

EXHIBIT S

EB5LRIV1

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 RIVER LIGHT V, L.P. and TORY BURCH
LLC,
4 Plaintiffs,

5 v. 13 CV 3669 (DLC)

6 LIN & J INTERNATIONAL, INC., LANI KIM,
and YOUNGRAN KIM,
7 Defendants.

Hearing

8 -----x
9 New York, N.Y.
November 5, 2014
10 9:32 a.m.

11 Before:

12 HON. DENISE COTE
13 District Judge

14 APPEARANCES

15 FISH & RICHARDSON P.C.
Attorneys for Plaintiffs
16 BY: NATALIE L. ARBAUGH, ESQ.
KRISTEN McCALLION, ESQ.

17 SONG LAW FIRM
Attorneys for Defendants
18 BY: HOWARD Z. MYEROWITZ, ESQ.
19 JEREMY M. DOBERMAN, ESQ.

20 ALSO PRESENT
TIFFANY WALDEN, Senior Counsel, Tory Burch, LLC
21 Tim Rhee, Paralegal, Song Law Firm
Lucia Lee, Korean Interpreter
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1 (Hearing resumed)

2 THE COURT: Ms. Kim, I remind you you are still under
3 oath.

4 THE WITNESS: Yes.

5 THE COURT: How much longer for your direct
6 examination, counsel?

7 MS. ARBAUGH: After yesterday, I anticipate about an
8 hour.

9 THE COURT: Okay. Let's try to keep it as short as
10 possible.

11 MS. ARBAUGH: Will do, your Honor.

12 YOUNGRAN KIM, resumed.

13 called as a witness by the Plaintiff,

14 having previously been duly sworn, testified through the

15 Korean interpreter as follows:

16 DIRECT EXAMINATION (cont'd)

17 BY MS. ARBAUGH:

18 MS. ARBAUGH: May I proceed, your Honor?

19 Q. Ms. Kim, yesterday we left off with discussing what you had

20 done with respect to re-branding your company in 2013. I'd

21 like to ask you some questions about that. In 2013, in

22 approximately May of that year, you created LJ Brand Inc.,

23 correct?

24 A. Yes.

25 Q. You created a new website, www.isiscross.com, correct?

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Kim - direct

1 A. Yes.

2 Q. And for the first time that website displayed the Isis
3 Cross design that you had applied for a trademark on, correct?

4 A. Yes.

5 Q. So if you look at Plaintiff's Exhibit 67 in your notebook,
6 there's tab numbers on your notebook, ma'am, and if you look at
7 the tab that says 67, do you recognize Plaintiff's Exhibit 67
8 as the new website you created in 2013?

9 A. Yes.

10 Q. And you can see on that website that you're displaying for
11 the first time a copy of your Isis Cross, correct?

12 A. Yes.

13 Q. Another thing you did for the first time in 2013 was create
14 new tags for your products that displayed the Isis Cross,
15 correct?

16 A. Correct.

17 Q. And another thing you did in 2013 was create green banners
18 for your storefronts to begin using in your showroom that
19 created the Isis Cross or displayed the Isis Cross on them,
20 correct?

21 A. I had the banner before.

22 Q. We'll get to that again in a minute. But, in any event,
23 you needed to do these things we've discussed you did in 2013
24 to create support for having trademark rights, correct?

25 A. Yes.

EB5LRIV1

Kim - direct

1 Q. So let's go back. Yesterday we talked about the office
2 action you received from the trademark office, and I would like
3 to discuss more specifically what you did in response to that.
4 You created documents as specimens to give to the patent
5 trademark office, correct?

6 A. Yes.

7 Q. You did that on your own, right?

8 A. Yes.

9 Q. And the specimens that you submitted to the trademark
10 office consisted of point of sale materials that you used the
11 goods, or at least that's what you were representing to the
12 trademark office, correct?

13 A. Yes.

14 Q. Now let's take a look at Plaintiff's Exhibit 1. It should
15 be the first document in your binder. And do you recognize
16 Plaintiff's Exhibit 1 as the response to the trademark office's
17 office action?

18 A. Yes.

19 Q. And this document includes specimens that you created to be
20 submitted to the trademark office, correct?

21 A. Yes.

22 Q. Okay. Let's look at the page of this exhibit that's
23 labeled 11783.

24 THE INTERPRETER: 1178?

25 Q. 11783, in the bottom right-hand corner.

EB5LRIV1

Kim - direct

1 A. I can't locate it.

2 Q. Do you recognize 11783 as one of the specimens you created
3 for the PTO?

4 A. Yes.

5 Q. Okay. Now, this document says at the top, "Welcome
6 Customers to Lin & J," correct?

7 A. Yes.

8 Q. You were wanting the trademark office to think this is
9 something you gave your customers, right?

10 A. I'm not so sure.

11 Q. Well, ma'am, can you explain to Judge Cote why you would
12 put "Welcome Customers to Lin & J" on a document if you didn't
13 want the trademark office to think it was something you were
14 giving or showing your customers?

15 A. I already had those materials and it's been submitted as it
16 were.

17 Q. Well, ma'am, you created these materials in August 2013,
18 correct?

19 A. We already had these photos before.

20 Q. Ma'am, that's not what I'm asking you about. I'm not
21 asking about the photos. I'm asking about this document where
22 you compiled a number of photos and you titled it "Welcome
23 Customers to Lin & J." Now, you put that on this document and
24 submitted this document in this format to the trademark office
25 because you wanted to lead them to believe this was something

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Kim - direct

1 you gave your customers, right?

2 A. That could be the case.

3 Q. And you displayed pictures of your showroom on this
4 document, correct?

5 A. Yes.

6 Q. And it's difficult to see from the quality of these photos,
7 but there are green banners outlining the doorways of the
8 showroom, correct?

9 A. Yes.

10 Q. And those green banners contain marks or watermarks of the
11 Isis Cross design, correct, ma'am?

12 A. Yes.

13 Q. If you turn to the very next page, 11784, which your binder
14 is open to --

15 A. Yes.

16 Q. -- this is another document you created for the trademark
17 office, correct?

18 A. Yes.

19 Q. And you pulled together pictures, correct?

20 A. Yes.

21 Q. And, again, at the top of this document you put "Welcome
22 Customers to Lin & J," right?

23 A. Yes.

24 Q. And you also put above the pictures, many stores are
25 selling Isis Cross product, exclamation point, exclamation

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Kim - direct

1 point, exclamation point, correct?

2 A. Yes.

3 Q. And the photographs you submitted to the trademark office,
4 those are photographs of a customer store of Lin & J, right?

5 A. Yes.

6 Q. And it's Wona, W-O-N-A, Trading, right?

7 A. Yes.

8 Q. And Lin & J asked Wona Trading to display these Isis Cross
9 signs that are depicted in those photographs so that Lin & J
10 could take these photographs, right?

11 A. Yes.

12 Q. And Lin & J did that sometime after the trademark office
13 sent its first office action that we went over yesterday,
14 right?

15 A. I do not recall the time.

16 Q. You certainly didn't have these photographs when you
17 submitted your first application to the trademark office
18 earlier that year, correct?

19 A. It was additional documents.

20 Q. And the language you put at the top of the document above
21 the pictures that says many stores are selling Isis Cross
22 product, you did that because you wanted the trademark office
23 to think that your customers were selling jewelry in this
24 fashion, displaying it next to an Isis Cross sign, right?

25 A. I do not recall.

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Kim - direct

1 Q. You don't recall why you did that?

2 A. Correct.

3 Q. Okay. In any event, the two pages that we just looked at
4 that you created, you submitted these to the PTO because you
5 wanted them to approve your trademark on the basis of these
6 documents, correct?

7 A. Yes.

8 Q. If you will turn to the next page in the binder, ma'am, the
9 next page is the new collection book of 2012, correct?

10 A. Yes.

11 Q. Okay. And you created this, right?

12 A. Yes.

13 Q. And you put this in here, again, because you wanted the PTO
14 to believe this catalog showing sales of your Isis Cross
15 products in the 2012 time period, right?

16 A. Yes.

17 Q. And, in fact, the catalog itself says 2012 on its face,
18 correct?

19 A. Yes.

20 Q. But it did not exist in 2012, did it?

21 A. Correct.

22 Q. The last page of your specimen, 11792, which is after the
23 catalog, this is another document you created solely for
24 purposes of giving to the trademark office, correct?

25 A. Yes.

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Kim - direct

1 Q. And you've got a picture of your showroom again, correct?

2 A. Yes.

3 Q. With those same green banners we saw on the earlier
4 specimens?

5 A. Yes.

6 Q. And, again, you say we graciously welcome you, right?

7 A. Yes.

8 Q. And you put a watermark of the Isis Cross design in three
9 places on that specimen, correct?

10 A. Yes.

11 Q. And you discuss the Isis Cross as part of what you call our
12 brand, right?

13 A. Yes.

14 Q. Okay. So I just want to make sure I'm clear. For all of
15 these documents we just went over, you created them solely for
16 purposes of responding to the trademark office, correct?

17 A. Yes.

18 Q. And you created them because you wanted the trademark
19 office to approve your trademark on the basis of these
20 specimens, right?

21 A. Yes.

22 Q. Now, I want to talk about those green banners one more
23 time. You did not start using those green banners in your
24 showroom in the fashion you displayed to the trademark office
25 until after you first applied for a trademark, correct?

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Kim - direct

1 A. That's not true. That's not true.

2 MS. ARBAUGH: Could the translator please translate
3 for Ms. Kim the page and line of the deposition of Ms. Kim 428,
4 12 through 14.

5 Q. Ms. Kim, I asked you in your deposition in April: So after
6 you applied for a trademark, you created these green banners to
7 display on your storefront, correct?

8 And your answer was yes. Right?

9 A. On the paper that's what it said.

10 Q. Now, even though you created these specimens for the PTO to
11 say welcome Lin & J customers, as if to suggest they were
12 really given to customers, you in fact did not share those
13 documents with your customers, right?

14 A. We're talking about the banners only. We used the banner
15 in the show, so customer are aware of the banners.

16 Q. Ms. Kim, my question was not about the banners. I've
17 changed my question. I'm asking about the specimens that we
18 just looked at where you state repeatedly welcome customers to
19 Lin & J. Now, even though you did that to suggest it was
20 something you gave your customers, you actually never gave
21 these documents to your customers, correct?

22 A. Isn't it the same. One moment. I'd like to get the
23 question back, please.

24 THE COURT: So let's turn back to the page that ends
25 783. Do you have that page before you?

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Kim - direct

1 THE WITNESS: Yes.

2 THE COURT: Do you see it says at the top "Welcome
3 Customers to Lin & J"?

4 THE WITNESS: Yes.

5 THE COURT: Did you give this document to your
6 customers?

7 THE WITNESS: No.

8 MS. ARBAUGH: Thank you, your Honor.

9 Q. Now, regarding the 2012 collection catalog, you had no such
10 thing as a collection book like this 2012 collection book prior
11 to creating the one you created for the trademark office,
12 right?

13 A. Correct.

14 Q. Now I'm going to talk about the Isis Cross design that we
15 saw used as a watermark on some of the documents we just looked
16 at that you gave the PTO. You did not use the Isis Cross
17 design like you show as a watermark on some of these documents
18 on any advertising, marketing materials, or collection books
19 prior to creating these documents for the PTO, correct?

20 A. Correct.

21 Q. Now, even though you admit that all of these specimens were
22 not created until August 2013, that is not what you told the
23 trademark office, is it?

24 A. We always had the catalog.

25 Q. Ma'am, are you changing your testimony from what you just

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Kim - direct

1 gave a minute ago?

2 A. That's not what I meant. I'm saying I always had the
3 catalog.

4 Q. All right. Let me ask the question that I just asked one
5 more time. Let's just talk specifically about the documents
6 that are specimens you gave the trademark office, the ones we
7 just went over and only those. These were all created in
8 August 2013, right?

9 A. Yes.

10 Q. But you told the trademark office that they existed prior
11 to that date, right?

12 A. Correct.

13 Q. You gave false testimony to the trademark office, correct?

14 A. It was not false testimony because we had it.

15 Q. Ma'am, you did not have these documents prior to
16 August 2013, correct?

17 A. The products, photos, catalog, we always had them.

18 Q. I'm talking about the specific documents that we just
19 looked at that are specimens that you gave the PTO, okay. I'm
20 not talking about other things that existed. You told the
21 trademark office that those documents existed prior to the date
22 that you submitted them, correct?

23 A. Yes.

24 Q. Let's do this. Let's look at your declaration and see if
25 we can make this easier. So, Ms. Kim, you have in front of you

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Kim - direct

1 document with Bates number 11780 and it goes into the next
2 page, 11781. Do you recognize this document as a declaration
3 in support of your trademark application that you submitted
4 with this response to the trademark office?

5 A. Yes.

6 Q. Okay. And you signed this declaration, correct?

7 A. Yes.

8 Q. And you are attesting to the truth of what's contained in
9 this declaration, right?

10 A. Yes.

11 Q. If you wanted to, you could have asked questions of your
12 lawyer about what this declaration meant, correct?

13 A. I don't recall for sure.

14 Q. I'm not asking you if you did. I'm just saying you had the
15 opportunity to ask questions of your lawyers if you had any,
16 correct?

17 A. Correct.

18 Q. In fact, that's one of the reasons you've told me
19 previously you like having the Song Law Firm as your lawyers,
20 because they speak Korean and they can translate and
21 communicate easily with you, correct?

22 A. Correct.

23 Q. Did you or your attorneys draft this declaration?

24 A. I don't know.

25 Q. You don't remember if you drafted it or your attorneys

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Kim - direct

1 drafted it and gave it to you and explained it to you?

2 A. My lawyer did.

3 Q. You understood what you were signing when you signed it,
4 correct?

5 A. Yes.

6 Q. Now, this declaration is dated -- it's difficult to read --
7 I thought it was August 27, 2013, but I can't read it. Do you
8 recall when you dated and signed this declaration?

9 A. I do not recall for sure.

10 Q. In any event, if we look at the paragraph that begins the
11 undersigned, you were warned about the importance of not giving
12 false statements in this declaration, correct?

13 A. Yes.

14 Q. And you were warned that willful false statements would be
15 punishable by fine or imprisonment or both, correct?

16 A. Yes.

17 Q. Now, in the first paragraph, what you tell the trademark
18 office is as follows: Applicant herein submits four substitute
19 specimens, each of which has been in actual use in commerce as
20 early as the filing date of the application and shows proper
21 trademark use of each international class identified in the
22 application.

23 A. Yes.

24 Q. That was a false statement, correct?

25 A. I don't know for sure.

EB5LRIV1

Kim - direct

1 Q. That was a false statement, correct?

2 A. I don't know.

3 Q. Okay. Your initial trademark application was dated several
4 months earlier, January 31, 2013, right?

5 A. Yes.

6 Q. But your specimens did not exist as of that date, correct?

7 A. Correct.

8 Q. Now, even though you admitted to me today that those
9 photographs we looked at that were pictures of your customer
10 store Wona Trading, that's not what you told me in your
11 deposition, is it?

12 A. I do not recall.

13 Q. You told me that you didn't know where those pictures were
14 taken, correct?

15 A. Correct.

16 Q. Okay. But you knew when I took your deposition that those
17 were photos of Wona Trading, correct?

18 A. That's not true. I didn't know.

19 Q. You're the one who pulled together this document for the
20 PTO, and it's your testimony that you didn't know where those
21 photos came from?

22 A. I have several photos and pictures.

23 Q. Now, in addition to submitting these false specimens to the
24 trademark office, you also produced them in this litigation to
25 Tory Burch, correct?

EB5LRIV1

Kim - direct

1 A. Yes.

2 Q. And you did that knowing that Tory Burch would rely on them
3 in this litigation, right?

4 A. I turned over the documents, yes.

5 Q. Knowing that Tory Burch and perhaps even this Court would
6 rely on them, correct?

7 A. I don't know.

8 Q. You don't know?

9 A. That was not my intention.

10 Q. If you look at the first page of Exhibit 1, which is the
11 response to the office action we were looking at, the bottom
12 box it says statement type, and I want to read what you
13 represented to the trademark office for your use in commerce
14 application. And you represent the substitute or new, if
15 appropriate, specimens were in use in commerce at least as
16 early as the filing date of the application. Correct?

17 A. Yes.

18 Q. Now I'd like to talk about the photographs.

19 MS. ARBAUGH: And, your Honor, we do have a few
20 demonstratives for this that we'll turn to.

21 Q. The photographs that are embedded in the different pages of
22 the PTO specimens that we just looked at, those photographs
23 were in your possession at least as of August 2013, correct?

24 A. Yes.

25 Q. And you're aware that we asked to inspect those photographs

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Kim - direct

1 natively, but you've been unable to produce those to us because
2 they've been destroyed, correct?

3 A. That's not correct.

4 Q. Okay. It's your testimony that you have these photographs
5 in native format to produce to us?

6 A. We produced in native formats everything.

7 Q. Ms. Kim, can you turn to Plaintiff's Exhibit 42. So
8 Exhibit 42 I'll represent to you is an email dated August 18,
9 2014, where your attorney, Mr. Doberman, is trying to follow-up
10 and address for us the issue of not having received these
11 photographs in native format so they could be inspected. And
12 I'm not going to walk through this whole email chain. But what
13 your attorney tells us is, Michael, after some inquiry, here is
14 what the client is saying. The constituent pictures we were
15 discussing above were taken at various points -- I'm going to
16 skip some of the internal language -- using a camera with no
17 memory card. They were deleted sometime in 2013.

18 Is it true or not true that these photos were deleted
19 sometime in 2013?

20 A. I don't understand.

21 MR. MYEROWITZ: Just clarify which pictures you're
22 talking about. I think she's confused.

23 Q. Ms. Kim, let's look back at Exhibit 1. Actually, let's do
24 it this way. Can we go to the next slide. This is probably
25 the easiest way do it. All right.

EB5LRIV1

Kim - direct

1 On the slide you have before you, Ms. Kim, do you see
2 in the top portion there's that photograph we looked at in one
3 of the PTO specimens, your showroom with the green banner?

4 A. Yes.

5 Q. You no longer have that photograph to produce to us to
6 inspect natively, correct?

7 A. To my understanding, it's been stored in my computer or our
8 computers and it's been taken.

9 Q. Someone took it?

10 A. When the computer inspector came out, they took them.

11 Q. All right. We don't have this photograph in native. So is
12 it now your testimony that what's been told to us is a mistake?

13 A. Anything we had in native format had been taken.

14 MS. ARBAUGH: Anything we had in native format?

15 THE INTERPRETER: Has been taken.

16 Q. So since we don't have it in native format, it's safe to
17 say it has not been given to us, correct?

18 A. Maybe I'm not following your question well. Someone
19 inspected our computers and they took everything from our
20 computer system.

21 Q. Ms. Kim, this photograph that we do not have in native
22 format, it's a photograph that you used and repeated not just
23 in the PTO specimen, but all of those four catalogs that had
24 been produced in this case and are the subject of this motion,
25 correct?

EB5LRIV1

Kim - direct

1 A. Yes.

2 Q. If we can turn to the next slide. Ms. Kim, this is a
3 document that was contained in the PTO specimens as well as the
4 2012 catalog, correct, or it depicts a copy of it?

5 A. Yes.

6 Q. Okay. And we don't have these photographs in native format
7 and those have been destroyed, correct?

8 A. To my understanding, this photos we had in native format
9 and it's been produced.

10 Q. If we don't have them, do you have any explanation for
11 that?

12 A. We have nothing left. You took everything from us.

13 Q. Can you turn to the next slide, please. The next slide
14 represents additional pages from the PTO specimens, Plaintiff's
15 Exhibits 1 and 2, and additional photos we've not been
16 provided. Those photographs have been deleted so they cannot
17 be inspected natively, correct?

18 A. To my understanding, all photos have been submitted or
19 produced in native format.

20 Q. All photos in the specimens we just looked at, that's still
21 your understanding?

22 A. Yes.

23 Q. Okay.

24 A. Because you have our catalogs.

25 Q. Ma'am, if you take a look back at Exhibit 42, which is the

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Kim - direct

1 email chain your attorney had with my office, the third page of
2 that exhibit, which is this email chain, contains numerous
3 pictures embedded within the email. Can you please take a
4 minute to look through these pictures.

5 Have you had a minute to look through these pictures?

6 It continues more than one page.

7 A. Yes.

8 Q. And those are photographs that are contained in the PTO
9 specimens, right?

10 A. It sounds right, yes.

11 Q. And so this email chain is very clear which photographs
12 we're asking about, which are the ones we just looked at, and
13 your attorney tells us they've been deleted sometime in 2013,
14 correct?

15 A. I don't know whether that was true or not. I do not know
16 the content of that communication.

17 Q. When I first deposed you in February of this year, Ms. Kim,
18 you told me that no one had asked you to take any steps to be
19 sure that Lin & J preserved documents and information relevant
20 to this lawsuit, correct?

21 A. Yes.

22 Q. And that you had not asked any of your employees to take
23 steps to preserve relevant documents and information to this
24 lawsuit, correct?

25 A. I had asked my employees to do that.

EB5LRIV1

Kim - direct

1 Q. That's not what you told me when I took your deposition in
2 February, is it?

3 A. I do not recall.

4 THE COURT: Counsel, ten more minutes.

5 MS. ARBAUGH: Thank you, your Honor.

6 If the translator could please read the question and
7 answer 78, line 15 through 18.

8 Q. Now, what I asked you in your deposition in February was:
9 So, have you asked any of your employees to take any specific
10 steps to preserve documents relating to this lawsuit?

11 And you told me at that time: No, I have not.

12 Correct?

13 A. There's what this paper says.

14 Q. And you understood though, Ms. Kim, that you had a legal
15 obligation to preserve all documents relevant to this
16 litigation?

17 A. Yes.

18 Q. Ms. Kim, if you could look at Plaintiff's Exhibit 3. Do
19 you recognize Plaintiff's Exhibit 3 as a copy of what purports
20 to be a 2009 collection catalog of Lin & J?

21 A. Yes.

22 Q. You created this document, right?

23 A. Yes.

24 Q. And you produced it in this lawsuit?

25 A. Yes.

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Kim - direct

1 Q. You wanted to give Tory Burch and this Court the impression
2 that this was in fact a catalog from 2009, right?

3 A. That's not -- I don't know about that.

4 Q. Ms. Kim, why else would you produce a document that says
5 2009 collection catalog on the front of it?

6 A. It was one of the requirements from the U.S. PTO so that we
7 made this catalog for submission.

8 Q. But this document wasn't actually submitted to the PTO, was
9 it?

10 A. We did.

11 Q. And you didn't create this document until August 2013,
12 right?

13 A. Correct.

14 Q. Even though that's the case, what you told me in your
15 deposition was that this in fact was a 2009 catalog, right?

16 A. Yes.

17 Q. That wasn't true?

18 A. These are the products we had in 2009.

19 Q. But you told me this catalog existed in 2009, right?

20 A. I do not recall for sure.

21 Q. Okay. So you're changing your answer. Is that correct?

22 A. I don't know.

23 Q. You also produced 2010, 2011, and 2012 catalogs, right?

24 A. Yes.

25 Q. And you took the position in your deposition with me that

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Kim - direct

1 those existed as of the dates of those catalogs, right?

2 A. I think I testified that we had those products contained in
3 those catalogs in that year.

4 Q. Okay. If you'll turn to page 551, line -- sorry.

5 A. I can't find it.

6 MS. ARBAUGH: All right. Line 551, seven through ten,
7 first if the translator could read that question and answer.
8 Did you have a chance to translate that? Okay.

9 Q. What I asked you in your deposition, specifically talking
10 about the 2009 catalog: Did you create this document solely in
11 connection with preparing an application to trademark office?

12 And you told me no. This is a catalog from 2009.
13 Right?

14 A. This what it says on the paper.

15 THE COURT: Ms. Kim, when you say, as you have said
16 repeatedly, this is what it says in the paper, what do you want
17 me to understand? Do you want me to understand that those are
18 not the words you said when your deposition was taken?

19 THE WITNESS: I was in a deposition for much full days
20 for long hours and I have a limited capacity to understand
21 English and the only possibility is maybe interpretation,
22 translation was off.

23 THE COURT: So what you want me to understand is that
24 the words in that transcript are not the words you spoke?

25 THE WITNESS: That's not what I said. Maybe I had

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Kim - direct

1 some misunderstanding when I was asked those questions.

2 THE COURT: Okay. So you admit that the words in the
3 transcript are the words you spoke?

4 THE WITNESS: I'm sorry. Can you repeat that, please?

5 THE COURT: So you are admitting that the words in the
6 transcript are the words you spoke during the deposition?

7 THE WITNESS: Yes.

8 BY MS. ARBAUGH:

9 Q. Ms. Kim, you were there at the deposition when I had
10 discussions with your lawyer, Mr. Myerowitz, at the end of each
11 of those depositions when I specifically asked him if he had
12 any objections to the translation issues, correct?

13 A. Yes.

14 Q. And, in fact, in those depositions, although we had an
15 agreed translator, which includes Ms. Lucia who's here today,
16 plaintiffs also allowed you to have another person there to
17 translate who included either a personal friend of yours or a
18 lawyer from the Song Law Firm, correct?

19 A. Correct.

20 Q. And when Mr. Myerowitz was asked about any objections to
21 the translation at the end of the day, he typically said there
22 were only minor issues. If there was anything objectionable,
23 he would let plaintiffs know. Correct?

24 A. Yes.

25 (Continued on next page)

EB5GRIV2

Kim - direct

1 BY MS. ARBAUGH:

2 Q. And you have not submitted any errata sheets or any
3 documents of any kind to Tory Burch in this case correcting any
4 of your prior testimony in your depositions, right?

5 A. Correct, because I didn't have -- I didn't have opportunity
6 to review.

7 Q. And we talked about that yesterday. I only have a minute
8 or two left, I believe, so I want to ask just a couple more
9 questions.

10 We've discussed previously that there were invoices
11 produced in this case where defendants are referring to
12 products as Tory Burch style products, correct?

13 A. Yes.

14 Q. When I asked you about that in your deposition, you
15 admitted to me that at some point you went in and changed that
16 description title in your invoicing system, correct?

17 A. I do not recall.

18 Q. If we could look at page 593 line two through nine. Do you
19 have 593?

20 THE INTERPRETER: 593?

21 Q. Lines two through nine.

22 When I asked you in your deposition can you tell me
23 who changed the description for that item, you stated I
24 corrected it myself.

25 Correct?

EB5GRIV2

Kim - direct

1 A. When I found any errors, then I corrected it.

2 Q. Is the answer to my question yes or no, you changed that
3 description, correct?

4 A. That happened, yes.

5 Q. And did you do it, you personally changed the description?

6 A. If you can specify what description you meant to ask.

7 Q. Well, let's talk about item number R231, which is the item
8 number that said Tory Burch style stretch ring. You changed
9 the description for that item number, correct?

10 A. Because it was incorrect because it was not Tory Burch
11 style.

12 Q. Is the answer to my question yes?

13 A. Correct.

14 Q. Now, I also asked you about Sam Mi invoices in your
15 deposition, correct?

16 THE COURT: This is your last line of questions,
17 counsel.

18 MS. ARBAUGH: Thank you, your Honor.

19 A. Yes.

20 Q. Okay. Now, you admit now to Judge Cote that you sent
21 revised invoices to Sam Mi, correct?

22 A. I didn't admit that. I didn't understand your question
23 maybe.

24 Q. I'm not talking about your deposition. I'm talking about
25 right here. You now admit to Judge Cote that Lin & J sent

EB5GRIV2

Kim - direct

1 modified invoices to Sam Mi, correct?

2 A. I don't know about that.

3 Q. You don't know what your position is on that, in this
4 motion before Judge Cote?

5 A. Correct, I do not know anything about the Sam Mi invoice.

6 Q. And in fact, that's what you told me in your deposition
7 earlier this year, is you know nothing about it, right?

8 A. Correct.

9 Q. And do you remember how the second time you met for your
10 deposition I asked you if you had an opportunity to investigate
11 the issue and I asked you more questions about it?

12 A. I don't recall.

13 Q. You don't remember me asking if you had an opportunity to
14 investigate the issue and discuss it with your employees but
15 you still didn't know what happened with the Sam Mi invoices?

16 A. I can tell you this much: I do not know much about what
17 happened to the Sam Mi invoice.

18 Q. You're the president of the company and your lawyers have
19 conceded to the Court that these invoices have been falsified,
20 but you're here telling the Court today that you have no idea
21 what happened with them?

22 A. I became aware of the issue just because my lawyer Howard
23 told me about it, but I do not know what happened.

24 MS. ARBAUGH: Pass the witness, your Honor.

25 MR. MYEROWITZ: Can I just have a few minutes to look

EB5GRIV2

Kim - direct

1 over my notes before I start.

2 THE COURT: How long is your cross going to be?

3 MR. MYEROWITZ: Not very long.

4 THE COURT: How long is that?

5 MR. MYEROWITZ: Fifteen, 20 minutes.

6 THE COURT: Sure. We'll take a brief recess.

7 (Recess)

8 THE COURT: Please be seated.

9 Mr. Myerowitz, again, you are not restricted to the
10 scope of direct examination since you also intended to call
11 Ms. Kim as a witness.

12 MR. MYEROWITZ: I'm going to be very brief, your
13 Honor.

14 CROSS-EXAMINATION

15 BY MR. MYEROWITZ:

16 Q. Ms. Kim, when you created the catalogs that were submitted
17 to the USPTO, what were you trying to show the USPTO?

18 A. I wanted to show that we been for a long time using these
19 products with this trademark.

20 Q. It was pointed out to you by Ms. Arbaugh that not all the
21 catalogs were submitted to the USPTO, but were all the catalogs
22 created at the same time?

23 A. Well, I'm not talking about every single catalog, but if
24 you're talking about the catalogs that we submitted, then, yes,
25 it is.

EB5GRIV2

Kim - cross

1 Q. And was it the same intention for all of the catalogs?

2 A. I just wanted to show that we been using this product,
3 using this design for a long period of time.

4 Q. Do you have a pattern of practice at your company of
5 destroying documents?

6 A. What do you mean by that?

7 Q. At the beginning of this litigation, was it your
8 understanding that documents should not be destroyed?

9 A. Yes.

10 Q. And you were asked about whether you took any special
11 actions to preserve documents. Did you feel that it was
12 necessary to take any special actions to preserve documents?

13 A. There's no specific reason to do that because we don't have
14 any reason to destroy any documents because it's already
15 resolved.

16 Q. Ms. Arbaugh asked you about whether or not you had changed
17 any of the descriptions regarding the items that said Tory
18 Burch style, and you said that you had. Did you do that before
19 or after the invoices that said Tory Burch style had already
20 been turned over in this litigation?

21 A. I do not recall when I did that, but to my recollection it
22 was far before the commencement of this litigation and when I
23 found the error I just wanted to correct it.

24 Q. Okay. So that was before the litigation started?

25 A. Possibly, perhaps, maybe.

EB5GRIV2

Kim - cross

1 Q. And is that because you wanted the descriptions to be
2 accurate?

3 A. Yes.

4 Q. And you wanted it to be accurate when you were selling
5 products to customers?

6 THE COURT: Sustained.

7 Counsel, if this is to be helpful at all, it really
8 has to be the witness' testimony, not yours.

9 Q. Who is responsible for putting descriptions of the product
10 into the product description section of the invoices?

11 A. There's no specific person in charge of that duties, but
12 usually the intern employee who do that.

13 Q. Are there times when the interns who do that put in
14 descriptions without asking your permission or your authority
15 to put it in?

16 A. Not necessary.

17 Q. What has been your practice, if any, over the years if you
18 find incorrect descriptions?

19 A. There's some occasions that I went in and corrected some
20 description when it was not correct, but in a general practice
21 in my business, the description of the item was not really
22 important because this is just for the matter of the
23 communication with the customers in the factories or
24 manufacturer for the items, so it wasn't that -- it didn't
25 really have much weight.

EB5GRIV2

Kim - cross

1 Q. What is important?

2 A. Item number and catalogs.

3 THE INTERPRETER: I'm sorry.

4 A. Item numbers and colors.

5 Q. And colors.

6 MR. MYEROWITZ: We pulled up a document, but I don't
7 have any copy of it. It was Exhibit BB to our opposition to
8 this motion for summary judgment; and it's Bates stamped
9 Starata, S-T-A-R-A-T-A, 137 at 122.

10 It relates to the exhibits from counsel and it would
11 be Exhibit 17 for the witness.

12 THE COURT: Plaintiffs' Exhibit 17?

13 MR. MYEROWITZ: Yes.

14 THE COURT: I have Plaintiffs' Exhibit 17 before me.
15 It's an invoice.

16 MR. MYEROWITZ: Yes. I think counsel would say this
17 is the invoice that was turned over during discovery. I'm not
18 sure how we're going to do this.

19 I'd like the witness to take a look at Starata 137 and
20 122, which were obtained by plaintiff's. Your Honor, these
21 documents were turned over to us after they had been obtained
22 by counsel in response to subpoenas.

23 THE COURT: "By counsel," do you mean plaintiff's
24 counsel?

25 MR. MYEROWITZ: Ms. Arbaugh, yes.

EB5GRIV2

Kim - cross

1 THE COURT: Not by you.

2 MR. MYEROWITZ: No. They were turned over by
3 plaintiff's counsel to us after they issued subpoenas to third
4 parties. What this is is the copy of the same invoice that
5 they obtained from the customer which relates to the same
6 invoice which is Exhibit 17.

7 Am I making myself clear?

8 THE COURT: I think you have a question for the
9 witness.

10 MR. MYEROWITZ: Yes. I'm just letting Ms. Arbaugh
11 look at it.

12 MS. ARBAUGH: I thought that was an extra copy.

13 MR. MYEROWITZ: No.

14 Q. Could you please take a look at the two documents that say
15 Starata at the bottom.

16 THE COURT: What is the exhibit number?

17 MR. MYEROWITZ: It doesn't have an exhibit number. I
18 guess we can add it on to our list.

19 MR. DOBERMAN: Exhibit BB.

20 MR. MYEROWITZ: It's Exhibit BB from the opposition to
21 summary judgment.

22 THE COURT: Showing you Exhibit BB.

23 Q. From our opposition to summary judgment, have you ever seen
24 these documents before?

25 A. Maybe, maybe first time. I don't recall.

EB5GRIV2

Kim - cross

1 Q. Can you explain to the Court what this document is.

2 A. It's an invoice, invoices to our customers.

3 Q. What's the name of the customer?

4 A. I don't see it here in the document at the top portion of
5 the document, but it says Starata in the bottom.

6 Q. It's been redacted at the top over there. Is there an
7 invoice number?

8 A. Yes.

9 Q. What is the invoice number?

10 A. You mean this one?

11 Q. Yes?

12 A. 5207.

13 Q. And what is the date?

14 A. 2008, December 30, 2008.

15 Q. Do you see the, I guess, the third and fourth items from
16 the top?

17 A. Yes.

18 Q. What items are those?

19 A. It says filigree earring.

20 Q. And on the second page over here, could you tell us what
21 this invoice number is?

22 A. 5246.

23 Q. I'm going to show you what's Exhibit 17 for today. Is
24 there a difference between the order of the items on the two
25 different invoices?

EB5GRIV2

Kim - cross

1 A. Yes, a little different.

2 Q. Is the invoice in Exhibit 17 the same invoice number as on
3 the document that's redacted?

4 A. Yes.

5 Q. Do you know why there's a difference between the order of
6 the items on the two invoices?

7 A. I do not know for sure, but I can make some assumption that
8 maybe the way it was printing out the invoices or something
9 else.

10 Q. Is there any difference in the information contained in
11 these two invoices?

12 A. No.

13 Q. Thank you. Ms. Kim, could you please tell the Court what
14 the effect of this litigation has been on the financial
15 stability of your business?

16 A. I can't even describe how hard it has been.

17 Q. Financially, how is your company doing compared to how it
18 was doing before this litigation started?

19 A. We always had increased our -- increase in our sales since
20 the inception, but -- even just little; we would grow and grow
21 each year. But after the commencement of the litigation, it's
22 hard.

23 Q. Have your sales of Isis Cross products been affected by
24 this litigation and the efforts by Tory Burch?

25 A. Yes, very much.

EB5GRIV2

Kim - cross

1 Q. In what way?

2 A. We lost all our customer, I mean, many customers. And
3 there are bad -- my company have very bad reputation around our
4 customers. And one customer even mentioned that she or he
5 heard that I was in jail.

6 Q. In creating the Isis Cross, what was your intention?

7 A. I'm a Christian, I believe in God, so the cross means
8 something to me. And I've been -- I've been growing up with
9 the familiarity with the cross as my father was in this kind of
10 business when I was growing up, so I familiarize myself --

11 MS. ARBAUGH: Objection this is beyond the scope of
12 the question it's nonresponsive. It's also beyond the scope of
13 this motion.

14 THE COURT: I agree it is beyond the scope of the
15 question. It's beyond the scope of the sanctions motion. A
16 lot is at stake here for Ms. Kim. She can complete her answer.

17 MR. MYEROWITZ: Thank you, your Honor.

18 THE WITNESS: Where did I stop?

19 THE COURT: Place a question, counsel.

20 MR. MYEROWITZ: Yes, I'm going to, your Honor.

21 Q. There was a question or there's an issue regarding your
22 financial --

23 THE COURT: No.

24 MR. MYEROWITZ: I'm moving into something else.

25 THE COURT: Okay.

EB5GRIV2

Kim - cross

1 Q. Regarding whether part of the issue in this motion was
2 whether your company was having financial problems at the time
3 that there was a motion filed earlier.

4 The documents that were turned over, the financial
5 documents, were they accurate?

6 A. Yes, yes.

7 Q. At the time that you turned them over, had you yet filed
8 your 2013 tax returns for the companies?

9 A. I have not.

10 Q. So were the financial documents being looked at and turned
11 over, were they complete for the period of time during which
12 this litigation has been ongoing?

13 A. I'm not so sure what you're asking, but it was not
14 complete.

15 MR. MYEROWITZ: I have no further questions, your
16 Honor.

17 MS. ARBAUGH: No further questions, your Honor.

18 THE COURT: You may step down.

19 (Witness excused)

20 THE COURT: Do the plaintiffs have any further
21 evidence to offer?

22 MS. ARBAUGH: No, your Honor.

23 THE COURT: Mr. Myerowitz.

24 MR. MYEROWITZ: Yes.

25 THE COURT: Do you have any evidence to offer?

EB5GRIV2

Kim - cross

1 MR. MYEROWITZ: No, your Honor.

2 THE COURT: So you're not calling Mr. In.

3 MR. MYEROWITZ: That's correct, your Honor.

4 THE COURT: Okay.

5 MS. ARBAUGH: May I make just one thing available to
6 the Court. We have already rested with Mr. Rosen, but I did
7 want to let the Court know in light of the Court's questioning
8 yesterday of Mr. Rosen regarding description changes and
9 retroactivity and all of that, he actually went back and
10 conducted further review of the documents and has the answers
11 to those questions to actually definitively answer them without
12 the need of conducting further inspection. He is prepared to
13 answer those questions if the Court would like to hear those
14 answers.

15 THE COURT: We'll take a recess. Did you review this
16 with Mr. Myerowitz?

17 MS. ARBAUGH: No, your Honor. I haven't had a chance
18 to discuss it with Mr. Myerowitz.

19 THE COURT: The witness and Mr. Myerowitz and you,
20 Ms. Arbaugh, may talk about this issue. And Mr. Myerowitz will
21 consent or object after he is more fully informed about this
22 opportunity.

23 We'll take a five-minute recess.

24 MS. ARBAUGH: Thank you, your Honor.

25 (Recess)

EB5GRIV2

Kim - cross

1 THE COURT: Please be seated.

2 Ms. Arbaugh, I'll take a report from you.

3 MS. ARBAUGH: Yes. We conferred and counsel has
4 agreed to allow us to do a little bit more questioning of
5 Mr. Rosen to clarify some questions from the Court yesterday.

6 THE COURT: Mr. Rosen, please approach. Take the
7 witness stand. I remind you that you are still under oath.

8 THE WITNESS: Yes, ma'am.

9 ANDREW SCOTT ROSEN, recalled

10 as a witness by the Plaintiff,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. ARBAUGH:

14 Q. Mr. Rosen, do you recall yesterday when Mr. Myerowitz asked
15 you about change in a product description and how that might
16 impact past invoices and then the Court followed up on that
17 questioning?

18 A. Yes, I do.

19 Q. And Mr. Myerowitz asked you if you did any testing to
20 determine whether a changed description for an item number
21 could affect or how it would effect the description in past
22 invoices that had already been created, right?

23 A. Correct.

24 Q. And you testified it depended on how the relational
25 database and the various tables in the database were set up?

EB5GRIV2

Rosen - direct

1 A. Correct.

2 Q. And you could not say for certain yesterday when Judge Cote
3 followed up with you on those questions exactly what would
4 happen in this situation here, right?

5 A. That's correct.

6 Q. Have you been able to spend some additional time with the
7 invoice tables that Mr. Donofrio produced to you in this
8 litigation in an attempt to answer Mr. Myerowitz's and Judge
9 Cote's questions on this issue?

10 A. Yes, ma'am.

11 Q. At a high level, what were you able to determine from your
12 review and analysis of that information?

13 A. The questions that were asked at the conclusion of my
14 testimony yesterday related to what would happen if a
15 description were changed. There was a discussion about how
16 that would likely propagate forward. And I was uncertain as to
17 how invoices that had been previously created would be
18 referenced within the database. I needed to do additional
19 analysis and testing.

20 Q. So after you did that, what did you determine to answer the
21 question for Judge Cote?

22 A. That the changes do not appear to propagate backwards; that
23 moving forward, items that are assigned an item number with a
24 changed description show the changed description, but invoices
25 that were created with the original description, the original

EB5GRIV2

Rosen - direct

1 description remained and in the instances that I reviewed, the
2 last input date and time did not change.

3 Q. If we could turn to the slide in the demonstrative, do you
4 have some examples where even though a description might have
5 gotten changed at some point, the descriptions retroactive or
6 in the past did not get changed when that happened?

7 A. Yes, ma'am. And that's up on the screen now.

8 Q. So looking at the slide we have up here which for the
9 Court's benefit is referring to Plaintiffs' Exhibit 23, that's
10 where this information comes from, can you walk the Court
11 through this slide and what it tells you to lead you to the
12 conclusion that you drew?

13 A. Yes, ma'am.

14 THE COURT: Excuse me. I'm going to interrupt.

15 These demonstratives which are all marked, of course,
16 with the reference to the exhibit from which the data has been
17 drawn, these demonstratives have independent importance at this
18 hearing for understanding the transcript of the testimony given
19 by the various witnesses who have been working with the
20 demonstratives.

21 I want to make sure, counsel, that we have a complete
22 set of not only the hearing exhibits, but also the
23 demonstratives. Counsel are required to keep custody of those;
24 and to the extent they are necessary for any record on appeal
25 or in further motion practice before this Court, that we have a

EB5GRIV2

Rosen - direct

1 complete set.

2 MS. ARBAUGH: Yes, your Honor.

3 THE COURT: Thank you.

4 MS. ARBAUGH: Thank you.

5 THE COURT: I'm sorry to interrupt.

6 A. Thank you, your Honor.

7 I was able to identify, for example, on invoice
8 014748 --

9 THE COURT: Let's just use the last two digits.

10 THE WITNESS: Yes, your Honor. On the first --

11 BY MS. ARBAUGH:

12 Q. If I can stop you there, sir. Tell us what item number you
13 are talking about so that if the Court goes back to look at
14 PX23, what item number specifically you looked at on this?

15 A. Yes, ma'am. It's BG05 G.

16 Q. So you looked at this item number across multiple invoices
17 over different time periods, correct?

18 A. Yes, ma'am.

19 Q. And that's what this demonstrative is showing
20 representative examples of, right?

21 A. Yes, ma'am.

22 Q. If you'll continue explaining what you can see from this to
23 the Court.

24 A. We see that an invoice that was originally created an input
25 in May of 2012 shows that item description as Cross Theme

EB5GRIV2

Rosen - direct

1 casting and then "BRAELET," which I'm assuming is a misspelling
2 of bracelet, that invoice does not appear to have been
3 modified; even though the BG05 G item description is shown to
4 change later in early 2013, that item number, BG05 G, was
5 renamed to Isis Cross color pendant, I'm assuming it's
6 bracelet, with a further description of the color white.

7 Q. It appears based on what you looked at that the description
8 changed in sometime in 2013?

9 A. Yes, ma'am.

10 Q. Am I correct that the invoices that are reflected in purple
11 in the bottom half are ones that are after the change and show
12 that for future invoices, just like you testified to yesterday,
13 that change incorporates in the future for any invoices
14 created?

15 A. That's correct.

16 Q. But the top half of the demonstrative has a couple of
17 invoices in blue which represent invoices that appear to have a
18 different description for the same item number before that
19 description was changed, right?

20 A. Yes, ma'am.

21 Q. You noted that the invoice date actually matches the input
22 date; and we can tell there was no change to those invoices
23 because the input date did not change, correct?

24 A. Yes, ma'am.

25 Q. If we can turn to the next slide, it's just a different

EB5GRIV2

Rosen - direct

1 kind of example. Is this slide representing a different item
2 number you looked at, ST186?

3 A. Yes, ma'am.

4 Q. And, again, you looked at PX23 as part of reviewing what
5 happened with this item number description, correct?

6 A. That's correct.

7 Q. If you could explain to Judge Cote what you saw with this
8 particular item description change.

9 A. On the lower portion of this exhibit, your Honor, we see,
10 similar to the previous slide, we have a number of invoices
11 that do not appear to be -- have been substantively modified
12 since they were created, even though the product description in
13 this -- for this product also has changed in late 2012. The
14 product description was changed to Isis Cross pendant from its
15 original name, Cross Theme leather pendant.

16 Q. So what we see is that it appears that the changed
17 description occurred sometime around September 2012. So for
18 the bottom two which are in purple, that shows that that change
19 in description to Isis Cross pendant is applied going forward,
20 correct?

21 A. Correct.

22 Q. Now, the blue, which are the two items above it, show that
23 that change in description does not get applied to those past
24 invoices, which were in August of 2012, right?

25 A. That's correct.

EB5GRIV2

Rosen - direct

1 Q. Now, those past invoices in August 2012 also have invoice
2 dates that match the input dates, right?

3 A. Correct.

4 Q. Now, what happens is, and what have you attempted to show
5 on this demonstrative, if you go back to the invoice dated
6 October 27, 2009, that's the first line item on this; one of
7 the invoices that was identified and what you discussed
8 yesterday as having been modified because the input date
9 changes to April 29, 2014.

10 What does that description say?

11 A. That description says Isis Cross pendant necklace set, just
12 like the renamed term that was renamed in late 2012; however,
13 there appear to have been at least an addition or additional
14 changes that were made on this 2009 invoice that occurred
15 April 29 of 2014.

16 Q. Which would not be consistent with the fact that other
17 earlier invoices, such as the two in August 2012 listed here,
18 show the description as a Cross Theme, right?

19 A. Correct. The description is the same, but this invoice
20 ending in 83, we did see the input date change and we also see
21 that this item is the last item on that invoice leading me to
22 believe that it was added after the invoice was created and
23 added after the description of the item was changed.

24 MS. ARBAUGH: Thank you, your Honor. I pass the
25 witness.

EB5GRIV2

Rosen - direct

1 CROSS-EXAMINATION

2 BY MR. MYEROWITZ:

3 Q. Mr. Rosen.

4 A. Good morning, sir.

5 Q. Could you just explain exactly what it was you were looking
6 at when you came to this determination?

7 A. I explained what I was looking at and where I got that
8 information from; yes, sir.

9 Q. Were you looking at hard copies? Were you looking at data
10 on a disk? What were you looking at specifically?

11 A. Specifically during my review, I looked at the invoice
12 isolation spreadsheet created by Mr. Donofrio.

13 Q. How far back did you go in looking at these particular item
14 numbers?

15 A. I looked at the entirety of the data.

16 Q. So these are all the times in the data that these item
17 numbers appear?

18 A. As I sit here right now, I think this is just an example of
19 other changes, but it illustrates the questions that the Court
20 had asked me yesterday.

21 Q. What I'm asking you is these particular items -- let's take
22 a look at ST186, which is, I believe, the one that's up there
23 now, the invoice table analysis.

24 My question is, this was for a particular item number,
25 ST186GBK. Is that correct?

EB5GRIV2

Rosen - cross

1 A. Yes, sir.

2 Q. Are all of these that are listed here on this page all the
3 times that that item number appears in the data that you looked
4 at last night?

5 A. I don't believe this is a comprehensive list. I believe
6 it's a list that answers the questions that were posed to me
7 yesterday, sir.

8 Q. My question is, did you look at the other times that the
9 item number appeared in the data?

10 A. I looked at the entirety of the data but focused on things
11 that would answer the questions that I was unable to answer
12 yesterday, sir.

13 Q. Would the answer to that be no then?

14 A. Can you rephrase the question for me, please.

15 Q. Yes. Did you look at the data for each time that the item
16 number appeared in the data?

17 A. My review was not going line by line through that entire
18 spreadsheet. It was more of a query the way that the database
19 would be queried. So I looked at everything in the invoice
20 isolation document but did that electronically; in other words,
21 queried the entire data set, but I didn't look at every single
22 item in every single line in that database, if that answers
23 your question, sir.

24 Q. Thank you. Did you look -- withdrawn.

25 Did you check to see if there were any other changes

EB5GRIV2

Rosen - cross

1 made on this particular item number besides the description?

2 A. With respect to, for example, pricing or --

3 Q. Anything.

4 A. Anything? No, sir. My review focused on the product
5 number and the product description, which I understood was the
6 question pending yesterday, sir.

7 Q. My question is, is it possible that other changes being
8 made in conjunction with an item description could cause a
9 change in prior descriptions?

10 A. That would not be something that I have seen based on my
11 review and analysis thus far.

12 Q. But you didn't check for that?

13 A. I don't have the actual database. All I have is the
14 invoice isolation, which is a representation of the database.

15 Q. So you didn't actually do a test last night to see if you
16 changed a description if it would have an effect on past
17 invoice descriptions, is that correct?

18 A. Did not test the database. Tested the data from invoice
19 isolation spreadsheet.

20 Q. When you say "tested the data," what you mean is you looked
21 at the data, correct?

22 A. Yes, sir.

23 Q. You didn't actually conduct a test to see what would happen
24 if you made a change?

25 A. Correct. I don't have access to the database. That's

EB5GRIV2

Rosen - cross

1 correct.

2 Q. And again, at the top of this page it says input date, 29th
3 of April, 2014. Correct?

4 A. Yes, sir.

5 Q. So there was some change made on that date?

6 A. Yes, sir.

7 Q. Can you tell us what that change was?

8 A. It appears because that item, Isis Cross pendant, is the
9 last item, this is consistent with my testimony yesterday that
10 when you append, when you make a substantive change to a line
11 item, substantive in this case being adding an item in 2014 to
12 an invoice that was created in 2009, that does in fact,
13 consistent with the other testimony, cause the input date to
14 become updated.

15 Q. So what was the substantive change that was made on the
16 29th of April, 2014?

17 A. It appears because the Isis Cross item appears at the
18 bottom and because we know that that name description was
19 changed several years after that invoice was created in 2009,
20 it appears that this item was added to the invoice causing the
21 update -- the input date to be updated.

22 Q. You're saying that the item was added to the invoice?

23 A. That's consistent with --

24 Q. It's a yes or no question.

25 A. As that question is phrased, sir, I can't --

EB5GRIV2

Rosen - cross

1 Q. You don't know, do you?

2 A. I can say that it's consistent with all the other observed
3 behavior that we've seen with regard to the information in the
4 Smart Bee database.

5 Q. Again, as we discussed yesterday, are you aware of the fact
6 that the hard copies of these items, of these invoices were
7 turned over three months earlier in January of 2014?

8 A. My analysis didn't look at anything having to do with hard
9 copies.

10 Q. So if in fact that item, Isis Cross pendant necklace set,
11 appears on the invoice that was turned over in January of 2014,
12 what would be the important change that was made on the 29th of
13 April 2014?

14 A. It would have had to have been a substantive change to a
15 line item, a quantity shipped or some other field that isn't
16 necessarily represented in the hard copy that you're
17 referencing.

18 Q. So the answer is you don't know.

19 A. I cannot be certain. That's correct.

20 Q. Not be certain. You have no idea, do you?

21 A. We know that something substantive changed to a line item
22 on that invoice. We don't know exactly what, nor do we know
23 how many times it was changed between October of 2009 and April
24 of 2014.

25 Q. Thank you. You don't know.

EB5GRIV2

Rosen - cross

1 MR. MYEROWITZ: Thank you very much, your Honor.

2 MS. ARBAUGH: No further questions, your Honor.

3 THE COURT: To follow up on this last issue, when
4 there is a substantive change to the content of an item number
5 on an invoice, the way that invoice gets effected is the item
6 with the substantive change is shifted to the position on the
7 invoice, the last position on the invoice.

8 THE WITNESS: Not necessarily, your Honor. When an
9 item is added, it becomes appended at the bottom, but if
10 someone were to change, for example, the quantity ordered, the
11 quantity shipped, anything in a line item, even ostensibly a
12 price or any of the perhaps dozens of fields that are in that
13 database relating to a specific line item, that's been shown to
14 cause the input date to become updated to reflect that date.

15 (Continued on next page)

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EB5LRIV3

Rosen - cross

1 THE COURT: So when an item is the last item on the
2 invoice, it either was originally the last item on the invoice
3 or it was added to the invoice at a later point in time?

4 THE WITNESS: Generally speaking, yes, your Honor.

5 THE COURT: And when you look at an input date, you
6 know that's the last date of a substantive change to the
7 database, the invoice database.

8 THE WITNESS: Yes, your Honor.

9 THE COURT: And you don't know if that is the date on
10 which an item, if an item was added, you don't know if that's
11 the date it was added or not.

12 THE WITNESS: No, your Honor, we don't.

13 THE COURT: You only know two dates. You know the
14 invoice date, the original invoice date, and the last
15 substantive change date.

16 THE WITNESS: Yes, your Honor, that's correct.

17 THE COURT: So there could be a dozen changes made,
18 substantive changes made to the content of the invoice database
19 for that particular invoice, and you will not be able to locate
20 the intervening ten substantive change dates.

21 THE WITNESS: Yes, your Honor, that's correct.

22 THE COURT: Okay. Do either counsel have additional
23 questions to put to this witness based on my questions?

24 MS. ARBAUGH: No, your Honor.

25 MR. MYEROWITZ: No, your Honor. I would like the

EB5LRIV3

Rosen - cross

1 Court to take notice of an exhibit, Plaintiff's Exhibit 18,
2 which has the invoice that was turned over in January.

3 THE COURT: This is the invoice 83?

4 MR. MYEROWITZ: Yes, your Honor.

5 THE COURT: And it shows that the last two items are
6 ST186GBK and ST186GCR, both of these described as Isis Cross
7 pendant necklace sets, each priced at \$39, and the invoice date
8 is 10/27/09. We understand from the demonstrative today that
9 comes out of information contained in the database reflected in
10 PX23 that that database information for that invoice, which is
11 83, was changed as recently as April 29, 2014.

12 We also know because the two Isis Cross entries are
13 the last two fields on this invoice 83 that they either existed
14 as the last two entries on October 27, 2009, or were added
15 after October 27, 2009. If they were added later, they go to
16 the end.

17 And we also know based on the demonstrative that this
18 item number ST186GBK used to have a different product
19 description name. It used to be cross theme leather pendant
20 necklace set and that was the product description name as of at
21 least August 2012.

22 Therefore, piecing this all together, I would have to
23 say that sometime after August 2012, someone entered the
24 database, the defendant's database, changed the item
25 description to Isis Cross pendant necklace set and entered

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Rosen - cross

1 invoice 83 and entered invoice or the database for invoice 83
2 sometime before January of 2014 when it was produced. And
3 either item ST186 was already the last item on the invoice or
4 the change was to add ST186GBK as it now existed in the
5 database, which says to me that this invoice 83 was altered in
6 a substantive way before its production in January of 2014 to
7 mislead the plaintiffs and, ultimately, the fact finder to
8 suggest that products identified as Isis Cross pendant necklace
9 set were sold in October of 2009 when products bearing that
10 name were not sold by the defendants in October 2009.

11 So that's from the documents and evidence presented at
12 this hearing what I'm able to deduce with respect to this
13 single invoice.

14 Any further questions for this witness, counsel?

15 MS. ARBAUGH: No, your Honor. Thank you for your
16 time.

17 MR. MYEROWITZ: No, your Honor.

18 THE COURT: You may step down.

19 THE WITNESS: Thank you, your Honor.

20 (Witness excused)

21 THE COURT: So we close the evidentiary record on what
22 is the first hearing of two hearings.

23 So, counsel, do you have an agreement as to who will
24 make closing argument first with respect to this hearing?

25 MR. MYEROWITZ: We haven't discussed it.

EB5LRIV3

Summation - Ms. Arbaugh

1 MS. ARBAUGH: We don't, your Honor.

2 THE COURT: Do you have preferences? Why don't you
3 talk with each other.

4 MS. ARBAUGH: Plaintiffs will go first, your Honor.

5 Your Honor, I believe that the evidence conclusively
6 establishes that the defendants manufactured evidence in an
7 effort to deceive the PTO and this Court in this litigation,
8 including the PTO specimens and the catalogs. Undisputed.
9 They altered evidence. I believe the forensic examination is
10 conclusive on this point. And we hope we've answered the
11 Court's questions here today to further confirm that. And the
12 defendants have admitted that they falsified the Sam Mi
13 invoices.

14 They destroyed evidence. We don't have those forensic
15 photographs. We asked for them. We had an agreement for them.
16 They had to exist as of August 2013. Their lawyers told us
17 they no longer exist, so they destroyed evidence. And they've
18 given false testimony, particularly Ms. Kim.

19 I'm not going to rehash the law here that we've
20 outlined for the Court in the brief because I know you're
21 familiar with it. But it's clear that this type of conduct
22 constitutes spoliation and fraud on the Court. In terms of
23 spoliation, there's no doubt they had a duty to preserve
24 relevant evidence to this case. They've altered evidence
25 throughout the course of this case. The case law is clear that

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Summation - Ms. Arbaugh

1 alteration of evidence, particularly evidence that's clearly
2 relevant such as these invoices, is spoliation.

3 THE COURT: Let me just make sure I have the sequence
4 of disclosures correct. What I'm interested in knowing is when
5 plaintiff, when the defendants admitted these various frauds to
6 the plaintiffs such that the plaintiffs no longer had to expend
7 resources in discovery in uncovering the extent of the fraud.
8 And, well, I could say more, but that's the essence. So let's
9 take it one step at a time.

10 The fraud on the trademark office, the fabrication of
11 the 2012 collection book and the associated specimens, I
12 believe that there was an admission that those were fabricated
13 documents in the opposition to the sanctions motion.

14 MS. ARBAUGH: Correct.

15 THE COURT: Were the plaintiffs informed before that
16 time that the defendants were going to admit that those were
17 fabricated documents?

18 MS. ARBAUGH: No. I will qualify that by saying that
19 in the deposition of Ms. Kim in April, that is the first thing
20 that clued us into that besides the fact we looked at them and
21 thought they looked contrived. She admitted at one point in
22 the deposition she created them solely for responding to the
23 PTO, even though the rest of her testimony was she had them
24 before. She kind of went back and forth on that. She did tell
25 me that at one point in the deposition. Not about the

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Summation - Ms. Arbaugh

1 catalogs, as you saw from her testimony today. She told me
2 those catalogs existed as of the dates they said on faces of
3 them. But at the deposition, she did say that the specimens
4 she created to respond to the PTO and that deposition was in
5 April of this year, your Honor.

6 THE COURT: Then let's go to the collection books for
7 the years 2009 to 2011. I believe in the opposition to the
8 sanctions motion the defendants admitted that those were
9 fabricated documents. Had they given you notice of that
10 before?

11 MS. ARBAUGH: No, your Honor.

12 THE COURT: Then the fabricated Sam Mi invoices, as I
13 understand it, the defendants produced the original invoices
14 during discovery here, but you received from Sam Mi the
15 fabricated invoices. I believe in opposition to the sanctions
16 motion, the defendants admitted that they had fabricated
17 invoices and presented them to Sam Mi for production to Tory
18 Burch. Had the defendants before that time informed
19 plaintiff's counsel that the defendants had created falsified
20 Sam Mi invoices and presented them to Sam Mi?

21 MS. ARBAUGH: No, your Honor. In fact, Ms. Kim went
22 to great lengths in her deposition and so did Mr. In, who's her
23 nephew and the salesperson responsible for Sam Mi, to say they
24 had no idea why the invoices that I presented to them didn't
25 match. They didn't know what happened. And she was adamant

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Summation - Ms. Arbaugh

1 that they did not create false invoices. I asked her in
2 February. I came back in April. I asked her if she had a
3 chance to investigate it and look at the issue. And I believe
4 I've cited this deposition testimony to the Court in the motion
5 papers. She said she did, she talked to her employees, and
6 nobody knew anything about them.

7 THE COURT: Then there was a production made in
8 October of 2013, small production of documents that included
9 most tellingly a handful of early invoices or invoices with
10 dates going back to -- see if I can do this -- going back to
11 2005. I think the production in October included single
12 invoices from 2005, '06, and '07, and a handful of invoices
13 from later years. And it's my understanding that the
14 defendants are still contending as of today that those invoices
15 are genuine and were not altered or fabricated. And is that
16 your understanding?

17 MS. ARBAUGH: Yes, your Honor.

18 THE COURT: And then there's a January 2014 document
19 production, a larger document production that included more
20 invoices. And it's my understanding that as of today, the
21 defendants are still contending that the invoices in that
22 document production were all genuine.

23 MS. ARBAUGH: Yes, your Honor.

24 THE COURT: Thank you.

25 MS. ARBAUGH: So going into this hearing, your Honor,

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Summation - Ms. Arbaugh

1 and I believe you stated this on our call we had last week,
2 really it seems that the primary issue, we know they're still
3 disputing what's going on with the invoices. But aside from
4 that, the primary issue that the defendants had identified was
5 intent. They didn't have an indent to deceive anyone, the PTO
6 or otherwise. No intent to deceive generally. And then, of
7 course, the fact that the invoices are disputed. So I'd like
8 to focus if I may on those two issues as I believe the evidence
9 bears out.

10 First talking about the invoices themselves, whether
11 they've been modified. You've heard from two very qualified
12 forensic experts who say they've been modified and the input
13 date shows that. And one of those experts is a neutral. And
14 one of those experts is an expert they could have asked at any
15 time to conduct further testing than what the parties had
16 already done to answer any questions about what happens with
17 the description change, linking to a photograph. They could
18 have made this as airtight as they want. We believe it's as
19 airtight as it needs to be. They want to pull questions out of
20 thin air and hypotheticals and speculation, couldn't this have
21 caused it.

22 The most telling thing is that having a neutral at
23 their disposal, they did not do that. And they could have
24 hired a rebuttal expert. They've hired several experts in this
25 case. They did not hire a rebuttal expert to come in here and

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Summation - Ms. Arbaugh

1 say anything contrary to what you heard from these two forensic
2 experts. I think that's telling for the Court.

3 If that is not telling enough, I think that the
4 earlier invoices you've identified, your Honor, that they
5 produced in the case, are very telling to get one invoice for
6 the year 2005 as your evidence of continuous use and
7 nonabandonment where there are two items that happen to be
8 appended at the bottom of the invoice and other years there are
9 many invoices like that, that's telling. That's not
10 coincidence. It's the whole thing that got the ball rolling in
11 terms of us wanting to inspect these documents in a native
12 format. We thought it looked fishy and they do look fishy. I
13 think when you couple that with this testimony, there's no
14 doubt they're modifying invoices to lay a false trail for
15 alleged sales.

16 We've heard from the experts that even though they
17 can't tell what change is made when and all of the changes that
18 were made in between, what they can tell is that oftentimes if
19 there's an input date change, they do notice that when there's
20 an line item add it gets put to the bottom of the invoice.
21 Just another example of corroboration we have for the fact that
22 they're getting in there and doctoring these invoices.

23 And the Tory Burch style invoices I think are very
24 telling, your Honor. Somebody went in there to try to do
25 something during this litigation with those Tory Burch style

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Summation - Ms. Arbaugh

1 invoices to have those line items and the quantity ship
2 changed. And then in the electronic format, which would not be
3 visible to the person using the computer, have Isis Cross be
4 appended on the bottom shows they're trying to change it.

5 Now, it turns out they weren't successful and maybe
6 they thought they were with what got produced to us or maybe
7 they thought they had successfully kept those invoices from us
8 and getting produced in the case, but they didn't and we caught
9 them.

10 What I think this shows is that who knows how many
11 other invoices were out there that were referring to Tory Burch
12 style stretch ring before they had a chance to produce them to
13 us. I'll note they have produced thousands of pages of
14 invoices. We did not conduct an inspection into every single
15 page of that. And there's no possible way to know because the
16 input date tells us modification but doesn't tell us everything
17 that's changed. We can't tell how many more other invoices out
18 there would have had Tory Burch style in describing their
19 products. But they tried to conceal that from us because they
20 wanted to conceal their own liability on our claims against
21 them. So I think the evidence on invoice modification is
22 clear.

23 Now, if you want to back up and talk about general
24 intent, which is what I think Mr. Myerowitz is going to
25 discuss.

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Summation - Ms. Arbaugh

1 THE COURT: Hold on one second.

2 MS. ARBAUGH: Yes, your Honor.

3 THE COURT: So if you were able to succeed on
4 liability in this case, you believe, if I understand what you
5 just said correctly, that you would have a very difficult time
6 determining what the defendant's actual sales of infringing
7 jewelry was because of the modifications to the invoice
8 database.

9 MS. ARBAUGH: Possibly. But I think I was saying
10 something a little bit different which I think more goes to the
11 willfulness point. We've got evidence from the item numbers
12 and we've tried to track down as best we can with the
13 defendants what item number is which product so we know which
14 ones are infringing. So I believe we're going to be able as
15 best we can to give a number to the fact finder for damages
16 purposes. The issue is more willfulness because they've taken
17 the position these products aren't infringing. We found a
18 small amount of invoices that called one of the products Tory
19 Burch style. I'm saying that I bet you there were many more.

20 Did I answer the question?

21 THE COURT: You might be able to find the universe of
22 the item numbers that were associated in your client's view
23 with infringing items.

24 MS. ARBAUGH: Yes.

25 THE COURT: But will you have any confidence based on

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Summation - Ms. Arbaugh

1 your current understanding of the way the invoice database
2 works and the modifications that have been made to it, to the
3 content with respect to individual invoice numbers, will you
4 have any confidence that you will be able to run the numbers
5 accurately with respect to the number of infringing items sold
6 and the money earned from the sale of those items?

7 MS. ARBAUGH: No. I would say that we've tried as
8 hard as we can to get there, but I don't have significant
9 confidence in that.

10 May I proceed?

11 So I'd like to talk about intent generally. And as
12 the Court I know is aware, there's sort of a continuing scale
13 here under the law. You have a range of options within your
14 discretion of remedies here. And those range of options in
15 terms of how severe they are depend on the level of intent. If
16 you find intent versus something like negligence, then more
17 severe sanctions are appropriate. We think this is an
18 egregious case and more severe sanctions are appropriate.

19 The reason why intent is clear is several things.
20 One, Sam Mi invoices. I think that those invoices, the fact
21 that they gave those to their customer and lied about it to us
22 multiple times completely taints their credibility here,
23 completely taints their credibility. They gave fake invoices
24 to that customer. Again, this was before we had sued them.
25 They gave fake invoices to that customer that substantially

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Summation - Ms. Arbaugh

1 understated the amount of sales of accused goods by something
2 like 7,000 pieces, then changed the descriptions in those
3 invoices from Isis Cross to snow flake to further conceal the
4 ones that did remain on those invoices.

5 And even though she vehemently denied that happened,
6 they're now for the first time in opposition to our motion
7 conceding that it did. Who knows if we had not filed this
8 motion and been able to do this forensic inspection what they
9 would be doing and saying to the fact finder after this point
10 about these invoices.

11 And, by the way, they now take the position in their
12 papers that well, yes, we did it. I know we said we didn't all
13 along, but we did it only because they requested it from us.
14 That's their position they take in the papers to the Court. It
15 shows the extent to which they're willing to lie, whether it's
16 for a customer or for someone else. And the bottom line is
17 that's no different than if a friend asked them to go -- I
18 don't know -- rob a bank. You know, it's not an excuse to say,
19 well, they asked me to do it. The bottom line is they gave
20 those to Sam Mi knowing that Sam Mi would turn them over to us
21 in order to reach an agreement with us. It taints all of their
22 credibility here.

23 The PTO specimens. Ms. Kim fabricated those, as she
24 admits, and then she submitted a sworn declaration to the PTO
25 they existed and shows use in commerce prior to that date when

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Summation - Ms. Arbaugh

1 the fact is they absolutely did not exist. Not even disputed
2 now. She signed a declaration. She was warned about willful
3 false statements in that declaration. She was represented by
4 counsel. She told me she understood that declaration both in
5 her deposition and here today. I'm sure it was explained to
6 her by her attorneys who also speak Korean, not Mr. Myerowitz,
7 but the attorneys who work with them. I don't think the
8 evidence of intent could be any clearer with respect to
9 fabricating those specimens.

10 And then, by the way, taking those documents and
11 producing them in this litigation. And they didn't just
12 produce the documents. They didn't just take the response to
13 the office action, which is what was our Plaintiff's Exhibit 1,
14 and give those to us. What they did was they took the
15 specimens separate out of that response and gave them to us
16 like it's a document showing trademark use in the case and we
17 relied on that. And I spent a lot of time asking her questions
18 in her depositions about these documents. A lot of time was
19 spent believing this was authentic evidence.

20 The specimens, aside from the catalogs, the specimens
21 themselves make very clear the intent that Ms. Kim had with
22 them. Welcome to Lin & J customers. Welcome customers to Lin
23 & J. She admitted she wanted the trademark office to believe
24 this was something she was giving to customers. It couldn't be
25 more contrived than that. She never gave them to customers.

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Summation - Ms. Arbaugh

1 The faces of those documents show intent.

2 Now, one of those specimens we looked at had pictures
3 of Lin & J customer Wona Trading. When I asked her about that
4 in her deposition, she told me she didn't know where those
5 pictures came from. She told me she didn't know whose store it
6 was. I asked her, those little Isis Cross signs she had put in
7 the photos of that customer store, I asked her if she knew
8 whether those photos, whether those signs were there before or
9 whether she had asked the customer to do it. Well, guess what.
10 We took the customer's deposition and the customer said, oh,
11 yeah, Lin & J asked me. This is my store. Lin & J asked me to
12 put these signs here so they could take pictures of the store
13 with those signs there and then removed the signs right after.
14 I don't sell my jewelry this way.

15 So she now knows that she has to admit that she asked
16 them to do that. She pled ignorance in her deposition. But
17 she's the one who created these specimens, which she admitted
18 to you today, but she told me in her deposition she had no idea
19 what those photos were.

20 THE COURT: So with respect to the Wona Trading
21 photos, when did you first learn that those were fabricated in
22 the way you've just described, was that again in the opposition
23 to the sanctions motion?

24 MS. ARBAUGH: That's the first time that they admitted
25 that they were fabricated. But we took Wona Trading's

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Summation - Ms. Arbaugh

1 deposition -- and I apologize to the Court. I don't remember
2 the date of that.

3 THE COURT: But at that time obviously then defense
4 counsel was on notice that you had uncovered evidence of the
5 fabrication.

6 MS. ARBAUGH: Yes, your Honor.

7 THE COURT: Thank you.

8 MS. ARBAUGH: Thank you.

9 The catalogs, your Honor, again, the documents
10 themselves say everything you need to determine the level of
11 intent and bad faith here. A document that says 2009
12 collection catalog and it didn't even exist until 2013, the
13 photographs didn't even exist until 2013, it reveals intent.
14 And she knows it. Ms. Kim knows it. They know it without a
15 doubt. Why? Because she told me in her deposition that this
16 catalog existed as of that date. So she went out of her way to
17 tell me otherwise because she didn't want to be caught in her
18 own deceit about this document. That shows intent.

19 I think at the end of the day, the documents
20 themselves show intent. Ms. Kim's false testimony to the PTO,
21 to me in the deposition, and I believe to the Court today shows
22 intent. The false testimony shows that she knew what she was
23 doing when she created these documents, but she bent over
24 backwards in her deposition to try to cover up what she had
25 done.

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Summation - Ms. Arbaugh

1 THE COURT: And the proof that these collection books
2 and specimens were created in August of 2013, that was
3 discovered through the forensic analysis.

4 MS. ARBAUGH: Yes, your Honor. So we believe that
5 intent and bad faith is clear here and it was all part of a
6 scheme to defraud the PTO, Court, Tory Burch into two things --
7 one, the defendants having really the world because they've
8 been telling their customers this too, having everyone believe
9 that they had valid trademark rights when they didn't and they
10 brought a counterclaim on that basis and that's part of their
11 defense to the current claims that Tory Burch has in this case.
12 So it's partly that. And partly what they've been doing is
13 trying to conceal their own wrongdoing, whether it's lying to
14 me about the catalogs or the Tory Burch style invoices being
15 tampered with, they're trying to cover up their tracks.

16 So this goes to every issue in the case in terms of
17 both their affirmative counterclaims and to the defenses
18 they've been leading us to believe they have on our claims in
19 this case.

20 THE COURT: And let's just be specific about that.

21 MS. ARBAUGH: Yes, your Honor.

22 THE COURT: This is a trademark case. So to the
23 extent that someone has a historical use of an item over time
24 before Tory Burch did or didn't acquire its own trademark
25 rights in a substantially similar design, those are important

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Summation - Ms. Arbaugh

1 issues in deciding the merits of a trademark case.

2 MS. ARBAUGH: Absolutely, your Honor. And I would
3 tell you that I mean we were misled by this. In the beginning
4 of the case -- and I won't get into 408 discussions or anything
5 like that. We took this at face value. We went into a
6 mediation thinking, oh, these people have had this. Our client
7 became imminently reasonable. We haven't been able to settle
8 the case because of this evidence and trying to work with
9 Ms. Kim. We were deceived based on this evidence.

10 And then we get into this and it takes months of
11 discovery, third party subpoenas that were conducted solely to
12 try to figure out what's going with these documents. Forensic
13 discovery. Five days of deposition, partially because of
14 translation, partially because I had to ask questions about all
15 of these invoices and was she really using it this way, was she
16 using it as a source identifier, point of sale, etc. Days of
17 deposition testimony on this where we're thinking, oh, this is
18 something we really have to consider here and defend in this
19 case. It has ran up fees in this case.

20 So, yes, we took it very seriously and we mediated on
21 the basis of what they've given us in this case.

22 THE COURT: And if I remember correctly, there were
23 disputes as to whether or not you should be able to take third
24 party discovery here because of the impact on the defendant's
25 business.

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Summation - Ms. Arbaugh

1 MS. ARBAUGH: Right, your Honor. And I would note
2 there what was especially maddening about that is that they
3 have something like 450 customers. We only served limited
4 subpoenas for, I'm estimating based on my recollection,
5 approximately 25 of those customers. So we did what we really
6 felt we needed based on the invoices we had identified and we
7 tried to be selective about it.

8 Mr. Myerowitz had a call with me and he said, look,
9 this is causing some disruption. My client is concerned
10 because her customers are calling her. We reached an agreement
11 to cut that almost in half because of his concerns about the
12 impact on her business. But the entirety of those third party
13 subpoenas were to try to get these invoices before we had done
14 the native inspection from some other source to figure out if,
15 hey, are these authentic or not. That was the whole purpose of
16 that exercise. And you're correct it was disputed and it
17 caused an issue.

18 I think Ms. Kim's testimony about why she brought her
19 counterclaims in this case is particularly telling and what she
20 told me in her deposition was she brought them solely because
21 she thought it was unfair she was being sued. Not because they
22 have any merit, she was frustrated. She was so frustrated that
23 she brought counterclaims that have no merit and then continued
24 her scheme of tampering with evidence to lead us to believe
25 that those counterclaims have merit. Again, I think that's

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Summation - Ms. Arbaugh

1 evidence of intent and bad faith.

2 And the actions in this case taint all of defendant's
3 counterclaims and all of the defendant's counterclaims should
4 be dismissed as a sanction and, at a minimum, because the
5 defendants have come to the Court with unclean hands and we've
6 cited that case law for the Court and I know that you're
7 familiar with it.

8 So at the end of the day, what we'd like to ask the
9 Court to do is dismiss the remaining counterclaims that the
10 defendants have and the four defenses that you identified at
11 the beginning of the hearing. And then we are going to ask the
12 Court to award attorneys' fees. I'll tell you a little bit
13 about attorneys' fees. I prepared a rough chart last night,
14 your Honor, based on fees to date that I can go over with you
15 briefly as well.

16 We've defended meritless counterclaims and spent
17 substantial time conducting discovery in the case to defend
18 those counterclaims. I'd go so far as to say we've spent more
19 time on this case dealing with their counterclaims and running
20 down this falsified evidence and computer forensic experts and
21 taking depositions over did you really use this and did you
22 have trademark use -- more time on that than discovery on our
23 affirmative claims in the case.

24 We were forced to defend a TRO request that I know the
25 Court recalls. And we spent a lot of time on that, again,

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Summation - Ms. Arbaugh

1 where they were claiming they had their own trademark rights.
2 And we took, again, part of the reasons the depositions took so
3 long is not just because of the counterclaims, is that because
4 when we were taking them, that TRO was on file. So we were
5 doing it for multiple purposes at that point. And Ms. Kim had
6 submitted a declaration to this Court discussing at length harm
7 to her business. It turns out that that declaration is false
8 and we've proved and put the evidence in for the Court's
9 benefit.

10 Could you pull up the slide of the financial summary.

11 We spent months of discovery, your Honor, before that
12 TRO request was pulled down into the final determination on the
13 merits, which was of course only at the Court's request. We
14 had already drafted the brief and everything. Candidly, I was
15 stunned that we were having to put as much time as we had to in
16 the TRO request because it was completely meritless from our
17 perspective.

18 We prepared a demonstrative for the Court. As you can
19 see in this demonstrative -- and if you look at we've cited
20 this I believe in our sanctions motion the evidence that
21 supports this.

22 Ms. Kim said in her declaration all kinds of things
23 about how she was losing business and her average monthly sales
24 had gone down for certain time periods. I spent substantial
25 time with her in her deposition on this issue because she had

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Summation - Ms. Arbaugh

1 produced documents in the case. And I was stunned to find out
2 in the deposition it just wasn't true.

3 Now, I'm not saying this hasn't had an impact on her
4 business. I don't want to lead the Court to believe that's
5 what I'm saying. I'm sure it has had some impact from
6 reputation alone. But she put very specific information in her
7 affidavit to the Court about the impact of the harm and it just
8 wasn't accurate.

9 And so what we show the Court on this demonstrative,
10 for example, Plaintiff's Exhibit 74, Lin & J sales 2012. Total
11 sales for Lin & J were 2.871 million in 2012. The average
12 monthly revenue was 239,267. So that was before we brought our
13 lawsuit.

14 Now, 2013, what we've done, if you look at Plaintiff's
15 Exhibit 75, is there's a monthly sales revenue chart they
16 produced to us. And I did walk through some of this with her
17 in her deposition. And Lin & J sales, taking those months,
18 plus LJ brand. Again, LJ brand is the same company. This is
19 the company that has the same operations, employees; it's all
20 the same place. She formed it for part of her re-branding
21 efforts for her trademark use. What happens is because she's
22 selling the accused jewelry technically through both
23 entities -- and, by the way, she also created new invoices. So
24 she might have invoices for the same customer that say Lin & J
25 and LJ brand, but they're all the same company and they're both

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Summation - Ms. Arbaugh

1 selling accused infringing jewelry and she admits they're both
2 selling accused infringing jewelry.

3 So you add up the 2013 monthly sales revenue in PX 75,
4 for 2013, her revenues go up by 25 percent to 3.971 million.
5 Her average monthly revenue for 2013 is 330,000. It's higher,
6 of course, because the overall went up. And her average
7 monthly revenue from June to December is 253. Guess what,
8 that's higher than the year before. She goes to great lengths
9 in her affidavit to you in the TRO papers to say when we were
10 sued by Tory Burch in June 2013, you know, the sky started
11 falling and our monthly revenues went down. This shows that's
12 just absolutely not the case.

13 So even with the TRO request, she was wasting judicial
14 resources, wasting time getting Tory Burch and the Court to
15 hear issues that were just false. And I'll note that in her
16 deposition in February I spent a lot of time questioning about
17 this. It became very clear.

18 And you've asked questions today, your Honor, about
19 when defendants were on notice of certain things and conceded
20 certain things to us and also when counsel was on notice of
21 certain things. Counsel was on notice as early as February
22 that this was a problem and that what she was saying was
23 happening with her business was not supported by what was in
24 her affidavit. And I actually raised with Mr. Myerowitz that I
25 didn't think his client's position had credibility and that I

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Summation - Ms. Arbaugh

1 thought the deposition made that clear and that was in

2 February.

3 But you know what it took to get them to withdraw the
4 TRO papers. It took your Honor on the phone finally saying you
5 know what, it's been something like four months since they had
6 been filed. With the timing of the case, that should be
7 collapsed in the final trial on the merits. That's what it
8 took for them to pull it down.

9 But the entire basis of this TRO was this alleged harm
10 to their company when all along they've got documents showing
11 that their revenues have increased and we spent substantial
12 time addressing that. And we would ask as part of the fees the
13 Court consider awarding in this case is the amount of time that
14 went into preparing for this TRO which, again, was based on
15 false allegations of harm and false allegations of alleged
16 trademark rights.

17 And then we'd also ask for our costs. Now, your
18 Honor, I would like to tell you that the amount of fees that we
19 request the Court to award is 1.38 million. That is actually
20 far less than what we spent in the case and I will tell you how
21 it breaks down. And I would like to make clear this is an
22 estimation. Last night we went off block bills and did the
23 best we could, but I'm happy to submit any kind of affidavit to
24 make this more specific as I know the Court may want.

25 The TRO, we spent \$203,000 conducting discovery and

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Summation - Ms. Arbaugh

1 preparing to respond to that before it was pulled down.

2 Initial investigation and research into and preparing
3 a response to the counterclaims when they were first filed was
4 86,000.

5 Discovery. So our total fact discovery in the case
6 has been about 535,000. So we estimate that of that about -- I
7 just basically cut it in half -- about 265,000 would be for
8 running down the false evidence, the deposition time, defending
9 against the counterclaims, and defending against the trademark
10 counterclaim that's been withdrawn.

11 Expert discovery, the total amount is close to
12 300,000. So I just cut that in half and said probably about
13 150 of that is related to what we would ask for fees as a
14 result of this.

15 And then we conducted third party subpoenas and
16 forensic examinations and that's about \$49,000.

17 We also prepared papers in support of our summary
18 judgment motion on all of the counterclaims, including the
19 trademark claim that was withdrawn the 11th hour after we had
20 already drafted and researched and prepared that brief. Our
21 total preparation of all summary judgment papers was 286,000.
22 I would ask that 140,000 of that be awarded as a sanction part
23 of this.

24 And then we've also of course spent significant time
25 filing the sanctions motion and getting these experts ready for

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Summation - Ms. Arbaugh

1 the hearing and being here at the hearing. And all of that
2 total is 376,000.

3 So total is approximately 1.38 million. There are,
4 just for the Court's benefit, there are over \$2 million in fees
5 in this case.

6 I have also tried, based on rough estimates, tried to
7 be conservative in what I say would be related to the sanction
8 fees that would be appropriate as a result of this hearing. I
9 was not able to determine any specific costs. But, of course,
10 the client has spent significant costs on this as well, and
11 we're happy to provide any sort of a bill of costs afterwards
12 if the Court is inclined to award costs in the case to give you
13 more specific numbers for that.

14 And, finally, I'll just conclude by saying, your
15 Honor, that in terms of the attorneys, they failed to timely
16 remedy defendant's conduct as well. They didn't send a letter
17 to us saying, hey, we're withdrawing our counterclaim. One
18 thing that did become clear in the depositions in April was
19 they clearly were not using this as a trademark. The one thing
20 she did admit to me is she didn't have point of sale materials
21 and marketing and branding, anything that would be evidence of
22 a trademark use prior to hearing about complaints from us and
23 getting her initial trademark application refused. That was
24 all trumped up.

25 They've been on notice since April that she's got

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Summation - Ms. Arbaugh

1 serious problems with her trademark claim, didn't withdraw it.
2 Even though she said -- even though there was it was clear from
3 her deposition that these documents were suspicious based on my
4 questions and at one point she did say I created these solely
5 for the PTO, they didn't withdraw their counterclaim. So
6 they've known since April.

7 They've known since July that there were problems
8 based on the computer forensic reports with the modification of
9 documents and things like that, but there were no affirmative
10 steps to withdraw. Pull back documents, say, hey, we're not
11 going to rely on these documents anymore in the case. Withdraw
12 the counterclaims.

13 What ultimately happened is we sent a letter to
14 counsel in August that said we're going to seek sanctions here
15 on all the counterclaims. It took that letter for them to
16 finally withdraw it and that's when we reached the agreed
17 dismissal, to have the trademark counterclaim dismissed right
18 before the summary judgment deadline.

19 So a lot of this or at least a small amount of this
20 could have been avoided by simply earlier in the case saying
21 you know what, we're going to pull some of this back and it
22 didn't happen. We've prepared substantial dispositive motion
23 briefs on that basis.

24 Finally, your Honor, I'll conclude by saying what I
25 think is most telling and amazing about this is that they are

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Summation - Ms. Arbaugh

1 still citing to and relying on that initial trademark
2 publication of their trademark that they got from the PTO,
3 still to this day. If you look at Plaintiff's Exhibit 71,
4 attached opposition to the motion for sanctions. And by the
5 way, this is all over all of the recent pleadings, summary
6 judgment and otherwise.

7 This is Ms. Kim's declaration, paragraph 12, Lin & J
8 has received preliminary approval from the United States Patent
9 and Trademark Office for a trademark which has use and design
10 and manufacture of many of the Isis Cross products. I mean
11 they're still pointing to it in all of their briefing as if it
12 means something in the case and it doesn't. As we know, the
13 PTO got the wool pulled over its eyes based on these falsified
14 specimens. They cite to it in their briefing on the summary
15 judgment and response to the summary judgment as well. And the
16 fact that they haven't just completely backed off of that and
17 said, you know, we're staying away from it, we know that's
18 based on tainted evidence, is very telling.

19 And I would ask the Court at the end the day to please
20 dismiss defendant's counterclaims, award attorneys' fees and
21 costs to Tory Burch. Thank you.

22 MR. MYEROWITZ: Your Honor, Tory Burch has brought
23 this motion for sanctions alleging numerous bad acts by my
24 clients. And the question that the Court has to look at is
25 what has the evidence actually shown.

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Summation - Mr. Myerowitz

1 To begin with, my clients have admitted that they
2 created the catalogs for the U.S. PTO. Plaintiffs were on
3 notice of that at the deposition at the same time that I became
4 on notice of it. Ms. Kim has testified she was doing what she
5 thought she was supposed to do.

6 THE COURT: I'm sorry now. I just want to make sure I
7 understand the specificity of what you're saying.

8 What you're saying is that in April of 2014, during
9 the deposition, your client admitted the fabrication of the
10 documents submitted to the trademark office.

11 MR. MYEROWITZ: Yes, your Honor. She did it without
12 reservation. She was just saying what she had done.

13 THE COURT: I think you said something more. I think
14 you were talking about the collection books. Now, are you
15 saying that in her April deposition she also admitted to
16 fabrication of the 2009, '10 and '11 collection books?

17 MR. MYEROWITZ: My recollection is she admitted to all
18 of that at that time.

19 THE COURT: In the April deposition.

20 MR. MYEROWITZ: Yes, your Honor.

21 As for the Sam Mi documents, they were never submitted
22 in this litigation for the purpose of misleading this Court or
23 for the purpose of misleading counsel. The plaintiffs were on
24 notice of the Sam Mi documents that had been altered when they
25 were provided to counsel by the attorney for Sam Mi, way before

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Summation - Mr. Myerowitz

1 it became an issue here. When my clients turned over the
2 documents to us, which we turned over to counsel in this case,
3 we turned over the correct documents. We never used any
4 falsified documents for Sam Mi in this litigation.

5 THE COURT: And so when did you disclose to the
6 plaintiffs that you had fabricated the Sam Mi invoices?

7 MR. MYEROWITZ: They disclosed it to us.

8 THE COURT: Okay. When did you admit that accusation
9 was true?

10 MR. MYEROWITZ: There was no question at that point.
11 When counsel came and told me she had these other documents and
12 I looked at them, it was clear they had been changed. We
13 didn't dispute that.

14 THE COURT: So I've been told that the first time you
15 admitted the fabrication was in the opposition to the sanctions
16 motion.

17 MR. MYEROWITZ: That's the first time that it's been
18 an issue that it needed to be addressed in this litigation
19 because it was the first time it was raised as far as this
20 litigation. But we've never submitted false documents, as far
21 as Sam Mi is concerned, in this litigation. We've always -- I
22 don't think counsel would claim that we submitted anything
23 false in this litigation regarding the Sam Mi invoices.

24 THE COURT: I understand that you disclosed the
25 original Sam Mi invoices in this litigation, not the ones you

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Summation - Mr. Myerowitz

1 fabricated.

2 MR. MYEROWITZ: Okay. As far as these other documents
3 which we've heard from two experts on, your Honor.

4 THE COURT: The invoices.

5 MR. MYEROWITZ: Yes, your Honor. They've testified
6 that the Smart Bee system is a rudimentary system that they
7 don't completely understand. There's been testimony that the
8 system pulls from different files, different folders. I'm not
9 a computer guy so I can't explain all of that. But they've
10 admitted and they concede there are things going on that they
11 don't understand and that they haven't tested for.

12 I understand Mr. Rosen checked last night and came
13 back with some information. That is not a complete test. Even
14 today when I asked Mr. Rosen what happened on April 29, there
15 are tons and tons of supposed substantive changes that happened
16 on April 29 and he can't tell us what they were.

17 THE COURT: Or that could have happened. You don't
18 know what happened on April 29; am I right?

19 MR. MYEROWITZ: Absolutely. I don't know. It's the
20 experts that say something happened on April 29. And what
21 Mr. Rosen testified to yesterday and today is the fact that
22 whatever that so-called substantive change could have been on
23 April 29 might not even appear on the invoice itself. So if
24 it's that substantive and it's not on the invoice, how do we
25 know what's going on? I mean I understand if they think that

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Summation - Mr. Myerowitz

1 the changes were made substantively. But clearly something
2 unusual was happening on April 29. There's no logic for my
3 clients to have changed anything on April 29. They already
4 turned over all of the documents in January, three months
5 earlier.

6 THE COURT: So, counsel, I've asked you this I think
7 yesterday. I just want to make sure I understand your position
8 today.

9 MR. MYEROWITZ: Yes, your Honor.

10 THE COURT: With respect to the invoices that were
11 produced in October of 2013 and in January of 2014, is it your
12 position that all those invoices are genuine?

13 MR. MYEROWITZ: That's how it's been represented to me
14 by my client, your Honor, and that is the representation I am
15 making to the Court. And I have no reason to think anything
16 else, your Honor. And, again, I can only point to what the
17 experts are saying. Even the standard to which they were
18 testifying and, again, you know, this is what Mr. Rosen said
19 yesterday. He's reasonably certain. He's making reasonable
20 inferences. That's not the normal standard we hear about.

21 I quite frankly -- well, let me back up. One of the
22 issues in this is even if the Court believes that there have
23 been changes made, the question goes to intent. If things are
24 happening in the system which can't be explained by the
25 experts, how can we say that my client intentionally was making

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Summation - Mr. Myerowitz

1 changes? And I think it's really, really important that we
2 look at April 29, 2014. What intentional change was my client
3 doing on that day? It makes no sense for them to have done
4 anything intentionally, yet we know some substantive change
5 happened in the system. What caused it? It must have been
6 accidental or inadvertent. We don't know what it is. They
7 can't tell us what it is. The experts can't. How do we know
8 then that these other changes that have been alleged were done
9 intentionally? I don't and I don't know how the Court can come
10 to that decision without getting the experts explaining this to
11 us and they haven't.

12 (Continued on next page)

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Eb5griv4

Summation - Mr. Myerowitz

1 MR. MYEROWITZ: I showed one invoice earlier to the
2 Court and that was, again, pages 27 to 29, Plaintiffs'
3 Exhibit 23 and Plaintiffs' Exhibit 13 where I was showing the
4 expert the fact that the original invoice showed four
5 references to a Tory Burch style item; whereas, the revised
6 invoice showed only two references to a Tory Burch style item;
7 and the question I asked which was objected to, probably
8 appropriately so, was, What sense would it make to delete two
9 out of the four references? I'll ask the question now: What
10 sense would it make?

11 If we were trying to hide the fact that there were
12 references to Tory Burch style items in our invoices, why would
13 we only delete some of them on a particular invoice and leave
14 the other ones there? Again, it's illogical, it makes no
15 sense. It had to have been something going on that we weren't
16 intentionally doing.

17 There are numerous invoices that have been turned over
18 in this litigation that have the reference to Tory Burch style
19 items on them. If we were trying to hide it, why wouldn't we
20 have taken it all off?

21 I want to address quickly some of the things that were
22 raised by counsel. She asked why we didn't hire an expert, why
23 we didn't get a neutral to do more testing.

24 Frankly, your Honor, it appeared to us quite from the
25 start that what the experts were coming up with made no sense,

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Summation - Mr. Myerowitz

1 could not be substantiated and quite frankly, this is their
2 motion, not our motion. It's not our job to try to lock this
3 down, and that's why we didn't get one. We didn't feel it was
4 necessary to get one.

5 As far as the number of items, I know your Honor asked
6 counsel if because of these alleged changes there would be a
7 difficulty in them determining the number of alleged infringing
8 items that were sold. I just want to state simply that they
9 have provided to us documents with dozens of names of items
10 that they believe are allegedly infringing items. The
11 determination of the number is not dependent on the name Tory
12 Burch style in our documents. That name being in the documents
13 is almost irrelevant to how many items we have sold because
14 they have identified, as I said, dozens of names in our
15 documents that they believe are the items.

16 So I don't think that that makes any difference and I
17 don't think that it was, again, could have been intended to
18 make a difference because changing the style description
19 doesn't change what the item is. And if it's the item that's
20 allegedly infringing, it's going to be an issue in the case,
21 and it has become an issue in the case.

22 THE COURT: Yes, I understand that it's very possible.

23 One would hope that there is reliable-enough
24 information to identify the product numbers or item numbers
25 that the plaintiffs contend represent pieces of infringing

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Summation - Mr. Myerowitz

1 jewelry.

2 The question I asked, intended to ask or convey was
3 because of the manipulation of the invoice database, do you
4 have any confidence that you could determine today the number
5 of pieces of jewelry that were sold and the prices at which
6 they were sold historically for any particular infringing item
7 number?

8 MR. MYEROWITZ: I don't believe there's been any
9 allegation made or evidence presented that any of the total
10 numbers have been changed, that any of the pricing have been
11 changed.

12 I understand there have been allegations of a lot of
13 different things, but if there had been changes to the names
14 and they changed the names of items throughout all along for
15 all different kinds of items, not just the items at issue here,
16 they changed constantly based on who is inputting. I think
17 that is what we explained in our papers.

18 But the fact that the names changed, doesn't mean that
19 the items come out; the items have always stayed there.

20 THE COURT: Yes. I'm not focusing on the description
21 of the item. I'm talking about the number of units sold, the
22 prices at which they were sold, that are associated with an
23 item number. I do think at this hearing we have had evidence
24 of alterations to the units sold associated with an item
25 number.

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Summation - Mr. Myerowitz

1 You may continue, counsel.

2 MR. MYEROWITZ: Right. That was in the Sam Mi
3 documents, which were provided to Sam Mi, but not that anything
4 in this case was provided to counsel for this litigation.
5 Absolutely in the Sam Mi related case over there, they provided
6 them with documents showing that that they bought less and paid
7 less. If that's what your Honor is referring to, I agree
8 completely.

9 THE COURT: Let me ask you, counsel, if you could
10 consult with your client over the luncheon break if they are in
11 a position to pay something like \$1.4 million in sanctions and
12 whether that amount of money can be paid within the next two
13 weeks, and I'll ask for your answer by 2:00. Thank you.

14 MR. MYEROWITZ: Can I just finish up.

15 THE COURT: Please continue.

16 MR. MYEROWITZ: I just want to, again, the issue was
17 brought up as far as whether my clients have suffered
18 financially and whether they were suffering financially at the
19 time that the motion for a stay was brought, for the order to
20 show cause.

21 I can only tell you that my clients have been
22 suffering terribly. I'm not going to go over the financial
23 documents that we have put in in response, but they do show the
24 losses that they have taken.

25 The financial documents that counsel went through at

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Summation - Mr. Myerowitz

1 the deposition were not complete. They're based on partial
2 years. Financial years don't line up often in business with
3 calendar years, and that's my understanding of what the
4 difference is. I just wanted to explain that as far as I'm
5 concerned and as far as I know, my clients have been suffering.

6 As far as the USPTO issue relying on false
7 documentation given, I think there's some confusion as to what
8 it is that my client keeps asserting, and what she's asserting
9 is that when the USPTO first sent their office action, what
10 they said was that there was no likelihood of confusion with
11 any other marks out there. That's what it says on it. And it
12 was based on that that my client believed - and continues to
13 believe - that other than the other issues that have arisen in
14 whether or not they were in use, that the designs themselves
15 are not the same.

16 I believe that if we look at the USPTO document, it's
17 very clear that they did their own search. They did their own
18 investigation as they usually do. And if my client had, in
19 fact, been able to provide documentation of prior use, I think
20 there's no question she would have gotten the registration.
21 That's the part she's talking about. She's not talking about
22 anything else, your Honor.

23 THE COURT: Show me, direct me, and can you help me,
24 Ms. Arbaugh, what exhibit number should I be looking at?

25 MS. ARBAUGH: The response to the office action is

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Summation - Mr. Myerowitz

1 Plaintiffs' Exhibit 1.

2 MR. MYEROWITZ: The office action itself, do you have
3 that?

4 MS. ARBAUGH: Yes. I apologize. I don't have that by
5 memory, but I'll direct you to it. I believe it's Plaintiffs'
6 Exhibit 59. Let me make sure. There were two office actions.

7 Plaintiffs' Exhibit 59, your Honor.

8 THE COURT: Mr. Myerowitz, where do you want me to
9 look?

10 MR. MYEROWITZ: It's on the first page at the bottom,
11 search of office's database of marks.

12 THE COURT: I'm sorry. That doesn't say that there's
13 no likelihood of confusion.

14 MR. MYEROWITZ: I'm sorry, your Honor.

15 I misspoke as to what it exactly says. Do you want me
16 to read it into the record or just look at it?

17 What it says is that the certain trademark offices
18 have found no conflicting marks that would bar registration
19 under the Trademark Act.

20 THE COURT: Section 2D.

21 MR. MYEROWITZ: Yes, your Honor.

22 THE COURT: That's what it says.

23 MR. MYEROWITZ: Yes.

24 Just to get into what sanctions counsel is asking for,
25 again, our brief has the law. I know the Court knows the law

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Summation - Mr. Myerowitz

1 better than we do. But the sanctions need to be appropriate.
2 They need to be the least harsh. They need to be related to
3 what the Court if it believes my client's did actually did.
4 And asking for dismissal of the counter claims in this action I
5 believe would be completely inappropriate.

6 THE COURT: So the tortious interference with business
7 relations, that is contacting the retailers?

8 MR. MYEROWITZ: It's contacting the retailers, filing
9 suits against the retailers, threatening legal action,
10 threatening criminal action against the retailers, calling my
11 clients all kinds of things that there's no substantiation for.
12 Even if there's a problem with the mark, there have been things
13 that have been done to interfere with the business.

14 THE COURT: Count Three is defamation.

15 MR. MYEROWITZ: Yes, your Honor.

16 THE COURT: That is statements to your retailers?

17 MR. MYEROWITZ: Correct.

18 THE COURT: And abuse of process, that's what?

19 MR. MYEROWITZ: That has to do with the entirety of
20 how this has been litigated throughout the country. There have
21 been at least nine other federal lawsuits filed, and in no case
22 has there been a determination by any court that my client has
23 infringed; and yet, there have been settlements in the amounts
24 of hundreds of thousands of dollars. We don't know the exact
25 number because they're all sealed. Every time Tory Burch

Eb5griv4

Summation - Mr. Myerowitz

1 agrees to a settlement, it's confidential.

2 But one of the things they always insist on is that
3 the retailer or the wholesaler who is buying from my client
4 agree to stop buying from my client, so even though there's
5 been no determination that my client has infringed, they have
6 successfully cut off my client's ability to do business.

7 THE COURT: So I understand from what Ms. Arbaugh is
8 trying to indicate to me that you may not have accurately
9 described, I'm sure she'll explain this to me, the nature of
10 any agreements in settlement with the retailers.

11 I expect it's customary that the allegedly infringing
12 articles no longer be purchased, and I'll assume that it's
13 that.

14 MR. MYEROWITZ: Yes.

15 THE COURT: Then I'm going to ask you to consult with
16 each other and if after lunchtime you want to make a broader
17 representation to me, you can.

18 Let's go to the affirmative defenses. The sixth
19 affirmative defense has to do with the fact you were an
20 innocent infringer. I'd say that's pretty related to the
21 context of the sanctions litigation.

22 MR. MYEROWITZ: Yes, your Honor.

23 THE COURT: The tenth is that your claims are barred
24 by estoppel. That's pretty related to this sanctions
25 litigation.

Eb5griv4

Summation - Mr. Myerowitz

1 Am I right?

2 MR. MYEROWITZ: Yes, your Honor.

3 THE COURT: Okay. The eleventh is that the
4 plaintiffs' claims are barred by the doctrine of unclean hands.
5 That's pretty related to the subject of the sanctions
6 litigation, as well.

7 Would you agree?

8 MR. MYEROWITZ: Correct, I would agree.

9 THE COURT: The fourteenth is, again, that your
10 client's actions were taken in good faith and that's pretty
11 related to the sanctions litigation as well.

12 MR. MYEROWITZ: I agree, your Honor.

13 THE COURT: So with respect to the four affirmative
14 defenses that the plaintiff is requesting to be struck, the
15 defendants are arguing perhaps that it would be too harsh to do
16 so, but they're not arguing that that conduct isn't related to
17 the subject of the sanctions hearing.

18 MR. MYEROWITZ: Correct, your Honor.

19 THE COURT: I have your argument on the three
20 counterclaims.

21 MR. MYEROWITZ: Thank you, your Honor.

22 THE COURT: Yes. Is there anything else you'd like to
23 say?

24 MR. MYEROWITZ: No.

25 THE COURT: We'll meet at 2:00. Be prepared to go

Eb5griv4

Summation - Mr. Myerowitz

1 into the second hearing on the attorney sanctions issue,
2 counsel's conduct. And I'll take a statement with respect to
3 the defendants' ability to pay the attorney's fees requested,
4 roughly \$1.4 million, within two weeks or some reasonably short
5 period of time. I think that's all we need to have addressed
6 during the lunch hour.

7 Counsel.

8 MS. ARBAUGH: It just occurred to me as you were going
9 through those things that you had asked us Friday, too, to get
10 back to you on the issue of what Tory Burch intended to do with
11 the remaining claims in the case.

12 You had made the point that if summary judgment was
13 granted on the trademark counterfeiting and trademark claims,
14 would it just be a damage and injunctive relief only case or if
15 that happened, would Tory Burch -- or if what happened with the
16 other claims, if that happens, then Tory Burch is not going to
17 pursue the other claims that we brought.

18 I wanted to get back to you on that.

19 THE COURT: I think there is one open issue also that
20 we were going to address today as reflected in one of my prior
21 orders, and that relates, in large part, to the second hearing
22 we're going to have but not entirely; and that is the
23 opposition to the summary judgment motion, whether that should
24 be stricken or a reply brief is needed.

25 Mr. Myerowitz, let's assume that I find that there has

Eb5griv4

Summation - Mr. Myerowitz

1 been such an intentional fabrication and alteration of evidence
2 here, that none of the documents that have been produced by the
3 defendants in discovery can be relied upon, and I'd like you to
4 further assume that the steps that plaintiffs have taken during
5 the course of discovery to try to understand what's true,
6 what's false here in terms of the defendants' documents and
7 historical conduct in its sale of jewelry, that that conduct
8 has been reasonable and necessary for its protection of its
9 rights and its prosecution of this action, including its
10 service of third-party subpoenas in gathering documents from
11 the defendants' retailers, I'd want to know what of your
12 opposition to the summary judgment motion would survive.

13 MR. MYEROWITZ: Okay.

14 THE COURT: We'll talk about that at 2:00.

15 Thank you, counsel. Have a good lunch.

16 (Luncheon recess)

17 (Continued on next page)

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Hearing

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AFTERNOON SESSION

2:00 p.m.

(In open court)

THE COURT: Please be seated.

There were some open questions I'd ask counsel to be able to address at the conclusion of our luncheon recess.

Mr. Myerowitz.

MR. MYEROWITZ: Yes, your Honor. I spoke with my client. They're telling me that the tax returns that have been prepared for this year are on the verge of being printed and actually they lost money at this year. They have no ability at this point to come up with any type of money for anything. I don't know what they would do.

THE COURT: That's helpful to know.

MR. MYEROWITZ: Sell the furniture.

THE COURT: That's very helpful to know.

Are there other issues that you wanted to report on before we move to the second hearing?

MR. MYEROWITZ: No, your Honor. I just wanted to clarify, if there was some issue, if I misrepresented that Tory Burch somehow was asking people that they were settling with or companies they were settling with to stop doing business altogether. That is not what they have done. I did not mean that if that's what it came out as. It was simply to stop selling the infringing products is what I was talking about.

Eb5griv4

Hearing

1 THE COURT: I appreciate that clarification.

2 MR. MYEROWITZ: Thank you.

3 THE COURT: Let us move to the second hearing.

4 This was a very, very sad set of affairs. After the
5 plaintiffs' questioned whether defense counsel had actually
6 served the papers due on October 2 in opposition to the summary
7 judgment motion or not, on October 2 defense counsel wrote on
8 Monday, October 6, to assure the Court that he checked and that
9 the opposition papers were mailed on October 2. Of course,
10 they should have been filed on the ECF system on October 2, but
11 he asserted they had instead been placed in the U.S. Mails or
12 otherwise placed in the stream of physical mail on October 2
13 and, therefore, were timely served.

14 Plaintiffs responded promptly with evidence suggesting
15 that did not happen, including the mailing label attached to
16 the opposition papers; and the next day, October 7,
17 Mr. Myerowitz called the plaintiffs' claims outrageous and
18 baseless accusations. I issued my order permitting a forensic
19 examination of the law firm's computers and set this matter
20 down for a hearing. On October 9, Mr. Myerowitz admitted that
21 the papers were not served on October 2 but asserted they were
22 served on October 3 and apologized.

23 Let me ask you, Mr. Myerowitz, to explain to me first,
24 having reviewed your opposition papers over the lunch break,
25 what arguments from those opposition papers do you contend

Eb5griv4

Hearing

1 survive given the hypothetical I asked you to consider?

2 MR. MYEROWITZ: Well, considering the hypothetical, I
3 would say that what would survive would be the opposition to
4 the affirmative case that they have brought, that the
5 plaintiffs have brought.

6 THE COURT: With what evidence?

7 MR. MYEROWITZ: I mean, if, in fact, it's suppressed,
8 our entire brief is suppressed? I'm confused, your Honor.

9 THE COURT: I asked you to look at your opposition
10 papers and assume that none of the documentary evidence from
11 the defendants' files would be considered and that any
12 arguments or evidence associated with the plaintiff attempting
13 to obtain discovery from the defendants' retailers would be
14 considered. What other evidence or arguments do you have that
15 you contend would survive in opposition to the plaintiffs'
16 summary judgment motion?

17 MR. MYEROWITZ: I think our counterclaims obviously
18 would be completely out. I think that there is still a burden
19 on the plaintiffs to prove that our clients' product, the Isis
20 Cross, actually does infringe on their intellectual property.

21 THE COURT: Yes. I understand that. The plaintiffs
22 have a burden when they move for summary judgment and not
23 infrequently, particularly in pro se litigation or civil rights
24 litigation, there is no opposition to a summary judgment motion
25 and I still have to review the summary judgment motion to make

Eb5griv4

Hearing

1 sure that it's adequately supported such that summary judgment
2 is warranted.

3 I'm trying to figure out what, if anything, survives
4 of your opposition papers in your view to the summary judgment
5 motion brought by the plaintiffs based on my hypothetical.

6 MR. MYEROWITZ: I would have to sit down and do a
7 little more than what I was able to do over lunch. I actually
8 don't have the papers with me. Mr. Doberman and I were
9 discussing it, but without having it completely in front of us,
10 it's difficult to give you a proper answer.

11 THE COURT: So nothing came to mind?

12 MR. MYEROWITZ: Nothing, your Honor.

13 THE COURT: Thank you.

14 Mr. Myerowitz, what witnesses do you have in the
15 courtroom and available to us now to describe to me what
16 factually happened with respect to the preparation, printing
17 and service of the summary judgment papers?

18 MR. MYEROWITZ: I have Mr. Doberman here and I also
19 have Tim Rhee, my paralegal.

20 THE COURT: Can you spell his name.

21 MR. MYEROWITZ: Tim, T-I-M, and his last name is
22 R-H-E-E.

23 THE COURT: Who is the principal author of the
24 opposition papers?

25 MR. MYEROWITZ: Myself.

Eb5griv4

Hearing

1 THE COURT: What was Mr. Doberman's role with respect
2 to those, if any?

3 MR. MYEROWITZ: He's the associate that's assigned to
4 this case with me.

5 THE COURT: Yes, I know that, but with respect to the
6 opposition papers?

7 MR. MYEROWITZ: He drafted part of it, did some of the
8 research.

9 THE COURT: Who is responsible for finalization of the
10 papers?

11 MR. MYEROWITZ: I am responsible for that.

12 THE COURT: Who was responsible for the printing and
13 mailing of the papers?

14 MR. MYEROWITZ: That would be Mr. Rhee.

15 THE COURT: Why don't you take the stand then,
16 Mr. Myerowitz. We'll start with you.

17 MR. MYEROWITZ: May I make an opening statement?

18 THE COURT: Certainly.

19 MR. MYEROWITZ: Your Honor, as I said in my letter, I
20 take full responsibility for the misrepresentation to the
21 Court. I have never done anything like this before. That's my
22 signature on all of the documents, and it's my responsibility
23 to make sure that everything that's on those documents, in
24 those documents and in the cover letters is accurate.

25 I am embarrassed and ashamed about this matter. I was

Eb5griv4

Hearing

1 brought up in a religious family. I was taught to always be
2 truthful. I went to a Jesuit law school and was in an ethics
3 and a public interest program. I'm sure my professors would
4 not be pleased with my actions here.

5 I consider it part of my responsibility at the firm
6 and in general to teach younger attorneys the proper way to
7 behave and the proper way to do that is by setting a proper
8 example. Obviously, I failed in that here.

9 I would simply ask that regardless of what the Court
10 decides that no sanctions for this be visited upon anyone other
11 than myself or on the firm.

12 Do you want me to take the stand, your Honor?

13 THE COURT: Yes.

14 Please remain standing. Raise your right hand.

15 (Witness sworn)

16 HOWARD MYEROWITZ,

17 called as a witness by the Court,

18 having been duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 THE COURT: Mr. Myerowitz, do you wish Mr. Doberman or
21 someone else to question you for what is in essence your direct
22 testimony?

23 THE WITNESS: No, your Honor. Actually, other than my
24 opening, I don't really have any direct. If the Court wants to
25 ask questions or Ms. Arbaugh --

Eb5griv4

Myerowitz - direct

1 THE COURT: Fine.

2 Ms. Arbaugh.

3 MS. ARBAUGH: I did have questions prepared, but
4 candidly, I think with Mr. Myerowitz's admissions, I'm going to
5 not ask my questions. I think he's admitted what happened. I
6 think the letters and the correspondence leading to, as you
7 call it, an unfortunate series of events are very clear of what
8 happened here, so I don't think I should ask any further
9 questions.

10 THE COURT: I'll ask some questions.

11 Mr. Myerowitz, what was the last day that you worked
12 on drafting the opposition to the summary judgment papers?

13 THE WITNESS: The third.

14 THE COURT: About what time did you finish your
15 written work in connection with the preparation of that
16 document?

17 THE WITNESS: Sometime late afternoon.

18 THE COURT: Did you do that work by making entries
19 into a computerized document or by editing something in
20 longhand and expecting someone else to enter those corrections?

21 THE WITNESS: On the computer.

22 THE COURT: When you finished your work on the
23 document late in the afternoon of October 3, was the document
24 then considered in final form?

25 THE WITNESS: Yes.

Eb5griv4

Myerowitz - direct

1 THE COURT: Besides a memorandum of law, what other
2 documents were there associated with the opposition?

3 THE WITNESS: I don't remember what all the exhibits
4 were, your Honor, but whatever exhibits there would have been
5 with it, that would have been included, there should also have
6 been a certificate of service.

7 THE COURT: I take it when you were describing to me
8 when you made changes to a document, you were talking about the
9 memorandum of law?

10 THE WITNESS: Yes, your Honor.

11 THE COURT: When were the exhibits assembled?

12 THE WITNESS: Prior to the memorandum of law being
13 completed.

14 THE COURT: Were they assembled on October 3?

15 THE WITNESS: I believe some of them were assembled
16 October 2, even earlier.

17 THE COURT: Were some assembled on October 3?

18 THE WITNESS: I believe so.

19 THE COURT: Who was in charge of assembling the
20 exhibits?

21 THE WITNESS: Myself, your Honor.

22 THE COURT: What did you do when you completed your
23 work on the memorandum of law and the assembly of the exhibits?

24 THE WITNESS: Asked Mr. Rhee to put everything
25 together and mail it.

Eb5griv4

Myerowitz - direct

1 THE COURT: As far as you remember, when did

2 Mr. Doberman's work on the opposition papers end?

3 THE WITNESS: Sometime before mine.

4 THE COURT: But also on October 3?

5 THE WITNESS: I believe so, your Honor.

6 THE COURT: Now, with respect to the letters to the
7 Court, the letters are over your signature.

8 Did you prepare the letters of October 6 and
9 October 7?

10 THE WITNESS: Yes.

11 THE COURT: Your letter of October 6 indicates that
12 you checked with your paralegal who assured you that the papers
13 had been mailed on October 2. I take it that at the time you
14 wrote that, you knew that was not true.

15 THE WITNESS: Yes.

16 THE COURT: In the October 7th letter, you write that
17 the plaintiffs' claims about late service were baseless. I
18 take it at the time you wrote that, you knew that was false?

19 THE WITNESS: Yes.

20 THE COURT: Is there anything else you want to add
21 before I ask Mr. Rhee to take the stand?

22 THE WITNESS: No, your Honor.

23 THE COURT: Ms. Arbaugh, did you have any questions
24 you wished to place to counsel?

25 MS. ARBAUGH: No, your Honor.

Eb5griv4

Myerowitz - direct

1 THE COURT: You may step down, Mr. Myerowitz.

2 Mr. Rhee, you may come up here. Please take the stand
3 and remain standing. Please raise your right hand.

4 (Witness sworn)

5 TIM RHEE,

6 called as a witness by the Court,

7 having been duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 THE COURT: Mr. Rhee, what's your current employment?

10 THE WITNESS: I'm a paralegal at Song Law Firm.

11 THE COURT: How long have you been a paralegal at the
12 Song Law Firm?

13 THE WITNESS: A little over a year.

14 THE COURT: Let me direct your attention to October of
15 last year.

16 Did you assist Mr. Myerowitz in the physical
17 preparation of documents to be mailed in this litigation that
18 constituted the opposition to a summary judgment motion?

19 THE WITNESS: Yes, ma'am.

20 THE COURT: Do you remember on what date you did that
21 work?

22 THE WITNESS: October 3, ma'am.

23 THE COURT: Were you responsible for placing the
24 documents in the mail?

25 THE WITNESS: Yes, ma'am.

Eb5griv4

Rhee - direct

1 THE COURT: Do you remember about when you did that?

2 THE WITNESS: Yes, ma'am.

3 THE COURT: When was that?

4 THE WITNESS: October 3.

5 THE COURT: Do you remember what time during the day?

6 THE WITNESS: I don't remember the exact time, but it
7 had to be somewhere between 5:30 and 6:30.

8 THE COURT: How do you remember it was around then?

9 THE WITNESS: Because I had waited for our mailman
10 from our office building, which he wasn't attending, so I had
11 offered to go over to the post office at that time.

12 THE COURT: Did you go to the post office?

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Did you return to work or go elsewhere --

15 THE WITNESS: No, ma'am.

16 THE COURT: -- after your visit to the post office?

17 THE WITNESS: Elsewhere.

18 THE COURT: Let me ask you, Mr. Rhee. Did you ever
19 tell Mr. Myerowitz that the papers had been mailed on
20 October 2?

21 THE WITNESS: I honestly don't remember, ma'am.

22 THE COURT: Do you remember if he ever asked you that?

23 THE WITNESS: I don't remember if he asked me that.

24 THE COURT: Ms. Arbaugh, do you have any questions?

25 MS. ARBAUGH: No, your Honor.

Eb5griv4

Rhee - direct

1 THE COURT: Mr. Myerowitz, do you have any questions?

2 MR. MYEROWITZ: No, your Honor.

3 THE COURT: You may step down.

4 THE WITNESS: Thank you.

5 THE COURT: I don't think we need Mr. Doberman's
6 testimony given the testimony from Mr. Myerowitz and Mr. Rhee.
7 I think that gives us the chronology and the basis to
8 understand the statements in Mr. Myerowitz's letters. I'm in a
9 position to close the evidentiary portion of this second
10 hearing.

11 Ms. Arbaugh, is there any evidence you wish to offer?

12 MS. ARBAUGH: No, your Honor.

13 THE COURT: Mr. Myerowitz, is there any further
14 evidence you wish me to take?

15 MS. ARBAUGH: No, your Honor.

16 THE COURT: The second hearing, the evidentiary
17 portion of it, is closed.

18 Ms. Arbaugh, did you wish to make any closing argument
19 with respect to this second hearing?

20 MS. ARBAUGH: If I may, your Honor.

21 Your Honor, based on the record, I think it's clear
22 that defendants' response brief was inexcusably and
23 indisputably filed late, and on that basis, the plaintiffs
24 would request that the Court strike that response brief and
25 deem the statement of undisputed material facts in support of

Eb5griv4

Hearing

1 plaintiffs' brief admitted and after evaluating plaintiffs'
2 motions for summary judgment, rule for summary judgment in our
3 favor.

4 As your Honor is, I'm sure, aware, striking the
5 response brief is well within the Court's discretion. In the
6 Watson v. Geithner case, (2d Cir. 2009) WL 4431051, the Second
7 Circuit affirmed the dismissal for summary judgment after an
8 opposition to a brief was not timely filed. And the Second
9 Circuit notes that the party who failed to timely file the
10 opposition had not only received extensions of time prior to
11 but had been warned about the consequence of missing that
12 deadline.

13 On appeal, the striking of that opposition was
14 affirmed and, your Honor, that's exactly what we have here: We
15 have a situation where there was an original deadline. The
16 Court granted it not once, but twice, and on the second time,
17 the Court warned there would be no further extensions. But
18 what happened was, it's undisputed, the deadline was missed.
19 It's undisputed that the defendants then lied about it. In
20 light of those facts, there is simply no excuse for missing the
21 deadline, I think it's clear that it's well within your
22 discretion to strike the opposition brief here. And they have
23 offered no excuse for their conduct.

24 I think what is most disturbing about it is the fact
25 that there was a cover-up engaged in. It wasn't just a missed

Eb5griv4

Hearing

1 deadline. You have already noted some of the letters in the
2 record about the length to which the defendants went to lead
3 Tory Burch and this Court to believe that they had, in fact,
4 served their brief timely when they hadn't.

5 They called our conduct outrageous. At one point,
6 they criticized my associate who was working for me while I was
7 in trial for jumping the gun on sending the letter, so they
8 went overboard about it. But where I think the cover-up really
9 is, is we have had a pattern of practice, pretty much since
10 this case has begun, in serving electronically and in the case
11 of the larger briefs, through the FTP site. That didn't happen
12 here. I think it was dropped in the mail for a reason.

13 If you look at the service letter and the filing
14 letter that went with the response brief, it's dated Wednesday,
15 October 1, two days before it was dropped in the mail. If you
16 look at the certificate of service, it's dated Thursday,
17 October 2, the day before. I don't think that's an accident.
18 I think it's part of a plan to cover-up the fact that they had
19 missed the deadline.

20 Why did they do that? Because just before that, when
21 they went to file their own motion papers, they couldn't meet
22 the MSJ deadline and they tried to file a preliminary MSJ, a
23 preliminary paper; and when we identified for the Court that
24 they then proceeded to, after the deadline, update those papers
25 and file something different with the Court, the Court struck

Eb5griv4

Hearing

1 those papers.

2 So in this situation, they couldn't meet a deadline,
3 they knew they couldn't do what they tried to do before because
4 it had resulted in you striking those papers. So the next
5 course of action that was engaged in is a cover-up to try and
6 fool everyone into thinking the papers were served when they
7 were not. And, in fact, as you have seen from the
8 correspondence, Mr. Myerowitz even went so far as to blame this
9 on the post office and criticize us because there's nothing
10 wrong with serving by mail under the federal rules. And if it
11 wasn't for us getting that package with the label on it showing
12 that it went through Newark over the weekend, we wouldn't know
13 and you wouldn't know.

14 I would submit to the Court that that's egregious
15 behavior and it's absolutely the exact type of case that
16 warrants striking an opposition brief in this situation, and
17 that's what we'll ask you to do here.

18 Mr. Myerowitz has already stated to the Court, I
19 believe yesterday and last week, that he doesn't want this to
20 be taken out on his client. But I would submit to the Court,
21 number one, we have outside counsel and we have attorneys for a
22 reason. As I know the Court is aware, clients all the time are
23 the recipients of ramifications about what outside counsel
24 does, whether it's outside counsel not writing a good brief or
25 something worse like what we have here.

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Hearing

1 We have lawyers for a reason. We're agents and we're
2 representatives of our clients. To that extent, Mr. Myerowitz,
3 as an extension of his client, it's absolutely warranted here
4 when they have missed an opposition brief after you warned them
5 that deadline would not be extended to strike that brief.

6 Furthermore, I would say that we have seen from the
7 first hearing that this isn't a situation where the client is
8 an innocent party, so to speak. So even if that type of
9 argument had relevance here, which I don't believe it does,
10 this was not the type of situation where that argument should
11 be considered by the Court.

12 At the end of the day, we'll ask your Honor to strike
13 the opposition that the defendants untimely filed in response
14 to our MSJ, deem our statement of facts admitted undisputed
15 and, of course, after a careful review of our summary judgment
16 papers, grant summary judgment in Tory Burch's favor.

17 Thank you.

18 THE COURT: Mr. Myerowitz.

19 MR. MYEROWITZ: I'm in the odd position of trying to
20 defend something that is indefensible, but I need to do that
21 because, as I said before, it would be unfair for any sanctions
22 to be visited on anyone other than myself.

23 Regardless of what the Court can do and the Court has
24 tremendous discretion here, the question is, what would be fair
25 under the circumstances. The client did not do anything wrong

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Hearing

1 here.

2 THE COURT: Your client did many things wrong here,
3 but with respect to the misrepresentations to the Court on the
4 date of filing of the opposition papers, that's counsel's
5 responsibility. I understand that.

6 MR. MYEROWITZ: Yes, your Honor. And it was for that
7 reason that I had asked the Court to separate these two into
8 two different hearings, and I appreciate that the Court did
9 that, because I didn't want whatever happened in one to be used
10 against the client in the other. I think that these are two
11 separate issues.

12 The question is -- maybe this isn't the question, but
13 I think the question has to be asked is what's the prejudice to
14 the plaintiffs in this case by receiving this one day later
15 than they would have? The fact is, it was dropped in the
16 mailbox on Friday instead of going in on Thursday. The fact is
17 that the Court had stayed their reply at this point, and they
18 will be given enough time to do it I'm sure by the Court if the
19 Court doesn't strike our opposition. I'm not sure what else
20 there is, other than that, to say at this point.

21 Again, I don't want to be in a position of trying to
22 defend anything.

23 Does the Court have any other questions?

24 THE COURT: Let me make an observation here.

25 I had some skepticism about the reliability of

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Hearing

1 counsel's representations to me because of a pattern of conduct
2 in this case, including a pattern of representations which I
3 felt were unreliable with respect to what happened with the
4 misfiling of the defendants' summary judgment papers. And it's
5 a sad day, a very sad day when the Court can no longer rely on
6 representations by counsel.

7 MR. MYEROWITZ: I agree totally, your Honor.

8 THE COURT: And you had lost my confidence before the
9 opposition papers were due.

10 MR. MYEROWITZ: I know that, your Honor.

11 THE COURT: Thank you.

12 MR. MYEROWITZ: Thank you.

13 (Continued on next page)

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EB5LRIV5

1 THE COURT: So let me turn first to some legal
2 standards that apply principally to our first hearing and bear
3 with me a moment as I lay some basic principles of law on the
4 record. They relate to the doctrines of spoliation, fraud on
5 the court, and Rule 11.

6 As we know, spoliation is the destruction or
7 significant alteration of evidence, or the failure to preserve
8 property for another's use as evidence in pending or reasonably
9 foreseeable litigation. I take that statement from the
10 Terrorist Bombings case, 552 F.3d at 148.

11 A party seeking sanctions for spoliation must
12 establish that the party having control over the evidence had
13 an obligation to preserve it at the time it was destroyed, that
14 the records were destroyed with a culpable state of mind, and
15 that the destroyed evidence was relevant to the party's claim
16 or defense such that a reasonable trier of fact could find that
17 it would support that claim or defense. *Chin*, 685 F.3d at 162,
18 cert. denied.

19 The obligation to preserve evidence arises when the
20 party has notice that the evidence is relevant to litigation or
21 when a party should have known that the evidence may be
22 relevant to future litigation. *Terrorist Bombings*, 552 F.3d at
23 148. The culpable state of mind factor is satisfied where the
24 evidence was destroyed knowingly, even without intent to breach
25 a duty to preserve it, or negligently. *Residential Funding*,

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1 306 F.3d at 108. The destroyed evidence is relevant to a
2 party's claim or defense where the party seeking the adverse
3 inference adduces sufficient evidence from which a reasonable
4 trier of fact could infer that the destroyed...evidence would
5 have been of the nature alleged by the party affected by its
6 destruction. *Id.* at 109. Where a party destroys evidence in
7 bad faith, that bad faith alone is sufficient circumstantial
8 evidence from which a reasonable fact finder may conclude that
9 the missing evidence was unfavorable. *Id.*

10 Although a district court has broad discretion in
11 crafting a proper sanction for spoliation,...the applicable
12 sanction should be molded to serve the prophylactic, punitive,
13 and remedial rationales underlying the spoliation doctrine.
14 *Goodyear*, 167 F.3d at 779. A spoliation sanction should deter
15 parties from engaging in spoliation, place the risk of an
16 erroneous judgment on the party who wrongfully created the
17 risk, and restore the prejudiced party to the same position
18 that it would have been in absent the wrongful destruction of
19 evidence by the opposing party. *Terrorist Bombings*, 552 F.3d
20 at 149.

21 One possible sanction is a jury instruction permitting
22 an adverse inference, and I've already referred to that in
23 passing. But there are other sanctions that are available too.
24 Outright dismissal of a lawsuit is within the Court's
25 discretion upon a showing of willfulness, bad faith, or fault

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1 on the part of the sanctioned party. *Goodyear*, 167 F.3d at
2 779. And when it is the defendant who's engaged in such
3 conduct, I would find that it is also possible to enter
4 judgment against the defendant or to dismiss its defenses.

5 Let me turn to the doctrine of fraud on the court. A
6 fraud on the court occurs where it can be demonstrated, clearly
7 and convincingly, that a party has sentiently set in motion
8 some unconscionable scheme calculated to interfere with the
9 judicial system's ability impartially to adjudicate a matter by
10 improperly influencing the trier or unfairly hampering the
11 presentation of the opposing party's claim or defense. *Aoude*
12 *v. Mobile Oil*, 892 F.2d at 1118. Fraud on the court is fraud
13 which does or attempts to defile the court itself, or is a
14 fraud perpetrated by officers of the court so that the judicial
15 machinery cannot perform in the usual manner its impartial task
16 of adjudicating cases. *King*, 287 F.3d at 95. The fabrication
17 of material evidence that is then inserted into litigation is a
18 near classic example of fraud on the court. *Aoude*, 892 F.2d at
19 118.

20 A federal court has the inherent power to sanction a
21 party or an attorney who has acted in bad faith, vexatiously,
22 wantonly, or for oppressive reasons. *Ransmeier*, 718 F.3d at
23 68. Courts are also authorized, pursuant to Section 1927, to
24 require any attorney who so multiplies the proceedings in any
25 case unreasonably and vexatiously...to satisfy personally the

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1 excess costs, expenses, and attorneys' fees reasonably incurred
2 because of such conduct. *Id.* The court may also impose
3 sanctions, including payment of attorneys' fees or dismissal,
4 pursuant to Rule 11(c), 26(g)(3), and 41(b).

5 Sanctions may be warranted even where bad faith
6 conduct does not disrupt the litigation before the sanctioning
7 court. *Emmon*, 675 F.3d at 145. A finding of bad faith is
8 required where an attorney's misconduct is undertaken for the
9 client's benefit. *United States v. Seltzer*, 227 F.3d at 42.

10 Dismissal is a drastic remedy that should be imposed
11 only in extreme circumstances, and I would include here entry
12 of judgment against a defendant. And such sanctions should
13 usually be imposed after consideration of alternative, less
14 drastic sanctions. *World Wide Polymers*, 694 F.3d at 159; and
15 *Dodson v. Runyon*, 86 F.3d at 39. And there are many more
16 cases, including a Supreme Court case, that stand for similar
17 propositions. They include *National Hockey League*, 427 U.S. at
18 643; and more recently *Mitchell v. Lyons*, 708 F.3d at 467.

19 Lesser sanctions include issuing a warning; excluding
20 tainted evidence; issuing a jury instruction; ordering payment
21 by the attorney, the client, or both of them; imposing fines;
22 mandating disclosure by counsel of his sanctionable conduct to
23 the bar, to future clients, and to courts, and other
24 disciplinary action against counsel; striking pleadings, in
25 whole or in part; and, as I've mentioned, dismissing an action

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1 or entering a default. Mitchell, 708 F.3d at 469; Dodson, 86
2 F.3d at 41; and Rule 37(b) (2) (A).

3 When considering the suitability of lesser sanctions
4 and whether the sanctions should be aimed primarily against the
5 party or the attorney, courts may consider the relative roles
6 of attorney and client in the misconduct, as well as whether a
7 tactical benefit was sought by the misconduct. Where the
8 opposing parties are found to have been meaningfully prejudiced
9 by misconduct, this factor speaks strongly in favor of
10 dismissal and may well override the hardship to the wrongdoer.
11 Dodson, 86 F.3d at 41. And that is equally applicable, I
12 think, to a defendant, an entry of judgment against a
13 defendant.

14 Moreover, the mere availability of softer sanctions
15 does not bar a court from imposing a default sanction. Here,
16 as in other areas of the law, the most severe in the spectrum
17 of sanctions provided by statute or rule must be available to
18 the district court in appropriate cases, not merely to penalize
19 those whose conduct may be deemed to warrant such a sanction,
20 but to deter those who might be tempted to such conduct in the
21 absence of such a deterrent. SEC v. Razmilovic, 738 F.3d at
22 25.

23 Drawing from this law and the factors considered in
24 connection with Rules 37 and 41, I consider the following
25 factors important in determining an appropriate sanction for

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1 fraud on the court: the flagrancy of a party's bad faith; the
2 duration and extent of the fraud; the culpability of the
3 litigant, as opposed to counsel; whether the fraud was
4 undertaken to gain an advantage over an opposing party; the
5 extent to which the fraud interfered with, or was designed to
6 interfere with, the judicial process; whether it was likely to
7 prejudice an opposing party; the wrongdoer's interest and the
8 public's interest in having this action adjudicated on the
9 merits; and the interest in deterring the wrongdoer from
10 further misconduct; the interest in deterring similar
11 misconduct by others; and the efficacy of lesser sanctions.

12 Let me turn to Rule 11. You are all familiar with the
13 contents of the rule itself. Pursuant to the rule, a district
14 court has discretion to impose sanctions to deter repetition of
15 the conduct or comparable conduct by others similarly situated.
16 *StreetEasy*, 752 F.3d at 307. Rule 11 sanctions may be
17 appropriate when an attorney misrepresents facts to the court.
18 *Muhammad*, 732 F.3d at 108. When they are entered sua sponte, I
19 must make a finding of subjective bad faith. *Id.* And such
20 sanctions, that is, Rule 111 sanctions, should be limited to
21 what is sufficient to deter repetition of the conduct by the
22 party or others similarly situated to the party.

23 Let me try to present a chronology of some critical
24 events here that will undergird my findings.

25 In 2003, Tory Burch applied for trademark to issue for

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1 its logo which is referred to as the TT logo. In 2005, Lin & J
2 International was formed. That same year, the PTO did register
3 the TT logo for Tory Burch. In this litigation, at least in
4 her deposition, Ms. Kim asserted that the Isis Cross design was
5 used by her companies for the first time in 2008.

6 Counsel, I may need your help here. I think the
7 evidence is that the invoice dates and the input dates
8 consistently match each other from the date December 22, 2011
9 and following, or is it December 22, 2012?

10 MS. ARBAUGH: It's 2011. And it's not for every
11 invoice after that date, your Honor. It's just that's where we
12 start to see the consistent matches.

13 THE COURT: Thank you.

14 I think the evidence in the record is that the
15 photographs that appear in the defendant's catalogs that were
16 prepared in 2013, essentially in August of 2013, were
17 photographs largely taken in 2013. But to the extent that we
18 have access to reliable information about when they were taken,
19 I think the earliest photograph in those catalogs, it dates
20 back to March 30 of 2012.

21 It is in 2012 that Tory Burch first notices sales of
22 what it considered counterfeit goods, counterfeit goods that
23 are at issue at least in this litigation. And it begins that
24 year in the late summer and early fall to send cease and desist
25 letters to various retailers. Ultimately it learns that many

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1 of those are Lin & J clients.

2 In that fall, the fall of 2012, Ms. Kim learns about
3 these cease and desist letters. And she at that time after
4 learning about this ongoing investigation by Tory Burch
5 contacts a law firm, Troutman Sanders, to discuss making her
6 own application for a trademark.

7 She filed two trademark applications, ultimately, with
8 the help of that law firm. One application was for the Isis
9 creative logo. The defendants were then using that logo, Isis
10 creative, on their hang tags and marketing materials.
11 Ultimately, as described in a moment, that application was
12 rejected and it no longer had any real relevance to the claims
13 and defenses in this litigation.

14 The trademark application which was presented to the
15 PTO on January 30, 2013, was not only for the Isis creative
16 logo but also for a second trademark, the Isis Cross design, a
17 design which is similar. And I don't mean to for purposes of
18 today's hearing describe the extent to which it is or isn't
19 similar. Suffice it to say that it is similar to the TT logo
20 of the plaintiffs. The specimen for that Isis Cross design was
21 submitted with a tag bearing the Isis creative logo, not with a
22 tag that held or displayed the Isis Cross design itself.

23 In April, early April, on April 3, 2013, the PTO
24 rejected the Isis creative application due to a likelihood of
25 confusion with other registered marks. And Lin & J never

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1 responded and has abandoned any claims for that trademark.

2 Later that month, on April 29, Tory Burch sent an
3 enforcement letter to Sam Mi trading. Sam Mi contacted Lin & J
4 at that time and wanted to return products to Lin & J.

5 Lin & J in early May sent Sam Mi revised invoices.
6 They were revised in at least two ways that are pertinent to
7 today's hearing -- one, they lowered the number of products
8 which may be described as counterfeit products that the
9 defendants sold to Sam Mi; and it changed on the invoices the
10 product name from Isis Cross to snow flake.

11 Shortly thereafter, on May 16, the PTO rejected the
12 defendant's application for a trademark for Isis Cross
13 indicating that the design was not used as a trademark, not as
14 a source indicator, but instead served a decorative or
15 ornamental purpose.

16 May was a busy month in other respects as well. On
17 May 31, Tory Burch filed this lawsuit and, within days, on
18 June 3, Lin & J was served. Shortly after being served, it
19 replaced its law firm. It retained the Song Law Firm.

20 At this point, roughly at this point, the defendants,
21 Ms. Kim, creates a new company, LJ Brand Inc., and creates a
22 website to reflect the Isis Cross design as a product appearing
23 on the defendant's jewelry and otherwise as a trademark design
24 to indicate the defendants as the source of products bearing
25 that design. All of that shows a far more sophisticated

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1 understanding of trademark law and what needed to be shown to
2 the trademark office to obtain a registration and what was at
3 stake in defending against a trademark infringement claim.

4 In mid-July, just before it filed its answer, an
5 answer that included counterclaims alleging trademark
6 infringement, Lin & J altered its computerized invoice system,
7 including alterations to invoices for the year 2009. During
8 this same period of time, Lin & J began to use the Isis Cross
9 design on banners and signs in its own store.

10 And late that summer it asked Wona Trading to place an
11 Isis Cross sign in its storefront windows and then it took
12 photographs, that is, the defendants took photographs of the
13 sign in those storefront windows. As soon as that picture
14 taking was done, Wona Trading removed the signs. They were
15 only momentarily placed in its windows for purposes of the
16 photographs.

17 In mid-August, August 15 and 16, a whole series of
18 documents were fabricated. There were four collection books
19 that were fabricated out of whole cloth -- one each for the
20 year 2009, '10, '11, and '12. The majority of photographs that
21 were used in those collection books were photographs taken in
22 mid-August 2013.

23 While that fabrication, massive fabrication of
24 documents was ongoing, counsel for the defendants attended the
25 initial pretrial conference before this Court in this case. At

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1 that conference, defense counsel represented that his clients
2 had been using the Isis Cross as a jewelry design since 2003.

3 Within two weeks, on September 3, Lin & J submitted
4 new specimens to the PTO in support of its application for an
5 Isis Cross trademark. The specimens that were submitted
6 included a new collection book of 2012. The declaration in
7 support of this submission indicated that the specimens were in
8 actual use as of the date of the initial application, which
9 would have been January 31, 2013. Those were all false
10 statements intended to deceive the PTO and cause it to take
11 action which did not have a basis in fact.

12 Ms. Kim signed the declaration. She understood its
13 terms. She understood the significance of what she was doing
14 in submitting these false documents and false statements to the
15 PTO. She did it purposefully to obtain favorable action by the
16 PTO and to help favorable action by the PTO defend against a
17 lawsuit, to protect her ongoing business and relationship with
18 her retail clients. Her statement was perjurious in the sense
19 that it was not just false but willfully false. The
20 declaration acknowledged that it was being made pursuant to the
21 rigors of Section 1001 where willful false statements are
22 punishable by fine or imprisonment.

23 Among the photographs shown were photographs that were
24 created in August. The collection book was created in August.
25 The flyers that are part of the specimens are intended to be

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1 misleading by suggesting in their heading that they are flyers
2 bearing the Isis Cross design that are handed to customers when
3 they were not used in that way.

4 At our initial conference in August, because the
5 defendants took the position that they had a long history of
6 using the Isis Cross design and it was subject to protection as
7 its own trademark or at least no one had any right to
8 protection of a mark that was otherwise in the public domain --
9 there were a variety of defenses discussed -- it seemed like
10 this litigation would be actively defended. I discussed with
11 the parties identifying core document discovery that could be
12 quickly exchanged and seeing whether early settlement
13 discussions might bear fruit and avoid the burden of
14 full-fledged discovery. The parties agreed, preserving, of
15 course, their rights to full-fledged discovery if the case did
16 not settle early on.

17 And as a result of that agreement, in early October,
18 and to assist the mediation efforts, Lin & J produced a limited
19 number of documents which were to show, intended to show the
20 active use of the Isis Cross design in its business from the
21 period of 2005. There was for the year 2005 a single invoice
22 with an entry, Isis Cross single pendant earring. Notably, as
23 I'll discuss in a moment, that entry was at the end of the list
24 of items. It was the last two items on that invoice.

25 The single invoice for 2006 had in the middle of the

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1 invoice an item described as cross theme casting bracelet. The
2 single invoice for 2007 had an entry again at the end of the
3 list of items, Isis Cross style bangle. There was a 2008
4 invoice and the last entries included descriptions of a product
5 called an Isis Cross color bangle.

6 There was an invoice for 2009, the last entries were
7 for an Isis Cross pendant necklace set. And there was an
8 invoice dated January 29, 2010, where the last entries were
9 Isis Cross style pendant necklace.

10 All of these invoices that I just described were
11 modified after their original invoice date so that the input
12 date and the invoice date do not match. There were other
13 invoices provided in early October that I believe show
14 modification to remove reference to Tory Burch products and a
15 substitution of terms like filigree earring or snow flake.
16 Each of them -- and these are invoices for 2008, 2009, 2010,
17 2011, 2012 -- were all modified after the original invoice
18 date.

19 Late in 2013, Lin & J for the first time begins to use
20 materials like hang tags that use the Isis Cross design on the
21 tag. The documents provided in October were a small fraction
22 of the hard copy document production made by the defendants in
23 this case. The major production was made in January.

24 In December the defendants undertook a massive
25 alteration of their documents in expecting to present to the

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1 plaintiffs in January a fabricated and altered document set.
2 These were presented on January 31, 2014. Only a small number
3 of the invoices produced on that date were for the period of
4 time before 2012. And on the small number of invoices before
5 2012, Isis Cross is listed almost uniformly on the bottom lines
6 of the invoices. No additional invoices were produced for the
7 period 2005, 2006, or 2007.

8 Ms. Kim was first deposed in February, on February 12.
9 On March 18, Tory Burch served Lin & J with requests for an
10 inspection. In April, Tory Burch begins to subpoena Lin & J
11 customers for invoices.

12 The alteration of documents continues into 2014. I'll
13 give you an example. On April 10, 2014, a 2011 invoice is
14 modified. The last item on that invoice now reads filigree
15 style necklace set.

16 Ms. Kim is deposed on April 14 and 15. On April 30,
17 Mr. Donofrio, a neutral forensic expert, collects computer
18 files from Lin & J's computer systems. Ms. Kim is deposed
19 again on May 7.

20 The trading company Wona Trading has its deposition
21 taken on May 9, and it's at that time that counsel for the
22 parties learn that the Wona Trading photographs were staged.

23 On July 1, Mr. Donofrio conducts testing of what we
24 now call the Smart Bee system to determine what kinds of
25 actions caused the input date and input time to change in the

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1 computer files. On July 8, Mr. Rosen, another forensic expert,
2 issues his report about the invoice modifications.

3 And on August 29, Tory Burch files motion for
4 sanctions.

5 September 5, the defendants voluntarily dismiss their
6 trademark counterclaim. September 5, Mr. Myerowitz requests on
7 consent an extension of the time to file the summary judgment
8 motion papers from September 8 to 10. I granted that request.

9 On September 10, you request an extension until
10 September 12 citing the need to have time to make and address
11 redaction issues. I denied that request except I permitted a
12 process to occur that would permit the parties to make
13 redactions before filing the final with the court. Therefore,
14 Tory Burch filed its summary judgment motions on that date.
15 Mr. Myerowitz, at midnight that day, filed or emailed a very
16 incomplete set of summary judgment papers which incorrectly
17 indicated that they were being served electronically.

18 On September 11, Mr. Myerowitz emails revised summary
19 judgment papers. On September 12, he requests an extension
20 after the fact claiming a paralegal was sick on September 10
21 and another paralegal was sick on September 11. Plaintiffs
22 indicate in writing to defense counsel that the papers provided
23 to it were incomplete and revised. On September 12,
24 Mr. Myerowitz does file a final set of his summary judgment
25 papers.

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1 On September 15, plaintiffs advise the Court of the
2 differences between the various versions of defendant's summary
3 judgment papers. I strike the defendant's summary judgment
4 motion as untimely.

5 On September 15, the defendants oppose the motion for
6 sanctions and admit for the first time the breadth of some of
7 the misconduct here, but not all of it. They admit the fraud
8 on the trademark office to the extent that they admit that the
9 2012 collection book and specimens provided to the trademark
10 office were fabricated and were not in existence as represented
11 to the trademark office as of January 2013. They admit that
12 the additional collection books for 2009, 2010, and 2011 were
13 created after the fact. They admit that the defendants
14 provided fabricated invoices to Sam Mi.

15 I've already recited the series of events related to
16 the filing of opposition to the summary judgment motion and I
17 won't repeat that here. I should say I don't think I put this
18 in the record. Obviously, it's all available in the historical
19 record. But for completeness here, on September 29,
20 Mr. Myerowitz wrote to request on consent an extension to
21 October 1 of the time to file his opposition to the summary
22 judgment motion representing that his computer system had
23 crashed over the weekend. I granted the extension.

24 On October 1 then he requested an extension to
25 October 2 again referring to the crash of the computer system.

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1 I granted that extension but indicated no further extension
2 would be granted.

3 Let me talk about some of the issues generically now
4 that I've completed the chronology. It's really tragic to make
5 these findings. There was an intentional complex fraud worked
6 on the trademark office, the creation of documents out of whole
7 cloth, misrepresentations, lies under oath at a time when
8 Ms. Kim had been represented by first one law firm and then
9 another. She had total access to legal counsel and advice. I
10 think she had a good understanding of what trademark rights
11 entailed and that drove her fabrication of documents and the
12 position she's taken in this litigation.

13 Fully apart from the specimens that were fabricated
14 for presentation to the trademark office, there was a
15 fabrication of collection books from 2009 to 2011, again, to
16 create a false claim that there had been a significant retail
17 business or wholesale business and retail business for Isis
18 Cross jewelry that went back to 2009. All of those documents
19 were separately provided in discovery in this litigation with
20 no advice to plaintiff's counsel that they were fabricated.
21 Quite the opposite.

22 The third category of documents that were
23 intentionally fabricated were the Sam Mi invoices. There was
24 of course in connection with that cooperation with another
25 company to mislead a litigant and work a fraud upon the legal

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1 system. So it's not simply the corruption of your own company
2 and its employees, but also the concerted cooperation with
3 another entity to engage in acts of deceit.

4 The next category of documents that were substantially
5 altered were the documents contained in the October 2013
6 document production to assist the parties in mediation. All
7 the early invoices reflecting an Isis Cross design were
8 produced in that period trying to create out of whole cloth the
9 impression that the sale of this product with that product
10 description went back for years.

11 In December of 2013, the defendants used their
12 computer system to alter invoices that were produced to the
13 plaintiffs in January of 2014. At this hearing as of today,
14 the defendants have not admitted that the invoices produced in
15 October of 2013 or in January of 2014 are altered. They
16 contend that they are genuine documents that reflect the
17 historical transactions and that can be relied upon by this
18 Court.

19 I find the forensic evidence and examination of the
20 individual documents overwhelming in establishing that there
21 was a massive document fraud worked upon the plaintiffs and
22 this Court or an attempt to work it on the plaintiffs and this
23 Court.

24 As we've learned, the Smart Bee system is not an
25 entirely transparent system. It shows essentially two dates --

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1 the date a document was originated, the invoice date, and the
2 last date it was substantively modified. The substantive
3 modification may be to the database entries associated with the
4 invoice rather than the document that may be shown on the
5 computer screen to an end user or in its printed form, but it
6 must be a substantive modification to the data associated with
7 that invoice to create a new input date that is different than
8 the invoice date. There is no way based on the record
9 currently before the Court to know how many times a document is
10 modified in a substantive way where the input date and the
11 invoice date vary. It's possible that that information can be
12 known, but that question can't be answered based on the
13 collection of data done by Mr. Donofrio. And the defendants
14 have not presented other expert testimony to research that
15 issue one way or another.

16 The defendant remarks on the fact that there are few
17 invoices that were produced that show reference to the intent
18 to infringe on Tory Burch's rights by using as a description
19 for the product sold a reference to a Tory Burch design and
20 argued in summation that if there was an alteration program
21 going on, why weren't those altered too? I can't answer that.
22 I don't know. It could be that a few slipped through the
23 cracks. There's enough evidence here that other invoices were
24 altered and given new product description names to hide the
25 fact that the original invoice referred to a Tory Burch design.

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1 It could be -- I don't know -- that the defendants
2 knew that Tory Burch was engaged in an effort to obtain
3 invoices from certain of the defendant's retailers and chose to
4 avoid altering those invoices. I don't know. The record has
5 not been developed on that. But the fact that a few slipped
6 through and there are only a few does not give me any doubt as
7 to the pattern and intent here for a massive document fraud.

8 The second argument that was made has to do with the
9 fact that the defendants did not produce the altered Sam Mi
10 invoices. They only produced in discovery the original Sam Mi
11 invoices. At that point in time, the defendants had no
12 assurance that Tory Burch would not have access to the truth
13 through Sam Mi and learn there had been, in essence, an effort
14 to make two sets of books. So I don't find that terribly
15 helpful as a fact either when considering the defense to this
16 motion for sanctions.

17 There's example after example of alteration in this
18 record -- alterations to hide the reference to Tory Burch
19 designs, alterations to create references to Isis Cross
20 designs -- one, to disguise the intent to infringe on the
21 plaintiff's mark; two, to create a defense that the defendant
22 itself had trademark rights at stake that could be a defense to
23 the claims here or the basis of their own damage claims.

24 Ms. Kim was the principal witness, the only witness
25 really for the defendants. She's committed perjury at every

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1 step of the way here. She lied to the PTO. She lied during
2 her depositions. She's lied at this hearing. She fabricated
3 documents and did so personally. She altered documents and did
4 so personally. She obstructed discovery by producing
5 fabricated documents and not disclosing that they were
6 fabricated.

7 (Continued on next page)

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1 THE COURT: The evidence is clear and convincing that
2 there has been a fraud on the Court or an attempt to perpetrate
3 a fraud on the Court and the judicial system. I find
4 spoliation through the alteration of records so that the
5 original documents have been destroyed in a way that we cannot
6 recover with any confidence or without great expense of trying
7 to obtain the original documents from third parties.

8 There was an argument made in opposition to this
9 motion that the fabrication of evidence does not qualify for
10 spoliation. I disagree. If it is sanctionable under the
11 spoliation doctrine to destroy evidence, it is certainly
12 sanctionable to fabricate it out of whole cloth. The
13 fundamental purposes of the spoliation doctrine would be
14 ill-served with any other finding. I find a fraud on the Court
15 by clear and convincing evidence perpetrated with bad faith, in
16 bad faith and intentional misconduct.

17 Let me make some findings along the lines of the
18 factors that I have to consider in determining what kinds of
19 sanctions should be imposed and on whom they should be imposed.

20 The bad faith exhibited here by the defendants was
21 flagrant in the extreme. The fraud existed throughout a
22 lengthy period of time. It extended from 2013 into 2014 and
23 continues to this day through the testimony given at this
24 hearing. The culpability for this conduct I have to find lies
25 largely with the client. Perhaps counsel could have more

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1 severely warned the defendant when counsel first discovered how
2 unreliable its client was, but ultimately, the responsibility
3 here lies with the client for the kind of fraud at issue.

4 This fraud was undertaken to gain an advantage over
5 the plaintiff, to avoid interruption of its business practices
6 and a damage award. It definitely interfered with the judicial
7 process. It made discovery far more expensive. It multiplied
8 applications to the Court and motion practice. If left
9 unchecked, it would have resulted potentially in infirm
10 fact-finding. It was therefore definitely designed to
11 prejudice the plaintiff.

12 Any trademark action should be resolved on the merits
13 if not settled through arm's length negotiations. I don't want
14 to do something here that would give Tory Burch a victory that
15 it does not deserve to have on the merits, and I'm very
16 conscious of that.

17 It's important to me to use the actions here to deter
18 other similar misconduct by similarly-situated litigants. I
19 gave notice that I would consider Rule 11 sanctions as well. I
20 think they are appropriate for the deterrence purposes and
21 because of the subjective bad faith shown here.

22 Let's turn to the kinds of sanctions that are asked
23 for and whether lesser sanctions would be appropriate. If this
24 case were suitable for trial, I could certainly exclude the
25 tainted evidence and I would do so. I would give an

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1 appropriate jury instruction with respect to spoliation issues.
2 I don't find that either of those would be sufficient, however,
3 in this circumstance. A jury's time should not be wasted when
4 there's been this kind of misconduct.

5 I have already heard from the defendants that they're
6 unable to pay any money. So a monetary sanction is not
7 available as an alternative. Imposition of a fine would put
8 the burden on the plaintiff to continue litigating to try to
9 enforce a fine. That seems, in the context of what we have
10 experienced here already, unfair in the extreme to the
11 plaintiff.

12 I'm going to deal with the sanctions for counsel
13 separately. I'm not thinking about those alternatives now.
14 I'm thinking just about the motion for sanctions against the
15 defendant. That leaves us with the sanctions of striking
16 certain pleadings or dismissing certain claims or entering a
17 default.

18 Defense counsel has admitted that each of the four
19 affirmative defenses is directly tied to the allegations of
20 misconduct here, and I find they are properly dismissed as a
21 sanction under each of these three theories.

22 I'm trying to find the letter once more. Give me a
23 moment, counsel.

24 MS. ARBAUGH: Is it the letter from Monday?

25 THE COURT: Yes.

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1 MS. ARBAUGH: May I approach.

2 THE COURT: Yes. Thank you.

3 The sixth affirmative defense of innocent infringement
4 is stricken. The tenth affirmative defense based on estoppel
5 is stricken. The eleventh affirmative defense based on an
6 unclean hands theory is stricken. And the fourteenth
7 affirmative defense based on the defendants' good faith is
8 stricken.

9 Let me turn to the counterclaims. The counterclaims
10 all relate to the actions of the plaintiff undertaken to
11 enforce its trademark rights and its interactions with the
12 defendants' retailers, its tortious interference with business
13 relations, defamation and abuse of process. I'm going to
14 strike all three of these counterclaims.

15 It would be extraordinarily difficult for a plaintiff
16 with a registered trademark to protect that mark without
17 actions policing the mark. That's standard trademark law. It
18 has a trademark registration. It has to police the
19 marketplace. The actions it took to locate the supplier were
20 successful here. It ultimately identified and sued Lin & J.
21 Because of the fabrication of evidence, the nature of the
22 motion practice, including the TRO, the nature of the
23 counterclaims that were asserted in the affirmative defenses,
24 the plaintiff had no choice but to continue engaging with the
25 retail marketplace in order to protect its mark and learn what

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1 the truth was. So the deceit and fraud worked by the
2 defendants, or which they attempted to work on the plaintiff,
3 was itself responsible for at least some of the interaction
4 that the plaintiff had with the marketplace.

5 I find that these three counterclaims are sufficiently
6 related to the fraud and other sanctionable conduct here, that
7 they should be stricken, and that there is no other adequate
8 alternative.

9 I think that takes us to the point where I have to
10 think about the opposition to the summary judgment motion.
11 Defense counsel asks what prejudice would there be to the
12 plaintiff from allowing the opposition to be filed?

13 Well, the plaintiff would have to prepare a reply,
14 which would cost money. The Court would have to spend time
15 looking at the opposition papers and the reply, which would
16 take judicial resources away from other important work on this
17 Court's docket.

18 If the defendants had been able to identify some
19 salvageable portion of their opposition that wasn't
20 intermingled with the fraud, I would have considered a reduced
21 opposition that made an argument that was not tied to the
22 fraud. He could not and did not identify any. So I'm going to
23 strike the opposition papers. I will consider the summary
24 judgment motion on its merits but as unopposed. It will be
25 granted or denied based upon my close examination of its

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1 merits.

2 Let me now turn to counsel's conduct. If this is a
3 sad day, it is sadder because of what counsel did here. I did
4 not find, even at the initial conference, that counsel was
5 impressing me with a reliable description of his client's
6 business. I had no reason to distrust him, but it raised
7 questions in my mind as to whether counsel had been as diligent
8 in learning his client's business as I would hope counsel would
9 be when coming to the court. But over time, I came to feel
10 that I could not rely on counsel's representations to me, and
11 that is really tragic.

12 I do not find that counsel was involved in the
13 fabrication and alteration of documents here, and by that I'm
14 referring to the collection books and the specimens and the
15 invoices; but I do find that the false statements to the Court
16 in connection with filing deadlines and procedural matters are
17 sanctionable, and I'm going to reflect on what the appropriate
18 sanction is.

19 I'm going to take a brief recess and review my notes
20 to see if there are other things that I need to add to my
21 factual findings or conclusions.

22 Counsel, if I have left any issue unaddressed that
23 would be necessary to complete the record here, please feel
24 free to bring it to my attention when I return.

25 (Recess)

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1 THE COURT: Please be seated.

2 Ms. Arbaugh, is there anything that you wish to bring
3 to my attention that I should consider that I have not already
4 addressed?

5 MS. ARBAUGH: My only question, your Honor, is that we
6 have made a request for an award of some amount of fees and
7 costs. Is that request being granted or denied at this time?

8 THE COURT: Well, in my mind, the plaintiffs certainly
9 deserve an award of fees and costs, and it's amply supported by
10 the record.

11 I cannot award an amount without a submission that
12 supports, with contemporaneous time records, a calculation of
13 fees and costs that are appropriately associated with the
14 misconduct here. You did, as I asked, give me a ballpark
15 figure with very little notice just so I could understand the
16 extent to which the defendants would agree that a lesser
17 sanction of a monetary award would be acceptable or possible
18 for them to meet, and I should continue to consider their
19 counterclaims and affirmative defenses on the merits. As you
20 know, they do not have any funds to pay any award of any size.
21 I'm conscious of the fact that an award will no doubt lead to
22 continuing litigation between these parties. I do not predict
23 that any award will be paid quickly or easily. So, yes, I do
24 find the record sufficient for an award of fees and costs. If
25 the plaintiffs wish a particular amount to be awarded, they

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1 should make a presentation with a showing to support the
2 particular figure they request. Talk with Mr. Myerowitz about
3 a schedule for briefing of such application if you choose to
4 make it.

5 MS. ARBAUGH: Thank you, your Honor.

6 THE COURT: Mr. Myerowitz, is there any issue or fact
7 that you believe I should address that I have not already
8 discussed?

9 MR. MYEROWITZ: Your Honor, I have to apologize
10 perhaps because I was concentrating on the second hearing when
11 I came up there. I was being thick or didn't understand what
12 it was your Honor was asking me.

13 There is some evidence that survives even with the
14 dismissal of the counterclaims and the other evidence that's in
15 this case. Again, I don't have the brief here, but I would
16 like to just submit what those are; and if your Honor would
17 consider allowing those to at least go in in the Court's
18 consideration on the motion for summary judgment.

19 THE COURT: If you get me a document tomorrow, a
20 mark-up of your original brief in opposition to summary
21 judgment with the passages indicated, I don't want a new
22 document, but with the passages indicated that you think
23 survive and any supporting exhibits that you think survive,
24 I'll consider whether to accept it.

25 MR. MYEROWITZ: Thank you.

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1 THE COURT: I'm not sure that there is anything
2 salvageable. If I think there is anything salvageable or think
3 it appropriate to have the plaintiffs weigh in on whether or
4 not I should accept it, I'll issue an order and give them an
5 opportunity to be heard on whether to accept it or not.
6 Obviously, if I accept it, the plaintiffs will have an
7 opportunity to submit a reply.

8 MR. MYEROWITZ: Should we fax that? Do it through
9 ECF? How does the Court want us to do that?

10 THE COURT: This is an ECF case. Everything is to be
11 filed on ECF. Use our standard order and rules of the Court
12 with respect to that.

13 MR. MYEROWITZ: Yes, your Honor.

14 MS. ARBAUGH: If I may add one more thing.

15 We have given the Court exhibits, Plaintiffs' Exhibits
16 1 - 108. And there's agreement with counsel that those can all
17 be admitted. Some of them overlap with what's in the motion.
18 Some of them don't. So to the extent there's any lack of
19 clarity in the record, I would ask the Court deem them as
20 received or admitted.

21 THE COURT: They are received.

22 MS. ARBAUGH: Thank you, your Honor.

23 THE COURT: Thank you, counsel.

24 (Adjourned)

25

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