterhouse asking you this
16 morning about the Alpha Legion door set sold by Games
17 Workshop?

18 A. Yes.

19 Q. And he made a point asking whether Chapterhouse sells an
20 Alpha Legion door set?

21 A. Yes.

22 Q. Can we go to Plaintiff's Exhibit 1020 at Page 94.

23 This is product 103, the dragon door kit. Do they
24 -- can you -- what do you see in their description of that
25 product?

1 A. This is where they say that it is -- they're trying to
2 say that it is good for Alpha Legion.

3 Q. So they're describing it as an Alpha Legion door set?

4 A. Yes, they're describing it as an Alpha Legion product
5 door set.

6 MR. KEENER: No more questions. Thank you.

7 THE COURT: Anything else?

8 MR. COOPER: No questions.

9 THE COURT: Do any of the jurors have any questions
10 for this witness? If so -- I see a couple people looking
11 down and writing, so I'll just wait. Just pass them down to
12 the end and the court reporter will come get them.

13 (Brief pause.)

14 (Proceedings had at sidebar:)

15 THE COURT: All right, so we'll just go through
16 these and you'll tell me whether you have any objections to
17 it.

18 No. 1: Is Forge World a licensed distributor or
19 part of Games Workshop?

20 MR. KEENER: No objection.

21 THE COURT: Do you have a problem with that
22 question?

23 MR. COOPER: No.

24 THE COURT: (Reading:) Does Chapterhouse help
25 boost your sales for your products by making parts to fit

1 your products?

2 Does anybody have an objection to that question?

3 MR. COOPER: No, your Honor.

4 MR. KEENER: I don't think he's going to know the
5 answer but --

6 THE COURT: It's a completely legitimate question,
7 though. (Reading:)

8 Who is the seller on the eBay pages that were shown
9 as evidence? Was it a fan, was it Chapterhouse, another
10 company?

11 MR. KEENER: No objection.

12 MR. COOPER: No objection.

13 THE COURT: Okay. (Reading:)

14 How many other companies sell 28-millimeter size
15 miniatures?

16 MR. COOPER: No objection.

17 MR. KEENER: No objection.

18 THE COURT: (Reading:) Is there anything within
19 Warhammer 40K that's called a Blood Eagle?

20 Does anybody have a problem with that?

21 MR. KEENER: No objection.

22 MR. COOPER: No.

23 THE COURT: (Reading:) Does Games Workshop or
24 Forge Work -- is that --

25 MR. KEENER: Forge World.

1 THE COURT: Forge World. (Continuing:)

2 Does Games Workshop or Forge World offer a means for
3 players to request or order custom bits designed by the
4 player or a method to provide feedback where they could
5 request kits which Games Workshop evaluates for potential
6 future products?

7 I think what they're getting at is, do you have a
8 way for customers to give you ideas and things to do.

9 MR. KEENER: I think that would be a fair question.

10 MR. COOPER: Yes.

11 THE COURT: Okay, fine. (Reading:)

12 Are you legally permitted to trademark a term that
13 was previously coined by someone else in the same business as
14 you even though you weren't the first to coin that term, but
15 you were not aware that the term had been coined before you
16 had done so?

17 I think that's phrased -- I think that's really not
18 a proper question for the witness to answer.

19 MR. COOPER: I agree.

20 MR. KEENER: I think it either would be an
21 instruction from you on the law or --

22 THE COURT: I'm going to tell them that.

23 (Reading:)

24 What's the difference between an unregistered and a
25 registered trademark in terms of protection under the law?

1 That's the same deal.

2 (Reading:) Are there companies in America besides
3 Chapterhouse that produce miniature jetbike figures?

4 I can ask him his knowledge.

5 MR. KEENER: I think he answered that but --

6 THE COURT: Sometimes people miss things, so I'll
7 ask that one.

8 This guy's handwriting I have a hard time with.

9 (Reading:)

10 How is Chapterhouse's use of Games Workshop's names in
11 the title of its products or in, quote, for use with
12 Tyranids, close quote, any different than when I buy a third
13 party manufacturer's I-Phone case that says for use with
14 I-Phone 5, close quote?

15 Well, I guess it shows somebody was listening to
16 the defendant's opening statement. I'm not sure what to do
17 with that.

18 MR. KEENER: Yeah, I mean, that could -- a lot of
19 those are actually licensed by Apple the same, made for
20 I-Phone 5. All those issues -- that's a legal issue, whether
21 that's okay? I'm not sure if that's an appropriate question
22 because that is under license. That's the issue.

23 MR. COOPER: I think he doesn't say the word
24 license here, and he's given a number of opinions about what
25 is proper and what is not in the descriptions and what he

1 believes should be allowed and should not be allowed. So I
2 think it's a legitimate question.

3 THE COURT: I'll come back to that one.

4 The other one by the same juror is: (Reading:)

5 Why is it okay to use, quote, conversion kit compatible
6 with Tyrannid Tervigon but not okay to use, quote, shoulder
7 pad compatible with Blood Raven Space Marine, close quote?
8 Why must it state, quote, 28-millimeter shoulder pad to be
9 used with 28-millimeter table top war game something or
10 other?

11 MR. KEENER: I think --

12 THE COURT: So I think -- I mean, I understand what
13 he's getting at. So that the witness has basically sort of
14 on cross largely drawn some distinctions between, you know,
15 what he thinks is okay and what he thinks isn't, and they're
16 arguably fine distinctions. I honestly think it's more
17 appropriate for argument rather than -- it's kind of an
18 argumentative question, I guess is what I'm saying.

19 The other one, the previous one, I think it sort of
20 approaches a legal question. I mean, I understand that the
21 guy gave opinions. That happened without objection. I'm not
22 saying you should have objected; I think it was okay. But I
23 don't think that that necessarily sort of opens him up as
24 kind of a legal expert that can opine on something like this.
25 So I'm not going to ask that one either. All right.

Jones -

**1 (The following proceedings were had in open court, in the
2 presence and hearing of the jury:)**

**3 THE COURT: Okay. So, there are a couple or three of
4 the questions that essentially ask legal questions, whether
5 something's legally permitted or not and what's the difference
6 between A and B and if this is okay, why isn't that okay. I'm
7 not going to ask those questions. I just want to tell you why
8 sort of in a nutshell.**

**9 Number one, to the extent that some of these are legal
10 questions, they're really not appropriate for a witness to
11 answer, but, more importantly, they will be addressed in the
12 jury instructions that I give you at the end of the case. Some
13 of the questions ask essentially for opinions, and I'm not
14 suggesting that that makes it inappropriate, but I think they're
15 more things in my view that are better addressed by lawyer
16 argument once you have the instructions rather than by a
17 witness. So, everything else I'll ask.**

**18 So, first of all, is Forge World a licensed distributor
19 of Games Workshop, or is it part of Games Workshop?**

20 THE WITNESS: It's part of Games Workshop.

21 THE COURT: It's part of Games Workshop.

22 THE WITNESS: Yes. It's a wholly owned subsidiary.

23 THE COURT: Wholly owned subsidiary. Okay.

**24 And you're definitely going to want to look at me to
25 hear the question, but then you're going to want to turn back**

Jones -

1 **there to answer them**

2 **THE WITNESS: Okay.**

3 **THE COURT: Does Chapterhouse help you boost your sales**
4 **for your products by making parts that fit your products? First**
5 **of all, do you understand the question?**

6 **THE WITNESS: I do understand.**

7 **THE COURT: Okay. Go ahead.**

8 **THE WITNESS: No, we believe that Chapterhouse doesn't**
9 **help boost the sales of our products. In fact, in many cases**
10 **just the opposite because we -- for example, when we put the**
11 **book together, like the Tyrannid book that we showed you, we**
12 **spend a great deal of time and effort and energy planning that**
13 **and making sure it's got all the right artwork and so on and so**
14 **forth in it, and then we plan when we're going to release the**
15 **products that are described in that book. And to do that, we**
16 **then spend again a lot of money and time and effort designing**
17 **the products, making the tools, and so on and so forth. So,**
18 **that term spoiling the well, you know, that's what happens when**
19 **Chapterhouse goes, oh, Games Workshop haven't made this product**
20 **that they showed and described in their book. They've decided**
21 **not to make it yet. Why don't we make one. Well, that doesn't**
22 **help boost our sales. It does just the opposite.**

23 **THE COURT: Next question has to do with the eBay pages**
24 **that were shown on the screen as part of the evidence. And I**
25 **don't know the extent to which you remember all of them Who**

Jones -

1 was the seller on those eBay pages? Was it a fan or a player?
2 Was it Chapterhouse, or was it some other company, as you
3 understand it?

4 THE WITNESS: Yes, I understand it. To the best of our
5 knowledge, those were Chapterhouse pages.

6 THE COURT: How many other companies to your knowledge
7 sell 28 millimeter size miniatures?

8 THE WITNESS: Oh, gosh. Hundreds. There are many,
9 many, many making historical figures, science fiction figures of
10 their own in all sorts of different scales and sizes. There are
11 many companies of various sizes making tabletop war game models.

12 THE COURT: Are there any companies in the United
13 States other than Chapterhouse, to your knowledge, that produce
14 miniature jetbike figures or jetbike whatever you'd call them?

15 THE WITNESS: To my knowledge, no.

16 THE COURT: Okay. Is there anything within Warhammer
17 40,000 that's actually called a Blood Eagle?

18 THE WITNESS: No.

19 THE COURT: Does either Games Workshop or Forge World
20 have any kind of a means or a mechanism by which a player can
21 request sort of the making of a custom bit or a kit? In other
22 words, "I'd like something like this. Can you make it?"

23 THE WITNESS: Well --

24 THE COURT: Or does that ever -- if you don't have a
25 mechanism, does it ever happen?

Jones -

1 THE WITNESS: Does it ever happen. I'd say, to be
2 honest, it's unlikely, but we do -- you know, we're in regular
3 communication with hundreds and thousands of our customers, and
4 they turn up at our events, and they tell us what they like, and
5 tell us what they might like to come along. And so, that is
6 obviously taken into account. But customers can't like
7 literally ring us up and say can you make me one of these or one
8 of those.

9 THE COURT: All right. Thanks.

10 Follow-up questions, Mr. Keener?

11 MR. KEENER: None, your Honor.

12 THE COURT: Any on the defense side?

13 MR. COOPER: No, your Honor.

14 THE COURT: You're excused. Please call the next
15 witness.

16 (Witness excused.)

17 THE COURT: Would you raise your right hand, please?

18 (Witness duly sworn.)

19 THE COURT: So, we've got I think both sides' binders
20 for Mr. Jones. Maybe if you could come up and collect those.
21 And then there's this other, I guess, magazine or whatever it
22 is. Catalog. Get that out of there.

23 THE WITNESS: Thank you.

24 THE COURT: Why don't you just have a seat, and I'll
25 move the microphone.

Stevenson - direct

1 GILLIAN STEVENSON, PLAINTIFF'S WITNESS, SWORN

2 DIRECT EXAMINATION

3 BY MR. KEENER:

4 Q. Can you introduce yourself to the jury?

5 A. Yes. My name is Gill Stevenson.

6 THE COURT: Spell Stevenson.

7 THE WITNESS: S-t-e-v-e-n-s-o-n.

8 BY MR. KEENER:

9 Q. And where do you work?

10 A. I work at Games Wrkshop.

11 Q. What do you do there?

12 A. I'm senior legal counsel.

13 Q. What does that mean?

**14 A. I'm a member of the legal team and I'm responsible for
15 pursuing litigation for the business.**

16 Q. When did Games Wrkshop first learn of Chapterhouse?

17 A. June 2008.

18 Q. How did it learn of Chapterhouse?

**19 A. We received an e-mail into our legal inbox telling us about
20 some auctions on eBay that were infringing Games Wrkshop's
21 trademarks and copyright.**

22 Q. So, what did you do?

**23 A. There's a system called VeRo where you can report auctions
24 on eBay for trademark and copyright infringement. So, we did
25 that.**

Stevenson - direct

1 **Q. And happened next?**

2 **A. When you report an auction, eBay sends an automatic standard**
3 **letter to the vendor telling them why their auction has been**
4 **removed, and they also send the person reporting the auction the**
5 **contact details of the vendor.**

6 **Q. And who did you learn was the vendor of those eBay postings**
7 **you had been seeing?**

8 **A. That was Nick Villacci.**

9 **Q. So, what did you do upon learning that Mr. Villacci of**
10 **Chapterhouse was selling those products?**

11 **A. Well, he contacted us, having had the automatic response**
12 **from eBay, and there was then an exchange of correspondence**
13 **where he told us that he had had legal advice. He said that his**
14 **use of our trademarks and copyright was legitimate. We replied**
15 **to say that we didn't believe that was the case. He said that**
16 **he wanted to work with us, but it was left that we were at**
17 **disagreement as to whether or not he could use those terms and**
18 **those items.**

19 **Q. What happened next?**

20 **A. We carried on reviewing the site or reviewing his eBay**
21 **auctions, and it became clear that he was expanding his range,**
22 **and then at some point around the beginning of 2009, he launched**
23 **the Chapterhouse Studios website. That clearly set out that he**
24 **was again continuing to expand his range using our trademarks**
25 **and our copyright. So, by summer of 2009, we sent him a further**

Stevenson - direct

1 **cease and desist letter, to which we had no response.**

2 **Q. At any point did you acquire any Chapterhouse products?**

3 **A. Yes, I bought a number of items. I bought some Rhino doors,**
4 **some drop pod doors, and one of the Super Heavy Walkers.**

5 **Q. Can we go to Plaintiff's Exhibit 1020 at Page 39? And do we**
6 **see the walker on this page sold by Chapterhouse?**

7 **A. Yes. It's on the left-hand side.**

8 **Q. And do you recall hearing testimony throughout the trial**
9 **that they don't use the word Tau anywhere in that title and**
10 **description?**

11 **A. I've heard that, but it isn't true.**

12 **Q. And why is that?**

13 **A. Well, there's two reasons, really. If you look at their**
14 **website, this item you can search. If you search Tau, you will**
15 **find this item. It's also under the tab for Tau products.**

16 **But, more importantly, I had an e-mail from Nick**
17 **Villacci when I bought the product where he clearly referred to**
18 **it as a Tau Super Heavy Walker.**

19 **Q. Let's look at that e-mail. Can we go to Plaintiff's**
20 **Exhibit 127? And what are we looking at here?**

21 **A. I had paid for the items that I had ordered from Nick**
22 **Villacci, and he forwarded this e-mail on to me to tell me that**
23 **I hadn't paid the correct shipping for the Tau Heavy Walker.**

24 **Q. And where does he say Tau Heavy Walker?**

25 **A. It's in the first line of his e-mail.**

Stevenson - direct

1 **Q. So, that was Mr. Villacci himself calling his product a Tau**
2 **product?**

3 **A. Absolutely.**

4 **Q. As part of your job, have you heard of a website called**
5 **WarSmith?**

6 **A. I have indeed.**

7 **Q. What can you tell us about it?**

8 **A. WarSmith was a miniatures company run by a guy called**
9 **Stephen Smith in the UK. We contacted him earlier on this -- I**
10 **think last year it was. He was selling, amongst other things,**
11 **TRU-Scale Space Marines or art scale Space Marines.**

12 **Q. Let's go to Plaintiff's Exhibit 898 at Page 3. What are we**
13 **looking at here? What's the description and the pictures?**

14 **A. This is a page from the WarSmith website.**

15 **Q. And what is being advertised?**

16 **A. It's an art scale Space Marine squad.**

17 **Q. In your job do you know what the term art scale means?**

18 **A. Yeah. Art scale or TRU-Scale, the best way I find to**
19 **describe it is if you look at a painting or a picture of a Space**
20 **Marine, he's taller than if you look at the miniature. So,**
21 **they're just stretched.**

22 **Q. Now, let's take a better look at one of these pictures. Can**
23 **we go to Page 5? Now, is this a picture from the WarSmith**
24 **website?**

25 **A. Yes, it is.**

Stevenson - direct

1 Q. Do you know if WarSmith is still selling this miniature?

**2 A. No, they're not. We had some correspondence with Stephen
3 Smith last year concerning his use of our trademarks and
4 copyright, and he agreed to close his site down. We didn't
5 require him to stop selling everything, just the infringing
6 things, but that was the result.**

7 Q. Have you seen this picture being advertised anywhere else?

**8 A. Yes. I've seen this picture previously on some Chapterhouse
9 marketing. I can't say exactly where, but I've seen it on some
10 of their marketing.**

**11 Q. Let's go to Plaintiff's Exhibit 651. Can we do a split
12 screen? And the screen we were just looking at.**

13 Is that the same picture?

14 A. It looks it to me, yeah.

**15 Q. And what is it that we're looking at on the left on
16 Plaintiff's Exhibit 651?**

17 A. That is an e-mail from Nick Villacci.

18 Q. And what is the e-mail advertising?

**19 A. Advertising the Chapterhouse TRU- Scale Knight Praetorius
20 Squad.**

21 Q. And on the picture, who does it credit the design to?

22 A. The model is painted and designed by Stephen Smith.

**23 Q. Now, are there any other companies out there without a
24 license from Games Workshop that make products that could be
25 used in Warhammer 40K?**

Stevenson - direct

1 **A. Yeah. There are other companies who make things like carry**
2 **cases or terrain, gaming boards like the one you've seen there.**
3 **But equally they could make their own army. As long as it**
4 **doesn't infringe our trademark or copyright, we're quite happy**
5 **for people to create their own Tigermen or whatever they want to**
6 **come up with, as long as it's their own unique idea.**

7 **Q. And as long as it doesn't use Games Workshop's copyrights or**
8 **names?**

9 **A. Absolutely. As long as it doesn't infringe our trademarks**
10 **or copyright, they can go for it.**

11 **Q. Now, as part of your job, have you discovered any evidence**
12 **of customer confusion between Games Workshop and Chapterhouse**
13 **products?**

14 **A. Yes, I have.**

15 **Q. And where have you found that confusion?**

16 **A. We have e-mails. We have a legal inbox that people can send**
17 **e-mails to through the Games Workshop website, and we've had**
18 **e-mails of confusion into our inbox.**

19 **Q. Let's turn to Plaintiff's Exhibit 107. On Page 1 here, what**
20 **are we looking at?**

21 **A. This document is a file note. Within the legal team, we**
22 **have a case management system for managing our case load, and**
23 **you save an e-mail into that, and if you then want to print it**
24 **out, it looks like this, but it's actually just an e-mail.**

25 **Q. All right. So, let's look at the text of the e-mail at the**

Stevenson - direct

1 bottom If you'd scroll down. And some of it continues onto
2 the next page, if we can show that.

3 Can you describe what you were being told?

4 A. Yes. So, this was an e-mail from Wil and Vicky, whoever
5 they are, to say that they had found the Chapterhouse websites
6 and that they were seeing resin kits for Space Marine Rhinos and
7 Land Raiders, and they were confused as to whether they were
8 allowed to do that, i.e., had a license, or whether that was
9 something that they shouldn't be doing.

10 Q. Let's turn to Page 3 of this exhibit. What are we looking
11 at here?

12 A. Again, this is an e-mail from a customer who is contacting
13 us concerned about the Chapterhouse website. And if you have a
14 look at it, it says, "It looks remarkably similar to the stuff
15 I've seen produced by yourselves," and then further down he
16 says, "My question is are they legit. Is what they are doing
17 even legal, or does it infringe on your IP and trademark
18 policies."

19 Q. And let's go to Page 4. What are we looking at here?

20 A. Another report of infringement.

21 Q. And what is this person saying?

22 A. He says, "I was thinking of the Power Fist and the leg parts
23 for the chaplain. They are clearly Citadel parts," which is
24 Citadel being Games Workshop, "with added details sculpted to
25 them" asking is this legal.

Stevenson - direct

1 **Q. Now, beyond customers coming to Games Workshop and being**
2 **confused about Chapterhouse, do you find any other confusion?**

3 **A. Yeah. A couple of weeks ago on eBay I had a couple of**
4 **auctions reported to me for somebody who was selling**
5 **Chapterhouse products using their photos, but equally using our**
6 **trademarks. So, clearly either they were confused or they were**
7 **trying to confuse end users.**

8 **Q. Let's take a look at one of those. Plaintiff's**
9 **Exhibit 1008. 1008, 1009.**

10 **Beyond the eBay pages we've talked about and seen**
11 **already, do you know if Chapterhouse had continued to sell on**
12 **eBay?**

13 **A. Yes, he's continued to sell on eBay.**

14 **Q. And do you know how many eBay auctions he's had since then?**

15 **A. I've got no idea how many eBay auctions he's had. We don't**
16 **carry on pulling the auctions down because that's an initial**
17 **warning shot to people, and we'd get their contact details from**
18 **that. But if they're going to carry on selling, then we decided**
19 **that this case would be settled here rather than by me paying**
20 **someone to pull eBay auctions down all day.**

21 **So, I've got no idea how many there are, but I do know**
22 **that there was a court order requiring Chapterhouse to produce**
23 **all of their eBay auctions, and they haven't done so.**

24 **Q. So, you made an attempt to ask Chapterhouse to collect and**
25 **produce all their eBay postings as part of this lawsuit?**

Stevenson - direct

1 **A. Absolutely. They were ordered to do that by the judge.**

2 **Q. And did they --**

3 **MS. GOLINVEAUX: Objection, your Honor.**

4 **THE COURT: The reference to an order by the judge is**
5 **sustained. It's not relevant, and the jury is directed to**
6 **disregard it.**

7 **BY MR. KEENER:**

8 **Q. Do you know if any eBay posts were produced to Games**
9 **Workshop?**

10 **A. No, they were not produced.**

11 **Q. Showing you what's been marked Plaintiff's Exhibit 1008,**
12 **what are we looking at here?**

13 **A. This is one of the eBay auctions that I removed a few weeks**
14 **ago for selling Chapterhouse products using Games Workshop**
15 **trademarks.**

16 **Q. Now, are you suggesting that Chapterhouse was selling this a**
17 **few weeks ago?**

18 **A. No. In fact, it was somebody in France from recollection.**

19 **Q. So, now why do you think this shows customer confusion?**

20 **A. Well, because the images are Chapterhouse image. It's taken**
21 **directly from their website.**

22 **MS. GOLINVEAUX: Objection.**

23 **THE COURT: I'm sorry. Basis?**

24 **MS. GOLINVEAUX: Relevance.**

25 **THE COURT: Overruled. Complete your answer.**

Stevenson - direct

1 BY THE WITNESS:

2 A. So, it's a Chapterhouse image, and actually the description
3 reads a bit like a Chapterhouse description from recollection.
4 But if you look at the product title, it says one -- I don't
5 speak French, but the words I can say are Exarque Scorpion Eldar
6 Eldars Warhammer 40K 40,000.

7 BY MR. KEENER:

8 Q. So, are you concerned about confusion here on the seller or
9 the buyer?

10 A. Both.

11 Q. Can you explain what you mean?

12 A. Well, the seller maybe doesn't know what they're selling, or
13 alternatively the buyer could be confused as to whether he's
14 buying a Games Workshop product or a Chapterhouse product.

15 Q. Let's go to Plaintiff's Exhibit 1009. What are we looking
16 at here?

17 A. This is the other auction that I referred to pulling down a
18 few weeks ago.

19 Q. And why do you believe this shows customer confusion?

20 A. Again, the image is the image taken from the Chapterhouse
21 website, but you can read the title of the auction is Eldar
22 Farseer Eldars Warlocks Warhammer 40K 40,000, which are Games
23 Workshop trademarks.

24 Q. And again are you worried about confusion from the buyer or
25 the seller here?

Stevenson - direct

1 **A. Well, again, it's both.**

2 **Q. And why is that?**

3 **A. Because either the seller doesn't know what he's selling or**
4 **the buyer doesn't know what he's buying.**

5 **Q. Now, in your role at Games Workshop, have you done anything**
6 **to demonstrate potential confusion between the Games Workshop**
7 **and Chapterhouse products?**

8 **A. Yes, I have. So, I gave some images from the Chapterhouse**
9 **website off their products to our hobby team, who are the very**
10 **talented painters who painted the models on the board at the**
11 **front, and I asked them to take an equivalent Games Workshop kit**
12 **and to pose it in the same pose as the Chapterhouse product and**
13 **paint it using their color scheme to give a very visual**
14 **representation of whether people could be confused.**

15 **Q. Let's look at Plaintiff's Exhibit 1022 at Page 2. What are**
16 **we looking at here?**

17 **A. This is a chart that I had put together. As I said, the**
18 **images on the left-hand side are the Chapterhouse images from**
19 **their website, and on the right-hand is a Games Workshop model**
20 **that has been prepared using an Eldar Farseer kit, as you can**
21 **see, it says. And it has been posed and painted using entirely**
22 **Games Workshop parts, and that is all one kit, painted in their**
23 **color scheme to show how easy it would be to be confused once**
24 **you've got a final finished product.**

25 **Q. Why do you think this shows potential confusion?**

Stevenson - direct

1 **A. Well, if they were on a tabletop or if they were on the**
2 **Internet, I wouldn't be able to tell them apart, and I'm sure**
3 **that you can all see that for yourselves.**

4 **Q. Let's go to Page 4. What are we looking at here?**

5 **A. So, on the left-hand side is the Chapterhouse TRU-Scale**
6 **Knights Praetorius kit. Images are shown on their website. And**
7 **on the right-hand side we have a Games Workshop Space Marine kit**
8 **that has been posed and assembled by the hobby team for me and**
9 **painted in their color scheme.**

10 **Q. Now, the ones that were made on the right-hand side, are**
11 **those Games Workshop trying to find all the right pieces in its**
12 **millions of bits to put together to look like Chapterhouse?**

13 **A. No, that's a standard kit that comes out of a box.**

14 **Q. So, all those pieces on the right-hand side were out of the**
15 **standard Space Marine Tactical box set, Plaintiff's Exhibit 704?**

16 **A. Absolutely, yeah.**

17 **Q. What about that guy in that kneeling position and pose?**

18 **A. Yeah. We have kneeling Space Marines.**

19 **Q. You didn't do anything to cut up the pieces and modify and**
20 **mold them to make them look like Chapterhouse, did you?**

21 **A. No, no. That's just how it came off the frame. They just**
22 **picked the right legs.**

23 **Q. And why do you think this shows potential confusion?**

24 **A. Well, because, again, if they were on a tabletop and you**
25 **were playing against somebody, you wouldn't know whether it was**

Stevenson - direct

1 a Games Workshop product or a Chapterhouse product. The
2 Chapterhouse one is a just a little bit taller. Or, equally, if
3 you were selling it as a secondhand product or selling it on the
4 Internet, you would have no idea because there's no markings to
5 tell you.

6 Q. Let's get to Page 7, one more. What are we looking at here?

7 A. This is the same thing. Again, on the left-hand side you've
8 got images taken from the Chapterhouse website showing their
9 TRU-Scale Knight Praetorius, and on the right-hand side was some
10 Space Marines that I got the hobby team to paint up in the
11 similar color scheme and pose as the Chapterhouse models.

12 Q. And what is Games Workshop's belief as to whether people
13 could confuse a Chapterhouse and a Games Workshop product?

14 A. Absolutely, they could.

15 Q. And why is that?

16 A. Because they're just pretty much identical in relation to --
17 in relation to these products. Some of the products you can
18 really tell because they're of poor quality. But in relation to
19 that, absolutely you could be confused.

20 MR. KEENER: Thank you. No more questions.

21 THE COURT: Ms. Golinveaux.

22 MS. GOLINVEAUX: Your Honor, Jennifer Golinveaux for
23 defendant Chapterhouse.

24

25

Stevenson - cross

CROSS EXAMINATION

1

2 **BY MS. GOLINVEAUX:**

3 **Q. Good afternoon, Ms. Stevenson.**

4 **A. Good afternoon.**

5 **Q. So, you told us you're the senior legal counsel for**
6 **plaintiff Games Workshop; is that right?**

7 **A. That's right.**

8 **Q. And you've been Games Workshop's lawyer for --**

9 **A. Five and a half years.**

10 **Q. For more than five years now; is that right?**

11 **A. Absolutely.**

12 **Q. And you're in charge of running Games Workshop's legal team**
13 **is that right?**

14 **A. Well, Andy Jones has responsibility above me. I report in**
15 **to him, but yeah.**

16 **Q. But you are responsible for managing the legal team, is that**
17 **right?**

18 **A. Because of my time that I've been involved in this case, we**
19 **have another manager who's come in to take management**
20 **responsibilities so that I can focus on this case because it's**
21 **such an important thing for us. So, at the moment I only have**
22 **one direct report, and there are other members of the legal team**
23 **who report elsewhere.**

24 **Q. Thank you for that.**

25 **And, in fact, you've been working with Games Workshop's**

Stevenson - cross

1 **lawyers and running this lawsuit ever since it was filed; is**
2 **that right?**

3 **A. And before that, yes.**

4 **Q. And it's the legal team's responsibility to protect Games**
5 **Workshop; is that right?**

6 **A. That's quite a broad phrase. Can you be more specific?**

7 **Q. Do you consider it the legal team's responsibility to**
8 **protect Games Workshop?**

9 **A. Yes. I don't think it's solely the legal team's**
10 **responsibility.**

11 **Q. To protect Games Workshop's intellectual property?**

12 **A. Again, I don't think that's solely the legal team's**
13 **responsibility. That also sits with the design studios in**
14 **making sure that our stuff is unique. In our marketing**
15 **department -- well, we don't have a marketing department, but**
16 **the people who put together and use letters in the website, to**
17 **make sure that they protect it appropriately.**

18 **Q. As well as the legal team?**

19 **A. Yes, we have our part to play.**

20 **Q. And you're testifying today on behalf of Games Workshop,**
21 **your employer, right?**

22 **A. Yes, that's right.**

23 **Q. And that's part of your -- you're here as part of your job,**
24 **correct?**

25 **A. Yes.**

Stevenson - cross

**1 Q. You're not getting paid extra to testify or anything like
2 that?**

3 A. That would be nice. No, I'm not.

4 Q. And, Ms. Stevenson, you're a lawyer in England, right?

5 A. Yes, I am

**6 Q. But you're not qualified to practice law in the United
7 States, are you?**

8 A. I'm not.

9 Q. And you don't have any U.S. legal degrees, do you?

10 A. I don't.

**11 Q. Ms. Stevenson, I'd like to talk about Games Workshop's
12 decision to sue Chapterhouse initially.**

13 A. Okay.

**14 Q. Now, you said you bought a number of Chapterhouse products
15 to examine; is that right?**

16 A. That's right.

**17 Q. Would you say that you reviewed many of Chapterhouse's
18 actual products in deciding what claims to bring?**

19 A. As opposed to the things on their website.

20 Q. The actual products is what my question is directed at.

**21 A. No, I wouldn't say we reviewed many of the physical
22 products.**

**23 Q. Well, in fact, you only obtained samples of a handful of the
24 actual products before deciding what claims to bring; is that
25 right?**

Stevenson - cross

1 **A. I reviewed the entire website. So, I didn't think I needed**
2 **to review the physical products in that much detail. I got what**
3 **I needed from the products I bought.**

4 **Q. And my question is you only examined a handful of actual**
5 **products in deciding what claims to bring; is that right?**

6 **A. I don't think the examination of the products was relevant**
7 **to the decision on what claims to bring.**

8 **Q. But that's not my question. Do you remember the question?**

9 **A. Yeah, but I don't think it makes sense.**

10 **Q. Well, do you understand the question?**

11 **A. Do you want to repeat it for me?**

12 **Q. Of course. Games Workshop only examined a handful of**
13 **Chapterhouse's actual products before deciding what claims to**
14 **bring in this lawsuit; is that right?**

15 **A. That's a slightly different question, but that is a yes.**

16 **Q. That is a yes?**

17 **A. Yes.**

18 **Q. Thank you.**

19 **Approximately half a dozen total? Do you think that's**
20 **about right?**

21 **A. That's probably about right, yes.**

22 **Q. Half a dozen?**

23 **A. Yes.**

24 **Q. Of all the Chapterhouse products that are in the case?**

25 **A. Yeah. Well, I wasn't going to spend a fortune giving Nick**

Stevenson - cross

1 Villacci money.

2 Q. And how about the Chapterhouse products -- strike that.

3 We were just talking about what products you examined
4 when deciding what claims to bring, right?

5 A. Well, no. That was what you said, but I said that wasn't
6 relevant.

7 Q. I understand you don't think it's relevant.

8 THE COURT: So, just ask a question.

9 BY MS. GOLINVEAUX:

10 Q. How about Chapterhouse's products added in the second phase
11 of the litigation last December? How many actual Chapterhouse
12 products did Games Wrkshop inspect before adding those claims?

13 A. I honestly don't know.

14 Q. Would it surprise you if the answer was zero?

15 A. No. As I already told you, it wasn't relevant to our
16 decision.

17 Q. So, did you examine any Chapterhouse products in deciding
18 what products to add in the second phase?

19 A. No. I carried out a thorough examination of their website
20 to see what new products they had released.

21 Q. Now, Ms. Stevenson, you're aware that Chapterhouse's
22 attorneys were permitted to inspect Games Wrkshop's reference
23 materials earlier this year; is that right?

24 A. Yes, that's right.

25 Q. And that inspection took place at Games Wrkshop's

Stevenson - cross

1 headquarters in Nottingham, is that right?

2 A. That's right.

3 Q. And you were there for that inspection, weren't you,
4 Ms. Stevenson?

5 A. I was.

6 Q. And when Chapterhouse's attorney arrived for the inspection,
7 is it true that all the reference materials had been boxed up in
8 blue boxes?

9 A. Yeah, blue crates.

10 Q. Blue crates. Approximately 200 blue crates?

11 A. Approximately 200 blue crates.

12 MR. KEENER: Objection, your Honor. Sidebar.

13 THE COURT: The objection is sustained. We don't need
14 a sidebar. I'll explain it at the break.

15 BY MS. GOLINVEAUX:

16 Q. Ms. Stevenson, you testified about a couple types of
17 confusion that you think has happened because of Chapterhouse's
18 alleged activity; is that right?

19 A. I did.

20 Q. And you talked about what you called post-sale confusion
21 potentially, and you showed some pictures of eBay auction sites;
22 is that right?

23 A. I did.

24 MS. GOLINVEAUX: Okay. Could we have Plaintiff's
25 Exhibit 1008, please? And can you blow up the right-hand

Stevenson - cross

1 column?

2 **BY MS. GOLINVEAUX:**

3 **Q. Do you see where it identifies the seller name there?**

4 **A. I do, yes.**

5 **Q. The seller has a username of Inroi, right?**

6 **A. Absolutely.**

7 **Q. And you have no evidence that Inroi was confused, do you?**

8 **A. Well, it is self-evident from the listing, I believe.**

9 **Q. You have no evidence to present today on that fact, do you?**

10 **A. Well, yeah, because it's self-evident from the listing.**

11 **Q. In fact, this page indicates the seller is in France,**
12 **doesn't it?**

13 **A. It does, yes. Well, it's on French eBay. So, I can only**
14 **assume from that that the person is in France.**

15 **Q. And the price here is listed in euros; is that right?**

16 **A. It is, yes.**

17 **Q. So, you have no reason to believe anyone in the United**
18 **States purchased this product, do you?**

19 **A. I've got no reason to believe it or not to believe it.**

20 **MS. GOLINVEAUX: Could we see Plaintiff's Exhibit 1009,**
21 **please? And can we blow it up again, please?**

22 **BY MS. GOLINVEAUX:**

23 **Q. We'll come back to that.**

24 **Now, Ms. Stevenson, you've testified that there's**
25 **evidence of confusion in this case, right? And you talked about**

Stevenson - cross

1 a few e-mails; is that right?

2 A. That's right, yes.

3 Q. And you're talking about confusion created by Chapterhouse's
4 references to Games Workshop's trademarks; is that right?

5 A. I don't think that that was what the e-mail said, no.

6 Q. Okay. We'll get into the individual e-mails.

7 Has Games Workshop done a consumer survey to find out
8 if any consumers are likely to be confused by Chapterhouse's
9 products?

10 A. No, but we got evidence of actual confusion, so --

11 Q. Well, and we'll get to that in a minute, but my question is
12 as to the survey.

13 A. No, we didn't do a survey.

14 Q. And any survey to determine whether consumers are likely to
15 be confused by the way Chapterhouse references the terms?

16 A. I'm sorry. Can you repeat the question?

17 Q. Sure. Have you done any survey to determine whether there's
18 likely to be confusion as to the way Chapterhouse references
19 Games Workshop's terms?

20 A. No, we haven't done any surveys.

21 Q. And Chapterhouse and Games Workshop have coexisted in the
22 marketplace for more than five years; is that right?

23 A. It was June 2008 when I first became aware of them and at
24 that time they were not selling as Chapterhouse. The eBay name
25 was Custom Mini 79. So, I can't honestly say that Chapterhouse

Stevenson - cross

1 and Games Workshop have coexisted for five years because as of
2 June 2008 when I removed those auctions from eBay, there was no
3 reference to Chapterhouse, and the e-mail I got from Nick
4 Villacci in June '08 didn't refer to Chapterhouse. My
5 understanding is that Chapterhouse didn't exist until 2009.

6 Q. So, but either their products that you claim Mr. Villacci
7 was selling on eBay and Chapterhouse together coexisted for
8 about five years; is that right?

9 A. Coexisted in probably the most unhappy sense rather than
10 coexisting happily.

11 Q. But coexisting in the marketplace.

12 A. Yeah.

13 Q. And today you testified about three e-mails that you claim
14 evidence some degree of consumer confusion; is that right?

15 A. I did, yes.

16 Q. Before we get to those e-mails, it's true, isn't it, that
17 Games Workshop has no evidence of confusion as to products it
18 added to the case in the second phase; is that right?

19 A. Yeah. I mean, the jury have heard quite a lot about the
20 forums that people who are fans of Warhammer 40,000 look at and
21 post on, and actually -- I know you're not allowed to look at
22 the Internet, but if you were allowed to look at the Internet,
23 what you would see is an awful lot of speculation about this
24 case, and actually our customers, our staff, and even just
25 people who are interested all know about this case and have for

Stevenson - cross

1 a very long time. So, the likelihood of there being any
2 confusion where there's such a publicly well known case, it's
3 just not really very likely because people know.

4 Q. But, Ms. Stevenson, you haven't presented any evidence of
5 confusion as to the products added in the second phase of the
6 case, have you?

7 A. No.

8 Q. And Games Workshop's not aware of any complaints about the
9 quality of those products, either, is it?

10 A. Not from people who buy the products directly, but --

11 THE COURT: That's the answer. Thanks. Next question.

12 BY MS. GOLINVEAUX:

13 Q. Turning to the products that you first sued on, they're
14 listed in a comparison chart for --

15 THE COURT: Actually, if you're going to go to a
16 different topic, this is where we're going to stop. So, we'll
17 resume at 1:30. I'll be right back out to talk to the lawyers.
18 All rise.

19 (The following proceedings were had in open court, out of
20 the presence and hearing of the jury:)

21 THE COURT: The reason for the sustaining of the
22 objection in the early part of the cross is I don't think it's
23 at all relevant how the materials in question were arranged for
24 production, and even if it was somehow relevant, which I don't
25 think it is in the least bit, it's unnecessarily confusing in a

1 way that far outweighs its probative value.

2 All of that aside, I think there was a motion about
3 this by Chapterhouse. I think I denied it. I mean, I think it
4 was a request for sanctions or something, which I think I
5 denied.

6 MR. ALY: You are absolutely correct.

7 THE COURT: Yes. So, that would be the third reason,
8 but I don't even need to get there because I just don't think
9 it's relevant. Anyway, that's the basis for the ruling. See
10 you at 1:30.

11 MR. KEENER: And, your Honor, do you want to handle the
12 limiting instruction when you come back before we start again?

13 THE COURT: Have you worked on something?

14 MR. KEENER: No. We'll work on it over lunch.

15 THE COURT: Do that over lunch.

16 MR. KEENER: Thank you.

17 (Whereupon, the within trial was recessed to 1:30 o'clock
18 p.m. of the same day.)

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GAMES WORKSHOP LIMITED,)	
)	
Plaintiff,)	Docket No. 10 C 8103
)	
vs.)	
)	
CHAPTERHOUSE STUDIOS, LLC,)	Chicago, Illinois
et al.,)	June 6, 2013
)	1:30 p.m.
Defendants.)	

VOLUME 4
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY AND A JURY

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MS. GILLIAN STEVENSON

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1 (The following proceedings were had in open court out of
2 the presence and hearing of the jury:)

3 THE COURT: All right, everybody all set?

4 MR. KEENER: The limiting instruction.

5 THE COURT: Oh, yes. Okay, go ahead.

6 MR. KEENER: We mostly agreed on the limiting
7 instruction with one disputed sentence.

8 Do you want to see it?

9 THE COURT: Yes, just hand it to Augie there.

10 (Brief interruption.)

11 THE COURT: Okay. So let me just read this whole
12 thing into the record so we have a record of it, and I will
13 point out the part that is objected to. Quote:

14 "Chapterhouse asked a witness why Games Workshop had
15 not presented eBay postings from Chapterhouse after 2008. It
16 is undisputed that Chapterhouse has sold various of its
17 products on eBay since 2008."

18 The next sentence is the one that is disputed:

19 "I have found that Chapterhouse failed to preserve
20 these posts."

21 The next sentence is not disputed:

22 "As a result, you're free to infer that these eBay"
23 -- these or those -- I can't tell which it says -- "eBay posts
24 use Games Workshop's trademarks in a manner similar to the one
25 you have seen."

1 So here's what I need you to do before I can --
2 before I make a decision on this. And, again, I don't think
3 it's crucial that we do this this afternoon. We could do it
4 in the morning. I know you guys have ordered the transcripts
5 from everything that has ever happened from the beginning of
6 the case to the end. Somebody needs to find me the one where
7 I dealt with this. And either just give it to me or tell me
8 where to find it. If it's on the docket, you could tell me
9 where to find it so that I can look at it and just refresh my
10 memory about what I concluded.

11 Or is it not in a transcript?

12 MR. ALY: It may not be because that's what we did
13 just try looking for, I think the last thing. It might have
14 been by phone, your Honor. I don't remember.

15 MR. KEENER: I remember it being the first pretrial
16 conference, but I would have to go back and check the
17 transcript.

18 THE COURT: The first pretrial conference.

19 MR. MOSKIN: The second one.

20 MR. KEENER: And the second one. I think it was
21 probably raised at both.

22 THE COURT: So I know guys you have got transcripts
23 of those because I know you've given them to me.

24 MR. ALY: That's right.

25 But after the second one, the status report was

1 requested, and that's the last thing that I think we have is
2 on April 22nd.

3 THE COURT: But if you could give me --

4 MR. ALY: Sure.

5 THE COURT: If somebody could just give me a hard
6 copy of the transcript of pretrial conference one and pretrial
7 conference two and the status report, I can skim through them,
8 and that will help me.

9 MR. ALY: Absolutely.

10 THE COURT: I can do that while some of the extremely
11 scintillating testimony is happening.

12 MR. ALY: Understood.

13 MR. KEENER: Are we able to get it to you first thing
14 in the morning?

15 THE COURT: You can give them to me now. If you've
16 got them now, you can give them to me now.

17 MS. HARTZELL: I've got the hearing transcripts. I
18 don't think I have the --

19 THE COURT: Go ahead and give me the hearing
20 transcripts. I will look at those.

21 MR. KEENER: You have got the joint status report
22 here.

23 MR. ALY: I've got the joint status report here.

24 THE COURT: Okay, so you've got it all.

25 MR. MOSKIN: It's marked up, which I think I would

Stevenson - direct

1 agree would be prejudicial.

2 THE COURT: Okay. You would have to take all the
3 references to idiot out of the margins.

4 MS. HARTZELL: Wait. Give it back.

5 MR. ALY: I'm sure hers are talking about me, but
6 here you go.

7 THE COURT: I'm confident all of the idiot references
8 are about yours truly. All right, thanks.

9 Okay, we can bring the jury out.

10 (The following proceedings were had in the presence and
11 hearing of the jury:)

12 THE COURT: You can all have a seat.

13 Ms. Stevenson, do you understand you're still under
14 oath?

15 THE WITNESS: I do.

16 THE COURT: Give it one second here.

17 (Brief interruption.)

18 THE COURT: Okay, you can proceed.

19 MS. GOLINVEAUX: Thank you, your Honor.

20 GILLIAN STEVENSON, PLAINTIFF'S WITNESS, DULY SWORN

21 CONTINUED DIRECT EXAMINATION

22 BY MS. GOLINVEAUX:

23 Q Hi again, Ms. Stevenson.

24 A Hi.

25 Q Now, before lunch, we were discussing a French eBay site;

Stevenson - direct

1 do you remember that?

2 A I do.

3 Q So can we pull back up PX-1008, please, and if you could
4 blow up the top portion of the page.

5 So, Ms. Stevenson, you identified the seller here as
6 Inroi -- I think that's 551 -- and the location is France, is
7 that right?

8 A That's right, yes.

9 Q And above the location in the gray scale box, do you see
10 where it has the number of bids identified?

11 A Yes. It says there's no bids.

12 Q Zero bids?

13 A Zero bids.

14 Q Can we move to PX-1009, please? I think you can blow up
15 the same top portion of the page.

16 Ms. Stevenson, is the seller here the same Inroi 551?

17 A It is.

18 Q And is the seller location also in France?

19 A I believe so, yes.

20 Q And what is the number of bids on this one?

21 A No bids.

22 Again, this auction was reported to me almost
23 immediately it was put up. So I pulled it down straight away
24 before anyone had a chance to bid.

25 Q Okay. You can take that exhibit down, please.

Stevenson - direct

1 Can we turn to PX-1022, please? And let's start at
2 page 2.

3 Now, Ms. Stevenson, as you recall, you testified that
4 this chart was put together at your direction by Games
5 Workshop's hobby team, and they painted and posed the Games
6 Workshop figures on the right column to look like the colors
7 and poses of the Chapterhouse products, is that right?

8 A Almost. The hobby team didn't put the chart together, but
9 they did build and paint the model.

10 Q And you said that you found this confusing when you see
11 them side by side like this?

12 A I find it compelling.

13 Q You said you found it confusing, correct?

14 A I said customers could find it confusing.

15 Q But you haven't offered any evidence that customers have
16 ever been confused by these two products, have you?

17 A Well, they haven't seen these two images side by side, so
18 they couldn't be.

19 Q So that's a no?

20 A Um --

21 Q Have you offered any evidence that any customers have
22 found these two products confusing?

23 A I said that I thought it was obvious that they would be
24 confusing.

25 Q But that's not my question.

Stevenson - direct

1 Have you offered any evidence today that any
2 customers ever found these two products confusing?

3 A Other than that I believe they're confusing, no.

4 Q And, Ms. Stevenson, can you please identify for me,
5 focusing your attention on the Games Workshop figurine, the
6 trademark that appears on that figure that Games Workshop is
7 claiming in this case?

8 A The figure is an Eldar Farseer figure, but the trademark
9 would appear on the product or on the website.

10 Q And --

11 A This isn't being offered for sale, so there is no
12 trademark on it.

13 Q So on the figure in the Games Workshop column, there is no
14 trademark that Games Workshop is claiming in this case, is
15 that right?

16 A No. That figure isn't being offered for sale in that
17 format.

18 Q Okay. Can we turn to page 7 of this exhibit, please? And
19 these are -- this is column 142.

20 And, again, you said that this was -- the Games
21 Workshop model was painted for demonstrative purposes in the
22 pose and color schemes of Chapterhouse, Chapterhouse's models,
23 is that right?

24 A That's right, yes.

25 Q And as with the other one, you haven't offered any

Stevenson - direct

1 evidence that any consumer has actually been confused between
2 these products, have you?

3 A No consumer has seen those side by side.

4 Q So you haven't offered any evidence of that, have you?

5 A They haven't been seen, so, no.

6 Q And, Ms. Stevenson, focusing your attention on the figures
7 that show in the Games Workshop column, what are the
8 trademarks that appear on those figures that Games Workshop is
9 claiming in this case?

10 A Again, there are no trademarks on those figures. The name
11 Space Marine is written above for identification purposes, but
12 those figures aren't being offered for sale in that format.

13 Q So there are no trademarks that appear on the Games
14 Workshop figures that you are claiming in this case?

15 A There will be a trademark on the bottom of the base.

16 Q Can we see it?

17 A No, I don't have them with me.

18 Q A picture?

19 A No.

20 Q Okay.

21 MS. GOLINVEAUX: You can take this exhibit down.

22 BY MS. GOLINVEAUX:

23 Q Now, let's turn to the three emails that you testified
24 earlier were, in your opinion, evidence of confusion in this
25 case. And those emails referred to Chapterhouse Studios,

Stevenson - direct

1 right?

2 A That's my recollection from earlier, yes.

3 Q Okay. Well, let's take a look at them.

4 Could you please pull up Plaintiff's Exhibit 107 at
5 page 3.

6 So, Ms. Stevenson, do you recognize this as one of
7 the emails you testified about this morning?

8 A Yes, the email in the format of a file note, yes.

9 Q And you explained to us what the file note indicated,
10 that --

11 A That it's an e-mail that has been saved into our case
12 management system within the legal team, and when you then
13 print it out, it prints as a file note rather than in the
14 usual email format.

15 Q Thank you for that.

16 If you could please blow up the email portion of this
17 exhibit? No, the entire email portion. Thank you.

18 (Brief interruption.)

19 BY MS. GOLINVEAUX:

20 Q So this appears to be a September, an email -- strike
21 that.

22 This appears to be an email dated September 27th,
23 2009, that was sent to legal at games-workshop.co.uk, is that
24 right?

25 A That's correct.

Stevenson - direct

1 Q And I'm reading from the beginning of the paragraph.

2 Beginning there it says:

3 "Dear sir/madam, I have recently come across this
4 website and it provides the URL for a ChapterhouseStudios.com
5 page selling conversion bits for Games Workshop kits."

6 Do you see that part?

7 A I do see that.

8 Q And looking at the last sentence of that paragraph, it
9 says:

10 "I'm looking at their Space Marine shoulder pads
11 here, Salamander, Luna Wolves, et cetera, which look
12 reasonable enough, but perhaps lack the sharpness and detail
13 of, quote, unquote, official Games Workshop products."

14 Do you see that?

15 A It says "GW," but, yes.

16 Q In that last sentence, the person's distinguishing the
17 Chapterhouse products that he saw from, quote, unquote,
18 official GW products, isn't he?

19 A Yes, but the key is in the following question, isn't it?

20 Q Well, that's something you discussed this morning, but I'm
21 focusing on my questions now.

22 So he's distinguishing them from official Games
23 Workshop products, isn't he?

24 A I -- sorry.

25 Can you repeat the question?

Stevenson - direct

1 Q Sure, let's move on. If you would look, please, at the
2 "from" line in the email header; do you see that?

3 A I do, yes.

4 Q It says that this email is from an @btinternet.com email
5 address?

6 A Indeed.

7 Q Do you have an understanding of what btinternet indicates
8 in the email address?

9 A Well, "bt" is shorthand for British telecom, which is a
10 telecom company in the U.K.

11 Does that answer the question?

12 Q It does. Thank you.

13 So there is no reason to believe that this individual
14 was in the United States, is there?

15 A Well, it's a dot com address, which would suggest it was
16 in the U.S. I don't know whether bt offers telecom services
17 in the U.S. or not, but most -- most U.K. email addresses are
18 dot co or dot uk.

19 Q Let's turn to Plaintiff's Exhibit 107 at page 4. It's the
20 same exhibit, page 4.

21 (Brief interruption.)

22 BY MS. GOLINVEAUX:

23 Q Ms. Stevenson, this is another one of the emails you
24 discussed this morning, correct?

25 A Absolutely.

Stevenson - direct

1 Q If we could blow up the email portion of it, not the file
2 note.

3 And this person -- I'm reading from the text of the
4 email. Before the text starts, there is also -- he's provided
5 a ChapterhouseStudios.com URL, is that right?

6 A That's right.

7 Q Okay. And then the email itself says:

8 "I was thinking of the power fist and the leg parts
9 for the Chaplain. They are clearly Citadel parts with added
10 details sculpted to them."

11 Do you see that?

12 A Yes.

13 Q Do I read that properly?

14 A Yes, you did.

15 Q Okay. And if you could look --

16 Well, actually, this email doesn't show the sender's
17 email address at all, does it?

18 A Not that I can see, no.

19 Q Okay. Let's turn in the same exhibit, let's turn to
20 pages 1 and 2.

21 (Brief interruption.)

22 BY MS. GOLINVEAUX:

23 Q As he's getting the second page loaded up -- there it is.
24 So this is the third email that you discussed this morning, is
25 that right?

Stevenson - direct

1 A I don't know what order I discussed them in, but it looks
2 like one of the three emails, yes.

3 Q Okay. And this email, if we could blow up the email
4 portion of the bottom third of the first page, this one is
5 also sent to legal U.K.

6 I assume that's Games Workshop legal, is that right?

7 A That's right.

8 Q Okay. And, again, it provides a URL for a
9 ChapterhouseStudios.com web page, is that right?

10 A That's right.

11 Q And the text says:

12 "Hi. I've just found this website, and they are
13 offering their own resin cast conversion kits for Space Marine
14 Rhino and Land Raider."

15 Do you see that?

16 A Yes.

17 Q Okay. And looking back up to the email header, do you see
18 the address where it says the email address is at an
19 @Yahoo.co.uk?

20 A I do.

21 Q And I believe a moment ago you indicated that that would
22 indicate a U.K. email address, is that right?

23 A That's right.

24 Q So do you have any reason to believe this individual was
25 in the U.S.?

Stevenson - direct

1 A No, but Chapterhouse Studios were.

2 Q But the individual sending you the email reporting about
3 it was not?

4 A Not so far as I'm aware.

5 Q And you have no reason to believe they were in the U.S.?

6 A No, although they could have been in the U.S. accessing
7 the U.S. website and emailing from a U.K. email address. I
8 don't know.

9 Q But the fact is they had a U.K. email, a co.uk email
10 address, correct?

11 A Yes.

12 Q If we can look at Defendants' Exhibit 170, please.

13 Again, we have the format with the file note on the
14 top, and can you blow up the content where it starts with
15 "from" on the bottom third of the page?

16 (Brief interruption.)

17 BY MS. GOLINVEAUX:

18 Q Okay. This is Defendants' 170, if you can blow up the
19 bottom third of the page, please.

20 Ms. Stevenson, this appears to be a September 22nd,
21 2010, email, again sent to legal U.K. indicating Games
22 Workshop legal, is that right?

23 A That's right.

24 Q Okay. And this email said:

25 "Thought you might find this link of interest. I

Stevenson - direct

1 don't usually care if someone is doing something GW style, but
2 there is a line for me and this has crossed it."

3 Do you see that?

4 A Yes.

5 Q Ms. Stevenson, this person is aware that Games Workshop
6 isn't the source of these products, isn't he?

7 A I can't testify what the person is aware of.

8 Q This -- do you consider this to be evidence of confusion?

9 A I don't think he's necessarily confused. He's clearly
10 unhappy.

11 Q So he doesn't appear confused to you?

12 A No.

13 Q Okay.

14 MS. GOLINVEAUX: Can we have Defendants' 171, please?

15 (Brief interruption.)

16 BY MS. GOLINVEAUX:

17 Q Can you pull up the -- go up a little bit to the blank
18 space in the middle of the page, okay, and pull up from there
19 down.

20 Ms. Stevenson, it appears you forwarded that last
21 email, and we see a message here:

22 "And another one who clearly is not confused,
23 exclamation point."

24 Do you see that?

25 A I do see that. That was an email to my external lawyers,

Stevenson - direct

1 yes.

2 Q Your external lawyers?

3 A Yes, and it was an email which was following an earlier
4 email which I sent two seconds earlier referring to someone
5 who was confused. So it was here's one who is and here's one
6 who isn't.

7 Q And that's your name underneath where I just read,
8 "another one who clearly is not confused"?

9 A Yes. One who was, one who wasn't, as I said.

10 Q So that's your name right there?

11 A That's right.

12 MS. GOLINVEAUX: You can take that exhibit down.

13 BY MS. GOLINVEAUX,

14 Q So, Ms. Stevenson, what you are telling us that in the
15 five years that you have been aware of Mr. Villacci and
16 Chapterhouse Studios, that you have received these three
17 emails that you think are evidence of confusion, is that
18 right?

19 A Yes, and they're all prior to his issuing the court
20 proceedings.

21 Q And what is the relevance of that?

22 A Well, the public knowledge afterwards would mean that
23 people wouldn't be confused.

24 Q So the litigation itself has mitigated any likelihood of
25 confusion; is that fair to say?

Stevenson - direct

1 A I don't know that you could actually say that because we
2 have had evidence from the French eBay vendor, and actually as
3 we have seen from the side-by-side documents, there's clearly
4 scope for confusion.

5 Q But in light of the litigation, people aren't likely to be
6 confused?

7 A People who don't know about it might be.

8 Q And so you have identified three emails that you consider
9 to be evidence of confusion, is that right?

10 A Absolutely.

11 Q And two of those emails were sent from what appears to be
12 U.K. email addresses?

13 A That's right.

14 Q And the third one didn't show the sender's email address
15 at all, did it?

16 A It didn't.

17 Q Okay. And Games Workshop has no way of knowing if any of
18 these three individuals were in the United States, does it?

19 A No.

20 Q And the most recent of those three emails was dated
21 February 15th, 2010, is that right?

22 A I don't know. Sorry.

23 Q Well, we can go back through them, if you would like.

24 A Not really. Yes, we can do that.

25 Q Let me represent to you that the most recent one was dated

Stevenson - redirect

1 February 15th, 2010, since we just looked at them and it's in
2 the record.

3 So that was nearly three and a half years ago, wasn't
4 it, Ms. Stevenson?

5 A Yes.

6 Q Then there is a fourth email where you say, "another one
7 who is clearly not confused," isn't there?

8 A Yes. That was an email following an earlier email, as I
9 said.

10 Q As you said, thank you very much.

11 THE COURT: Redirect.

12 REDIRECT EXAMINATION

13 BY MR. KEENER:

14 Q I'm bringing up Plaintiff's Exhibit 1008, which is the
15 French eBay posting we have been discussing so far.

16 And counsel for Chapterhouse pointed out that the
17 price for the post is in Euro; do you remember that?

18 A I do, yes.

19 Q It also lists the price in U.S. dollars?

20 A It does, yes.

21 Q Counsel for Chapterhouse also mentioned that the seller is
22 in France?

23 A That's right.

24 Q Do you remember that?

25 Does it list where the seller is willing to ship this

Stevenson - redirect

1 product to?

2 A It ships worldwide.

3 Q So someone in the U.S. can see and purchase this product?

4 A Absolutely.

5 Q Let's move to Plaintiff's Exhibit 1009.

6 Is this product also offered in U.S. dollars?

7 A It is, yes.

8 Q And where do they ship this product?

9 A Again, worldwide.

10 Q Can we pull up Plaintiff's Exhibit 1007?

11 (Brief interruption.)

12 MR. KEENER: It should be in your binder. I'm sorry,

13 107. Thank you. There we go.

14 BY MR. KEENER:

15 Q Now, if you blow up the bottom part of this email, this is
16 what counsel for Chapterhouse just read to you:

17 "Hi. I've just found this website and they're
18 offering their own resin kit -- their own resin cast
19 conversion kits for Space Marine Rhino and Land Raider."

20 Do you remember that?

21 A Yes, I do.

22 Q And she didn't finish reading the sentence.

23 Can you finish reading the sentence and the next
24 sentence?

25 A Yes. It says:

Stevenson - redirect

1 "Space Marine Rhino and Land Raider tanks along with
2 a few other GW things. I don't know if they are doing this
3 under license, but thought you may want to take a look at this
4 just in case."

5 Q So would you think this customer has any confusion?

6 A I was convinced he was confused.

7 Q About what?

8 A About whether they were legitimate or had a license.

9 Q So the confusion wasn't whether or not that product was
10 made by Games Workshop, but what was the confusion?

11 MS. GOLINVEAUX: Objection, your Honor. Leading.

12 THE COURT: Overruled.

13 THE WITNESS: They were confused as to whether Games
14 Workshop had given a license to these people to make the Rhino
15 and Land Raider.

16 MR. KEENER: Thank you. No more questions.

17 THE COURT: Ms. Golinveaux, anything else?

18 MS. GOLINVEAUX: No, your Honor.

19 THE COURT: Any of the jurors have any questions for
20 this witness?

21 I don't see anyone writing. Okay, the witness is
22 excused.

23 THE WITNESS: Thank you.

24 (Witness excused.)

25 THE COURT: Please call the next witness.

Villacci - direct

1 MR. MOSKIN: Plaintiffs call as their next witness
2 Nicholas Villacci.

3 THE COURT: I'm not sure that I need to explain this
4 to you all, but I will anyway. There is no limitation on
5 whether one side can call the other side's people in their
6 case. The only difference that you might see is what
7 lawyers --

8 You can come up, Mr. Villacci.

9 -- what lawyers sometimes call leading questions, in
10 other words, where the question sort of suggests an answer,
11 leads the person in a particular way. Generally speaking, a
12 lawyer is not allowed to ask those on direct examination of
13 their own witnesses. They can only ask them on cross
14 examination. But when the witness is somebody from the other
15 side, they're allowed to ask leading questions on direct
16 examination.

17 That may be more information -- that may be TMI, as
18 they say these days. But if it is, don't worry about it.
19 Just put it out of your mind.

20 (Witness sworn.)

21 NICHOLAS VILLACCI, PLAINTIFF'S WITNESS, DULY SWORN

22 DIRECT EXAMINATION

23 BY MR. MOSKIN:

24 Q Good afternoon, Mr. Villacci.

25 A Good afternoon.

Villacci - direct

1 Q You have been playing --

2 THE COURT: Let's have him state his name and spell
3 his name first.

4 MR. MOSKIN: All right.

5 THE COURT: Do that.

6 THE WITNESS: Nicholas Villacci.

7 THE COURT: Spell the last name, if you would.

8 THE WITNESS: V, as in Victor, i-l-l-a-c-c-i.

9 THE COURT: Thanks. Go ahead, Mr. Moskin.

10 BY MR. MOSKIN:

11 Q You have been playing the game Warhammer 40,000 since the
12 19 -- early 1990s, correct?

13 A Yes.

14 Q And at one point when you were younger, you worked in a
15 store, a hobby store, that sold Games Workshop Warhammer
16 40,000 products, correct?

17 A Yes.

18 Q And over the years, would it be safe to say that you have
19 acquired a rather large collection of Games Workshop Warhammer
20 40,000 materials?

21 A Yes.

22 MR. MOSKIN: Can we bring up Plaintiff's Exhibit 70?

23 BY MR. MOSKIN:

24 Q And principally because I don't want to show you the whole
25 thing -- it's 185. I'm sorry.

Villacci - direct

1 (Brief interruption.)

2 BY MR. MOSKIN:

3 Q I want to show you the actual physical collection of
4 photographs, and as we scroll through on the video screen
5 these images, can you confirm this is, in fact, your
6 collection of Warhammer 40,000 materials, right?

7 A I definitely recognize those pieces, yes.

8 Q And it goes on for several hundred pages, correct,
9 Exhibit 185?

10 A I will take your word for that, yes.

11 Q I didn't hear the answer.

12 A I will take your word for that, yes, unless --

13 Q That's why I gave you the binders, so you could see.

14 A Yes.

15 Q Now, you formed Chapterhouse in, was it in 2009?

16 A I would think that's a good approximation of that date,
17 yes.

18 Q And there are two owners of the company, you and a Thomas
19 Fiertek?

20 A Yes.

21 Q And you own 51 percent of the company; he owns 49 percent?

22 A I think so, yes.

23 Q All right. Can we bring up Plaintiff's Exhibit 435 at
24 pages 1062 to 63?

25 And this is more or less what the home page of your

Villacci - direct

1 website looked like -- well, that's not the home page yet.

2 1062, that's what the home page of your website
3 looked like initially, correct?

4 A Yes.

5 Q With that tag line, specializing in custom sculpts and
6 bits for Warhammer 40,000?

7 A Yes, we did have that tag line out there.

8 Q And can we bring up Plaintiff's Exhibit 690 at page 28506?

9 And this is now what the website, the home page of
10 the website looks like?

11 A Yes.

12 Q So after the lawsuit, you removed the tag line,
13 specializing in custom sculpts and bits for Warhammer 40,000,
14 right?

15 A Sometime after the lawsuit, yes.

16 Q Now, there was some testimony earlier today about a
17 disclaimer at the bottom of the page of this website, and we
18 don't need to look at it, but do you recall that testimony?

19 A Yes.

20 Q Now, Games Workshop did not compel you to put the
21 disclaimer there, did it?

22 A No.

23 Q You chose that of your own free will?

24 A Yes.

25 Q Over the years your company has employed -- and I don't

Villacci - direct

1 need the exact number, but we can figure it out if we want to
2 do the math.

3 I figure roughly 23 designers, not including yourself
4 and Mr. Fiertek, is that about right?

5 A Yes.

6 Q Okay. And ten people who have painted products for you?

7 A That seems about right, yes.

8 Q Now, you market your products.

9 Other than on your own website, you market your
10 products specifically on the Internet forums that Mr. Merrett
11 described, correct?

12 A Yes.

13 Q And so these include forums such as belloflostsouls and
14 dakkadakka and bartertown, Heresy-online, WarSeer.com,
15 frothersunite, and so forth?

16 A I think so, yes.

17 Q And also on eBay, correct?

18 A Yes.

19 Q And you make a particular point, don't you, to market your
20 products on your website and on these forums in color?

21 A Yes.

22 MR. MOSKIN: Can we pull up Plaintiff's Exhibit 168
23 at pages 30 to 31?

24 (Brief interruption.)

25 BY MR. MOSKIN:

Villacci - direct

1 Q WarSeer is one of those Internet forums, correct, that
2 caters to fans of Warhammer 40,000?

3 A Yes.

4 Q And if we --

5 That's not it. At pages 30 to 31. There we go. Can
6 we zoom in on the statement at the bottom, and particularly
7 the language.

8 If we back up, for example, so you can see the page
9 and make sure that you know that's yours, that's your forum
10 post there at the bottom, correct?

11 A Yes.

12 Q Now if we can zoom in.

13 You state there:

14 "I have made a rule not to show products until I have
15 painted pictures of them."

16 Do you see that?

17 A Yes, I do.

18 Q And you made that statement on that forum, right?

19 A Yes.

20 Q Okay. And if you continue down to this page, you say:

21 "I have a few more products I will be showing next
22 week as soon as the paint jobs are done," right?

23 A Yes.

24 Q And here you are referring to parts compatible with Space
25 Marine troops and so forth, is that correct?

Villacci - direct

1 A Yes.

2 Q Now, if you follow over to the next page, you see at the
3 beginning there, it says:

4 "I want to throw open a job opening."

5 And what kind of person were you looking to hire?

6 A Professional level commission painter.

7 Q And that is because having unpainted products is one of
8 your biggest delays to releasing new bits and models, correct?

9 A Yes.

10 THE COURT: What is the exhibit number here? I'm
11 sorry, Mr. Moskin. My fault.

12 MR. MOSKIN: 168.

13 THE COURT: Thanks.

14 MR. MOSKIN: Pages 30 to 31.

15 BY MR. MOSKIN:

16 Q Now, let's pull up Plaintiff's Exhibit 144.

17 And this is another posting by Chapterhouse. Well,
18 was this by Chapterhouse or by you personally?

19 A Since I'm pretty much Chapterhouse, I guess you could say
20 both.

21 Q And Bartertown is one of those Internet forums we were
22 just describing and that Mr. Merrett discussed?

23 A Yes.

24 Q And here is it correct to say that --

25 I see, okay. In the top of the first line, it says

Villacci - direct

1 that you and your friend have started a small enterprise, and

2 I want to focus on the second sentence there. It says:

3 "He sculpts shoulder pads for chapters that you never
4 see."

5 Do you see that?

6 A Yes.

7 Q And those chapters that you never see are chapters of the
8 Space Marines, correct?

9 A Yes.

10 Q And among those chapters that you never see, would that
11 include chapters taken from books like the The Horus Heresy?

12 A It could.

13 Q Okay. And because when you say at the bottom that these
14 are not identical to any published works out there, a bit
15 generic, but similar that you could be able to use them with
16 little problem -- first of all, do you see that?

17 A Yes.

18 Q When you say, similar that you should be able to use them,
19 that means so that people playing Warhammer 40,000 would be
20 able to use them playing the game, right?

21 A Yes.

22 Q So in order to make products to appeal to customers of
23 Warhammer 40,000, they have to be similar enough to be
24 recognizable to them with the context or reference to the game
25 Warhammer 40,000?

Villacci - direct

1 A Not necessarily.

2 Q But that's what you wrote here. That's what your goal is
3 to do is to make products similar enough that they could be
4 used with little problem by people playing Warhammer 40,000?

5 A That's what I said there, yes.

6 Q Okay. Let's look at Plaintiff's Exhibit 147.

7 Now, this is one of the products that -- this is a
8 product announcement from one of the products that you have
9 sold, correct, power armor pad for Exorcist players?

10 A Yes.

11 Q And the name Exorcist has a specific meaning in Warhammer
12 40,000, right?

13 A Yes.

14 Q So in order to be similar enough for a player of Warhammer
15 40,000, you couldn't put on an Exorcist player's pad a picture
16 of a rose, for instance?

17 A You could.

18 Q But that wouldn't be recognizable to them as an Exorcist
19 pad, right?

20 A Not as depicted as the GW idea of Exorcist.

21 Q I didn't hear that. Not as depicted by?

22 Why don't you just state it back again.

23 A Not as depicted as GW's idea of Exorcist.

24 Q Okay. But in theory you could put a rose or a castle or a
25 sword on a product and call it an Exorcist shoulder pad,

Villacci - direct

1 right?

2 A Yes.

3 Q But that's not what you chose to do?

4 A No.

5 Q Because you want to make products that are similar enough
6 to the Games Workshop products so that it could be immediately
7 recognizable to players of Warhammer 40,000?

8 A No.

9 Q So that's just a coincidence that you happened to pick a
10 shoulder pad design that looks just like the Exorcist design
11 of Warhammer 40,000 rather than a rose or a sword or a castle?

12 A No, that's not a coincidence. But you said we want to
13 make products that were similar to GW products. That's
14 incorrect.

15 Q Okay. Similar enough so that they could be used by
16 players in the game.

17 A Yes.

18 Q And to achieve that, they have to be recognizable to them
19 as similar to the GW reference point?

20 A Yes.

21 Q Let's look at one more example of a shoulder pad product,
22 and we'll look at Plaintiff's Exhibit 149.

23 And this is a shoulder pad for chalice or Soul
24 Drinkers, is that right?

25 A Yes.

Villacci - direct

1 Q That's a product that Chapterhouse has sold?

2 A Yes.

3 Q Okay. Now, it says here that the products are in a
4 standard size in the text there, the bottom.

5 Do you see that?

6 A Yes.

7 Q And what does that mean?

8 A They're a standard size of a Space Marine shoulder pad.

9 Q So, in other words, they pretty closely, if not exactly,
10 match the dimensions of an actual Games Workshop shoulder pad
11 for a Space Marine?

12 A Yes.

13 Q And in order to achieve that near or exact identity
14 dimensions, you use a tool called a digimeter to measure the
15 dimensions of the Games Workshop shoulder pad?

16 A I personally didn't do anything like that, no.

17 Q Fair enough.

18 Designers at Chapterhouse have used tools which I
19 think you previously explained to me was called a digimeter.

20 A I've never heard of it myself.

21 Q So is that correct, that designers for Chapterhouse have
22 used that tool?

23 A Yes, we have used that tool.

24 Q And for that reason, to make sure that the dimensions are
25 as close as possible to the Games Workshop original?

Villacci - direct

1 A I'm not sure about the process they went in to design our
2 shoulder pads in particular, no.

3 Q But it's your understanding that a digimeter allows you to
4 take very precise measurements, correct?

5 A Yes.

6 Q And, hence, you're able to offer a product in a standard
7 size for a Space Marine tactical shoulder pad?

8 A I think you're inferring what a digimeter does allows you
9 to do that. It could. But like I said, I didn't design the
10 specific pad itself. So I don't know what process they went
11 through to do that.

12 Q But, nonetheless, by referring to the standard size here
13 and in Exhibit 149, what you're talking about is matching
14 fairly closely the actual dimensions of a Games Workshop Space
15 Marine shoulder pad?

16 A Yes.

17 Q All right. Let's look at Plaintiff's Exhibit 189, and can
18 you tell us what this is?

19 A It looks like an email dated October 30th, 2009, from
20 myself to Wyatt Traina.

21 Q Wyatt Traina is somebody who worked as a designer for
22 Chapterhouse?

23 A Yes.

24 Q I want to focus on at the end of the second paragraph, and
25 it says:

Villacci - direct

1 "While using the same measured dimensions in 3D
2 applications," starting there.

3 A Okay.

4 Q So what does that mean, that you are --

5 Why don't you tell me what that means, to using the
6 same measured dimensions in 3D applications.

7 A Can we scroll down so I can read the rest of the email?

8 Q Sure. And you have a book of all these exhibits in front
9 of you as well.

10 A 189. Okay. Can you repeat your question?

11 Q So you have said to Mr. Traina:

12 "We have gone through a lot of resources to design
13 our own stuff from scratch while using the same measured
14 dimensions and 3D applications."

15 I'm just asking what you meant there.

16 A That we -- you know, whenever we want to design a product
17 that fits on a specific Games Workshop product, we need to
18 make sure it fits and that the customer doesn't have to buy
19 our product, then cut into it and try to get it -- jam it into
20 a space that fits. So we measure our products to make sure
21 they fit correctly.

22 Q And if you look at the top line of that, it says:

23 "GW has no legal say."

24 Does that pretty much sum up your feeling, that whole
25 paragraph, the top paragraph, that GW has no legal say, that

Villacci - direct

1 what people make to use with their models as long as it isn't
2 a direct copy or recast?

3 A Yes.

4 Q Okay. Let's pull up Plaintiff's Exhibit 170 because I
5 would like to explore with you a little further what is the
6 company philosophy, and we'll go to page -- it's 12 pages from
7 the back. No, not that, 12 pages back.

8 (Brief interruption.)

9 MR. MOSKIN: That looks like it, I think. Yes, okay.

10 BY MR. MOSKIN:

11 Q And that's the Chapterhouse logo on the left?

12 A Yes.

13 Q And so that's a forum post by you?

14 A Yes.

15 Q And you see that --

16 I will cut out some of the offensive language, but
17 you see there's a question that says that "peeps are making
18 requests. How about some iron hands stuff?"

19 Do you see that?

20 A Yes.

21 Q You said in response -- why don't you read out loud what
22 you wrote in response.

23 A "We have been considering that chapter for a while. We
24 just need to be able to create an icon similar enough to the
25 real GW icon while being acceptable to players as well, but we

Villacci - direct

1 can't copy the GW one straight on. It's a tricky thing."

2 Q Let's continue to Plaintiff's Exhibit 744. And it's -- if
3 you look at the very top, it says dakkadakka? Do you see in
4 the --

5 A Yes.

6 Q -- the navigation line at the top?

7 A Yes.

8 Q Okay. And do you see in the middle, there's a question
9 put to you by a potential customer or somebody. It says:

10 "Just out of interest, whatever happened to the
11 armored predator front panels you guys were working on a while
12 back?"

13 Do you see that?

14 A I honestly can't make it out.

15 Q Can you back it out a little to make it legible?

16 Again, you can refer to the --

17 A Which exhibit is this?

18 Q It's 744. There's only one page in that exhibit.

19 A I'm sorry. I'm not -- these just aren't in number order.

20 Q No, no. They're sort of in sequence that I'm going.

21 A Okay.

22 Q So you see where in the middle there, the customer says:

23 "Just out of interest, whatever happened to the
24 armored predator front panels you guys were working on a while
25 back?"

Villacci - direct

1 A Yes.

2 Q And can you read your response?

3 A Is that --

4 Q Yes.

5 A Because it looks like there's something blacked out there.

6 That could be a response.

7 Q Right. We have --

8 THE COURT: I think you should just assume that the
9 response is what is not blacked out. Is that a fair
10 statement?

11 MR. MOSKIN: Yes. There may have been an additional
12 part of your response, but the parties have agreed.

13 THE COURT: The blacked out stuff is not relevant,
14 and so we didn't want to just sort of clutter up things with
15 irrelevant stuff.

16 MR. MOSKIN: Thank you, your Honor.

17 THE COURT: All right.

18 THE WITNESS: Do you want me to read it still?

19 BY MR. MOSKIN:

20 Q Can you read that part of your response to this customer?

21 A "Yes, but we had to walk a line there. It's hard to
22 predict what people buy when it comes to existing chapters.
23 How close to the original iron hands icon do we have to stay
24 to make some money off it?"

25 Q "To make some money off it," that's what you wrote?

Villacci - direct

1 A That's what it says.

2 Q That's what you wrote?

3 A Yes.

4 Q And let's look at Plaintiff's Exhibit 183. And do you
5 have that in front of you?

6 A Yes.

7 Q And is this an email exchange between you and Mr. Fiertek,
8 your co-owner?

9 A Yes.

10 Q If we look at the second page, under the number 3, do you
11 see the question that Mr. Fiertek put to you?

12 "If 2D, how alike must it be -- how alike must it be
13 the GW Raven Guard shape? Does it have to look like an, aha,
14 it's Raven Guard when viewed from the front?"

15 Do you see that?

16 A Yes.

17 Q And Raven Guard is a chapter of the Space Marines?

18 A Yes.

19 Q And let's go back to the first page. And can you read
20 your response, the first paragraph at the top?

21 A First paragraph?

22 Q "For our Raven Guard."

23 A Yes.

24 "For our Raven Guard, a separate work from Mike's
25 Blood Ravens, I think the outside profile should be the same

Villacci - direct

1 roughly but with 3D added to it. So if a customer wanted to
2 paint the Raven all black, it would look the same as GW's
3 profile, but with tons of 3D detail added to it. It would
4 just be hard to see painted black."

5 Q And the GW you are referring to there is Games Workshop?

6 A Yes.

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Villacci - direct

1 Q And the GW you're referring to there is Games Workshop?

2 A Yes.

3 Q And when you market your products, you also make some
4 effort to time the release, don't you, so that it can be
5 coordinated with Games Workshop's releases of its new codexes?

6 A No.

7 Q No? Okay.

8 Well, let's look at Plaintiff's Exhibit 177. And I
9 think you'll agree this is the same Mr. Traina we mentioned a
10 moment ago, who was one of your designers?

11 A Yes.

12 Q And this is an email. It's -- at the top it says -- I
13 can't see the attachment, and that looks like it's from
14 Mr. Traina, right?

15 A Yes.

16 Q And then below that is your message to him?

17 A Yes.

18 Q Okay. And can you read the last line of that message
19 to -- that you wrote to Mr. Traina?

20 A "Well, we can release your stuff in time for the Blood
21 Angels codex coming up."

22 Q "Well, I think if you time your sculpting well, we can
23 release your stuff in time for the Blood Angels codex coming
24 up," that's what you wrote to him, right?

25 A That's the complete sentence.

Villacci - direct

1 Q So in fact you do make some effort, at least, to time the
2 release of your products to be coordinated with the release of
3 Games Workshop's codexes, right?

4 A Yes.

5 Q Let's go to one of the products you sell called the
6 Javelin Class jetbike.

7 And if you could bring up on the comparison chart
8 Plaintiff's Exhibit 1011 at page 24.

9 And this depicts the two different -- this depicts
10 the Javelin Class jetbike that Chapterhouse sells, correct?

11 A Yes.

12 Q And if you'd go to the next page, that's the Pylum
13 Imperial jetbike that Chapterhouse sells?

14 A Yes.

15 Q And the main difference is that you've added the fin at
16 the back and some extra weaponry?

17 A Yeah. That could be accurate, yes.

18 Q And let's take a look at Plaintiff's Exhibit 163. And
19 this is, I think, an announcement by Chapterhouse Studios of a
20 delay in the release of the jetbike?

21 A Yes.

22 Q And if you look at the second page of the release, it says
23 here, and you see the end of the second line that, "Looking
24 for the next toy release for the Heresy era 40K players." Do
25 you see that?

Villacci - direct

1 A Yes.

2 Q And that reference to Heresy, that's a reference to the
3 Horus Heresy by Games Workshop?

4 A Yes.

5 Q And in designing this product, you were specifically
6 inspired, weren't you, by the image from the Horus Heresy
7 shown at Exhibit 969, page 18763?

8 And I refer you to in the middle on the right. Do
9 you see that?

10 A Yes.

11 Q Okay. And that was the specific source of inspiration for
12 Chapterhouse in making its jetbike?

13 A No.

14 Q It wasn't.

15 A No.

16 Q Okay. In making your jetbike, you did look, I think
17 you -- perhaps you'll agree, at the actual Games Workshop bike
18 that Games Workshop sells, the physical model it sells, right?

19 A No.

20 Q All right. Well, let's call up Plaintiff's Exhibit --

21 A I'm sorry. Can I correct myself on that?

22 Q Excuse me?

23 A Can I correct myself on that?

24 Q Absolutely.

25 A Yes, Games Workshop bike.

Villacci - direct

1 Q Yes.

2 A They have a Games Workshop bike, yes.

3 Q Right. And we just saw that on the comparison chart on --

4 A Which?

5 Q A picture of the Games Workshop bike in addition to this
6 image of the Horus Heresy bike.

7 You can go back to Plaintiff's Exhibit 1011, page 24.
8 That's a Games Workshop bike at the bottom, right?

9 A Yes.

10 Q Okay. Now, let's call up Plaintiff's Exhibit 158. I'm
11 sorry. 174.

12 And can you see -- first of all, is this a series of
13 emails between you and one of the designers of the jetbike?

14 A No.

15 Q Well, that's you at the top, right?

16 A Yes.

17 Q And who designed the jetbike?

18 A I believe it was myself, Jeffrey Nagy and Tim all had
19 input on how it ended up.

20 Q And do you know somebody named Michio Okamura?

21 A Yes.

22 Q And was he involved in designing the jetbike?

23 A Not the bike itself, no.

24 Q Okay. And he designed legs and arms for the rider on the
25 bike?

Villacci - direct

1 A He did sculpt legs and arms.

2 Q Okay. And let's look at -- so this is an email chain
3 between you and Mr. Okamura, right?

4 A Yes.

5 Q Okay. And let's -- and this was created before the bike
6 was released, right?

7 A Yes.

8 Q Let's look at page 1 of Plaintiff's Exhibit 174.

9 And you see in the middle, the second line down,
10 Mr. Okamura says to you, "The bike's overall size and length
11 matches with the GW, but the seats controls, handlebars, et
12 cetera, are proportionally too small for the rider," right?

13 A Yes.

14 Q So clearly in the course of creating your jetbike, one of
15 your designers was making specific reference to the Games
16 Workshop bike?

17 A I feel it important to differentiate between the arms and
18 legs of the rider and the actual bike design.

19 Q But he commented on the fact that the bike's -- your
20 bike's overall size and length matches with Games Workshop's
21 bike?

22 A Our bike was done before he ever saw -- before this email
23 ever came up.

24 Q Was it just a complete coincidence your bike matched the
25 size of Games Workshop's bike?

Villacci - direct

1 A I can't testify if the bike matches the size of Games
2 Workshop's bike. I've never compared it to --

3 Q You --

4 A Looks like he has.

5 Q I'm sorry. I didn't mean to interrupt.

6 So you have no explanation for why Mr. Okamura, one
7 of your designers, thinks that the overall size and length of
8 your bike matches the Games Workshop bike?

9 A Yes.

10 Q Yes, that is you have no explanation?

11 A Yes.

12 Q And if we go back to Plaintiff's Exhibit 1011, page 24,
13 the arms and legs on the Chapterhouse product on the left,
14 those were made by Chapterhouse?

15 A Yes.

16 Q Okay. And they were made to look pretty much exactly like
17 Games Workshop Space Marine arms and legs, right?

18 A No.

19 Q No?

20 You don't think those look anything like the Games
21 Workshop Space Marine arms and legs?

22 A They're armored arms and legs. Games Workshop has armored
23 arms and legs.

24 Q That's the extent of the similarity you see?

25 A Yes.

Villacci - direct

1 Q Okay. And the rest of the rider, was that a Games
2 Workshop Space Marine?

3 A No.

4 Q You made that whole rider?

5 A Yes.

6 Q And would you agree that your rider on that bike looks
7 incredibly similar to the Games Workshop Space Marine?

8 A No.

9 Q You don't -- do you see any similarity?

10 A Yes.

11 Q Okay. But you don't think it's particularly --

12 How similar do you think it is?

13 A They're both armored, and they both have shoulder pads and
14 a helmet.

15 Q Can you identify any differences between your design --
16 and you can refer -- it may not be the best example, but there
17 is a picture of a Games Workshop Space Marine on the lower
18 right. Can you identify any differences, salient differences
19 between your design and the Games Workshop original Space
20 Marine?

21 A Yes.

22 Q Okay. Please tell us.

23 A Games Workshop's Space Marine seems to have a backpack on
24 the back of it.

25 The shoulder pads seem to have raised ridges on the

Villacci - direct

1 edge of the shoulder pad. It's a flat surface on the edges --
2 on the shoulder pads themselves, no studs.

3 Games Workshop's helmet is different. The eyes, the
4 eyes are the same color, but I can't really -- much detail.
5 If you look closely at the Chapterhouse Studios head, you can
6 see actual studs on the white portion of the helmet. I don't
7 see any studs on the Chapterhouse -- the Games Workshop
8 helmet. They look like they have round gas mask components on
9 the helmet. I don't think you see those on Games Workshop
10 component either.

11 The face mask itself is kind of like a pointed, like
12 this on ours. The Games Workshop helmet is the stereotypical
13 Space Marine flat nosed in the mouth area.

14 The torso itself is different. I believe the Games
15 Workshop back of the torso is just a little round half
16 hemisphere so you can put their backpack on it. Our torso
17 looks like it has mechanisms on there. The front of our torso
18 also has a raised part neck guard. I don't think this Games
19 Workshop torso incorporates that. The Games Workshop torso
20 also has a icon of a winged -- the Games Workshop winged
21 aquila that they say is their trademark. We don't use that on
22 our torso at all. Our torso is unadorned, just the
23 stereotypical armored power armor torso.

24 I can't see what the belly area is on their torso
25 because it's kind of hidden behind the handlebars and stuff,

Villacci - direct

1 the cowl.

2 Looks like on our leg we have a mechanism on a thigh.
3 I don't see anything like that on the Games Workshop upper
4 tor -- thigh.

5 Besides that, the arms look armored. I can't really
6 see much detail on the arms of the Games Workshop arm, so all
7 I can really see is the hands.

8 Q Can we look again at Plaintiff's Exhibit 189 and the top
9 line again.

10 So this would be a specific example of your
11 philosophy that Games Workshop has no legal say about what
12 people make to use their models with as long as it isn't a
13 direct copy or recast; is that right?

14 A That's what that says.

15 Q And the Space Marine figure we were just looking at,
16 that's an embodiment of the philosophy that you expressed on
17 the top of Exhibit 189?

18 A Which product are you referring to as Space Marine?

19 Q The Space Marine figure on the bike, your bike.

20 A Our bike, that's one of our Knights Praetorius figures.

21 Q Okay. One more time let me ask the question. That figure
22 sitting on the bike, your bike, is an embodiment of the
23 philosophy you express here in Plaintiff's Exhibit 189 that
24 Games Workshop pretty much has no legal say about what people
25 make to use with their models as long as it isn't a direct

Villacci - direct

1 copy or recast?

2 A I don't think that product is an embodiment of anything
3 I've said.

4 Q Excuse me?

5 A I don't think that product is an embodiment of anything
6 I've said. It's a product.

7 Q I'm saying it's an embodiment of your philosophy that you
8 seem to think you're free to copy pretty much exactly as long
9 as it's a little less than a perfect copy?

10 A No.

11 Q That's not -- that's the philosophy that you've expressed
12 at the top of page 189, correct?

13 A What I said on the top of page 189 is what's typed in
14 there. You're -- I mean, I'll read it again. "GW pretty much
15 has no legal say about what people make to use with their
16 models as long as it isn't direct copies or recast of the
17 models."

18 Q And what I'm asking you simply, and you don't have to
19 agree with me if you don't want to, that the figure sitting on
20 your jetbike is -- is it or is it not a reflection of the
21 philosophy that Games Workshop can't people -- can't stop
22 people from making copies as long as those copies aren't
23 direct exact copies or recasts?

24 A No.

25 Q That's -- okay.

Villacci - direct

1 Now, let's go back to looking at your jetbikes, and
2 let's look at the release announcement, which was, I think,
3 Exhibit 163. And jump down another page. Okay. That's
4 probably good enough -- or maybe if you can show that and the
5 following page together so we can see the actual --

6 This physical model, this was produced, made on a 3D
7 printer?

8 A The bike, yes.

9 Q And so that means you use a computer program and you
10 generate a computer model of the design and then literally
11 print it out, and it was this new high tech device that allows
12 you to create physical models like a printer?

13 A Yes.

14 Q And in order to make products this way, you also need to
15 use computer programs called CAD programs or computer-assisted
16 design programs, right?

17 A Yes.

18 Q And this isn't the only product that Chapterhouse has made
19 that way, right?

20 A No.

21 Q And once you have the computer model, you can send it to a
22 manufacturer anywhere in the world to make up as many copies
23 as you'd like, right?

24 A Yes.

25 Q And, in fact, you used, for example, a production company

Villacci - direct

1 in China to make the casts working off of these computer
2 models?

3 A That's one of the companies we used, yes.

4 Q Now, let's look at Plaintiff's Exhibit 884, pages 1 to 2.
5 This is -- can you tell us what we're looking at?

6 A Looks like a post from Chapterhouse Studios notifying the
7 forum we're releasing this kit, among other kits.

8 Q All right. Let's turn the page and see what the customer
9 identified as West Side had to say about it. Can you read
10 what he wrote at the top there?

11 A West Side wrote: "I was referring to the design on
12 jetbike, looks just like I remember the pre-Heresy jetbikes
13 looking like in the Sabertooth card game. There's pictures of
14 a bike quite like this one (the inspiration for it?) in the
15 Horus Heresy Collected Visions art book."

16 Q And that's the image we were just looking at a moment ago,
17 isn't it, from Plaintiff's Exhibit 969, the Horus Heresy
18 Collected Visions; is that right?

19 A Is this the Horus Heresy Collected Visions?

20 Q That image I just showed you a moment ago that's in the
21 claim chart, the image of the Heresy era jetbike.

22 A Okay.

23 Q That's the same image -- as far as you know, that's what
24 he's talking about?

25 A I don't know what he's referring to.

Villacci - direct

1 Q You don't know. All right.

2 And you know you didn't copy the image from the Horus
3 Heresy jetbike in making your jetbike, right?

4 A No.

5 Q Okay. Let's look at Plaintiff's Exhibit 885, and page 3.

6 A Mine's all blacked out.

7 Q Oh.

8 A Like the whole post is blacked out.

9 THE COURT: Can you just look at the one on the
10 screen?

11 THE WITNESS: It's real small.

12 BY MR. MOSKIN:

13 Q All I want to point you to is at the bottom there's a
14 posting by you. It says Chapterhouse Studios. Do you see?

15 A Yes.

16 MR. MOSKIN: And before -- I just want to be sure
17 we're not going to show him something that's unpermitted. Let
18 me just check before we show it online what the next page is.

19 THE COURT: Okay.

20 MR. MOSKIN: Let me use the ELMO because I don't want
21 to show anything inappropriately.

22 MS. HARTZELL: Can I see it?

23 MR. MOSKIN: Yes, absolutely.

24 (Brief pause.)

25 MS. HARTZELL: May we have a side bar, your Honor?

Villacci - direct

1 (The following proceedings were had at sidebar in the
2 presence but out of the hearing of the jury:)

3 THE COURT: So what's the issue?

4 MR. MOSKIN: Somehow, the unredacted went through,
5 your Honor.

6 THE COURT: I'm confident that nobody could read it
7 because I was squinting and I still couldn't see it.

8 MR. MOSKIN: So I just wanted to show him his image.
9 This is what we've agreed under --

10 THE COURT: So what you're going to do, you're just
11 going to pop it on the ELMO and then blow it up?

12 MR. MOSKIN: Right.

13 MS. HARTZELL: I think our concern is that there's
14 text here that we believe is relevant.

15 THE COURT: That you want in.

16 MS. HARTZELL: Yes.

17 THE COURT: Oh. Okay.

18 MS. HARTZELL: And this was, I agree, sent to us last
19 night, but we were looking for things that should have been
20 redacted that were not and not --

21 THE COURT: Not the opposite.

22 MS. HARTZELL: Yes.

23 THE COURT: Do you have a copy of this that doesn't
24 have the blacked out part there?

25 MS. HARTZELL: I do not.

Villacci - direct

1 MR. MOSKIN: But it has the whole thing.

2 THE COURT: Has the whole thing. And it's just the
3 part above the image that you want in?

4 MS. HARTZELL: Right. It's the post.

5 THE COURT: I assume he's got the capability of
6 looking something on his screen before it gets popped up?

7 MR. MOSKIN: That's why I wanted to check.

8 THE COURT: Maybe what you could do is you could have
9 him --

10 MS. HARTZELL: Blow up.

11 THE COURT: -- blow up just the top part.

12 MR. MOSKIN: I think we have an objection to some of
13 the text.

14 THE COURT: Oh. Well, then I need to see it. Does
15 somebody have something I can see?

16 MR. MOSKIN: Can I make a different suggestion?

17 THE COURT: I tell you what, I'm going to walk over
18 there.

19 MR. MOSKIN: Thank you.

20 (The following proceedings were had in the presence
21 and hearing of the jury:)

22 THE COURT: Don't mind me. I have to look at
23 something that's only on the screen. I know this is a breach
24 of protocol, but whatever.

25 (Brief pause.)

Villacci - direct

1 (The following proceedings were had at sidebar in the
2 presence but out of the hearing of the jury:)

3 THE COURT: Okay. So what's the thing up here that
4 you think is relevant, Ms. Hartzell?

5 MS. HARTZELL: We think his listing of the
6 differences.

7 THE COURT: "I see many differences," blah, blah,
8 blah. Okay. Let me just see some context here.

9 MS. HARTZELL: And it may also be relevant to context
10 that it was posted before, posted a link to that picture that
11 Mr. Villacci was not provided.

12 THE COURT: Well, so give me your argument as to why
13 this isn't relevant, Mr. Moskin.

14 MR. MOSKIN: You know, I'm going to withdraw the
15 exhibit.

16 THE COURT: I think it's relevant.
17 You're going to withdraw the exhibit.

18 MR. MOSKIN: Yes.

19 THE COURT: All right. Fine.

20 (The following proceedings were had in the presence
21 and hearing of the jury:)

22 THE COURT: Okay. I think Mr. Moskin's is going to
23 move to a different point.

24 MR. MOSKIN: Yes. I am going to move on.

25 BY MR. MOSKIN:

Villacci - direct

1 Q Okay. Within the same exhibit, let's just refer instead
2 to page 2 of Exhibit 885.

3 THE COURT: So just so you know, we'll be -- in 20
4 minutes is when we're going to take a break. If you want to
5 make any adjustments, you can hold it till then.

6 MR. MOSKIN: Okay. We can come back to this later.

7 THE COURT: Right.

8 BY MR. MOSKIN:

9 Q Now, you sell a product called the Striking Scorpion,
10 right?

11 A No.

12 Q All right. You sell a product called the Armana'serq,
13 right?

14 A Yes.

15 Q And that's your version of the Eldar Striking Scorpion,
16 right?

17 A No.

18 Q Let's look at Plaintiff's Exhibit 164.

19 First of all, that's your announcement, and that's
20 the Armana'serq Scorpion Warrior Priestess?

21 A Yes.

22 Q And it's just a coincidence that you call this a scorpion
23 warrior priestess and Games Workshop sells an Eldar scorpion,
24 Striking Scorpion, right?

25 A No.

Villacci - direct

1 Q No?

2 Your product, then, is in fact modeled after the
3 Games Workshop Eldar Striking Scorpion, correct?

4 A The idea that they had.

5 Q And once again when we say the idea, do you mean by that
6 the same philosophy we were discussing earlier that it's okay
7 to copy as long as you're not making exact recasts?

8 A No.

9 Q Let's look at Plaintiff's Exhibit 171.

10 And, first of all, is this the same Mr. Okamura that
11 we mentioned before as one of your designers?

12 A Yes.

13 Q And if you look at the bottom of page 2, you see in your
14 email to Mr. Okamura says, "I would like for you to explore
15 alternate sculpts for the Exarch Warriors (if GW makes a male
16 version, let's do a female nicer version and vice versa)"?

17 A Yes.

18 Q And the Games Workshop Striking Scorpion is one of its
19 Exarch Warriors?

20 A I don't think you quite got that right, but you got it
21 close enough.

22 Q Okay. And the -- let's turn back to the first page, and
23 do you see your message at the very bottom, "What exarch do
24 you want to do first," and that's from you to Mr. Okamura?
25 It's at the very bottom of the page?

Villacci - direct

1 A Yes.

2 Q And can you read the -- Mr. Okamura's response to you in
3 the email immediately above?

4 A "You mentioned Striking Scorpions, so I was going to start
5 with that."

6 Q So you told him to look at the striking scorpions in the
7 Warhammer 40,000 as your inspiration for the Armana'serq
8 character?

9 A Yes.

10 Q And do you see at the top you instructed him that it could
11 include mandiblasters? Do you see that?

12 A Yes.

13 Q And that's a feature of the Eldar Warriors in Games
14 Workshop's universe?

15 A Yes.

16 Q And do you see you ask, "I'm not sure what weapons she can
17 legally have"? Do you see that?

18 A Yes.

19 Q So you wanted to be sure that she had the same weapons
20 that were permitted or contemplated by the Eldar codex, right?

21 A Yes.

22 Q When you say what weapons can she legally have, were you
23 worried about copyright infringement, or were you worried
24 about rules or customs in playing Warhammer 40,000?

25 A The game rules.

Villacci - direct

1 Q Okay. So what does that mean in the context of Warhammer
2 40,000, to be legal within the game?

3 A In the game it's a set of rules in the books, you know,
4 the codex Eldar. By now I'm sure you know all about that
5 stuff. Each army unit, troop, creature, is allowed certain
6 equipment, and that's what I was talking about.

7 Q So, again, it had to suit the needs of Warhammer 40,000
8 players?

9 A Right here, yes.

10 Q I'm sorry?

11 A What I'm talking about here, yes.

12 Q And let's look at Plaintiff's Exhibit 181, and do you
13 recognize this email from somebody who identified themselves as
14 Honda Kowabunga?

15 A Is that 181?

16 Q 681. I'm sorry.

17 A Honda Kowabunga?

18 Q Right.

19 A Yes, I see that.

20 Q If I can call him Mr. Kowabunga, this is a customer of
21 yours?

22 A I couldn't tell if he was a customer of mine. He
23 definitely emailed us.

24 Q If you look at page 22 -- 22279, can you read how
25 Mr. Kowabunga at the very last line on the page referred to

Villacci - direct

1 your Armana'serq product?

2 It says, "by the way."

3 A "The new Eldar Scorpion."

4 Q Okay. So he was referring to your Armana'serq as an Eldar
5 Scorpion, correct?

6 A New Eldar Scorpion, yes.

7 Q And that was the Armana'serq character?

8 A I don't know what --

9 Q Is there any other product you think it could be that you
10 sell?

11 A No.

12 Q So you yourself recognize that among all your products
13 this is obviously what he's referring to, the Armana'serq,
14 because it looks so much like the Games Workshop Striking
15 Scorpion?

16 A It's the model we sculpted and modeled after the idea of
17 the unitype.

18 Q And when you say "idea" --

19 Never mind. I'll move along.

20 Now, you also sell a product called the Doomseer
21 Iyanar-Duanna?

22 A Yes.

23 Q Let's look at Plaintiff's Exhibit 161.

24 And is this the product?

25 A Yes.

Villacci - direct

1 Q And this product was modeled after the Eldar Farseer?

2 A No.

3 Q No.

4 A It's --

5 Q Sorry?

6 A The concept of a psycher.

7 Q And had nothing to do with Games Workshop at all?

8 A We drew inspiration from Games Workshop.

9 Q Okay.

10 And is that why in the little bit of fluff here on
11 this page you refer to her as someone with the ability to
12 foresee the slow death of her race?

13 A I wouldn't say that, no.

14 Q Because that, after all, is how the Eldar Farseers are
15 described in the fiction from Games Workshop, right?

16 A No.

17 Q No? Okay.

18 So you disagree with Mr. Merrett that that's how the
19 Eldar Farseer are described in the Games Workshop fiction?

20 A I'm not sure what Mr. Merrett's description was of that.

21 Q And let's look at Plaintiff's Exhibit 172.

22 Is this a series of emails between you and
23 Mr. Okamura?

24 A Yes.

25 Q And he was involved -- was he involved in designing the

Villacci - direct

1 Doomseer product?

2 A No.

3 Q And if you'd look at the second to last page, page 28,
4 when you were telling Mr. Okamura about the new plans for the
5 Armana'serq, can you look at the middle at -- your email sort
6 of at the bottom, right here, how did you describe what you
7 wanted in the new Armana'serq as compared with the Doomseer?

8 A Can you repeat the question? I'm sorry.

9 Q Well, I'll state it a different way.

10 When you were describing to Mr. Okamura what you
11 wanted him to do in creating the Armana'serq character, you
12 told him, didn't you, that "I would rather have the weapons
13 options included with the mini; we did this with the female
14 warseer"? Do you see that?

15 A Yes.

16 Q And that female warseer is a reference to the Doomseer,
17 right?

18 A Yes.

19 Q So you were -- you thought it was important to include
20 with your Doomseer the weapons options that were available for
21 the Eldar Farseer, right?

22 A Can I have a second to read the rest? Thank you.

23 Sorry. Can you ask your question one more time?

24 Q When you were telling Mr. Okamura how to design the
25 Armana'serq character, you began by telling him to use the

Villacci - direct

1 same weapons options you did with the female warseer, right?

2 A No.

3 Q No? That's not what that says?

4 A No.

5 Q Okay.

6 And -- but that reference to the female warseer,
7 that's a reference to the Doomseer, right?

8 A Yes.

9 Q Now, if you scroll up the page a little bit, you see it
10 says -- Mr. Okamura asks you, "How different do the designs
11 have to be from Games Workshop stuff? Is the Eldar model I'm
12 working on different enough, or have I wasted my time on the
13 model?" Do you see that?

14 A Yes.

15 Q Okay. And there he's referring to the Armana'serq, the
16 Eldar model?

17 A Yes.

18 Q And if we go up one page to page 26, right here, can you
19 read what you wrote in response?

20 Or I'll read it for you.

21 "From what I see, that is plenty nice and original
22 enough." Is that right?

23 A Yes.

24 Q So once again, is this a reflection of your philosophy
25 that it's okay to copy Games Workshop as long as the copies

Villacci - direct

1 aren't exact and as long as they're not just recasting their
2 products?

3 A No.

4 Q You mean something different.

5 Let's move on to Plaintiff's Exhibit 690 at page -- I
6 think it's page 101.

7 And here you've got all of your Eldar compatible bits
8 arrayed on your website, correct?

9 A Yes.

10 Q And here you include the Doomseer Iyanar-Duanna on the
11 left; is that right?

12 A Yes.

13 Q And that's the same product you just told me a moment ago
14 is not just an Eldar character?

15 A It's not a character from the Eldar codex.

16 Q And because it's not a character from the Eldar codex,
17 that's why you put it under your page under Eldar compatible
18 bits?

19 A It's a character that may appeal to Eldar players.

20 Q And the reason it appeals to Eldar plays is because it
21 looks almost exactly like an Eldar Farseer, right?

22 A No.

23 Q There's some other inherent reason about it that it would
24 appeal to Games Workshop players?

25 A The general aesthetics.

Villacci - direct

1 Q And likewise the Armana'serq, you advertised this here on
2 your web page as being an Eldar compatible product, right?

3 A Yes.

4 Q I guess we've already established that your designer was
5 looking at Eldar in making it, so that's why you advertise it
6 as an Eldar product, right?

7 A I don't think we have established that.

8 Q Okay. You don't think we've established that your
9 designer was looking at the Eldar Striking Scorpion in making
10 his product for you?

11 A I never saw him say that in his emails.

12 Q You just read that email from him that he was modeling it
13 on an Eldar product, wasn't he?

14 A Are you saying that he said he had an Eldar model in front
15 of him while he was sculpting it?

16 Q I didn't say that. But he was looking at an image, he had
17 something in front of him to reference specifically the Eldar
18 character the Striking Scorpion?

19 A I don't remember seeing that in an email anywhere.

20 Q Let's go back at the email we were just reviewing, which
21 is, I believe, was Plaintiff's Exhibit 172 at the second to
22 last page, and the same sentence I just referred to you, "How
23 different do the designs have to be from the GW stuff? Is the
24 Eldar model I'm working on different enough, or have I wasted
25 my time on the model?" Do you see that?

Villacci - direct

1 A Yes.

2 Q So do you disagree or do you have any reason to disagree
3 that Mr. Okamura was modeling his Armana'serq for you on an
4 Eldar model?

5 A I think anyone familiar with the Eldar models and line has
6 a general idea of what his Eldary and a striking scorpion
7 looks like. The features are hard angles and stuff like that.
8 I don't think that necessarily means he was looking at the
9 model.

10 Q And let's look at Plaintiff's Exhibit 168, and it would be
11 pages 30 to 31.

12 And do you see at the bottom your post --

13 A Mr. Moskin, I don't know if it makes a difference, but
14 that exhibit isn't the same one that's labeled in my binder.

15 Q If we can, let's refer to this just for now.

16 You can see this text in Plaintiff's Exhibit 168,
17 right?

18 A Yes.

19 Q There we go.

20 And on I think that would be February 18, 2011, you
21 wrote that, again we showed you this earlier, that you made a
22 rule against showing products that are unpainted. Do you see
23 that?

24 A Yes.

25 Q And you have -- you were working on a stand-alone proxy

Villacci - direct

1 for an Eldar unit. Do you see that.

2 A Yes.

3 Q And were you referring there to the Striking Scorpion, or
4 were you referring to the Doomseer?

5 A Neither.

6 Q Oh, really.

7 Okay. Well, let's go down one page and right at the
8 bottom, here, and I don't know why this laser pointer is not
9 pointing, and here on -- if you scroll over to the side, right
10 around the same time, it was on, again, February 18th, 2011,
11 you refer to -- you say in the middle, "If you have ever
12 wanted a female mage model for your Elfish or Space Elf
13 collections, this may be your lucky day." Do you see that?

14 A Yes.

15 Q And what product are you referring to there?

16 A The Doomseer.

17 Q So let's look at the next page. And that's your Doomseer
18 product right there, right?

19 A Yes.

20 Q So when you started earlier that day -- that same day, on
21 February 8th, you were talking about a new stand-alone product
22 as a proxy for an Eldar unit, and later on that same day you
23 showed people on this same forum the Doomseer model, right?

24 A Yes.

25 Q Okay. But that Doomseer model is not a -- it's your

Villacci - direct

1 testimony that that Doomseer model is not a proxy for an Eldar
2 unit?

3 A That's not the same product I was talking about.

4 Q Okay.

5 THE COURT: Are you moving to a different item?

6 MR. MOSKIN: Just about.

7 BY MR. MOSKIN:

8 Q Do you sell any other products that are proxies for Eldar
9 units?

10 A We have other products that have not been released.

11 Q Okay.

12 THE COURT: Is this the spot?

13 MR. MOSKIN: Yeah.

14 THE COURT: If you're moving to a different item,
15 tell me. Then we're going to break.

16 MR. MOSKIN: Yes.

17 THE COURT: If you're not done with this one yet,
18 then tell me that.

19 MR. MOSKIN: We can take a break.

20 THE COURT: Okay. We're going to take a break for
21 ten minutes.

22 (Recess taken.)

23

24

25

1 (Jury entered the courtroom.)

2 THE COURT: You can have a seat.

3 A juror made a comment to me about wanting to make
4 sure that people clearly identify what exhibit numbers
5 they're referring to. So they're making -- they know they're
6 going to get the exhibits at the end, but they're making
7 notes and sometimes it gets by them pretty quickly.

8 So just make sure that you make -- and I'm going to
9 try to sort of police that a little bit better, but make sure
10 you make clear references to them. In other words, if you go
11 from Page 14 to 16 of an exhibit, when you say that you're on
12 Page 16 it might make sense to say of Exhibit No. Blank
13 again.

14 Okay. You can proceed.

15 MR. MOSKIN: I should be more cognizant of that
16 anyway.

17 BY MR. MOSKIN:

18 Q. Mr. Villacci, I would like you to refer to a page on
19 your website concerning the Dark Eldar products, which is
20 Plaintiff's Exhibit 690 at Page 89.

21 And that is your Dark Elf and Eldar -- the one and
22 only Dark Elf and Eldar compatible product?

23 A. Yes.

24 Q. And you call it a Dark Elf Torturess, right?

25 A. Arch Torturess.

1 Q. Right?

2 A. Arch Torturess.

3 Q. Thank you.

4 And this product was modeled directly after the
5 Games Workshop Dark Eldar Haemonculus, correct?

6 A. No.

7 Q. Well, you do identify it as a Dark Eldar, right?

8 A. In the compatibility tab over there we say Dark Elf and
9 Eldar compatible kits.

10 Q. And it's not identified as being compatible with
11 anything else in the whole world?

12 A. No.

13 Q. Let's look at Plaintiff's Exhibit 185 -- oh, excuse me.
14 685.

15 And this is -- it's some e-mail exchanges between
16 you and Mr. Fiertek?

17 A. Yes.

18 Q. And if you look at the second page, do you see at the
19 top how Mr. Fiertek refers to this product --

20 A. Yes.

21 Q. -- as a Dark Eldar Heamon, right?

22 A. Yes.

23 Q. And that clearly means Dark Eldar Haemonculus, right?

24 A. Yes.

25 Q. Okay. And is it still your testimony that the

1 Chapterhouse product was not modeled directly on the Dark
2 Eldar Haemonculus?

3 A. Yes.

4 Q. Okay. The -- and when you say that, do you simply mean
5 it was not a recast or exact copy of a Dark Eldar
6 Haemonculus?

7 A. No.

8 Q. Okay. You think it's substantially different from the
9 Games Workshop Dark Eldar Haemonculus?

10 A. Yes.

11 Q. Okay. Let's look at -- going back to Exhibit 690 -- and
12 before we do that, I just want to make sure. So was it just
13 a coincidence that your designer referred to the product as a
14 Dark Eldar Haemonculus?

15 A. No.

16 Q. Okay. It was because they all have some obvious
17 similarities, right?

18 A. They share some features.

19 Q. Okay. Let's again look at Plaintiff's Exhibit 690, at
20 Page 304, your Tau compatible page.

21 And the only three products in your product line
22 that you identify as being Tau compatible are the Super Heavy
23 Walker, the -- and the two different alternative heads for
24 Tau Crisis suits, correct?

25 A. Yes.

1 Q. Okay. Now, in creating these products you were trying
2 to emulate the overall style and feel of the Games Workshop
3 products, weren't you, the Tau products?

4 A. Not on all these products.

5 Q. In any of them?

6 A. I would say the Heavy Walker on its own is sharing some
7 very superficial, you know, similarities and overall feel and
8 -- I don't know how else you put it, but the two head sculpts
9 over there are supposed to share aesthetics and feel.

10 Q. They do?

11 A. Yes.

12 Q. Okay. And, in fact, you hired Games Workshop's -- a
13 former Games Workshop employee, Roberto Cirillo, to do -- to
14 create the concept art for the Chapterhouse alternative heads
15 for Tau Crisis suits?

16 A. Yes.

17 Q. Okay. And you were aware when you were working with him
18 that he was a former Games Workshop employee, right?

19 A. Yes.

20 Q. Let's look at Plaintiff's Exhibit 662. And is this --
21 take a moment and look at it.

22 Is this a series of e-mails between you and
23 Mr. Cirillo, the designer of this product?

24 A. Yes.

25 Q. Okay. And if you look at page Bates No. 25924, can --

1 this is your -- in the middle of the page, hi, Roberto, on
2 August 15 of 2011 -- that's your e-mail to Roberto Cirillo?

3 A. Yes.

4 Q. Okay. And you explained to him what to do. You said:
5 (Reading:)

6 There's not much of a brief honestly. I would say keep
7 true to the Tau idea and style, we want heads that would fit
8 in with the current battle suits, mainly to give the players
9 more options on looks.

10 Do you see that?

11 A. Yes.

12 Q. So you are aware that there is such a thing as a Tau
13 style?

14 A. I'm sure everything you look at has its own style,
15 appearance.

16 Q. And when you were talking to Mr. Cirillo, it was so
17 clear what the Tau style was that you only had to say to him,
18 just use the Tau idea and style, right? He didn't need to
19 know anything more?

20 A. He was a former Games Workshop employee. I think he was
21 familiar with the aesthetics for the Tau.

22 Q. Right. He was immediately familiar with the specific
23 styling unique to the Tau, right?

24 A. I wouldn't say it was unique to the Tau, but it was
25 styling that Tau had, yes.

1 Q. Well, you didn't tell him to do the styling of something
2 else, right?

3 You told him to use the styling of the Tau with
4 which you're familiar and you knew he was familiar, right?

5 A. Yes.

6 Q. Okay. And so you didn't have to give him much of a
7 brief? He knew exactly what to do because he was familiar
8 with Games Workshop Tau figures?

9 A. Yes.

10 Q. Okay. Let's talk for a moment about your Tervigon
11 figure. And let's look at Plaintiff's Exhibit 47 at Page 54.

12 And --

13 A. I'm sorry, Jonathan. You said 47 or 647?

14 Q. 47. And it's right up on the screen, if you want to
15 look there.

16 A. Okay.

17 Q. You've seen that image before, right?

18 A. Yes.

19 Q. And that's the Games Workshop Tervigon, right?

20 A. Yes.

21 Q. Let's see how you describe the product yourself. Let's
22 go to Plaintiff's Exhibit 743. And it's the first page,
23 right in the middle.

24 And as you said: (Reading:)

25 My goal was to make a kit that is similar to Games

1 Workshop's single illustration of the Tervigon.

2 Do you see that?

3 A. Yes.

4 Q. Okay. And when you say the single illustration of the
5 Tervigon, that was the illustration we were just looking at,
6 right?

7 A. Yes.

8 Q. Okay. And let's go to Plaintiff's Exhibit 168 at
9 Page 10.

10 And you see this is a forum post by you on -- I
11 can't see -- if you scroll down a little bit -- what form it
12 is. Can --

13 (Brief pause.)

14 BY MR. MOSKIN:

15 Q. The bottom of the page, on Warseer, right there. Do you
16 see that?

17 A. Yes.

18 Q. Okay. So let's go back up and look what you wrote on
19 Warseer. You wrote: (Reading:)

20 Our Tervigon conversion kit has the parts necessary to
21 turn your GW -- and I assume that's Games Workshop, right?

22 A. Yes.

23 Q. -- Games Workshop Carnifex into something that resembles
24 one of their pictures.

25 Correct?

1 A. Yes.

2 Q. And again, that's the same picture from the Tervigon
3 codex that we were just looking at?

4 A. Yes.

5 Q. -- the Tyrannid codex we were just looking at?

6 A. Yes.

7 Q. Your mycetic spore. Let's look at Plaintiff's
8 Exhibit 47, Page 56. That's the codex again.

9 And that's the mycetic spore page from the Games
10 Workshop codex, right?

11 A. Yes.

12 Q. All right. And your product -- your mycetic spore
13 product was designed by somebody named Castro Navarro?

14 A. And myself.

15 Q. Okay. And let's look at Plaintiff's Exhibit 160.

16 And I think what this is is -- tell me if I'm
17 wrong. This is, in fact, two e-mails that were joined
18 together because they were both on January 7, 2010. The
19 first is between you and Mr. Navarro.

20 Do you see that?

21 A. Yes.

22 Q. And if you go back two pages, the second to the last
23 page is between you and Mr. Nagy?

24 A. Me and Mr. --

25 Q. Jeffrey Nagy?

1 A. I'm sorry. There's a string of e-mails here but -- I'm
2 looking at what's on the screen. Yes.

3 Q. Okay. And you see that the heading on both of these
4 related e-mails refers to a spore pod on the first and -- a
5 spore pod for a Tyrannid, and the second e-mail here,
6 revisions on the spore pod, right?

7 A. Yes.

8 Q. And the spore pod referred to is the mycetic spore
9 depicted by Games Workshop, right?

10 A. I think we're actually talking about the mycetic spore
11 as depicted by Chapterhouse Studios in this instance.

12 Q. And your -- the only source of reference in the entire
13 world, the real world, for a mycetic spore is that page of
14 the Tyrannid codex that we were just looking at, right?

15 A. For a mycetic spore, yes.

16 Q. Okay. If you look at the second page of this exhibit,
17 do you see --

18 A. Can I correct myself on that last one?

19 Q. Excuse me?

20 A. Can I correct myself on that last one?

21 Q. Sure.

22 A. Okay. Actually, we know -- I've been playing war games
23 for 20 years now, and I think about 15 years ago I bought a
24 known -- some mycetic spores that predated this, so --

25 Q. But that's not what you were referring to in the design

1 of the mycetic spore that you sell?

2 A. I don't think we referred to the Games Workshop photo
3 either.

4 Q. Not at all?

5 A. Just maybe for scale purposes. That's about it.

6 Q. Okay. But you did refer to the Games Workshop fiction
7 in designing this product, right?

8 A. Yes, we knew about the fiction.

9 Q. So -- and that explains why Mr. Navarro said to you on
10 December 11: (Reading:)

11 I see hive ships eject lots of spores towards planets
12 and little to no maneuver would be required.

13 Do you see that? Because -- do you see that?

14 A. Yes, I see that.

15 Q. In the Games Workshop fiction, in Warhammer 40,000 the
16 Tyranids are hive creatures, right?

17 A. They're kind of like a hive yes, a bug.

18 Q. And that's how it's described on that page of the
19 Tyranid codex?

20 A. I think you're reading into what he wrote, because if
21 you read the sentence above that: (Reading:)

22 As for nid concept -- which is what we were trying to
23 develop -- the spore pod, I imagine these and think they
24 would maneuver like a nautilus but in case of small bursts of
25 gases. He sees -- I see hive ships eject lots of spores --

1 THE COURT: You really have to slow down. Nobody
2 can understand you. It's not going to help you.

3 BY THE WITNESS:

4 A. Okay. (Continuing:)

5 I see hive ships eject lots of spores towards planets
6 and little to no maneuver would be required.

7 So in his mind that's what he's seeing.

8 BY MR. MOSKIN:

9 Q. Right. And that's a specific reference to the way the
10 mycetic spore is designed -- is described in Games Workshop's
11 fiction as being a hive creature?

12 A. No.

13 Q. No. Okay. That's fine.

14 And when he refers at the bottom to chimneys, we --
15 we showed examples, didn't we, of how the Tyranids, including
16 on your Tervigon conversion kit, they have those distinctive
17 chimneys at the top, right?

18 A. Tyranid creatures?

19 Q. Yes.

20 A. Some have --

21 Q. The Tervigon creature.

22 A. -- bony stacks, whatever. I guess you could refer to
23 them as chimney shape.

24 Q. On the Tervigon -- the character in the Tyranids?

25 A. I believe the Tervigon has those, yes.

1 Q. Okay. And can -- let's go back to the first page.

2 And so again, I just want to understand. Your
3 testimony is now that this mycetic spore had nothing to do
4 with the Tyranids, but yet you called it a spore pod for
5 Tyranid in the heading of the e-mail; is that your testimony?

6 A. I said it had nothing to do with the artwork in the
7 codex.

8 Q. Okay. And is that because you look -- if we go down,
9 I'm sorry, to the next page -- the bottom of the next page,
10 your -- another designer who was consulted here, he referred
11 to another picture that he found and referred you to of --
12 taken from Dawn of War. Do you see that?

13 A. I see that.

14 Q. Okay. And Dawn of War is another Games Workshop
15 Warhammer 40,000 product, a computer game, right?

16 A. Yes.

17 Q. Okay. And let's go back up to the top of the first
18 page, and then I'll soon be done with this.

19 Am I reading this correctly, that it says -- the
20 very first two lines: (Reading:)

21 Saw the codex at the store today, they wouldn't let me
22 buy it. Tyranofex and Tervigon.

23 Do you see that?

24 A. Yes.

25 Q. And that's what you wrote?

1 A. Yes.

2 Q. Okay. Let's move along.

3 You sell a product called the Shrike, correct?

4 A. I don't think that's the whole name to the unit.

5 Q. Well, let's bring up Plaintiff's Exhibit 680.

6 And this is the Shrike conversion kit for Tyranid
7 warriors?

8 A. Yes.

9 Q. The name Shrike, that's a name that's referenced in the
10 Warhammer 40,000 literature in regard to its Tyranids, right?

11 A. Yes.

12 Q. Okay. And in making this your own Shrike, you referred
13 specifically -- or your designer referred specifically,
14 didn't he, to the Games Workshop model?

15 A. No.

16 Q. No. All right.

17 Let's look at Plaintiff's Exhibit 686 and Page 21
18 -- well, first of all, let's just look at the cover of 686.

19 And this is an e-mail exchange between you and
20 Mr. Fiertek?

21 A. Yes.

22 Q. Okay. Let's go down -- and you see at the top it refers
23 to Tyranid warrior wings conversion?

24 A. Yes, that's in the URL.

25 Q. Okay. And the question is, how thick do you think these

1 are? And he's referring to a Forge World Tyranids page?

2 A. To Forge World's Tyranids page.

3 Q. Okay. And let's jump down to Page 21661.

4 And do you see here Mr. Fiertek -- this is from
5 Mr. Fiertek -- wrote to you: (Reading:)

6 How thick are the rev's wings? That 2.25-millimeter
7 thickness should be okay. That's about how thick Games
8 Workshop's are.

9 Right?

10 A. I see that.

11 Q. So in designing your Tyranid Shrike product, the
12 physical model, your designer was specifically referencing
13 the exact wing thickness of the Games Workshop Shrike model,
14 correct?

15 A. No.

16 Q. No. He was referring to some other Games Workshop
17 model?

18 A. The only reason he was looking at another company's
19 model was so we could figure out how thick we can do a wing.
20 So when you cast resin you're basically making a copy of what
21 you made, you know, you sculpted originally. You got a mold
22 and you make a copy of that one so you can keep on making
23 more later on. You don't have to sculpt 30 for every
24 customer who orders it.

25 If you make something too thin in resin-casting you

1 don't get as many pieces out of the mold. Every time you
2 cast a piece in resin -- I don't want to say toxins, but
3 materials from the piece that was cast accumulate in the silt
4 in the resin mold. And if your piece is too thin, as that
5 mold gets thinner and thinner from that accumulation of
6 material, you start getting holes in the actual production
7 piece.

8 So we were trying to figure out how safe it was and
9 how thick it was to make the wing so it didn't affect how
10 many products, pieces, we got out of the mold. Because, like
11 I said, if you make it too thin, you're only going to get
12 15 pieces out of that mold before you got to remake it, as
13 opposed to if you make it just right, you can get 30 or
14 40 pieces. That's the only reason he was referring to
15 another company's model.

16 Q. Right. But the specific product he was referring to was
17 not just anyone's product; it was the Games Workshop product,
18 right?

19 A. I'm not sure which product he's referring to, looking at
20 this line. I mean, he says that's about how thick GW's are,
21 but we don't know which product he was looking at.

22 GW has a number of wings. They got dragon wings,
23 they got vampire wings, they got bat wings. So he's
24 obviously looking at another company's product.

25 Q. Not just another company's product. A Games Workshop

1 product?

2 A. Okay, a Games Workshop product. He plays Games
3 Workshop.

4 Q. Right. And you can't, while you're sitting here, say --
5 identify any other product besides the Games Workshop Shrike
6 that he was looking at?

7 A. Sure I can.

8 Q. You know he was looking at a different product?

9 A. I can identify other products he could have been looking
10 at.

11 Q. But --

12 A. I don't know for certain he was looking -- yeah, I don't
13 know for certain what he was looking at.

14 Q. Okay. But you can't say that he was not, in fact,
15 looking at the Games Workshop Shrike wings?

16 A. I can say that with certainty.

17 Q. You know for sure -- a second ago you said you didn't
18 know what he was looking at, and now you do know what he was
19 looking at?

20 A. I can say with certainty he was not looking at the
21 winged Tyranid warrior wings.

22 Q. And it doesn't refer to any product of any company other
23 than Games Workshop?

24 A. I think it is apparent he was looking at a GW product,
25 yes.

1 Q. All right. And Mr. Fiertek is not here to tell us that
2 he, in fact, was looking at something other than the Shrike,
3 is he?

4 A. No.

5 Q. Okay. Let's turn to the Tru-scale product that your
6 company sells. And let's start by looking at -- I think it's
7 Page 1018 -- Exhibit, I'm sorry, 1018 -- oh, I'm sorry.

8 Let's look at Plaintiff's Exhibit 651. I
9 apologize. And this is an announcement of your so-called
10 Tru-scale Knight Praetorius, right?

11 A. Yes.

12 Q. Now, before you used the name Tru-scale, had you ever
13 heard that anywhere?

14 A. Yes.

15 Q. Okay. So you're aware that's a term that's used in
16 connection with Warhammer 40,000 products, right?

17 A. And other products, yes.

18 Q. Okay. And this is a picture of one of your Tru-scale
19 figures?

20 A. No.

21 Q. So you posted this picture as a model painted by your
22 designer, Stephen Smith, even though that's not your figure?

23 A. Yes.

24 Q. Okay. Let's look at Plaintiff's Exhibit 647.

25 Before I ask you that, you do acknowledge that

1 Stephen Smith designed the Tru-scale figure for you, correct?

2 A. Yes.

3 Q. Okay. And he painted it as well, right?

4 A. He painted -- he did not paint this figure, no.

5 Q. At any rate, the -- on Plaintiff's Exhibit 647, this is
6 on your website, right? So you -- this is your Tru-scale
7 figure, right?

8 A. Yes.

9 Q. And we also looked at that Tru-scale figure a little
10 while ago sitting on a jetbike?

11 A. Used some components from this kit, yes.

12 Q. And the reality is, this is simply a bigger Space
13 Marine, correct?

14 A. You could refer to it as a type of Space Marine.

15 Q. And it's a little bit bigger than the size of Space
16 Marines that Games Workshop sells its figure -- its miniature
17 models, right?

18 A. It's much bigger.

19 Q. Okay. And you -- and this product, in fact, is offered
20 for sale on your product (sic) under the Space Marine bit
21 section, right?

22 A. I'm not sure, because on here it says Knight Praetorius
23 Tru-scale figure kits on the left-hand side.

24 Q. All right. Well, then, let's look at Exhibit 690 and
25 page -- let's look at page -- it's Bates numbered 28743.

1 A. In 690?

2 Q. Uh-huh.

3 A. I don't have that page, Jonathan.

4 Q. Well, we'll show up it on the screen.

5 Okay. And you see this is the -- on the left this
6 is -- these are the Space Marine compatible bits?

7 A. Yes.

8 Q. Okay. And let's go down a couple pages to 28746. And
9 back up just a tiny bit so we can see -- you see at the top
10 it says Space Marine compatible bits?

11 A. Yes.

12 Q. Okay. And depicted among the Space Marine compatible
13 bits is the Tru-scale Knight Praetorius?

14 A. Yes.

15 Q. Okay. So it, in fact, is a Space Marine figure that
16 you've decided to call Tru-scale Knight Praetorius?

17 A. I think that means that it's compatible with Games
18 Workshop's Space Marine models.

19 Q. And is there some scale to which you were trying to be
20 true in creating this product?

21 A. The 28-millimeter scale.

22 Q. And how does that differ from any other miniature figure
23 that Games Workshop or perhaps you sell?

24 They are all 28-millimeter standard, right?

25 A. Yes.

1 Q. And you said, though, this is bigger than the Space
2 Marine figure, right?

3 A. It's a true to scale product.

4 Q. So what scale is -- it's not just -- you have added the
5 term Tru-scale to suggest that it's being true to some scale
6 that other products don't have, correct?

7 A. Yes.

8 Q. Right. And so in -- and you said you're aware that the
9 term Tru-scale has an established meaning among fans of
10 Warhammer 40,000, right?

11 A. Among modelers and miniature modelers.

12 Q. Including modelers and miniature modelers who are fans
13 of Warhammer 40,000?

14 A. Yes.

15 Q. And so you didn't pick that name, Tru-scale, just by
16 accident?

17 A. We sort of wanted to brand our own scale. That's why we
18 kind of spelled it kind of goofy, T-R-U, kind of make it our
19 own brand name, scale -- you heard Games Workshop say, oh,
20 they invented the 28-millimeter scale, et cetera. I guess --
21 I never heard that before, but we were trying to do something
22 on a different scale ourselves and that's why we called it
23 Tru-scale.

24 Q. But it's still a Space Marine, right?

25 A. It's an armored space knight, and I guess Space Marine

1 could be considered an armored space knight, the archetype in
2 science fiction. So I would agree it's a type of Space
3 Marine.

4 Q. All right. Well, let's look at what was introduced
5 earlier today as Plaintiff's Exhibit 898, Page 5.

6 And as you said, Stephen Smith was your designer of
7 this product, right?

8 A. Yes.

9 Q. Okay. And this is the product -- this is the picture
10 shown in that image of yours we just saw in Plaintiff's
11 Exhibit 651, right?

12 A. 651? Can you pull that up side by side, perhaps?

13 Q. Sure.

14 A. Yes, it looks like his same model.

15 Q. Okay. And this was under your heading, New -- in
16 Exhibit 651, New Tru-scale Knight Praetorius, and this is the
17 picture you showed?

18 A. This is one picture we showed.

19 Q. Okay. So going back to the Warsmith page, Exhibit 898
20 -- let's back up a little so we can see the page in context.

21 Right up here your designer referred to it as an
22 art scale Space Marine, right?

23 A. That's what he referred to it as.

24 Q. Okay. And let's go to Plaintiff's Exhibit 650.

25 And do you see your -- this customer wanted to know

1 how does the size compare with current standard Games
2 Workshop Space Marine legs. Do you see that?

3 A. Yes.

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Villacci - direct

1 **Q. And if you turn the page, does that show a comparison that**
2 **you provided to the customer of how your product looks in**
3 **comparison to the Games Workshop Space Marine?**

4 **A. Yes.**

5 **Q. So, would you agree with me that your product looks**
6 **essentially identical to the Space Marine, just bigger?**

7 **A. No.**

8 **Q. And when you say it doesn't look identical or almost**
9 **identical, is that according to the same philosophy we discussed**
10 **earlier that as long as it's not an exact copy or a recast or**
11 **something that Games Workshop does, then it's okay?**

12 **A. No.**

13 **Q. So, you see genuinely significant differences between these**
14 **two?**

15 **A. I see differences.**

16 **Q. Okay. That's fine.**

17 **Let's look at Plaintiff's Exhibit 168, Page 68, and**
18 **once again you posted the same picture on an Internet forum to**
19 **show the comparative size of the two?**

20 **A. Yes.**

21 **Q. And do you have any understanding as to why these people**
22 **wanted to be able to make a comparison with Games Workshop's**
23 **Space Marines?**

24 **A. Because they wanted to use our parts with Games Workshop's**
25 **parts to make a new model.**

Villacci - direct

1 **Q. New models of Space Marines, right?**

2 **A. A new model.**

3 **Q. Of Space Marines, right?**

4 **A. A new model, sir.**

5 **Q. Okay. So, you don't think your customers were interested in**
6 **it because it looks so much like a Space Marine.**

7 **A. They could do what they wanted with it.**

8 **Q. And let's look at Plaintiff's Exhibit 651. I think we've --**
9 **yes, we've looked at that already.**

10 **Let's jump then -- oh, excuse me. On Page 3 of this**
11 **exhibit, this is from you, this message, right? Do you see**
12 **that? You referred to the Chapterhouse Studios marine heads,**
13 **didn't you?**

14 **A. Yes.**

15 **Q. And in context you meant, didn't you, Space Marine heads,**
16 **right?**

17 **A. Compatible heads with Space Marines.**

18 **Q. Excuse me?**

19 **A. Compatible heads with Space Marines.**

20 **Q. But you referred to Chapterhouse Studios marines heads,**
21 **didn't you?**

22 **A. That's what I said there.**

23 **Q. Okay. And that's because the TRU-Scale Knight Praetorius is**
24 **really just a bigger Space Marine, correct?**

25 **A. No.**

Villacci - direct

1 **Q. So, the fact that you called the heads of your product**
2 **marine heads, that again is just a coincidence?**

3 **A. Again, I said that's because they're compatible with Space**
4 **Marine heads -- I mean, Games Workshop Space Marines.**

5 **Q. And let's back up so we can see the whole text in context**
6 **with what preceded it. You see down here in the text before you**
7 **referred to the product as having marine heads, if you look at**
8 **the follow-through, it doesn't say anything about them being**
9 **compatible, does it?**

10 **A. Not on this page, no.**

11 **Q. And if you follow over, the continuation paragraph, it just**
12 **refers to them as Chapterhouse Studios marine heads, right? Not**
13 **as compatible. Just as marine heads.**

14 **A. Those are the only sorts of heads that we have in our**
15 **website, the heads that are compatible with marine heads -- I**
16 **mean, I'm sorry, Games Workshop models.**

17 **Q. And, again, you think it's just coincidence that in**
18 **describing your product you said they have Chapterhouse marine**
19 **heads?**

20 **A. They are compatible with Games Workshop Space Marines.**

21 **Q. They're more than that. I mean, they're virtually identical**
22 **to Space Marines, aren't they?**

23 **A. The heads?**

24 **Q. The whole figure, including the head.**

25 **A. No.**

Villacci - direct

1 **Q. Okay. Let's turn to Exhibit 652. And this was an e-mail**
2 **exchange between you and a customer named Mr. Duggan, Ronan**
3 **Duggan?**

4 **A. Yes.**

5 **Q. If you turn to Page 2, do you see how Mr. Duggan referred to**
6 **these products that you say are merely compatible with Space**
7 **Marines? He says, "Thank you very much for making these resin**
8 **add-ons for Space Marines," correct?**

9 **A. Yes.**

10 **Q. He also says, "I have waited a long time to be able to make**
11 **true scale marines." Do you see that?**

12 **A. Yes.**

13 **Q. So, this is an example of how before you picked the name**
14 **TRU-Scale, fans of the Space Marines also understood the term**
15 **true scale to mean something.**

16 **A. Yes.**

17 **Q. Let's look next at Exhibit 653. And I believe this is**
18 **another e-mail from somebody named Sebastian. Do you see that?**

19 **A. Yes.**

20 **Q. And let's go down toward the bottom of the page of this**
21 **e-mail to you when he's talking about the -- he's talking about**
22 **the Knights Praetorius here, isn't he?**

23 **A. Yes.**

24 **Q. Okay. And let's see what he said about it. Do you see**
25 **where he said here, "The idea with the true scale Space Marine**

Villacci - direct

1 **is awesome," right?**

2 **A. Yes.**

3 **Q. So, your customers understand this is just a true scale**
4 **Space Marine, regardless of what you may call it, right?**

5 **A. That's what this customer said.**

6 **Q. Let's look at Exhibit 654 because I think you yourself refer**
7 **to your product as a Space Marine. Let's look at this -- who's**
8 **Jose Veiga at the top here? This is a painter of yours, right?**

9 **A. He's a professional painter, yes.**

10 **Q. Okay. Let's look at the last page of this exhibit. And do**
11 **you see down at the bottom here what Mr. Veiga says? He says,**
12 **"I finished the real size marine." Do you see that?**

13 **A. Yes.**

14 **Q. And he also said -- and that's a reference to the TRU-Scale**
15 **what you call Knights Praetorius, right?**

16 **A. I believe that's what he was painting.**

17 **Q. And looking at the next part of that paragraph, is it true**
18 **you told him to try to paint in a way so it didn't look so**
19 **obviously like a Games Workshop model?**

20 **A. I said I didn't want him to use any Games Workshop color**
21 **schemes.**

22 **Q. All right. And let's pull back a little bit and scroll up.**
23 **You'll see that e-mail, before we move, is dated 16 of May 2012.**
24 **Do you see that?**

25 **A. Yes.**

Villacci - direct

1 Q. And let's move up. The e-mail above it is from you, also on
2 May 16?

3 A. Yes.

4 Q. And you'll notice, by the way, that there's no subjects here
5 in the subject line, right?

6 A. Yes.

7 Q. All right. Let's scroll up a little bit more, the preceding
8 page, and we're now at the bottom of the page on May 17, the
9 next day, a message from you to Mr. Veiga. Again, there's no Re
10 line, right?

11 A. Correct.

12 Q. And then let's scroll up just a little bit more. And
13 there's some response from Mr. Veiga, right? Do you see that in
14 here, starting this part of the page?

15 A. Yes.

16 Q. And then immediately above it for the first time in your
17 message -- that's you, Mr. Villacci, right?

18 A. Yes.

19 Q. For the first time on May 21 we see the subject appear, real
20 size marine.

21 A. Yes.

22 Q. And so, the first time that appears in your exchange of
23 e-mails with Mr. Veiga was when you put it there, right?

24 A. I did not put that there.

25 Q. All right. It just miraculously appeared?

Villacci - direct

1 **A. I think we've had this discussion before. Whenever you**
2 **reply to an e-mail, the e-mail system usually puts Re. That was**
3 **the subject. And I've already explained this to Mr. Mbskin in a**
4 **deposition. Nowhere in this e-mail --**

5 **THE COURT: Just to be clear, you don't need to refer**
6 **to that because the jury hasn't seen that. So, just answer the**
7 **question.**

8 **THE WITNESS: Okay. I'm sorry, sir.**

9 **BY THE WITNESS:**

10 **A. No, I didn't put that there.**

11 **BY MR. MSKIN:**

12 **Q. Okay. So, it just -- for the first time -- and we've gone**
13 **through this chain of e-mails. For the first time that this**
14 **phrase in the subject line, real size marine, appears is when**
15 **it's attached to your e-mail. You would agree at least with**
16 **that?**

17 **A. Yes.**

18 **Q. Even if you say now you don't know how that got there.**

19 **A. I know I did not put that there.**

20 **Q. Okay. Let's look at Plaintiff's Exhibit 655. And this is**
21 **another set of e-mail exchanges between you and a customer Ken**
22 **Perry?**

23 **A. Yes.**

24 **Q. Let's go down a page. And do you see here where Mr. Perry**
25 **asks you to add, in addition to a pre-Heresy helmet, he wanted**

Villacci - direct

1 you to send him a TS marine kit, right?

2 A. Yes.

**3 Q. And that TS marine kit is what you call the Knights
4 Praetorius, right?**

5 A. Yes.

**6 Q. So, again, whatever you may decide to call it, your customer
7 certainly understands it's a true scale marine or Space Marine,
8 correct?**

9 A. Ken Perry called it that.

10 Q. I'm sorry?

11 A. Ken Perry called it that.

**12 Q. And just a few more questions about the Space Marine. Let's
13 look at Plaintiff's Exhibit 742. And this is a page from
14 Frothers Unite. Do you see that?**

15 A. Yes.

**16 Q. And that's another one of these web forums where people are
17 particularly interested in Warhammer 40,000?**

18 A. I wouldn't say that, no.

**19 Q. But it's one of the subjects of interest on Warhammer on
20 this forum**

**21 A. This website is more about the industry of sculpting and
22 modeling. It's more for designers.**

**23 Q. Regardless, here you see there's a posting regarding the
24 Chapterhouse not Space Marines. Do you see that?**

25 A. Yes.

Villacci - direct

1 **Q. And below that is a picture of the figure painted by Stephen**
2 **Smith for you?**

3 **A. Yes.**

4 **Q. Let's turn the page. And you see there are two comments by**
5 **other people posting. Can you read what the first one says?**

6 **A. "So, it's a Space Marine, right?"**

7 **Q. Okay. And what does the other poster say?**

8 **A. "Disregarding everything else, if I want Space Marines, why**
9 **would I buy these instead of the nearly identical GW ones?"**

10 **Q. So, the world at large, people think these are nearly**
11 **identical, but you think they're very different.**

12 **A. I think there are differences, yes.**

13 **Q. Let's turn to a couple quick questions about a product you**
14 **called -- I'm not sure what you're calling it now. The**
15 **Were-Croc that we're saying looks a little bit like the**
16 **Kroxigor. You know what I'm talking about?**

17 **A. Yes.**

18 **Q. And are you calling it now Lizard-Ogre?**

19 **A. I think that's what it's always been called on our website.**

20 **Q. Okay. Let's go to Plaintiff's Exhibit 124. And this again,**
21 **this is from Dakka Dakka. Do you see that at the top?**

22 **A. Yes.**

23 **Q. And Dakka Dakka is another one of these forums that you**
24 **mentioned earlier that Mr. Merrett described?**

25 **A. Yes.**

Villacci - direct

1 **Q. All right. And let's pull back and look at the bottom of**
2 **the page. And you see that's a posting by Chapterhouse**
3 **regarding its Lizardman figure?**

4 **A. Yes.**

5 **Q. And if you go to Page 12 of this exhibit, can you read what**
6 **the customer said about it?**

7 **A. "I like the 'not classic Kroxigor.' They'll let me keep the**
8 **4th/5th edition vibe of my Lizards without the arduous task of**
9 **trying to find enough actual period Krox."**

10 **Q. And Kroxigor, that's the name that Games Workshop uses for**
11 **its character from Warhammer, right?**

12 **A. Yes.**

13 **Q. So, this person posting referred to your product as a "not**
14 **classic Kroxigor," right?**

15 **A. Yes.**

16 **Q. And let's look at one more forum post, Exhibit 872. And**
17 **once again on Page 872 (sic) -- now, this is on BOLS Lounge.**
18 **This is another forum of the kind we've been discussing?**

19 **A. Yes.**

20 **Q. It's really Bell of Lost Souls, right?**

21 **A. Yes.**

22 **Q. And again you see there's a picture of your Lizard-Ogre at**
23 **the bottom of Page 1 of Exhibit 872?**

24 **A. Yes.**

25 **Q. Well, let's turn the page and see what the first response**

Villacci - direct

1 was to seeing your forum post or the picture of your product.

2 Do you see that?

3 A. Yes.

4 Q. And this individual identified as White Tiger 88 says,

5 "Really? That looks exactly like the current Lizardman with a
6 different face and belly. Even the same pose/weapons." Do you
7 see that?

8 A. Yes.

9 Q. Would you agree that your Lizard-Ogre product looks quite
10 similar to the Games Workshop Kroxigor?

11 A. No.

12 Q. Do you think there's any similarity?

13 A. Yes.

14 Q. But you would agree that unbiased individuals just looking
15 at this on the Internet and seeing your pictures, they think
16 they look almost identical, right?

17 A. You have shown that some people do think that, yes.

18 Q. Now, the question came up earlier today. Chapterhouse sells
19 some of its product on eBay, right?

20 A. Yes.

21 Q. When I say product, these are the products at issue in this
22 lawsuit, right? Is that right?

23 A. I think they are, yes.

24 Q. Let's look at Plaintiff's Exhibit 644. And is this another
25 example of an eBay posting by Chapterhouse? And this is a

Villacci - direct

1 instance of a -- I wonder if we can zoom in. A five resin
2 pre-Heresy Assault Jump Packs. It says fit Space Marines, but I
3 think that means for Space Marines, right?

4 A. It says fit.

5 Q. It says fit. All right. But you're referring to your
6 product here on eBay with the term Space Marines, right?

7 A. Saying it fits Space Marines.

8 Q. Okay. And it's a pre-Heresy assault jump pack?

9 A. Correct.

10 Q. And if we go down two pages, here we have another product
11 that Chapterhouse is selling on eBay called -- it's a resin
12 Mycetic Spore for Tyranid players. Do you see that?

13 A. Yes.

14 Q. Now, and go down two more pages. And here it's a little
15 faint, but you see it says that you're advertising your product
16 as a Tervigon conversion kit for Tyranid Carnifex model, right?

17 A. Yes.

18 Q. Two more pages. Here on eBay you are referring to your
19 product as six metal Yngarl heads fit Tyranid Genestealers. Do
20 you see that?

21 A. Yes.

22 Q. And these are all postings you made on eBay, right?

23 A. Yes.

24 Q. In the course of this litigation, Chapterhouse has not saved
25 any of its own eBay postings; is that correct?

Villacci - direct

1 **A. No, that's incorrect.**

2 **Q. That's not correct. All right. And what have you done with**
3 **these forum postings that you saved?**

4 **A. All this information was provided to my attorneys.**

5 **Q. And let's go down a page. Oh, excuse me. Let's go to,**
6 **excuse me, Exhibit 683. And can you tell us what we're looking**
7 **at?**

8 **A. It's a synopsis sales report for Chapterhouse Studios.**

9 **Q. And if you look on the left-hand side of the page, it refers**
10 **to a whole bunch of products that Chapterhouse sells, right,**
11 **from their inventory?**

12 **A. Yes.**

13 **THE COURT: What's the number of this one again,**
14 **Mr. Mbskin?**

15 **MR. MDSKIN: 683.**

16 **THE COURT: Thanks.**

17 **BY MR. MDSKIN:**

18 **Q. And let's go all the way down to the bottom and the last**
19 **page, the very last page here, right here, which is if you**
20 **follow, this is under amount. This column, the second column,**
21 **is amount. Does that indicate that Chapterhouse Studios has**
22 **sold \$427,226.35 of materials up to the date of this chart,**
23 **right?**

24 **A. During this time span that's in the report.**

25 **Q. Okay. Let's go back to Page 1. And this report is only**

Villacci - direct

1 current as of January 8th, 2013, right?

2 A. Yes.

3 Q. So, in the last six months you've continued to sell lots of
4 product, right?

5 A. Yes.

6 Q. The name Chapterhouse, you've sold many products that are
7 compatible with the different chapters of the Space Marines,
8 right?

9 A. Yes.

10 Q. And the name Chapterhouse -- but you contend the name
11 Chapterhouse has nothing to do with the chapters of the Space
12 Marines, right?

13 A. Yes.

14 Q. I don't want to put it up on the screen, but you should have
15 in your binder Plaintiff's Exhibit 139. And would you look at
16 Pages 21 to 22? Do you see on Page 21 there's a question put to
17 you as Interrogatory Number 8? "Set forth the meaning and
18 derivation of your company name Chapterhouse and identify all
19 sources consulted and used, reviewed, or relied on by
20 Chapterhouse in selecting the name." Do you see that question?

21 A. Yes.

22 Q. And if you turn the page -- well, no. Before you turn the
23 page, at the very bottom I'd like to read the first part of your
24 response to that question. And you say here, and correct me if
25 I'm reading anything wrong, "Without waiving and subject to

Villacci - direct

1 **various objections, Chapterhouse" --**

2 **MS. HARTZELL: Objection, your Honor, to the inclusion**
3 **of the legal objection in the reading.**

4 **THE COURT: Leave the objection out.**

5 **MR. MDSKIN: I'm sorry.**

6 **BY MR. MDSKIN:**

7 **Q. Forget the objections. It says, "Chapterhouse responds that**
8 **the Oxford English dictionary defines chapterhouse as a building**
9 **attached to a cathedral, monastery, etc. in which meetings of**
10 **the chapter are held." Do you see that?**

11 **A. Yes.**

12 **Q. Now, does Chapterhouse sell a lot of stuff for use in**
13 **churches?**

14 **A. No.**

15 **Q. No. It doesn't sell anything for use in churches, right?**

16 **A. No.**

17 **Q. And so, the fact that there happens to be a dictionary**
18 **definition, that has absolutely nothing to do with the actual**
19 **meaning of the name Chapterhouse, right?**

20 **A. Correct.**

21 **Q. And if you turn the page, it says, "Chapterhouse responds**
22 **additionally that Frank Herbert's novel Chapterhouse Dune was**
23 **known to Chapterhouse when it selected its name." Do you see**
24 **that?**

25 **A. Yes.**

Villacci - direct

1 Q. Can you identify any of the main characters of the novel
2 Chapterhouse Dune?

3 A. Paul Atreides.

4 Q. I'm sorry?

5 A. Paul Atreides.

6 Q. Paul of the Tradies?

7 A. Paul A-t-r-e-i-d-e-s.

8 Q. Okay. Any other characters?

9 A. Duncan Idaho.

10 Q. Now, does Chapterhouse sell on its website or anywhere
11 any -- and I've already forgotten the names that you just
12 said -- any products that have anything to do with those two
13 characters?

14 A. No.

15 Q. It doesn't sell any products having anything to do with
16 anything from the novel Chapterhouse Dune, does it?

17 A. No.

18 Q. But it does sell lots of products having lots to do with the
19 chapters of the Space Marines.

20 A. Yes.

21 Q. Okay. And, again, that had nothing to do with why you
22 picked the name Chapterhouse, that correspondence with Games
23 Workshop's Space Marine chapters?

24 A. No.

25 Q. Okay. One or two other questions about trademarks. In

Villacci - direct

1 fact, we were just looking at a picture on eBay of a product
2 that you were selling called a jump pack, right?

3 A. Yes.

4 Q. And we heard I think some questions the other day put to
5 Mr. Merrett that the Games Workshop jump pack looks like it has
6 two turbines. Do you remember that testimony?

7 A. Yes.

8 Q. Now, you didn't call your product, though, a twin turbine
9 lifter, did you?

10 A. No.

11 Q. You called it a jump pack, right?

12 A. Yes.

13 Q. And that's because the name jump pack is uniquely associated
14 with Games Workshop in the context of miniature war games.

15 A. No.

16 Q. It had nothing to do with that?

17 A. That wasn't the sole basis of us using that.

18 Q. So, it did have something to do with it?

19 A. Yes.

20 Q. And the same is true of other products. For example,
21 exorcist. We all know there's a movie called Exorcist, but when
22 you put the exorcist symbol and name on some shoulder pads, you
23 could have called it the demon remover shoulder pad, right?

24 A. Yes, we could have used that name.

25 Q. You used the name that Games Workshop had previously used,

Villacci - direct

1 exorcist, because you knew that that name was already associated
2 with Games Workshop, right?

3 A. Not necessarily.

4 Q. Okay. But that was certainly part of your thinking, right?

5 A. Yes.

6 Q. Okay. And the word -- you use the word heresy here quite
7 frequently in context with your products, right?

8 A. Yes.

9 Q. And you recognize that that's a direct reference to Horus
10 Heresy, right?

11 A. Yes.

12 Q. In the same way if I say to you what does the word Coke
13 mean, what would you say?

14 A. Soda.

15 Q. Coca-Cola, right?

16 A. Down South that's what we refer to all kind of drinks,
17 unless you are picking a specific item

18 Q. Well, you don't need to hear the full name Coca-Cola to know
19 that a shortened version of it, Coke, means the same thing,
20 right?

21 A. I would disagree with you.

22 Q. All right. But you do know -- still know it's referring to
23 a soda?

24 A. Yes.

25 Q. And if you were in the coal refining business, if you heard

Villacci - direct

1 the word coke, do you know what that would mean?

2 A. I'm not in the coal refining business.

3 Q. I realize that, but that is -- maybe you're not familiar,
4 but there is a term that's a coal by-product called coke from
5 processing of coal. And you don't have to agree with me or not,
6 but would you agree with me that how you hear the meaning of a
7 word is how you hear it in context of where it's used?

8 A. Yes.

9 Q. I'd like to just refer you to a few more comments about your
10 products on the forums, and then I'll be done. So, let's look
11 at Plaintiff's Exhibit 168, Page 8. And WarSeer again is one of
12 those forums we've been talking about.

13 A. Is that a question?

14 Q. The forum WarSeer, that's one of those forums we've been
15 talking about where whatever else is discussed, the Warhammer
16 40,000 products are discussed, right?

17 A. Yes.

18 Q. Okay. Let's look again on Page 8. Do you see that this
19 individual identified as Erwes says in respect to Chapterhouse
20 Studios' new releases Tervigon kit and so forth, "So, are you
21 guys licensed by GW?" Do you see that?

22 A. Yes.

23 Q. So, would you agree that this person has a question whether
24 you're affiliated with Games Workshop?

25 A. Whether we have a license.

Villacci - direct

1 **Q. Right. And let's look at Plaintiff's Exhibit 170. I think**
2 **it's the second to the last page of this exhibit. And let's**
3 **zoom in on the bottom here. And do you see under the subject**
4 **line Chapterhouse Studios Mach I shoulder pad, new conversion**
5 **kits for Space Marines. Do you see that?**

6 **A. Yes.**

7 **Q. And can you read what this individual said in response?**

8 **A. "It's the latest in a long chain. FYI your products suck**
9 **and are more overpriced than GWs. The closest you come to a**
10 **decent good looking product is that Mach I Rhino kit, and even**
11 **that's a direct copy of the original model in terms of look. No**
12 **idea where you're pulling your prices from "**

13 **MR. MDSKIN: I have nothing further for this witness.**

14 **THE COURT: Ms. Hartzell.**

15 **CROSS EXAMINATION**

16 **BY MS. HARTZELL:**

17 **Q. Good afternoon, Mr. Villacci.**

18 **A. Good afternoon.**

19 **Q. We're going to back up to some background in a minute, but**
20 **first I want to ask you. Did you agree with that last poster?**

21 **A. No, but everyone's entitled to their opinions.**

22 **Q. And the other question that came up at the end of**
23 **Mr. Mbskin's questioning, why the name Chapterhouse Studios?**

24 **A. It just rolled off the tongue, and one day me and Joe Mbss**
25 **(phonetic) were discussing names for our company, and that**

Villacci - cross

1 **happened to be the book sitting next to me in my van while I was**
2 **working.**

3 **Q. One second.**

4 **(Brief pause.)**

5 **BY MS. HARTZELL:**

6 **Q. We'll go ahead and get started on that background now. Tell**
7 **us where you live?**

8 **A. Live in Hurst, which is a suburb of Fort Worth in Texas.**

9 **Q. Before you started Chapterhouse, what did you do for work?**

10 **A. I used to work at Verizon. I was a telephone guy, the guys**
11 **you see climbing up on poles and fixing your telephones and**
12 **stuff like that.**

13 **Q. Did you attend college?**

14 **A. Yes.**

15 **Q. What did you study?**

16 **A. Initially, I got my couple associate's in -- I'm trying to**
17 **remember. Business administration. And from there I decided to**
18 **move into a Bachelor's of Information Technology Management, and**
19 **I think I'm five courses away from my accounting degree.**

20 **Q. And when you're not working, how do you spend your time?**

21 **A. Lots of time with my daughter. I'm a single dad now.**
22 **Church has become really important to me in the last year and a**
23 **half. Volunteering. I recently moved into a house that I had**
24 **to remodel, working on that. But it's mainly my daughter. And**
25 **I've discovered soccer in the last year and a half. I love**

Villacci - cross

1 playing soccer.

2 Q. Do you consider yourself to be a science fiction fan?

3 A. Yes.

4 Q. When did you first become interested in science fiction?

5 A. When did Star Wars come out? I think that was before I was
6 born. Two or three when I remember seeing Empire Strikes Back
7 and Return of the Jedi. Then from there I started watching
8 cartoons when I was little. I don't know if anyone remember
9 Robotech. That was a cartoon when I was little. And
10 Transformers and Buck Rogers, all that.

11 Q. At what point did you learn about Warhammer 40,000?

12 A. I believe I was 15 and -- no, I'm sorry. That's earlier
13 than that. I think the first time I saw it was maybe when I was
14 eleven or twelve in a comic book store. I saw a box of Games
15 Workshop products, and what caught my attention was it was
16 called Warhammer, and at that time I was interested in another
17 game from a company called FASA. I don't think they're around
18 anymore. But it's called BattleTech. And one of their big
19 walking robots in the game was called Warhammer. It was a
20 Warhammer vehicle. So, I saw that. I was like, oh, it's
21 Warhammer. Oh, no. It wasn't Warhammer. But that's the first
22 time I ever saw their product.

23 Q. And how did you initially get involved in BattleTech?

24 A. I remember seeing it in a Nintendo Power Magazine when I was
25 seven or eight. They were having a contest in the back because

Villacci - cross

1 one of the new games coming out was MechWarrior, and they were
2 running a contest to promote it, and they were giving it all
3 this BattleTech stuff, and I saw that.

4 And then when I actually got to play with the game was
5 maybe a year later when I was with my dad for the summer. And
6 my parents were divorced, so I was trying to figure out
7 something I can get my dad to buy me, because that's what
8 happens when your parents are divorced, and we went to the hobby
9 store, and we got that game, and it was a pretty cool game with
10 little walking robots, and that's when I first got into that.

11 Q. What kind of game was BattleTech?

12 A. Miniature war gaming game.

13 Q. As you got older, did you have any other interactions with
14 the comic book store in your town?

15 A. Yeah. I was just interested in comics. I think most young
16 men either go towards comics and stuff like that or sports, and
17 at that age I was more into comic books and card games and stuff
18 like that. So, yeah, just generally stayed in that zone for
19 awhile.

20 Q. And did your interactions with the comic book store ever
21 change from being just a customer?

22 A. Yes. I think my third job, I think I was 16, was working at
23 a comic book store.

24 Q. What kind of games did the comic book store sell?

25 A. Collectible card games. You may be familiar with Magic or

Villacci - cross

1 **Pokemon. Back then that was the big thing, pushing new card**
2 **games. It was a new idea for card games. Board games. Like I**
3 **remember jurors talking Imperium, Twilight Imperium, or**
4 **something like that. Twilight of the Imperium? I'm not sure of**
5 **the name. I know they had that. Like in Munchkin, regular**
6 **board games like Risk everyone's talking about. We even had**
7 **Checkers, miniature role playing games. I'm sorry. Miniature**
8 **tabletop games. They also had role playing games, as well.**

9 **Q. Any examples of the miniature games that you became aware of**
10 **while you were working there?**

11 **A. Warhammer for sure was one of the big ones. They had**
12 **Dungeons & Dragons, which was a miniature game that they had a**
13 **system to play with miniatures. There's been a number of them**
14 **Starship Troopers had a miniatures game. I think that's come**
15 **and gone. I think there was an aliens miniature games. There's**
16 **all sorts of miniature games. And, of course, BattleTech was**
17 **still alive back then.**

18 **Q. At any point did you become a player of Warhammer 40K?**

19 **A. Yes.**

20 **Q. How did that happen?**

21 **A. My manager at the time, I think they were running a demo**
22 **game to get customers into the game, and I kind of got**
23 **interested in it. Like, again, I've been familiar with**
24 **miniature games, and this one is just another miniature game,**
25 **but it was kind of cool. And he actually bought me some stuff**

Villacci - cross

1 for my birthday one day. Just we were closing up the shop, and
2 I saw him buying some stuff. I had no idea what he was doing.
3 And he's like, "Here, here you go." I was like, "Cool." And
4 that kind of sucked me into the whole Games Workshop world.

5 Q. And what was it about Warhammer 40K that appealed to you?

6 A. I mean, just giant superhumans in armor. Space knights I
7 guess you could call them Fighting demons. It's kind of like
8 the regular fantasy movie, but with a space twist to it.

9 I think one of my favorite things was it was so
10 dynamic. Back then when you like shot at a tank, the tank
11 didn't just go away. There was a big old chart you had to look
12 at if a tank got hit. Did a wheel get blown off, did it go out
13 of control, run over a bunch of people, did it get stuck, did
14 the vehicle blow up. It was very dynamic and realistic. It
15 wasn't static and boring.

16 Q. And did you participate at all in the painting side of the
17 hobby?

18 A. I had always been a painter before this. I was always
19 painting model planes and tanks and stuff like that. So, that
20 was just one more way of sucking me in.

21 Q. And let's pull out PX909 at Page 54. What's this a picture
22 of?

23 A. This is a picture of a Games Workshop Land Raider tank with
24 Chapterhouse Studios additional components, and it's actually my
25 personal Land Raider.

Villacci - cross

1 Q. So, you have a personal collection of Games Workshop parts?

2 A. Yeah, I do.

3 Q. Do you have particular armies that you collect?

4 A. Yes.

5 Q. Which ones?

**6 A. Currently, I have a Tau army, a Necron army, a Salamander
7 Space Marine Army. Let me think. A Tyranid army. Can't forget
8 about them Thank God that's all I have.**

9 Q. And if we look at PX909 at 18, what is that?

10 A. That is one of my first Tau battle suits that I ever bought.

11 Q. And PX909 at 22.

**12 A. That is one of my almost completely painted Salamander Space
13 Marines.**

**14 Q. And are the parts on that product Games Workshop or
15 Chapterhouse?**

16 A. They are both.

17 Q. Which parts are from Chapterhouse?

**18 A. The shoulder pad on the right-hand side with the big orange
19 dragon head on it, that's our product. And, sadly, the
20 unpainted gun in his hand is also our product because it's not
21 painted.**

22 Q. How long have you been playing Warhammer 40K?

**23 A. Let's see. I was 15, I think, when I started. 16. I'm
24 afraid to say how old I am Seventeen years.**

25 Q. And how did you first get started creating your own

Villacci - cross

1 miniatures?

2 A. Just wanted to add onto my personalization of my stuff. You
3 see I got a ton of stuff here. One of the aspects of the hobby
4 is individualizing your units, making them different looking,
5 your own flare to them And also I'm very competitive in the
6 gaming community. We play tournaments and stuff like that, and
7 one of the major parts of the tournaments, you could even -- I
8 mean, you could do great in the actual gaming part of it and win
9 all your games, but if you don't have anything painted well or
10 it doesn't look good, you could lose to someone else who did
11 better.

12 It was painting and converting, converting meaning
13 adding your own flare and twist to a model or sculpting onto and
14 stuff like that stuff. That's what made me want to get into it,
15 to, I guess, win more competitions.

16 Q. And how did you get ideas for your customization?

17 A. Initially, it was on the forums. The forums have been such
18 a big part of this whole case. Everyone goes there and talks.
19 They get on there to brag about their stuff. Look at this.
20 Look what I did. Oh, that's great.

21 I ran into a guy who played Salamanders, as well, and I
22 saw these awesome looking shoulder pads. I was like, oh, that's
23 awesome. There's nothing out there like that. And it's such a
24 simple thing to add that onto your figure, but it makes it look
25 totally different than the guy next to him with a plain, boring,

Villacci - cross

1 flat surface.

2 So, I contacted Tomas, who's been talked about, and
3 he's like, yeah, you know, I sculpt these by hand, and I'm like
4 holy cow. And at the time I knew how -- I don't know why I was
5 getting into learning how to do resin casting in my garage,
6 but -- actually, I don't even know if I knew how to do it at the
7 time, but I think they sell kits at Hobby Lobby where you can
8 buy your little resin casting kit, and it gives you instruction
9 how you do it, and you can do it on your table.

10 So, I told him, hey, if you send me some of those, I'll
11 make you a few hundred of them for your personal collection.
12 And Tomas, he's like awesome, you know. I don't know how to
13 cast. All I know how to do is sculpt this by hand. So, that's
14 what happened. You know, two people meeting on the Internet --
15 sounds weird -- got together, and we started doing this just for
16 ourselves.

17 And then that same forum I met him, we posted our stuff
18 on there, and everyone's like, oh, those are awesome. Where did
19 you get those. Games Workshop doesn't have anything like that,
20 you know. So, through private messages they sent Tomas and
21 myself or just posting on the forum, we told them we had them
22 and people started paying for them. And I think a lot of
23 businesses start that way. You do something small, and you're
24 not really looking to make any money, but there was a demand for
25 it, and that's how we started.

Villacci - cross

1 Q. And is Tomas Mr. Fiertek?

2 A. Yes.

3 Q. Who is that?

4 A. Tomas is a Swedish gentleman that I met on the forums, like
5 I just told you. Mainly -- all he does is sculpt and come up
6 with new ideas in his head of new products to make, and I kind
7 of manage him, and we talk back and forth and trade ideas, and
8 he works with other designers, as well.

9 Q. How do you communicate with one another mostly?

10 A. E-mail.

11 Q. How would you describe the tone of your communications?

12 A. Well, he's Swedish, and there's an obvious language barrier
13 there, and I almost want to say there's -- everyone's different
14 in their part of the world. You know, we act different than
15 Swedish. We act different than, you know, the British. So,
16 there's always some diversity in communications there. But it's
17 pretty informal between me and him. That could be a good thing
18 and a bad thing sometimes.

19 Q. And how frequently did you communicate?

20 A. Quite often.

21 Q. How did you start working together on original ideas?

22 A. Just originally we stuck to only things that were for
23 ourselves. The Salamanders, which we both loved. And there
24 wasn't really any way to customize them with Games Workshop
25 components at that time. They didn't branch out into the

Villacci - cross

1 Salamanders for years after we started doing our personal stuff
2 and the Chapterhouse stuff.

3 And then I guess it just slowly branched out. I
4 started selling our Salamander stuff on eBay, and people would
5 see that, and they may not necessarily want dragon stuff on
6 their shoulders, but they wanted something else, and they would
7 contact us. And I think our first few products that weren't
8 having to do with the Salamanders came about from customers
9 asking us to do stuff.

10 Q. What kind of time frame are we talking about here? When did
11 you first meet Mr. Fiertek?

12 A. Wow. Geez. That was a long time ago. 2005.

13 Q. And when did you start working together?

14 A. In an official capacity or just --

15 Q. Yes, in an official capacity.

16 A. Maybe six months later, seven months later.

17 Q. And you talked about some of the first products that you
18 started with were for Salamanders. What kind of products did
19 you design?

20 A. Generally, everything with Salamanders, there's a theme.
21 Dragons, flames, scales. In the fiction they talk about how
22 they're great craftsmen. They make their own weapons. So,
23 anvils, hammers, where you forge swords and armor, stuff like
24 that. That's generally the theme we tend to stay with when we
25 do our Salamander components.

Villacci - cross

1 **And then they're generally components that fit on Games**
2 **Workshop models that we own because we want to individualize our**
3 **products. So, they would fit on the Rhino, as everyone's seen.**
4 **We make doors that fit on their kit. You don't have to use**
5 **their plain doors. We make armor panels that don't replace**
6 **anything on their kit. They just fit on the groove. The drop**
7 **pod's like that, too. It's not a drop pod door. It's just a**
8 **panel that fits on their door, over the door. You don't replace**
9 **a kit on that, any component of that kit.**

10 **Shoulder pads, those are really, like I said, something**
11 **that's easy to sculpt, but adds a lot of flare to your products.**
12 **Weapons. So, I guess you could break it all down into weapons**
13 **and accessories.**

14 **Q. Where did you first sell your products?**

15 **A. Geez. Definitely not a website, like our own company**
16 **website, at all. I would say probably the first place we ever**
17 **sold them was that forum we met a long time ago.**

18 **Q. And where else did you sell your products before you started**
19 **a website?**

20 **A. On eBay, in person. People would ask me, you know, if they**
21 **saw my stuff in a shop, they'd ask me do you have any more of**
22 **those, and that way. Bartertown.**

23 **Q. What's Bartertown?**

24 **A. Bartertown, as the name might clue you in on, is a place**
25 **where people meet to barter stuff, and it's generally to do with**

Villacci - cross

1 gaming, miniatures, role playing books, comic books, action
2 figures. And people either barter, they trade stuff. Hey, I
3 got this. Do you want to trade it for this. I'm looking for
4 this. Or they sell stuff.

5 Q. Why did you decide to make it into a business?

6 A. Basically so I didn't have to work 60 hours a week,
7 overtime, you know, working late into the night. This really
8 coincided with me having my daughter, and that's been my main
9 motivation. I didn't want to have to, you know, work long hours
10 and miss out on my daughter's life. Because that's what I did
11 for the first few years. I was working 60, 70 hours a week late
12 at night. My daughter had just been born. I wanted to do
13 something where I could work at home and be available for her
14 right after school and that kind of thing. That's really been
15 my drive to be clear.

16 Q. And is that still where Chapterhouse is located, in your
17 home?

18 A. Yes.

19 Q. What steps did you take to make it into a business?

20 A. We became an official LLC, which you just go to the state
21 register and file the paperwork and do that. We also -- well,
22 we. I also went to an attorney. We wanted -- I keep saying we.
23 I wanted to make sure it was a viable business idea. I didn't
24 want to put a lot of work into starting a business up if there
25 was no legal precedence for making conversion kits for someone

Villacci - cross

1 **else's products, making accessories for someone else's products.**

2 **Q. And what about for selling the products? Did you do**
3 **anything to start your own shop?**

4 **A. Workshop?**

5 **Q. A place where you could sell your products.**

6 **A. A web shop?**

7 **Q. A website.**

8 **A. Yeah. I mean, I think the website was launched shortly**
9 **after we became Chapterhouse Studios, and it was a very cheap**
10 **and basic website, but it worked. And, I mean, I didn't have to**
11 **receive e-mails from people and process the orders that way.**
12 **They could just place an order on the website, and it definitely**
13 **spun up the process of becoming a viable business.**

14 **Q. Let's take a look at your early website, PX435 at Page 1033.**
15 **Can we zoom in on the top of the page? Is this a version of**
16 **your early website?**

17 **A. Yes.**

18 **Q. And when would you say that it was created?**

19 **A. Wbw. 2007 or 2008.**

20 **Q. Looking at the top of the page, what is that logo?**

21 **A. That is a Raven.**

22 **Q. And below the name Chapterhouse, what's its tagline?**

23 **A. Specializing in custom sculpts and bits for Warhammer 40,000**
24 **and Fantasy.**

25 **Q. And what's that mean?**

Villacci - cross

1 **A. That our main line of business was doing custom sculpts and**
2 **components for the Warhammer 40,000 line.**

3 **Q. And when you refer there to Warhammer 40,000, what is that**
4 **referring to?**

5 **A. The Games Workshop Warhammer 40,000 product line.**

6 **Q. Turning to the next page of the same exhibit, PX435, what's**
7 **at the bottom of the web page?**

8 **A. A disclaimer.**

9 **Q. And what's the first line say?**

10 **A. "This website is completely unofficial and in no way**
11 **endorsed by Games Workshop Limited."**

12 **Q. Why did you put that on there?**

13 **A. We didn't want to get in legal trouble with Games Workshop.**
14 **So, besides going to an attorney and finding out what he told**
15 **us, we went to the Games Workshop --**

16 **MR. MDSKIN: Objection, your Honor.**

17 **THE COURT: Basis?**

18 **MR. MDSKIN: There's been no defense in this case of --**

19 **THE COURT: I'll tell you what. Here's what we're**
20 **going to do. We're going to need to discuss this a little bit**
21 **further. So, it's almost five minutes to 5:00. We're going to**
22 **break for the day. Remember we're starting at 9:00 tomorrow.**
23 **Please time your schedules to make sure you get here by 9:00. I**
24 **have nothing else scheduled. We'll start right at 9:00. Don't**
25 **discuss the case.**

1 I'll take the jury out and come back out.

2 (The following proceedings were had in open court, out of
3 the presence and hearing of the jury:)

4 THE COURT: Okay. So, finish the thought, Mr. Mbskin.

5 MR. MSKIN: Through the course of this litigation,
6 Chapterhouse has repeatedly asserted attorney-client privilege
7 in any communications even remotely connected with counsel and
8 has not asserted an opinion of counsel defense in the case.

9 THE COURT: Repeat the first part of what you said.
10 There was a discovery --

11 MR. MSKIN: During the course of discovery, they
12 have --

13 THE COURT: Privilege was asserted.

14 MR. MSKIN: -- claimed attorney-client privilege in
15 all manner of communications that refer in any way to
16 discussions with lawyers. And we actually --

17 THE COURT: Okay. Let's just start with that. What
18 about that?

19 MS. HARTZELL: I don't think we have any intention of
20 disclosing the communications with an attorney.

21 THE COURT: Well, wait a second. You just did. I
22 mean, he's talking about how he went and got advice from
23 attorneys so he wouldn't get crosswise with Games Workshop. If
24 there's anybody on the jury who doesn't get that, then I'd be
25 really surprised.

1 **MS. HARTZELL:** The fact of the attorney-client
2 communication at that time frame was disclosed in our privilege
3 log, the fact that that took place.

4 **THE COURT:** Yeah, but I mean, you know, you're
5 eliciting from Mr. Villacci that he went and got advice from an
6 attorney so that he would not, you know, run afoul of whatever
7 restrictions, so he wouldn't get in trouble with Games Workshop
8 or whatever the lingo was that he used.

9 You can't do that on the one hand, having, you know, on
10 the other hand having withheld and objected to production of,
11 you know, communications with counsel because if -- I mean, if
12 you're going to rely on that, you open up the entirety of the
13 relationship. The entirety of it. The law is really clear on
14 that.

15 **MS. HARTZELL:** And the question that I was asking him
16 that elicited that response was actually trying to get that he
17 started a website.

18 **THE COURT:** Okay. So, it was a nonresponsive answer is
19 what you're telling me.

20 **MS. HARTZELL:** Yes.

21 **THE COURT:** Okay. Fine. So, then a remedy for that
22 would be for me to specifically advise the jury first thing in
23 the morning is that any testimony that you've heard from
24 Mr. Villacci regarding consulting an attorney is stricken, you
25 may not consider it, and there is no defense in this case and

1 **there will be no argument in this case that Chapterhouse,**
2 **Mr. Villacci, or anybody associated with Chapterhouse relied on**
3 **the advice of an attorney in any way, shape, or form**

4 **So, would you be comfortable with that instruction?**

5 **MS. HARTZELL: Yes.**

6 **THE COURT: Would that do it for you?**

7 **MR. MDSKIN: That's fine.**

8 **THE COURT: Okay. So, the one other thing that was**
9 **under advisement was this limiting instruction regarding the**
10 **eBay postings.**

11 **MR. KEENER: And, your Honor, there was testimony here**
12 **that actually makes it worse.**

13 **THE COURT: Okay. Well, let me just sort of back up a**
14 **little bit. So, the issue that I dealt with in connection with**
15 **the pretrial conference and the motions in limine, really it was**
16 **I think a separate motion called motion for discovery compliance**
17 **or something like that.**

18 **MR. KEENER: To enforce, yes.**

19 **THE COURT: Had to do with whether there should be an**
20 **adverse inference based simply on the failure to preserve the**
21 **prior eBay postings. And I concluded in the transcript I think**
22 **it was of the second pretrial conference on the 25th of April**
23 **that there wasn't a sufficient basis. I think, if I'm recalling**
24 **it correctly -- it's been a couple hours since I read it --**
25 **there wasn't a sufficient basis to show that there was something**

1 actually in existence that might have been favorable to Games
2 Workshop that had not been preserved as of the date on which I
3 concluded that there was a duty to preserve.

4 Now I think we're dealing with a different issue, and
5 that is -- what I gather is considered to be by Games Workshop,
6 at least, the affirmative use of the absence of evidence
7 introduced by Games Workshop of eBay postings.

8 MR. KEENER: And now it's even worse. On the stand on
9 cross he said yes, I saved all those eBay postings, and I gave
10 them to counsel. We've never seen an eBay posting from
11 Chapterhouse.

12 THE COURT: Yes, he did say something pretty darn close
13 to that when Mr. Mbskin was questioning.

14 MR. KEENER: The only ones in this case are ones Games
15 Workshop found themselves. We've never seen an eBay post.

16 THE COURT: And so, I sort of wondered about that when
17 it happened because I guess I assumed that -- because I think I
18 said during the pretrial conference that counsel could go into
19 the issue of preservation at the trial, and I assumed that
20 that's what Mr. Mbskin was doing at that point.

21 MR. MDSKIN: Right.

22 THE COURT: And then Mr. Villacci basically said no, I
23 gave everything to my lawyers. So, it is in some ways worse.

24 How should I deal with this?

25 MR. ALY: Yes, your Honor. I think that what that's

1 referring to is the investigation that -- I think you should
2 deal with it, your Honor, with either a limiting instruction or
3 follow-up cross examination because I believe what he's
4 referring to, and I can confirm this tonight or even right now,
5 is in the course of the investigation of the joint status report
6 that we submitted to your Honor, there was collections of
7 comments that were made on posts for products, and we asked him
8 to please help us double check that because we wanted to be
9 certain there weren't any other additional materials.

10 So, he did help us collect the forum post comments that
11 customers made to confirm that the only comments that had been
12 made were about products that Games Workshop had already found,
13 and there wasn't anything else. And so, I'm sure that's what it
14 is regarding to, but I can confirm that a hundred percent, if
15 you give me five minutes.

16 THE COURT: Well, so, but the problem though -- the
17 problem though, is that, you know, it was I think made pretty
18 clear during -- you know, in the submission of the status report
19 during the discussions we had about this at the pretrial
20 conference that there hadn't been any attempt to preserve eBay
21 postings up until a certain point in time.

22 MR. KEENER: No. I think ever. The issue is even
23 after the lawsuit was --

24 THE COURT: I mean, okay.

25 MR. KEENER: He was still selling stuff on eBay and

1 never preserved any of those. Their argument was, well, you
2 found most of what we think is out there.

3 THE COURT: Okay. Fine. Mistake on my part. That
4 there hadn't been any effort to preserve eBay postings ever.
5 Games Workshop had located, you know, from a certain point
6 forward what they could find, but what was missing was, you
7 know, the period of time that predated that.

8 You know, it was I think my intention and I think I
9 said pretty clearly that the defense could go into that -- or
10 excuse me -- the plaintiff could go into that at the trial,
11 presumably when questioning Mr. Villacci. Now, the problem is
12 that Mr. Villacci seems to have given a different answer to what
13 I thought the question was, and, you know, maybe the question
14 wasn't worded precisely enough. I'm not going to deal with
15 that.

16 So, one way of dealing with that is to say okay. Look.
17 I'm going to let Mr. Mbskin go back into this in redirect,
18 whether it's within the scope or not, and we'll see what
19 Mr. Villacci says then. And, you know, if there's something
20 along the lines of the answer that he already gave, which is I
21 gave everything to my lawyers, then there is absolutely no
22 question that I'm going to have to take other steps.

23 MR. ALY: Understood.

24 THE COURT: So, as far as -- the other point that you
25 made, Mr. Keener, had to do with the questioning just now. So,

1 repeat that for me again.

2 MR. KEENER: The questioning just now was whether he
3 had saved eBay posts, and he said yes, he turned them over to
4 counsel.

5 MR. MDSKIN: And he had said --

6 MR. KEENER: And he said the same thing at deposition,
7 too.

8 MR. MDSKIN: I'm looking for the testimony. When I
9 asked him that question at his deposition, he said the same
10 thing, as well, and this was before any of this discussion we
11 had this morning.

12 THE COURT: Before any of this discussion. Okay.

13 MR. MDSKIN: I can find the testimony somewhere in
14 here.

15 THE COURT: Yes. Well, one way or another, I don't
16 think that this instruction that I have really -- in some ways
17 it says too much, and in some ways it says not enough. So, the
18 statement where it says I've found that Chapterhouse failed to
19 preserve these posts, I mean, I think that's -- I don't think
20 that that's something that's appropriately communicated to the
21 jury because, you know, the ruling that I made at the pretrial
22 conference was okay, Chapterhouse didn't preserve this stuff,
23 but now let's figure out what the sanction is. And what I
24 concluded was -- what I concluded was as to, you know, the more
25 recent postings, there wasn't any prejudice and, therefore, no

1 basis for any kind of a spoliation type sanction because Games
2 Workshop had located eBay postings on its own.

3 With regard to earlier materials, I didn't think -- and
4 it's pretty clear in the transcript -- that there was the
5 necessary showing that there was something that was missing that
6 was likely to be favorable to Games Workshop.

7 So, for that reason, I just don't think saying I found
8 Chapterhouse failed to preserve these posts really is something
9 that ought to be communicated. By the same token, when it says
10 that, you know, you're free to infer that the eBay posts on an
11 earlier date are in a manner -- you know, are similar to the
12 ones you've seen, I'm not sure that says enough.

13 So, I think -- there's two things I'm going to have you
14 do is, A, you need to do some more work on this. I'm going to
15 give you back all these transcripts, as well as the draft of the
16 instruction. I think you need to do some more work on it
17 between now and the morning. I'd like you to e-mail me
18 something tonight, some sort of a draft. And you can just
19 include in the e-mail, but just make sure you make part of the
20 record, as well, to the extent you can't agree on something,
21 your respective views on the disagreed part.

22 And then the other thing is, you know, as far as the
23 current testimony -- and I think -- you know, I think,
24 Mr. Mbskin, you should just figure that you're going to go into
25 this again on redirect. Who knows. It may get dealt with by

1 Ms. Hartzell tomorrow morning when she continues to question
2 Mr. Villacci. But you should go into it on redirect, and we're
3 just going to have to see what happens.

4 But, I mean, I think you should, you know, just try to
5 sort of phrase the questions, you know, in a really clear and
6 concise way that makes it clear that what you're asking about is
7 eBay postings like this one from an earlier point in time. And
8 you sort of did that, but it might be helpful to just sort of
9 have it up on the screen, and I'll just deal with it once we get
10 through all that. Okay. Is that clear enough for everybody?

11 MR. MDSKIN: Just I'll note for the record here what he
12 said, and I don't want to belabor the point.

13 THE COURT: You just told me he said in his deposition
14 something similar to what he said today.

15 MR. MDSKIN: Yeah. I found the place.

16 THE COURT: And so, fine. I mean, that's -- you know,
17 if that's his testimony, that's his testimony, but then there's
18 going to need to be some other way to get in that Chapterhouse
19 actually did not preserve eBay postings, and that can be by
20 stipulation or it can be by something else or it can be by me
21 saying something. And so, I'll -- you know, I'll leave it to
22 you to propose something in the first instance.

23 MR. KEENER: And, your Honor, should they not be
24 consulting with Mr. Villacci tonight about his testimony?

25 THE COURT: Well, on that particular point I think it's

1 **okay for you to talk to him Not anything else because he's --**
2 **you know, he's essentially under questioning by other people now**
3 **or has been, at least. But you can talk to him about that one**
4 **thing because I think that, you know, in some ways maybe the**
5 **simplest way to clear all this up is he fixes it. I'm not**
6 **telling anybody what to say. People should only say the truth.**
7 **That's to be clear about it.**

8 **MR. ALY: Your Honor, I just want to confirm Even**
9 **though he's our witness, we can't talk to him for --**

10 **THE COURT: I just told you you could on this, on this**
11 **particular topic.**

12 **MR. ALY: Understood.**

13 **THE COURT: Okay. All right. See you in the morning.**
14 **(Whereupon, the within trial was adjourned to Friday,**
15 **June 7, 2013, at 9:00 o'clock a.m.)**

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