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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

M2 SOFTWARE, INC., a Delaware corporation,)	Opposition No: 91151549
)	
)	
Opposer,)	APPLICANT M2 AUTOMOTIVE'S
)	NOTICE OF RELIANCE;
vs.)	DECLARATION OF
)	DUNCAN JOSEPH MOORE IN
M2 AUTOMOTIVE, INC., a California corporation,)	SUPPORT THEREOF
)	
)	
Applicant.)	
)	
)	

NOTICE is hereby given that Applicant M2 Automotive, Inc. ("M2 Automotive") submits this Notice of Reliance pursuant to 37 CFR §§ 2.122(e) and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 704. M2 Automotive hereby gives notice that in this proceeding it relies on the following:

I.

EVIDENCE

A. M2 Automotive's First Set of Interrogatories and Responses

1. M2 Automotive's First Set of Interrogatories, dated August 5, 2002 (Exhibit ("Exh." 1)), may be offered into evidence pursuant to 37 CFR §2.120(j) and TBMP § 704.10.



02-23-2005

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #66

2. M2 Software's Response to Applicant's First Set of Interrogatories and Requests for Production of Documents and Things to Applicant M2 Automotive, Inc., dated September 9, 2002 (Exh. 2), may be offered into evidence pursuant to 37 CFR §2.120(j) and TBMP § 704.10.

3. M2 Software's Supplemental Responses to Applicant's First Set of Interrogatories and Requests for Production of Documents and Things, dated April 3, 2003 (ESCAMDEPO Exh. 6), may be offered into evidence pursuant to 37 CFR §2.120(j) and TBMP § 704.10.

B. M2 Automotive's Second Set of Interrogatories and First Set of Requests for Admission and Responses

1. M2 Automotive's Second Set of Interrogatories, dated June 23, 2003 (Exh. 3), may be offered into evidence pursuant to 37 CFR §2.120(j) and TBMP § 704.10.

2. M2 Automotive's First Set of Requests for Admission, dated June 23, 2003 (Exh. 4), may be offered into evidence pursuant to 37 CFR § 2.120(j) and TBMP § 704.10.

3. M2 Software's Responses to Applicant's First Set of Requests of Admission and Second Set of Interrogatories, dated July 26, 2003 (Exh. 5) may be offered into evidence pursuant to 37 CFR § 2.120(j) and TBMP § 704.10.

4. M2 Software's Responses to Applicant's Second Set of Requests for Production and Second (Served as "Third") Set of Interrogatories, dated August 4, 2003 (Exh. 6), may be offered into evidence pursuant to 37 CFR § 2.120(j) and TBMP § 704.10.

C. Third Party Trademark Registrations Containing "M2"

Pursuant to 37 CFR § 2.122(e) and TBMP § 704.03(b)(1)(B), copies of third-party registrations may be made of record by submitting a printout of the registration from the electronic records of the Patent and Trademark Office through the Trademark Electronic Search System ("Tess"). The following third-party U.S. trademark registrations are relied upon by M2 Automotive to illustrate that M2 Software's word mark is not distinctive, and that marks *containing the characters "M2"* are used to identify a wide variety of goods and services:

1. Registration No. 2142411, registered March 10, 1998, Word Mark: M2 and Design (Exh. 7), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=7ocfun.3.1>
2. Registration No. 2583119, registered June 18, 2002, Word Mark: M2 (Exh. 8), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=uvjnio.5.1>
3. Registration No. 2775972, registered July 15, 1999, Word Mark: M2 (Exh. 9), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=elc8di.2.1>
4. Registration No. 2897464, registered October 26, 2004, Word Mark: M2C (Exh. 10), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&stateuvjnio.7.1>
5. Registration No. 2151899, registered April 21, 1998, Word Mark: M2 (Exh. 11), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=jc1q4.2.1>
6. Registration No. 2410415, registered December 5, 2000, Word Mark: M2 Communications, Mark Drawing Code: (1) Typed Drawing, (Exh. 12), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=elc8di.3.1>
7. Registration No. 1361490, registered September 24, 1985, Word Mark: M2, Mark Drawing Code: (1) Typed Drawing, (Exh. 13), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=elc8di.5.1>
8. Registration No. 2181158, registered August 11, 1998, Word Mark: M2 Merrell Millennium, Mark Drawing Code: (3) Design Plus Words, Letters and/or Numbers, (Exh. 14), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=elc8di.6.1>
9. Registration No. 1288754, registered April 13, 1983, Word Mark: M2, Mark Drawing Code: (5) Words, Letters, And/or Numbers in Stylized Form, (Exh. 15), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=ocs97b.4.1>
10. Registration No. 2759551, registered September 2, 2003, Word Mark: M2, Mark Drawing Code: (1) Typed Drawing, (Exh. 16), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=mvjpog.8.1>

11. Registration No. 2234337, registered March 23, 1999, Word Mark: M2, Mark Drawing Code: (3) Design Plus Words, Letters and /or Numbers, (Exh. 17), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=mvjpog.6.1>

12. Registration No. 2462520, registered June 19, 2001, Word Mark: M2, Mark Drawing Code: (3) Design Plus Words, Letters, and/or numbers (Exh. 18), available at: <http://tess2.uspto.gov/bin/showfield?f=doc&state=mvjpog.3.1>

D. Prior Litigation Involving M2 Software

Printed publications and official records may be offered into evidence where the record or publication is competent evidence and relevant to an issue in a proceeding pursuant to 37 CFR § 2.122(e) and TBMP § 704.08. The Central District of California decision in M2 Software, Inc. v. M2 Communications, LLC, 281 F. Supp. 2d 1166 (C.D. Cal. 2003) (Exh. 19) is relevant evidence for determining the strength of M2 Software's mark, the types of services in which M2 Software is engaged, the marketing channels in which M2 Software is involved, the likelihood of M2 Software's expansion into other commercial areas, and other relevant factors in a likelihood of confusion analysis. This document is available at www.lexis.com or can be accessed in the Federal Supplement.

E. Discovery Deposition of Dave Escamilla

The Discovery Deposition of Dave Escamilla ("ESCAMDEPO") (Separate copy enclosed as Exh. 20 pursuant to 37 CFR § 2.126), President and Chief Executive Officer of Opposer M2 Software ("M2 Software"), was taken by M2 Automotive on July 3, 2003 while Mr.

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Escamilla was an officer of M2 Software, and may therefore be offered into evidence pursuant to 37 CFR § 2.120(j) and TBMP § 704.09

II.

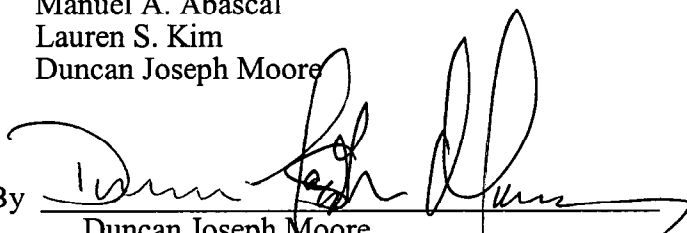
CONCLUSION

Copies of the above referenced are submitted herein under this Notice of Reliance on the basis of 37 CFR §§ 2.120(j), 2.122(e) and TBMP §704 and are relevant for defending the claims of trademark dilution and likelihood of confusion made by M2 Software against M2 Automotive.

Dated: February 22, 2005

LATHAM & WATKINS
Manuel A. Abascal
Lauren S. Kim
Duncan Joseph Moore

By



Duncan Joseph Moore
LATHAM & WATKINS
633 W. Fifth Street, Suite 4000
Los Angeles, California 90071
Phone: (213) 485-1234
Fax: (213) 897-8763

Attorneys for Applicant M2 Automotive,
Inc.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

M2 SOFTWARE, INC., a Delaware
corporation,

Opposer,

vs.

M2 AUTOMOTIVE, INC., a California
corporation,

Applicant.

) Opposition No: 91151549
)
)

) **DECLARATION OF
) DUNCAN JOSEPH MOORE IN
) SUPPORT OF APPLICANT M2
) AUTOMOTIVE'S NOTICE OF
) RELIANCE**
)
)
)
)
)
)

DECLARATION OF DUNCAN JOSEPH MOORE

I, Duncan Joseph Moore, declare as follows:

1. I am an attorney admitted to practice before this Court and am counsel for Applicant M2 Automotive ("M2 Automotive") in this proceeding. I have firsthand personal knowledge of the facts set forth below, and if called upon to do so, I could and would testify competently thereto under oath.
2. Attached as Exhibit 1 is a true and correct copy of M2 Automotive's First Set of Interrogatories, dated August 5, 2002.
3. Attached as Exhibit 2 is a true and correct copy of M2 Software's Response to Applicant's First Set of Interrogatories and Requests for Production of Documents and Things to Applicant M2 Automotive, Inc., dated September 9, 2002.

4. Attached as Exhibit 3 is a true and correct copy of M2 Automotive's Second Set of Interrogatories, dated June 23, 2003.

5. Attached as Exhibit 4 is a true and correct copy of M2 Automotive's First Set of Requests for Admission, dated June 23, 2003.

6. Attached as Exhibit 5 is a true and correct copy of M2 Software's Responses to Applicant's First Set of Requests of Admission and Second Set of Interrogatories, dated July 26, 2003.

7. Attached as Exhibit 6 is a true and correct copy of M2 Software's Responses to Applicant's Second Set of Requests for Production and Second (Served as "Third") Set of Interrogatories, dated August 4, 2003.

8. Attached as Exhibit 7 is a true and correct copy of U.S. Trademark Registration No. 2142411, registered March 10, 1998.

9. Attached as Exhibit 8 is a true and correct copy of U.S. Trademark Registration No. 2583119, registered June 18, 2002.

10. Attached as Exhibit 9 is a true and correct copy of U.S. Trademark Registration No. 2775972, registered July 15, 1999.

11. Attached as Exhibit 10 is a true and correct copy of U.S. Trademark Registration No. 2897464, registered October 26, 2004.

12. Attached as Exhibit 11 is a true and correct copy of U.S. Trademark Registration No. 2151899, registered April 21, 1998.

13. Attached as Exhibit 12 is a true and correct copy of U.S. Trademark Registration No. 2410415, registered December 5, 2000.

14. Attached as Exhibit 13 is a true and correct copy of U.S. Trademark Registration No. 1361490, registered September 24, 1985.

15. Attached as Exhibit 14 is a true and correct copy of U.S. Trademark Registration No. 2181158, registered August 11, 1998.

16. Attached as Exhibit 15 is a true and correct copy of U.S. Trademark Registration No. 1288754, registered April 13, 1983.

17. Attached as Exhibit 16 is a true and correct copy of U.S. Trademark Registration No. 2759551, registered September 2, 2003.

18. Attached as Exhibit 17 is a true and correct copy of U.S. Trademark Registration No. 2234337, registered March 23, 1999.

19. Attached as Exhibit 18 is a true and correct copy of U.S. Trademark Registration No. 2462520, registered June 19, 2001.

20. Attached as Exhibit 19 is a true and correct copy of M2 Software, Inc. v. M2 Communications, LLC, 281 F. Supp. 2d 1166 (C.D. Cal. 2003).

21. Attached as Exhibit 20 is a true and correct copy of the Discovery Deposition of Dave Escamilla, President and Chief Executive Officer of Opposer M2 Software, dated July 3, 2003.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 22nd day of February, 2005 in Los Angeles, California.

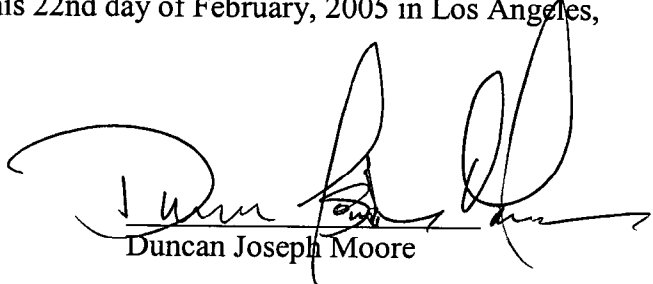

Duncan Joseph Moore

EXHIBIT 1

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

M2 SOFTWARE, INC.

Opposer,

v.

M2 AUTOMOTIVE, INC.

Applicant.

Opposition No. 91151549
Serial No. 76318293

**APPLICANT M2 AUTOMOTIVE, INC.'S
FIRST SET OF INTERROGATORIES**

PROPOUNDING PARTIES: M2 AUTOMOTIVE, INC

RESPONDING PARTY: M2 SOFTWARE, INC.

Applicant M2 Automotive, Inc. ("M2 Automotive") hereby propound their First Set of Interrogatories to M2 Software, Inc. ("M2 Software"), consisting of Interrogatories Nos. 1-19.

I.

DEFINITIONS

1. The term "M2 Automotive" refers to Applicant M2 Automotive, Inc. and any parent, subsidiary, predecessor, successor, member and/or affiliated entities, past or present of M2 Automotive, Inc.

2. The term "M2 Software" refers to M2 Software, Inc. and any parent, subsidiary, predecessor, successor, member and/or affiliated entities, past or present, of M2 Software, Inc. and any person or entity, past or present, acting on behalf of M2 Software, Inc. including, but not limited to, each of its respective present and former officers, executives, partners, directors, employees, attorneys, agents and/or representatives.

3. The term "M2" refers to any combination of the letter "M" and "2", including any "M2" designation and mark used by M2 Software and the mark that is the subject of this opposition proceeding.

4. The terms "You" and "Your" refer to the responding party, M2 Software, as defined above in paragraph 2.

5. The term "Opposition" refers to the opposition filed by M2 Software in this action.

6. The term "Answer" refers to the Answer filed by M2 Automotive in this action.

7. The term "Identity" in the case of a person is defined as:

- (a) The name of the person;
- (b) His or her current business address and telephone number and residence address and telephone number;
- (c) His or her employer, occupation, and position at all relevant times;
- (d) His or her Social Security number; and
- (e) His or her driver's license number and the state of the license.

8. The term "Identity" in the case of an entity is defined as:

- (a) The name of the entity;
- (b) The nature of the entity;
- (c) The current business address and telephone number for the entity and any addresses and phone numbers used by the entity during the period January 1, 1991 to the present;
- (d) The Identity of any parent, subsidiary, partners and/or affiliate of the entity; and
- (e) The Identity of any principals, owners, directors, shareholder, officers, employees and/or general or limited partners of the entity, and the percentage of the entity which each of the foregoing own or control.

9. The term "Document(s)" shall have the meaning set forth in Federal Rule of Evidence 1001, and includes, without limitation, writings, including handwritten, typewritten, photostatic, photographic, electronic and every other means of recording upon any tangible thing, or any form of communication or representation, including, without limitation, letters, words, pictures, sounds or symbols, or combinations thereof, computer records (including electronic mail records), ledgers, journals and statements of account.

10. The term "Correspondence" means letters, memoranda, emails, or any other Documents.

II.

INSTRUCTIONS REGARDING PRODUCTION OF DOCUMENTS

1. In producing Documents and things, You are requested to furnish all Documents or things in Your actual or constructive possession, custody and/or control including, without limitation, Documents which may be in the physical possession of another person or entity such as Your advisors, attorneys, investigators, employees, agents, associates, affiliates, and/or representatives.

2. In producing Documents, You are requested to produce the original of each Document requested, together with all non-identical copies and drafts of that Document. (A non-identical copy is a document which was initially identical in all respects to any other document, but which now is no longer identical by reason of any notation or other modification of any kind whatsoever including, without limiting the generality of the foregoing, notes or modifications on the backs of pages or in the margin thereof, and/or on any copies thereof).

3. It is requested that all Documents be produced in the form in which they are found in their normal filing place, and that the file folders or other bindings in which such documents are found be produced with the Documents. If for any reason the container cannot be produced, please produce copies of all labels or other identifying markings.

4. Documents attached to each other should not be separated.

5. If any requested Document cannot be produced in full, please produce it to the extent possible, indicating what portion or portions are being withheld and the reason it is being withheld.

6. If a Document otherwise responsive to this request was, but no longer is, in Your actual or constructive possession, custody or control, please state whether the document (a) is lost or destroyed; (b) has been transferred to another person or entity either voluntarily or involuntarily; or (c) has been otherwise disposed of, and, in each instance; (d) explain the circumstance surrounding the disposition, including the date or approximate date of the disposition.

7. If You object to the production of any Document requested, please state the reasons for Your objection. If objection is made to part of an item or category, please specify the part to which You object.

8. If You claim that the attorney-client privilege or any other privilege is applicable to any requested Document, that Document need not be produced but You shall, with respect to that Document: (a) State the date of the Document; (b) Identify each and every author of the Document; (c) Identify each and every other person who prepared or participated in the

preparation of the Document; (d) Identify each and every person who received the Document; (e) Identify each and every person from whom the Document was received; (f) Identify the present location of the Document and all copies thereof; (g) Identify each and every person having custody or control of the Document and all copies thereof; and (h) Provide sufficient further information concerning the Document to explain the claim of privilege and to permit the adjudication of the propriety of that claim.

9. Each request set forth below should be construed independently, and not in reference to any other request for purposes of limitation.

10. The use of the terms "and," "or," and "and/or" should be construed conjunctively and disjunctively for the broadest possible meaning.

11. The singular use of any term or phrase includes its plural, and the plural of any term or phrase includes its singular.

III.

INTERROGATORIES

INTERROGATORY NO. 1:

Describe each and every product, good, or service you sell, and for those products, goods, and services that use the term M2, include in Your answer: (a) the date on which You began using the term M2 in connection with such product and/or service; (b) the manner and Documents in which you use the term M2 (including without limitation the advertisements, promotional material, and Correspondence), (c) a description of the type of product, service or trade; (d) the geographical area in which such products and/or services are marketed; (e) the amount of money spent on, and the duration, timing, and a description of, the advertising and marketing for the product, (f) the method by which the product is distributed and marketed, (g) the customers that purchase the product, and (h) if applicable, the date on which You ceased marketing each such product and/or service using the term M2, in each geographic area described.

INTERROGATORY NO. 6:

Please Identify every advertisements and marketing materials (including those on any website, Correspondence, journal, magazine, newspaper, brochure, trade publication and/or periodical of any nature) in which You have used the term "M2" that was directed at the automotive collision repair market or automotive collision repair customers, and as to each Identify the date the advertisement or materials were used, the website or publication in which they were shown, and any sales that were generated from the advertisements or materials.

INTERROGATORY NO. 7:

Do you believe any of Your customers are "impulse buyers," that is, do any of Your customers purchase Your product or service on an impulse or without doing much or any research or investigation into Your product or service. If so, please identify the customer or class of customer that is an impulse buyer and the product or service they purchased.

INTERROGATORY NO. 8:

Please describe the similarities and differences between the trademark "M2" that You claim to own, and the mark applied for by M2 Automotive.

INTERROGATORY NO. 9:

Please Identify any customer or other person that has confused Your products, goods, services or business with the products, goods, services or business of M2 Automotive, and as to each: (a) state the date in which the person or customer became confused, (b) the date and manner in which You became aware of the confusion, and (c) describe the nature of the confusion. If You are not aware of or have not Identified any such customers or persons, please state "none."

INTERROGATORY NO. 10:

Please Identify any customer or other person that has confused Your products, goods, services or business with the products, goods, services or business of any other entity that uses the term M2, including without limitation those entities listed in Interrogatory No. 4, and as to each: (a) state the date in which the person or customer became confused, (b) the date and

manner in which You became aware of the confusion, and (c) describe the nature of the confusion. If You are not aware of or have not Identified any such customers or persons, please state "none."

INTERROGATORY NO. 11:

Please Identify and describe all facts that support your belief that customers or any member of the consuming public recognize the M2 mark to be associated with Your company, products, goods, or services.

INTERROGATORY NO. 12:

Please Identify and describe how and every way in which any of Your customers could potentially become confused between M2 Automotive and M2 Software.

INTERROGATORY NO. 13:

State each and every fact on which You base Your claim, or that supports Your claim, that "Opposer has invested a great deal of time, money, and effort in the development, promotion, enforcement, and federal registration of its fanciful M2® mark," in paragraph 8 of your Opposition, including the amount and nature of the time, money and effort spent promoting Your mark.

INTERROGATORY NO. 14:

State each and every fact on which You base Your allegation that M2 Automotive has acted "in bad faith in an effort to unlawfully transfer the goodwill built up by Applicant in its M2® mark, or to damage, blur, or tarnish the value that Opposer has built in its own mark over many years" as alleged in paragraph 9 of your Opposition.

INTERROGATORY NO. 15:

State each and every fact on which You base Your allegation that the use of the term M2 by M2 Automotive is "likely to cause confusion, cause mistake or to deceive the public into the belief that the goods and services offered under Applicant's applied-for mark come from or are otherwise authorized or sponsored by Opposer, or vice versa, in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d)," as alleged in paragraph 15 of your Opposition.

INTERROGATORY NO. 16:

State each and every fact on which You base Your claim that your M2 mark is strong and famous and any use by M2 Automotive of the M2 mark would be dilutive of your strong and famous mark as alleged in paragraphs 17 and 18 of your Opposition.

INTERROGATORY NO. 17:

Please identify all witnesses, expert or otherwise, You expect to submit testimony in this matter.

INTERROGATORY NO. 18:

Please identify any advertising, marketing, or promotion agency You have hired, used, or employed since 1991.


INTERROGATORY NO. 19:

Identify all individuals employed by M2 Software who are responsible for the development, promotion and enforcement of its M2 mark.

Dated: August 5, 2002

LATHAM & WATKINS
Mark A. Flagel
Manuel A. Abascal
Lauren S. Kim

By _____


LATHAM & WATKINS
633 W. Fifth Street, Suite 4000
Los Angeles, California 90071
Phone: (213) 485-1234
Fax: (213) 897-8763

Attorneys for Applicant M2 Automotive, Inc.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins, 633 West Fifth Street, Suite 4000, Los Angeles, CA 90071-2007.

On **August 5, 2002**, I served the following document described as:

APPLICANT M2 AUTOMOTIVE, INC.'S FIRST SET OF INTERROGATORIES

by serving a true copy of the above-described document in the following manner:

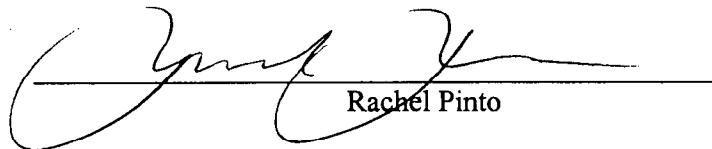
BY OVERNIGHT MAIL DELIVERY

I am familiar with the office practice of Latham & Watkins for collecting and processing documents for overnight mail delivery by Express Mail or other express service carrier. Under that practice, documents are deposited with the Latham & Watkins personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Express Mail or other express service carrier; such documents are delivered for overnight mail delivery by Express Mail or other express service carrier on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins for collecting and processing documents for overnight mail delivery by Express Mail or other express service carrier:

Dave Escamilla
1247 Lincoln Boulevard, Suite 456
Santa Monica, California 90401

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury that the foregoing is true and correct.

Executed on **August 5, 2002**, at Los Angeles, California.


Rachel Pinto

BOSTON
BRUSSELS
CHICAGO
FRANKFURT
HAMBURG
HONG KONG
LONDON
LOS ANGELES
MILAN
MOSCOW
NEW JERSEY

Latham & Watkins

ATTORNEYS AT LAW
WWW.LW.COM

NEW YORK
NORTHERN VIRGINIA
ORANGE COUNTY
PARIS
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

August 5, 2002

VIA FIRST CLASS MAIL

BOX TTAB NO FEE

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

Re: Opposition No. 151,549

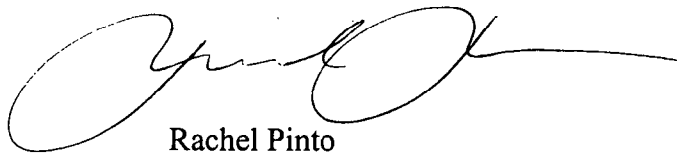
Application of: M2 Automotive, Inc.
Mark: **M2 & DESIGN**
Serial No.: 76/318,293
Published: April 30, 2002
Attorney: David M. Mermelstein

Dear Mr. Mermelstein:

We have enclosed a copy of *Applicant M2 Automotive, Inc.'s First Set of Interrogatories* in connection with the above-referenced trademark opposition/application.

Should you have any questions, please do not hesitate to contact Lauren Kim directly at (213) 891-7871.

Respectfully submitted,



Rachel Pinto
Intellectual Property Paralegal

Enclosures

cc: Mark Flagel, Esq. (w/ enclosures)
Manny Abascal, Esq. (w/ enclosures)
Lauren Kim, Esq. (w/ enclosures)

LATHAM & WATKINS

Assistant Commissioner for Trademarks

August 5, 2002

Page 2

bcc: D. Hunt Ramsbottom (w/ enclosures)

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited on this date with the United States Postal Service as first class mail in an envelope addressed to:

*BOX TTAB NO FEE
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513.*

on

August 5, 2002
Date


Signature

TRACIE L. PINTO

(Printed Name)

EXHIBIT 2

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

M2 SOFTWARE, INC.,

Opposition No. 91151549

Opposer,

v.

M2 AUTOMOTIVE, INC.

Applicant.

**OPPOSER'S RESPONSE TO APPLICANT'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF
DOCUMENTS AND THINGS**

Opposer, M2 Software, Inc., responds to Applicant's First Set of Interrogatories and Requests for Production of Documents and Things subject to the following general objections for each and every interrogatory and request ("General Objections" hereafter):

A.) Opposer objects to the production of items or information requested to the extent that the request is vague, ambiguous, and/or overly broad and remote and without reasonable limitation in scope or do not relate to the matter in controversy;

B.) Opposer objects to the production of items or information requested to the extent that the request is not reasonably calculated to lead to the discovery of

admissible evidence or of information relevant to the subject of this action, or is otherwise unduly oppressive, cumulative, or burdensome;

C.) Opposer objects to the production of items or information requested to the extent that the documents or information items sought therein are not within Opposer's possession, custody, or control;

D.) Opposer objects to the production of the items or information requested to the extent that the documents or information items sought therein are trade secret, proprietary, confidential, attorney-client privileged, privileged under work product doctrine, subject of Opposer's privacy rights, or otherwise privileged. The inadvertent disclosure of any matter covered by any such privilege shall not be deemed a waiver thereof;

E.) Opposer objects to the production of items or information requested to the extent that the requests, counting subparts, exceed the maximum allowed under TBMP § 406.03(a), 406.03(d), 37 CFR 2.120(d)(1) and Rule 33 of the Federal Rules of Civil Procedure;

F.) Opposer anticipates the possibility that in the course of this action it may learn of facts not presently known to it. The specific responses below are provided without waiver of Opposer's right to discover and use in any appropriate fashion such additional information, and Opposer specifically reserves the right to introduce at the time of hearing, or otherwise, any evidence from any source and from documents hereafter discovered, at the discretion of the Trademark Trial and Appeal Board.

1.) See General Objections, esp. (A), (B). Subject to and without waiver of the General Objections, Opposer answers as follows:

A representative sampling of Opposer's goods and/or services offered under the M2® mark include the field of goods identified in Opposer's Reg. No. 1,931,182 and services related to those goods, including computer software featuring business management applications for the film and music industries; and interactive multimedia applications for entertainment, education, and information, in the nature of artists' performances and biographical information from the film and music industries; and instructions and information for playing musical instruments, in Class 9 (U.S. Cls. 21, 23, 26, 36 and 38). Opposer's use and registration of the M2® mark includes no limitation or restriction on type of goods, channels of trade, or classes of purchasers. Opposer has offered goods and/or services in this field since at least as early as 1991, and such use has been continuous to the present. Opposer first began use of the M2® mark at least as early as 1991, has continuously used the M2® mark, and has invested an amount in the millions of dollars in securing, protecting, promoting, and marketing the M2® mark throughout the United States and the world. A representative sampling of the manner in which the M2® mark is used and marketed includes: use of M2® prominently displayed on business cards, letterhead and other stationery; prominent display and use of M2® in print advertisements in national and international magazines and trade publications, including SPIN Magazine, Guitar Player Magazine, Music Connection, BAM Magazine, Billboard buyer's guide; prominent display and use of M2® in all manners and use as a trade name; prominent display and use of M2® mark in corporate telephone, email, fax, and directory listings; prominent display and use of M2® mark at U.S. and international trade shows and conferences, including the MIDEM international music industry conference; prominent display and use of M2® mark in direct mail advertisements; prominent display and use of M2® on the Internet.

2.) See General Objections, esp. (A), (B). Subject to and without waiver of the General Objections, Opposer answers as follows:

See Answer to Interrogatory No. 1.

3.) See General Objections, esp. (A), (B), (D). Subject to and without waiver of the General Objections, Opposer answers as follows:

A representative sampling of Opposer's other enforcement of its M2® mark includes the matters of M2 Software, Inc. v. Viacom, Inc. et al, M2 Software, Inc. v. Madacy Entertainment Group et al, and M2 Software, Inc. v. Manmade Multimedia at the United States District Court, Central District of California.

4.) See General Objections, esp. (A), (B), (D). Subject to and without waiver of the General Objections, Opposer answers as follows:

See Answer to Interrogatory No. 3.

5.) See General Objections, esp. (A), (B), (D). Subject to and without waiver of the General Objections, Opposer answers as follows:

Opposer's customers include the general public, and Opposer's use and registration of the M2® mark includes no limitation or restriction on classes of purchasers.

6.) See General Objections, esp. (A), (B). Subject to and without waiver of the General Objections, Opposer answers as follows:

See Answers to Interrogatories No.'s 1,2,5.

7.) See General Objections, esp. (A), (B). Subject to and without waiver of the General Objections, Opposer answers as follows:

Yes.

8.) See General Objections. Subject to and without waiver of the General Objections, Opposer answers as follows:

The marks are identical in sight, sound, and meaning.

9.) See General Objections, esp. (A), (B). Subject to and without waiver of the General Objections, Opposer answers as follows:

Numerous persons from 1999 through 2002 have been confused as to sponsorship, affiliation, or existence of license, joint venture, or other relationship between the parties.

10.) See General Objections, esp. (A), (B), (D).

11.) See General Objections, esp. (A), (B). Subject to and without waiver of the General Objections, Opposer answers as follows:

See Answers to Interrogatories No.'s 1,2,3,4,5,6,9.

12.) See General Objections, esp. (A). Subject to and without waiver of the General Objections, Opposer answers as follows:

A representative sampling of some of the ways in which the parties' customers could be confused includes finding the word marks to be identical, finding the trade names to be identical, finding any or all design marks to be identical.

13.) See General Objections, esp. (A), (B), (D). Subject to and without waiver of the General Objections, Opposer answers as follows:

See Answers to Interrogatories No.'s 1,2,3,4,5,6,9.

14.) See General Objections, esp. (A), (B), (D). Subject to and without waiver of the General Objections, Opposer answers as follows:

See Answers to Interrogatories No.'s 1,2,3,4,5,6,9,11,13.

15.) See General Objections, esp. (A), (B). Subject to and without waiver of the General Objections, Opposer answers as follows:

See Answers to Interrogatories No.'s 1,2,3,4,5,6,9,11,13,14.

16.) See General Objections, esp. (A), (B). Subject to and without waiver of the General Objections, Opposer answers as follows:

See Answers to Interrogatories No.'s 1,2,3,4,5,6,9,11,13,14,15.

17.) See General Objections, esp. (D). Subject to and without waiver of the General Objections, Opposer answers as follows:

At this time Opposer plans to call Dave Escamilla; experts retained by Opposer; Applicant's officers, directors, employees, customers or affiliates; and experts retained by Applicant. Opposer will supplement this response as the litigation progresses.

18.) See General Objections, esp. (D).

19.) See General Objections, esp. (A), (B), (D).

RESPONSES TO REQUESTS FOR PRODUCTION

1.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative for the purposes of this action. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.

1.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative for the purposes of this action. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.

2.) See General Objections. Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative, and that documents relevant to this request have already been made available to Applicant through the United States Patent and Trademark Office and as a part of this proceeding.

- 3.) See General Objections, esp. (A), (B), (D). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative, and that documents relevant to this request have already been made available to Applicant through the United States Patent and Trademark Office and as a part of this proceeding.
- 4.) See General Objections, esp. (A), (B), (D). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.
- 5.) See General Objections, esp. (A), (B), (D). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.
- 6.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.
- 7.) See General Objections, esp. (A), (B), (D). Opposer specifically objects to this request on the ground that it seeks the disclosure of trade secrets, proprietary and confidential information.
- 8.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.
- 9.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without

waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.

10.) See General Objections, esp. (A), (B),(D). Opposer specifically objects to this request on the ground that it seeks the disclosure of trade secrets, proprietary and confidential information.

11.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.

12.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.

13.) See General Objections, esp. (A), (B),(D). Opposer specifically objects to this request on the ground that it seeks the disclosure of trade secrets, proprietary and confidential information.

14.) See General Objections, esp. (A), (B),(D). Opposer specifically objects to this request on the ground that it seeks the disclosure of trade secrets, proprietary and confidential information.

15.) See General Objections, esp. (A), (B),(D). Opposer specifically objects to this request on the ground that it seeks the disclosure of trade secrets, proprietary and confidential information.

16.) See General Objections, esp. (A), (B),(D). Opposer specifically objects to this request on the ground that it seeks the disclosure of trade secrets, proprietary and confidential information.

17.) See General Objections, esp. (A), (B),(D). Opposer specifically objects to this request on the ground that it seeks the disclosure of trade secrets, proprietary and confidential information.

18.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.

19.) See General Objections, esp. (A), (B). Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative. Subject to and without waiver of the General Objections, Opposer will produce a representative sampling of documents relating to this request.

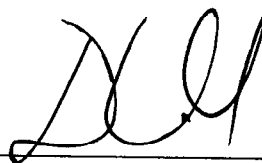
Dated: September 9, 2002

Respectfully submitted,

M2 SOFTWARE, INC.

OPPOSER

By: _____



Dave Escamilla

President and C.E.O.

M2 SOFTWARE, INC.

VERIFICATION

OPPOSER declares as follows:

I have read the foregoing OPPOSER'S REPSONSES TO APPLICANT'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS and know the contents thereof. I am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 9, 2002 at Los Angeles, CA.

M2 SOFTWARE, INC.
OPPOSER



By: Dave Escamilla, President

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S RESPONSE TO APPLICANT'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS** is being served on September 9, 2002, by first class mail, postage prepaid, upon:

Lauren Kim, Esq.
Latham & Watkins
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007



Dave Escamilla

EXHIBIT 3

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

M2 SOFTWARE, INC.

Opposer,

v.

M2 AUTOMOTIVE, INC.

Applicant.

Opposition No. 91151549
Serial No. 76318293

**APPLICANT M2 AUTOMOTIVE, INC.'S
SECOND SET OF INTERROGATORIES**

PROPOUNDING PARTIES: M2 AUTOMOTIVE, INC

RESPONDING PARTY: M2 SOFTWARE, INC.

Applicant M2 Automotive, Inc. ("M2 Automotive") hereby propounds its Second Set of Interrogatories to M2 Software, Inc. ("M2 Software"), consisting of Interrogatories No. 20-22.

I.

DEFINITIONS

1. The term "M2 Automotive" refers to Applicant M2 Automotive, Inc. and any parent, subsidiary, predecessor, successor, member and/or affiliated entities, past or present of M2 Automotive, Inc.

2. The term "M2 Software" refers to M2 Software, Inc. and any parent, subsidiary, predecessor, successor, member and/or affiliated entities, past or present, of M2 Software, Inc. and any person or entity, past or present, acting on behalf of M2 Software, Inc. including, but not limited to, each of its respective present and former officers, executives, partners, directors, employees, attorneys, agents and/or representatives.

3. The terms "You" and "Your" refer to the responding party, M2 Software, as defined above in paragraph 2.

III.

INTERROGATORIES

INTERROGATORY NO. 20:

For any Request for Admission in M2 Automotive's First Set of Requests for Admission where you answer was not an unequivocal "admit," please provide all facts and reasons supporting your response.

INTERROGATORY NO. 21:

Please provide the address(es) of the location(s) where you, David Escamilla, physically work at M2 Software.


INTERROGATORY NO. 22:

Please provide a complete list of all the addresses, phone numbers and fax numbers of M2 Software's business locations.

Dated: June 20, 2003

LATHAM & WATKINS LLP
Manuel A. Abascal
Lauren S. Kim

By _____


LATHAM & WATKINS LLP
633 W. Fifth Street, Suite 4000
Los Angeles, California 90071
Phone: (213) 485-1234
Fax: (213) 897-8763

Attorneys for Applicant M2 Automotive,
Inc.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 633 West Fifth Street, Suite 4000, Los Angeles, CA 90071-2007.

On **June 23, 2003**, I served the following document described as:

APPLICANT M2 AUTOMOTIVE, INC.'S SECOND SET OF INTERROGATORIES

by serving a true copy of the above-described document in the following manner:

BY FEDERAL EXPRESS DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for federal express delivery. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of delivery by federal express. I deposited in Latham & Watkins LLP' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for federal express delivery:

Dave Escamilla
1247 Lincoln Blvd., Suite 456
Santa Monica, CA 90401

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **June 23, 2003**, at Los Angeles, California.


Sandra D. Graggs

EXHIBIT 4

6/23k

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

M2 SOFTWARE, INC.

Opposer,

v.

M2 AUTOMOTIVE, INC.

Applicant.

Opposition No. 91151549
Serial No. 76318293

**APPLICANT M2 AUTOMOTIVE, INC.'S
FIRST SET OF REQUESTS FOR ADMISSION**

PROPOUNDING PARTIES: M2 AUTOMOTIVE, INC

RESPONDING PARTY: M2 SOFTWARE, INC.

Pursuant to Federal Rule of Civil Procedure 36(a) and TBMP § 403.01, Applicant M2 Automotive, Inc. ("M2 Automotive") hereby propounds its First Set of Requests for Admission to M2 Software, Inc. ("M2 Software"), consisting of Request Nos. 1-19. M2 Automotive hereby requests that M2 Software admit or deny the following requests within thirty (30) days from the date of service. Failure to respond within the required time period will result in each request being deemed admitted for all purposes.

I.

DEFINITIONS

1. The term "M2 Automotive" refers to Applicant M2 Automotive, Inc. and any parent, subsidiary, predecessor, successor, member and/or affiliated entities, past or present of M2 Automotive, Inc.
2. The term "M2 Software" refers to M2 Software, Inc. and any parent, subsidiary, predecessor, successor, member and/or affiliated entities, past or present, of M2 Software, Inc. and any person or entity, past or present, acting on behalf of M2 Software, Inc. including, but not limited to, each of its respective present and former officers, executives, partners, directors, employees, attorneys, agents and/or representatives.
3. The term "M2 Software's M2 Mark" refers to the M2 mark used by M2 Software.
4. The term "M2 Automotive's M2 Mark" refers to the M2 mark applied for by M2 Automotive that is the subject of this proceeding.
5. The terms "You" and "Your" refer to the responding party, M2 Software, as defined above in paragraph 2.
6. The term "Agreement(s)" refers to any bid, proposal, or contract (written or oral) entered into, including, without limitation, any drafts of agreements, and any Documents concerning negotiations, discussions, or other Correspondence leading up to, and/or following, the agreements.
7. The term "Document(s)" shall have the meaning set forth in Federal Rule of Evidence 1001, and includes, without limitation, writings, including handwritten, typewritten, photostatic, photographic, electronic and every other means of recording upon any tangible thing, or any form of communication or representation, including, without limitation, letters, words, pictures, sounds or symbols, or combinations thereof, computer records (including electronic mail records), ledgers, journals and statements of account.

II.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

Admit that M2 Software's M2 Mark is not federally registered in the category of International Class 37 for automobile repair and maintenance.

REQUEST FOR ADMISSION NO. 2:

Admit that M2 Software's M2 Mark is federally registered under International Class 9 for "computer software featuring business management applications for the film and music industries; and interactive multimedia applications for entertainment, education and information, in the nature of artists' performances and biographical information from the film and music industries; and instructions for playing musical instruments."

REQUEST FOR ADMISSION NO. 3:

Admit that M2 Software's M2 Mark is not used by M2 Software in connection with automobile repair or maintenance products or services.

REQUEST FOR ADMISSION NO. 4:

Admit that M2 Software's M2 Mark has never been used by M2 Software in connection with automobile repair or maintenance products or services.

REQUEST FOR ADMISSION NO. 5:

Admit that You have no Documents demonstrating or reflecting M2 Software customers actually confusing M2 Automotive's M2 Mark with M2 Software's M2 Mark.

REQUEST FOR ADMISSION NO. 6:

Admit that You have no Documents demonstrating or reflecting M2 Software customers actually confusing M2 Automotive's place of business at 1100 Colorado Blvd., Santa Monica, CA 90401, with what you represent to be M2 Software's place of business at 1247 Lincoln Blvd., Suite 456, Santa Monica, CA 90401.

REQUEST FOR ADMISSION NO. 7:

Admit that M2 Software's M2 Mark does not use red lettering for "M2" and does not use a yellow background within an oval enclosing the letters "M2."

REQUEST FOR ADMISSION NO. 8:

Admit that M2 Software's goods and services are not marketed to automobile insurance companies.

REQUEST FOR ADMISSION NO. 9:

Admit that M2 Software's goods and services are not sold from automobile repair and maintenance shops.

REQUEST FOR ADMISSION NO. 10:

Admit that M2 Software's goods and services are not advertised, marketed or promoted in automobile repair and maintenance trade magazines or publications.

REQUEST FOR ADMISSION NO. 11:

Admit that M2 Software's goods and services have never been advertised, marketed or promoted in Bodyshop Business magazine.

REQUEST FOR ADMISSION NO. 12:

Admit that M2 Software's goods and services are not sold or marketed at automobile repair trade shows or conventions.

REQUEST FOR ADMISSION NO. 13:

Admit that M2 Software's goods and services have never been advertised on a billboard.

REQUEST FOR ADMISSION NO. 14:

Admit that you are aware of the existence of other entities besides M2 Software and M2 Automotive, who incorporate or use "M2" as their mark.

REQUEST FOR ADMISSION NO. 15:

Admit that you are aware of the existence of other entities besides M2 Software and M2 Automotive, who incorporate or use "M2" in the name of their business.

REQUEST FOR ADMISSION NO. 16:

Admit that you are not aware of any surveys that have been commissioned and/or conducted regarding the fame or strength of the M2 Software M2 mark.

REQUEST FOR ADMISSION NO. 17:

Admit that M2 Software has no Documents demonstrating or reflecting financial injury or damages suffered as a direct result of M2 Automotive's M2 Mark.

REQUEST FOR ADMISSION NO. 18:

Admit that M2 Software and M2 Automotive have never entered into any Agreements with each other whatsoever.

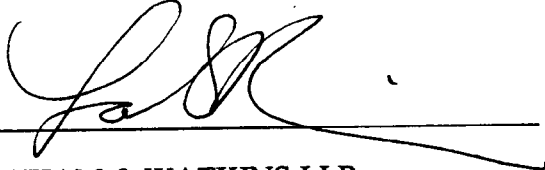
REQUEST FOR ADMISSION NO. 19:

Admit that there is no visible sign reflecting or containing M2 Software's M2 Mark at M2 Software's purported business location at 1247 Lincoln Blvd., Suite 456, Santa Monica, CA 90401.

Dated: June 29, 2003

LATHAM & WATKINS LLP
Manuel A. Abascal
Lauren S. Kim

By _____


LATHAM & WATKINS LLP
633 W. Fifth Street, Suite 4000
Los Angeles, California 90071
Phone: (213) 485-1234
Fax: (213) 897-8763

Attorneys for Applicant M2 Automotive,
Inc.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 633 West Fifth Street, Suite 4000, Los Angeles, CA 90071-2007.

On June 23, 2003, I served the following document described as:

APPLICANT M2 AUTOMOTIVE, INC.'S FIRST SET OF REQUEST FOR ADMISSION

by serving a true copy of the above-described document in the following manner:

BY FEDERAL EXPRESS DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for federal express delivery. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of delivery by federal express. I deposited in Latham & Watkins LLP' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for federal express delivery:

Dave Escamilla
1247 Lincoln Blvd., Suite 456
Santa Monica, CA 90401

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 23, 2003, at Los Angeles, California.

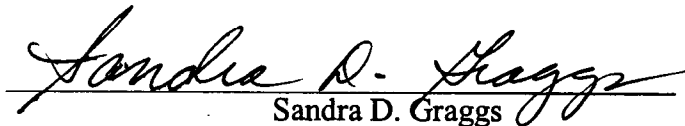

Sandra D. Graggs

EXHIBIT 5

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

M2 SOFTWARE, INC.,

Opposer,

v.

M2 AUTOMOTIVE, INC.

Applicant.

Opposition No. 91151549

**OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF REQUESTS FOR
ADMISSION AND SECOND SET OF INTERROGATORIES**

Opposer, M2 Software, Inc., provides the following supplemental responses to Applicant's First Set of Requests For Admission and Second Set of Interrogatories subject to the following general objections for each and every interrogatory and request ("General Objections" hereafter):

- A.) Opposer objects to the production of items or information requested to the extent that the request is vague, ambiguous, and/or overly broad and remote and without reasonable limitation in scope or do not relate to the matter in controversy;
- B.) Opposer objects to the production of items or information requested to the extent that the request is not reasonably calculated to lead to the discovery of admissible evidence or of information relevant to the subject of this action, or is otherwise unduly oppressive, cumulative, or burdensome;

C.) Opposer objects to the production of items or information requested to the extent that the documents or information items sought therein are not within Opposer's possession, custody, or control;

D.) Opposer objects to the production of the items or information requested to the extent that the documents or information items sought therein are trade secret, proprietary, confidential, attorney-client privileged, privileged under work product doctrine, subject of Opposer's privacy rights, or otherwise privileged. The inadvertent disclosure of any matter covered by any such privilege shall not be deemed a waiver thereof;

E.) Opposer objects to the production of items or information requested to the extent that the requests, counting subparts, exceed the maximum allowed under TBMP § 406.03(a), 406.03(d), 37 CFR 2.120(d)(1) and Rule 33 of the Federal Rules of Civil Procedure;

F.) Opposer anticipates the possibility that in the course of this action it may learn of facts not presently known to it. The specific responses below are provided without waiver of Opposer's right to discover and use in any appropriate fashion such additional information, and Opposer specifically reserves the right to introduce at the time of hearing, or otherwise, any evidence from any source and from documents hereafter discovered, at the discretion of the Trademark Trial and Appeal Board.

REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:

Admit that M2 Software's M2 Mark is not federally registered in the category of International Class 37 for automobile repair and maintenance.

RESPONSE TO REQUEST FOR ADMISSION NO. 1

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous in its inquiry as

to registration "in the category" of a field incompletely defined by Applicant, and on the grounds that the request calls for a legal conclusion. Based on the foregoing objections, Opposer responds as follows: DENIED. Opposer's M2 Mark is federally-registered under Reg. No. 1,931,182, and the scope and protection of that registration calls for a legal conclusion.

REQUEST FOR ADMISSION NO. 2:

Admit that M2 Software's M2 Mark is federally registered under International Class 9 for "computer software featuring business management applications for the film and music industries; and interactive multimedia applications for entertainment, education and information, in the nature of artists' performances and biographical information from the film and music industries; and instructions for playing musical instruments."

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is compound, vague and ambiguous as to "M2 Mark" and limitation of class. Based on the foregoing objections, Opposer responds as follows: DENIED. Applicant's request fails to even accurately state the plain language of Opposer's Reg. No. 1,931,182.

REQUEST FOR ADMISSION NO. 3:

Admit that M2 Software's M2 Mark is not used by M2 Software in connection with automobile repair or maintenance products or services.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is compound, vague and ambiguous as to "M2 Mark" and vague and ambiguous as to the nature of "connection." Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 4:

Admit that M2 Software's M2 Mark has never been used by M2 Software in connection with automobile repair or maintenance products or services.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is compound, vague and ambiguous as to "M2 Mark" and vague and ambiguous as to the nature of "connection." Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 5:

Admit that You have no Documents demonstrating or reflecting M2 Software customers actually confusing M2 Automotive's M2 Mark with M2 Software's M2 Mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous as to "M2 Mark." Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 6:

Admit that You have no Documents demonstrating or reflecting M2 Software customers actually confusing M2 Automotive's place of business at 1100 Colorado Blvd., Santa Monica, CA 90401, with what you represent to be M2 Software's place of business at 1247 Lincoln Blvd., Suite 456, Santa Monica, CA 90401.

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous as to the

requested circumstances of confusion at issue. Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 7:

Admit that M2 Software's M2 Mark does not use red lettering for "M2" and does not use a yellow background within an oval enclosing the letters "M2."

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is compound, vague and ambiguous as to "M2 Mark." Based on the foregoing objections, Opposer responds as follows: DENIED. Opposer has produced or will produce documents identifying its commercial use of red-orange lettering for "M2" within an oval enclosing the letters "M2."

REQUEST FOR ADMISSION NO. 8:

Admit that M2 Software's goods and services are not marketed to automobile insurance companies.

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

See General Objections, all of which are incorporated herein. Based on the foregoing objections, Opposer responds as follows: DENIED. M2 Software's goods and services are marketed to a broad section of the general public as well as to diversified entertainment conglomerates, with marketing that reaches individual employees of insurance companies.

REQUEST FOR ADMISSION NO. 9:

Admit that M2 Software's goods and services are not sold from automobile repair and maintenance shops.

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous as to the phrase "sold from." Based on the foregoing objections, Opposer responds as follows: DENIED. M2 Software's goods and services have been advertised in national and international magazines and publications available to the general public.

REQUEST FOR ADMISSION NO. 10:

Admit that M2 Software's goods and services are not advertised, marketed or promoted in automobile repair and maintenance trade magazines or publications.

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is compound, vague and ambiguous as to classification of "trade magazines or publications." Based on the foregoing objections, Opposer responds as follows: DENIED. M2 Software's goods and services have been advertised in advertised in national and international magazines and publications, including publications which also contain automobile-related content and advertising.

REQUEST FOR ADMISSION NO. 11:

Admit that M2 Software's goods and services have never been advertised, marketed or promoted in Bodyshop Business magazine.

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

See General Objections, all of which are incorporated herein. Subject to and without waiver of the foregoing objections, Opposer responds as follows: Opposer is without sufficient information to admit or deny this request.

REQUEST FOR ADMISSION NO. 12:

Admit that M2 Software's goods and services are not sold or marketed at automobile repair trade shows or conventions.

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous as to "sold or marketed at" and as to "conventions." Based on the foregoing objections, Opposer responds as follows: DENIED. M2 Software's goods and services have been marketed at music industry trade shows and media conventions also attended by marketing personnel from the automobile industry.

REQUEST FOR ADMISSION NO. 13:

Admit that M2 Software's goods and services have never been advertised on a billboard.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous as to "billboard." Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 14:

Admit that you are aware of the existence of other entities besides M2 Software and M2 Automotive, who incorporate or use "M2" as their mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is irrelevant, that it is vague and ambiguous as to "you[r]" awareness of "existence," and vague and ambiguous as to

inquiry of "use" of the symbol at issue "as their mark." Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 15:

Admit that you are aware of the existence of other entities besides M2 Software and M2 Automotive, who incorporate or use "M2" in the name of their business.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is irrelevant, that it is compound, vague and ambiguous as to "you[r]" awareness of "existence," and vague and ambiguous as to inquiry of "use" of the symbol at issue "in the name of their business." Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 16:

Admit that you are not aware of any surveys that have been commissioned and/or conducted regarding the fame or strength of the M2 Software M2 mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is compound, vague and ambiguous as to "you[r]" awareness, and vague and ambiguous as to the nature of survey requested. Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 17:

Admit that M2 Software has no Documents demonstrating or reflecting financial injury or damages suffered as a direct result of M2 Automotive's M2 Mark.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is compound, vague and ambiguous as to the nature of documents requested. Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 18:

Admit that M2 Software and M2 Automotive have never entered into any Agreements with each other whatsoever.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is compound, vague and ambiguous as to the types of agreements at issue. Based on the foregoing objections, Opposer responds as follows: DENIED.

REQUEST FOR ADMISSION NO. 19:

Admit that there is no visible sign reflecting or containing M2 Software's M2 Mark at M2 Software's purported business location at 1247 Lincoln Blvd., Suite 456, Santa Monica, CA 90401.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

See General Objections, all of which are incorporated herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous as to "visible sign." Based on the foregoing objections, Opposer responds as follows: DENIED.

INTERROGATORIES

INTERROGATORY NO. 20:

For any Request for Admission in M2 Automotive's First Set of Requests for Admission where you answer was not an unequivocal "admit," please provide all facts and reasons supporting your response.

RESPONSE TO INTERROGATORY NO. 20:

See General Objections, esp. (A), (B), (D), (E). Opposer specifically objects that this interrogatory is overly broad and remote and without reasonable limitation in scope., and that Applicant's requests, counting subparts, exceed the maximum allowed under TBMP § 406.03(a), 406.03(d), 37 CFR 2.120(d)(1) and Rule 33 of the Federal Rules of Civil Procedure. Subject to and without waiver of the General Objections, Opposer refers to the specific facts included within the above responses to the Requests. Opposer further responds that, pursuant to Fed. R. Civ. Pr. 33(d), Opposer has produced or will produce documents in its possession relating to this request.

INTERROGATORY NO. 21:

Please provide the address(es) of the location(s) where you, David Escamilla, physically work at M2 Software.

RESPONSE TO INTERROGATORY NO. 21:

See General Objections, esp. (A), (B), (D), (E). Opposer specifically objects that the request seeks private and confidential information in a request directed to "you, David Escamilla," where Opposer is the corporation, M2 Software, Inc. Opposer further objects to the request as overly broad and remote and without reasonable limitation in scope. Notwithstanding and without waiver of the general and specific objections, Opposer responds that the five most recent commercial business addresses of M2 Software, Inc. are as follows:

1247 Lincoln Blvd., Suite 456
Santa Monica, CA 90401

1429 Lincoln Blvd.
Santa Monica, CA 90401

626 Santa Monica Blvd., Suite 456
Santa Monica, CA 90401

325 West 16th Street
Fourth Floor East
New York, NY 10011

368 Broadway, Suite 504
New York, NY 10013

INTERROGATORY NO. 22:

Please provide a complete list of all the addresses, phone numbers and fax numbers of M2 Software's business locations.

RESPONSE TO INTERROGATORY NO. 22:


See General Objections, esp. (A), (B), (D), (E). Subject to and without waiver of the General Objections, Opposer responds that its current business address is as follows:

M2 Software, Inc.
1247 Lincoln Boulevard, Suite 456
Santa Monica, CA 90401
Telephone: (310) 399-2728
Facsimile: (310) 392-0447

Dated: July 23, 2003

Respectfully submitted,
M2 SOFTWARE, INC.
OPPOSER

By: _____



Dave Escamilla
President and C.E.O.
M2 SOFTWARE, INC.

VERIFICATION

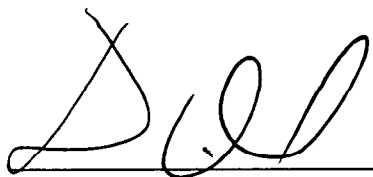
OPPOSER declares as follows:

I have read the foregoing OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF REQUESTS FOR ADMISSION AND SECOND SET OF INTERROGATORIES and know the contents thereof. I am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 23, 2003 at Los Angeles, CA.

M2 SOFTWARE, INC.
OPPOSER



By: Dave Escamilla, President

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF REQUESTS FOR ADMISSION AND SECOND SET OF INTERROGATORIES** is being served on July 26, 2003, by first class mail, postage prepaid, upon:

Lauren Kim, Esq.
Manuel Abascal, Esq.
Latham & Watkins
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007



Dave Escamilla

EXHIBIT 6

8/4/03

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

M2 SOFTWARE, INC.,

Opposer,

v.

M2 AUTOMOTIVE, INC.

Applicant.

Opposition No. 91151549

**OPPOSER'S RESPONSES TO APPLICANT'S SECOND SET OF REQUESTS
FOR PRODUCTION AND SECOND (SERVED AS "THIRD") SET OF
INTERROGATORIES**

Opposer, M2 Software, Inc., provides the following responses to Applicant's Second Set Of Requests For Production and Second (Served as "Third") Set of Interrogatories subject to the following general objections for each and every interrogatory and request ("General Objections" hereafter):

A.) Opposer objects to the production of items or information requested to the extent that the request is vague, ambiguous, and/or overly broad and remote and without reasonable limitation in scope or do not relate to the matter in controversy;

B.) Opposer objects to the production of items or information requested to the extent that the request is not reasonably calculated to lead to the discovery of admissible evidence or of information relevant to the subject of this action, or is

otherwise unduly oppressive, cumulative, or burdensome;

C.) Opposer objects to the production of items or information requested to the extent that the documents or information items sought therein are not within Opposer's possession, custody, or control;

D.) Opposer objects to the production of the items or information requested to the extent that the documents or information items sought therein are trade secret, proprietary, confidential, attorney-client privileged, privileged under work product doctrine, subject of Opposer's privacy rights, or otherwise privileged. The inadvertent disclosure of any matter covered by any such privilege shall not be deemed a waiver thereof;

E.) Opposer objects to the production of items or information requested to the extent that the requests, counting subparts, exceed the maximum allowed under TBMP § 406.03(a), 406.03(d), 37 CFR 2.120(d)(1) and Rule 33 of the Federal Rules of Civil Procedure;

F.) Opposer anticipates the possibility that in the course of this action it may learn of facts not presently known to it. The specific responses below are provided without waiver of Opposer's right to discover and use in any appropriate fashion such additional information, and Opposer specifically reserves the right to introduce at the time of hearing, or otherwise, any evidence from any source and from documents hereafter discovered, at the discretion of the Trademark Trial and Appeal Board.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Any and all copies of any license (including but not limited to site licenses) for any product or service provided by M2 software, including without limitation site licenses for sales of the M2 Record Label Management System and any modules thereof.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1

See General Objections, esp. (A), (B), (D), all of which are incorporated herein. Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative, that this request is vague, ambiguous, and/or overly broad and remote and without reasonable limitation in scope, and seeks confidential and privileged trade secret information of Opposer. Subject to and without waiver of these objections, Opposer responds that it has produced a representative sampling of documents relating to this request.

REQUEST FOR PRODUCTION NO. 2:

Any documents reflecting expenses incurred in connection with the promotion, enforcement, and development of the M2 mark, including without limitation any documents reflecting expenses that are included in Mr. Escamilla's estimate during his July 3, 2003 deposition of having spent \$2.75 million in M2 related expenses.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2

See General Objections, esp. (A), (B), (D), all of which are incorporated herein. Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative, and that this request is vague, ambiguous, and/or overly broad and remote and without reasonable limitation in scope, and seeks confidential and privileged trade secret information of Opposer. Subject to and without waiver of these objections, Opposer responds that it has produced a representative sampling of documents relating to this request.

REQUEST FOR PRODUCTION NO. 3:

Any documents reflecting the names, addresses, and contact information for any customers of M2 Software that have purchased the M2 Record Label Management System or any module thereof.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3

See General Objections, esp. (A), (B), (D), all of which are incorporated herein. Opposer objects to this request on the basis that such request is unreasonably cumulative and duplicative and seeks confidential and privileged trade secret information of Opposer. Subject to and without waiver of these objections, Opposer responds that it will produce a representative sampling of documents relating to this request.

INTERROGATORIES

INTERROGATORY NO. 20:

For any Request for Admission in M2 Automotive's First Set of Requests for Admission where you answer was not an unequivocal "admit," please provide all facts and reasons supporting your response.

RESPONSE TO INTERROGATORY NO. 20:

See General Objections, esp. (A), (B), (D), (E). Opposer specifically objects that this interrogatory is overly broad and remote and without reasonable limitation in scope., and that Applicant's requests, counting subparts, exceed the maximum allowed under TBMP § 406.03(a), 406.03(d), 37 CFR 2.120(d)(1) and Rule 33 of the Federal Rules of Civil Procedure. Subject to and without waiver of the General Objections, Opposer answers that specific facts have been included within its responses to the Requests. Opposer further responds that, pursuant to Fed. R. Civ. Pr. 33(d), Opposer has produced or will produce documents in its possession relating to this request.

INTERROGATORY NO. 21:

Please provide the address(es) of the location(s) where you, David Escamilla, physically work at M2 Software.

RESPONSE TO INTERROGATORY NO. 21:

See General Objections, esp. (A), (B), (D), (E). Opposer specifically objects that the request seeks private and confidential information requested directly of a non-party individual, where the respondent is a party corporation, Opposer M2 Software, Inc., and is overly broad and remote and without reasonable limitation in scope.

Notwithstanding and without waiver of the general and specific objections, Opposer responds that its most recent commercial business addresses are as follows:

1247 Lincoln Blvd., Suite 456
Santa Monica, CA 90401

1429 Lincoln Blvd.
Santa Monica, CA 90401

626 Santa Monica Blvd., Suite 456
Santa Monica, CA 90401

325 West 16th Street
Fourth Floor East
New York, NY 10011

368 Broadway, Suite 504
New York, NY 10013

INTERROGATORY NO. 22:

Please provide a complete list of all the addresses, phone numbers and fax numbers of M2 Software's business locations.

RESPONSE TO INTERROGATORY NO. 22:

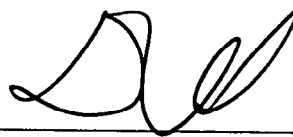
See General Objections, esp. (A), (B), (D), (E). Subject to and without waiver of the General Objections, Opposer responds that its current business address is as follows:

M2 Software, Inc.
1247 Lincoln Boulevard, Suite 456
Santa Monica, CA 90401
Telephone: (310) 399-2728
Facsimile: (310) 392-0447

Dated: August 4, 2003

Respectfully submitted,
M2 SOFTWARE, INC.
OPPOSER

By: _____



Dave Escamilla
President and C.E.O.
M2 SOFTWARE, INC.

VERIFICATION


OPPOSER declares as follows:

I have read the foregoing OPPOSER'S RESPONSES TO APPLICANT'S SECOND SET OF REQUESTS FOR PRODUCTION AND SECOND (SERVED AS "THIRD") SET OF INTERROGATORIES and know the contents thereof. I am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 4, 2003 at Los Angeles, CA.

M2 SOFTWARE, INC.
OPPOSER

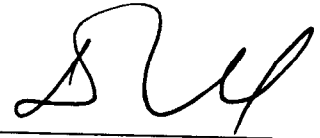


By: Dave Escamilla, President

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S RESPONSES TO APPLICANT'S SECOND SET OF REQUESTS FOR PRODUCTION AND SECOND (SERVED AS "THIRD") SET OF INTERROGATORIES** is being served on August 4, 2003, by first class mail, postage prepaid, upon:

Lauren Kim, Esq.
Manuel Abascal, Esq.
Latham & Watkins
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007



Dave Escamilla

ESTEFAN ENTERPRISES, INC.

9114

VENDOR ID.	NAME	PAYMENT NUMBER	CHECK DATE				
M2 SOFTWARE	M2 Software, Inc	0000000000015989	8/2/02	911423			
OUR VOUCHER NUMBER	YOUR VOUCHER NUMBER	DATE	AMOUNT	AMOUNT PAID	DISCOUNT	WRITE-OFF	NET
210208011	0/1/02		\$5,615.26	\$5,615.26	\$0.00		\$5,615.26
COMMENT			\$5,615.26	\$5,615.26	\$0.00		\$5,615.26

51N321 (401) 1591

MUSIC FOR LITTLE PEOPLE

M2 Software, Inc.

49204

2/28/03

492
\$8,194.00

Payment; M2 Software, Inc.

In Payment For:

Invoice #90302251

Purchase #03022251

12/31/02

\$8,194.00

Vendor No.		BMC ENTERTAINMENT			Code	Check No.
0654690080					01-REG	10125895
Vendor Name					1011	Date
M2 SOFTWARE INC						Page
					09/05/97	1
Date	Invoice No.	Voucher	Gross	Discount	Net	
08/21/97	583	HB3M000148	16,962.50	.00	16,962.50	
* TOTAL *			16,962.50	.00	16,962.50	

Vendor No.		ARISTA RECORDS			Code	Check No.
0654690000					01-REG	10047094
Vendor Name				6106	Date	Page
M2 SOFTWARE INC					10/30/97	1
Date	Invoice No.	Voucher	Gross	Discount	Net	
06/24/97	551	NLGF000806	437.50	.00	437.50	
	* TOTAL *		437.50	.00	437.50	

10003097

Vendor No.
6637010000

Private Music / Beverly Hills, CA 90211-2713

Code
03-CVA 10003097

Vendor Name
RZ SOFTWARE

Date
2002 02/26/97

Page
1

Date	Invoice No.	Voucher	Gross	Discount	Net
10/31/96	458	UL3Y000276	12,935.00	.00	12,935.00
PRIVATE MUSIC/WINDHAM HILL COMBINED ANNUAL SUPPORT					
* TOTAL *			12,935.00	.00	12,935.00

MV2 (2/94)

REUNION RECORDS NASHVILLE, TN

No. 038114

OFF. NO	YOUR INV. NO	INVOICE DATE	INVOICE AMOUNT	AMOUNT PAID	DISCOUNT TAKEN	NET CHECK AMOUNT
	368	03/15/95	990.00	990.00	0.00	990.00
TOTAL			990.00	990.00	0.00	990.00

E-A-S-I
 Equipment & Supplies Service Inc
 100 Linn Ave, Eastford, Ct. 06027

paid on behalf of:

027267

Vendor No. 0667800000		HOUSE OF BLUES			Case 01-REG 00027267
Vendor Name M2 SOFTWARE INC		8001		Date 12/06/95	Page 1
Date	Invoice No.	Voucher	Gross	Discount	Net
10/30/95	LICENSED CO EXTENSION TO ADD HOUSE OF BLUES REGGROS	8998000103	6,000.00	.00	6,000.00
* TOTAL *			6,000.00	.00	6,000.00

EA 137 (12-90)

EXHIBIT 7



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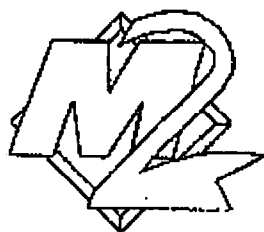
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Please logout when you are done to release system resources allocated for you.

Record 1 out of 1

Check Status

(TARR contains current status, correspondence address and attorney of record for this mark. Use the "Back" button of the Internet Browser to return to TESS)



Word Mark M2

Goods and Services IC 009. US 021 023 026 036 038. G & S: computer software for digital-signal processing, namely, an object-oriented program that permits the systematic reuse of existing, tested components with new, user-written components in problem areas of digital-signal processing, such as signal processing, data display, networking, graphical user interface design, and hardware control. FIRST USE: 19970113. FIRST USE IN COMMERCE: 19970113

Mark

Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code 260701

Serial Number 75234769

Filing Date February 3, 1997

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition December 16, 1997

Registration

Number 2142411
Registration Date March 10, 1998
Owner (REGISTRANT) Rincon Research Corporation CORPORATION ARIZONA 101 N. Wilmot, Suite 101 Tucson ARIZONA 85711
Attorney of Record ANTONIO R. DURANDO
Type of Mark TRADEMARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
Live/Dead Indicator LIVE

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EXHIBIT 8



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Typed Drawing

Word Mark M2

Goods and Services IC 009. US 021 023 026 036 038. G & S: MAGNETIC TAPE CARTRIDGE SUBSYSTEMS COMPRISING TAPE DRIVES AND CONTROL UNITS FOR DATA STORAGE AND ARCHIVING, FOR USE WITH COMPUTERS. FIRST USE: 19991228. FIRST USE IN COMMERCE: 19991228

Mark Drawing Code (1) TYPED DRAWING

Serial Number 75888386

Filing Date January 6, 2000

Current Filing Basis 1A

Original Filing Basis 1B

Published for Opposition June 5, 2001

Registration Number 2583119

Registration Date June 18, 2002

Owner (REGISTRANT) Exabyte Corporation CORPORATION DELAWARE 1685 38th Street Boulder COLORADO 80301

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Donna J. Bunton

Type of Mark TRADEMARK

Register PRINCIPAL
Live/Dead
Indicator LIVE

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EXHIBIT 9



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[Home](#)
[Index](#)
[Search](#)
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[eBusiness Center](#)
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[PTO HOME](#)
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Record 1 out of 1

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M²

Word Mark M2

Goods and Services IC 022. US 001 002 007 019 022 042 050. G & S: Raw fibrous textile materials made of composites of plastic-like polymeric resin and fibers, namely, cellulosic fibers and/or lignocellulosic fibers, for use in manufacture but not for use in the manufacture of clothing. FIRST USE: 19990200. FIRST USE IN COMMERCE: 19990300

Mark Drawing Code (5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM

Serial Number 75752265

Filing Date July 15, 1999

Current Filing Basis 1A

Original Filing Basis 1B

Published for Opposition May 29, 2001

Registration Number 2775972

Registration Date October 21, 2003

Owner (REGISTRANT) Xyleco, Inc. CORPORATION DELAWARE 90 Addington Road Brookline MASSACHUSETTS 024454520

Attorney of Record TIMOTHY A FRENCH
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

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Record 1 out of 1

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m2C

Word Mark M2C
Goods and Services IC 035. US 100 101 102. G & S: Provision of strategic marketing consulting services for others. FIRST USE: 20011031. FIRST USE IN COMMERCE: 20011031
Mark Drawing Code (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code 260521
Serial Number 78323035
Filing Date November 4, 2003
Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition August 3, 2004
Registration Number 2897464
Registration Date October 26, 2004
Owner

(REGISTRANT) Monitor Company Group Limited Partnership Monitor Company Group GP LLC, a limited liability company organized under the laws of Delaware

LIMITED PARTNERSHIP DELAWARE 2 Canal Park Cambridge
MASSACHUSETTS 02141

**Assignment
Recorded** ASSIGNMENT RECORDED

**Attorney of
Record** Judith R. S. Stern

**Description of
Mark** The mark consists of the letter M, the numeral 2, an arrow design, and the letter C.

Type of Mark SERVICE MARK

Register PRINCIPAL

**Live/Dead
Indicator** LIVE

[PTO HOME](#) [TRADEMARK](#) [TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [TOP](#) [HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) |
[CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 11



UNITED STATES PATENT AND TRADEMARK OFFICE

Home

Index

Search

System
AlertseBusiness
CenterNews &
Notices

Contact Us

Trademark Electronic Search System(Tess)

TESS was last updated on Fri Feb 11 04:28:49 EST 2005

PTO HOME

TRADEMARK

TESS HOME

NEW USER

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Word Mark	M2
Goods and Services	IC 035. US 100 101 102. G & S: business management consultation and employment agency services. FIRST USE: 19880724. FIRST USE IN COMMERCE: 19880724
Mark Drawing Code	(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM
Serial Number	75184105
Filing Date	October 21, 1996
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	October 28, 1997
Registration Number	2151899
Registration Date	April 21, 1998
Owner	(REGISTRANT) M2 Management Maximizers CORPORATION CALIFORNIA 433 California Street San Francisco CALIFORNIA 941042013 (LAST LISTED OWNER) M SQUARED CONSULTING, INC. CORPORATION DELAWARE 111 SUTTER STREET, SUITE 850 SAN FRANCISCO

CALIFORNIA 94104

Assignment Recorded ASSIGNMENT RECORDED
Attorney of Record BRUCE D HOLLOWAY
Type of Mark Register SERVICE MARK
Affidavit Text PRINCIPAL
Live/Dead Indicator SECT 15. SECT 8 (6-YR).
LIVE

[PTO HOME](#) [TRADEMARK](#) [TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [TOP](#) [HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) | [CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 12



UNITED STATES PATENT AND TRADEMARK OFFICE

Home	Index	Search	System Alerts	eBusiness Center	News & Notices	Contact Us
------	-------	--------	---------------	------------------	----------------	------------

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PTO HOME	TRADEMARK	TESS HOME	NEW USER	STRUCTURED	FREE FORM	BROWSE LIST	BOTTOM	HELP
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Typed Drawing

Word Mark M2 COMMUNICATIONS

Goods and Services IC 016. US 002 005 022 023 029 037 038 050. G & S: PUBLICATIONS, NAMELY PAMPHLETS AND BOOKLETS OF A PROMOTIONAL NATURE DEALING WITH MEDICAL AND PHARMACEUTICAL ISSUES. FIRST USE: 19970900. FIRST USE IN COMMERCE: 19970900

Mark Drawing Code (1) TYPED DRAWING

Serial Number 75804162

Filing Date September 21, 1999

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition September 12, 2000

Registration Number 2410415

Registration Date December 5, 2000

Owner (REGISTRANT) M2 COMMUNICATIONS INC. CORPORATION NEW JERSEY 30 Montgomery Street Jersey City NEW JERSEY 07302

Attorney of Record Marvin N. Gordon

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "COMMUNICATIONS" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL
Live/Dead
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[IP TO HOME](#) [TRADEMARK](#) [TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [TOP](#) [HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) |
[CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 13



UNITED STATES PATENT AND TRADEMARK OFFICE

[Home](#)
[Index](#)
[Search](#)
[System Alerts](#)
[eBusiness Center](#)
[News & Notices](#)
[Contact Us](#)

Trademark Electronic Search System(Tess)

TESS was last updated on Fri Feb 11 04:28:49 EST 2005

[PTO HOME](#)
[TRADEMARK](#)
[TESS HOME](#)
[NEW USER](#)
[STRUCTURED](#)
[FREE FORM](#)
[BROWSE DICT](#)
[BOTTOM](#)
[HELP](#)
[Logout](#)

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Typed Drawing

Word Mark	M2
Goods and Services	IC 008. US 023. G & S: METAL CUTTING SNIPS. FIRST USE: 19451231. FIRST USE IN COMMERCE: 19451231
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	73518971
Filing Date	January 23, 1985
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	July 16, 1985
Registration Number	1361490
Registration Date	September 24, 1985
Owner	(REGISTRANT) COOPER INDUSTRIES, INC. CORPORATION OHIO P. O. BOX 4446 HOUSTON TEXAS 77210
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	EDDIE E. SCOTT
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR).
Live/Dead Indicator	LIVE

[PTC HOME](#) [TRADEMARK](#) [TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [TOP](#) [HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) | [CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 14



UNITED STATES PATENT AND TRADEMARK OFFICE

Home

Index

Search

System
AlertseBusiness
CenterNews &
Notices

Contact Us

Trademark Electronic Search System(Tess)

TESS was last updated on Fri Feb 11 04:28:49 EST 2005

PTO HOME

TRADEMARK

TESS HOME

NEW USER

STRUCTURED

FREE FORM

BROWSE DICT

BOTTOM

HELP

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Word Mark	M2 MERRELL MILLENNIUM
Goods and Services	IC 025. US 022 039. G & S: footwear, namely, boots, hiking boots, trekking boots, trail boots, [cross country ski boots,] shoes, sandals, [sock liners; clothing, namely, T-shirts, caps]. FIRST USE: 19961101. FIRST USE IN COMMERCE: 19961101
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	260102
Serial Number	75129152
Filing Date	July 2, 1996
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	February 25, 1997
Registration Number	2181158
Registration Date	August 11, 1998
Owner	(REGISTRANT) WOLVERINE WORLD WIDE, INC. CORPORATION

MICHIGAN 93411 Courtland Dr., N.E. Rockford MICHIGAN 49351

(LAST LISTED OWNER) WOLVERINE OUTDOORS, INC. CORPORATION
MICHIGAN 9341 COURTLAND DR., N.E. ROCKFORD MICHIGAN 49351

Assignment Recorded ASSIGNMENT RECORDED
Attorney of Record JAMES L. SCOTT
Prior Registrations 1337440;1987331;AND OTHERS
Type of Mark TRADEMARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
Live/Dead Indicator LIVE

[PTO HOME](#) [TRADEMARK](#) [TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [TOP](#) [HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) |
[CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 15



UNITED STATES PATENT AND TRADEMARK OFFICE

[Home](#)

[Index](#)

[Search](#)

[System Alerts](#)

[eBusiness Center](#)

[News & Notices](#)

[Contact Us](#)

Trademark Electronic Search System(Tess)

TESS was last updated on Fri Feb 11 04:28:49 EST 2005

[PTO HOME](#)

[TRADEMARK](#)

[TESS HOME](#)

[NEW USER](#)

[STRUCTURED](#)

[FREE FORM](#)

[BROWSER DICT](#)

[BOTTOM](#)

[HELP](#)

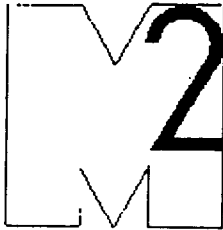
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Word Mark	M2
Goods and Services	IC 009. US 026. G & S: Recorders of Digital Video Images, Color Film Images, Video Images, and Electronic Programmers and Transparency Format Oscilloscope Cameras. FIRST USE: 19821115. FIRST USE IN COMMERCE: 19821115
Mark Drawing Code	(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM
Serial Number	73421388
Filing Date	April 13, 1983
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	May 15, 1984
Registration Number	1288754
Registration Date	August 7, 1984
Owner	(REGISTRANT) Matrix Corporation CORPORATION NEW JERSEY 230 Pegasus Ave. Northvale NEW JERSEY 07647 (LAST LISTED OWNER) AFGO CORPORATION CORPORATION BY

CHANGE OF NAME FROM NEW JERSEY 230 PEGASUS AVE. NORTHVALE
NEW JERSEY 07647

Assignment Recorded ASSIGNMENT RECORDED
Attorney of Record Myron Amer
Type of Mark TRADEMARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
Live/Dead Indicator LIVE

[PTO HOME](#) | [TRADEMARK](#) | [TESS HOME](#) | [NEW USER](#) | [STRUCTURED](#) | [FREE FORM](#) | [BROWSE DICT](#) | [TOP](#) | [HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) | [CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 16



UNITED STATES PATENT AND TRADEMARK OFFICE

[Home](#)

[Index](#)

[Search](#)

[System Alerts](#)

[eBusiness Center](#)

[News & Notices](#)

[Contact Us](#)

Trademark Electronic Search System(Tess)

TESS was last updated on Fri Feb 11 04:28:49 EST 2005

[PTO HOME](#)

[TRADEMARK](#)

[TESS HOME](#)

[NEW USER](#)

[STRUCTURED](#)

[FREE FORM](#)

[BROWSER DICT](#)

[BOTTOM](#)

[HELP](#)

[Logout](#)

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Record 1 out of 1

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Typed Drawing

Word Mark M2

Goods and Services IC 009. US 021 023 026 036 038. G & S: SURGE PROTECTOR ASSEMBLY UNITS CONSISTING PRIMARILY OF SURGE PROTECTORS AND GROUND FAULT PROTECTORS, USED TO PROTECT COMMUNICATION EQUIPMENT FROM OVER-VOLTAGE SURGES AND GROUND FAULTS. FIRST USE: 20010400. FIRST USE IN COMMERCE: 20010400

Mark Drawing Code (1) TYPED DRAWING

Serial Number 76195632

Filing Date January 17, 2001

Current Filing Basis 1A

Original Filing Basis 1B

Published for Opposition May 21, 2002

Registration Number 2759551

Registration Date September 2, 2003

Owner (REGISTRANT) TII NETWORK TECHNOLOGIES, INC. CORPORATION
DELAWARE 1385 AKRON STREET COPIAGUE NEW YORK 11726

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Scott Greenberg

Record

Type of Mark TRADEMARK

Register PRINCIPAL

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Indicator** LIVE

[PTO HOME](#) [TRADEMARK](#) [TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [Browse Dict](#) [TOP](#) [HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) | [CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 17



UNITED STATES PATENT AND TRADEMARK OFFICE

[Home](#)[Index](#)[Search](#)[System Alerts](#)[eBusiness Center](#)[News & Notices](#)[Contact Us](#)**Trademark Electronic Search System(Tess)***TESS was last updated on Fri Feb 11 04:28:49 EST 2005*[PTO HOME](#)[TRADEMARK](#)[TESS HOME](#)[NEW USER](#)[STRUCTURED](#)[FREE FORM](#)[BROWSER DICT](#)[BOTTOM](#)[HELP](#)[Logout](#)

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Record 1 out of 1[Check Status](#)*(TARR contains current status, correspondence address and attorney of record for this mark. Use the "Back" button of the Internet Browser to return to TESS)***Word Mark** M2

Goods and Services IC 003. US 001 004 006 050 051 052. G & S: Cosmetics, namely, skin creams and skin cleansers; skin care products, namely, lotions, creams, face and body soaps, toners, skin revitalizers and conditioners, foundations, and moisturizers; hair care products, namely, shampoos, rinses, and conditioners; personal hygiene products, namely, bath oils, bath salts, perfumes, and colognes. FIRST USE: 19980223. FIRST USE IN COMMERCE: 19980316

Mark**Drawing Code** (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS**Design Search Code** 260921**Serial Number** 75477174**Filing Date** April 30, 1998**Current Filing Basis** 1A**Original Filing Basis** 1A**Published for Opposition** December 29, 1998**Registration**

Number 2234337
Registration Date March 23, 1999
Owner (REGISTRANT) Millennium Skincare, Inc. CORPORATION NEVADA 864
Teakwood Road Los Angeles CALIFORNIA 90049
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

[PTO HOME](#)[TRADEMARK](#)[TESS HOME](#)[NEW USER](#)[STRUCTURED](#)[FREE FORM](#)[BROWSE DICT](#)[TOP](#)[HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) |
[CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 18



UNITED STATES PATENT AND TRADEMARK OFFICE

[Home](#)
[Index](#)
[Search](#)
[System Alerts](#)
[eBusiness Center](#)
[News & Notices](#)
[Contact Us](#)

Trademark Electronic Search System(Tess)

TESS was last updated on Fri Feb 11 04:28:49 EST 2005

[PTO HOME](#)
[TRADEMARK](#)
[TESS HOME](#)
[NEW USER](#)
[STRUCTURED](#)
[FREE FORM](#)
[BROWSE DICT](#)
[BOTTOM](#)
[HELP](#)
[Logout](#)

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Word Mark	M2
Goods and Services	IC 009. US 021 023 026 036 038. G & S: Computer processors and enabling software for the system optimization and management of all types of industrial machinery. FIRST USE: 20000705. FIRST USE IN COMMERCE: 20000705
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	260303 260308 260321
Serial Number	75713905
Filing Date	May 26, 1999
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	February 15, 2000
Registration Number	2462520
Registration Date	June 19, 2001
Owner	(REGISTRANT) Bently Nevada Corporation CORPORATION NEVADA 1617

Water Street Minden NEVADA 89423

Assignment Recorded ASSIGNMENT RECORDED
Attorney of Record Bernhard Kreten
Prior Registrations 1232576;1238772;1347290
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator LIVE

[PTO HOME](#)[TRADEMARK](#)[TESS HOME](#)[NEW USER](#)[STRUCTURED](#)[FREE FORM](#)[BROWSE DICT](#)[TOP](#)[HELP](#)

[HOME](#) | [INDEX](#) | [SEARCH](#) | [SYSTEM ALERTS](#) | [BUSINESS CENTER](#) | [NEWS&NOTICES](#) |
[CONTACT US](#) | [PRIVACY STATEMENT](#)

EXHIBIT 19

3 of 8 DOCUMENTS

**M2 SOFTWARE, INC., Plaintiff, v. M2 COMMUNICATIONS, L.L.C., et al.
Defendant.**

CASE NO. CV02-1588 AHM (Mcx)

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA**

281 F. Supp. 2d 1166; 2003 U.S. Dist. LEXIS 24920

August 1, 2003, Decided

August 1, 2003, Filed; August 4, 2003, Entered

SUBSEQUENT HISTORY: Affirmed in part and appeal dismissed in part by *M2 Software v. M2 Communs. L.L.C.*, 76 Fed. Appx. 123, 2003 U.S. App. LEXIS 16741 (2003)

PRIOR HISTORY: *M2 Software, Inc. v. M2 Communs., L.L.C.*, 217 F.R.D. 499, 2003 U.S. Dist. LEXIS 18936 (C.D. Cal., 2003)

DISPOSITION: [**1] Defendant's Motion for Summary Judgment GRANTED. Plaintiff's Motion for Summary Adjudication DENIED. Defendant's Motion for Summary Adjudication on issue of Damages MOOT. Defendant's request for attorneys' fees DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, a company that provided royalty tracking services, filed a motion for summary adjudication as to likelihood of confusion in its action against defendant, a producer of Christian music products, for trademark infringement, 15 U.S.C.S. § 1114, trade name infringement, Cal. Bus. & Prof. Code § 14402, and unfair competition, Cal. Bus. & Prof. Code § 17200. Defendant filed a motion for summary judgment on the likelihood of confusion issue.

OVERVIEW: Plaintiff marketed database applications and management services to the music industry. Plaintiff also marketed digital audio and video to the public at large over the Internet as well as music content on CDs, CD-ROMs, and cassettes. Defendant was an artist-based independent Christian music company that distributed

audio and video recordings featuring Christian music. The court granted defendant's motion for summary judgment, finding that no reasonable jury could conclude that there was a likelihood of forward or reverse confusion between defendant's Christian music products and the music products and business services of plaintiff. The court found that defendant's recordings would not be classified as the same genre as plaintiff's products. In making its decision, the court considered the Sleekcraft factors separately as they pertained to general consumers and the record industry. The only factor that weighed in favor of plaintiff was similarity of marks. In considering defendant's request for attorney fees, the court found that plaintiff's suit was not groundless, unreasonable, vexatious, or pursued in bad faith.

OUTCOME: The court denied plaintiff's motion for summary adjudication. The court granted defendant's motion for summary judgment. The court denied defendant's request for attorney fees.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Burdens of Production & Proof

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN1] Fed. R. Civ. P. 56(c) provides for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the

initial burden of demonstrating the absence of a genuine issue of material fact for trial. A fact is material if it could affect the outcome of the suit under the governing substantive law. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial.

Civil Procedure > Summary Judgment > Burdens of Production & Proof

[HN2] When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case. In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. Thus, summary judgment for a defendant is appropriate when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. When the moving party meets its burden, the adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. Only admissible evidence may be considered in deciding a motion for summary judgment.

Civil Procedure > Summary Judgment > Burdens of Production & Proof

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN3] In ruling on a motion for summary judgment, the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor. But the non-moving party must come forward with more than the mere existence of a scintilla of evidence. Thus, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion

Trademark Law > Likelihood of Confusion > Similarity > Appearance, Meaning & Sound > General Overview

Trademark Law > Likelihood of Confusion > Intent > General Overview

[HN4] In assessing likelihood of confusion, the court considers eight factors: (a) the strength of plaintiff's mark; (b) the relatedness of the two companies' goods or services; (c) the similarity of the marks; (d) evidence of actual confusion; (e) the marketing channels used; (f) the degree of care likely to be exercised by purchasers; (g) the likelihood of expansion of the product lines; and (h) defendant's intent in selecting the mark. To prevail on defendant's summary judgment motion, plaintiff must create a genuine issue that confusion is probable, not simply a possibility.

Trademark Law > Infringement Actions > Determinations

Trademark Law > Subject Matter > Strength Trademark Law > Federal Unfair Competition Law > General Overview

[HN5] The strength of a trademark is evaluated in terms of its conceptual strength and commercial strength. A court measures a mark's commercial strength by reference to the plaintiff's use of the mark in the marketplace.

Trademark Law > Infringement Actions > General Overview

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

[HN6] In assessing the relatedness of the goods and services of the parties in a trademark infringement action, the court considers whether the relevant consumers are likely to associate the parties' products with each other. Whether the parties compete for an "overlapping audience" is relevant to this inquiry.

Trademark Law > Likelihood of Confusion > Similarity > Appearance, Meaning & Sound > General Overview

[HN7] The determination of mark "similarity" involves consideration of the marks and names in their entirety and as they appear in the marketplace.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

[HN8] Some use of the Internet for marketing does not alone and as a matter of law constitute overlapping marketing channels for purposes of a likelihood of confusion analysis.

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

Trademark Law > Subject Matter > Recordings

[HN9] The role of the trademark in the purchase of musical recordings is generally subordinate in a

meaningful way to the purchaser's search for the artist and the composition.

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

[HN10] A strong possibility that either party may expand his business to compete with the other will weigh in favor of finding that the present use is infringing.

Trademark Law > Protection of Rights > Registration > Constructive Notice

Trademark Law > Likelihood of Confusion > Intent > General Overview

[HN11] Adopting a designation with knowledge of its trademark status permits a presumption of intent to deceive. However, even where intent is presumed, this factor loses importance where due to weakness of the mark and differences in the marks and goods, there is no infringement. This is so, because a defendant's intent is irrelevant if it has not actually committed a wrong in the first place. The intent factor is only relevant to the extent that it bears upon the likelihood that consumers will be confused by the alleged infringer's mark.

Trademark Law > Likelihood of Confusion > Consumer Confusion > Reverse Confusion

[HN12] The question in reverse confusion cases is whether consumers doing business with the senior user might mistakenly believe that they are dealing with the junior user. When evaluating reverse confusion, the court focuses on the strength of the defendant's mark, because the greater the power of the defendant's mark in the marketplace, the more likely it is to capture the minds of the plaintiff's customers. The United States Court of Appeals for the Ninth Circuit has stated that reverse confusion occurs when the smaller senior user seeks to protect its business identity from being overwhelmed by a larger junior user who has saturated the market with publicity.

Trademark Law > Infringement Actions > Remedies > Attorney Fees

Trademark Law > Infringement Actions > Remedies > Damages > General Overview

[HN13] The court in exceptional cases may award reasonable attorney fees to the prevailing party in a trademark infringement action. 15 U.S.C.S. § 1117(a). The United States Court of Appeals for the Ninth Circuit has held that this requirement is satisfied when the suit is groundless, unreasonable, vexatious, or pursued in bad faith.

COUNSEL: For M2 Software Inc, PLAINTIFF: Toula A Arvanitis-Dalpe, Toula A Arvanitis-Dalpe Law

Offices, Anaheim, CA USA.

For M2 Communications LLC, A Limited Liability Company, Jeff Moseley, an Individual, DEFENDANTS: Anthony M Keats, Larry W McFarland, David K Caplan, Keats McFarland & Wilson, Beverly Hills, CA USA.

For Gaylord Entertainment Inc, A Corporation, DEFENDANT: Mark Hayes Wildasin, Robb S Harvey, Waller Lansden Dortch & Davis, Nashville, TN USA.

For Gaylord Entertainment Inc, A Corporation, DEFENDANT: John E McOsker, Waller Lansden Dortch & Davis, Los Angeles, CA USA.

JUDGES: A. Howard Matz, United States District Judge.

OPINIONBY: A. Howard Matz

OPINION:

[*1167] ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

I.

INTRODUCTION

This matter is before the Court on cross-motions for Summary Judgment and Summary Adjudication. Defendant M2 Communications, L. [**2] L.C. ("M2 Communications") moves for Summary Judgment, arguing that no reasonable jury could conclude that there is a likelihood of confusion between Defendant's Christian music products and the music products and music business services of Plaintiff M2 Software, Inc. ("M2 Software"). On the other hand, Plaintiff moves for Summary Adjudication, arguing that no reasonable jury could *not* conclude that there is a likelihood of confusion. For the reasons provided below, Defendant's motion is GRANTED and Plaintiff's motion is DENIED. Based on the Court's rulings on the cross-motions, Defendant's motion for Summary Adjudication on the Issue of Damages is MOOT. n1

n1 On July 29, 2003, the Court Clerk provided a draft of this Order to the parties via facsimile. The deadline to request a hearing was August 1, 2003 at 1:00 p.m. Neither party requested a hearing.

II.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) [HN1] provides for summary judgment when "the [**3] pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving [*1168] party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

[HN2] "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transportation Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) [**4] (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325. Thus, "summary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'" *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 805-06, 143 L. Ed. 2d 966, 119 S. Ct. 1597 (1999) (citing *Celotex*, 477 U.S. at 322).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. Summary judgment will be entered against the non-moving party if that party does not present such specific [**5] facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.*; *Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179,

1181 (9th Cir. 1988).

[HN3] "In ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor. *Hunt v. Cromartie*, 526 U.S. 541, 552, 143 L. Ed. 2d 731, 119 S. Ct. 1545 (1999) (quoting *Anderson*, 477 U.S. at 255). But the non-moving party must come forward with more than the mere existence of a scintilla of evidence," *Anderson*, 477 U.S. at 252. Thus, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citation omitted).

III.

ANALYSIS

The facts of this case are well-known to the parties. Plaintiff's activities and products were discussed in the November 27, 2002 Order Denying Plaintiff's Motion for a Preliminary Injunction ("11/27/02 Order") and other orders issued by this [**6] Court in this case and the related cases of *M2 Software, Inc. v. Madacy Entertainment, et al.*, CVOO-2853 AHM (Mcx) ("Madacy case") and *M2 Software, Inc. v. Viacom, Inc.*, CV98-8734 AHM (Mcx) ("Viacom case"), including Judge Baird's January 4, 2002 Summary Judgment Order in the *Madacy* case. Defendant's [*1169] products and activities have been discussed in the 11/27/02 Order and other orders entered in this case. Because it appears that on this motion little evidence has been presented by either party other than what was included in the Preliminary Injunction motion decided seven months ago, n2 the Court will not devote space in this order to a rehashing of the facts. Instead, the Court incorporates by reference the facts set forth in its previous orders.

n2 Indeed, in both Plaintiff's Motion for Summary Adjudication and its Opposition to Defendant's Summary Judgment Motion, Plaintiff relies primarily on exhibits proffered on prior motions. *See* Plaintiff's Mot. at 1 n.1; Plaintiff's Opp. at 2n. 2 n.2.

[**7]

Although Plaintiff alleges eight claims for relief in its First Amended Complaint, the only issue on these cross-motions is likelihood of confusion. Plaintiff has alleged claims for trademark infringement under 15 U.S.C. § § 1114 (FAC PP 31-34), common law

trademark infringement (FAC PP 48-52), false designation of origin under 15 U.S.C. § 1125 (FAC PP 35-40); trade name infringement under Bus. & Prof. § 14402 (FAC PP 41-47); common law trade name infringement (FAC PP 53-57); unfair competition under Bus. & Prof. § 17200 (FAC PP 64-66); common law unfair competition (FAC PP 58-63) and fraudulent transfer under Civ. Code § 3439.04 (FAC PP 67-76). Both parties agree that Plaintiff's trademark infringement, trade name infringement and unfair competition claims turn on the same likelihood of confusion analysis. The false designation of origin claim also turns on likelihood of confusion. *E.g. Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir. 1985). Plaintiff's fraudulent transfer claim is no longer in this case, because it recites facts pertaining only to Defendant Gaylord Entertainment, Inc., a party [**8] this Court dismissed for lack of personal jurisdiction in January 2003. 1/27/03 Order.

[HN4] In assessing likelihood of confusion, the Court considers eight factors: (a) the strength of Plaintiff's mark; (b) the relatedness of the two companies' goods or services; (c) the similarity of the marks; (d) evidence of actual confusion; (e) the marketing channels used; (f) the degree of care likely to be exercised by purchasers; (g) the likelihood of expansion of the product lines and (h) Defendant's intent in selecting the mark. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) ("*Sleekcraft* factors"). To prevail on Defendant's Summary Judgment motion, Plaintiff must "create a genuine issue that confusion is probable, not simply a possibility." *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002) (quotation omitted).

Plaintiff believes that it has raised claims for both forward and reverse confusion; Defendant argues that the First Amended Complaint properly states claims only for forward confusion. As the Court discusses below, whether Plaintiff has properly claimed reverse confusion does not affect the outcome, because Plaintiff has [**9] not raised a genuine issue about either forward or reverse confusion.

A. Likelihood of Forward Confusion

Plaintiff's business consists of (1) music industry database applications, including the M2 Record Label Management System (RLMS); (2) providing management services to record labels, such as management of album catalogs and sales information; (3) the website "M2MUSIC.COM," which provides digital audio and video over the internet; and (4) music content on CDs, CD-ROMs, cassettes, and the internet. 11/27/02 Order at 1-2. Items (1) and (2) are marketed within the

music industry and not to the public at large. *Id.* at 2.

Defendant is an "artist-based independent Christian music company," Escamilla [*1170] Decl. in Support of Pl.'s SA Mot. ("Escamilla Decl.") Exh. 7 at 36, that distributes audio and video recordings featuring Christian music. 11/12/02 Caplan SJ Decl. Exh. 20 at 380. Defendant has jointly developed with Integrity Media, Inc., its parent company, a line of CDs and DVDs called "i Worship." The iWorship CDs include "the most popular contemporary and emerging modern Christian songs in the world." Escamilla Decl. Exh. 7 at 50. The DVDs are "designed to enhance the [**10] worshiper's experience through visuals combined with sing-along lyrics and click tracks for musicians and worship leaders." *Id.* Defendant's "M2.0" mark does not appear anywhere on the outside packaging of the iWorship double CD and DVD lodged with the Court n3 and Plaintiff has not provided any evidence that any other iWorship products or promotional materials contain the "M2.0" mark.

n3 However, Defendant's mark does appear on the last page of the booklet inside the CD packaging in which the text states that one of the songs on the album was "courtesy of M2.0." Additionally, Defendant's "M2.0" mark appears, along with 5 other marks, for approximately one second on the DVD video. 11/18/02 Escamilla Decl. Exh. 1.

Recognizing that the goods and services Plaintiff provides to the recording industry are different from the goods it sells to the general public, both Judge Baird and this Court have considered the *Sleekcraft* factors separately as they pertain to general consumers and the record industry.

(a) [**11] Strength of Plaintiff's "M2" Mark

Plaintiff argues that in a trademark infringement action, the strength of a mark is determined based solely on its conceptual strength. Because "M2" is an arbitrary or fanciful term, Plaintiff argues, its mark is deemed inherently strong and the strength inquiry must end there. This is an incorrect statement of the law. [HN5] "The 'strength' of [a] trademark is evaluated in terms of its conceptual strength *and commercial strength.*" *GoTo.com, Inc. v. Walt Disney Company*, 202 F.3d 1199, 1207 (9th Cir. 2000) (citing 2 *McCarthy on Trademarks and Unfair Competition* § 11:83 (hereinafter "*McCarthy*")) (emphasis added). A court measures a mark's commercial strength by reference to the plaintiff's use of the mark in the marketplace. *See* 2

McCarthy § 11:83 ("Many arbitrary and suggestive terms may be conceptually and inherently strong, but if they receive little publicity through only meager advertising and feeble sales, they are relatively weak marks in the place where it counts: the marketplace.").

Plaintiff contends that market strength considerations occur in dilution cases only and that it would be error to consider commercial [**12] strength in this infringement case. Plaintiff is wrong. The *GoTo.com* case was not about dilution; like this case, it was a suit for infringement under section 43(a)(1) of the Lanham Act (15 U.S.C. § 1125(a)(1)). *GoTo.com*, 202 F.3d at 1204 n. 3, 1206. Similarly, the quoted section of *McCarthy* does not pertain to dilution cases specifically, but rather to the strength of a mark generally.

Plaintiff's reliance on *Morningside Group Ltd. v. Morningside Capital Group, L.L.C.* 182 F.3d 133 (2d Cir. 1999) is unavailing. In that case, the Second Circuit held that the district court had erred in relying on the plaintiff's lack of advertising in concluding that the plaintiff's mark was weak. The court stated that the absence of advertising "need not weaken" a mark, especially where, as in that case, the plaintiff obtained recognition by consumers without the need for advertising. *Id.* at 139. The court stated that "when a claimant has no need for traditional advertising because of the nature of its market, it should not feel compelled to advertise [*1171] simply to protect its service mark." *Id.* *Morningside Group* did [**13] not hold that commercial strength is not relevant to likelihood of confusion; it held that evidence of advertising is not necessary where other indicia of commercial strength are available. See *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 632 (6th Cir. 2002) (citing *Morningside Group* and stating that not "examining whether the mark is distinctive and well-known in the general population, would shift the focus away from the key question of whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.") (emphasis added).

The facts relating to this factor are substantially unchanged from those before the Court when it ruled on the Preliminary Injunction motion. Plaintiff's "M2" mark is arbitrary or fanciful, rendering it conceptually strong. However, the commercial strength of Plaintiff's mark among general consumers is extremely weak. The evidence of Plaintiff's marketing efforts to general consumers relating to its music CD and CD-ROM products appears to consist of a few advertisements in magazines such as *Music Connection* and *BAM*. Caplan Decl. Regarding Excerpts of Escamilla's [**14] Deposition ("Caplan Decl. I") Exh. 45 at 307-312.

Plaintiff does not provide evidence that it has created or sold any new or additional CD or CD-ROM content since Judge Baird correctly found in January 2002 that Plaintiff's sales of those items were too "flabby" to warrant a finding by any reasonable trier of fact that confusion is likely. *Madacy* case 1/4/02 Order ("*Madacy* SJ") at 16. Plaintiff itself characterizes its CD and CD ROM sales as "minuscule." Plaintiff's Opp. at 5 n 3.

Plaintiff's evidence regarding its record industry consumers does raise a genuine issue about the strength of its mark in that arena, albeit barely. As it did at the preliminary injunction stage, Plaintiff claims vaguely to have engaged in "day-to-day advertising, promotion and marketing of its M2 mark to major record labels located in Los Angeles, Miami, Nashville, New York City and throughout the United States." M2 Software's Opp. at 5-6 (citing Escamilla Decl. in Support of Preliminary Inj. Mot. P 21). Plaintiff also estimates that it has expended \$ 2.75 million over the past ten years on promotional efforts in the music industry, including promotion of its mark at various music industry trade [**15] conferences, and on "securing and protecting its exclusive right to use the M2 mark." Caplan Decl. in Support of M2 Communications's SJ Mot. ("Caplan Decl. II") Exh. 2 at 30-31. After subtracting from that sum the \$ 1 million Plaintiff has previously alleged were spent on enforcement efforts, see 11/27/02 Order at 6, (which are not sufficient to show that Plaintiff's mark is strong), that leaves about \$ 1.75 million in unspecified and unproven expenditures over 10 years on promotion to record industry consumers.

Plaintiff proffers little evidence of actual sales of its record label management products and services. On these motions and on its motion for a preliminary injunction, Plaintiff has proffered a total of about 15 "Site Licensing" or "Royalty Processing" Agreements, most of which are redacted, in which Plaintiff provided its RLMS system or its record management services to customers. Most of the agreements provided are from 1997 or earlier. There is no evidence in the record about the number of customers Plaintiff currently has. n4 [*1172] Indeed, there is little indication of who Plaintiff's customers are, since customer names in the contracts are in many instances redacted. [**16]

n4 Plaintiff claims it provided a list of customer names in its Interrogatory Responses and that Defendant omitted the relevant pages of those responses from the exhibits Defendant filed in relation to these motions. But Plaintiff inexplicably did not file the allegedly omitted customer list itself.

(b) Relatedness of Products/Services

[HN6] In assessing the relatedness of the parties' goods and services, the Court considers whether the relevant consumers are likely to associate M2 Communications's products with the products and services of M2 Software. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1056 (9th Cir. 1999). Whether the parties compete for an "overlapping audience" is relevant to this inquiry. *Id.* When the Court denied Plaintiff's Preliminary Injunction motion, it considered the sparse record relating to the proximity of Plaintiff's CD-ROM products and Defendant's Christian music recordings. The Court observed that Plaintiff's musical offerings, [**17] including "acid-jazz" artists, were vastly different from Defendant's Christian music offerings and that Plaintiff had provided no evidence that consumers of its CD-ROM products would overlap with Defendant's target audience. 11/27/02 Order at 8-9. See *Q Division Records, LLC v. Q Records*, 2000 U.S. Dist. LEXIS 1773, 2000 WL 294875, *4 (D. Mass) (Stating that although both parties sold musical recordings "that is not the end of the matter, since this type of classification is so broad as to be meaningless.")

The only new evidence regarding the proximity of Plaintiff's CD-ROM products favors Defendant. Defendant proffered an expert report by Bill Conine, n5 an individual with experience in the Christian music industry, who opines that Christian music is a "niche" market that is delineated by its lyrical content. Caplan Decl. II Exh. 9 at 114 (Conine Report). Conine states that two trade associations - the Gospel Music Association and the Christian Music Trade Association - assess lyrical content to determine whether a particular product ought to be classified as Christian music for purposes of tracking its sales in a database called Christian Soundscan. *Id.* at 114-15. Conine represents that [**18] Plaintiff's CDs and CD-ROMs are not listed on Christian Soundscan and opines that the Christian Music Trade Association would not consider Plaintiff's music content as Christian music. *Id.* at 115. Thus, even if Plaintiff's products were sold in a general record store, they would be sold in a separate section from Defendant's products, *id.*, and Plaintiff's products would not be sold in the Christian bookstores where Defendant's products are primarily sold. 11/27/02 Order at 3.

n5 Plaintiff did not depose Mr. Conine, did not furnish a competing expert report or consumer study, and does not address Mr.

Conine's competence or credibility in any of its papers.

Plaintiff argues that the relevant issue is not whether its CD-ROM products are related to Defendant's products, but whether its RLMS and record label management services are related to Defendant's Christian music products. Plaintiff argues that the conceptual strength of its "M2" mark makes record industry consumers likely to associate M2 Communications's [**19] Christian music with M2 Software's record business services. No reasonable jury could come to that conclusion. Plaintiff's royalty processing products and services and Defendant's Christian music products are not complementary, not sold to the same class of purchasers and not similar in use or function. See *Walter v. Mattel, Inc.*, 210 F.3d 1108, 1111 (9th Cir. 2000).

Plaintiff appears to argue that members of record industry who work for Christian record labels will believe that Plaintiff and Defendant are affiliated, because Plaintiff has provided record label business services to Christian record labels. P1.'s Mot. at 5; [*1173] P1.'s SGI PP 114, 115. Plaintiff points out that one of its Christian label customers has a distribution agreement with "Word Entertainment," which is also M2 Communications's distributor P1. Mot. at 5 n.2 (citing 11/18/02 Escamilla Decl. Exh. 6 at 19-21). This argument does not raise a genuine issue about a likelihood of confusion. Plaintiff has proffered absolutely no evidence to indicate that this strained, narrow and limited connection makes confusion by record industry professionals probable. *Cohn*, 281 F.3d at 842 (Plaintiff [**20] must "create a genuine issue that confusion is probable, not simply a possibility.") (quotation omitted). First, that a record label to whom Plaintiff provides royalty tracking services uses the same distributor as Defendant, without more, cannot raise a genuine issue that confusion is probable among record industry professionals. Second, Plaintiff has proffered no evidence to counter Defendant's expert's statement that record industry professionals understand the difference between a company that tracks royalties and a Christian record label that provides musical content. Caplan Decl. II. Exh. 9 at 117-18 (Conine Report). Third, Plaintiff does not proffer evidence to dispute Mr. Conine's expert statement that the Christian music industry is a "close-knit business where most people either personally know or know of the significant players in the business," including Jeff Moseley, Defendant's Chief Manager, *id.* at 118; 8/23/02 Moseley Decl. P 1, and that "when record industry professionals deal with [Moseley] or M2 Communications, LLC, or the M2.0 ... record label[], they know who they are dealing with." Caplan Decl. II

Exh. 9 at 118 (Conine Report). n6

n6 What record industry professionals think when they deal with Plaintiff M2 Software is a reverse confusion issue. As the Court discusses *infra*, Plaintiff has not raised a genuine issue about reverse confusion either.

[**21]

(c) Similarity of the Marks

[HN7] The "determination of 'similarity' involves consideration of the marks and names in their entirety and as they appear in the marketplace." *Nutri/System, Inc. v. Con-Stan Indus. Inc.*, 809 F.2d 601, 605-606 (9th Cir. 1987) (citation omitted). There remains a genuine issue about whether "sight, sound and meaning," *Brookfield*, 174 F.3d at 1054, of the parties' respective marks are similar enough to engender confusion.

This is the only *Sleekcraft* factor that weighs in favor of the Plaintiff.

(d) Evidence of Actual Confusion

Nothing has changed since the Court remarked in its Order denying Plaintiff's request for a Preliminary Injunction that "while this factor is not as important as the others ... Plaintiff has not proffered a shred of evidence of actual confusion regarding either its general or record industry consumers." 11/27/02 Order at 10.

(e) Marketing Channels

For the reasons provided in the Court's Order Denying Plaintiff's Motion for a Preliminary Injunction, there is simply no evidence that the parties employ the same primary marketing channels. 11/27/02 Order at 9-10. Additionally, Plaintiff's [**22] argument that this factor weighs in its favor because both parties use the Internet is unfounded. [HN8] "Some use of the Internet for marketing ... does not alone and as a matter of law constitute overlapping marketing channels." *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002). Plaintiff has not shown that it uses its website, which appears to be geared primarily to providing music and [*1174] video content, Pl.'s Opp. at 5, as a "substantial marketing and advertising channel," *Entrepreneur Media*, 279 F.3d at 1151, for the RLMS products and label management services it provides to its record industry customers. Additionally, even if Plaintiff considers its website as a substantial marketing channel for its CD-ROM musical products, "the failure to provide any evidence of sales attributable to the website [*see* Caplan Decl. I at 127:1-128:17],

prevents the inference that this site has created recognition of the mark or the qualities of M2 Software's product lines among the general public." *Madacy* SJ at 18.

(f) Purchasers' Degree of Care

As for Plaintiff's CD-ROM products, the Court has already noted - and no evidence has [**23] been proffered to the contrary - that [HN9] "the role of the trademark in the purchase of musical recordings is generally subordinate in a meaningful way to the purchaser's search for the artist and the composition." *Sunenblick v. Harrell*, 895 F. Supp. 616, 634. *See also Tsiolis v. Interscope Records, Inc.*, 946 F. Supp. 1344, 1356 (N.D.Ill. 1996) ("Customers are motivated to purchase recordings based upon the performer, not the record label ... [and] are necessarily discriminating between musical genres."). Defendant's expert opines that, aside from "a limited number of possible exceptions," n7 Caplan Decl. Exh. 9 at 115 n. 2 (Conine Report), "it is essentially unheard of in the music business for a consumer to search for music recordings by record label." *Id.* at 115. Mr. Conine opines that general market retailers organize products by musical genre, *id.* at 114, and that Defendant's Christian recordings would not be classified as the same genre as Plaintiff's CD-ROMs. *Id.* at 115.

n7 Plaintiff challenges Conine's conclusion by pointing out that amazon.com has a "label stores" area which lists albums by record label. The "label stores" contain only a limited number of famous labels, such as Deutsche Grammophon, Blue Note and Motown Records. It does not list Plaintiff's or Defendant's labels. Plaintiff does not dispute Defendant's expert's contention that "purchasers of Christian music recordings in particular make purchasing decisions based on the artist or the style of music, and not the record label." Caplan Decl. II Exh. 9 at 116 (Conine Report).

[**24]

For Plaintiff's record business products and services, Plaintiff has not provided any evidence to rebut Defendant's expert's opinion, supported by case law, that record industry professionals know the difference between a company that provides royalty tracking services and a label that provides Christian music products. Caplan Decl. II Exh. 9 at 118 (Conine Report); *Q Division Records*, 2000 U.S. Dist. LEXIS 1773, [WL] at *5 ("[Record] industry insiders ... are presumed to be

quite sophisticated."). Moreover, Plaintiff's royalty management products and services are expensive (according to a 2001 contract Plaintiff proffered, the annual fee was \$ 17,000 for 2001 and 2002, Caplan Decl. I. at 239) and even a one-time decision to purchase Plaintiff's services creates an ongoing relationship with Plaintiff. There is no indication that a record label considering entering into a services or software licensing contract with Plaintiff lasting a year or more would not consider carefully the origin and nature of Plaintiff's services before entering into such a contract.

Plaintiff's citation to *Television Enterprise Network, Inc. v. Entertainment Network, Inc.*, 630 F. Supp. 244, 247 (D.N.J. 1986), [**25] does not alter the analysis. On a Preliminary Injunction motion in that case, the Court noted that "deals [in the television business] are cut over the telephone and through signatures on form contracts. There need be no prolonged negotiations, no personal visits, no personal services." *Id.* This, Plaintiff argues, weighs against a finding that record industry professionals [*1175] display care as consumers of products or services such as those of Plaintiff or Defendant. However, there is no evidence before the Court that (a) when Defendant M2 Communications makes deals with other record labels (if it makes such deals at all), those deals involve form contracts and lack prolonged negotiations, personal visits and the like; or (b) that this is the manner in which Plaintiff deals with its record label customers.

(g) Likelihood of Expansion

[HN10] "A strong possibility that either party may expand his business to compete with the other will weigh in favor of finding that the present use is infringing." *Sleekcraft*, 599 F.2d at 354. Mr. Escamilla, the President of M2 Software, has testified that he is interested in developing web content in the rock, techno, metal, pop and [**26] jungle music genres. Pl.'s SGI PP 68-69. Plaintiff has not demonstrated that it intends to expand into Defendant's Christian music genre, nor that consumers believe that this is the case. Similarly, there is no evidence that Defendant intends (or that consumers believe that Defendant intends) to expand into music genres other than Christian music.

Plaintiff argues, citing Defendant's current "iWorship" multimedia offerings, that "consumers will perceive that Defendant will ... expand into ... interactive software offerings in an intersecting field." Pl.'s Opp. at 23. It is unclear what "intersecting field" Plaintiff is talking about. If Plaintiff means CD-ROM products, that categorization is too broad to be meaningful. Even if Defendant is likely to produce CD-ROM products in the future, there is no evidence that they would have anything

other than a Christian theme, which is outside the realm of Plaintiff's CD-ROM products. If by "intersecting field" Plaintiff means royalty processing software applications, there is absolutely no evidence that Defendant intends -- or that record industry consumers perceive that Defendant intends - to expand into this field. Contrary to Plaintiff's [**27] implication, that Integrity Media, Inc., Defendant's parent company, sells software, 5/29/03 Escamilla Decl. Exh. 7 at 36 (Integrity Media, Inc.'s 2002 10-K filing), says nothing about Defendant's likelihood of expansion.

(h) Defendant's Intent in Selecting the Mark

[HN11] "Adopting a designation with knowledge of its trademark status permits a presumption of intent to deceive." *Interstellar Starship Services, Ltd v. Epix, Inc.*, 184 F.3d 1107, 1111 (9th Cir. 1999) (citing *Brookfield*, 174 F.3d at 1059). Plaintiff argues that the constructive notice its trademark registration served is sufficient to infer such knowledge on Defendant's part. *See Id.* But see 3 *McCarthy* § 23:109 ("The existence of constructive notice [of a plaintiff's registration] is not evidence that a later user necessarily intended to confuse."). However, even if intent must be presumed in this case, this factor "loses importance" where "due to weakness of the mark and differences in the marks and goods, there is no infringement." *Id.* § 23:107. This is so, because a Defendant's intent is irrelevant if it has not actually committed a wrong in the first place. *Id.* As [**28] discussed above, other than the similarity of the marks, nearly all of the *Sleekcraft* factors strongly favor the Defendant. Therefore, even if Defendant intended to capitalize on Plaintiff's goodwill, the Court finds that no reasonable jury could conclude that there is a likelihood of forward confusion between Plaintiff's products and services and Defendant's products. *See Brookfield*, 174 F.3d at 1059 ("This [intent] factor is only relevant to the extent that it bears upon the likelihood that consumers will be confused by the alleged infringer's mark.").

The above analysis leads to the conclusion that no reasonable juror could conclude [*1176] that members of the public generally or record industry consumers are likely to believe that there is an "affiliation, connection, or association" between Plaintiff's goods and services and Defendant's goods, or that Defendant's goods originate from, are sponsored by or are approved by Plaintiff. 15 U.S.C. § 1125(a)(1)(A). Accordingly, Defendant's Motion for Summary Adjudication on forward confusion is GRANTED and Plaintiff's Motion for Summary Adjudication on this same claim is DENIED.

B. Likelihood [**29] of Reverse Confusion

[HN12] "The question in [reverse confusion] cases

is whether consumers doing business with the senior user might mistakenly believe that they are dealing with the junior user." *Walter*, 210 F.3d at 1110 (9th Cir. 2000) (quoting *Dreamwerks Prod. Group, Inc. v. SKG Studio*, 142 F.3d 1127, 1130 (9th Cir.1998)). When evaluating reverse confusion, the Court focuses on the strength of M2 Communications's mark, because "the greater the power of [M2 Communications's] mark in the marketplace, the more likely it is to capture the minds of [M2 Software's] customers." *Id.* at 1130 n. 5. Indeed, the Ninth Circuit has stated that reverse confusion occurs when "the smaller senior user ... seeks to protect its business identity from being overwhelmed by a larger junior user who has saturated the market with publicity." *Cohn*, 281 F.3d at 841.

No reasonable jury could find reverse confusion in this case, because Plaintiff has provided no evidence that M2 Communications "saturated the market" with publicity. Plaintiff argues that upon encountering Plaintiffs music business products, a record label executive "may [**30] simply assume that [Defendant] has expanded into providing ... record label management services." P1.'s Reply at 5. However, this assertion does not establish that confusion is "probable, not simply a possibility," *Cohn*, 281 F.3d at 842, among "an appreciable number" of consumers. *Entrepreneur Media*, 279 F.3d at 1151. The evidence is that Defendant publicizes products in the Christian music market by advertising in Christian publications, Christian music conferences and the like. There is no evidence that Defendants marketing efforts are so extensive, in that area or any other area, that such efforts likely would cause a record industry professional to believe that Defendant has expanded into the royalty processing business. Similarly, there is no evidence that Defendant publicized its "M2.0" mark in the Christian music market to such an extent that a general Christian music consumer would believe that Defendant had expanded into the non-Christian music genres in which Plaintiff's CD-ROM products and website fall. *Compare Dreamwerks*, 142 F.3d at 1130 (Defendant DreamWorks SKG had a "famous mark" that "casts a long shadow."); *Cohn*, 281 F.3d at 839, 841 [**31] (Court found that "extensive advertising" by Defendant Petsmart, a national chain of pet supplies stores, "[gave] it the ability to overwhelm any public recognition and goodwill that Cohn [had] developed.").

C. Defendant's Request for Attorneys' Fees

[HN13] "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a). The Ninth Circuit has held that this requirement is satisfied when the suit is "groundless,

unreasonable, vexatious, or pursued in bad faith." *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1156 (9th Cir. 2002) (quoting *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 881 (9th Cir. 1999)). The Court declines to award attorneys' fees in this case.

First, although Plaintiff's actions in this litigation have on occasion been misguided, [*1177] the Court cannot find with the requisite confidence that Plaintiff pursued this action in bad faith. Second, the Court does not find that Plaintiff's suit was wholly "groundless" or "unreasonable." This is not a situation where Plaintiff sued on an invalid trademark registration for a generic term and without admissible evidence [**32] for a good faith belief that infringement was occurring. *E.g. K-Jack Engineering Co. v. Pete's Newsrack, Inc.*, 1980 U.S. Dist. LEXIS 16677, 209 U.S.P.Q. 386, 387 (C.D. Cal. 1980). Nor is there evidence of an ulterior competitive motive. 5 *McCarthy* § 30:101 at 30-196 to 30-197.

Defendant argues that the Court ought to award attorneys' fees, because "Plaintiff blindly pursued this action while taking no steps to fulfill its burden." Dft.'s Reply at 21-22. Defendant notes that Plaintiff did not depose Defendant's managing agent and experts, chose not to conduct any third party discovery and did not conduct a survey regarding likelihood of confusion. First, Plaintiff *did* conduct a survey, albeit a poorly designed one and focused on another case, that included questions about Defendant's "M2.0" mark. 8/26/02 Madacy Mot. *in limine* No. 2 Exh. B-1 Q.8 (*Madacy* case). That the Court granted a motion *in limine* in that case to exclude the survey on the basis of its poor design does not warrant penalizing Plaintiff again by awarding attorneys' fees. Second, Plaintiff's discovery failures are partly the reason Plaintiff was unable to raise a genuine issue on [**33] these motions. That Plaintiff lost its case is a sufficient sanction for its sloppy discovery conduct.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment n8 is GRANTED and Plaintiff's Motion for Summary Adjudication on the Issue of Likelihood of Confusion n9 is DENIED. Defendant's Motion for Summary Adjudication on the issue of Damages is MOOT. n10 Defendant's request for attorneys' fees is DENIED.

n8 Docket No. 145.

n9 Docket No. 150.

n10 Docket No. 154.

Defendant shall lodge a proposed Judgment consistent with this Order by not later than August 8, 2003.

IT IS SO ORDERED.

DATE: August 1, 2003

A. Howard Matz

United States District Judge

EXHIBIT 20

CONFIDENTIAL

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

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M2 SOFTWARE, INC., a Delaware)
corporation,)
Opposer,) Opposition
vs.) No. 91151549
M2 AUTOMOTIVE, INC., a California) VOLUME I
corporation,)
Applicant.)

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THIS TRANSCRIPT IS CONFIDENTIAL
PURSUANT TO PROTECTIVE ORDER

Deposition of DAVE ESCAMILLA,
taken at 633 West Fifth Street,
Los Angeles, California, commencing
at 11:23 A.M., Thursday, July 3, 2003,
before Harry Hansen, CSR No. 4907.

spherion
deposition services
700 South Flower Street, Suite 1050
Los Angeles, CA 90017
Voice: 213-385-4000 / 800-722-1235
Fax: 213-389-8514
Email: depos@spherion.com

APPEARANCES OF COUNSEL:

- 1
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FOR THE OPPOSER:

DAVE ESCAMILLA
 (IN PROPRIA PERSONA)
 M2
 1247 Lincoln Boulevard
 Suite 456
 Santa Monica, California 90401
 (310) 399-2728

FOR THE APPLICANT:

LATHAM & WATKINS LLP
 BY: MANUEL A. ABASCAL, ESQ.
 633 West Fifth Street
 Suite 4000
 Los Angeles, California 90071-2
 (213) 485-1235

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DAVE ESCAMILLA,

having been first placed under oath, testified as follows:

EXAMINATION

BY MR. ABASCAL:

Q. All right, Dave, tell me your background, where did you go to school, what's your education.

A. You want specifics?

Q. Where did you go to college?

11:23 AM

A. I went to Stanford undergrad and Wharton graduate school.

Q. When did you graduate?

A. 1987 from Stanford and 1991 from Wharton.

Q. What did you do after you graduated?

11:23 AM

A. Started M2.

Q. What does M2 do?

A. A wide variety of projects.

Q. Go ahead and describe it.

A. Just initially I wanted to object to this deposition on the grounds that I was provided unreasonable notice to schedule an attorney to represent me here today. I intended to have an attorney here to defend this deposition.

11:24 AM

You gave me approximately 48 hours to find

11:24 AM

CONFIDENTIAL

1 one and I was unable to get one in that short a
2 time.

3 Q. Do you want to go forward or not?

4 A. Well, I'm objecting to the deposition on
5 those grounds.

11:24 AM

6 Q. Okay. Well, you may have to make a
7 decision. Do you want to stop the deposition and
8 consult with an attorney or do you want to go
9 forward without your attorney?

10 A. It's really up to you. I think it's --
11 The onus is on you to schedule the deposition in an
12 appropriate amount of time. I shouldn't have to
13 reschedule my own schedule based on your delay.

11:24 AM

14 Q. Okay. So I'll interpret what you're
15 saying to me as you're willing to go forward without
16 an attorney today. And so since you're saying it's
17 up to me, I'm going to go ahead and go forward.

11:24 AM

18 But if you want an attorney and you want
19 to stop the deposition to consult an attorney, then
20 you need to tell me. Because otherwise I'm going to
21 interpret it as not a request to stop the
22 deposition.

11:25 AM

23 A. Well, do we have any other alternate dates
24 before the deadline?

25 Q. I'm not going to negotiate with you on it.

11:25 AM

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1 If you want to stop the deposition and you want an
2 attorney present, you may have to make that call. I
3 can't advise you about it. And it's not my call to
4 decide whether or not you want an attorney present.
5 That's your call.

11:25 AM

6 I've noticed the deposition, you're here,
7 and I'm going to go forward unless you say "I'm not
8 going to go forward." So it's your call.

9 A. Well, I'm not going to reappear. I've
10 already taken the time off, I've stayed in town
11 specifically for this deposition. So if I go, then
12 I'm not going to reappear.

11:25 AM

13 Q. Then I'm going to go forward.

14 A. Okay. So for the record, I have an
15 objection on the basis of unreasonable notice.

11:25 AM

16 Q. Okay. But for the record I'm interpreting
17 you as saying you're willing to go forward without
18 your attorney. Because you're here and you're
19 willing to go forward.

20 So, you know, when it's later on you say I
21 wish I had an attorney present, it's clear on the
22 record that you didn't walk away.

11:26 AM

23 A. But I am objecting.

24 Q. I mean it's one thing to object and then
25 continue and it's another thing to walk out the

11:26 AM

CONFIDENTIAL

1 room. Your feet do the talking.

2 When you saying, Manny, I'm going to do
3 this deposition without an attorney, then, you know,
4 you can walk out. It's your call. It's on the
5 record. Your call. Either you walk out or you 11:26 AM
6 stay. And if you stay, I'm going to depose you.
7 It's your call.

8 So you let me know. You want to call your
9 attorney, feel free. We can take a break and you
10 can call your attorney. 11:26 AM

11 A. Well, that's part of the problem, I
12 haven't had a chance to get in touch with an
13 attorney in 48 hours.

14 Q. Well, you went to Wharton, you're a smart
15 guy, you can make the call. It's your call. 11:26 AM

16 A. I'm making the call that I'm not going to
17 reappear another time. So for your benefit I'm
18 going to stay here and take my deposition pursuant
19 to my objection.

20 Q. Okay, great. So you'll stay here. 11:26 AM

21 And I take it that you're not objecting to
22 me asking your deposition without your attorney
23 present?

24 A. That's what I'm objecting to.

25 Q. Well, I'm going to continue asking the 11:27 AM

CONFIDENTIAL

1 deposition. You're trying to play both sides of the
2 game, and I'm not going to let you do it.

3 I'm going to ask you questions. And if at
4 any time you feel you can't answer the question
5 without an attorney present or you want an attorney 11:27 AM
6 present, then you should walk out the room. And you
7 should say this deposition is not going forward.

8 A. I don't want to waste your time and my
9 time. I'm going to go forward with the deposition.
10 But I want my objection noted for the record that 11:27 AM
11 reasonable notice wasn't provided.

12 So let's proceed.

13 Q. So in 1991 you leave Wharton, you start
14 M2.

15 What was M2 when you started it, what were 11:27 AM
16 you intending to start, the type of business?

17 A. The same business that I did start, which
18 is a music industry firm with a technology
19 orientation.

20 Q. What does that mean? 11:27 AM

21 Explain more. Music industry firm. What
22 product are you selling or service are you selling?

23 A. One of the products is a music database
24 application used by major record labels and music
25 publishers. 11:28 AM

CONFIDENTIAL

1 Q. Music data applications is what you said?

2 A. You want to reread it.

3 Q. You can just tell me.

4 What was it? Say it again.

5 A. Do you want to reread. 11:28 AM

6 MR. ABASCAL: I don't want it reread. But
7 if he needs to remind himself what his product is,
8 that's fine.

9 (The preceding answer was read as follows:

10 "Q. One of the products is a 11:28 AM
11 music database application used by
12 major record labels and music
13 publishers?")

14 BY MR. ABASCAL:

15 Q. So what does a database application do? 11:28 AM

16 A. Does a variety of functions, some of them
17 include tracking songs, albums, artists, recording
18 contracts, and paying royalties based upon sales
19 information for the album catalog.

20 Q. Who is it targeted to, which customers? 11:29 AM

21 Studios or talent, for example?

22 A. General music industry.

23 Q. Do you divide it between segments in the
24 music industry, do you go after the studios, the
25 producers, the publishers or the talent or the 11:29 AM

CONFIDENTIAL

1 consumer?

2 A. I attend music industry trade shows for
3 this product that are attended by the whole
4 cross-section of the music industry, from artists to
5 producers to executives to consumers. 11:29 AM

6 Q. All right, let's try it this way.
7 Which consumers are most likely to
8 purchase your product, is it the studios, is it the
9 record labels, is it the consumer that listens to
10 music, is it the talent that produces it? 11:29 AM

11 A. All of the above.

12 Q. All of the above. Okay.

13 A. Yes.

14 Q. So somebody like me could use it to
15 organize my CDs and royalties? 11:30 AM

16 A. Other products that M2 produces somebody
17 like you could use.

18 Q. Let's break it down then.

19 So you've got a database product. Who is
20 really the targeted customer for the database 11:30 AM
21 product?

22 A. Music industry products.

23 Q. I take it not the music consumer, not the
24 person who listens to music?

25 A. The person that listens to music is 11:30 AM

CONFIDENTIAL

1 exposed to our advertising and to our marketing for
2 this product.

3 Q. But are they likely to purchase it, is
4 that who you really want to buy your database
5 products?

11:30 AM

6 A. Again, music industry firms purchase the
7 product.

8 Q. All right.

9 But the general music consumer not
10 receiving any royalty payments are not the people
11 you're targeting for this database product; correct?

11:30 AM

12 A. That is not entirely correct.

13 Q. So you want to sell this product to the
14 general music consumer?

15 A. No. But I market the trademark in ads
16 that sell this product in periodicals and trade
17 shows that reach the general public.

11:30 AM

18 Q. I'm not talking about who would see your
19 advertising. I'm talking about who you are trying
20 to sell to.

11:31 AM

21 Are you trying to sell your database
22 product to the person who just buys a CD and has no
23 other involvement in the music industry?

24 A. The person that just buys the CD is a
25 target of our advertising and marketing, but they

11:31 AM

10

CONFIDENTIAL

1 are not the ones that license or have licensed in
2 the past the music database application.

3 Q. Okay. Perfect.

4 A. Other than the database applications that
5 are included on the web.

11:31 AM

6 Q. Okay. All right. That's helpful.

7 Let's focus on the database that's not
8 included on the web.

9 The database not on the web and that's not
10 targeted to the general music listening public but
11 that's targeted to somebody else, who is that
12 product targeted to?

11:32 AM

13 A. Well, again you're saying "targeted" which
14 implies marketed to. And it's marketed to the
15 entire music industry.

11:32 AM

16 Q. Then I won't try to use those words.

17 The database product that's not marketed
18 on the web, who is your target customer for that
19 product?

20 A. It's the same answer.

11:32 AM

21 Q. Okay. Let's try it this way.

22 The database product that's not on the
23 web, who are the customers that are buying that from
24 you?

25 Describe the general nature of the

11:32 AM

CONFIDENTIAL

1 customer that buys that product.

2 A. Traditionally that product has been
3 licensed by music industry firms.

4 Q. And which firms?

5 A. Well, generally record labels and music 11:32 AM
6 publishers.

7 Q. Don't tell me generally, tell me
8 specifically.

9 Who are the music publishers and labels?

10 A. Our customer list is confidential. 11:32 AM

11 Q. Well, we have a confidentiality agreement.

12 A. I understand.

13 Q. And you refuse to provide that
14 information?

15 A. I'm providing the class of customers, 11:33 AM
16 which is the extent I'm obliged to provide under the
17 trademark manual.

18 Q. So you don't think you're required to
19 provided the specific names?

20 A. I know I'm not. 11:33 AM

21 Q. And you're refusing to provide them today?

22 A. Based on my objection as to trade secret
23 customer lists.

24 Q. So then how are you comfortable describing
25 them?

11:33 AM

12

CONFIDENTIAL

1 You're saying they are music industry
2 publishers and studios?

3 A. Music industry firms including record
4 labels and music publishers.

5 Q. Music industry firms including record 11:33 AM
6 labels and publishers. Okay.

7 That's the database product that's not on
8 the web?

9 A. That's correct.

10 Q. Any other class of customer that purchases 11:33 AM
11 that product other than those two?

12 A. Traditionally, no. In the past those --
13 The first firms that I've described as the
14 customers for that product.

15 Q. I want to pin you down. 11:34 AM

16 You say traditionally no. Any exceptions
17 to the tradition other than those two segments?

18 A. Well, I say traditionally because the
19 marketing has been of the general consumer. And now
20 that general consumers are downloading songs off of 11:34 AM
21 the web, that's a natural zone of expansion for the
22 product.

23 Q. Okay. But the -- Let's not focus on the
24 database on the web. That's not on the web.

25 A. That's the product. 11:34 AM

CONFIDENTIAL

1 Q. It's the same product, your database is
2 now on the web?

3 A. No.

4 Q. So the database that's not on the web, are
5 general consumers buying that product now? 11:34 AM

6 A. I'm saying it's marketed to an audience
7 that includes general consumers and as a zone of
8 expansion general consumers are included.

9 Q. That's not my question.

10 I'm asking are they buying it, who is 11:34 AM
11 buying it. You say traditionally the music
12 publishers are buying, and I, rather than limit your
13 answer to traditionally, I want to know specifically
14 who is else is buying it.

15 A. That's my answer. 11:35 AM

16 In the past music publishers, record
17 labels, and other music industry firms have licensed
18 that database.

19 Q. And now who else is doing it, other than
20 in the past, anybody else doing it, anybody else 11:35 AM
21 participate in purchasing it?

22 A. Well, other than in the past implies the
23 future, is that what you're implying?

24 Q. Up to the present. I don't want to limit
25 your answer. 11:35 AM

CONFIDENTIAL

1 A. Up to the present. That's my answer.

2 Q. Great.

3 So that's a database product not on the
4 web. What's the name of that product, do you have a
5 specific product name for it? 11:35 AM

6 A. The main product is the M2 Record Label
7 Management System.

8 Q. What has been your sales for the M2 Record
9 Label Management Systems since the creation of the
10 product in annual revenues? 11:36 AM

11 A. Off the top of my head, I know that
12 revenues have been over 1.5 million.

13 Q. In the history of the product or per year
14 or how are you describing it?

15 A. I would say roughly over the past eight 11:37 AM
16 years or so.

17 Q. Over the past eight years. So 1.5 million
18 total over the past eight years?

19 A. Yes.

20 Q. About how many customers have purchased 11:37 AM
21 licenses for this product?

22 A. I'm not exactly sure because the licenses
23 apply to several customers per license. But I would
24 estimate the licenses cover thousands of record
25 albums, tens of thousands of songs, and 11:38 AM

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1 approximately twenty music industry firms.

2 Q. How many customers, how many licenses have
3 you sold?

4 A. Well, that's my point, the licenses apply
5 to several firms. So for the firms, licenses that 11:39 AM
6 have applied to approximately thirty firms.

7 Q. Let's explore that.

8 So you described the different types of
9 licenses that you offer with this product.

10 A. This type of product is licensed through a 11:39 AM
11 site license agreement.

12 Q. Okay. And so with the site license, I
13 assume that the company then can allow many people
14 within that company to use the software; correct?

15 A. Depending on the license. 11:39 AM

16 Q. How many site licenses have you sold since
17 the history of the product?

18 A. I'm not sure off hand.

19 Q. How can we find that out?

20 You want to make a phone call or some 11:40 AM
21 documents with you that will tell you?

22 A. No.

23 Q. We asked for documents about that.

24 Do you have some documents somewhere that
25 you didn't produce that would have that information? 11:40 AM

CONFIDENTIAL

1 A. I think I responded to your document
2 requests in opposer's responses. If you want to
3 pull that out, then I'll examine it.

4 Q. Well, I didn't see it in there.

5 Do you have documents at your firm that 11:40 AM
6 would have the number of site licenses that you sold
7 since the inception of the product?

8 A. I may.

9 Q. Those weren't produced. Do you know why?

10 A. Again, my responses are in my answers to 11:41 AM
11 your request for production.

12 Q. Okay. Is it more than thirty site
13 licenses or less than thirty?

14 A. Less than thirty.

15 Q. So when you say an estimate of thirty 11:41 AM
16 firms have used your product, I take it that some
17 firms -- multiple firms may have used it under one
18 site license; correct?

19 A. The nature of the music industry is
20 conglomerate firms, so one site license may apply to 11:41 AM
21 20 percent of the entire music industry, so there
22 are several firms that may be covered under one
23 license.

24 Q. I'm trying to focus on your estimate of
25 about thirty firms. 11:41 AM

CONFIDENTIAL

1 A. So what I'm saying, kind of deceptive, can
2 cover a large number of the music industry. But may
3 be a small number of site licenses because of the
4 conglomerate nature of the music industry.

5 Q. Let's estimate how many site licenses you 11:42 AM
6 have since you don't know specifically --

7 A. Roughly twenty.

8 Q. Roughly twenty?

9 A. Yes.

10 Q. Are they all still active or have some 11:42 AM
11 expired?

12 A. They are perpetual licenses.

13 Q. Do you get a stream of revenue in addition
14 to the original license fee?

15 A. Yes. 11:42 AM

16 Q. Have you sold any site licenses to any
17 insurance companies?

18 A. I believe some of the license fees are
19 affiliated with insurance companies.

20 Q. Have you sold it directly, putting aside 11:42 AM
21 any affiliations, directly to any insurance
22 companies?

23 A. I have to examine the corporate structure
24 of the licensees to give you an answer on that.

25 Q. You don't know as you sit here today 11:43 AM

CONFIDENTIAL

1 whether you've sold to any insurance companies?

2 A. The licensees may include insurance
3 companies as divisions or subsidiaries or other
4 affiliates.

5 Q. Pitting aside, again, affiliates, 11:43 AM
6 divisions, subsidiaries, have you sold directly to
7 any insurance companies any site licenses for the M2
8 Record Label Management System, to your knowledge?

9 A. Again, I would have to examine the
10 corporate structure. 11:43 AM

11 Q. So you don't know?

12 A. I don't know.

13 Q. Have you sold any on-site licenses for the
14 M2 Record Label Management System to any automobile
15 insurance companies, to your knowledge? 11:43 AM

16 A. Again, they may be affiliated, but the
17 conglomerate's net license.

18 Q. Have any insurance companies or automobile
19 insurance companies signed your site licenses, to
20 your knowledge? 11:44 AM

21 A. Again, when an executive of a conglomerate
22 signs a license, that --

23 Q. So you don't know?

24 A. -- may apply to an insurance company or an
25 automobile insurance company. 11:44 AM

CONFIDENTIAL

1 Q. Have you sold any M2 Record Label
2 Management System site license to any automotive
3 repair shops?

4 A. It's the same answer. I would have to
5 check the conglomerate nature of the licensees to 11:44 AM
6 see if they include repair shop divisions.

7 Q. Have you sold it to any automobile repair
8 firms?

9 A. Same answer.

10 Q. Have you sold it to any automotive parts 11:44 AM
11 companies?

12 A. Same answer.

13 Q. Have you ever negotiated with any person
14 that represented themselves to be in the automotive
15 industry with respect to the sales of an M2 Record 11:44 AM
16 Label Management System site license?

17 A. That's kind of a hard question to answer
18 because some of the conglomerates do business with
19 automobile companies in terms of sponsoring,
20 compilations, from NASCAR or some other 11:46 AM
21 organizations. And I can't give a definitive answer
22 without seeing the products that my licensees have
23 sponsored.

24 Q. Yes, you can. You're not answering the
25 question. 11:46 AM

CONFIDENTIAL

1 The question is:

2 Have you ever negotiated with someone that
3 represented themselves to you to be someone who is
4 in the automobile insurance business or the
5 automobile repair business or the automotive 11:46 AM
6 industry in general?

7 Representations to you. So you would have
8 heard them.

9 The question is not about conglomerates or
10 affiliates or something that you would have never 11:46 AM
11 heard of.

12 A. I'm not sure.

13 Q. You don't know.

14 So it's possible that someone may --
15 someone may have talked to you from the automotive 11:47 AM
16 industry to purchase your Record Label Management
17 software?

18 A. Again, because the conglomerate nature of
19 our customers, it's possible.

20 Q. Has nothing to do with the conglomerate 11:47 AM
21 nature of the customer, as I've repeated to you.

22 A. That's argumentative.

23 Q. Representations to you.

24 Has anybody represented to you that they
25 are in the automotive industry when they are 11:47 AM

CONFIDENTIAL

1 negotiating over site licenses?

2 A. I can't think of a specific instance right
3 now, but it's possible.

4 Q. It's possible. All right.

5 Does the M2 Record Label Management System 11:48 AM
6 have any application to the automotive repair
7 industry?

8 A. That's kind of vague. Can you be more
9 specific?

10 Q. I think it's a fairly straightforward 11:49 AM
11 question. You can answer it.

12 A. Can you repeat it.

13 (The pending question was read
14 as follows:

15 "Q. Does the M2 Record Label
16 Management System have any
17 application to the automotive
18 repair industry?")

19 THE WITNESS: Yes, in a way,

20 BY MR. ABASCAL: 11:50 AM

21 Q. How so? Explain.

22 A. First of all, it's based on a database
23 management system that is used by the automotive
24 repair industry within their own applications.

25 Q. You have to describe that more carefully. 11:50 AM

CONFIDENTIAL

1 It's based on a system that's used in the automotive
2 industry, what do you mean by that?

3 A. It's based on a database management system
4 that's used in the automotive industry.

5 Q. What is that? 11:51 AM

6 A. An Oracle database management system.

7 Q. And how do you know that Oracle is used in
8 the automotive industry?

9 A. From my understanding of applications that
10 are used in the automotive repair business, 11:51 AM
11 including claims applications for the insurance
12 companies.

13 Q. So the fact that you use an Oracle
14 database you think makes your product applicable and
15 useful for the automotive industry, is that what 11:51 AM
16 you're saying?

17 A. I merely answered your question.

18 Q. Is that what you're saying, you think it's
19 based on the fact that you use Oracle, does that
20 make your product applicable to the automotive 11:51 AM
21 industry and useful for that industry?

22 A. Some of the underlying code would
23 certainly be useful.

24 Q. Okay.

25 Your product, as you describe in part, 11:52 AM

CONFIDENTIAL

1 manages or helps track royalty payments for record
2 labels in the music industry.

3 How can an automotive repair collision
4 business use a product like that?

5 A. Again, the underlying database management 11:52 AM
6 application could be used by the automotive repair
7 industry.

8 Q. So the automotive repair industry can use
9 the Oracle database system; correct?

10 A. Yes. 11:52 AM

11 Q. Can they use your system, your Record
12 Label Management System, for tracking automotive?

13 A. In some cases.

14 Q. And what would those cases be?

15 A. For example, if they, automobile 11:53 AM
16 manufacturers, put out a compilation disk, which is
17 becoming more common, of a CD or other musical
18 prerecorded products, they would find it useful to
19 track the sales and the royalties and the payments
20 to the publishers using an M2 System. 11:53 AM

21 Q. So if an automotive insurance company,
22 automobile insurance company, or an automotive
23 repair business, did not put out any music
24 whatsoever, could they conceivably use your M2
25 Record Label Management System for the business? 11:53 AM

CONFIDENTIAL

1 A. Yes.

2 Q. How?

3 A. The intellectual property assets of that
4 class of firm could be tracked using the system with
5 appropriate royalties and distributions paid to the 11:54 AM
6 intellectual property owners.

7 Q. What if they had no intellectual property
8 and were receiving no royalties from the licensing
9 of that property, could they use it?

10 A. Well, for example, even a trademark is a 11:54 AM
11 piece of intellectual property that could be royalty
12 bearing.

13 Q. What if they are receiving no royalties --
14 that's my question -- could they use your system to
15 track royalty payments? 11:55 AM

16 A. Yes.

17 Q. How so?

18 A. You don't need to be receiving royalties,
19 only in a position to compensate the intellectual
20 property holder. 11:55 AM

21 Q. Have you ever tried to sell your M2 Record
22 Label Management System to an automobile insurance
23 repair company?

24 A. It's been advertised and marketed in
25 forums and periodicals that reach members of that 11:56 AM

CONFIDENTIAL

1 industry.

2 Q. Okay.

3 Have you ever tried to sell through direct
4 negotiations or contact your M2 Record Label
5 Management System to any automobile insurance 11:56 AM
6 company?

7 A. I think that goes back to your earlier
8 question. That would require me to see the
9 corporate structure of the conglomerates to see if
10 that included a division or subsidiary that was part 11:57 AM
11 of the automobile insurance industry.

12 Q. Okay. Putting aside any affiliates, any
13 conglomerate, subsidiaries, did you ever directly
14 deal with a customer that you were aware of was an
15 automobile insurance company? 11:57 AM

16 A. Maybe you can be more specific with a
17 specific name and I can answer your question.

18 Q. I will later. But my question now is:
19 Have you ever dealt with, putting aside
20 any subsidiaries that you're not aware of, any 11:57 AM
21 conglomerates that you're not aware of, any
22 affiliates, have you ever directly dealt with a
23 potential customer, direct negotiations, not
24 advertisements, not marketing, that was an
25 automobile insurance company? 11:57 AM

26

CONFIDENTIAL

1 A. If you can mention the names, I can answer
2 your question. Otherwise it's vague because of the
3 conglomerate nature of my licensees.

4 Q. I'm going to repeat the question again.
5 And if you refuse to answer, you have to say you 11:58 AM
6 refuse to answer it.

7 Have you ever dealt with a company
8 directly, through personal negotiations, you on the
9 phone, for example, where you understood, this is
10 now your understanding, that the company was an 11:58 AM
11 automobile insurance company?

12 A. I can't recall a specific conversation.

13 Q. Okay.

14 Same question as to automobile repair and
15 collision shops. 11:59 AM

16 A. Can you repeat the question.

17 Q. Sure.

18 Have you ever dealt directly through
19 personal negotiations with a potential customer that
20 you understood to be an automobile repair business? 11:59 AM

21 A. Can you provide any names?

22 Q. I'm asking about your understanding of a
23 company. So you can -- You're the only one that can
24 answer it. Your understanding of whether the
25 customer you're dealing with was an automotive 12:00 PM

CONFIDENTIAL

1 repair business.

2 A. My understanding is that some of the
3 conglomerates that I've licensed are widely
4 diversified, and it wouldn't surprise me if that
5 diversification included automobile industry 12:01 PM
6 divisions.

7 Q. Again, the question is your understanding.
8 Were you ever dealing with a customer
9 directly, putting aside conglomerates, putting aside
10 affiliates, that you understood at the time that 12:01 PM
11 you're dealing with them that they are an automobile
12 repair business, your understanding?

13 Take your time.

14 A. One of those licensees is BMG. And it's
15 my understanding that they are a very diversified 12:03 PM
16 company. And I believe they have some affiliation
17 with NASCAR.

18 Q. Do you think NASCAR is an automobile
19 repair company?

20 A. I believe it's within the industry. 12:03 PM

21 Q. My question was automobile repair.
22 So anybody else that is possibly in the
23 automobile repair business other than NASCAR, the
24 race car company?

25 And take your time. 12:03 PM

CONFIDENTIAL

1 Will the transcript reflect how much time
2 he's taking?

3 THE REPORTER: The transcript will have
4 timestamps.

5 THE WITNESS: You've asked very broad 12:04 PM
6 questions that require that I think back over twelve
7 years' business.

8 BY MR. ABASCAL:

9 Q. Just answer the question.

10 A. It's not proper to rush me in answering 12:04 PM
11 the question.

12 Q. I'm not rushing you. I said take all the
13 time you need.

14 A. I'm trying to think of some major
15 automobile repair chains. It might help if you 12:05 PM
16 mention some and I could tell you if they were
17 related to any of my negotiations.

18 Q. Okay, I'm not going to do that.

19 I want you to tell me your understanding
20 of whether any of your customers were automobile 12:05 PM
21 repair businesses, your understanding. And if the
22 answer is "I don't understand any to be," then so be
23 it.

24 Your understanding.

25 A. Well, my understanding, which is what I've 12:05 PM

CONFIDENTIAL

1 stated, is that my licensees are widely diversified.
2 And so I can't point to specific instances, but it's
3 likely that that includes the class of customer that
4 you're referring to.

5 Q. You haven't stated that before. But let's 12:06 PM
6 try it again.

7 A. I have.

8 Q. Your understanding, were any customers
9 that you were directly dealing with, were they
10 people in the automotive repair business, putting 12:06 PM
11 aside affiliates, putting aside conglomerates,
12 putting aside any subsidiaries, were the persons you
13 were dealing with across the table from you in
14 personal negotiations for site license of the M2
15 Record Label Management System, was that person an 12:06 PM
16 employee or representative of an automobile repair
17 business?

18 Your understanding. I'm not going to give
19 you a list.

20 A. That's a hard question to answer because 12:07 PM
21 the individual that I sit across the table from in
22 negotiation is sometimes the general counsel for the
23 entire conglomerate. And so they may be involved in
24 one of the diversified businesses, even if -- even
25 if I can't think of a specific name. 12:07 PM

CONFIDENTIAL

1 Q. But to your knowledge, your understanding,
2 they weren't an automobile repair business company;
3 right?

4 A. My understanding, again, is that the
5 general counsel for a conglomerate is a 12:08 PM
6 representative for a diverse section of businesses.

7 Q. Okay. If you don't want to answer the
8 question, we'll move on.

9 Tell me about your other products. You've
10 got M2 Record Label Management System, what other 12:08 PM
11 products does M2 Software sell?

12 A. The M2 Music Publisher Management System
13 is licensed as a module of the M2 Record Label
14 Management System.

15 Q. M2 Music Publisher Systems, that's a 12:09 PM
16 module of the M2 Record Label Management System?

17 A. No. It's the M@ Music Publisher
18 Management System.

19 Q. And that is a module of what?

20 A. Of the M2 Record Label Management System. 12:09 PM

21 Q. Okay. And that's sold to the same
22 customers and through the same process --

23 A. Yes.

24 Q. -- I take it; correct?

25 Okay. 12:09 PM

CONFIDENTIAL

1 In order for someone to buy the M2 Music
2 Publisher Management System they have to first buy
3 the M2 Record Label Management System, I take it;
4 correct?

5 A. When you say buy, I think you mean 12:10 PM
6 license.

7 Q. Yes, correct.

8 A. And right now that's the only way that
9 that product is licensed.

10 Q. Correct. Because it's a module of the 12:10 PM
11 Record Label Management System; right?

12 A. Yes.

13 Q. So you need the management system for the
14 record label, I should say -- Let me strike that.

15 You need the Record Label Management 12:10 PM
16 System in order to be able to use the Music
17 Publisher Management System?

18 A. As we sit here today, you would need to
19 license the former to be able to license the latter.

20 Q. Great. 12:10 PM

21 What other products does M2 sell, products
22 or services?

23 A. M2 has also provided record label content
24 products.

25 Q. Such as what? 12:12 PM

CONFIDENTIAL

1 A. Prerecorded music.

2 Q. Okay.

3 What else?

4 A. Distributed on CD, CD-ROM, the Internet.

5 Q. All right.

12:12 PM

6 Anything else, any other record label
7 content products?

8 A. Others have been distributed on cassette
9 and floppy disk.

10 Q. What other products does M2 Software sell? 12:13 PM

11 A. M2 also provides record label services.

12 Q. Such as what?

13 A. Generally administration services for
14 record labels.

15 Q. Okay.

12:14 PM

16 What types of administrative services?

17 A. For example, M2 has maintained contract
18 data briefs, album catalogs, song catalogs, and
19 sales information for major record labels. And has
20 provided reports and royalty statements to recording 12:15 PM
21 artists, producers, music publishers, and other
22 parties on behalf of the record labels.

23 Q. All right.

24 Any other products other than the Record

25 Label Management System, Music Publisher Management 12:15 PM

CONFIDENTIAL

1 System, record label content products, record label
2 services, any other products or services?

3 A. There's another module called the M2 Sales
4 Gateway. That's licensed or that has been licensed
5 with the M2 Record Label Management System. 12:17 PM

6 Q. Okay.

7 Any other products or services other than
8 the five that we've mentioned so far?

9 A. I'm constantly working on new products.

10 Q. Okay. 12:17 PM

11 Any that you've sold to customers other
12 than the five that you've mentioned so far?

13 A. Not that I can think of right now.

14 Q. What have been M2 Software's sales since
15 its inception? 12:18 PM

16 A. A number that I know that the company
17 surpassed is 1.5 million. I'm not sure exactly how
18 much above that number M2 has earned to date.

19 Q. Okay.

20 You said earlier that 1.5 million was the 12:18 PM
21 total sales for the Record Label Management System.

22 But then you described four other products, two of
23 which were admittedly modules of the Record Label
24 Management System.

25 What I want to know, what your total sales 12:18 PM

CONFIDENTIAL

1 from all the products over the past eight years,
2 what are the total sales for all five products over
3 the last eight years for M2 Software?

4 A. I think the 1.5 million was the floor for
5 all products. The floor number. Meaning that I'm 12:19 PM
6 certain that M2 surpassed that number. I'm not sure
7 about how much.

8 Q. Let's talk about the ceiling, then, if you
9 don't know the exact number.

10 And I take it as you sit here today you 12:19 PM
11 don't know the exact number of your total sales for
12 the last eight years?

13 A. The ceiling would be 500,000 above that.
14 So between 1.5 million and 2 million.

15 Q. So your total sales for all products and 12:19 PM
16 services?

17 A. And I should note this testimony is
18 protected. I would like to designate it protected
19 under our --

20 Q. No problem. 12:19 PM

21 A. -- confidentiality order.

22 Q. So agreed.

23 So your total revenue, M2 Software's total
24 revenue since its inception is somewhere between 1.5
25 million and 2 million from all products and 12:20 PM

CONFIDENTIAL

1 services?

2 A. That's correct.

3 Q. What have been your total expenses during
4 that period?

5 A. I'm not sure. 12:20 PM

6 Q. Can you give me an estimate?

7 A. I really don't know off the top of my
8 head.

9 Q. All right, let's try it another way.
10 Is it more than 1.5 million to 2 million? 12:20 PM

11 In other words, have you lost money or
12 have you made money?

13 A. I'm really not sure.

14 Q. You don't know if you've lost money or
15 made money? 12:20 PM

16 A. I know that M2 has invested over a million
17 dollars in enforcing the M2 trademark.

18 Q. I'm not talking about enforcing the
19 trademark.

20 A. That's expenses. 12:20 PM

21 Q. What have been your total expenses for M2
22 Software between its inception to date?

23 A. And I'm saying the legal enforcement
24 expenditures have been over a million.

25 Q. I'm not asking about legal. 12:21 PM

CONFIDENTIAL

1 A. That's the primary expense, is the
2 enforcement of the M2 trademark. So I know that the
3 total expenses have been over 1 million.

4 Q. So there's a floor, I take it, of
5 \$1 million, you know your expenses are at least 12:21 PM
6 \$1 million?

7 A. Yes.

8 Q. Let's try to get a ceiling.
9 What do you think is the maximum estimate
10 of your expenses, not just legal bills, but also 12:21 PM
11 software development, rent, your salary, all the
12 other stuff?

13 A. I'm not sure.

14 Q. So you don't know if you made money or
15 lost money? 12:21 PM

16 A. Not as we sit here.

17 Q. How can you find that out?

18 A. Well, I'll object to it on the basis that
19 it's irrelevant and confidential.

20 Q. How can you find it out if you were going 12:21 PM
21 to go back and figure out how much money you made?

22 A. I'm objecting on the basis it's
23 irrelevant.

24 Q. So you refuse to answer?

25 A. That's correct. 12:22 PM

CONFIDENTIAL

1 Q. Okay.

2 Do you have any -- Who owns M2 Software?

3 A. I do.

4 Q. Do you have any co-owners?

5 A. No.

12:22 PM

6 Q. You're the sole owner.

7 Do you prepare financial statements?

8 A. No. Other than tax.

9 Q. On your annual taxes have you shown a gain
10 or a loss?

12:22 PM

11 A. Depends on the year.

12 Q. Well, let's go through the whole history
13 of the business.

14 Since the beginning of your business, if
15 you added up the years wherein on your taxes you
16 lost money and on your taxes you made money, what
17 would be the result --

12:22 PM

18 A. I'm objecting to this line of questioning.
19 I've given you my total revenues which I'm obligated
20 to give you, a range. But I'm objecting to specific
21 confidential information concerning profit.

12:22 PM

22 Q. Has M2 Software ever repaired anybody's
23 automobile for a fee?

24 A. I have personally repaired my motorcycle.

25 Q. Did you pay yourself?

12:23 PM

CONFIDENTIAL

1 A. Indirectly.

2 Q. Has M2 Software ever, other than repairing
3 your motorcycle, M2 Software ever repaired anybody's
4 automobile for a fee?

5 A. No. 12:23 PM

6 Q. Let's talk about your advertisements.

7 We asked for documents regarding your
8 advertisements. And you produced some documents to
9 us.

10 Did you produce all of the copies of all 12:23 PM
11 advertisements that M2 Software has ever purchased?

12 A. Can I see those?

13 Q. Well, try to answer my question first.

14 Did you produce all of the documents that
15 M2 -- all the advertisements that M2 has ever 12:24 PM
16 purchased?

17 A. Off the top of my head, I would have to
18 respond that our responses are set forth in the
19 document.

20 Q. But were those responses complete? 12:24 PM

21 Did you go and find all the advertisements
22 that you've ever purchased and produce them?

23 A. Again, it was set forth in the responses
24 to the applicant's request for production.

25 Q. Okay. I want you to answer today, though, 12:24 PM

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1 putting aside what you said before.

2 Did you produce all of the documents in
3 your possession that constitute advertisements by M2
4 Software?

5 A. I'd have to review my responses to tell. 12:24 PM

6 Q. Did you do a diligent search for all the
7 documents?

8 I assume you did.

9 A. I'd have to review my responses. If you
10 have my -- 12:25 PM

11 Q. I'm not talking about your responses.
12 Once you got our document request did you
13 then do a diligent search for all of your
14 advertisements for M2 Software that were in your
15 possession. 12:25 PM

16 Talking about a search, not for the
17 documents.

18 Were you diligent when you searched for
19 documents?

20 A. I was diligent in responding to 12:25 PM
21 production.

22 Q. Okay.

23 I'm going to show you now Exhibit 1. I
24 don't have extra copies. He'll have it in his
25 transcript. Which is an advertisement in Billboard 12:25 PM

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1 1994 International Buyers Guide, 35th edition.

2 A. Are we marking this?

3 Q. Yes. Marking it Exhibit 1.

4 (Deposition Exhibit 1 was
5 marked for identification and is
6 annexed hereto.)

12:26 PM

7 BY MR. ABASCAL:

8 Q. This is Exhibit 1.

9 Is that -- Drawing your attention to the
10 bottom, which has --

12:26 PM

11 A. This actually had two pages on top of it.

12 Q. Would you like the whole thing marked?

13 Happy to do that.

14 A. If you don't mind.

15 Q. Sure.

12:26 PM

16 A. So I can see the date and things like
17 that.

18 Q. Sure.

19 All right.

20 Is that an advertisement that you
21 purchased for M2 Software?

12:26 PM

22 A. Yes.

23 Q. And what is that advertisement selling,
24 which of your products?

25 A. This advertisement is promoting the M2

12:27 PM

CONFIDENTIAL

1 brand and logo, the M2 logo. And it's promoting the
2 M2 Record Label Management System and is promoting
3 the M2 trade name.

4 Q. Okay, great.

5 Is this the only ad you purchased in 12:27 PM
6 Billboard magazine?

7 A. No.

8 Q. How many more ads did you purchase in
9 Billboard magazine?

10 A. The listing as a trade name was renewed 12:27 PM
11 annually at no cost because I purchased the
12 advertisement in that first annual edition.

13 Q. Okay. Well, let's back that up.

14 This is the Billboard -- Exhibit 1 is a
15 Billboard 1994 International Buyer's Guide; correct? 12:28 PM

16 A. Yes.

17 Q. And I take it this must come out every
18 year?

19 A. Can I have a look at --

20 Q. Sure. 12:28 PM

21 A. I believe that it's an annual guide.

22 Q. All right.

23 And you say you purchased an ad in every
24 year's guide; is that correct?

25 A. M2 has had a listing in subsequent years' 12:29 PM

CONFIDENTIAL

1 guides subsequent to 1994.

2 Q. But perhaps not an ad, just a listing?

3 A. A listing for the M2 name.

4 Q. Any other advertisements in any other

5 Billboard publication that you're aware of? 12:29 PM

6 A. Not that I can think of.

7 Q. I'm going to show you Exhibit 2.

8 (Deposition Exhibit 2 was

9 marked for identification and is

10 annexed hereto.) 12:29 PM

11 BY MR. ABASCAL:

12 Q. And this is a portion of -- Well, I'll put
13 the whole thing together -- of Music Connection, two
14 pages from Music Connection's. Looks like July 19th
15 edition. Appears to be an M2 advertisement, "Rock 12:29 PM
16 n' Roll. Interactive."

17 Do you see that?

18 A. Yes, this is July 19th, 1999.

19 Q. What are you -- Is that an advertisement
20 that you purchased? 12:30 PM

21 A. Yes.

22 Q. Have you purchased other advertisements in
23 Music Connection magazine?

24 A. Yes.

25 Q. What are you selling there, or what are 12:30 PM

CONFIDENTIAL

1 you advertising there in that advertisement.

2 Let me -- What product or service are you
3 advertising?

4 A. Well, the primary graphic is the large M2
5 oval logo. It's also advertising the Internet 12:30 PM
6 venture and the other record label content ventures.

7 Q. You say in the advertisement at the bottom
8 "Seeking music and video content."

9 What did you mean by that?

10 A. Part of the advertisement indicates that 12:31 PM
11 M2 is creating new interactive music products, the
12 record label content products I described earlier.
13 As a part of the marketing of those products the
14 company looks for music to include in the product.

15 Q. Have you -- Can I have the exhibit back. 12:31 PM

16 Have you purchased other advertisements in
17 Music Connection magazine?

18 A. Yes.

19 Q. Okay.

20 Hand you now -- 12:32 PM

21 A. Did you want to mark the other
22 advertisement?

23 Q. No.

24 Hand you now --

25 A. For the record, shall we say what the date 12:32 PM

CONFIDENTIAL

1 is.

2 Q. For what?

3 A. Of the second Music Connection.

4 Q. No. You can do that at your deposition.

5 But it's my deposition. I don't need to ask you. 12:32 PM

6 Now that you mention it, how many ads in
7 total did you purchase in Music Connection magazine,
8 just two?

9 A. Yes.

10 Q. Handing you now what's marked as 12:32 PM

11 Exhibit 3, which is a portion of Bam magazine.

12 (Deposition Exhibit 3 was
13 marked for identification and is
14 annexed hereto.)

15 BY MR. ABASCAL: 12:33 PM

16 Q. Do you see that?

17 Is that an advertisement that you
18 purchased?

19 A. Yes.

20 Q. Did you purchase any other advertisements 12:33 PM
21 for M2 Software in Bam magazine?

22 A. This is an advertisement for M2, the
23 wordmark alone, as opposed to M2 Software.

24 Q. Did M2 Software purchase any other
25 advertisements in Bam magazine? 12:34 PM

CONFIDENTIAL

1 A. Not that I can recall.

2 Q. Okay. Can I have that back.

3 I'll take you up on your suggestion. I'm
4 handing you Exhibit 4.

5 And Exhibit 4, I take it, is the other 12:34 PM
6 advertisement that you purchased in Music Connection
7 magazine; is that correct?

8 A. Yes.

9 (Deposition Exhibit 4 was
10 marked for identification and is 12:34 PM
11 annexed hereto.)

12 BY MR. ABASCAL:

13 Q. There were no other advertisements in
14 Music Connection magazine?

15 A. Not that I can think of right now. 12:34 PM

16 Q. So we've gone through three
17 advertisements, M2 Billboard Buyer's Guide plus
18 their anniversary edition, the two ads in Music
19 Connection magazine, and the Bam, the ad in Bam
20 magazine. 12:35 PM

21 Has M2 Software purchased any other
22 advertisements --

23 A. Yes.

24 Q. -- in any other magazines?

25 A. Yes. 12:35 PM

CONFIDENTIAL

1 Q. Which ones?

2 A. Off the top of my head, I can think of
3 Spin magazine.

4 Q. All right. Is that the music magazine?

5 A. It's kind of a lifestyle music magazine. 12:35 PM

6 Q. The popular one that's on the newsstands
7 that people would recognize; correct?

8 A. Yes.

9 Q. How many advertisements have you purchased
10 in Spin magazine? 12:35 PM

11 A. One.

12 Q. Have you purchased any other
13 advertisements for M2 Software?

14 A. Yes.

15 Q. Where else? 12:35 PM

16 A. Off the top of my head, I can think of
17 other ads in the M I D E M, M I D E M, Conference Guide.

18 Q. Okay. Anything else?

19 A. Well, at that conference I had a booth at
20 one time. It's a music industry conference attended 12:37 PM
21 by the industry as well as consumers.

22 Q. Any other advertisements?

23 A. Yes.

24 M2 had an advertisement in Guitar Player
25 magazine. 12:37 PM

CONFIDENTIAL

1 Q. Okay. How many?

2 A. One.

3 Q. About when was that advertisement?

4 A. That was taken out in late '97, I believe.

5 And then I think it ran in early '98.

12:38 PM

6 Q. Any other advertisements?

7 A. Yes.

8 Q. Where?

9 A. The M2 brand has been advertised on the

10 Internet.

12:38 PM

11 Q. Which web site?

12 A. Amazon, for example.

13 Q. All right. Where else?

14 A. M2music.com. And a variety of domains

15 containing the wordmark M2.

12:39 PM

16 Q. What other domains?

17 A. M2rock.com. M2pop.com. M2techno.com.

18 M2metal.com. Metal, M E T A L as opposed to medal.

19 And M2jungle.com. And M2software.com.

20 Q. Any other advertisements that you're aware of purchased by M2 Software? 12:40 PM

22 A. Yes.

23 I distributed probably thousands of
24 business cards bearing the M2 logo oval. All of the

25 stationery bears the M2 oval logo. Fax

12:40 PM

48

CONFIDENTIAL

1 transmissions bearing the M2 oval logo. E-mail
2 transmissions bearing the M2 oval logo.

3 Voice mail into the company uses the M2
4 wordmark. Virtually all correspondence or
5 interaction with the public or consumers uses the M2 12:41 PM
6 mark, advertises the M2 mark.

7 Q. Anything else?

8 A. The mark's advertised as a graphic on
9 product packaging.

10 Q. What products? 12:41 PM

11 A. All of those that I've outlined for you.

12 Q. On the packaging?

13 A. And on the record label content products.
14 And of the services and of the web sites.

15 Q. Anything else? 12:42 PM

16 A. The M2 mark's used as a part of the trade
17 name, so on all business transactions there's
18 effectively an advertisement for the M2 mark with
19 the bank, insurance companies, with anybody that M2
20 does business with. 12:42 PM

21 Q. Okay.

22 Anything else?

23 A. M2's received publicity in national
24 newspapers.

25 Q. Which ones? 12:42 PM

CONFIDENTIAL

1 A. For example, the Washington Post.

2 Q. When?

3 A. On at least one occasion that I'm aware of
4 in 2002.

5 Q. Okay. Anything else? 12:43 PM

6 A. That's all I can think of right now.
7 Although I may be missing some advertisement.

8 Q. Understood.

9 Let me ask you a couple more questions and
10 we'll take a quick lunch break, if you don't mind. 12:43 PM

11 Focusing solely on the advertisements that
12 appeared in periodicals, and not any of the other
13 things that you called advertising, such as the
14 packaging, the correspondence, the business
15 transactions, but focusing solely on the 12:43 PM
16 periodicals, to your knowledge have any of those
17 advertisements used the words "automobile,"
18 "automobile insurance," or "automobile repair"?

19 A. There may have been those towards other
20 advertisements within the same periodicals, but not 12:44 PM
21 within M2's specific advertisements.

22 Q. Not within your advertisements; correct,
23 the M2 Software's advertisements?

24 A. Again, within the same periodicals those
25 words may have appeared, but not within the M2 12:44 PM

CONFIDENTIAL

1 advertisements.

2 MR. ABASCAL: It's about 12:39. We can go
3 off the record.

4

5 (The luncheon recess was taken
6 at 12:44 P.M.)

7

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CONFIDENTIAL

1 APPEARANCES OF COUNSEL:

2 (P.M. SESSION)

3

4 DAVE ESCAMILLA, (In Propria Persona)

5

6 MANUEL A. ABASCAL, ESQ.

7

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REPORTED BY:

23

24

HARRY HANSEN, CSR No. 4907

25

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1 (The deposition of DAVE ESCAMILLA
2 was reconvened at 1:27 P.M.)

3
4 DAVE ESCAMILLA,
5 having been previously placed under oath, testified
6 further as follows:

7
8 EXAMINATION (CONTINUING)

9 BY MR. ABASCAL:

10 Q. All right. 01:26 PM

11 All set?

12 A. Yes.

13 Q. Let me go back to this conglomerate thing
14 that we spent a lot of time on this morning.

15 Going back to all of your customers that 01:27 PM

16 you've ever done business with for any of your five
17 principal products, are you aware that any of those
18 customers have an affiliate, subsidiary, or other
19 relationship with an automobile insurer, an

20 automobile repair company, or any other part of 01:27 PM
21 automotive industry?

22 A. Since some of the products are sold to the
23 general public, it's entirely possible that some of
24 the consumers were participants in the automobile
25 industry. 01:28 PM

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1 Q. I'm not asking you about possibilities.
2 I'm asking about your awareness, your state of mind.

3 A. Well, for example, the Amazon sales, the
4 identity of the purchasers isn't disclosed to the
5 manufacturer.

01:28 PM

6 Q. Right. So that would mean you're not
7 aware.

8 So talk about your awareness.

9 Are you aware of any of your customers
10 that are in any way affiliated with the automobile 01:28 PM
11 insurance, automobile repair, or automotive industry
12 in any way?

13 Your awareness.

14 A. Isn't this the same as the prior
15 questioning this morning? 01:28 PM

16 Q. I don't think so.

17 A. My answer is the same.

18 Q. Well, I didn't ask you this before.

19 Your awareness.

20 Are you aware of any of your customers 01:29 PM
21 having any affiliation whatsoever with the
22 automobile insurance, automobile repair, or
23 automotive industry in anyway?

24 A. I think I've already answered that.

25 Q. Well, then answer it again. 01:29 PM

54

CONFIDENTIAL

1 A. I indicated that, for example, BMG is
2 involved with NASCAR, to my knowledge.

3 And I've always indicated that it's my
4 understanding that some of the customers whose
5 identity I do know, for example, the conglomerates, 01:29 PM
6 it's my understanding that they are diversified
7 businesses that are likely involved in automobile
8 businesses as well.

9 Q. Again, opinion. Not asking about
10 possibilities, not likeliness. 01:29 PM

11 I want to know specific cases where you're
12 aware of them being involved through affiliates,
13 subsidiary, or some other relationship, with an
14 automobile insurers, automobile repair company, or
15 other company in the automotive industry. 01:29 PM

16 And you've told me one, NASCAR. I want to
17 know any other examples.

18 A. I'd have to review the conglomerates. I
19 couldn't tell you off the top of my head.

20 Q. So as you sit here today you're not aware 01:30 PM
21 of any other than NASCAR?

22 A. I'm aware that the licensees are a
23 diversified company. That's my awareness. At the
24 time I was negotiating I was aware of that fact as
25 well. 01:30 PM

CONFIDENTIAL

1 Q. But you're not aware -- You're not aware
2 as you sit here today of any of your customers being
3 affiliated in any way with any automotive industry
4 company other than the affiliation mentioned earlier
5 with BMG and NASCAR? 01:30 PM

6 A. No, I wouldn't say that.

7 Q. Okay. What other examples of customers,
8 your customers, tell me any other customers of yours
9 that are somehow affiliated in some way in an
10 automobile insurance company, in an automotive 01:30 PM
11 repair company, or other company in the automotive
12 industry.

13 A. As just one example, I'm aware that
14 automobile companies license popular music to
15 advertise their cars and therefore pay royalties to 01:31 PM
16 some of the licensees that use M2 systems.

17 Q. Okay.
18 That's one relationship. One example.
19 Give me another example.

20 I want all examples in which your clients, 01:32 PM
21 your customers at M2 Software are somehow affiliated
22 with the automotive repair, insurance, or general
23 automotive industry.

24 A. As another example, virtually all of the
25 executives in the Los Angeles area music industry 01:32 PM

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1 commute to work and pass automotive repair signs
2 such as your client's M2 Automotive on the freeway.

3 Q. So they drive cars, they commute in their
4 cars.

5 What other relationships do your clients 01:32 PM
6 have with the automotive industry?

7 A. And the advertising of the automobile
8 repair brand of the applicant is directed at those
9 parties.

10 Q. Okay. 01:33 PM

11 So what other relationships do your
12 clients have with the automobile insurance, repair
13 industry -- or repair industry?

14 A. I'm sure there's several examples that I
15 can come up with, but that's all I can think of. 01:33 PM

16 Q. As you sit here today?

17 A. Right now.

18 Q. And I take it if you had more time you
19 would be able to think of more?

20 A. I would. 01:33 PM

21 Q. How much more time do you need?

22 A. Well, there's an infinite number of
23 possibilities that my clients and the individuals
24 who license M2 systems are involved with the
25 automobile industry. 01:33 PM

CONFIDENTIAL

1 Q. But no more --

2 A. It's a broad industry. It's a very broad
3 industry.

4 Q. But no more that you can think of right
5 now?

01:33 PM

6 A. Well, if I had time and spent time with
7 this question, of course I could.

8 Q. All right.

9 How many employees does M2 Software have?

10 A. I'll object to that as confidential trade 01:34 PM
11 secret information.

12 Q. All right.

13 We've got a protective order, I think you
14 can tell me.

15 A. I'll also object as irrelevant. 01:34 PM

16 Q. Are you going to refuse to answer?

17 A. Yes.

18 Q. How many offices do you have?

19 A. Same objection.

20 Q. And you also refuse to answer? 01:34 PM

21 A. Yes.

22 Q. Do you advertise on any billboards?

23 A. Can you be more specific?

24 Q. Do you, M2 Software-- Has M2 Software ever
25 advertised on any billboards?

01:34 PM

CONFIDENTIAL

1 A. Can you define billboard?

2 Q. I think I would refer you to the general
3 understanding of what a billboard is.

4 Do you not understand that term billboard?

5 A. It can mean a variety of different -- 01:35 PM

6 Q. Well, what meanings does it have to you?

7 Why don't we start with that.

8 What does billboard mean to you?

9 A. A posting of an advertisement.

10 Q. On what? 01:35 PM

11 Is that it, the definition of billboard to
12 you?

13 A. Yes.

14 Q. Let me define billboard for you, since
15 apparently it confuses you. 01:35 PM

16 By billboard, I mean an advertisement
17 that's outdoors, that can be seen from an
18 automobile, that is fairly large, on top of a
19 structure that's, say, can be as high as twenty to
20 thirty feet, and is what's commonly understood by 01:36 PM
21 many people as a billboard, that are all throughout
22 Southern California.

23 Now with that definition, has M2 Software
24 ever purchased an advertisement on a billboard?

25 A. No. 01:36 PM

CONFIDENTIAL

1 Q. Let's talk about your mark now, the M2
2 mark.

3 A. I should just qualify that to say that
4 doesn't mean or that M2 would never purchase
5 billboard space for the M2 logo. 01:36 PM

6 It's really a question of expansion and
7 cost.

8 Q. I'm going to refer to the M2 mark that
9 you've registered as your M2 mark. Does that make
10 sense to you, when I refer to your M2 mark? 01:37 PM

11 You understand that that's the M2
12 trademark you filed for August 30th, 1994 and was
13 registered October 31st, 1995; is that fair?

14 A. Are you referring to the wordmark?
15 Why don't you call it the M2 wordmark. 01:37 PM

16 Q. Okay.
17 Is there some other mark that you have
18 other than the M2 wordmark?

19 A. Yes.

20 Q. Which other? 01:37 PM

21 A. For example, the M2 oval logo.

22 Q. Okay. When did you register that?

23 A. It's registered as a part of the M2
24 wordmark because the registration allows a -- or
25 rather does not restrict use of the mark within any 01:38 PM

CONFIDENTIAL

1 particular design.

2 Q. Have you registered any other marks other
3 than the M2 wordmark that you're describing, in
4 other words, have you obtained a straight
5 registration for your M2 logo?

01:38 PM

6 A. Not other than as are contained in the M2
7 wordmark registries.

8 Q. Okay. And that's the registration that
9 was effective October 31st, 1995, or I should say
10 that's the registration date of October 31st, 1995;
11 correct?

01:38 PM

12 A. We can just refer to it by the reg number
13 to be clear.

14 Q. Okay. All right, that's fine.

15 Reg number 1931182; is that correct?

01:38 PM

16 A. Yes.

17 Q. Now isn't it true when you registered that
18 mark, you indicated to the TTAB that the mark was
19 registered in class 009 for computer software;
20 correct?

01:39 PM

21 A. I would need to see the application.

22 Q. You don't recall what class you registered
23 your mark in?

24 A. Not offhand. I'm not looking at the
25 document, you are.

01:39 PM

CONFIDENTIAL

1 Q. Did you register the mark in any class
2 relating to automobiles?

3 A. I'll object that's a vague and ambiguous
4 question.

5 Q. So you refuse to answer it? 01:39 PM

6 A. No, I'm just stating my objection.

7 Q. Okay. Then answer.

8 A. And with that objection, the class in
9 which it is registered is associated on at least
10 some level with automobiles. 01:40 PM

11 Q. The computer software class?

12 A. Yes.

13 Q. How do you believe it's affiliated or
14 associated with automobiles?

15 A. For example, there could be automotive 01:40 PM
16 software registered in the same class.

17 Q. Okay.

18 Did you register your trademark for the M2
19 wordmark in class 12 titled "Automobiles and
20 Structural Parts Therefore"? 01:41 PM

21 A. Do you have a copy of the registration?

22 Q. You know, I don't. But I want to ask you
23 from your recollection, do you have -- did you
24 register it class 12?

25 A. I think the registration would describe 01:41 PM

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1 that.

2 Q. Did you intend to register it in class 12?

3 A. I think the registration would show that.

4 Q. It wouldn't show your intent.

5 Did you intend to register is in class 12? 01:41 PM

6 A. I don't think the class had any relevance
7 other than a designation provided by the Trademark
8 Office.

9 Q. I'm not asking about your opinion about
10 relevance. I'm asking do you intend to register it 01:41 PM
11 in class 12?

12 A. I intended to register a unique mark that
13 I came up with. And to what class that applied to
14 is a legal question.

15 Q. No. I'm asking about your intent. 01:41 PM

16 Did you intend to register it in class 12?

17 A. Again, I intended to register it to the
18 fullest protection. The legal conclusion is
19 improper for a deposition.

20 Q. So you're refusing to answer? 01:42 PM

21 A. I am answering it.

22 I intended to register it to the fullest
23 degree possible.

24 Q. Did you intend to register it in class 37,
25 automobile body repair and finishing? 01:42 PM

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1 A. I intended to register the mark to the
2 fullest degree that the Lanham Act would allow.

3 MR. ABASCAL: Go off the record for a
4 minute.

5 (Recess taken.) 01:42 PM

6 MR. ABASCAL: We'll go back on.

7 Q. You produced this document to us. And for
8 the record, it's M2P-00018. We'll mark it as
9 Exhibit next in order.

10 (Deposition Exhibit 5 was 01:45 PM

11 marked for identification and is
12 annexed hereto.)

13 BY MR. ABASCAL:

14 Q. Do you see that document?

15 A. Yes. It's a photograph of the applicant's 01:45 PM

16 M2 logo painted on the wall without any additional
17 words. Of an office of the applicant.

18 Q. Who took that photo?

19 A. I don't know.

20 Q. How did you get it? 01:45 PM

21 A. I think it's probably attorney-client.

22 Q. So you're going to object to that on
23 attorney-client privilege?

24 A. Yes.

25 Q. Who is your attorney? 01:45 PM

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1 A. I'm not going to discuss anything related
2 to attorney-client.

3 Q. You're not going to tell me the name of
4 your attorney, you think that's attorney-client
5 privilege? 01:45 PM

6 A. To the extent that they are not named in
7 this litigation, it is. They haven't appeared. And
8 therefore all discussions are attorney-client
9 privileged.

10 Q. Did you take that photo? 01:46 PM

11 A. No.

12 Q. Did you tell someone to take that photo?

13 A. No.

14 Q. Did you tell someone to go on to my
15 client's property and take that photo? 01:46 PM

16 A. No.

17 Q. How did you get it?

18 A. Again, it's confidential. You're asking
19 for case information.

20 Q. So you refuse to answer based on an 01:46 PM
21 objection of attorney-client with an attorney that
22 you haven't told us what his or her name is; is that
23 correct?

24 A. I'm also objecting on the basis that it
25 seeks work product. 01:46 PM

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1 Is that the correct term?

2 Q. I'm not going to give you advice. State
3 whatever objection you want.

4 Okay. I'm going to ask some questions
5 about your responses to our interrogatories. 01:48 PM

6 And I'm happy to mark it as an exhibit.
7 You think I'll need this as an exhibit?

8 A. Yes.

9 Q. Yes?

10 A. Yes. 01:48 PM

11 MR. ABASCAL: Mark it as exhibit next in
12 order, which I think is 6.

13 (Deposition Exhibit 6 was
14 marked for identification and is
15 annexed hereto.) 01:48 PM

16 BY MR. ABASCAL:

17 Q. I want to draw your attention to your
18 response to interrogatory No. 1. And in that you
19 state:

20 "Opposer has offered goods 01:49 PM
21 and/or services in this field
22 since at least as early as 1991."

23 I'll show you that portion of your
24 interrogatory. Bottom paragraph.

25 Do you see that? 01:50 PM

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1 A. Yes.

2 Q. Have you used M2, the M2 mark, prior to
3 1991?

4 A. Based on my recollection, no.

5 I stated as at least as early as 1991 01:50 PM
6 because that is the earliest document that I could
7 locate that bore the mark.

8 Q. But to your recollection have you used it
9 prior to that?

10 A. I believe that was the first year. Based 01:51 PM
11 on my review of that first document.

12 Q. All right. Can I have that back. Okay.

13 A. But I state at least as early as, because
14 in the event that there's something else that comes
15 up that's earlier, I wanted to just set it based on 01:51 PM
16 the actual document given that it's 12 years ago.

17 Q. But you don't recall any earlier use as
18 you sit here today?

19 A. As I sit here today, no.

20 Q. I'm going to show you some documents that 01:51 PM
21 you produced in connection with our document
22 request. And that would include a certificate from
23 the U.S. Department of Commerce and related
24 documents. And we'll mark it as Exhibit 7.

25 (Deposition Exhibit 7 was 01:52 PM

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1 marked for identification and is
2 annexed hereto.)

3 BY MR. ABASCAL:

4 Q. Do you see that?

5 Do you have those documents in mind now? 01:52 PM

6 A. Yes.

7 Q. I want to draw your attention to page 2 of
8 Exhibit No. 7, and it says "First use 10-23-1991; in
9 commerce 1-10-1992."

10 Are those dates the dates you submitted to 01:52 PM
11 the United States Patent Trademark Office in
12 connection with your application for the M2
13 wordmark?

14 A. I believe so, yes.

15 Q. And are those dates accurate? 01:52 PM

16 A. Yes, based on the document that I had
17 located.

18 Q. Now, again, read for me starting right
19 here, 4.

20 A. Just for the record, right here, were you 01:53 PM
21 pointing to page 2? --

22 Q. Yes.

23 A. -- on the Trademark Principal Register?

24 Q. Yes.

25 A. "Computer software featuring business 01:53 PM

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1 management applications from the film and music
2 industries; and interactive multimedia applications
3 for entertainment, education, and information in the
4 nature of artists' performances, and biographical
5 information from the film and music industries; and 01:53 PM
6 instructions and information for playing musical
7 instruments, in class 9, (U.S. CLS. 21, 23, 26, 36
8 and 38)."

9 Q. All right.

10 Is that the description that you included 01:54 PM
11 in your application for the M2 mark?

12 A. It's a description that was the final
13 submission for the M2 mark.

14 Q. And is that the class that you included in
15 the submission for the M2 mark, class 9? 01:54 PM

16 A. Again, I intended the registration to
17 apply to the full breadth that the Lanham Act would
18 allow.

19 Q. Not my question.

20 Was that the class you submitted in your 01:55 PM
21 application, class 9?

22 A. I would believe so because it appears in
23 the registration.

24 But can't say for sure.

25 Q. Did you include class 12 and class 37, 01:55 PM

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1 class 12 being automobiles and structural parts
2 therefore, and class 37 being automobile body repair
3 and finishing products, in your application for the
4 M2 mark?

5 A. Do know what the international classes are 01:55 PM
6 for this -- I'm sorry -- the U S classes?

7 Q. Well, this is class 12 and class 37.
8 You're looking at U.S. class marks that are
9 outdated, but the more current one is 9 and the one
10 at present is 12 and 37. 01:55 PM

11 But I want you to tell me to your
12 recollection.

13 Did you apply for this trademark in class
14 12, automobiles and structural parts therefore, or
15 in class 37, automobile body repair and finishing 01:56 PM
16 products?

17 A. Again, I don't remember specifically which
18 class the examiner designated for this application.
19 But based on the registration, it includes U.S.
20 classes 21 and 23, 26, 36, and 38. 01:56 PM

21 Q. Okay.

22 Now you did not produce your application
23 for this, did you, for the M2 mark, did you?

24 A. I'm not sure.

25 Q. Well, I don't have a copy. 01:57 PM

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1 Do you recall if you still have a copy of
2 it?

3 A. I recall seeing a copy within the past two
4 years, but it could have been something that was
5 required by the defendant in a related case. So I 01:57 PM
6 know that it's available from the Trademark Office.

7 Q. Can I have that exhibit back, please.

8 Now drawing your attention again to
9 Exhibit No. 1. And just the last page of
10 Exhibit No. 1. 01:58 PM

11 Do you have that in front of you?

12 A. Yes.

13 Q. And that shows the M2 logo on the bottom
14 that -- in one of your advertisements. And that
15 includes an "M" and a "2" surrounded by a circle. 01:59 PM

16 When did you start using that logo?

17 A. That's incorrect. It's surrounded by an
18 oval. Identical to the applicant's logo.

19 Q. All right.

20 So there's an "M2" with an oval. And the 01:59 PM
21 "M2" is enclosed in the oval.

22 Can you tell me when you started to use
23 that logo?

24 A. I believe 1992. As to the oval.

25 Q. And the "M2" in it? 01:59 PM

CONFIDENTIAL

1 A. The "M2," '91.

2 MR. ABASCAL: By the way I said "that's
3 correct" about him correcting me that it's an oval,
4 not a circle. I did not agree that it's virtually
5 identical to my client's logo.

01:59 PM

6 Q. So you started using that in 1992;
7 correct?

8 A. Yes.

9 Q. About when in 1992?

10 A. Well, it could have been either late '91
11 or '92. I remember I began using it when I opened
12 an office in New York.

02:00 PM

13 Q. How long were you in New York?

14 A. I had an office in New York for about nine
15 years, I believe.

02:00 PM

16 Q. From what years?

17 A. Beginning either late '91 or early '92
18 until 2000.

19 Q. Did you have any L.A. offices prior to
20 2000?

02:00 PM

21 A. Yes.

22 Q. Where?

23 A. In the Santa Monica area.

24 Q. Where in Santa Monica?

25 A. Actually in '91 -- Let's see.

02:01 PM

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1 Before I went to New York in late '91 or
2 '92 I was actually in Los Angeles in the Westwood
3 area. Approximately '94 I established business
4 locations in both New York and in Santa Monica.

5 Q. All right. 02:01 PM

6 I think there's a little discrepancy
7 there.

8 When did you establish your New York
9 operation?

10 A. Late '91 or early '92. 02:01 PM

11 Q. And were you working out of New York when
12 you first started M2?

13 A. Yes. No. No. Out of L.A.

14 Q. So you were working out of L.A. '91?

15 A. Exactly. 02:02 PM

16 Q. Who was working in the New York office?

17 A. I moved from L.A. to New York in late '91
18 or early '92. So L.A. was a matter of months.

19 Q. So after you moved out of L.A. in late
20 '91, early '92, what happened to your L.A. location, 02:02 PM
21 did you close it?

22 A. Yes. Moved it to New York, the address on
23 the advertisement.

24 Q. May I see the advertisement.

25 So from '91 or so you were working in New 02:02 PM

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1 York on West 16th Street; correct?

2 A. Yes.

3 Q. And how long did you stay in New York?

4 A. Until -- Well, again, I was on both coasts
5 for several years within that time period, but my 02:02 PM
6 most recent New York lease expired in 2000.

7 Q. So you had a lease in New York from, say,
8 '91 or '92, some time period there, until 2000;
9 correct?

10 A. Various leases. 02:03 PM

11 Q. Various leases?

12 A. Yes.

13 Q. Did you lease any other space for M2
14 Software in Los Angeles during that period from '91,
15 '92 to 2000? 02:03 PM

16 A. Yes.

17 Q. Where?

18 A. I had business locations at 626 Santa
19 Monica Boulevard, 1247 Lincoln Boulevard, and 1429
20 Lincoln Boulevard. All of which are within a matter 02:03 PM
21 of a hundreds yards from M2 Collisions, the
22 applicant's offices at 1100 Colorado.

23 Q. All right. Let's go through each would
24 one.

25 626 Santa Monica Boulevard, what types of 02:03 PM

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1 office space did you have there and what time
2 period?

3 A. That was a business location, that was a
4 mail center.

5 Q. What do you mean by mail center? 02:04 PM

6 A. It's a shipping and receiving location.

7 Q. Describe it. Is it a mailbox that you
8 rented?

9 A. It's not a P.O. box, it's a center that
10 handled shipping and receiving. 02:04 PM

11 Q. What's the name of the mail center?

12 A. I don't recall. That was the address.

13 Q. I take it it's a business that offers
14 shipping and receiving services and you --

15 A. To businesses. 02:04 PM

16 Q. -- and you subscribe to this business and
17 got their services so you could receive and ship
18 packages out of 626 Santa Monica?

19 A. Yes.

20 Q. You don't recall the name? 02:04 PM

21 A. No.

22 Q. Did you have any employees that worked
23 at -- for you at 626 Santa Monica during that time
24 period?

25 A. I'm sorry, it was originally 1341 Ocean. 02:04 PM

CONFIDENTIAL

1 Then it became 626 Santa Monica.

2 Q. Both of them were mail centers?

3 A. Yes.

4 Q. All right.

5 And did you have any employees of M2 02:05 PM

6 Software that worked at those locations during that

7 time period?

8 A. It was locations where M2 would receive
9 mail during that time period. So they were business

10 locations. But not work facilities. 02:05 PM

11 Q. Okay. That's for the Ocean and Santa
12 Monica locations; correct?

13 A. Yes.

14 Q. Let's go to the Lincoln location, one at
15 1247 and 1429. Let's start at 1247. 02:05 PM

16 Describe that?

17 A. The same.

18 Q. Mail center?

19 A. Yes.

20 Q. And you would receive and send mail from 02:05 PM
21 that center?

22 A. That's correct.

23 Q. Another business owned that center and you
24 just subscribed to their services?

25 A. That's correct. 02:05 PM