

TTAB

Attorney Docket No. 020206-202500

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

In re Application No. 76/384,129  
Applicant: CIBER, Inc.  
Published: June 8, 2004  
Mark: CIBER

In re Registration No. 1,185,100  
Applicant: CIBER, Inc.  
Published: January 5, 1982  
Mark: CIBER

In re Registration No. 1,479,942  
Applicant: CIBER, Inc.  
Published: January 5, 1982  
Mark: CIBER (Stylized)

BRUCE F. EVANS,  
  
Petitioner/Opposer,  
  
v.  
  
CIBER, INC.,  
  
Registrant/Applicant.

Opposition No.: 91162306

Cancellation No.: 92043733

**NOTICE OF MOTION AND  
REGISTRANT/APPLICANT'S  
MOTION  
FOR SUMMARY JUDGMENT**

Box TTAB NO FEE  
Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

**NOTICE OF MOTION**

Please take notice that Applicant/Respondent, CIBER, Inc., ("CIBER") by this document and pursuant to 37 C.F.R. § 2.127, moves the Trademark Trial and Appeal Board ("TTAB" or the "Board") to grant summary judgment on the grounds and for the reasons set forth in the accompanying Motion and incorporated brief.

01-04-2005

**MOTION**

**I. INTRODUCTION**

Petitioner/Opposer Bruce F. Evans (“Evans”) lacks the requisite standing to prosecute this proceeding before the TTAB. There is no genuine dispute that Evans has no real interest in this proceeding. Likewise, there is no genuine dispute that Evans has no reasonable basis to believe that he will be damaged by the registration of any of CIBER’s marks. CIBER, therefore, respectfully requests that the Board enter summary judgment in favor of CIBER and dismiss this proceeding for lack of standing.

**II. UNDISPUTED FACTS**

CIBER is the owner of numerous trademark registrations and applications, including without limitation U.S. Trademark Registration Nos. 1,185,100, for CIBER, and 1,479,942, for CIBER (stylized), as well as U.S. Trademark Application No. 76/384,129, for CIBER (collectively, CIBER’s “Marks”).<sup>1</sup> Registration No. 1,185,100 has been on the Principal Register since January 5, 1982, and Registration No. 1,479,942 has been on the Principal Register since March 8, 1988. *Id.* Hence, both of these registrations have long since become incontestable.

Evans owns a company called “Ciber Consulting.” From March 1, 1996 to March 1, 2002, Evans’ company existed as “Ciber Consulting, Inc.,” an Illinois corporation. In 2002,

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<sup>1</sup> King Decl. ¶ 3, Exhibit A. (All references herein to an exhibit refer to the respective exhibit attached to the Declaration of Chad E. King in Support of Summary Judgment (“King Decl.”), filed concurrently herewith.)

however, Evans lost the right to use the trade name "Ciber Consulting, Inc." when his corporation was administratively dissolved and CIBER registered that trade name in Illinois. *See* Exhibit E at 7. Evans' company is essentially a one man operation, with Evans running the business out of his home as the sole officer, employee and owner.<sup>2</sup> Evans' business provides very specialized consulting services in the field of nuclear records management and in the eight years Evans has operated his business, he has only had four customers. Exhibit B at 9:23-10:2, 19:14-23. Although Evans has attempted, on multiple occasions, to provide services outside this field, such attempts have never been successful. Exhibit E, at 3; Exhibit G, at 7. Simply put, there is absolutely no evidence that Evans ever will expand either his business or his use of the CIBER mark beyond their current boundaries.

On September 18, 2002, CIBER initiated a trademark infringement action (the "Infringement Litigation") in the U.S. District Court for the Northern District of Texas against Evans and his company, Ciber Consulting, Inc. ("CCI"), which was, at the time, an Illinois corporation. King Decl. ¶ 5, Exhibit C. The Infringement Litigation alleged that Evans and CCI infringed CIBER's rights in the CIBER Marks. Exhibit C. The Infringement Litigation was transferred to the U.S. District Court for the Northern District of Illinois on January 27, 2003. King Decl. ¶ 5.

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<sup>2</sup> Evans' wife is also a nominal owner of the business (51%) and carries the title of "President." It appears, however, that her "ownership" and title are simply for the purpose of securing potential governmental preferences available to "woman-owned" businesses. *See* Exhibit E at 4, n.3.

In the Infringement Litigation, Evans and CCI asserted a counterclaim against CIBER, alleging that the mark CIBER is generic and requesting an order canceling CIBER's registration and an order compelling the rejection of CIBER's application. *Id.* ¶ 6. On May 7, 2004, CIBER voluntarily moved to dismiss with prejudice its infringement claim against CCI and Evans, and to dismiss the counterclaim as moot. *Id.* ¶ 7, Exhibit E. Evans and CCI opposed the motion to dismiss their counterclaim, alleging that their counterclaim was not moot because Evans and CCI "have every intention of expanding their business to serve additional clients and, if the opportunity presents itself, expanding the business outside the field of records management." King Decl. ¶ 7, Exhibit F.

In an order dated July 6, 2004, the District Court dismissed CIBER's claims with prejudice and dismissed Evans and CCI's counterclaim as moot. *Id.* ¶ 8, Exhibit G. In that order, the District Court noted that Evans and CCI failed to provide any evidentiary support for the proposition that Evans intended to expand his business, and that any speculation about such intentions was too remote to provide a controversy between the parties. Exhibit E at 5, 7. Specifically, the District Court found dispositive the utter absence of factual support for Evans and CCI's speculation that the business would expand, coupled with the fact that Evans "no longer even hold[s] the right to use the trade name "Ciber Consulting, Inc." in [his] home state of Illinois . . . ." *Id.* at 7.

On September 3, 2004, Evans initiated this proceeding by filing a Combined Petition to Cancel and Notice of Opposition (the "Petition"), seeking the cancellation of U.S. Trademark Registration Nos. 1,185,100 and 1,479,942, and opposing U.S. Trademark Application No. 76/384,129. In alleging standing before the TTAB, Evans asserted that he "has a real and

personal interest in canceling the mark CIBER for computer and internet related services because he intends to continue doing business as “Ciber Consulting” and intends to expand his business, including expanding the scope of his business and obtaining new and larger customers.”

Petition, ¶ 5. This allegation is substantially identical to the allegation already rejected as without factual basis by the District Court in the Infringement Litigation. Notably, the Petition pleads no facts that either support this allegation or refute the findings of the District Court’s opinion dismissing Evans and CCI’s counterclaim. Thus, there is no record evidence supporting Evans’ allegations that he believes he will be damaged by the registration of CIBER’s mark.

### **III. ARGUMENT**

#### **A. Summary judgment is appropriate in this case.**

The Federal Rules of Civil Procedure generally apply to proceedings before the TTAB. *See* 37 C.F.R. § 2.116(a). Therefore, on a motion for summary judgment, the Board may render judgment for the moving party if there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56(c). In *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 222 U.S.P.Q. 741 (Fed. Cir. 1984), the Federal Circuit affirmed the Board’s grant of summary judgment in an opposition proceeding. The court explained that the “basic purpose of summary judgment is one of judicial economy.” *Pure Gold*, 739 F.2d at 626, 222 U.S.P.Q. at 743 (citing *Exxon Corp. v. Nat’l Food Line Corp.*, 579 F.2d 1244, 1246, 198 U.S.P.Q. 407, 408 (C.C.P.A. 1978)). It is against public interest to conduct unnecessary trials, and where the time and expense of a full trial can be avoided by the summary judgment procedure, such action is favored. *See Pure Gold*, 739 F.2d at

621, 222 U.S.P.Q. at 743. Indeed, the Federal Circuit encouraged the disposition of matters before the TTAB by summary judgment:

The practice of the U.S. Claims Court and of the former U.S. Court of Claims in routinely disposing of numerous cases on the basis of cross-motions for summary judgment has much to commend it. The adoption of a similar practice is to be encouraged in inter partes cases before the Trademark Trial and Appeal Board, which seem particularly suitable to this type of disposition. Too often we see voluminous records which would be appropriate to an infringement or unfair competition suit but are wholly unnecessary to resolution of the issue of registrability of a mark.

739 F.2d at 627 n.2, 222 U.S.P.Q. at 744 n.2. *See also Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560 1562, 4 U.S.P.Q.2d 1793, 1795 (Fed. Cir. 1987) (lauding the use of summary judgment to resolve Board proceedings).

The burden of a party moving for summary judgment is met by showing “that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). When the moving party shows that there is no genuine issue of material fact, the nonmoving party “may not rest upon the mere allegations or denials of [its] pleadings.” Fed. R. Civ. P. 56(e). It must respond, setting “forth specific facts showing that there is a genuine factual issue for trial.” *Id.* A factual dispute is genuine only if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the nonmoving party. *See Lloyd’s Food Products, Inc. v. Eli’s, Inc.*, 987 F.2d 766, 767, 25 U.S.P.Q.2d 2027, 2029 (Fed. Cir. 1993); *Sweats Fashions*, 833 F.2d at 1562, 4 U.S.P.Q.2d 1795. To survive summary judgment on the issue of standing, therefore, Evans must adduce sufficient evidence to establish a genuine issue of material fact with respect to his standing before the TTAB. As discussed below, however, there is no genuine dispute that Evans has identified neither any real interest in the registration

status of CIBER's Marks nor any reasonable basis to believe that he will be damaged in any cognizable way by the registration of CIBER's Marks. Summary judgment, therefore, is appropriate in this case.

**B. Evans does not have standing to pursue this action.**

As noted above, the District of Illinois has already held that Evans' concerns do not rise to the level of a "case or controversy" sufficient to confer standing under Article III of the Constitution. The TTAB, however, is not subject to Article III; instead, to determine standing in the TTAB, one must look to the statutes conferring standing before this tribunal. *Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 U.S.P.Q.2d 1023, 1025 (Fed. Cir. 1999). Section 14 of the Lanham Act, 15 U.S.C. § 1064, provides that "[a]ny person who believes that he is or will be damaged . . . by the registration of a mark upon the principal register" may file a petition to cancel a registration. *Accord* T.B.M.P. § 303.<sup>3</sup>

In addition to the bare requirements of §§ 13 and 14, the Federal Circuit acknowledges two additional requirements for party to establish standing before the TTAB. First, the party must demonstrate a "real interest" in the proceeding. *Ritchie*, 170 F.3d at 1095, 50 U.S.P.Q.2d at 1025. In addition, the party must establish a "reasonable basis" for the party's belief that it will be damaged by the registration of the mark at issue. *Id.* These criteria are more than mere pleading requirements: "A petitioner's allegations alone do not establish standing. . . . The facts

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<sup>3</sup> Section 13 of the Lanham Act, 15 U.S.C. § 1063, establishes a similar standard for filing an opposition. Moreover, the same standing requirements apply in both opposition and cancellation proceedings, *see Ritchie*, 170 F.3d at 1095, 50 U.S.P.Q.2d 1025, so this Motion will address both the Petition and the

regarding standing . . . are part of a petitioner's case and must be affirmatively proved." *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028, 213 U.S.P.Q. 185, 188 (C.C.P.A. 1982). Thus, Evans, as the petitioner/opposer, bears a burden to establish a genuine issue with respect both his "real interest" in this proceeding and the "reasonable basis" for his alleged belief that he will be damaged by CIBER's Marks. The undisputed evidence shows that Evans cannot meet either of these requirements, and this action therefore must be dismissed for lack of standing.

**1. Evans, as a mere intermeddler, has no real interest in this proceeding.**

As an initial matter, to establish standing to challenge a mark, a party must have a legitimate personal interest in the outcome of the proceeding. *Ritchie*, 170 F.3d at 1095, 50 U.S.P.Q.2d 1025. "This 'real interest' requirement stems from a policy of preventing 'mere intermeddlers' who do not raise a real controversy from bringing oppositions or cancellation proceedings in the PTO." *Id.* Consequently, a party challenging a registration in the TTAB cannot do so merely to vindicate the rights of others or for punitive reasons; instead, "the party seeking review must, himself, be among the injured." *Ritchie*, 170 F. 3d at 1096, 50 U.S.P.Q.2d at 1026 (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)); accord *Intersat Corp. v. Int'l Telecomm. Satellite Org.*, 226 U.S.P.Q. 154, 155 (T.T.A.B. 1985) ("The purpose of the requirement of standing is to avoid litigation where there is no real controversy between the

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Footnote continued from previous page

Opposition collectively. *Accord Young v. AGB Corp.*, 152 F.3d 1377, 1380, 47 U.S.P.Q.2d 1752,1755 (Fed. Cir. 1998).



parties. That is to say, the standing requirement weeds out ‘intermeddlers’ from those with a ‘personal interest in the outcome beyond that of the general public.’”).

There is no genuine issue that Evans is a mere intermeddler in this proceeding. While there are many bases for finding a real interest in the proceedings,<sup>4</sup> none of them exist here. While CIBER’s registrations were at issue in the infringement litigation between the parties, that litigation actually established that there is no real controversy between the parties. The preclusive effect of the federal litigation between the parties means that Evans stands in a materially different position than the general public vis-à-vis CIBER’s registrations and applications—he is immune to infringement claims. If not for the infringement litigation, CIBER would be free to assert its registrations against Evans in an infringement action. Because of the infringement litigation, however, CIBER cannot do that unless Evans materially changes the nature or extent of his use, and as discussed below, there is insufficient evidence that Evans might actually change his use to create a genuine issue of fact. Thus, Evans has no personal interest in either this proceeding or the status of CIBER’s registrations and applications.

Instead, Evans’ participation in this action, to the extent it is not merely a deliberate attempt to obtain an extortionate settlement from CIBER, represents an attempt to vindicate the public interest. Evans has stated (through counsel) on at least one occasion that he seeks “to liberate the word ‘ciber’” and that this effort is a matter of public policy. Exhibit F, at 12-13, 14.

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<sup>4</sup> For example, the TTAB has noted that if “the registration has . . . been raised and relied on by respondent in proceedings before the court,” the petitioner has standing to challenge the registration. *Tonka Corp. v. Tonka Tools, Inc.*, 229 U.S.P.Q. 857, 858-59 (T.T.A.B. 1986).

Since Evans is free to continue to use CIBER without fear of infringement claims, this “liberation” would be of value to only to persons other than Mr. Evans himself. Accordingly, the public interest that Evans seeks to vindicate does not represent a personal interest of Evans himself, and that interest is insufficient to confer standing on Evans in this proceeding. Consequently, as there is no genuine issue that Evans lacks a personal interest in this proceeding, summary judgment is appropriate.

**2. Evans has no reasonable belief that he will be damaged by the registration of CIBER’s Marks.**

In addition to establishing that he has a real interest in this proceeding, Evans must also establish that he has a reasonable basis to believe he will be damaged by the registration of CIBER’s Marks. *Ritchie*, 50 U.S.P.Q.2d 1025, 170 F.3d at 1095. Specifically, “the ‘belief of damage’ required by § 13 of the Lanham Act is more than a subjective belief. The belief must have a ‘reasonable basis in fact.’” *Id.* at 1098, 50 U.S.P.Q.2d at 1027 (quoting *Univ. Oil Prod. Co. v. Rexall Drug & Chem. Co.*, 463 F.2d 1122, 1124, 174 U.S.P.Q. 458, 459-60 (C.C.P.A. 1972)). The only conceivable interest Evans might have in this proceeding is his allegation that he might be subject to an infringement claim based on CIBER’s registrations.

Specifically, Evans has alleged that he “has a real and personal interest in the mark CIBER . . . because he intends to continue doing business as ‘Ciber Consulting,’” Petition ¶ 11, and therefore, presumably, fears that he will be subject to an infringement claim if CIBER’s registrations stand. This allegation, even if taken as true, fails to establish a genuine dispute that Evans has any reasonable basis to believe he might be damaged by the registration of CIBER’s Marks. As a matter of law, Evans cannot dispute that the dismissal of the infringement litigation

between the parties allows Evans to continue using the CIBER mark in the same manner as he currently uses the mark without any fear whatsoever of an infringement claim by CIBER. Thus, the mere fact that Evans intends to continue doing business as “Ciber Consulting” fails to establish a commercial interest in the registration of CIBER’s Marks.

Evans also alleges that he “intends to expand his business, including expanding the scope of his business and obtaining new and larger customers.” Petition, ¶ 11. Presumably, Evans fears that, if he changes his use materially, he will be subject to an infringement claim by CIBER. This allegation, however, represents merely a subjective belief that Evans might be damaged by CIBER’s registrations. The evidence fails to establish a reasonable basis for this belief, as required for Evans to have standing in this proceeding.

The undisputed facts, rather than supporting Evans’ allegation, actually contradict it. Evans and his company have used the CIBER mark in substantially the same manner for over eight years with virtually zero growth, and there is absolutely no evidence that Evans ever will change his use materially. In fact, the undisputed evidence demonstrates that Evans has tried in the past to expand his use of the mark CIBER without any success whatsoever.

The undisputed facts further establish that Evans has little prospect of ever changing his use of the mark CIBER. First, Evans’ company is basically a one-man operation, and there is no evidence that Evans ever will hire additional personnel or otherwise expand his capabilities. Second, Evans has suffered from a “personal health situation,” which likely will continue to impede Evans’ ability to expand his business, even if he were otherwise able to do so. Finally, while Evans did business for several years under the corporate name “Ciber Consulting, Inc.,” Evans has lost the right, under state law, to use that corporate name in his home state. CCI was

administratively dissolved in 2003, and CIBER has since registered the corporate name in Illinois, Evans' home state. Thus, even if he were to expand his business, Evans would not be able to do so under the "Ciber Consulting, Inc." name.<sup>5</sup>

Evans' speculation that he might attempt to expand his business is merely that—speculation unsupported by any evidence whatsoever. The Northern District of Illinois addressed precisely the same speculation, and held,

defendants' stated intentions to expand their use of the 'CIBER' mark, standing alone, are simply too speculative to create a case or controversy in the instant case. As plaintiff points out in its motion to dismiss, defendants no longer even hold the right to use the trade name Ciber Consulting, Inc. in their home state of Illinois . . . . Nor have defendants buttressed their stated goal of expanding their business beyond the nuclear records management industry with any factual support.

Exhibit G at 7. As the District Court held, the record evidence simply provides no reasonable basis to believe that Evans ever might change his use in such a fashion that he would be subject to an infringement claim by CIBER. Consequently, Evans has no reasonable basis to believe he would be damaged by the registration of CIBER's Marks. Thus, Evans cannot carry his burden to establish a genuine question with respect to his standing to prosecute this proceeding, and summary judgment is appropriate.

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<sup>5</sup> Thus, although Evans has not alleged that he intends possibly to sell his business, even if he did intend to sell his business, it is highly unlikely that a purchaser would agree to purchase the name "Ciber Consulting," since Evans cannot demonstrate title to that name even in his home state of Illinois.

IV. CONCLUSION

For the foregoing reasons, the Board should enter judgment in favor of CIBER. As such, CIBER respectfully requests the Board to grant this motion in all respects.

Dated: December 30, 2004

Respectfully submitted,

TOWNSEND AND TOWNSEND AND CREW, LLP

By



Stephen F. Jewett

Chad E. King

*Attorneys for Applicant/Registrant*

Two Embarcadero Center, 8th Floor  
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**CERTIFICATE OF SERVICE AND MAILING**

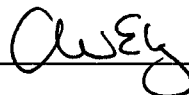
I hereby certify that on December 30, 2004, this **MOTION FOR SUMMARY JUDGMENT** was served by Express Mail No. EL889378901US, to counsel for Petitioner, as follows:

Anthony E. Dowell, Esq.  
1001 Main Street  
Lafayette, IN 47901

and was sent by Express Mail No. EL889378915US, to

Commissioner for Trademarks  
Box TTAB NO FEE  
2900 Crystal Drive  
Arlington, VA 22202-3514.

Dated: December 30, 2004

By:  \_\_\_\_\_

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

In re Application No. 76/384,129  
Applicant: CIBER, Inc.  
Published: June 8, 2004  
Mark: **CIBER**

In re Registration No. 1,185,100  
Applicant: CIBER, Inc.  
Published: January 5, 1982  
Mark: **CIBER**

In re Registration No. 1,479,942  
Applicant: CIBER, Inc.  
Published: January 5, 1982  
Mark: **CIBER (Stylized)**

BRUCE F. EVANS,  
  
Petitioner/Opposer,  
  
v.  
  
CIBER, INC.,  
  
Registrant/Applicant.

Opposition No.: 91162306

Cancellation No.: 92043733

**DECLARATION OF CHAD E. KING  
IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

Box TTAB NO FEE  
Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

I, CHAD E. KING, hereby declare under penalty of perjury, as follows:

1. I am an attorney licensed to practice law in the State of Colorado. I am one of the attorneys of record representing Applicant/Respondent CIBER, Inc. ("CIBER") in this proceeding.
2. I make this declaration in support of CIBER's Motion for Summary Judgment.

3. CIBER has used the trademark "CIBER" since at least 1974 and has obtained at least two federal registrations for the CIBER mark: U.S. Registration No. 1,185,100 for CIBER (the "'100 Registration'"), and U.S. Registration No. 1,479,942 for CIBER (Stylized) (the "'942 Registration'"). The '100 Registration was registered on the Principal Register on January 5, 1982, and the '492 Registration was registered on the Principal Register on March 8, 1988. CIBER also has pending numerous federal applications for CIBER and related marks, including without limitation U.S. Application No. 76/384,129, (the "'129 Application'") for CIBER. Attached hereto as Exhibit A are, collectively, true and correct copies of certificates of registration for the '100 Registration and the '942 Registration, and a true and correct copy of a TESS printout for the '129 Application.

4. Evans, through his company (formerly known as CCI), provides very specialized consulting services in the field of nuclear records management. *See* Exhibit B (true and correct copy of an excerpt from the transcript of the December 10, 2002 deposition of Bruce F. Evans).

5. On September 19, 2002, CIBER filed a complaint in the U.S. District Court for the Northern District of Texas against Ciber Consulting, Inc. ("CCI") and Bruce F. Evans. Attached hereto as Exhibit C is a true and correct copy of that complaint. On January 27, 2003, the litigation between CIBER, CCI and Evans was transferred to the U.S. District Court for the Northern District of Illinois.

6. On May 12, 2003, CCI and Evans filed a counterclaim against CIBER, alleging that the CIBER mark is generic and requesting an order canceling the '100 Registration and the




'492 Registration, as well as an order compelling the rejection of the '129 Application. Attached hereto as Exhibit D is a true and correct copy of that counterclaim.

7. After discovering that Evans' use of the CIBER mark is, at most, *de minimis*, CIBER filed on May 7, 2004 a motion to dismiss with prejudice its claims against Evans and CCI, and to dismiss as moot Evans' and CCI's counterclaim against CIBER. A true and correct copy of that motion to dismiss, along with a supporting declaration by Chad E. King and exhibits thereto, is attached hereto as Exhibit E.

8. In a response filed May 27, 2004 (a true and correct copy of which is attached hereto as Exhibit F), Evans and CCI opposed CIBER's motion to dismiss their counterclaim, contending that the counterclaim was not moot because Evans and CCI "have every intention of expanding their business to serve additional clients and, if the opportunity presents itself, expanding the business outside the field of records management."

9. In an order dated July 6, 2004, the Northern District of Illinois dismissed CIBER's claims, as well as the counterclaim, finding "too speculative" any assertion by Evans and CCI that Evans might expand his business. A true and correct copy of that order is attached hereto as Exhibit G.

Executed this 30<sup>th</sup> day of December, 2004.

  
Chad E. King

**CERTIFICATE OF SERVICE AND MAILING**

I hereby certify that on December 30, 2004, this **DECLARATION OF CHAD E. KING IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served by Express

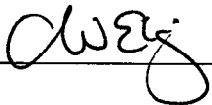
Mail No. EL889378901US, to counsel for Petitioner, as follows:

Anthony E. Dowell, Esq.  
1001 Main Street  
Lafayette, IN 47901

and was sent by Express Mail No. EL889378915US, to

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2900 Crystal Drive  
Arlington, VA 22202-3514.

Dated: December 30, 2004

By: 



**Int. Cls.: 35 and 42**

**Prior U.S. Cl.: 101**

**United States Patent and Trademark Office**

**Reg. No. 1,185,100**

**Registered Jan. 5, 1982**

**SERVICE MARK**

**Principal Register**

**CIBER**

**Ciber, Inc. (Michigan corporation)  
30400 Telegraph Rd.  
Bingham Farms, Mich. 48010**

**For: MANAGEMENT CONSULTING SERVICES IN THE FIELDS OF BUSINESS, ENGINEERING AND RESEARCH, in CLASS 35 (U.S. Cl. 101).**

**First use Jul. 1, 1974; in commerce Jul. 1, 1974.**

**For: DESIGN, DEVELOPMENT AND IMPLE-**

**MENTATION OF COMPUTER PROGRAMMING AND SOFTWARE SERVICES, in CLASS 42 (U.S. Cl. 101).**

**First use Jul. 1, 1974; in commerce Jul. 1, 1974.**

**Ser. No. 171,161, filed May 22, 1978.**

**MARC BERGSMAN, Primary Examiner**

Int. Cls.: 35 and 42

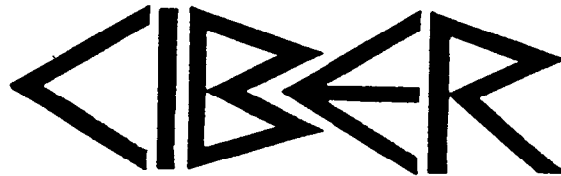
Prior U.S. Cls.: 100 and 101

**United States Patent and Trademark Office**

Reg. No. 1,479,942

Registered Mar. 8, 1988

**SERVICE MARK  
PRINCIPAL REGISTER**



CIBER, INC. (MICHIGAN CORPORATION)  
SUITE 323  
FOUR PARKLAND BOULEVARD  
DEARBORN, MI 48126

FOR: MANAGEMENT CONSULTING SERVICES IN THE FIELDS OF BUSINESS, ENGINEERING AND RESEARCH, IN CLASS 35 (U.S. CL. 101).

FIRST USE 7-1-1974; IN COMMERCE 7-1-1974.

FOR: DESIGN, DEVELOPMENT AND IMPLEMENTATION OF COMPUTER PROGRAM-

MING AND SOFTWARE SERVICES, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 7-1-1974; IN COMMERCE 7-1-1974.

OWNER OF U.S. REG. NO. 1,185,100 AND OTHERS.

SER. NO. 674,566, FILED 7-27-1987.

DAVID A. HERDMAN, EXAMINING ATTORNEY



UNITED STATES PATENT AND TRADEMARK OFFICE

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**Goods and Services** IC 035. US 100 101 102. G & S: CONSULTING AND PROJECT MANAGEMENT SERVICES FOR BUSINESSES, NAMELY ANALYZING, ASSESSING, PLANNING AND DEVELOPING STRATEGIES, INFORMATION, PROCESSES, AND ORGANIZATIONS FOR BUSINESSES IN ORDER TO ENHANCE THE EFFICIENCY AND EFFECTIVENESS OF THOSE BUSINESSES; AND OUTSOURCING SERVICES, NAMELY PROVIDING STAFFING TO OTHERS IN ORDER TO OPERATE HELP DESKS, CUSTOMER CARE CENTERS, SOFTWARE MAINTENANCE AND NETWORK SUPPORT FUNCTIONS, AND PRODUCTION HOSTING AND SUPPORT FACILITIES. FIRST USE: 19740701. FIRST USE IN COMMERCE: 19740701

IC 041. US 100 101 107. G & S: TRAINING SERVICES, NAMELY PROVIDING TRAINING TO OTHERS IN THE FIELDS OF COMPUTERS, DATABASES AND PROJECT MANAGEMENT. FIRST USE: 19740701. FIRST USE IN COMMERCE: 19740701

IC 042. US 100 101. G & S: CONSULTING SERVICES, NAMELY ANALYZING, ASSESSING, PLANNING AND DEVELOPING INFORMATION-BASED AND E-COMMERCE BASED COMPUTER AND SOFTWARE SYSTEMS FOR BUSINESSES; AND SYSTEM IMPLEMENTATION AND SYSTEM INTEGRATION OF CUSTOM AND PACKAGE SOFTWARE FOR INFORMATION-BASED AND E-COMMERCE BASED SYSTEMS FOR BUSINESSES. FIRST USE: 19740701. FIRST USE IN COMMERCE: 19740701

**Mark Drawing Code**

(1) TYPED DRAWING

**Serial**

76384129

**Number**  
**Filing Date** March 13, 2002  
**Current Filing Basis** 1A  
**Original Filing Basis** 1A  
**Published for Opposition** June 8, 2004  
**Owner** (APPLICANT) Ciber, Inc. CORPORATION DELAWARE 5251 DTC Parkway, Suite 1400 Greenwood Village COLORADO 80111  
**Assignment Recorded** ASSIGNMENT RECORDED  
**Attorney of Record** Lesley S. Craig, Esq.  
**Prior Registrations** 1185100;1479942;AND OTHERS  
**Type of Mark** SERVICE MARK  
**Register** PRINCIPAL  
**Live/Dead Indicator** LIVE

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IN THE MATTER OF:

CIBER, INC.

vs.

CIBER CONSULTING, INC.

**BRUCE F. EVANS**

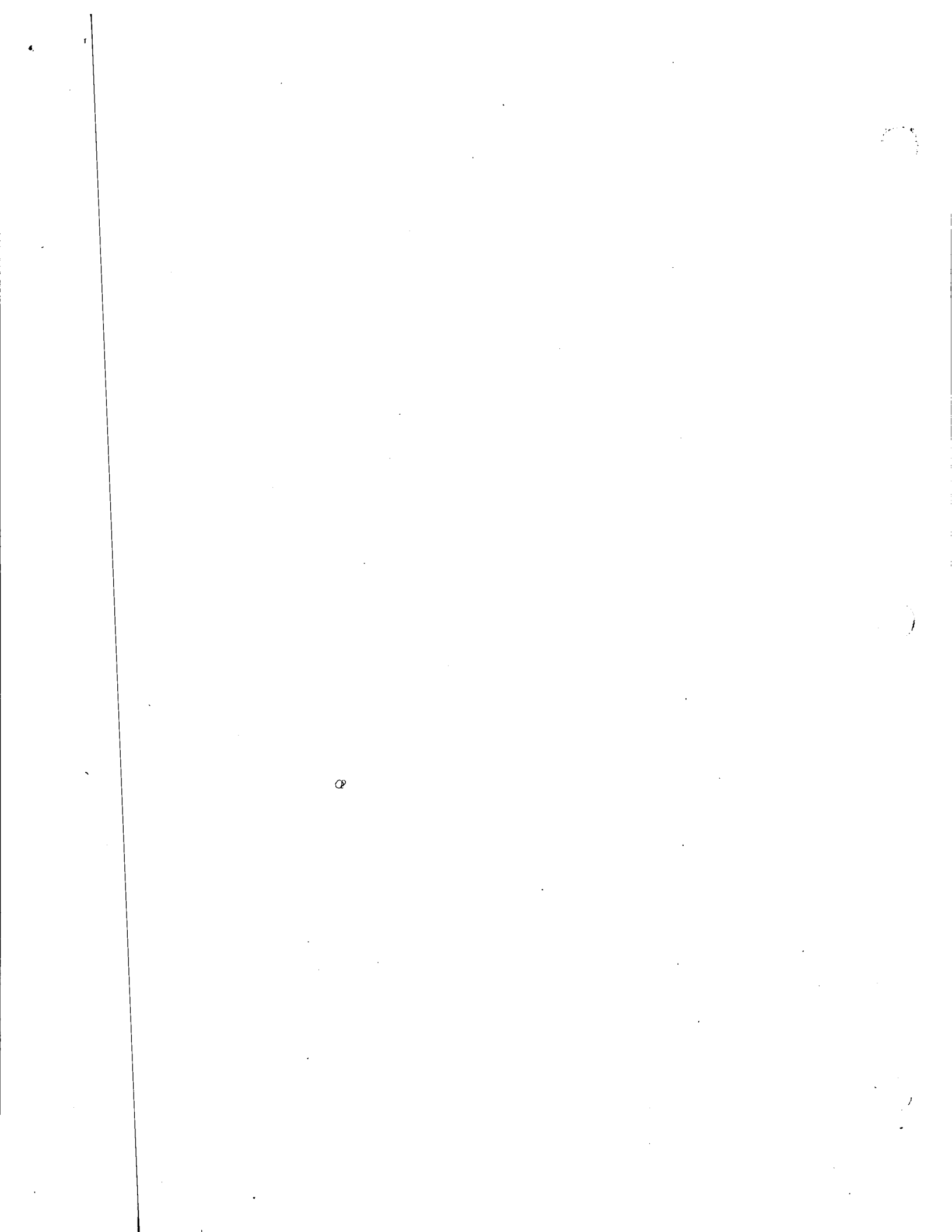
December 10, 2002

L.A. REPORTING

79 West Monroe Street, Suite 1219

Chicago, Illinois 60603

(312) 419-9292



1 IN THE DISTRICT COURT OF THE UNITED STATES  
 2 NORTHERN DISTRICT FOR TEXAS  
 3 DALLAS DIVISION  
 4 CIBER, INC., a Delaware )  
 5 corporation, )  
 6 Plaintiff, )  
 7 vs. ) 3:02-CV-20261  
 8 CIBER CONSULTING, Inc., an )  
 9 Illinois corporation, and BRUCE )  
 10 F. EVANS, an individual, )  
 11 Defendants. )

12  
 13 The deposition of BRUCE F. EVANS,  
 14 called by the Plaintiff for examination,  
 15 pursuant to the Rules of Civil Procedure for  
 16 United States District Courts pertaining to the  
 17 taking of depositions, taken before Rosenarie  
 18 LaMantia, a Notary Public in and for the County  
 19 of DuPage, State of Illinois, and a Certified  
 20 Shorthand Reporter of said state, CSR License  
 21 No. 084-002661, at Suite 3400, 500 West Madison  
 22 Street, Chicago, Illinois, on the 10th day of  
 23 December, A.D. 2002, commencing at the hour of  
 24 1:00 o'clock a.m.

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1  
 2 INDEX  
 3  
 4 THE WITNESS:  
 5 BRUCE F. EVANS  
 6  
 7 Direct Examination by Mr. Siplora . . .4  
 8

9 EXHIBITS  
 10 Exhibit No. 1 marked for ID . 42  
 11 Exhibit No. 2 marked for ID . 68  
 12 Exhibit No. 3 marked for ID . 78  
 13

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1 A-P-P-E-A-R-A-N-C-E-S:  
 2  
 3 TOWNSEND AND TOWNSEND AND CREW, LLP  
 4 1200 Seventeenth Street  
 5 Suite 2700  
 6 Denver, CO 80202  
 7 (303)571-4000  
 8 BY: MR. DAVID E. SIPIORA  
 9 Appeared on behalf of the Plaintiff;  
 10  
 11 MCANDREWS, HELD & MALLOY, LTD.  
 12 500 West Madison Street  
 13 34th Floor  
 14 Chicago, IL 60661  
 15 (312)775-8000  
 16 BY: MR. ANTHONY E. DOWELL  
 17 MR. CHRISTOPHER V. CARANI  
 18 Appeared on behalf of the Defendant.  
 19  
 20  
 21 \* \* \* \* \*  
 22  
 23  
 24

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1 (Whereupon, the witness was  
 2 first duly sworn.)  
 3 BRUCE F. EVANS,  
 4 called as the Defendant herein, having been  
 5 first duly sworn, was examined and testified as  
 6 follows:

7 DIRECT EXAMINATION  
 8 BY MR. SIPIORA:  
 9 Q. Good afternoon, Mr. Evans.  
 10 Could you state your full name for us  
 11 and state your home address?  
 12 A. Bruce Franz Evans, E-V-A-N-S, 625  
 13 Quail Run Drive, Plainfield, Illinois, 60544.  
 14 Q. Thank you.  
 15 Now, can you state also the business  
 16 address for CIBER Consulting?  
 17 A. 625 Quail Run Drive, Plainfield,  
 18 Illinois.  
 19 Q. My name is David Siplora. I represent  
 20 Ciber, Inc. I'm here today to ask you some  
 21 questions regarding the pending matter between  
 22 Ciber and your company, focusing specifically on  
 23 contacts between you and business you conducted  
 24 in the state of Texas to the extent there is

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1 any.

2 Have you ever had your deposition

3 taken before?

4 A. Quite some time ago, yes.

5 Q. Have you ever testified in court?

6 A. No.

7 Q. Let me briefly just describe the

8 ground rules of a deposition.

9 I'll ask you questions. I'll make

10 them as clear as I can but if at any point a

11 question is not clear, I'll ask you to let me

12 know so I can rephrase it, if that is acceptable

13 to you. Your answers need to be audible, in

14 other words, a nod or an un-huh or common

15 colloquial ways that we answer questions won't

16 work here, we need to have audible answers, yes

17 or no, loud enough and clear so that the court

18 reporter can take that record down. The court

19 reporter is making a written record of

20 everything that we say. You'll be provided a

21 transcript at some point down the road to

22 review. I'd ask you in this deposition not to

23 speculate or to guess. If you have information

24 on a subject, I'd ask you to share it, but

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1 deposition.

2 MR. DOWELL: You know, let me maybe

3 advance this. We've, of course, alerted Mr.

4 Evans to the attorney/client privilege and

5 instructed him to at least alert us if there is

6 anything called for that is attorney/client

7 privilege. This is not, you can tell him. In

8 fact, you have to tell him whatever documents

9 you looked at, that would not be something that

10 is privileged, if that was your concern.

11 THE WITNESS: No, I was actually

12 confused about whether we're referring to

13 e-mails or the specific complaint that was

14 issued or a response to the complaint. I was

15 just looking for some specifics on what kind of

16 documents you're referring to.

17 I have looked at the complaint

18 document, yes.

19 BY MR. SIIPIORA:

20 Q. Okay. Did you look at any other

21 documents other than the complaint?

22 A. Not to my recollection, no.

23 Q. Okay. Did you review any of your

24 records to see if you had any contracts or any

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1 encourage you not to speculate or guess, just

2 tell us what you know.

3 Do you have any questions about

4 anything I've said so far?

5 A. No.

6 Q. Okay. You understand the oath you

7 just took is under penalty of perjury?

8 A. I do.

9 Q. Have you reviewed any documents in

10 preparation for this deposition?

11 A. Could you be more specific as to what

12 you mean by review?

13 Q. Have you looked at any documents?

14 A. What kind of documents might you be

15 referring to?

16 Q. Any documents at all that you might

17 have looked at in anticipation of this

18 deposition?

19 A. I guess that is kind of a broad

20 question now. If you can be more specific, I

21 can give you a specific answer.

22 Q. At the high level I'm just asking, I

23 think, for a yes or no, whether or not you've

24 looked at any documents in preparation for this

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1 communications relating to contacts with the

2 state of Texas?

3 A. Could you explain by review did I do a

4 thorough search or what do you mean by review?

5 Q. Again, just looked at. Did you look

6 at any documents that would relate to -- any

7 type of document that would relate to possible

8 contacts with Texas?

9 A. No.

10 Q. The answer is no?

11 A. Correct.

12 Q. Is there any reason why you cannot

13 give accurate or truthful testimony here?

14 A. No.

15 Q. During the course of this deposition,

16 I'll be referring to you, and there are two

17 parties named here. And I wanted to see if we

18 can have an understanding between us that when I

19 say you, for purposes of this deposition only,

20 when I say you, it refers to you, Mr. Evans, and

21 also to your company, CIBER Consulting; would

22 that be acceptable to you?

23 A. It refers to both or just to me

24 specifically?

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- 1 Q. To both of you for purposes of --
- 2 A. Okay.
- 3 Q. If you need to break it out at any
- 4 point, you can just tell me that, for me it is
- 5 this, and is that acceptable?
- 6 A. Sure.
- 7 Q. Now, I understand the name of your
- 8 company is CIBER Consulting and it's an Illinois
- 9 corporation, is that correct?
- 10 A. It's CIBER Consulting, Inc., it is an
- 11 Illinois corporation, correct.
- 12 Q. And it was incorporated in 1996?
- 13 A. Correct.
- 14 Q. Okay. Has it been in continuous
- 15 operation since 1996?
- 16 A. If you mean as with respect to papers
- 17 of incorporation or what do you mean by
- 18 continuous operation?
- 19 Q. Have you conducted business as CIBER
- 20 Consulting, Inc., on a continuing basis since
- 21 1996?
- 22 A. Yes.
- 23 Q. I understand from your declaration
- 24 that you currently have no employees at CIBER

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- 1 does?
- 2 MR. DOWELL: I'm going to this object
- 3 at this point. Can we limit this to Texas,
- 4 because I think we're getting into an area of
- 5 general discovery and because this deposition is
- 6 limited to the jurisdictional issues and, of
- 7 course, you're entitled to information but only
- 8 when we get to the position where we're also
- 9 going to be asking you the same questions? So,
- 10 I'm reluctant to have him answer that pursuant
- 11 to our agreement.
- 12 MR. SIPIORA: I appreciate your
- 13 concern. I have a few introductory questions
- 14 along these lines. I'm not intending to go
- 15 deep, just to understand what his six people do
- 16 and understand what his business did. I don't
- 17 want him to go very deep into it. It is
- 18 relevant because I need to know what the six
- 19 people are doing. And, obviously, if the six
- 20 people are working for him involved in Texas, I
- 21 want to understand that. I can come back around
- 22 the other way and ask individually, if you want
- 23 me to, each individual contractor, what did they
- 24 do.

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- 1 Consulting, Inc., other than yourself?
- 2 A. That is correct.
- 3 Q. Over time from 1996 to the present,
- 4 have you had any employees other than yourself?
- 5 A. No.
- 6 Q. Have you ever had any independent
- 7 contractors work for you at CIBER Consulting,
- 8 Inc.?
- 9 A. Yes, I have.
- 10 Q. Okay. How many have you had?
- 11 A. It varies.
- 12 Q. Do you have any currently employed?
- 13 A. Yes, I do.
- 14 Q. How many?
- 15 A. One, two -- four -- six. I'm sorry.
- 16 Q. Briefly, can you describe what these
- 17 six contractors do?
- 18 A. Support work for -- well, they perform
- 19 a variety of tasks. I'm not exactly sure --
- 20 Q. Are they programmers?
- 21 A. No.
- 22 Q. Perhaps we can jump ahead.
- 23 Generally, can you describe what your
- 24 business does, what CIBER Consulting, Inc.,

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- 1 MR. DOWELL: Can you do it that way
- 2 because that is a fairly important definitional
- 3 issue, what your business does?
- 4 MR. SIPIORA: All right. If that's
- 5 what you want me to do, I'll be happy to do
- 6 that.
- 7 BY MR. SIPIORA:
- 8 Q. Can you tell me, let's just go down
- 9 the list, if we can, of the six contractors,
- 10 identify who they are and briefly just tell me
- 11 what they do?
- 12 A. Jessica Evans, who does office support
- 13 work.
- 14 By the way, none of the six do any
- 15 work in the state of Texas.
- 16 Q. Okay.
- 17 A. As a clarification, or work on a
- 18 project related to the state of Texas.
- 19 Nicholas Evans is also doing office
- 20 support work.
- 21 Q. When you say office support work, what
- 22 do you mean?
- 23 A. Typing, filing, administrative type
- 24 work.

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- 1 Q. Okay.
- 2 A. Yes. Answering phones.
- 3 Q. Great. Please, continue.
- 4 A. Gary Rau, who is doing training and
- 5 communications.
- 6 Q. What is he training in?
- 7 A. Procedure development, how to do
- 8 procedures, how to work with procedure changes.
- 9 Q. Who does he train?
- 10 A. Clients, staff.
- 11 Q. How do you spell Mr. Rau's last name?
- 12 A. R-A-U.
- 13 Q. Does he travel as far as his work?
- 14 A. Just locally.
- 15 Q. Locally meaning the --
- 16 A. In the Illinois area.
- 17 Q. In the Illinois area.
- 18 He doesn't have any projects out of
- 19 state?
- 20 A. Does not.
- 21 Q. And is it historically true also that
- 22 he has had no projects out of state?
- 23 A. No, that is not correct.
- 24 Q. Has he had any projects in the state

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- 1 Q. How long has she been with the
- 2 company?
- 3 A. Three years, four years.
- 4 Q. How long has Mr. Rau been with the
- 5 company?
- 6 A. Three years, not continuous in either
- 7 case.
- 8 Q. Can you, please, go ahead with the
- 9 list? Who else?
- 10 A. Sandy Miller.
- 11 Q. And is it Ms. Or Mrs.?
- 12 A. Mrs.
- 13 Q. Okay. What does she do?
- 14 A. She is doing staff support.
- 15 Q. Generally, what does that entail?
- 16 A. Again, doing administrative tasks.
- 17 Q. No client work or working with
- 18 clients?
- 19 A. No, it's for the client through the
- 20 company.
- 21 Q. Okay. Has Mrs. Miller done any work
- 22 outside of the state of Illinois for you?
- 23 A. No.
- 24 Q. Okay. Is there one more that you

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- 1 of Texas?
- 2 A. Has not.
- 3 Q. Has he dealt with any clients in the
- 4 state of Texas?
- 5 A. Has not.
- 6 Q. Okay. Please, continue.
- 7 A. Judy Ferguson, also training.
- 8 Q. Same type of training?
- 9 A. Correct.
- 10 Q. Is this training related to the
- 11 maintenance of records for companies involved in
- 12 the nuclear industry?
- 13 A. No, it's more procedure training. It
- 14 is nuclear utility. It's focused on the
- 15 industry itself.
- 16 Q. With respect to Ms. Ferguson, has she
- 17 had any projects out of the state of Illinois?
- 18 A. Yes.
- 19 Q. Any projects in the state of Texas?
- 20 A. No.
- 21 Q. Any client contacts or business
- 22 contacts in the state of Texas on behalf of your
- 23 company?
- 24 A. No.

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- 1 have?
- 2 A. Right. Eugene Yang.
- 3 Q. Mr. Yang, what does he do?
- 4 A. He is doing support, project support.
- 5 Q. And, generally, what does that entail?
- 6 A. He is doing cost monitoring, schedule
- 7 monitoring.
- 8 Q. How long has Mr. Yang worked for you?
- 9 A. Six years.
- 10 Q. And I neglected to ask you how long
- 11 Mrs. Miller worked for you?
- 12 A. About seven months.
- 13 Q. And has Mr. Yang had any projects
- 14 outside of the state of Illinois?
- 15 A. Through Ciber?
- 16 Q. Yes.
- 17 A. Yes, he has.
- 18 Q. Any projects in the state of Texas?
- 19 A. No.
- 20 Q. Any contacts on your behalf, on behalf
- 21 of Ciber with the state of Texas where he has
- 22 dealt what customers or answered questions or
- 23 solicited business in Texas?
- 24 A. Not on my behalf, no.

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- 1 Q. Have you had independent contractors  
2 work with you over the course of the last six  
3 years other than these individuals?  
4 A. Stuart Helgason.  
5 Q. What did Mr. Helgason do?  
6 A. He also did project support.  
7 Q. Similar to Yang?  
8 A. Yes.  
9 Q. Any work by Mr. Helgason outside of  
10 the state of Illinois?  
11 A. Yes.  
12 Q. Any work in the state of Texas?  
13 A. No.  
14 Q. Any contacts between -- are you aware  
15 of any contacts on behalf of Ciber by Mr.  
16 Helgason in the state of Texas, customers,  
17 clients?  
18 A. No.  
19 Q. The answer is no?  
20 A. No.  
21 Q. Any other individuals that have been  
22 independent contractors working for Ciber over  
23 the past six years?  
24 A. There is one other individual and I

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- 1 individuals who have helped you in terms of  
2 selling services?  
3 A. No.  
4 Q. Has your business always operated out  
5 of your home residence?  
6 A. Yes.  
7 Q. Have you had any location for your  
8 business other than your home residence?  
9 A. No.  
10 Q. How many customers do you have at  
11 CIBER Consulting?  
12 A. Currently, in the past, collectively  
13 in the state of Texas? I'm not sure.  
14 Q. Say currently, how many current  
15 customers do you have?  
16 A. Two.  
17 Q. And where are they located?  
18 A. In Illinois and Wisconsin.  
19 Q. Could you give me a ballpark, the  
20 number of customers you've had over the six  
21 years that you've worked with as CIBER  
22 Consulting?  
23 A. Four.  
24 Q. In addition to these two or total?

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- 1 can't remember his name, to be honest with you.  
2 It was several years ago. Oh, Steve Beeaker.  
3 Q. How would you spell that?  
4 A. B-E-E-A-K-E-R.  
5 Q. And what was Mr. Beeaker's role?  
6 A. Project support.  
7 Q. Similar to Mr. Yang?  
8 A. Correct.  
9 Q. Did he do any work outside of Illinois  
10 for Ciber?  
11 A. Yes.  
12 Q. Okay. Any work in the state of Texas?  
13 A. No.  
14 Q. To your knowledge, did Mr. Beeaker  
15 have any contacts with customers or did he  
16 solicit business in the state of Texas on behalf  
17 of Ciber?  
18 A. No.  
19 Q. Other than the individuals that you've  
20 named, who are independent contractors, have  
21 there been any other individuals who have done  
22 work on behalf of Ciber over the past six years?  
23 A. No.  
24 Q. Have you had any rep, sales reps or

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- 1 A. No, total.  
2 Q. Total.  
3 So, the other two customers, where  
4 have they been located?  
5 A. Pennsylvania, and currently Illinois.  
6 Q. So, total of four customers during the  
7 entire time -- let me rephrase the question.  
8 During the entire time that CIBER  
9 Consulting has existed, it's had a total of four  
10 customers?  
11 A. That is correct.  
12 Q. And those customers have been located  
13 in Wisconsin, Pennsylvania, and two have been in  
14 the state of Illinois?  
15 A. That's correct. Stand corrected.  
16 There were five. One was in Tennessee.  
17 Q. Tennessee Valley area?  
18 A. No.  
19 Q. Since 1996, how many times have you  
20 been in the state of Texas?  
21 A. To the best of my recollection, three  
22 times.  
23 Q. And were those three occasions the  
24 three seminars that are referenced in the

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1 complaint?  
 2 A. Correct.  
 3 Q. Are you aware of any other activities  
 4 of any of the contractors that you've hired that  
 5 would have taken you into the state of Texas?  
 6 A. Are you referring to in association  
 7 with Ciber or independent of Ciber?  
 8 Q. No. Just for clarification throughout  
 9 this deposition, these independent contractors  
 10 had worked outside of -- worked for Ciber, I'm  
 11 not interested in that. I'm only interested in  
 12 their work on behalf of Ciber where they're  
 13 working on your behalf or for you.  
 14 A. No.  
 15 Q. The answer is no?  
 16 A. Correct.  
 17 Q. Do you do any advertising?  
 18 A. Do not.  
 19 Q. Have you ever done any advertising?  
 20 A. Could you define what you mean by  
 21 advertising?  
 22 Q. Broadly construed, anything where you  
 23 were soliciting business, brochures, pamphlets?  
 24 A. No.

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1 A. Well, no, you were asking if I had any  
 2 advertising materials. I put a letter together  
 3 or I can put a list of qualifications together,  
 4 but that's it.  
 5 Q. Okay. So, it's individualized?  
 6 A. Correct.  
 7 Q. And other than the letters that you  
 8 mentioned, in other words, if you're contacted,  
 9 you will write a letter describing what you do  
 10 and put forward your best foot?  
 11 A. Correct.  
 12 Q. And that is the extent of written  
 13 materials that you have relating to promoting or  
 14 describing your business?  
 15 A. Correct, that is the only thing I have  
 16 put together, correct.  
 17 Q. Over the course of the six years  
 18 you've been in business?  
 19 A. To the best of my recollection, yes.  
 20 Q. Have you ever sent any letter of that  
 21 type to anyone in the state of Texas?  
 22 A. Not to my recollection, no.  
 23 Q. You've never had an ad in a trade  
 24 publication?

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1 Q. Ads?  
 2 A. No.  
 3 Q. How do you get the word out about your  
 4 business?  
 5 A. Reputation.  
 6 Q. Word of mouth?  
 7 A. Correct.  
 8 Q. Have you had any written materials  
 9 that you provide to prospective customers or  
 10 customers?  
 11 A. No.  
 12 Q. So, you do not even have a brochure --  
 13 A. That's correct.  
 14 Q. -- who we are type statement?  
 15 A. That's correct.  
 16 Q. Historically, at any point in time,  
 17 have you had written materials of any type that  
 18 describe your business that you've used for  
 19 purposes of promoting or describing your  
 20 business to others?  
 21 A. No.  
 22 Q. So, when you're contacted, if you're  
 23 contacted by someone, the description of your  
 24 business you provide is all done by you orally?

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1 A. No.  
 2 Q. Have you ever been listed in a  
 3 registry or any list of service providers, any  
 4 type of industry publication?  
 5 A. No, not my knowledge.  
 6 Q. So, you've never put your name into  
 7 any -- I don't know what the industry relevant  
 8 publications are.  
 9 Are there publications relevant to  
 10 your industry, the nuclear industry that are  
 11 generally circulated?  
 12 A. Yes, there are.  
 13 MR. DOWELL: Objection, foundation.  
 14 BY MR. SIPIORA:  
 15 Q. Have you ever put any kind of -- even  
 16 listed your name in any of those periodicals?  
 17 A. I have not, no.  
 18 Q. Has your name appeared in any of those  
 19 periodicals, to your knowledge?  
 20 A. Not to my knowledge.  
 21 Q. And by name I mean the name of your  
 22 company?  
 23 A. Correct.  
 24 Q. So, the answer is still no?

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- 1 A. Not to my knowledge.  
 2 Q. Have you ever used any direct  
 3 marketing in your promoting of business?  
 4 A. I'm not sure what you mean by direct  
 5 marketing.  
 6 Q. Telephone calls.  
 7 A. In general or in the state of Texas?  
 8 Q. Generally first.  
 9 A. Not for the purposes of advertising.  
 10 Q. Have you ever put any newsletters or  
 11 descriptions of general information about the  
 12 business or the industry?  
 13 A. No.  
 14 Q. So, based on that there is nothing  
 15 that you've ever sent in the way of an  
 16 advertisement or a letter or a promotional piece  
 17 or a brochure into the state of Texas?  
 18 A. That is correct.  
 19 Q. Do you use the Internet at all in your  
 20 business?  
 21 A. To advertise or --  
 22 Q. Let me rephrase the question.  
 23 Do you use the Internet to promote  
 24 your business in any way?

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- 1 Q. Well, you use e-mail at your office?  
 2 A. Correct.  
 3 Q. So, you communicate with customers via  
 4 e-mail?  
 5 A. Correct.  
 6 Q. Have you ever communicated with a  
 7 prospective customer or a customer in the state  
 8 of Texas?  
 9 A. No.  
 10 Well, for clarification you mean by  
 11 way of advertising or soliciting business or --  
 12 Q. Any communication with someone in the  
 13 state of Texas via e-mail?  
 14 A. Certainly I've had communications with  
 15 people in Texas but not for the purpose of  
 16 soliciting business or advertising.  
 17 Q. What communications have you had?  
 18 A. Personal e-mails or e-mails with  
 19 associates or peers.  
 20 Q. Has anyone that has worked for you  
 21 ever operated out of the state of Texas?  
 22 A. Not to my knowledge.  
 23 Q. Do your contractors physically reside  
 24 in the state of Illinois?

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- 1 A. Do not.  
 2 Q. I understand from your declaration you  
 3 do not have a Website?  
 4 A. That's correct.  
 5 Q. Have you ever had a Website?  
 6 A. Have not.  
 7 Q. You're maybe the only person who  
 8 doesn't.  
 9 A. I'm an old-fashioned kind of guy.  
 10 Q. So, you've never used the Internet  
 11 for -- have you ever used e-mail to promote your  
 12 business, mailing e-mail or posting on other  
 13 people's Websites, banner ads, anything of that  
 14 type?  
 15 A. Have not.  
 16 Q. Have you ever done any seeding of  
 17 search engines or put your name out in such a  
 18 way that your name would come up if people were  
 19 searching the Internet?  
 20 A. Have not.  
 21 Q. Do you take any orders over the  
 22 Internet, in other words, request for services?  
 23 A. Can you define what you mean by  
 24 Internet in that case?

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- 1 A. Not all of them.  
 2 Q. Have any of your contractors ever,  
 3 over the course of your business of CIBER  
 4 Consulting, Inc., have any of your contractors  
 5 ever worked for you while residing in the state  
 6 of Texas?  
 7 A. Not to my knowledge.  
 8 Q. Has your business always been known as  
 9 CIBER Consulting, Inc., since you began using  
 10 that name?  
 11 A. Correct.  
 12 Q. Is the Ciber always capital C I-b-e-r?  
 13 A. Correct.  
 14 Q. Where does that name, CIBER  
 15 Consulting, Inc., where does it appear with  
 16 respect to your business? Is it on letterhead?  
 17 A. Yes.  
 18 Q. Do you have it on business cards?  
 19 A. Yes.  
 20 Q. Where else would it be, on invoices?  
 21 A. Yes.  
 22 Q. Any place else the name appears?  
 23 A. Internal forms.  
 24 Q. Internal meaning within your company

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1 only?  
 2 A. Correct.  
 3 Q. Any place else that the name CIBER  
 4 Consulting, Inc., would appear in connection  
 5 with the operation of your business?  
 6 A. Envelopes, pens that I used. That's  
 7 it.  
 8 Q. Do you have any signage, CIBER  
 9 Consulting, Inc.?  
 10 A. Do not.  
 11 Q. Have you ever filed to register the  
 12 trademark, CIBER Consulting, Inc.?  
 13 A. Have not.  
 14 Q. And that would include not in the  
 15 state level or the federal level?  
 16 A. Maybe it's a reflection of my name  
 17 tag, but I filed for papers of incorporation,  
 18 that's the only formal submittal.  
 19 Q. With the secretary of state of  
 20 Illinois?  
 21 A. Correct.  
 22 Q. And to your understanding, that's how  
 23 you became incorporated as CIBER Consulting,  
 24 Inc.?

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1 Q. Okay. Have you, was your company or  
 2 anyone working on your behalf, a contractor or  
 3 anyone else ever solicited, that is sought to  
 4 obtain business within the state of Texas?  
 5 A. Have not.  
 6 Q. Do you have any suppliers that provide  
 7 goods or services to you?  
 8 A. I'm not sure what you mean by goods  
 9 and services or --  
 10 Q. Do you provide any goods in your  
 11 business or are you strictly a service business?  
 12 A. Service.  
 13 Q. Okay. With respect to the services  
 14 that you provide, do you obtain or do you  
 15 contract for services from anyone else to assist  
 16 you in your business?  
 17 A. Do not.  
 18 Q. In connection with your business, have  
 19 you ever sent any letters into the state of  
 20 Texas?  
 21 Let me rephrase it to say have you in  
 22 connection with your business ever sent any  
 23 letters to a person or an entity that was  
 24 resident in the state of Texas?

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1 A. That is how I became incorporated,  
 2 correct.  
 3 Q. Other than what you've described, the  
 4 letterhead, the invoices, internal documents or  
 5 forms, envelopes and some pens, is there any  
 6 place else that the name CIBER Consulting has  
 7 appeared over the course of your business?  
 8 A. Not to my knowledge.  
 9 Q. Have you or CIBER Consulting ever had  
 10 any contracts with any person or entity in the  
 11 state of Texas?  
 12 A. Have not.  
 13 Q. Have you ever, have you or Ciber ever  
 14 negotiated with, to do business with a company  
 15 or person who was located in the state of Texas?  
 16 A. Have not.  
 17 Q. Now, has anyone on your behalf,  
 18 contractor or anyone else, negotiated to do  
 19 business with someone in the state of Texas?  
 20 A. Representing Ciber?  
 21 Q. Yes, sir.  
 22 A. Not to my knowledge.  
 23 Q. Have --  
 24 A. Have not.

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1 A. Not to my knowledge.  
 2 Q. I'm not --  
 3 A. For the purposes of advertising the  
 4 company or providing services or -- I'm not  
 5 sure.  
 6 Q. I'm asking it broadly, in connection  
 7 with any part of your business, whether it be  
 8 advertising or soliciting or servicing or  
 9 promoting or anything else relating to your  
 10 business, have you ever sent, or someone on your  
 11 behalf sent a letter into the state of Texas to  
 12 someone regarding --  
 13 A. One time.  
 14 Q. When was that?  
 15 A. It was a receipt for an honorarium.  
 16 Q. When was this?  
 17 A. About eight months ago.  
 18 Q. What did the honorarium relate to?  
 19 A. A speaking engagement where I was  
 20 asked to speak at an educational session.  
 21 Q. Where was that?  
 22 A. In Houston.  
 23 Q. Did you actually speak?  
 24 A. Yes, I did.

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- 1 Q. And you received an honorarium as a  
2 result of your speaking?
- 3 A. No, I have not received anything.
- 4 Q. What was the letter relating to?
- 5 A. It was a listing of expenses that they  
6 were going to cover.
- 7 Q. So, you sent a letter to someone in  
8 Texas listing out your expenses in connection  
9 with the engagement that you had there?
- 10 A. Correct.
- 11 Q. And you never received a response?
- 12 A. No, I received responses but no  
13 compensation.
- 14 Q. How much was the honorarium?
- 15 A. \$200 or \$250, something like that.
- 16 Q. Is this in connection with the -- is  
17 it the ARMA conference?
- 18 A. Yes, it was.
- 19 Q. So, other than that one letter that  
20 you sent into Texas in connection with the ARMA  
21 conference and receiving compensation for your  
22 expenses, to your recollection, there has been  
23 no other correspondence or letter sent from you,  
24 by your business or anyone working for you to a

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- 1 Q. Now, you mentioned at the outset there  
2 were three seminars in the state of Texas that  
3 you attended, is that correct?
- 4 A. Correct.
- 5 Q. Okay. Putting aside those, just for  
6 the moment, other than those seminars, have you  
7 had any contacts of any kind in connection with  
8 your business in the state of Texas?
- 9 A. Not to my recollection, no.
- 10 Q. What is NIRMA?
- 11 A. It's the Nuclear Information & Records  
12 Management Association.
- 13 Q. Who are the members of that  
14 organization?
- 15 A. Primarily -- well, I -- I don't know.  
16 The Website probably gives you the best  
17 information as far as that is concerned. They  
18 do have a Website. I don't know what the  
19 breakdown of it is or the makeup of the  
20 association is.
- 21 Q. Are you a member?
- 22 A. Yes, I am.
- 23 Q. Is it a trade association?
- 24 A. No, it's an educational forum.

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- 1 person or entity in the state of Texas?
- 2 A. Not to my knowledge, correct.
- 3 Q. To ask the same question with respect  
4 to e-mail, in other words, communication by you  
5 or your company or someone working for you  
6 relating to your business that was sent via  
7 e-mail to the state of Texas?
- 8 A. With respect to the business itself,  
9 that would be a correct statement.
- 10 Q. What would be a correct statement?
- 11 A. That I have -- I have not sent any  
12 e-mail or other correspondence to the state of  
13 Texas on behalf of the company.
- 14 Q. Have you ever received any requests  
15 for in relation to your business from a person  
16 or company in the state of Texas?
- 17 A. No, not that I can recall.
- 18 Q. Have you ever recruited to hire  
19 someone or to engage services of someone who was  
20 resident in the state of Texas?
- 21 A. Have not.
- 22 Q. Have you registered to do business in  
23 the state of Texas?
- 24 A. Have not.

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- 1 Q. So, the purpose of that organization  
2 is for education of whom?
- 3 A. People involved in records management  
4 activities in the nuclear industry.
- 5 Q. Are you aware of any other purpose  
6 that it has other than providing education to  
7 the members of the industry?
- 8 A. No.
- 9 Q. How long have you been a member of  
10 NIRMA?
- 11 A. Oh, gosh. 16, 17 years, 18 years.
- 12 Q. And NIRMA is N-I-R-M-A?
- 13 A. Correct.
- 14 Q. Does NIRMA have annual meetings?
- 15 A. Yes, they do.
- 16 Q. In the past three years, where have  
17 they been held?
- 18 A. Oh, boy. Last one was in Knoxville.  
19 Quite frankly, you're stretching my memory. It  
20 varies from year to year.
- 21 Q. Not in the same place?
- 22 A. Oh, no. No.
- 23 Q. Do you recall that NIRMA held its  
24 annual meeting in Dallas, Texas, in the year

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- 1 2000?
- 2 A. I know they had a conference in -- I
- 3 don't remember which year. They all run
- 4 together.
- 5 Q. Do you recall attending a conference
- 6 relating to NIRMA in Dallas, Texas?
- 7 A. Yes.
- 8 Q. What was the purpose for your
- 9 attendance at that conference?
- 10 A. To make a presentation and as a
- 11 member.
- 12 Q. What does one do as a member of NIRMA
- 13 at its annual meetings?
- 14 A. Information sharing.
- 15 Q. And what do you mean by information
- 16 sharing?
- 17 A. Networking.
- 18 Q. Is NIRMA comprised of businesses in
- 19 the nuclear industry?
- 20 A. There are some. There may be others,
- 21 but, yes.
- 22 Q. Okay. Also, individuals such as
- 23 yourself who are active in the industry?
- 24 A. Correct.

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- 1 Q. How many conferences have you attended
- 2 this year?
- 3 A. One conference, one committee meeting,
- 4 that was it.
- 5 Q. Where was the conference?
- 6 A. The NIRMA symposium in Knoxville.
- 7 Q. And what was the meeting that you
- 8 attended?
- 9 A. It was a committee meeting for
- 10 information management.
- 11 Q. When was that?
- 12 A. Also in Knoxville.
- 13 Q. Was it in connection with the NIRMA
- 14 meeting?
- 15 A. No. There was one additional
- 16 committee meeting. So, there was a committee
- 17 meeting at the conference and then an additional
- 18 committee meeting. That's where the two comes
- 19 from.
- 20 Q. That was the NIRMA meeting, the
- 21 committee meeting?
- 22 A. Correct.
- 23 Q. Other than the NIRMA meetings, the two
- 24 that you've described, the meeting and the

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- 1 Q. Okay. And when you say networking,
- 2 are you referring to interacting with other
- 3 members of the industry to exchange ideas and
- 4 information?
- 5 A. Yes.
- 6 Q. The meeting that was in Dallas, Texas,
- 7 did you attend with anyone else? In other
- 8 words, did anyone else accompany you to the
- 9 meeting?
- 10 A. Not to my knowledge.
- 11 Q. Have you regularly attend the NIRMA
- 12 annual meetings?
- 13 A. Yes.
- 14 Q. Do you attend meetings relating to the
- 15 industry on a regular basis?
- 16 A. Yes.
- 17 Q. And how many meetings do you go to
- 18 each year roughly?
- 19 A. Of NIRMA or --
- 20 Q. Generally.
- 21 A. Well, it varies from year to year.
- 22 Q. Well, let's talk, if we could, 2002,
- 23 how many?
- 24 A. 2002.

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- 1 symposium, did you attend any other conferences,
- 2 industry meetings, trade meetings in 2002?
- 3 A. External to NIRMA?
- 4 Q. Yes.
- 5 A. External to the nuclear industry?
- 6 Q. No. In relation -- well, of any type
- 7 relating to your business. I don't know -- I
- 8 haven't been able to ask you what your business
- 9 is exactly, but in relation to your business I'm
- 10 interested to know what conferences, seminars,
- 11 whatever you've attended in 2002.
- 12 A. I attended the ARMA conference this
- 13 year.
- 14 Q. That was in Houston, Texas?
- 15 A. No, in addition to that. The annual
- 16 ARMA conference.
- 17 Oh, what else?
- 18 And just some local ARMA chapter
- 19 meetings for Chicago and that was it. To the
- 20 best of my knowledge, that's all I can recall.
- 21 Q. The ARMA conference, where was that
- 22 held?
- 23 A. In New Orleans.
- 24 Q. Did you speak at the ARMA conference

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- 1 in New Orleans?
- 2 A. Yes, I did.
- 3 Q. Did you speak at the NIRMA symposium
- 4 in Knoxville?
- 5 A. Yes, I did.
- 6 Q. And there was another ARMA meeting,
- 7 which you attended in Houston, correct, in 2002?
- 8 A. Correct.
- 9 Q. And what was that?
- 10 A. It was an educational local chapter,
- 11 ARMA chapter.
- 12 Q. And you spoke at that meeting?
- 13 A. Yes, I did.
- 14 Q. Other than the NIRMA symposium in
- 15 Knoxville, the NIRMA committee meeting in
- 16 Knoxville, the ARMA conference in New Orleans,
- 17 the local ARMA chapter meeting you spoke at in
- 18 Houston, Texas, and some of the local ARMA
- 19 chapter meetings here in the state of Illinois,
- 20 did you attend any other conferences or seminars
- 21 or training programs or anything of some sort
- 22 related to your business in 2002?
- 23 A. Not that I can recall.
- 24

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- 1 Q. Okay. Is part of what goes on at this
- 2 type of seminar people offering their services
- 3 to others or promoting their services, trying to
- 4 make business connections?
- 5 A. There are those that do that, yes.
- 6 Q. Is it your testimony that you do not
- 7 do that at these conferences?
- 8 A. I mostly hang out with the people that
- 9 I've been associated with for the last 18 years.
- 10 Q. Who are these people?
- 11 A. People that have been members of the
- 12 association as long as I have. Friends.
- 13 Q. Who is in that group?
- 14 A. Brian Mathews who I spoke with at this
- 15 session, some of the people that work with me.
- 16 Q. When you say work with you, people
- 17 from your company?
- 18 A. Well, people that are subcontracted to
- 19 my company, yes.
- 20 Q. That would be the people we talked
- 21 about earlier, the independent contractors?
- 22 A. Correct.
- 23 Q. They also attended with you?
- 24 A. They don't attend with me. No, they

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- 1 (Exhibit No. 1 was marked for
- 2 identification.)
- 3 BY MR. SIPIORA:
- 4 Q. Mr. Evans, can you, please, identify
- 5 Exhibit No. 17
- 6 A. It looks like a printout of the NIRMA
- 7 Website page related to the annual symposium for
- 8 NIRMA.
- 9 Q. Is this the symposium discussed just a
- 10 few minutes ago that you attended in 2000?
- 11 A. Yes.
- 12 Q. Now, you described earlier that part
- 13 of what you do at these conferences is
- 14 networking.
- 15 Did you do networking at this
- 16 symposium?
- 17 A. I'm not sure in this case what you
- 18 mean by networking. I talked to people, yes.
- 19 Q. Okay. Do you recall earlier you
- 20 talked about networking, exchanging information
- 21 and talking to people in the industry?
- 22 A. Right. Correct.
- 23 Q. And you did that in the 2000 seminar?
- 24 A. Correct.

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- 1 attend on their own.
- 2 Q. On their own.
- 3 Who does Brian Mathews work with?
- 4 A. Wisconsin Public Service.
- 5 Q. Is he one of your clients?
- 6 A. Yes, he is.
- 7 Q. Do you meet with any of your other
- 8 clients at -- let me rephrase that.
- 9 In connection with attending these
- 10 symposiums or conferences you go to, do you meet
- 11 with any of your clients other than Wisconsin
- 12 Public Service?
- 13 A. I'm not sure what you mean by meet
- 14 with. We don't have formal meetings, no.
- 15 Q. Do you spend time with them at the
- 16 conferences?
- 17 A. Oh, sure.
- 18 Q. Are you in your business interested in
- 19 obtaining new customers?
- 20 A. Not exactly sure what you mean by the
- 21 question.
- 22 Q. I can say it again.
- 23 Are you interested in your business
- 24 obtaining new customers?

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- 1 A. No.
- 2 Q. At this point you have no interest in
- 3 obtaining additional clients or new accounts?
- 4 A. No. I'm not sure I'd say that either.
- 5 If you're asking would I be interested in
- 6 soliciting new clients, that is why I say I'm
- 7 not quite sure what you mean by the question.
- 8 Q. Well, I'm asking -- let's just focus
- 9 on the literal language of what I said and that
- 10 is, do you have an interest in your business in
- 11 developing new clients?
- 12 A. Frankly, the word interest is what
- 13 confuses me. I don't actively solicit new
- 14 clients.
- 15 Q. Why not?
- 16 A. I don't need to.
- 17 Q. And why not?
- 18 A. My reputation.
- 19 Q. So, does that mean the people come to
- 20 you?
- 21 A. Frequently.
- 22 Q. Does that mean that you have more work
- 23 that you can do and so you don't have the desire
- 24 to obtain more work?

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- 1 Q. With respect to the first topic, which
- 2 is on the second page of this document, Exhibit
- 3 1, this refers to the ConEd standard records
- 4 retention schedule project, do you see that?
- 5 A. Correct.
- 6 Q. Did you actually give that
- 7 presentation?
- 8 A. I did in cooperation with Cheri Susner
- 9 from ConEd.
- 10 Q. What is ConEd?
- 11 A. Commonwealth Edison, it's a local
- 12 utility.
- 13 Q. Local to Illinois?
- 14 A. Correct.
- 15 Q. How many people attended this seminar
- 16 that you gave?
- 17 A. I don't recall.
- 18 Q. More than 20?
- 19 A. I honestly don't recall.
- 20 Q. In connection with this presentation
- 21 on the ConEd standard records retention schedule
- 22 project, did you make available to attendees any
- 23 material from your company?
- 24 A. Just the -- not from my company, no.

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- 1 A. That is taking it to the extreme. I'm
- 2 not sure that that is an accurate statement.
- 3 Q. Okay. So, if the work presented
- 4 itself, you would be interested in doing it?
- 5 A. I would consider it.
- 6 Q. But getting to the gist of what you're
- 7 saying, it's not that you need to go seek
- 8 business, generally business comes to you?
- 9 A. That's a fair statement.
- 10 Q. And your testimony is that business
- 11 comes to you based on your reputation, not by
- 12 virtue of any solicitation or advertising you
- 13 do?
- 14 A. That is a correct statement.
- 15 Q. When you attend these conferences,
- 16 then you're not in any way attempting to
- 17 interest anyone in using your services?
- 18 A. I'm not actively promoting it, no.
- 19 Q. Let's take a specific example. The
- 20 2000 conference in Dallas, Texas, the NIRMA
- 21 conference, you made two presentations at this
- 22 conference. Why is it that you made two
- 23 presentations?
- 24 A. I was asked to provide two.

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- 1 Q. What was made available to?
- 2 A. Just the PowerPoint presentation of
- 3 the discussion.
- 4 Q. Did the PowerPoint presentation have
- 5 your name on it?
- 6 A. Yes, it did.
- 7 Q. Did it say, in connection with your
- 8 name, CIBER Consulting Inc.?
- 9 A. It had both our names.
- 10 Q. And you had it printed up, made copies
- 11 of that available for people who attended the
- 12 conference?
- 13 A. I did not, no.
- 14 Q. Who did?
- 15 A. The symposium people did.
- 16 Q. So, those who attended your particular
- 17 session could obtain a PowerPoint copy of your
- 18 presentation?
- 19 A. That is correct.
- 20 Q. Did you make available any other
- 21 materials that related to -- had CIBER
- 22 Consulting on them?
- 23 A. I did not, no.
- 24 Q. Did you hand out any business cards at

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- 1 the meeting or the seminar?
- 2 A. Only upon request.
- 3 Q. Did you receive requests for cards?
- 4 A. I don't remember.
- 5 Q. Do you distribute new cards or do you
- 6 hand out cards when you go to these conferences?
- 7 A. Only when I'm requested.
- 8 Q. So, when you meet someone, is it your
- 9 practice to give them a card?
- 10 A. If they ask for it, sure.
- 11 Q. But if they don't ask for it, you
- 12 don't give it to them?
- 13 A. Typically, I don't, no.
- 14 Q. The presentation that you gave, did it
- 15 relate to services that you were providing to
- 16 Commonwealth Edison?
- 17 A. Yes, it did.
- 18 Q. And did it describe the services you
- 19 were providing?
- 20 A. It described the project that we
- 21 worked on.
- 22 Q. In connection with that presentation,
- 23 were you approached by anyone who was interested
- 24 in your services?

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- 1 talks that you're giving?
- 2 A. No.
- 3 Q. Have you ever invited anyone to come
- 4 hear you speak?
- 5 A. My son.
- 6 Q. Other than your son?
- 7 A. No. Seriously, other than that, no.
- 8 Q. The second talk that you gave at the
- 9 2000 NIRMA conference was called the Integrated
- 10 Corporate Mind: Information Management Program,
- 11 concepts and Definitions. Did that talk
- 12 actually take place?
- 13 A. Yes, it did.
- 14 Q. How many people attended that session?
- 15 A. I honestly don't recall.
- 16 Q. In connection with that session, did
- 17 you make any materials available to the public?
- 18 A. I did not, no.
- 19 Q. Would your answer to this, is it
- 20 generally the same situation, where the
- 21 organization makes available materials?
- 22 A. Correct.
- 23 Q. Did you provide any business cards to
- 24 anyone or provide any other written materials

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- 1 A. Not that I recall.
- 2 Q. Who chose the topic of that
- 3 presentation?
- 4 A. Cheri Susner did, and, actually, as I
- 5 recall, she printed out the material, the
- 6 association did not.
- 7 Q. Is Commonwealth Edison one of your
- 8 current customers?
- 9 A. No longer, no.
- 10 Q. So, that is one of the former
- 11 customers?
- 12 A. Correct.
- 13 Q. Are you aware of whether there were
- 14 any mailings or other promotion put out of your
- 15 talk in the 2000 NIRMA conference?
- 16 A. The association probably did some but
- 17 I did not.
- 18 Q. Did you send anything out to any
- 19 clients or prospective clients telling them
- 20 about your speaking?
- 21 A. No.
- 22 Q. Have you ever in connection with any
- 23 of your speaking engagements put out a flier or
- 24 notified customers or prospective customers of

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- 1 yourself to anyone?
- 2 A. Again, only on request of business
- 3 cards.
- 4 Q. Do you have any recollection of giving
- 5 out any cards?
- 6 A. No, I don't.
- 7 Q. Do you have any recollection of anyone
- 8 approaching you about doing business with you in
- 9 connection with this talk?
- 10 A. No, I don't.
- 11 Q. Generally, with respect to the 2000
- 12 NIRMA conference in Texas, do you recall whether
- 13 you talked to anyone about providing services to
- 14 their business?
- 15 A. No, I don't.
- 16 Q. When you go to these conferences,
- 17 focusing specifically on 2000 conference, do you
- 18 ever discuss or meet with other speakers?
- 19 A. Yes. Sure.
- 20 Q. Okay. Did you meet, for example,
- 21 with -- I notice that there is a speak from --
- 22 just page -- looks like 4 of 6, Sandia National
- 23 Laboratories, Martha Keenen, did you meet with
- 24 Ms. Keenen?

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1 A. I'm not sure what you mean by meet  
2 with her. I've known her for a long time. So,  
3 I'm -- we did not have a formal meeting, no, not  
4 to my recollection anyway.

5 Q. But at the conference you would have  
6 spoken to her or said hello?

7 A. Oh, sure.

8 Q. Exchanged pleasantries?

9 A. Certainly.

10 Q. Talked about business?

11 A. I'm -- again, I don't recall the exact  
12 conversation, so.

13 Q. So, you recall talking to Ms. Keenen  
14 at the conference but you wouldn't recall the  
15 details of the conversation?

16 A. No, I don't even recall specifically  
17 talking to her. I -- frankly, I don't remember  
18 if she was there or not. I just know her and I  
19 have known her for quite sometime.

20 Q. Have you ever solicited business from  
21 Sandia National Labs?

22 A. No, I have not.

23 Q. Have you ever done business with them  
24 in you anyway?

1 Dallas, did you have any meetings with anyone?

2 A. I'm sorry. Can you repeat that?

3 Q. During the time you were at the  
4 conference, the NIRMA conference in Dallas,  
5 2000, did you have any meetings with people at  
6 the conference?

7 A. Could you define what you mean by  
8 meetings? Like a formal scheduled sit down  
9 or -- I'm not sure what you mean by meeting.

10 Q. A get together where you stat with  
11 them or talked to someone, whether it be formal  
12 or informal?

13 A. Well, certainly we met on an informal  
14 basis. I did not have any formal scheduled  
15 meetings that I recall with anybody.

16 Q. So, you had, at no time during the  
17 NIRMA 2000 conference, did you have any  
18 scheduled meetings?

19 A. Not that I recall, correct.

20 Q. So, the only -- but you did meet with  
21 people while you were there?

22 A. Well, certainly, the social events or  
23 walking in the halls or things of that nature.

24 Q. Let's walk-through. This conference

1 A. No, I've not.

2 Q. But professionally you do encounter  
3 and have or have conversed with people from  
4 Sandia National Labs in connection with your  
5 attendance at these meetings at least?

6 A. Certainly.

7 MR. DOWELL: Would this be a good  
8 place for a break?

9 MR. SIPIORA: Sure.

10 (Off the record.)

11 BY MR. SIPIORA:

12 Q. Mr. Evans, at the 2000 NIRMA  
13 conference, did you have any discussions with  
14 anyone from Duke Energy Corporation?

15 A. I don't recall.

16 Q. Did you have discussions with anyone  
17 from Tarian Software, Inc.?

18 A. I don't recall any.

19 Q. Prior to going down to Dallas for the  
20 2000 NIRMA conference, did you make any  
21 arrangements to have meetings with anyone while  
22 at the conference?

23 A. Not that I can recall, no.

24 Q. While at the 2000 NIRMA conference in

1 was scheduled from August 20th to the 23rd. To  
2 the best of your recollection, just tell me  
3 how -- exactly what you did when you flew down,  
4 who you met with, what dinners you attended,  
5 what events you socialized at?

6 A. Boy, I don't recall any of the  
7 specifics. I went down to the conference. They  
8 start on Sundays. I don't recall exactly when I  
9 flew to this particular one. They end on  
10 Wednesdays, but, again, this is two years ago, a  
11 little over two years ago. I don't recall  
12 exactly what my flight schedule was or I did  
13 speak at those two sessions.

14 Q. Do you recall any other -- who do you  
15 recall talking to at the conference, the NIRMA  
16 2000 conference?

17 A. Gosh, I don't recall any specifics.  
18 I -- there are a lot of people that I know in  
19 the industry and I'm sure I talked to a number  
20 of them, but I don't recall specific  
21 conversations.

22 Q. Do you remember specific individuals  
23 you talked to while you were there?

24 A. Well, I know I talked to Cheryl Susner



1 and Brian Matheus because I spoke with them but  
2 other than that I don't recall any specific  
3 conversations or individuals that I met with,  
4 no.

5 Q. Do you recall attending any dinners  
6 while you were there?

7 A. I'm almost sure we went to Trail Dust.

8 Q. Steak house?

9 A. Yes.

10 Q. Who was that with?

11 A. It would have been a bunch of people.  
12 It's just one of my favorite steak restaurants.

13 Q. In Dallas?

14 A. Correct.

15 Q. Was that part of a planned event at  
16 the conference?

17 A. No.

18 Q. Just an impromptu get together with  
19 some --

20 A. Correct.

21 Q. -- people you knew?

22 A. Correct.

23 Q. Do you recall who was in that party  
24 that went to Trail Dust?

1 evening activities planned for a night out. I  
2 don't remember what the night out was at this  
3 particular conference.

4 Q. Are there social activities that the  
5 conference schedules?

6 A. Correct. And there is an opening  
7 reception on Sunday nights that are scheduled,  
8 regularly scheduled activities.

9 Q. Did you attend that?

10 A. I don't specifically recall having  
11 attended that one.

12 Q. Is it your practice to attend those?

13 A. I'd say that is a fair statement.

14 Q. So, you may have attended, you just  
15 don't recall?

16 A. I don't recall that particular one,  
17 no.

18 Q. So, the answer is you may have  
19 attended, you just don't recall?

20 A. Well, you know, I've been to 18 years  
21 worth of these things, so they kind of all run  
22 together. I have a hard enough time remembering  
23 where the last one was, never mind who I met  
24 with or who I attended but that is my practice.

1 A. No.

2 Q. Do you recall any other dinners that  
3 you attended while you were at the Dallas NIRMA  
4 conference in 2000?

5 A. No, I sure don't.

6 Q. Do you recall any other meals that you  
7 had where you met people for lunch or had brunch  
8 or breakfast with anyone?

9 A. No, I don't remember any specific  
10 people that I sat with. I mean, obviously, I  
11 ate all of those meals but most of the meals are  
12 served at the symposium so you eat there.

13 Q. What do you do, what did you do at  
14 this symposium, other than your two speaking  
15 engagements, what did you do?

16 A. I don't recall what sessions I  
17 attended, I would have attended some sessions.

18 Q. So, you attended sessions and meals  
19 are provided in between the sessions?

20 A. Correct.

21 Q. Do you recall anything else you did at  
22 the conference, at the NIRMA conference in  
23 Dallas of 2000?

24 A. Certainly nothing of note. They have

1 Q. While you were at the NIRMA conference  
2 in Dallas in 2000, do you recall speaking with  
3 anyone about your business, about what you were  
4 doing at CIBER Consulting, Inc.?

5 A. I don't remember specific  
6 conversations, no.

7 Q. Is it your practice to talk about your  
8 business at such conferences?

9 A. I'm sure -- I mean, people ask you  
10 what you're doing or what projects you're  
11 working on, those kinds of questions, yes.

12 Q. In connection with your attendance at  
13 the NIRMA 2000 conference, do you recall anyone  
14 offering their services to you?

15 A. No, I don't.

16 Q. Do you recall anyone at the 2000 NIRMA  
17 conference in Dallas asking you about services  
18 you were providing?

19 A. No --

20 Q. Or could provide?

21 A. I don't recall any specific  
22 conversations, no.

23 Q. In connection with the conferences  
24 that you have attended over the last year, last

1 few years, have there ever been occasions where  
2 people have asked you about, say, Bruce or Mr.  
3 Evans, can you do this or can you provide such a  
4 service or do you do this type of thing?

5 A. Oh, I'm sure there have been. I don't  
6 recall any specific instances or individuals,  
7 but I'm sure there have been.

8 Q. Is that part of what goes on at these  
9 type of conferences, where people find out what  
10 type of services other people provide and what  
11 type of activities are going on in the industry?

12 A. For an individual that has been around  
13 as long as I have, they pretty much know, so  
14 they may ask specifics about a particular  
15 project, but --

16 Q. So, is the answer yes?

17 A. Well, could you repeat the question  
18 for me again?

19 Q. Sure.

20 At conferences such as the NIRMA 2000  
21 conference in Dallas, is it the common practice  
22 or common at such conferences for people to  
23 inquire of others regarding what types of  
24 services the person might provide or things

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1 related to your business or someone asked you  
2 about your business or you talked about your  
3 business other than the presentation that you  
4 gave?

5 A. No, I don't remember any specific  
6 conversations. No.

7 Q. In connection with your attendance at  
8 any conferences or seminars, not just the 2000  
9 conference in Dallas, have you ever made an  
10 attempt in advance of the conference to schedule  
11 a meeting with someone relating to your  
12 business?

13 A. Not to my recollection, no.

14 Q. So, is it your -- it has never been  
15 the case in all of the conferences that you've  
16 attended that you have planned ahead to do some  
17 business while at the conference?

18 A. Not to my recollection, no.

19 Q. And would your testimony be that when  
20 you attended the NIRMA conference in Dallas that  
21 you did not engage in any business activity?

22 A. Well, you'd have to define business  
23 activities for me. Did we ever discuss the  
24 state of the industry or discuss what I was

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1 related to a person's business?

2 A. It's difficult for me to address what  
3 would be common for interactions between other  
4 individuals. It has happened with me but not  
5 with any frequency.

6 Q. Well, you say not with any frequency.  
7 Why do you say that? People do not ask you  
8 about your business very often?

9 A. Well, again, because I've been in  
10 these associations as long as I have, people  
11 typically know what I do.

12 Q. And they know about your business,  
13 CIBER Consulting?

14 A. I know they know me by name and by  
15 face.

16 Q. As Bruce Evans?

17 A. Correct.

18 Q. As Bruce Evans of CIBER Consulting,  
19 Inc.?

20 A. That I don't know. I don't know how  
21 they make the association. I just know that  
22 they know me.

23 Q. Do you recall anything specifically  
24 about the NIRMA 2000 conference in Dallas that

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1 doing in the business or discuss what projects I  
2 was working on, I don't remember specific  
3 conversations or individuals I had those  
4 conversations with but in all probability those  
5 kinds of conversations occurred.

6 No, I did not schedule meetings for  
7 the purpose of soliciting any business or  
8 providing services or advertising services or  
9 any of that kind of thing, no.

10 Q. Did you acquire any new business as a  
11 result of attending the 2000 conference in  
12 Dallas?

13 A. Did not, not that I recall any way.

14 Q. Did you obtain any -- let me rephrase  
15 that.

16 Did you receive any inquiries relating  
17 to new business as a result of your attendance  
18 at the 2000 conference Dallas?

19 A. Not that I recall, no.

20 Q. Were you an exhibitor at the  
21 conference?

22 A. I was not.

23 Q. Have you been present -- let me  
24 rephrase that.

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1 In connection with your attending  
2 conferences, have you observed other people  
3 negotiating business or talking business leading  
4 to actual transactions taking place at these  
5 conferences?

6 A. Not that I can recall. It would  
7 certainly be imprudent for them to do that in  
8 front of me, but not that I recall.

9 Q. Why would it be imprudent?

10 A. Well, if they weren't conducting  
11 business with me.

12 Q. Well, I guess what I'm trying to get  
13 at whether in your experience are other people  
14 the same as you, they don't go to these  
15 conferences for business purposes or have you  
16 observed people actually soliciting business and  
17 trying to make contacts and networking to get  
18 business?

19 A. I have not been part of or overheard  
20 any of those kinds of conversations, no.

21 Q. Why was your company name used in the  
22 program for the NIRMA 2000 conference?

23 A. I'm not sure I understand the  
24 question.

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1 conference and for educational purposes I've  
2 done a lot of work in that particular area.

3 Q. Do you participate and provide  
4 presentations in part to promote your business?

5 A. No. My purpose is more to tell people  
6 about the state of information management at  
7 this point.

8 Q. So, in the 2000 conference in Dallas,  
9 your testimony would be that there are no  
10 part -- you had no intention of promoting your  
11 business by being a speaker at the conference?

12 A. That was not one of my purposes, no.

13 Q. And your only purpose is to promote  
14 education in the industry?

15 A. Correct.

16 Q. And I think you testified you don't  
17 recall giving out any business cards at the 2000  
18 conference in Dallas?

19 A. Not that I can recall, no.

20 Q. But it would be your practice at  
21 conferences to give people your business card if  
22 they asked for one?

23 A. Certainly.

24 Q. After the NIRMA conference in Dallas

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1 Q. Well, your name appears, Bruce Evans,  
2 CIBER Consulting, Inc., do you know why?

3 A. For purposes of identification.

4 Q. Did you authorize that?

5 A. I'm not sure what you mean by  
6 authorize, but they typically ask for name and  
7 address and phone number, e-mail address, things  
8 of that nature for their proceedings.

9 Q. And you provided the name CIBER  
10 Consulting, Inc.?

11 A. That is correct.

12 Q. Would you agree that your appearance  
13 in this program helps the visibility of your  
14 business?

15 A. I've not seen any tangible result of  
16 that, no.

17 Q. So, you disagree with that statement?

18 A. Based on that fact, I'd have to  
19 disagree with that statement.

20 Q. Why do you attend and why do you --  
21 let me rephrase it.

22 Why did you speak at the NIRMA 2000  
23 conference?

24 A. I was requested to speak at the

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1 in 2000, when was the next time you were in the  
2 state of Texas?

3 A. Probably for the DOE conference. I  
4 don't remember what the sequence of those  
5 conferences were, or the ARMA Houston chapter, I  
6 don't remember what the sequence of those  
7 conferences were.

8 (Exhibit No. 2 was marked for  
9 identification.)

10 BY MR. SIPIORA:

11 Q. Mr. Evans, handing you what has been  
12 marked as Exhibit 2. Can you, please, identify  
13 this exhibit?

14 A. It's an agenda and information package  
15 from a DOE records conference. I don't know  
16 whether it came off a Website or where it came  
17 from. Oh, I guess from a Website.

18 Q. Did you attend this conference?

19 A. Yes, I did.

20 Q. Where did this take place?

21 A. I think San Antonio. I don't see the  
22 location on it. I'm assuming San Antonio.

23 Q. What was this conference about?

24 A. It's an education conference for

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1 records management people and department of  
2 energy, department of energy related  
3 organizations.

4 Q. Is this a regular meeting that takes  
5 place?

6 A. Yes. It's an annual meeting that they  
7 hold.

8 Q. Have you attended meetings other than  
9 this one relating to same subject matter?

10 A. Yes.

11 Q. Do you attend this every year?

12 A. No, I don't. I've -- no, I don't.

13 Q. And you did attend this one in June  
14 2001?

15 A. I did.

16 Q. Now, why did you attend this meeting  
17 presented by the department of energy?

18 A. I had been requested to speak at this  
19 session.

20 Q. Who asked you to speak?

21 A. I don't remember who specifically it  
22 was, but it was a member of their program  
23 committee.

24 Q. What is the purpose of this meeting or

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1 Q. Okay. Do you recall having any  
2 dinners or meetings with anyone at dinner or  
3 lunch or any other time?

4 A. No, I don't.

5 Q. What recollection do you have of this  
6 conference?

7 A. Only that I spoke, and I'm not trying  
8 to be flippant, I looked for a motorcycle down  
9 there because I was shopping for a motorcycle at  
10 the time.

11 Q. Do you recall anything else about the  
12 conference other than the fact that you spoke?

13 A. No.

14 Q. Do you recall anyone that you spoke  
15 with?

16 A. I don't recall having any specific  
17 conversations with anybody at the conference,  
18 no.

19 Q. Do you recall anything that you spoke  
20 about other than your topic?

21 A. Not business related, no.

22 Q. Just social discussions?

23 A. Well, there was a good deal of

24 pollination, cross pollination between NIRMA and

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1 What was the purpose of this meeting?

2 A. It's an educational seminar for  
3 records management practices in the department  
4 of energy, specifically nuclear related  
5 facilities.

6 Q. Did you make any arrangement to meet  
7 with anyone prior to attending this conference?

8 A. No.

9 Q. While you were there, did you have any  
10 meetings with anyone concerning your business?

11 A. Not to my knowledge. I had no  
12 specific scheduled meetings with anybody.

13 Q. Briefly, can you walk me through what  
14 you did at this conference? Did you come down  
15 on Sunday?

16 A. Frankly, I remember even less about  
17 this one than I do about the NIRMA conference.  
18 I know I spoke on Tuesday.

19 Q. Do you recall any dinner, going to any  
20 gatherings, social events?

21 A. For this particular conference,  
22 typically meals are on your own. They do have  
23 an opening reception. I don't recall whether I  
24 attended the opening reception or not on Monday.

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1 this DOE conference, so I would have run into  
2 several of I'm sure the same people and we would  
3 have had social conversations, yes.

4 Q. When you say cross pollination, what  
5 do you mean?

6 A. They attend both conferences.

7 Q. So, the same group of people you talk  
8 to at NIRMA you were talking to here?

9 A. Typically, yes, they're both focused  
10 on nuclear energy.

11 Q. But you don't recall any specific  
12 conversations or any details about  
13 conversations?

14 A. No, I don't.

15 Q. Did you hand out any materials or give  
16 out anything written at the conference?

17 A. Again, there would have only been a  
18 PowerPoint handout, which they would have  
19 provided, and other than that, no.

20 Q. Do you recall giving any business  
21 cards to anyone at this meeting?

22 A. No, I don't remember giving them  
23 unless one was requested of me.

24 Q. When you do your talks, do you -- in

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1 the room where the talk takes place, do you  
 2 leave business cards available for people to  
 3 pick up?  
 4 A. No.  
 5 Q. Do you leave any material for people  
 6 to pick up?  
 7 A. No, again, just the handouts, the  
 8 PowerPoint handouts.  
 9 Q. And as a result of attending the  
 10 conference in San Antonio in 2001, did you  
 11 receive any contact or leads with respect to  
 12 business?  
 13 A. Nothing that -- no.  
 14 Q. Did you receive any inquiries at the  
 15 2001 conference in San Antonio regarding  
 16 business?  
 17 A. Not that I recall, no.  
 18 Q. Any follow-up inquiries after the  
 19 conference that related to your attendance there  
 20 relating to business?  
 21 A. No, not that I recall.  
 22 Q. Well, when you're down at these  
 23 conferences, the three that you attended in  
 24 Dallas or San Antonio or Houston, have you ever

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1 Laboratories?  
 2 A. Well, she was the last time I talked  
 3 to her.  
 4 Q. How long have you known her?  
 5 A. Quite a few years.  
 6 Q. Did you talk with her at the 2001  
 7 conference in San Antonio?  
 8 A. I don't recall whether she was there  
 9 or not. She may have been. If I didn't talk to  
 10 her there, I might have talked to her at NIRMA,  
 11 but --  
 12 Q. If you look at the second page, top,  
 13 the Monday session, Scientific and Technical  
 14 Records, Nusbaum; do you recall that she was  
 15 there?  
 16 A. No, I didn't go to that session, so  
 17 I -- she may have been. Her name is here but I  
 18 don't recall seeing her.  
 19 Q. But you know her and you've talked to  
 20 her at different conferences over the years?  
 21 A. Right, we have been friends for quite  
 22 some time.  
 23 Q. Is it the case that if one went  
 24 through here, the list of speakers, you

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1 made contact with any local businesses there?  
 2 A. Businesses related to my business  
 3 or --  
 4 Q. Yes.  
 5 A. -- or related to the conference?  
 6 Q. Yes. Relating to your business.  
 7 A. No.  
 8 Q. You've never used your trip down to  
 9 Texas as an opportunity to make contact with  
 10 anyone else who might have been potentially a  
 11 customer down in Texas?  
 12 A. No.  
 13 Q. As with the NIRMA conference, would it  
 14 have been the case at the 2001 conference in San  
 15 Antonio that you would have talked to people  
 16 generally about business in relation to your  
 17 business at CIBER Consulting?  
 18 A. I would have talked to people about  
 19 the records management profession and projects  
 20 that I might be working on at that particular  
 21 time, yes.  
 22 Q. Do you know Anna Nusbaum?  
 23 A. Yes, I do.  
 24 Q. She is with Sandia National

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1 generally know or personally know most of the  
 2 people who speak at these conferences?  
 3 A. Most might be an extreme but I'm quite  
 4 sure I know several.  
 5 Q. Okay. And they know of you as Bruce  
 6 Evans from CIBER Consulting?  
 7 A. They know of me, yes.  
 8 Q. When you said earlier that your  
 9 reputation is well known within the nuclear  
 10 industry, how is that?  
 11 A. The advantage of being around longer  
 12 than dirt, I guess, and there is more truth to  
 13 that than fiction. I've been around a long  
 14 time. And I've been -- I've been an active  
 15 speaker.  
 16 Q. And is your -- at this point in time,  
 17 after being in business six years of CIBER  
 18 Consulting, are you known as Bruce Evans from  
 19 CIBER Consulting?  
 20 A. To be honest with you, you'd have to  
 21 ask them that. I don't know.  
 22 Q. What is your perception of what you're  
 23 known as now?  
 24 A. I don't -- I don't think I could -- I

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1 don't think I could accurately characterize  
2 that. I think it would be a bit presumptive for  
3 me to --

4 Q. Well, when you meet people at  
5 conferences like at the 2001 conference in San  
6 Antonio, when you introduce yourself, do you  
7 introduce yourself as Bruce Evans from CIBER  
8 Consulting?

9 A. No, to be quite frank with you, either  
10 people already know me or other people introduce  
11 me to whomever as Bruce Evans.

12 Q. And when you are introduced by others,  
13 is it your experience that they introduce you as  
14 Bruce Evans from CIBER Consulting?

15 A. I don't know that I could assign a  
16 specific percentage to it. Sometimes it is  
17 Bruce Evans. Sometimes it is Bruce Evans from  
18 Ciber. I don't know what the percentages would  
19 be.

20 Q. When those introductions take place,  
21 where they give the name of your company, do  
22 they refer to it as Ciber or CIBER Consulting?

23 A. CIBER Consulting, in the few instances  
24 that I can think of.

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1 been marked as Exhibit 3.

2 A. It appears to be an ARMA Houston  
3 monthly meeting schedule taken from their  
4 Website.

5 Q. And on the second page of this  
6 document is a reference to a July 24th, 2002,  
7 speaking engagement that names you?

8 A. Correct.

9 Q. Did you, in fact, give that  
10 presentation?

11 A. Yes, I did.

12 Q. Okay. How many people attended that  
13 conference or that meeting?

14 A. I don't recall how many were in  
15 attendance.

16 Q. More than ten?

17 A. More than ten, but how many, I don't  
18 know.

19 Q. Okay. This was a meeting that you  
20 were invited to speak at?

21 A. That is correct.

22 Q. What is ARMA?

23 A. The association of records, managers  
24 and administrators.

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1 Q. Are you generally known as Ciber or  
2 are you known as CIBER Consulting?

3 MR. DOWELL: Objection. Counsel, I  
4 think we're now kind of getting far outside of  
5 the purpose of the deposition.

6 BY MR. SIPIORA:

7 Q. Let me focus the question on the 2001  
8 conference, introductions that you had at that  
9 conference, would you be introduced as Ciber or  
10 CIBER Consulting?

11 A. Again, I don't have any percentage or  
12 recollections of specific introductions so I  
13 can't honestly answer that question.

14 Q. Fair enough.

15 You testified earlier that you also  
16 attended a conference in Houston in 2002, the  
17 ARMA conference?

18 A. Correct.

19 Q. Let's --

20 A. Local chapter.

21 (Exhibit No. 3 was marked for  
22 identification.)

23 BY MR. SIPIORA:

24 Q. Mr. Evans, please, identify what has

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1 Q. Where are they based?

2 A. The corporate headquarters is in  
3 Kansas, but they've got local chapters  
4 throughout the world.

5 Q. Are you a member of ARMA?

6 A. Yes, I am.

7 Q. What organizations are you a member of  
8 other than ARMA and NIRMA?

9 A. AIIM, which is the Association of  
10 Imagine and Integration Management, and a member  
11 of ASME NQA and that's it.

12 Q. You said ARMA you think is based in  
13 Kansas.

14 Where is NIRMA based?

15 A. They were based in New York but I  
16 think they moved their offices to New Hampshire.  
17 I think they closed down the New York office.

18 Q. Where is AIIM based?

19 A. That I don't know.

20 Q. Where is ASME NQA based?

21 A. That I don't know. It's a committee  
22 of the American Society of Mechanical Engineers.

23 Q. Are you a member of any professional  
24 organizations that are based in Texas?

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- 1 A. No, I am not.  
 2 Q. Are you certified or registered,  
 3 licensed in any respect in the state of Texas?  
 4 A. Licensed by the state of Texas or --  
 5 Q. By the state of Texas or by any  
 6 authority within the state of Texas?  
 7 A. No, I'm not.  
 8 Q. Are you registered as an engineer in  
 9 the state of Illinois?  
 10 A. No, I'm not.  
 11 Q. Are you an engineer by training?  
 12 A. No, I'm not.  
 13 Q. Turning back to Exhibit 3, the ARMA  
 14 meeting in Houston, who invited you to speak at  
 15 this conference?  
 16 A. It was a member of their program  
 17 committee. I don't remember who it was.  
 18 Q. In anticipation of going down to  
 19 Houston for that meeting, 2002, did you make any  
 20 plans or schedule any meetings with anyone to  
 21 occur while you were in Houston?  
 22 A. No, I do not.  
 23 Q. How long were you in Houston?  
 24 A. I flew in in the morning, late in the

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- 1 A. Not yet.  
 2 Q. Did you perceive that by attending  
 3 this conference or this meeting and making a  
 4 presentation that you would help promote your  
 5 business?  
 6 A. Couldn't even get paid for the trip.  
 7 No, I did not.  
 8 Q. Well, you didn't get paid for the trip  
 9 but you did get -- people came to hear you and  
 10 your name got out and your business name got  
 11 out?  
 12 MR. DOWELL: Objection, foundation.  
 13 BY MR. SIPIORA:  
 14 Q. I mean, let me put it as a question.  
 15 It says here principal and founder of  
 16 CIBER Consulting on the program, do you see  
 17 that?  
 18 A. Yes.  
 19 Q. Did you authorize them to say that?  
 20 A. They asked me for a bio, and that was  
 21 part of my personal bio.  
 22 Q. And, in fact, if you look at the next  
 23 page there, it has a little bio about you?  
 24 A. Yes.

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- 1 morning and flew out that afternoon.  
 2 Q. While you were there, other than  
 3 giving the talk, did you have meetings with  
 4 anyone else?  
 5 A. No, I did not.  
 6 Q. Did you make any contacts with anyone  
 7 to discuss business?  
 8 A. No, I did not.  
 9 Q. What was your purpose in attending  
 10 the July 24th, 2002, meeting in Houston Texas?  
 11 A. Just to make this presentation.  
 12 Q. And why did you want to make this  
 13 presentation?  
 14 A. I was asked to.  
 15 Q. And you testified earlier you were  
 16 given an honorarium or you were promised one?  
 17 A. Well, they promised to cover my  
 18 expenses.  
 19 Q. So just that, not additional  
 20 compensation?  
 21 A. They talked about a \$250 honorarium  
 22 but I've not seen expenses nor an honorarium.  
 23 Q. They've never even paid for your plane  
 24 ticket?

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- 1 Q. Is that something you provided?  
 2 A. Yes, it is.  
 3 Q. And they accurately produced what you  
 4 gave them?  
 5 A. The copy is a little cut off on the  
 6 right-hand side so I can't tell whether there is  
 7 text that goes beyond, but it looks like it's  
 8 all there but I can't say for certain. What is  
 9 there or what I can read it is accurate, yes.  
 10 Q. Did you perceive that by attending  
 11 this meeting and making this presentation that  
 12 you would promote CIBER Consulting?  
 13 A. That wasn't my purpose. My purpose  
 14 was to go down and had been specifically asked  
 15 to present this particular subject and that's  
 16 what I did.  
 17 Q. Well, what was in it for you?  
 18 A. Same reason I speak at all of the  
 19 other conferences, just information sharing.  
 20 Q. And there is no part of -- no part of  
 21 why you did this relates to an objective of  
 22 advancing your business?  
 23 A. That was not my purpose. I think it  
 24 would be disingenuous to think that that might

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1 not occur, but that wasn't my purpose, no.

2 Q. If you could turn back just to a  
3 moment for the previous exhibit, which was the  
4 Exhibit 2, 2001 conference, the last page also  
5 contains a bio.

6 A. I'm sorry. That was the DOE  
7 conference?

8 Q. Yes, sir.

9 A. Okay.

10 Q. Is that a bio of you on the last page  
11 of Exhibit 2?

12 A. Yes, it is.

13 Q. Is this a bio that you provided to the  
14 DOE people putting on the conference?

15 A. Yes, it is.

16 Q. Was this bio made available to those  
17 that attended the conference?

18 A. I would assume it was in the  
19 proceedings but I don't know that with  
20 certainty. Apparently, it was on the Website,  
21 so.

22 Q. Did you see anyone with your bio or  
23 did you see it distributed at the conference?

24 A. No, I did not.

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1 A. No, I did not.

2 Q. And as a result of this attendance of  
3 this conference in 2002 in Houston, have you  
4 received any business at all from anyone who has  
5 wanted to use your services?

6 A. I'm not sure I understand the  
7 question.

8 Q. Has anyone contacted you either at  
9 that session or as a result of your attendance  
10 at that session, someone who saw you, someone  
11 who heard you, who wanted to use your services?

12 A. Not to my knowledge, no, nothing  
13 directly related to that.

14 Q. Over the whatever number of years you  
15 said, 18 years, 16 years that you've attended  
16 these conferences, have you ever received a call  
17 or an e-mail or a letter or a communication from  
18 anyone after the conference inquiring about  
19 using your services?

20 A. Not that I can recall.

21 Q. So, these conferences you attend, and  
22 you attend four, five a year, have never  
23 generated any business for you at any time?

24 A. I'm not sure that I can state that but

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1 Q. When you spoke at the 2001 conference,  
2 were there materials in the room available to  
3 people who were in attendance?

4 A. Just copies of the PowerPoint  
5 presentations.

6 Q. But not a copy of your bio?

7 A. Not to my knowledge. I did not  
8 distribute anything.

9 Q. You simply provided the bio to the DOE  
10 presenters --

11 A. To the program committee, correct.

12 Q. Okay. And then after that they,  
13 obviously, they put it on the Website because  
14 you're looking at it, but you don't know any  
15 other place it was distributed or shared?

16 A. No, I don't.

17 Q. Is this an accurate description of  
18 your -- is this an accurate reproduction of your  
19 bio you provided?

20 A. Yes, it is.

21 Q. In connection with this 2002  
22 presentation that you made in Houston, Texas,  
23 did you receive any inquiries from anyone  
24 concerning your business?

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1 I've not received anything that directly related  
2 to my presenting or my attending or someone else  
3 attending a particular conference with any work.

4 Q. Well, do you have any basis to believe  
5 that your attendance or your participation or  
6 presentations at any of these conferences has  
7 caused you to receive business?

8 A. I have not seen anything that would  
9 allow me to draw that conclusion, no.

10 Q. And this is true before you were CIBER  
11 Consulting, Inc., as well in your previous  
12 business, same experience?

13 A. That's an accurate statement. Again,  
14 I've not seen anything that wouldn't allow me to  
15 draw that conclusion.

16 Q. To draw the conclusion that this is  
17 good for your business, that it creates business  
18 for you?

19 A. Correct.

20 Q. Since attending the ARMA conference in  
21 Houston in July 2002, have you had any other  
22 contact with the state of Texas other than that  
23 one letter you mentioned?

24 A. As related to CIBER Consulting,

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1 Incorporated, no.  
 2 MR. SIPIORA: Take just a few minute  
 3 break to. . .  
 4 (Off the record.)  
 5 BY MR. SIPIORA:  
 6 Q. With respect to anything you have  
 7 testified to today, do you have any further  
 8 recollection, any further changes to what you  
 9 stated? Are you satisfied that what you stated  
 10 so far has been accurate, no new changes or  
 11 comments than what you've previously stated?  
 12 A. No changes, to the best of my  
 13 recollection of everything I've stated, no.  
 14 MR. SIPIORA: Okay. No further  
 15 questions.  
 16 MR. DOWELL: We have nothing.  
 17 FURTHER DEPONENT SAITH NOT  
 18  
 19  
 20  
 21  
 22  
 23  
 24

1 testimony given by me at said deposition except  
 2 as I have so indicated on the errata sheets  
 3 provided herein.  
 4  
 5  
 6 BRUCE F. EVANS  
 7  
 8 No corrections (Please initial)  
 9 Number of errata sheets submitted  
 10 (pgs)  
 11  
 12 SUBSCRIBED AND SWORN TO  
 13 before me this day  
 14 of , 2002.  
 15  
 16  
 17  
 18 NOTARY PUBLIC  
 19  
 20  
 21  
 22  
 23  
 24

1 IN THE DISTRICT COURT OF THE UNITED STATES  
 2 NORTHERN DISTRICT FOR TEXAS  
 3 DALLAS DIVISION  
 4 CIBER, INC., a Delaware )  
 5 corporation, )  
 6 Plaintiff, )  
 7 vs. ) 3:02-CV-20261  
 8 CIBER CONSULTING, Inc., an )  
 9 Illinois corporation, and BRUCE )  
 10 F. EVANS, an individual, )  
 11 Defendants. )  
 12 I, BRUCE F. EVANS state that I have  
 13 read the foregoing transcript of the testimony  
 14 given by me at my deposition on the 10th day of  
 15 December 2002, and that said transcript  
 16 constitutes a true and correct record of the  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24

1 WITNESS ERRATA SHEET PAGE #1  
 2 CIBER, INC. Vs No. 3:02-CV-20261  
 3 CIBER CONSULTING Deposition of: BRUCE F. EVANS  
 4 DATE: 12-10-02  
 5 I wish to make the following changes for  
 6 the following reasons:  
 7 Page Line Change: Reason:  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24 (Signed) Reason:

1 STATE OF ILLINOIS )  
 2 ) SS:  
 3 COUNTY OF DU PAGE )  
 4

5 I, ROSEMARIE LaMANTIA, Certified  
 6 Shorthand Reporter No. 084-02661, Registered  
 7 Professional Reporter and Notary Public in and  
 8 for the County of DuPage, State of Illinois, do  
 9 hereby certify that previous to the commencement  
 10 of the examination, said witness was duly sworn  
 11 by me to testify the truth; that the said  
 12 deposition was taken at the time and place  
 13 aforesaid; that the testimony given by said  
 14 witness was reduced to writing by means of  
 15 shorthand and thereafter transcribed into  
 16 typewritten form; and that the foregoing is a  
 17 true, correct, and complete transcript of my  
 18 shorthand notes so taken as aforesaid.

19  
 20 I further certify that there were  
 21 present at the taking of said deposition the  
 22 persons and parties as indicated on the  
 23 appearance page made a part of this deposition.  
 24

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1  
 2 I further certify that I am not counsel  
 3 for nor in any way related to any of the parties  
 4 to this suit, nor am I in any way interested in  
 5 the outcome thereof.  
 6

7 I further certify that this certificate  
 8 applies to the original signed IN INK and  
 9 certified transcripts only. I assume no  
 10 responsibility for the accuracy of any  
 11 reproduced copies not made under my control or  
 12 direction.  
 13

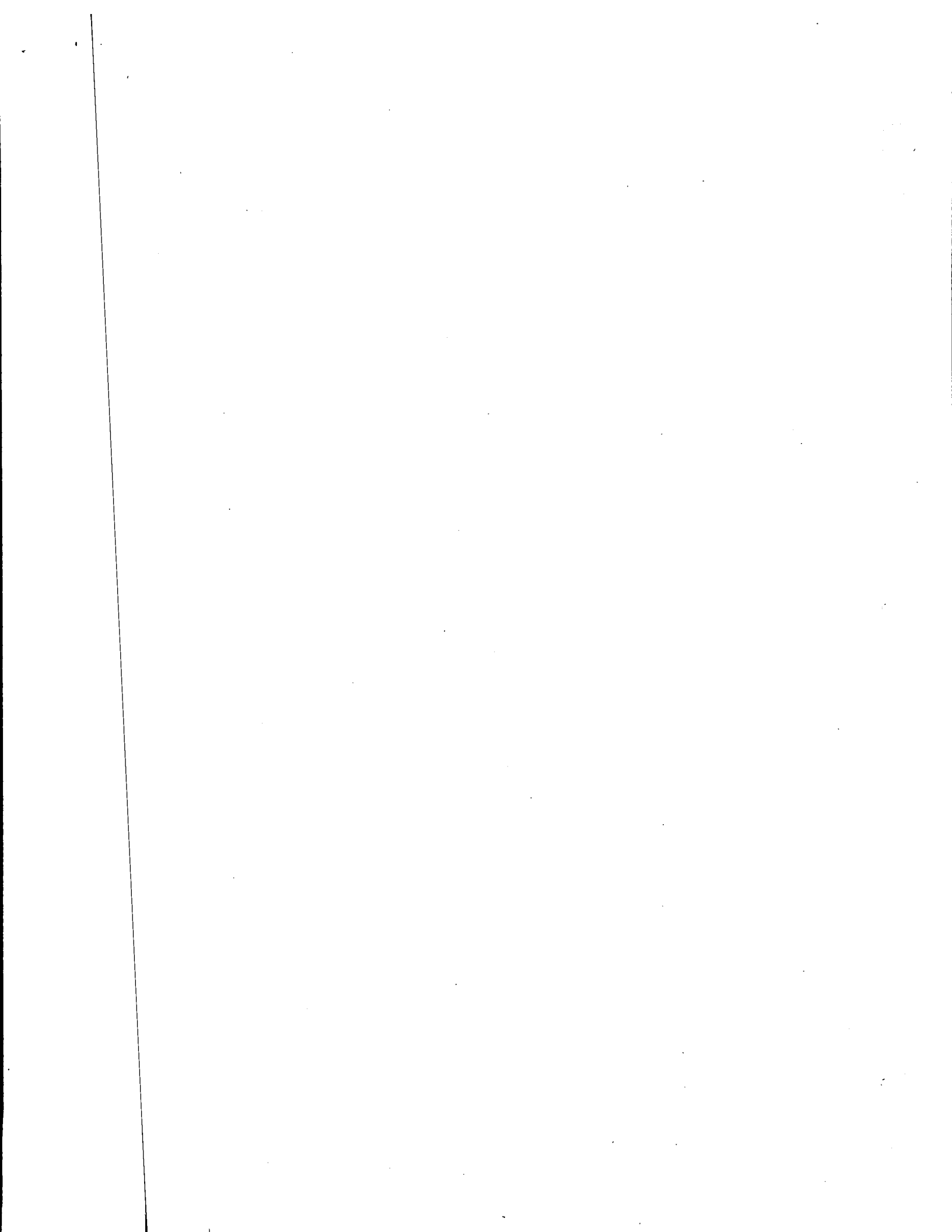
14 IN WITNESS WHEREOF I have hereunto set  
 15 my hand and affixed my notarial seal this 22nd  
 16 day of December, A.D., 2002.  
 17  
 18  
 19

20 Rosemarie LaMantia, CSR, RPR

21  
 22 My Commission Expires:  
 23 March 6, 2003.  
 24

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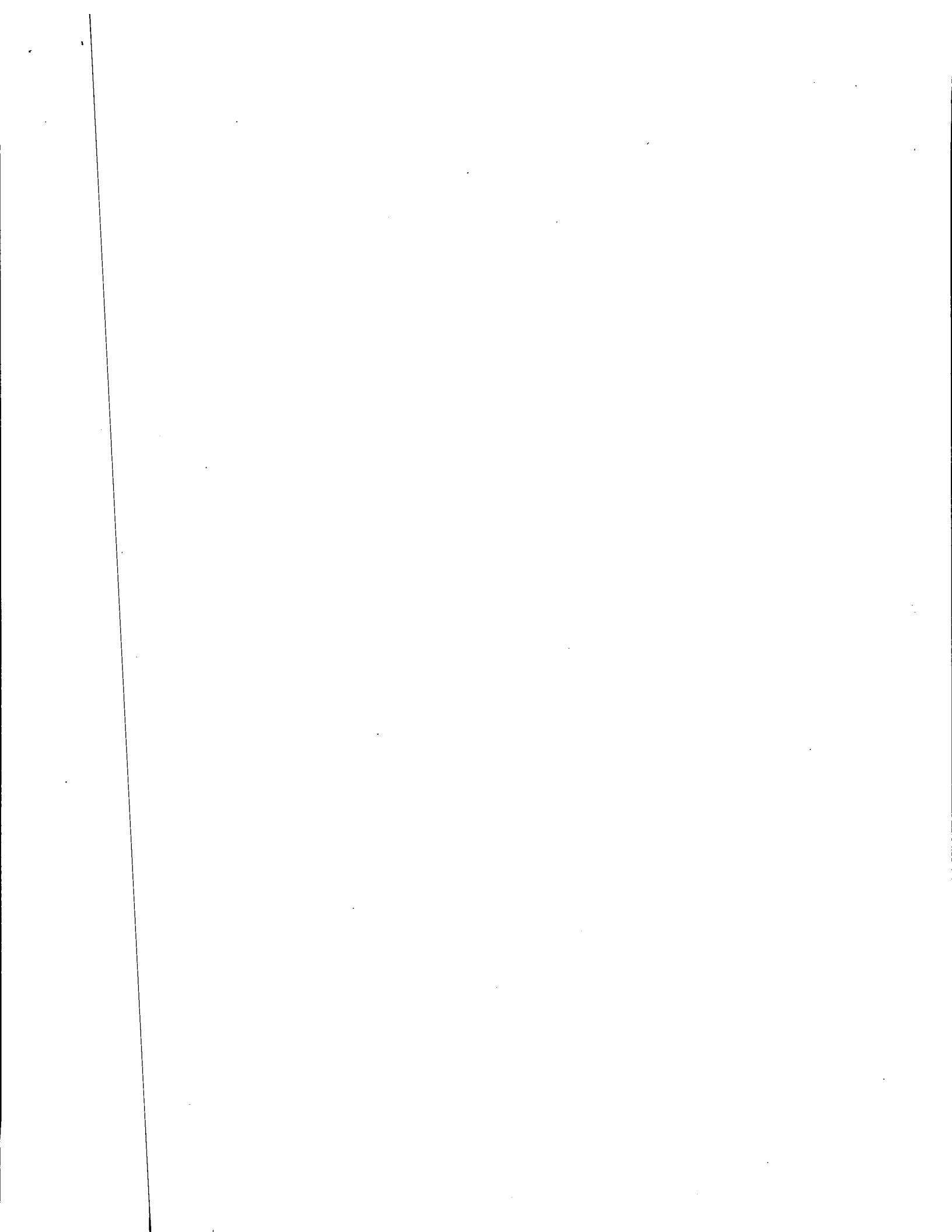
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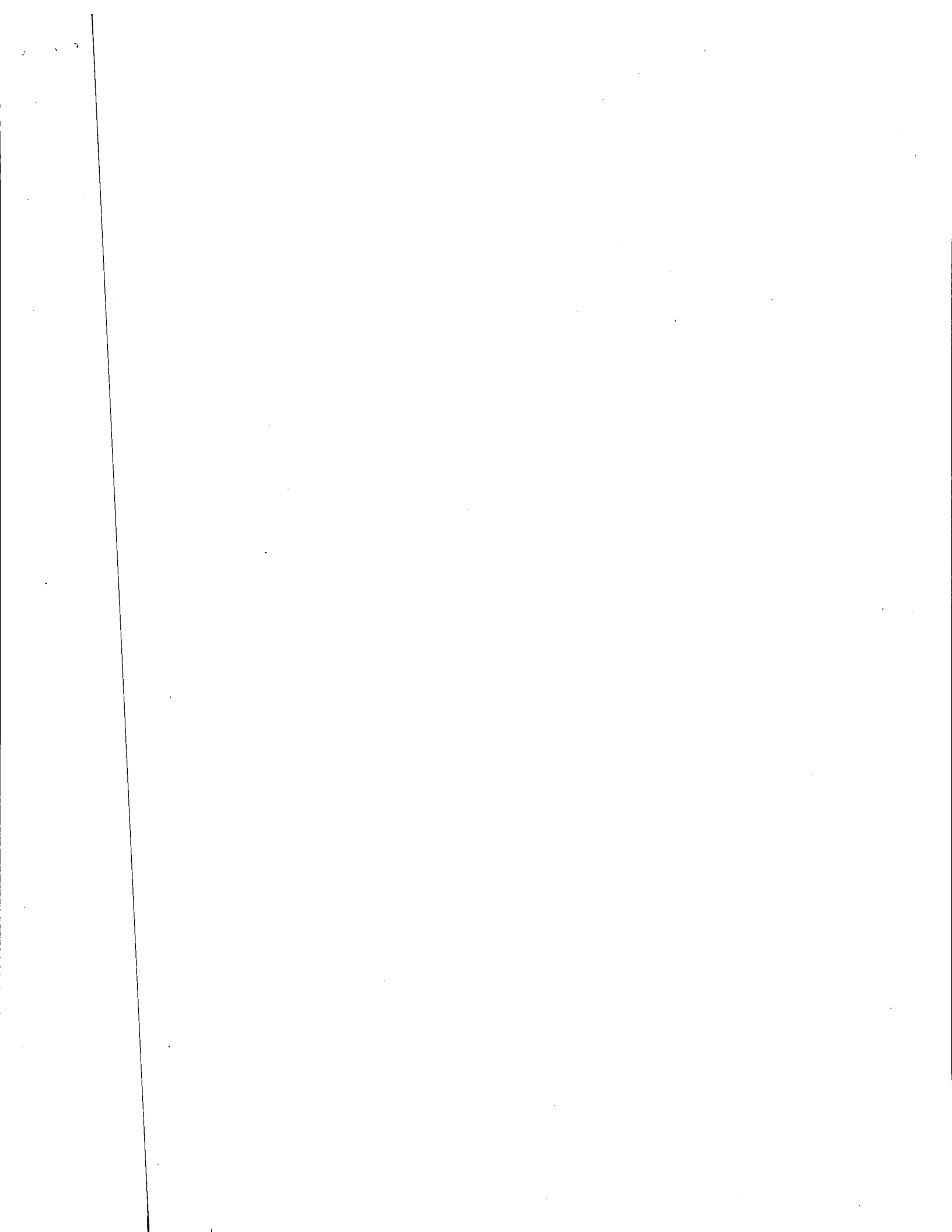
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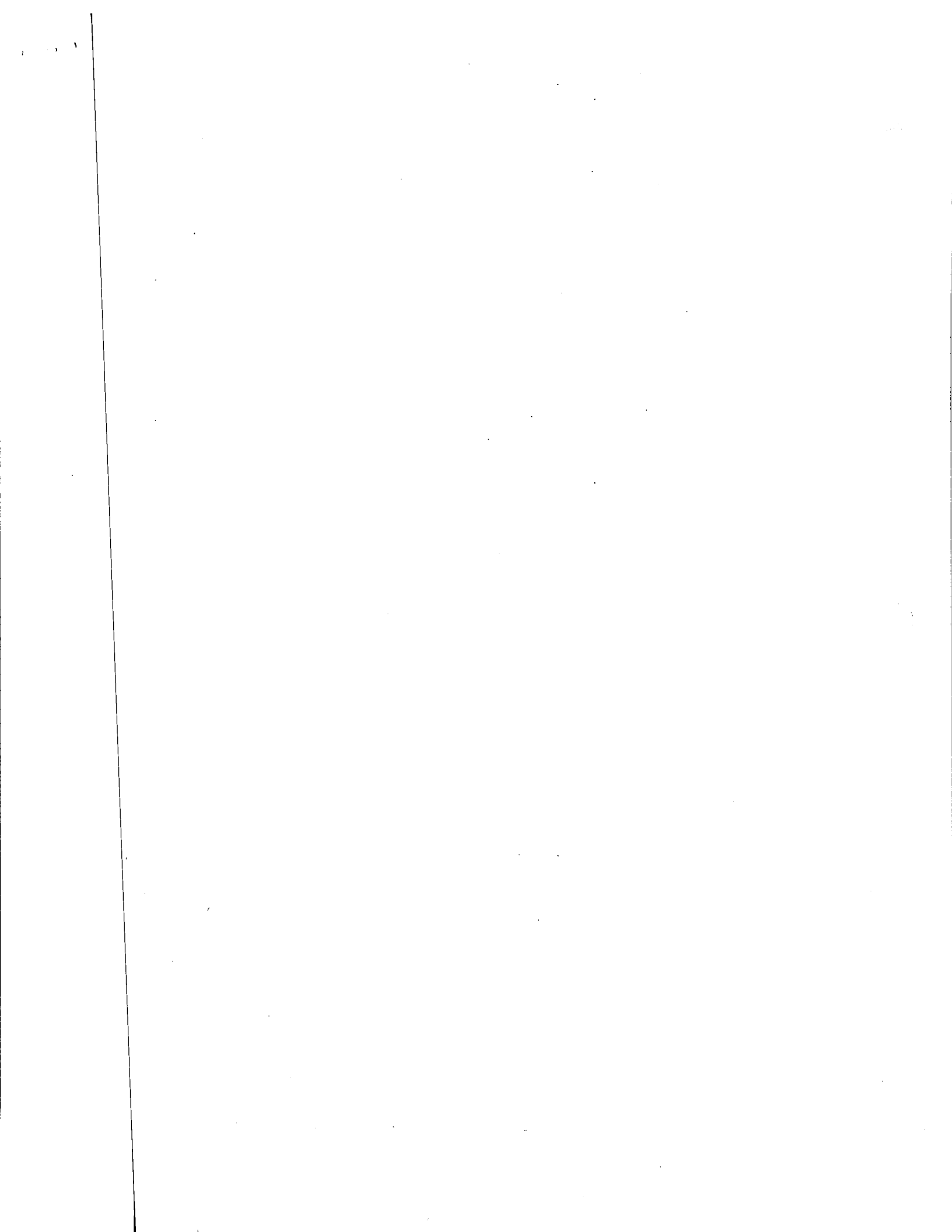
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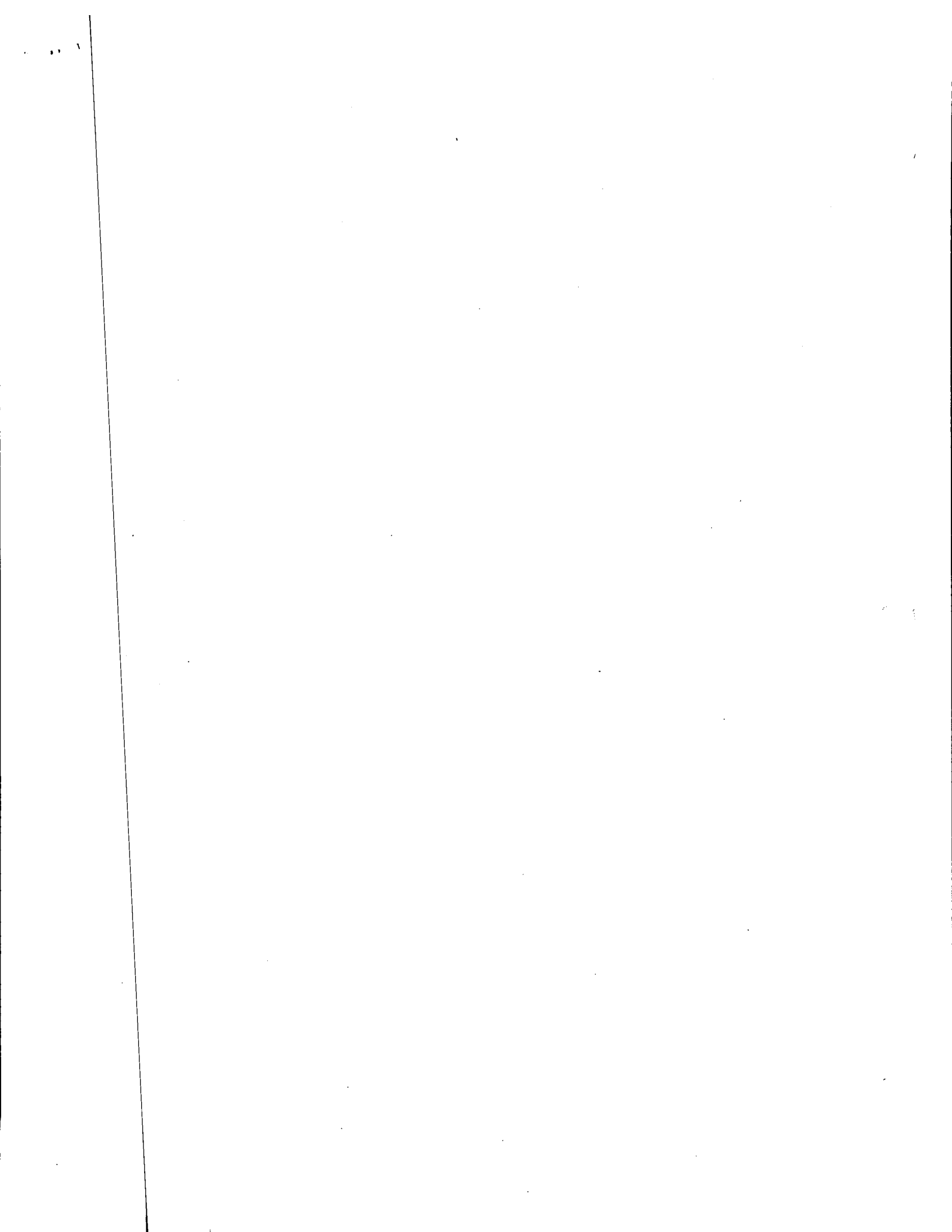
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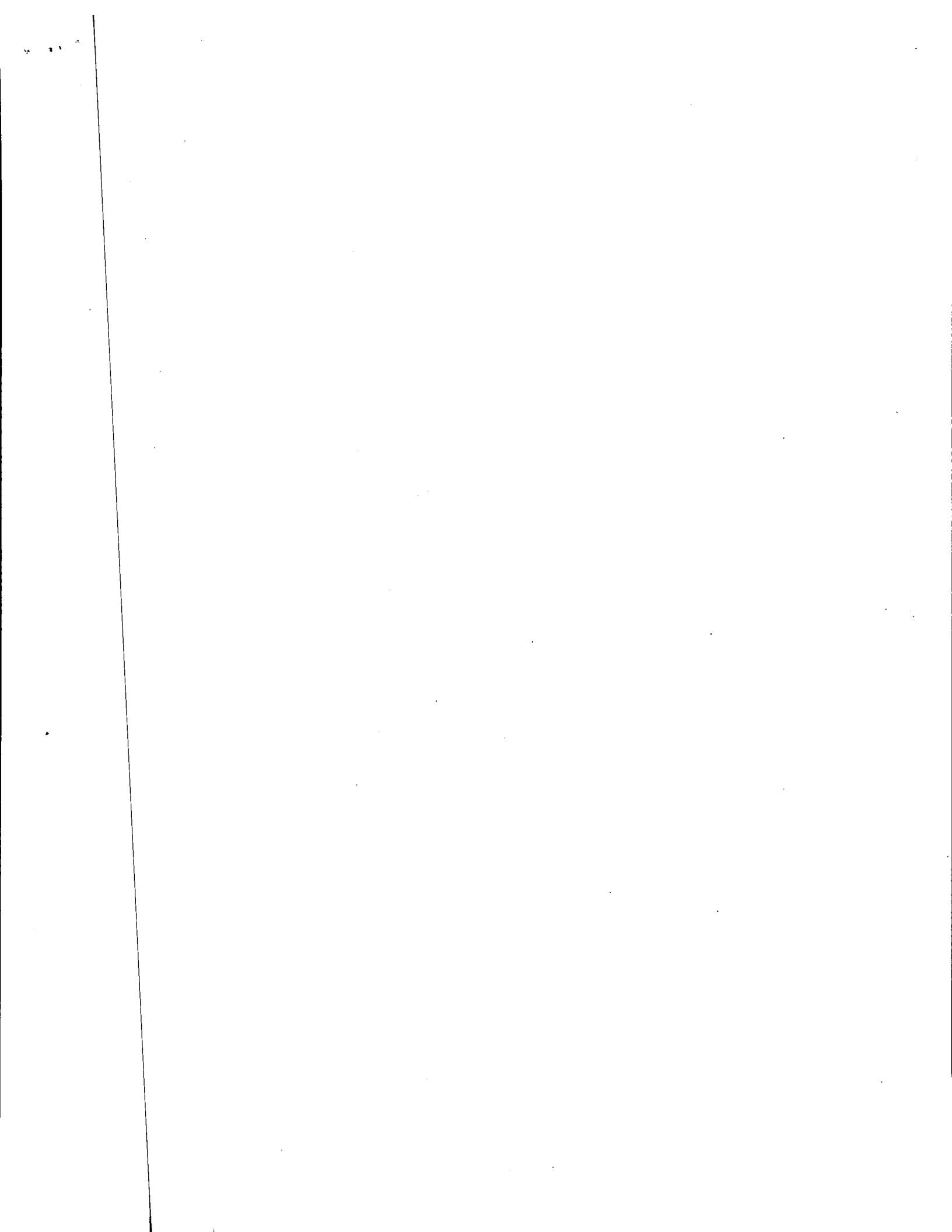
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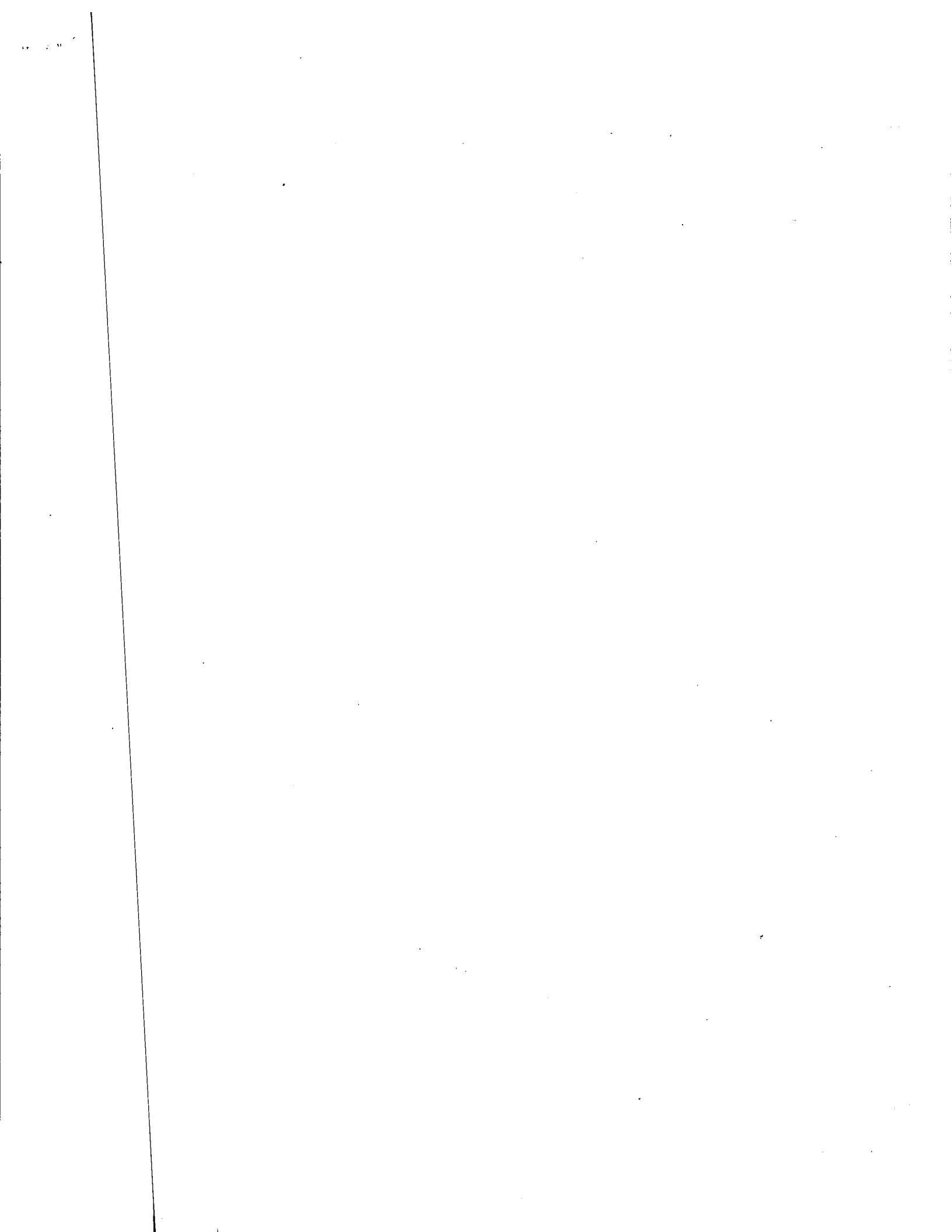
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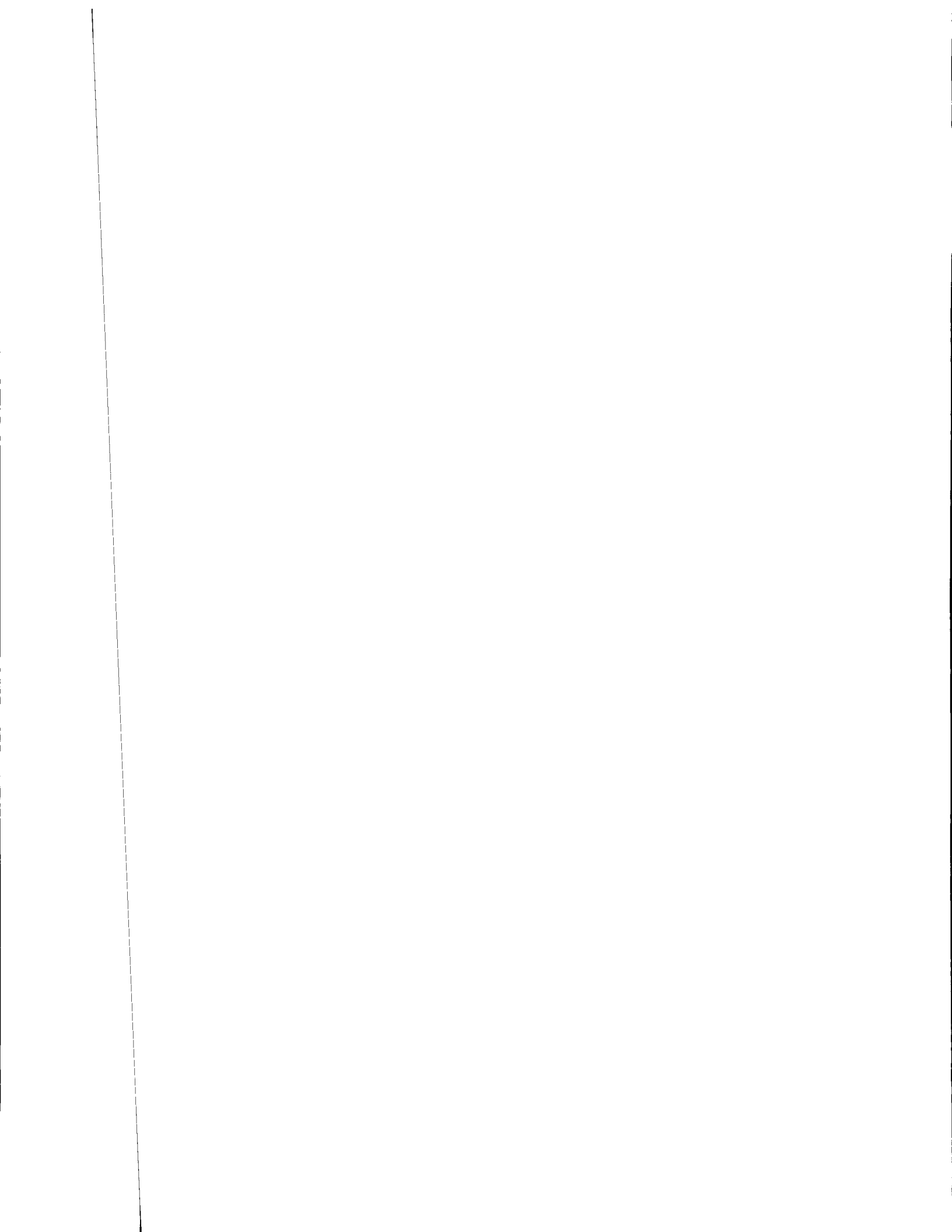
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# CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

### I. (a) PLAINTIFFS

Ciber, Inc., a Delaware Corporation

### DEFENDANTS

Ciber Consulting, Inc., an Illinois Corporation  
Bruce F. Evers, an individual

# 302CV-2026L

(b) County of Residence of First Listed Plaintiff Denver County, Colorado  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Cook County, Illinois  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)  
Bird, Skibell, Baucum, Landa, LLP      Townsend, Townsend, Crew, LLP  
16812 Dallas Parkway                      1200 Seventeenth St. #2700  
Dallas, TX 75248                              Denver, CO 80202  
Telephone 972/750-6300                      Telephone 303/571-4000  
Facsimile 214/363-0719

Attorneys (If Known)

SEP 19 2002

### II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

### III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                                       |                                       |
|---|----------------------------|----------------------------|---|---------------------------------------|---------------------------------------|
|   | PTF                        | DEF                        |   | PTF                                   | DEF                                   |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4            | <input type="checkbox"/> 4            |
| Citizen of Another                      | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal of Business In Another State   | <input checked="" type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6            | <input type="checkbox"/> 6            |

### IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENAL	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related of Property 21 USC <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY	FEDERAL TAX SUITS
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor Union Reporting <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 860 State Reapportionment <input type="checkbox"/> 861 Antitrust <input type="checkbox"/> 862 Banks and Banking <input type="checkbox"/> 863 Commerce/ICC Rates/etc. <input type="checkbox"/> 864 Deportation <input type="checkbox"/> 865 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 866 Selective Service <input type="checkbox"/> 867 Securities/Commodities/Exchange <input type="checkbox"/> 868 Customer Challenge 12 USC 3410 <input type="checkbox"/> 869 Agricultural Acts <input type="checkbox"/> 870 Economic Stabilization Act <input type="checkbox"/> 871 Environmental Matters <input type="checkbox"/> 872 Energy Allocation Act <input type="checkbox"/> 873 Freedom of Information Act <input type="checkbox"/> 874 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 875 Constitutionality of State Statutes <input type="checkbox"/> 876 Other Statutory Actions

### V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

### VI. CAUSE OF ACTION

(Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)  
Trademark Infringement, under Lanham Act, Federal Unfair Competition and False Advertising, Unfair Competition and Unfair Business Practices

### VII. REQUESTED IN COMPLAINT:

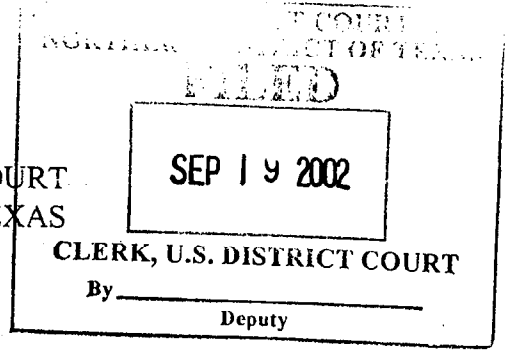
CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23      DEMANDS      CHECK YES only if demanded in complaint:  
JURY DEMAND:      X Yes       No

### VIII. RELATED CASE(S) IF ANY

(See instructions):      JUDGE      DOCKET NUMBER

DATE: 9/18/02      SIGNATURE OF ATTORNEY OF RECORD: *[Signature]*

FOR OFFICE USE ONLY



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
Dallas Division

CIBER, INC., a Delaware corporation, §  
§  
Plaintiff, §  
§  
v. §  
§  
CIBER CONSULTING, INC., an Illinois §  
corporation; and BRUCE F. EVANS, an §  
individual, §  
§  
Defendants. §

§ 0207-20881  
Civil Action No. \_\_\_\_\_

**JURY TRIAL DEMANDED**

**COMPLAINT**

Plaintiff CIBER, Inc. ("CIBER"), by and through its attorneys, for its Complaint against Defendants CIBER Consulting, Inc. and Bruce F. Evans (collectively "Defendants"), alleges as follows:

**JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction of this action under 28 U.S.C. § 1331 (federal question) in that Counts I and II arise under the Trademark Act of 1946, 15 U.S.C. §§ 1051-1127, as amended (the "Lanham Act").

2. This Court also has supplemental jurisdiction over Count III of this complaint under 28 U.S.C. § 1367(a) because the claim arises from the same common nucleus of operative facts complained of in Counts I and II.

3. This Court has personal jurisdiction over Defendants because of Defendants' repeated use of the "CIBER" mark in the State of Texas and in this District, as detailed below. Additionally,

this Court can properly exercise personal jurisdiction over non resident Defendants because, upon information and belief, Defendants came to Texas repeatedly and used the "CIBER" mark to solicit business and consulting contracts in this state.

4. Upon information and belief, Defendants made telephone calls, sent facsimile transmissions, and sent mailings into and out of Texas.

5. Venue is proper in this judicial district under 28 U.S.C. § 1391. CIBER has offices located in the Northern District of Texas and has more than one hundred employees in Dallas, Texas. As detailed below, some of Defendants' acts giving rise to the claims occurred in the Northern District of Texas, and Defendants expect, or reasonably should expect, their acts to have legal consequences in the Northern District of Texas.

6. The assertion of personal jurisdiction by the Court over these Defendants is consistent with traditional notions of fair play and substantial justice given the history of Defendant's business and trade involvement with Texas and its residents.

#### **PARTIES**

7. CIBER is a corporation duly organized and existing under the laws of the State of Delaware and has offices in this District.

8. CIBER is informed, believes, and thereon alleges that defendant CIBER Consulting, Inc. ("CCI") is an Illinois corporation with a business address of 625 Quail Run Dr., Plainfield, Illinois 60544.

9. CIBER is informed, believes, and thereon alleges that defendant Bruce F. Evans ("Evans") is an individual and is the principal and founder of CCI, and is a resident of the State of

Illinois and may be served with process at his principal place of business to wit: 625 Quail Run Dr., Plainfield, Illinois 60544.

### CIBER'S BUSINESS

10. CIBER is an international company that specializes in management and consulting services in the fields of business, engineering, research, and design, including the development and implementation of computer programming and software services. Founded in 1974, CIBER has more than five thousand employees and more than sixty offices in the United States, Canada, and Europe.

11. CIBER has used the "CIBER" mark (the "Mark") since at least July 1974. Since its adoption of the mark, CIBER has worked to maintain the strength of the Mark. For example, CIBER has obtained federal registration of several marks among a family of related trademarks, including CIBER and CIBER (stylized). Specifically, U.S. Trademark Registration No. 1,185,100 for the Mark covers goods and services in the following areas: management consulting services in the fields of business, engineering and research; and design, development and implementation of computer programming and software services. See Exhibit A attached hereto and incorporated herein by reference. U.S. Trademark Registration No. 1,479,942 is for a stylized version of the Mark that covers goods and services in the same classes as U.S. Trademark Registration No. 1,185,100. See Exhibit B attached hereto and incorporated herein by reference.

12. CIBER serves clients in both the private and public sectors, and provides consulting services to customers in a variety of industries, including the nuclear energy field. For example, CIBER has a contract with Lawrence Berkeley National Laboratory in Berkeley, California, and has done work for Los Alamos National Laboratory in Los Alamos, New Mexico, both of which are U.S.

Department of Energy ("DOE") facilities that engage in, *inter alia*, nuclear science research. In addition, CIBER has provided consulting services to Sandia National Laboratories ("Sandia") in Albuquerque, New Mexico, which is a facility operated for the DOE's National Nuclear Security Administration. Among other things, Sandia maintains the nation's nuclear weapons supply and works with the DOE and the Nuclear Regulatory Commission ("NRC") to ensure the safety of the country's nuclear energy generation capabilities. CIBER has provided its services, and will continue to offer its services, to the nuclear energy industry and to contractors that provide services to DOE facilities that maintain and manage both nuclear weapons and materials.

13. In addition to providing its services to several prominent national laboratories, CIBER serves dozens of private and publicly-held clients in the utility industry, and in particular serves many DOE-licensed operators of nuclear generation facilities. For instance, one of CIBER's clients is SCANA, a holding company that owns several utilities, including South Carolina Electric and Gas Co. ("SCG&E"), a licensed nuclear facility. Other CIBER clients include Progress Energy, which operates several nuclear power plants in the Southeast; Nuclear Management Company, one of the largest nuclear operating companies in the United States; and Consumers Energy, Michigan's largest utility, which operates nuclear power facilities in the Midwest. Another CIBER client, Electric Power Research Institute ("EPRI"), serves the entire power utility industry, including providing research and advice on issues relating to nuclear power generation. Further, the Nuclear Information and Records Management Association ("NIRMA"), of which Defendant CIBER Consulting, Inc. is a member, also counts as members several of CIBER's clients and former clients, including Eastman Kodak Company, General Electric Company, GRC International (an AT&T Company), Lockheed Martin, and Sandia.

14. In the state of Texas, Plaintiff Ciber has been in the business of providing management and consulting services since 1977 and maintains offices in Dallas, Houston and Austin, Texas.

15. By virtue of the long, continuous and substantial use by Plaintiff of its mark and name, "CIBER, Inc." and further, by virtue of its extensive advertising of its services under the mark "CIBER", said mark has become a strong and distinctive identifier of Plaintiff and its services from those of all others. Because of the consistent quality of excellence of Plaintiff's management and consulting services above described marketed under the CIBER mark and name, Plaintiff has established valuable good will and reputation with respect to its services and related products.

#### **DEFENDANTS' USE OF THE MARK "CIBER"**

16. Upon information and belief, Defendant CCI provides information management consulting services in the nuclear energy field under the name CIBER Consulting, Inc. Upon information and belief, CCI offers its services to entities that are customers or potential customers of CIBER.

17. Upon information and belief, Defendants sought to misappropriate Plaintiff's mark "CIBER" by adopting a confusingly similar mark and name in order to insure Defendant's success.

18. Defendants have used the "CIBER" mark in the State of Texas and within this District. For example, Defendants used the "CIBER" mark in August 2000 at the 24th Annual NIRMA Symposium in Dallas, Texas. According to the symposium program, defendant Bruce F. Evans presented two conferences at the symposium. Upon information and belief, Defendants used their participation in these conferences to solicit business in the State of Texas and this District with customers who are both domiciliaries and non-residents of this state. At both conferences, Defendant

Evans acted as a representative of Defendant CIBER Consulting, Inc. A copy of the symposium program is attached hereto as Exhibit C and incorporated herein by reference.

19. In June 2001, defendant Evans used the "CIBER" mark at the DOE Records Management Conference in Dallas. Defendant Evans presented a session entitled "Records Identification and Indexing in Paper and Electronic Format." Other presenters included officials from several DOE facilities, including Sandia, Oak Ridge National Laboratory, and Rocky Flats field office, as well as representatives of the nuclear industry, including Bechtel and Westinghouse. Included with the conference materials was a copy of defendant Evans' biography, which describes him as "principal and founder of CIBER Consulting, Inc." The conference program identified defendant Evans as a representative of Defendant CIBER. Upon information and belief, in connection with their activities at the conference, Defendants solicited business within the State of Texas and within this District. Copies of relevant portions of the conference materials are attached hereto as Exhibit D and incorporated herein by reference.

20. On or about July 24, 2002, Defendants again used the "CIBER" mark in the State of Texas, this time at a meeting of the Houston chapter of ARMA -- The Association for Information Management Professionals, in Houston, Texas. According to the website of the Houston chapter of ARMA, Defendant Evans acted as a representative of Defendant CIBER Consulting, Inc. at the meeting. Upon information and belief, in connection with their activities at the meeting, Defendants solicited business within the State of Texas and within this District. A printout of relevant portions of the ARMA website is attached hereto as Exhibit E and incorporated herein by reference.



21. Defendants' use of the "CIBER" mark has caused actual consumer confusion with respect to services offered by CIBER and services offered by Defendants and has created a likelihood of confusion between the services of Defendants and CIBER.

22. On September 13, 2001, CIBER's counsel sent a cease and desist letter to CCI requesting that CCI immediately refrain from further use of the Mark as part of its company name. More than a month later, CCI responded through counsel by refusing to comply with CIBER's demands. To further encourage a prompt resolution of the matter, CIBER's counsel responded by offering to allow CCI to have a transition period during which it could gradually cease use of the Mark. However, CCI once again refused to comply with CIBER's demands and indicated no interest in refraining from its infringement upon CIBER's name and mark. At this point, CIBER believes that further attempts to negotiate with CCI will be futile and, therefore, CIBER has instituted this action to stop CCI from further using the "CIBER" mark.

23. Defendants' services are of the same general nature and type as those offered by Plaintiff to the public and target the same customers. Defendants' use of marks nearly identical to Plaintiff's common law trade name and its registered marks are likely to cause confusion, mistake and/or deceive the public. Defendants' services are likely to be mistaken or confused with Plaintiff, its business and products. Furthermore, Defendants' use of the CIBER name is likely to create the mistaken impression in the public that Defendant Ciber Consulting, Inc. or its services are endorsed by Plaintiff or that Defendant CCI is sponsored, affiliated or in some way connected with Plaintiff.

24. Defendant Bruce F. Evans represents himself to be the founder and principal of Defendant CCI. As such, he orchestrates and directs all of the actions of Defendant CCI and acts as CCI's representative. As a consequence of the actions complained of, he should be held jointly and severally liable for the trademark infringement and unfair competition and business practices.

**COUNT I: Trademark Infringement**

**(15 U.S.C. § 1114(a))**

25. CIBER re-alleges and incorporates by reference paragraphs 1 through 25 above.

26. CIBER is the exclusive owner of the "CIBER" mark and its related family of marks, and has obtained two federal trademark registrations for the Mark, as described above.

27. Upon information and belief, Defendants knowingly have advertised, offered for sale and sold services using the term "CIBER" in interstate commerce. Defendants' actions have been willful and in knowing disregard of the rights of Plaintiff CIBER.

28. Defendants' use of "CIBER" in connection with consulting services has caused, or is likely to cause, consumer confusion, deception or mistake.

29. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

30. CIBER has suffered and will continue to suffer irreparable harm unless Defendants cease use of or are enjoined from using the "CIBER" mark. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

**COUNT II: Federal Unfair Competition and False Advertising**

(15 U.S.C. § 1125(a))

31. CIBER re-alleges and incorporates by reference paragraphs 1 through 30 above.

32. Defendants have used and continue to use in interstate commerce, in connection with consulting services, a word, term, name, symbol, or device that, in commercial advertising or promotion misrepresents the nature, characteristics, qualities and/or origin of their goods, services or products in violation of 15 U.S.C. § 1125(a)(1)(B). Defendants' actions have been willful and in knowing disregard of the rights of CIBER.

33. The marks and name utilized by Defendants are confusingly similar to that of Plaintiff's unique mark and trade name. This attempt by Defendants to trade upon Plaintiff's goodwill and reputation and to unlawfully appropriate the benefit of Plaintiff's years of advertising constitutes unfair competition and has caused and is causing irreparable damage to Plaintiff by misleading the public to believe that Defendant is affiliated, associated with or sponsored by Plaintiff.

34. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

35. CIBER has suffered and will continue to suffer irreparable harm unless Defendants cease use of or are enjoined from using the "CIBER" mark. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

**COUNT III: Unfair Competition and Unfair Business Practices**

36. CIBER re-alleges and incorporates by reference paragraphs 1 through 35 above.

37. This claim for relief arises under the common law of unfair competition.

38. CCI's actions described above (with its continued use of a mark similarly deceptive of Plaintiff's trademark or trade name) is, on information and belief, intended to mislead the public and lead to confusion and mistake and constitute deliberate and willful unfair competition and unlawful business practices in violation of common law.

39. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

40. Unless restrained and enjoined by this court, Defendants' wrongful conduct will continue to cause irreparable harm to CIBER. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

#### **PRAYER FOR RELIEF**

WHEREFORE, CIBER demands judgment against defendants CIBER Consulting, Inc. and Bruce F. Evans as follows:

- A. Temporarily, preliminary, and, permanently enjoining Defendants, CCI and Evans, their officers, agents, servants, employees, attorneys and representatives and those in privity or acting in concert with them:
  - i. from infringing, reproducing, copying or imitating any of CIBER's trademarks, including but not limited to the mark "CIBER";
  - ii. from engaging in unfair competition, including any false or misleading advertising through the use of CIBER's trademarks;
- B. Awarding CIBER, at its election, jointly and severally against the Defendants either treble or statutory damages in accordance with Section 35 of the Lanham Act, 15 U.S.C. § 1117, on all claims asserted under 15 U.S.C. § 1125 and 15 U.S.C. § 1114;

- C. Awarding CIBER its actual damages, requiring Defendants jointly and severally to account for and pay to CIBER all of their profits, and awarding CIBER any additional damages or royalties that the Court deems just and equitable under the circumstances of the case;
- D. Awarding CIBER prejudgment interest jointly and severally against Defendants at the rate established under 26 U.S.C. § 6621(a)(2) from the date of service of the Complaint through the date of judgment or prejudgment as otherwise allowed by law;
- E. Awarding CIBER exemplary damages as provided under law;
- F. Awarding CIBER against the Defendants its allowable costs and attorneys' fees; and
- G. Awarding CIBER such other and further relief as is just and equitable.

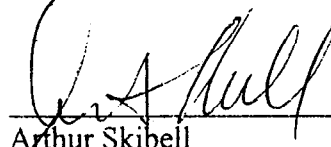
JURY DEMAND

Plaintiff demands trial by jury on all issues and claims in this Complaint.

Dated: September 18, 2002

Respectfully Submitted,

BIRD SKIBELL BAUCUM & LANDA, LLP



---

Arthur Skibell  
16812 Dallas Parkway  
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Townsend and Townsend and Crew LLP  
1200 Seventeenth Street  
Suite 2700  
Denver, Colorado 80202  
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ATTORNEYS FOR PLAINTIFF CIBER, INC.

**EXHIBIT A**



UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Electronic Search System (TESS)

TESS was last updated on Wed Sep 11 04:33:17 EDT 2002

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## Record 1 out of 1

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### Typed Drawing

Word Mark	CIBER
Goods and Services	IC 035. US 101. G & S: Management Consulting Services in the Fields of Business, Engineering and Research. FIRST USE: 19740701. FIRST USE IN COMMERCE: 19740701
	IC 042. US 101. G & S: Design, Development and Implementation of Computer Programming and Software Services. FIRST USE: 19740701. FIRST USE IN COMMERCE: 19740701
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	73171161
Filing Date	May 22, 1978
Published for Opposition	May 27, 1980
Registration Number	1185100
Registration Date	January 5, 1982
Owner	(REGISTRANT) Ciber, Inc. CORPORATION MICHIGAN 5251 DTC Parkway, Suite 1400 Greenwood Village COLORADO 80111
Attorney of Record	LESLEY S. CRAIG
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20020115.

Renewal 1ST RENEWAL 20020115  
Live/Dead Indicator LIVE

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Latest Status Info

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 09/11/2002 14:12:01 ET

Serial Number: 73171161

Registration Number: 1185100

Mark (words only): CIBER

Current Status: This registration has been renewed.

Date of Status: 2002-01-15

Filing Date: 1978-05-22

Registration Date: 1982-01-05

Law Office Assigned: (NOT AVAILABLE)

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: (NOT AVAILABLE)

Date In Location: 2002-01-17

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**CURRENT APPLICANT(S)/OWNER(S)**

---

1. Ciber, Inc.

**Address:**

Ciber, Inc.

5251 DTC Parkway, Suite 1400

Greenwood Village, CO 80111

United States

**State or Country of Incorporation:** Michigan

**Legal Entity Type:** Corporation

---

**GOODS AND/OR SERVICES**

---

Management Consulting Services in the Fields of Business, Engineering and Research

**International Class:** 035

**First Use Date:** 19740701

**First Use in Commerce Date:** 19740701

**Basis:** 1(a)

Design, Development and Implementation of Computer Programming and Software Services

**International Class:** 042  
**First Use Date:** 19740701  
**First Use in Commerce Date:** 19740701

**Basis:** 1(a)

---

**ADDITIONAL INFORMATION**

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(NOT AVAILABLE)

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**PROSECUTION HISTORY**

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2002-01-15 - Registration renewed - 10 year  
2002-01-15 - Section 8 (10-year) accepted/ Section 9 granted  
2001-12-04 - Combined Section 8 (10-year)/Section 9 filed  
2001-12-04 - Section 8 (6-year) filed  
1988-03-08 - Section 8 (6-year) accepted & Section 15 acknowledged  
1987-07-27 - Section 8 (6-year) and Section 15 Filed  
1982-01-05 - Registered - Principal Register

---

**CONTACT INFORMATION**

---

**Correspondent (Owner)**  
LESLEY S. CRAIG (Attorney of record)  
  
LESLEY S. CRAIG  
TOWNSEND AND TOWNSEND AND CREW LLP  
TWO EMBARCADERO CENTER, 8TH FLOOR  
SAN FRANCISCO CA 94111  
United States

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**EXHIBIT B**



UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Electronic Search System (TESS)

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**Word Mark** CIBER

**Goods and Services** IC 042. US 100 101. G & S: DESIGN, DEVELOPMENT AND IMPLEMENTATION OF COMPUTER PROGRAMMING AND SOFTWARE SERVICES. FIRST USE: 19740701. FIRST USE IN COMMERCE: 19740701

IC 035. US 101. G & S: MANAGEMENT CONSULTING SERVICES IN THE FIELDS OF BUSINESS, ENGINEERING AND RESEARCH. FIRST USE: 19740701. FIRST USE IN COMMERCE: 19740701

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

**Serial Number** 73674566

**Filing Date** July 27, 1987

**Published for Opposition** December 15, 1987

**Registration Number** 1479942

**Registration Date** March 8, 1988

**Owner** (REGISTRANT) CIBER, INC. CORPORATION MICHIGAN SUITE 323 FOUR

Registrations 1185100;AND OTHERS  
Type of Mark SERVICE MARK  
Register PRINCIPAL  
Affidavit Text SECT 15. SECT 8 (6-YR).  
Live/Dead Indicator LIVE

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<a href="#">CURR LIST</a>	<a href="#">NEXT LIST</a>	<a href="#">FIRST DOC</a>	<a href="#">PREV DOC</a>	<a href="#">NEXT DOC</a>	<a href="#">LAST DOC</a>				

**EXHIBIT C**

Privacy/Security Notice

U.S. Department of Energy

**Office of the Chief Information Officer**

Office of Security &amp; Emergency Operations

Records Management Division

## Agenda

**Sunday, June 3, 2001**

3:30 pm - 5:00 pm

Conference Steering Committee Meeting - *Sam Houston Room*

5:30 pm - 7:30 pm

First Time Attendee Gathering, Hotel Lobby (Optional)

**Monday, June 4, 2001**

7:30 am - 4:30 pm

Registration

9:00 am - 4:00 pm

Forms Meeting - *Conference Center B*

9:00 am - 4:00 pm

Workgroup Meetings - Workgroup leaders who wish to schedule meetings should contact Kelly Flynn, 301-903-0826, for time and space availability.

<b>Springboard - Grand Ballroom EFG</b>		
8:00 am - 8:30 am	<i>Introductions</i> Cathy Hutzell and Rosalie Weller, DOE Headquarters	<i>Bring your own breakfast!</i>
8:30 am - 8:45 am	<i>Welcome</i> Su Frey, DOE Headquarters Cathy Marciante, DOE Oak Ridge Operations Office	<i>Stop by the muffin stand and join us for a working breakfast</i>
8:45 am - 9:15 am	<i>Historical Overview of the Agency</i> Marie Hallion, DOE Headquarters	9:00 am - 12:00 noon Military and Mission Tour
9:15 am - 9:30 am	<i>Break</i>	
9:30 am - 10:15 am	<i>Current Records Environment: Issues that Impact Our Work</i> Juli Stewart, Oak Ridge National Laboratory	
10:15 am - 11:00 am	<i>Regulations</i> Cynthia Eubanks, Bechtel Jacobs	10:00 - Applying Disposition Schedules Work Group <i>Sam Houston Room</i>
11:00 am - 12:00 n	<i>Elements of a Records Management Program</i> Pat Veler, Oak Ridge Associated University	
12:00 n - 1:00 pm	<i>Lunch</i>	
1:00 pm - 1:45 pm	<i>Introduction to NARA: Building A Records Schedule</i> Tom Steinichen, National Archives and Records Administration	1:00 pm - 4:00 pm <i>Spotlighting San Antonio Tour</i>

1:45 pm - 2:30 pm	<i>Electronic Records, Part I - Electronic Records, Part II</i> Kermitt Nicks, Westinghouse Savannah River Fred Walden, Bechtel Nevada
2:30 pm - 2:45 pm	<i>Break</i>
2:45 pm - 3:30 pm	<i>Scientific and Technical Records</i> Anna Nusbaum, Sandia National Laboratories, AL
3:30 pm - 4:00 pm	<i>Questions and Wrap-up</i>

6:00 pm - 7:00 pm

Reception--Welcoming Get Together - *Colonnade Room*

## Tuesday, June 5, 2001

Plenary Session - Grand Ballroom EFG							
8:00 am - 8:15 am	<i>Welcome and Introductions</i> Meg Milligan, DOE Carlsbad Field Office Roger Anders, DOE Headquarters						
8:15 am - 8:45 am	<i>Washington Update</i> Howard Landon, Acting Chief Information Officer Marc S. Hollander, National Nuclear Security Administration (NNSA) Richard Yockman, Office of Science Stephen Warren, Office of Environmental Management						
8:45 am - 9:30 am	<b>Keynote Address</b> Susan Brechbill, Manager, DOE Ohio Field Office						
9:30 am - 9:45 am	<i>Break - Resource Room Open - Ballroom D</i>						
9:45 am - 10:45 am	<b>Keynote Address</b> Tad Howington, Records Manager, Lower Colorado River Authority						
10:45 am - 11:30 am	<i>Site Highlight - Carlsbad Field Office</i> Meg Milligan, DOE Carlsbad Field Office						
11:30 am - 1:30 pm	<b>Lunch</b> <i>Resource Room Open - Ballroom D</i>						
	<table border="1" style="width:100%"> <thead> <tr> <th style="width:50%">Session A Grand Ballroom E</th> <th style="width:50%">Session B Grand Ballroom F&amp;G</th> </tr> </thead> <tbody> <tr> <td>1:30 pm - 2:30 pm</td> <td> <i>Panel: Development, Approval, and Access to Records Schedules</i> Sharon Evelin, DOE Headquarters John Ellis, NARA Jay Blewett, Millican &amp; Associates </td> </tr> <tr> <td>2:30 pm - 2:45 pm</td> <td><i>Break - Resource Room Open - Ballroom D</i></td> </tr> </tbody> </table>	Session A Grand Ballroom E	Session B Grand Ballroom F&G	1:30 pm - 2:30 pm	<i>Panel: Development, Approval, and Access to Records Schedules</i> Sharon Evelin, DOE Headquarters John Ellis, NARA Jay Blewett, Millican & Associates	2:30 pm - 2:45 pm	<i>Break - Resource Room Open - Ballroom D</i>
Session A Grand Ballroom E	Session B Grand Ballroom F&G						
1:30 pm - 2:30 pm	<i>Panel: Development, Approval, and Access to Records Schedules</i> Sharon Evelin, DOE Headquarters John Ellis, NARA Jay Blewett, Millican & Associates						
2:30 pm - 2:45 pm	<i>Break - Resource Room Open - Ballroom D</i>						



2:45 pm - 3:45 pm	<p><i>Panel: Customers and Stakeholders – Building Strategic Alliances and Growing Our Records Management Programs</i>  Moderator: David Gaynon, LLNL  Panelists: Juli Stewart, ORNL,  Cheryl Kirkwood, BWXT Ohio  Jean Marie Deken, Stanford University</p>	<p><i>Enabling Culture of Service in an Era of Radical Change</i>  Tom Huckabee, Westinghouse Savannah River</p>
3:45 pm - 4:00 pm	<i>Break - Resource Room Open - Ballroom D</i>	
	<b>Plenary Session Grand Ballroom F&amp;G</b>	
4:00 pm - 4:30 pm	<i>Networking with the LPSO CIOs</i>	

6:00 pm - 10:00 pm Complimentary Shuttle Bus to the Riverwalk

## Wednesday, June 6, 2001

	<b>Plenary Session - Grand Ballroom EFG</b>	
8:00 am - 8:30 am	<i>Announcements</i>	
8:30 am - 9:30 am	<p><i>Panel – E Commerce and Electronic Signatures</i>  Larry Mathews, Department of Justice  Mark Giguere, National Archives and Records Administration</p>	
9:30 am - 9:45 am	<i>Break - Resource Room Open - Ballroom D</i>	
9:45 am - 10:30 am	<p><i>Electronic Records Management, the Next Five Years</i>  Karen Shaw, Center for Army Lessons Learned</p>	
10:30 am - 11:30 am	<p><i>Panel: Federal Records Managers Program Overviews</i>  Moderator: Gina Dan, DOE Rocky Flats Field Office  Panelists: <u>Mary Rose Kerg</u>, DOE Bonneville Power Administration, Sandee Roth, DOE Western Area Power Administration, <u>Francine Lamothe</u>, DOE Strategic Petroleum Reserve, <u>Elizabeth Laiche</u>, DynMcDermott, and <u>Joyce Beattie</u>, DOE Headquarters Office of Fossil Energy</p>	
11:30 am - 1:30 pm	<p style="text-align: center;"><i>Lunch</i>  Resource Room Open - Ballroom D</p>	
	<b>Session A Grand Ballroom E</b>	<b>Session B Grand Ballroom F&amp;G</b>
1:30 pm - 2:00 pm	<i>Hybrid Imaging - the Best of Both Worlds?</i> Martha Johnson, Millican & Associates	<i>Intelligent E-Mail Archiving</i> Tim Shinkle, Provenance Systems, Inc.
2:00 pm - 2:30 pm	<i>Lend a Helping Hand</i>	

	V.L. "Pinky" Landon, BWXT Idaho	
2:30 pm - 2:45 pm	<b>Break - Resource Room Open - Ballroom D</b>	
2:45 pm - 3:45 pm	<i>Exploring the Challenges of Electronic Records Management</i> Karen Cox and Rebecca Lawson, Spallation Neutron Source Project	<i>Headquarters E-Mail Pilot Project: What We Learned and What We Are Still Learning</i> <u>Loretta Bryant</u> , DOE Headquarters <u>Jay Blewett</u> , Millican & Associates
3:45 pm - 4:00 pm	<b>Break - Resource Room Open - Ballroom D</b>	
	<b>Plenary Session</b> <b>Grand Ballroom F&amp;G</b>	
4:00 pm - 4:30 pm	Session Recap and Summary	

## Thursday, June 7, 2001

	<b>Plenary Session - Grand Ballroom ABC</b>	
8:00 am - 8:15 am	<i>Announcements</i>	
8:15 am - 8:45 am	<i>Records Management Update</i> <u>Susan Frey</u> , Departmental Records Officer	
8:45 am - 9:15 am	<b>Featured Speakers</b> <i>National Archives Update</i> <u>Marie Allen</u> , <u>Leslie Farkas</u> , and John Ellis, National Archives and Records Administration	
9:15 am - 10:00 am	<b>Featured Speaker</b> <i>The Records Implications of the Energy Employees Occupational Illness Compensation Program Act</i> <u>Paul Seligman</u> , Acting Director, DOE Headquarters Office of Worker Advocacy	
10:00 am - 10:15 am	<b>Break</b>	
10:15 am - 12:00 pm	<i>Panel: Site Closure Records Issues</i> Moderator: Cathy Marciante, DOE Oak Ridge Operations Office Panelists: Patrick Noone, DOE Headquarters, <u>Deborah Wayne</u> , National Archives and Records Administration, <u>Mike Autobee</u> , DOE Rocky Flats Field Office, and Shawn Wasilewsky, BTAS, Inc., Ohio	
12:00 pm - 1:00 pm	<b>Lunch</b>	
	<b>Session A</b> <b>Grand Ballroom E</b>	<b>Session B</b> <b>Grand Ballroom F&amp;G</b>

1:00 pm - 1:45 pm	<i>Question and Answer Session</i> <u>Paul Seligman</u> , DOE Headquarters	<i>Flexible Support: Meeting Information Needs of Technical Staff in Constant Transition</i> <u>Orville Pratt</u> , <u>Lucille Boone</u> , and <u>Rebecca Ullrich</u> , Sandia National Laboratories - AL
1:45 pm - 2:30 pm	<i>NNSA Records</i> Jim Baldree, DOE Headquarters Margarita Sexson, DOE Albuquerque Operations Office	<i>Protecting Electronic Health Information: Beyond PKI</i> <u>John von Kadich</u> , TecSec, Inc
2:30 pm - 2:45 pm	<i>Break</i>	
	<b>Plenary Session</b> <b>Grand Ballroom ABC</b>	
2:45 pm - 3:30 pm	<i>Wrap Up</i>	
3:30 pm - 4:30 pm	Old and New Steering Committee Meeting - <i>Sam Houston Room</i>	

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## Bruce Evans

### Biography

Bruce Evans has over 23 years in utility and manufacturing industries including a variety of utility management and consulting positions. In 1996, he became Principal and founder of CIBER Consulting, Inc. where he has been involved as project manager and consultant on numerous information management projects. Prior to that he was with the Western Regional Office of PRC-ESI from February 1990, where he was Project Manager and Associate Technical Manager for major mid-west clients. For the last 9 years his primary focus has been in the area of consultation in the development of Electronic Records and Document Management programs and systems for a variety of clients.

He has been a member of the Nuclear Information and Records Management Association (NIRMA) since 1985 holding several key positions including Chair of the Regulations Committee, Chair of the the Electronic Records and Regulations Review Subcommittees and current Director of the Information Management Business Unit. He was also the cosponsor of the Tenth Annual NIRMA Symposium in Denver, CO. His activities in electronic records issues has kept him involved as an active member of a variety of industry organizations and forums including the Association of Records Managers and Administrators (ARMA) Electronic Records Management Committee, the American Society of Mechanical Engineers (ASME)/NQA1 Committee, the Association for Information and Image Management (AIIM) C22 Evidentiary Support and C24 Imaging Standards Committees, the Department of Energy Records Management and Managing Electronic Records Conferences and is a consulting member of the National Archives and Records Administration Electronic Records Work Group (ERWG) Phase 1 effort.

He is also a Certified Records Manager/Nuclear Specialist (CRM/NS) as certified by the Institute of Certified Records Managers (ICRM) and NIRMA.

### Presentation

*Records Identification and Indexing in Paper and Electronic Format*

Tuesday, June 5, 1:30 p.m.

Download a copy of the presentation in Microsoft PowerPoint (ppt) format.

[Return to Agenda](#)

**EXHIBIT D**

## Last Year's NIRMA Symposium

The annual Symposium provides members with the most focused information management technical program in the country, distinguished guest speakers, and opportunities for networking and exchanging information.

**24th Annual NIRMA Symposium**  
**Dallas, Texas**  
**August 20-23, 2000**

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Nuclear Information & Records Management Association  
210 5th Avenue, New York, NY 10010  
TEL: (603)432-6476 - FAX: (603)432-3024

## NIRMA 2000 Technical Sessions

Conversion of Nuclear Plant Licensing Documents to New and Emerging Electronic Document Management and Publishing Technologies

Laura T Burba, Duke Energy Corporation  
James W. Jones, Jr., Duke Energy Corporation  
Timothy J Wringer, Duke Energy Corporation

Lessons Learned in Conducting a Data Conversion

Peggy Warner, Sandia National Laboratories  
Chris Northrop-Salazar

The ComEd Standard Records Retention Schedule Project

Chef Susner, ComEd  
Bruce Evans, CIBER Consulting, Inc.

The Integrated Corporate Mind: Information Management Program Concepts and Definitions

Brian Mathews, Wisconsin Public Service Corp.  
Bruce Evans, CIBER Consulting, Inc.

Implementing Electronic Recordkeeping Systems The Five-Step Program for Success

Bruce Miller, Tarlan Software Inc.

Business Ethics for The New Millennium:

Julie Cunningham, Millican & Associates

Improving Records Management in Historical Businesses

Mel Gould, British Nuclear Fuels

Barcode Uses & Abuses

Martha W. Keenen, Sandia National Laboratories

Targeted Assistance for the New Millennium

Margarita Y. Sexson, U.S. Department of Energy  
Steve Adams, National Archives and Records Administration

Top Ten Reasons To Become A Records Manager

Margarita Y. Sexson, U.S. Department of Energy  
John L. Day, Team21, LLC D.C.

Cook's Experience in their Document Control/Records Management Recovery Efforts

Sissy Nelson, American Electric Power  
Martha Johnson, Millican & Associates

Managing Electronic Information

Paul Krueger, Southern California Edison  
Paul Killins, Southern California Edison

Automating Records Management Using the Latest Technology in Artificial Intelligence

Tim Shinkle, Provenance Systems

Implementing a Scalable Image Repository for Litigation Support

Charles Meier, Arthur Anderson Los Angeles Technology Group

Redesign and Implementation of Information Management for OCRWM and Yucca Mountain  
Karen Kutnick, KISMET Consulting

Living Documents & ADAMS - What's Going On?  
Rich Giska and the Living Documents Committee

ANSI/NIRMA Standard Guidelines for Configuration Management of Nuclear Facilities  
Rich Giska and the Configuration Management Committee

EDMS and Regulatory Compliance: Matching Efficiency With Security  
Scott Buchart, Optical Image Technology, Inc.

WEPCO's EDMS: Cornerstone of Point Beach IM and CM  
Joanne Crowley, Wisconsin Electric  
Bud Sawatzky, TwoRivers Consultants

Vendor Information Program Survey Results  
Joseph Burack, STP Nuclear Operating Company  
Rhonda Stone, Rochester Gas & Electric  
Susan Griffin, Vendor Information Solutions, Inc.

Scheduling Federal Records  
John Ellis, NARA

The Challenge of Explaining the NRC Reactor Oversight Process  
Dr. August K. Specior, Nuclear Regulatory Commission

Project Management Brings Dignity To What Otherwise Would Be A Vulgar Brawl  
Bob Vecchiarello, Intergraph Corp.

Lessons Learned in Migrating Curator 3  
Pal Stello, Vermont Yankee  
Ray Reese, Bitwise Computing, Inc

Conversion of Nuclear Plant Licensing Documents to New and Emerging Electronic Document Management and Publishing Technologies  
Laura T Burba, Duke Energy Corporation  
James W. Jones, Jr., Duke Energy Corporation  
Timothy J Winiger, Duke Energy Corporation

In 1999, Duke Energy Corporation was faced with an all too common dilemma. The existing publication software was not keeping pace with needs and the vendor had announced plans to discontinue support. This paper describes the design, specification, selection, and implementation of a comprehensive solution. Experiences, issues, lessons learned, and future plans for enhancements are shared. A demonstration of a converted licensing document using Enigma's Insight publication will be presented.

Lessons Learned In Conducting a Data Conversion  
Peggy Warner, Sandia National Laboratories  
Chris Northrop-Salazar

We will provide lessons learned on our database conversion and provide "help aids" to assist



For the past year, the majority of time was spent setting the stage for the new program. We will also discuss general project management needs. The Nuclear Waste Management Center Program (NWMP) Electronic Records Management System Conversion Team at Sandia National Laboratories took an off-the-shelf software product (PC DDCS) and established it as a work enhancing record and information management indexing and retrieval tool. The overall conversion activity included the conversion of six databases.

**The ComEd Standard Records Retention Schedule Project**

Cheri Susner, ComEd  
Bruce Evans, CIBER Consulting, Inc.

This presentation will discuss a project approach to the consolidation of multiple, redundant and inconsistent record types across multiple sites and corporate records centers. This discussion will describe the project plan development, resource assignment and methodologies used to complete this effort. In addition this session will cover some of the unique problems associated with developing, assigning and implementing the consolidated records schedule across multiple sites and organizational entities and the cultural roadblocks encountered.

**The Integrated Corporate Mind: Information Management Program Concepts and Definitions**

Brian Mathews, Wisconsin Public Service Corp.  
Bruce Evans, CIBER Consulting, Inc.

Current technology makes it possible for many diverse groups within organizations to generate and maintain data and records that could prove of significant benefit to the organization at large yet frequently many of these organizations have failed to institute organizational infrastructures that match the sophistication and integration of the software they use. This session will describe unique organizational infrastructure and cultural considerations often not considered in the implementation of ER Programs and changes that may be necessary to implement cost effective programs at your facilities. Lessons learned will be discussed regarding several implementation projects.

**Implementing Electronic Recordkeeping Systems The Five-Step Program for Success**

Bruce Miller, Tarian Software Inc.

A proven five-step program for successful ERS implementation will be outlined. Learn how to set realistic expectations, and measure concrete results against it. Understand the barriers to successful implementation and how to overcome them. Discover the four key ERS success factors and how to monitor them throughout your project. Learn to manage the project, not the software. And finally, learn to integrate, integrate, and integrate some more. With this valuable insight into ERS project implementation, you will gain the fundamental tools to apply electronic recordkeeping to your organization - successfully!

**Business Ethics for The New Millennium**

Julie Cunningham, Milligan & Associates

The United States Sentencing Commission (USSC) was created by Congress and given a mandate to correct noted sentencing discrepancies in the federal courts. The USSC responded with two sets of guidelines. The first set of guidelines applies to individuals and the second set focuses on organizations, primarily corporations. The session objective is to emphasize to middle and senior level management the importance of communicating high standards of business ethics throughout their organization. It prompts the manager to consider how to incorporate ethics more formally into the business culture of his/her organization. The session also provides a 5-Step Ethical Decision Model that facilitates in making good ethical decisions.

**Improving Records Management In Historical Businesses**

Mel Gould, British Nuclear Fuels

and its relationship to human resources management, the primary focus of the presentation is on emerging electronic information management issues and their impact on CM and your facility.

**Automating Records Management Using the Latest Technology In Artificial Intelligence**  
 Tim Shinkle, Provenance Systems

Learn about important industry advancements that allow you to automate end user involvement, therefore removing the end user from the equation and effectively eliminating the greatest barrier to electronic recordkeeping systems. Understanding industry developments that offer a solution to your enterprise deployment needs, helping you overcome technological barriers that surround mass distribution of ERS solutions are outlined in detail. And understand what it takes to adapt your ERS solution to suit the current work environment, to ensure it is working seamlessly with all of your existing applications, including email, workflow and document management.

**Implementing a Scalable Image Repository for Litigation Support**  
 Charles Meier, Arthur Anderson Los Angeles Technology Group

In 1995, the law firm of Hennigan, Mercer, and Bennett (HMB) was formed in Los Angeles to represent Orange County in their Bankruptcy matter. At that time, the Director of Technology determined that the scale of this case warranted a migration of the litigation support platform from AppleTalk / Apple Macintosh to TCP/IP / Microsoft Windows NT. The challenge was to RAPIDLY integrate "best of breed" components and build a firm-wide client-server litigation support platform in time to assist the discovery process. As an added complexity, 7 million pages stored in the Macintosh system in PBIT format needed to be converted and made available ASAP. The stage was set for a real-life rapid application development cycle. In this presentation, technical criteria will be discussed that affected the initial vendor selection in 1995, share some lessons (learned the hard way), focus on the promising new technologies investigated this year, and describe the implementation of a "litigation smart" image repository, utilizing a feature-rich web browser-based environment.

**Redesign and Implementation of Information Management for OCRWM and Yucca Mountain**  
 Karen Kulzick, KISMET Consulting

The Yucca Mountain Project is in transition from a research project to developing the license application for formal construction. To better support the licensing process, as well as future construction and operations, the OCRWM CIO decided that improvements were needed in the management of information. This included a change in philosophy from records management and information technology to technology-enabled information management. This paper will address the methodology that was used, some of the issues and problems that were uncovered in current work activities, a discussion of the future vision for Information Management in terms of the processes, information, technology and organization to support IM, the plans for transitioning from the current to the target environment and a summary of the current status of the project, including any lessons learned.

**Living Documents & ADAMS - What's Going On?**  
 Rich Giska and the Living Documents Committee

The NRC has developed and implemented their agency-wide EDMS (ADAMS) to manage all NRC and Licensee correspondence and documents. In conjunction with the ADAMS rollout, the NRC had requested assistance from NIRMA regarding the subject of Living Documents. The term "living documents" as used by the NRC, refers to those licensing documents for which changes and revisions had been accomplished. With the advent of ADAMS and electronic file formats in lieu of paper, the document management practices within the NRC are drastically affected. Now, the NRC and the nuclear industry must deal with the fact that all the variations must somehow be accommodated within ADAMS. The NRC and NIRMA are working in a collaborative manner to identify relevant issues and develop alternative solutions to address them in the most efficient manner possible. This session will provide a brief history of the Living Documents Committee

The talk will cover the legislative and regulatory background in the UK, and look over the record management systems, which have prevailed over 50 years at the UK's major nuclear recycling site, Sellafield. Mel will explain the work underway to implement World Class Records Management systems, and share some of the high and low points along the way. The talk will include an explanation of the integrated systems for managing drawings, design information, maintenance processes, and how they have been linked to the SAP Computer system. Mel returns to NIRMA after two years, and his honest open style, coupled with a wry sense of humour, will provide an interesting and enjoyable presentation, sprinkled with practical learning points. This year he will bring his water pistol to the lecture - will he?

#### Barcode Uses & Abuses

Martha W. Keenen, Sandia National Laboratories

This presentation provides insight into the types, uses, abuses, and hardware and software associated with barcode technologies. The original - inventory and equipment-related uses of barcode are quite old. Even in Recorded Information Management (RIM) barcode has been used to track boxes in storage and check records in- and out of facilities. What is right way to use barcode? Barcode products vary by type, by cost, by portability and even by their ability to interface with other software. Which products are chosen for which uses depend, for the most part, on what exactly the intended environment will be. The majority of the presentation is about what questions to ask, why, and some potential answers. At the end of the presentation, what the speaker is doing now with barcode and how well it works will be discussed as an example.

#### Targeted Assistance for the New Millennium

Margarita Y. Sexson, U.S. Department of Energy  
Steve Adams, National Archives and Records Administration

This presentation will outline how the National Archives and Records Administration (NARA), specifically the Southwest Region, is working with government agencies (specifically, DOE Albuquerque), to develop and improve their records management and archival programs.

#### Top Ten Reasons To Become A Records Manager

Margarita Y. Sexson, U.S. Department of Energy  
John L. Day, Team21, LLC

This is a humorous, motivational presentation that reveals true expressions by field personnel about records management. The presentation is educational as well as entertaining.

#### D.C. Cook's Experience In their Document Control/Records Management Recovery Efforts

Sissy Nelson, American Electric Power  
Martha Johnson, Millican & Associates

In 1997, the Cook Nuclear Plant was shut down because of design issues. Additional issues were raised as a result of NRC and company reviews that continued through 1998 and into 1999. One of those issues was the inadequate functional and programmatic performance of document control and records management. In the spring of 1999, a consultant was retained to assist Cook in document control and records management recovery that included compensatory actions and long-term solutions. This presentation will share how we established recovery through this partnership, lessons-learned, and where we are today.

#### Managing Electronic Information

Paul Krueger, Southern California Edison  
Paul Killins, Southern California Edison

Attendees of this presentation will hear a brief overview of facility configuration management (CM)

activities on this subject, an update on issues and an overview of future efforts by both NIRMA and the NRC. A panel will be assembled to discuss specific issues and experiences they have had with ADAMS and management of electronic documents. This will be both an informative as well as interactive session with expected interaction with those attending.

**ANSI/NIRMA Standard Guidelines for Configuration Management of Nuclear Facilities**  
Rich Giska and the Configuration Management Committee

NIRMA has achieved a major milestone for the organization as the American National Standards Institute (ANSI) approved the first ANSI/NIRMA Standard. The approval of this industry consensus standard provides a single source of guidance for organizations to use as a reference for planning, designing and implementing their individual CM Programs for operating or managing nuclear facilities. This session will include a brief discussion of the evolution of this CM Standard with emphasis on its purpose and the process and wide range of interest groups involved with the review and approvals. In addition, the basic components of effective CM Programs and key aspects of each subject area will be discussed. The presentation will benefit all parties associated with and supporting the daily operation of a nuclear facility. The session format will include an initial presentation with an open forum for interactive discussion on questions/issues raised by the attendees.

**EDMS and Regulatory Compliance: Matching Efficiency With Security**  
Scott Buchart, Optical Image Technology, Inc.

Electronic Document Management Systems (EDMS) improve efficiency and accuracy. These systems are also kept under close scrutiny by regulatory agencies. Can a business or organization achieve the benefits of implementing an EDMS and still be compliant with government regulations? In this presentation, Scott Buchart explains the latest innovations in the field of EDMS, such as encryption and digital signatures. These innovations, recognized by numerous government entities and agencies, not only provide efficient storage and workflow of files and documents, they are also paving the way for government compliance. In several industries, compliance has already been achieved.

**WEPCO's EDMS: Cornerstone of Point Beach IM and CM**  
Joanne Crowley, Wisconsin Electric  
Bud Sawatzky, TwoRivers Consultants

This presentation describes the joint effort of two projects to ensure that an effective information management (IM) tool met end user system requirements while also adequately supporting conceptual and infrastructure elements of CM. The presentation will focus on: how requirements were defined with an eye toward both IM and CM principles; how development was innovated in a collaborative environment; how implementation was achieved that satisfied both projects; and finally, the lessons that were learned along the way that can assist other organizations who may choose to follow a similar path.

**Vendor Information Program Survey Results**  
Joseph Burack, STP Nuclear Operating Company  
Rhonda Stone, Rochester Gas & Electric  
Susan Griffin, Vendor Information Solutions, Inc.

This session will provide insight regarding the nature of utility compliance with NRC GL 90-03, the extent of utility resources dedicated to vendor information, and methods that utilities utilize to ensure they are compliant with NRC expectations. VTIC will present the information through providing the results of its Vendor Information Program Survey conducted during 1999, answered by 18 utilities.

**Scheduling Federal Records**  
John Ellis, NARA

This presentation covers Scheduling Federal Records: why, how, and where to get help. Attendees will learn: why scheduling Federal records is important; meeting statutory and regulatory requirements; organizational needs and efficiencies; identifying the value of records; proposing retention periods; and how to write a good schedule.

**The Challenge of Explaining the NRC Reactor Oversight Process**  
Dr. August K. Spector, Nuclear Regulatory Commission

During the past two years, the Nuclear Regulatory Commission has developed a new process to providing oversight of operating nuclear power reactor licensees. The new Reactor Oversight Process utilizes data from both performance indicators and inspection findings to determine plant performance and the agency's regulatory response. Against the backdrop of the Government Performance and Results Act and principles of re-engineering, the agency has implemented a more effective and efficient management process to regulatory oversight. NRC management was challenged to more effectively communicate to both internal and external stakeholders; to take a pro-active approach to communicating using plain language. This presentation will demonstrate how the NRC developed its communication plan and how it utilized a variety of media, including the "old" more traditional print media and the "new" electronic web-based media, to carry out the plan. The challenges, which confronted the agency in implementing a strategy, which emphasizes stakeholder dialogue and plain language communication, will be presented. Communicating new concepts in the context of a changed communication environment is relevant to other government agencies as they enter the new millennium. Fashioning an approach to stakeholder communication, which encourages currency of information, plain language, easy retrieval, as well as establishing an atmosphere of meaningful dialogue can be a challenge to any organization.

**Project Management Brings Dignity To What Otherwise Would Be A Vulgar Brawl**  
Bob Vecchiarolo, Intergraph Corp.

Are your IT projects characterized by conflict? Conflict between users and developers, conflict between hardware and software suppliers, conflict between developers and testers or even conflict among user groups. Is your IT project not living up to expectations? Functionally that does not support users needs, missed delivery/release dates, constantly requiring additional funding and not meeting Return On Investment targets. If this describes your project environment, its time to bring the chaos under control by implementing tried and true project management techniques. This session will provide the attendee with grounding in basic project management techniques. Techniques that will help turn the typical chaotic project environment into a three-ring circus with the Project Manager as the Ringmaster.

**Lessons Learned in Migrating Curator 3**  
Pat Stello, Vermont Yankee  
Ray Reese, Bitwise Computing, Inc.

The focus of this technically oriented session will be on the experiences of migrating from Curator 2.5.5 to Curator 3.0 at Vermont Yankee with an emphasis on lessons learned and advantages gained from use of new features in the product. The session will emphasize Q&A time for audience members to interact with the speakers and each other. Our intent is to begin a dialog among the user population to promote business advantages and best practices associated the use of Curator, specifically as it concerns the Nuclear Records Management community.

Comments? [Send NIRMA an email](#) by clicking here

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Nuclear Information & Records Management Association  
210 5th Avenue, New York, NY 10010  
TEL: (603)432-6476 - FAX: (603)432-3024

**EXHIBIT E**



## Monthly Meetings

<b>Location:</b>	<b>HESS Building, 5430 Westheimer Way, 713-627-2283</b>
<b>Cost:</b>	Registrations made on or before the Friday prior to the meetin charged the early registration prices. Registrations made after th prior to the meeting will be charged the regular registration prices.  <b>Member early registration price: \$25</b> <b>Non-member early registration price: \$30</b>  <b>Member regular registration price: \$30</b> <b>Non-member regular registration price: \$35</b>
<b>Registration Information:</b>	If registering offline, please contact Pamela Speer at 713-243-1270 p.m. on the Friday prior to the meeting. Cancellations must be recee noon on the Monday prior to the meeting.
<b>Time:</b>	Lunch Meetings: Workshops: 10:00 a.m. - 11:00 a.m. Registration: 11:00 a.m.- 11:30 a.m. Lunch: 11:30 a.m. - 12:15 p.m. Program: 12:15 p.m. - 1:00 p.m.
<b>Committee Managers:</b>	Programs: Stephanie Lemon, 713-243-1270 Registration: Pamela Speer, 713-243-1270 Workshops: Shylan Cadmus, 713-243-1270

## 2002 Meeting Schedule

Date 4 <sup>th</sup> Wed	Lunch/Dinner Program	Workshop I	Workshop
January 23 Luncheon	<u>Electronic Evidence Discovery</u> John Jessen, Electronic Evidence Discovery, Inc.		
February 27 Luncheon	<u>Shredding - 101 "One Man's Trash Is Another Man's Treasure"</u> David Culbertson, President of the National Association for Infor Destruction (NAID) and the ISG Leader of Records Storage/Destr ARMA International		
March 27 Luncheon	<u>Web Technologies for Information Management</u> John P. Frost, CRM, Project Manager for Knowledge Manageme Applications - American Airlines Fort Worth, Texas		



May 22 Luncheon	<u>Customer Service</u> <b>Sonia Meltzer, Records Manager, Winstead Sechrest &amp; Minick - I TX</b>
June 26 Luncheon	<u>ISGs and You</u> <b>Penny J. Quirk, CRA, Principal Consultant, Information Network International</b>
July 24 Luncheon	<u>Applying Records Retention Scheduling...</u> <b>Bruce Evans, CRM/NS, Principal and founder of CIBER Consulti</b>
August 27 Luncheon	<u>The New e-Records Market</u> <b>Andrew Warzecha, Sr. Vice President Electronic Business Strate META Group</b>

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**ARMA HOUSTON**

The Information Management Professionals

## July 2002 Meeting

For monthly meeting information, please contact Pamela Speer at 713-243-1270.

### **Meeting Topic: "Applying Records Retention Scheduling in an Information Management World"**

**Synopsis:** This Session will cover some of the unique problems associated with developing, assigning and implementing consolidated records schedule across multiple sites and organizational entities and the cultural roadblocks encountered.

**Speaker Bio:** Bruce Evans, CRM/NS has over 23 years in utility manufacturing industries including a variety of utility management consulting positions. In 1996, he became Principal and founded CIBER Consulting, Inc. where he has been involved as project manager and consultant on numerous information management projects. Prior to that, he was with the Western Regional Office of PRC-ESI in February 1990, where he was Project Manager and Associate Technical Manager for major mid-west clients.

For the last 9 years, his primary focus has been in the area of consultation in the development of Electronic Records and Document Management programs and systems for a variety of clients. He is a Certified Records Manager/Nuclear Specialist (CRM/NS) as certified by the Institute of Certified Records Managers (ICRM) and the National Information and Records Management Association (NIRMA).

### **July 2002 Workshops:**

For workshops information, please contact Shylan Cadmus at 713-243-1270.

**Speaker(s):** Kevin Granhold and Cory Williams

**Topic:** *Electronic Corporate Security*

**Date:** July 24, 2002

**Time:** 10:00 a.m.

**Speaker(s):** Adel Carboni

**Topic:** *Fundamentals of Desktop Records Management*

**Date:** July 24, 2002

**Time:** 10:00 a.m.

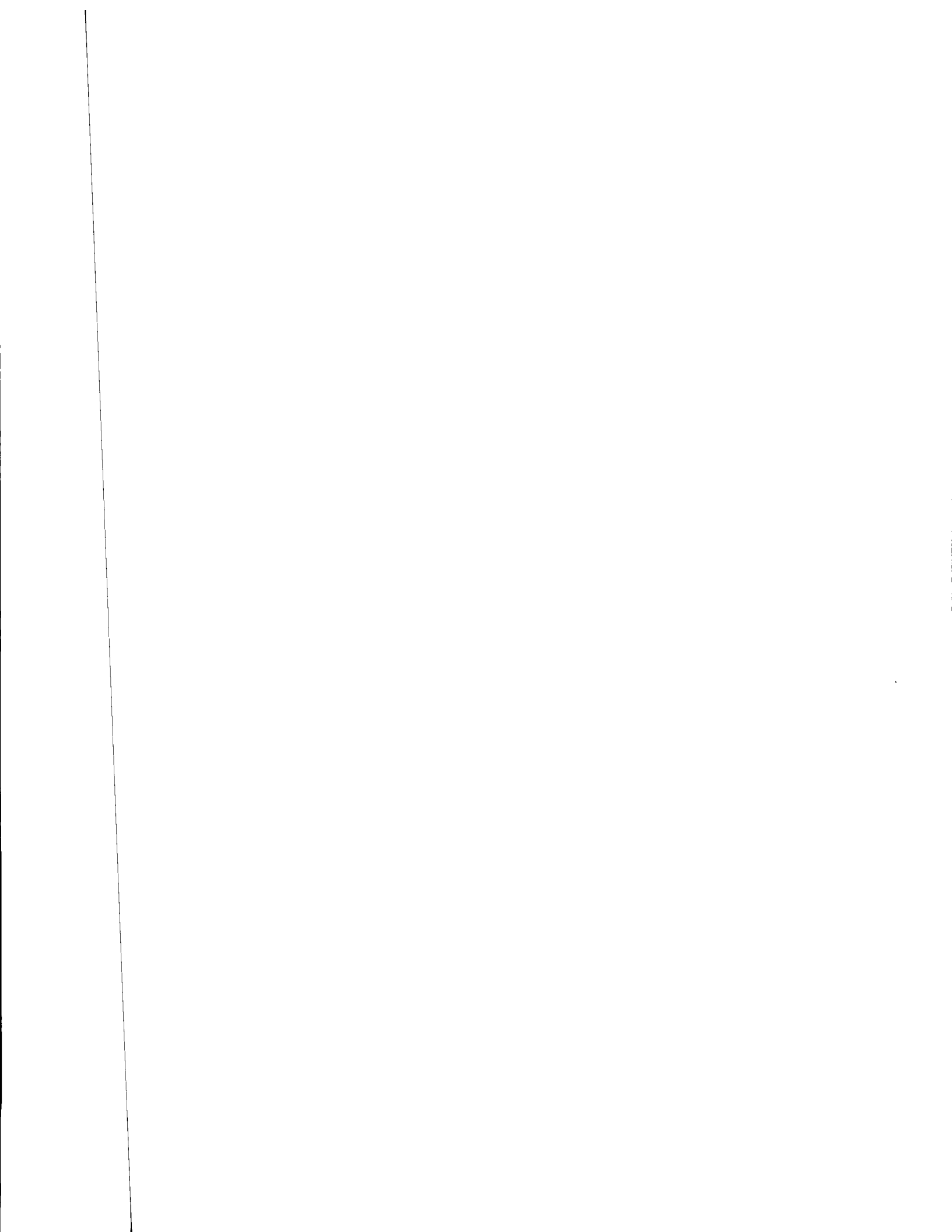
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS**

CIBER, INC., a Delaware corporation,	)	
	)	
Plaintiff,	)	<b>Civil Action No. 03-CV-840</b>
	)	
v.	)	
	)	
CIBER CONSULTING, INC.,	)	<b>JURY TRIAL REQUESTED</b>
an Illinois corporation; and	)	
BRUCE F. EVANS, an individual,	)	
	)	
Defendants.	)	

**ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM**

Defendants, Ciber Consulting, Inc. ("CCI") and Bruce F. Evans, answer Plaintiff Ciber, Inc.'s Complaint as follows:

**JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction of this action under 28 U.S.C. § 1331 (federal question) in that Counts I and II arise under the Trademark Act of 1946, 15 U.S.C. §§ 1051-1127, as amended (the "Lanham Act").

**ANSWER:** Admitted.

2. This Court also has supplemental jurisdiction over Count III of this complaint under 28 U.S.C. § 1367(a) because the claim arises from the same common nucleus of operative facts complained of in Counts I and II.

**ANSWER:** Admitted.

3. This Court has personal jurisdiction over Defendants because of Defendants' repeated use of the "CIBER" mark in the State of Illinois and in this District, as detailed below. Additionally, this Court has personal jurisdiction over Defendants because, upon information and belief, Defendants use the "CIBER" mark to solicit business in this District, including, upon information and belief, through the mails, by telephone and through other means.

**ANSWER:** Defendants admit that this Court has personal jurisdiction over the Defendants. Defendant CCI admits that it has used the business name "Ciber Consulting, Inc." in

the State of Illinois and in this district. Defendants deny that they use the "CIBER" mark or that they have ever used the "CIBER" mark to solicit business anywhere.

4. Venue is proper in this judicial district under 28 U.S.C. § 1391. As detailed below, Defendants reside in this District, and Defendants expect, or reasonably should expect, their acts to have legal consequences in the Northern District of Illinois.

**ANSWER:** Admitted.

### PARTIES

5. CIBER is a corporation duly organized and existing under the laws of the State of Delaware.

**ANSWER:** Admitted.

6. CIBER is informed, believes, and thereon alleges that defendant CIBER Consulting, Inc. ("CCI") is an Illinois corporation with a business address of 625 Quail Run Dr., Plainfield, Illinois 60544.

**ANSWER:** Admitted.

7. CIBER is informed, believes, and thereon alleges that defendant Bruce F. Evans ("Evans") is an individual and is the principal and founder of CCI, and is a resident of the State of Illinois.

**ANSWER:** Admitted.

### CIBER'S BUSINESS

8. CIBER is an international company that specializes in management and consulting services in the fields of business, engineering, research, and design, including the development and implementation of computer programming and software services. Founded in 1974, CIBER has more than five thousand employees and more than sixty offices in the United States, Canada, and Europe.

**ANSWER:** Defendants are without sufficient information to admit or deny the allegations of Paragraph 8.

9. CIBER has used the "CIBER" mark (the "Mark") since at least July 1974. Since its adoption of the Mark, CIBER has worked to maintain the strength of the Mark. For example, CIBER has obtained federal registration of several marks among a family of related trademarks, including CIBER and CIBER (stylized). Specifically, U.S. Trademark Registration No. 1,185,100 for the Mark covers goods and services in the following areas: management consulting services in the fields of business, engineering and research; and design,

development and implementation of computer programming and software services. U.S. Trademark Registration No. 1,479,942 is for a stylized version of the Mark that covers goods and services in the same classes as U.S. Trademark Registration No. 1,185, 100.

**ANSWER:** Defendants admit that the service mark "CIBER" is registered as a trademark, U.S. Trademark Registration No. 1,185,100, for goods and services in the following areas: management consulting services in the fields of business, engineering and research; and design, development and implementation of computer programming and software services. Defendants also admit that the stylized service mark "CIBER" is registered as a trademark, U.S. Trademark Registration No. 1,479,942, for goods and services in the following areas: management consulting services in the fields of business, engineering and research; and design, development and implementation of computer programming and software services. Defendants are without sufficient information to admit or deny the remaining allegations in Paragraph 9.

10. CIBER serves clients in both the private and public sectors, and provides consulting services to customers in a variety of industries, including the nuclear energy field. For example, CIBER has a contract with Lawrence Berkeley National Laboratory in Berkeley, California, and has done work for Los Alamos National Laboratory in Los Alamos, New Mexico, both of which are U.S. Department of Energy ("DOE") facilities that engage in, inter alia, nuclear science research. In addition, CIBER has provided consulting services to Sandia National Laboratories ("Sandia") in Albuquerque, New Mexico, which is a facility operated for the DOE's National Nuclear Security Administration. Among other things, Sandia maintains the nation's nuclear weapons supply and works with the DOE and the Nuclear Regulatory Commission ("NRC") to ensure the safety of the country's nuclear energy generation capabilities. CIBER has provided its services, and will continue to offer its services, to the nuclear energy industry and to contractors that provide services to DOE facilities that maintain and manage both nuclear weapons and materials.

**ANSWER:** Defendants are without sufficient information to admit or deny the allegations of Paragraph 10.

11. In addition to providing its services to several prominent national laboratories, CIBER serves dozens of private and publicly-held clients in the utility industry, and in particular serves many DOE-licensed operators of nuclear generation facilities. For instance, one of CIBER's clients is SCANA, a holding company that owns several utilities, including

South Carolina Electric and Gas Co. ("SCG&E"), a licensed nuclear facility. Other CIBER clients include Progress Energy, which operates several nuclear power plants in the Southeast; Nuclear Management Company, one of the largest nuclear operating companies in the United States; and Consumers Energy, Michigan's largest utility, which operates nuclear power facilities in the Midwest. Another CIBER client, Electric Power Research Institute ("EPRI"), serves the entire power utility industry, including providing research and advice on issues relating to nuclear power generation. Further, the Nuclear Information and Records Management Association ("NIRMA"), of which Defendant CIBER Consulting, Inc. is a member, also counts as members several of CIBER's clients and former clients, including Eastman Kodak Company, General Electric Company, GRC International (an AT&T Company), Lockheed Martin, and Sandia.

**ANSWER:** Defendants are without sufficient information to admit or deny the allegations of Paragraph 11.

12. By virtue of the long, continuous and substantial use by CIBER of its mark and name, "CIBER, Inc.," and further, by virtue of its extensive advertising of its services under the Mark, said Mark has become a strong and distinctive identifier of CIBER and its services from those of all others. Because of the consistent quality of excellence of CIBER's management and consulting services (as described above and marketed under the Mark), CIBER has established valuable good will and reputation with respect to its services and related products.

**ANSWER:** Defendants deny that the words "ciber" and/or "cyber" have become identified with the Plaintiff and instead allege that these are commonly used words to describe computer related and computer network related products and services. Defendants are without sufficient information to admit or deny the remaining allegations of Paragraph 12.

#### **DEFENDANTS' USE OF THE MARK CIBER**

13. Upon information and belief, defendant CCI provides information management consulting services in the nuclear energy field under the name CIBER Consulting, Inc. Upon information and belief, CCI offers its services to entities that are customers or potential customers of CIBER.



**ANSWER:** Defendants admit that CCI provides information management consulting services in the nuclear energy field under the name CIBER Consulting, Inc. Defendants are without sufficient information to admit or deny that CCI offers its services to entities that are customers or potential customers of CIBER.

14. Upon information and belief, Defendants sought to misappropriate the Mark by adopting a confusingly similar mark and name in order to insure Defendants' success.

**ANSWER:** Denied.

15. Defendants' use of the "CIBER" mark has caused actual consumer confusion with respect to services offered by CIBER and services offered by Defendants and has created a likelihood of confusion between the services of Defendants and CIBER.

**ANSWER:** Denied.

16. On September 13, 2001, CIBER's counsel sent a cease and desist letter to CCI requesting that CCI immediately refrain from further use of the Mark as part of its company name. More than a month later, CCI responded through counsel by refusing to comply with CIBER's demands. To further encourage a prompt resolution of the matter, CIBER's counsel responded by offering to allow CCI to have a transition period during which it could gradually cease use of the Mark. However, CCI once again refused to comply with CIBER's demands and indicated no interest in refraining from its infringement upon CIBER's name and Mark. At this point, CIBER believes that further attempts to negotiate with CCI will be futile and, therefore, CIBER has instituted this action to stop CCI from further using the "CIBER" mark.

**ANSWER:** Defendants admit that Plaintiff has requested that CCI refrain from using the word "ciber" as part of its company name or in the marketing of its services and that CCI has declined to do so. Defendants are without sufficient information to admit or deny whether further attempts to negotiate would be futile. Defendants are without sufficient information to admit or deny allegations concerning Ciber, Inc.'s motives in instituting this action.

17. Defendants' services are of the same general nature and type as those offered by CIBER to the public and target the same customers. Defendants' use of marks nearly identical to CIBER's Mark and trade name are likely to cause confusion, mistake and/or deceive the public. Defendants' services are likely to be mistaken or confused with CIBER, its business and products. Furthermore, Defendants' use of the Mark is likely to create the mistaken impression in the public that Defendant CIBER Consulting, Inc. or its services are endorsed by CIBER or that Defendant CCI is sponsored, affiliated or in some way connected with CIBER.

**ANSWER:** Defendants deny that CCI's services are of the same general nature and type as those offered by Ciber, Inc. Defendants deny that CCI's services are offered "to the public." Defendants deny that CCI's services target the same customers. Defendants deny that CCI uses any mark nearly identical to Ciber, Inc.'s alleged trademark. Defendants deny that CCI's trade name is likely to cause confusion, mistake and/or deceive the public. Defendants deny that CCI's services are likely to be mistaken or confused with Ciber, Inc., its business and products. Defendants deny that CCI's use of its name Ciber Consulting, Inc. is likely to create the mistaken impression in the public that CCI or its services are endorsed by Ciber, Inc. or that Defendant CCI is sponsored, affiliated or in some way connected with Ciber, Inc.

18. Defendant Bruce F. Evans represents himself to be the founder and principal of Defendant CCI. As a result, he orchestrates and directs all of the actions of Defendant CCI and acts as CCI's representative. As a consequence of the actions complained of, he should be held jointly and severally liable for the trade mark infringement and unfair business practices.

**ANSWER:** Defendant Bruce F. Evans admits that he is the founder and principal of Defendant CCI and acts as CCI's representative. Otherwise, denied.

**COUNT I: Trademark Infringement**

**(15 U.S.C. § 1114(a))**

19. CIBER re-alleges and incorporates by reference paragraphs 1 through 18 above.

**ANSWER:** Defendants incorporate by reference their responses to paragraphs 1 through 18 above.

20. CIBER is the exclusive owner of the "CIBER" mark and its related family of marks, and has obtained two federal trademark registrations for the Mark, as described above.

**ANSWER:** Except as specifically admitted above, Defendants are without sufficient information to admit or deny the allegations of Paragraph 20.

21. Upon information and belief, Defendants knowingly have advertised, offered for sale and sold services using the term "CIBER" in interstate commerce. Defendants' actions have been willful and in knowing disregard of the rights of CIBER.

**ANSWER:** Denied.

22. Defendants' use of "CIBER" in connection with consulting services has caused, or is likely to cause, consumer confusion, deception or mistake.

**ANSWER:** Denied.

23. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

**ANSWER:** Denied.

24. CIBER has suffered and will continue to suffer irreparable harm unless Defendants cease use of or are enjoined from using the "CIBER" mark. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

**ANSWER:** Denied.

**COUNT II: Federal Unfair Competition and False Advertising**

**(15 U.S.C. § 1125(a))**

25. CIBER re-alleges and incorporates by reference paragraphs 1 through 24 above.

**ANSWER:** Defendants incorporate by reference their responses to paragraphs 1 through 24 above.

26. Defendants have used in interstate commerce in connection with consulting services a word, term, name, symbol, or device that, in commercial advertising or promotion misrepresents the nature, characteristics, qualities and/or origin of their goods, services or products in violation of 15 U.S.C. § 1125(a)(1)(B). Defendants' actions have been willful and in knowing disregard of the rights of CIBER.

**ANSWER:** Denied.

27. The marks and name utilized by Defendants are confusing similar to that of CIBER's unique mark and trade name. This attempt by Defendants to trade upon Plaintiff's good will and reputation and to unlawfully appropriate the benefits of CIBER's years of advertising constitutes unfair competition and has caused and is causing

irreparable damage to CIBER by misleading the public to believe that Defendants are affiliated, associated with or sponsored by CIBER.

**ANSWER:** Denied.

28. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

**ANSWER:** Denied.

29. CIBER has suffered and will continue to suffer irreparable harm unless Defendants cease use of or are enjoined from using the "CIBER" mark. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

**ANSWER:** Denied.

**COUNT III: Unfair Competition and Unfair Business Practices**

30. CIBER re-alleges and incorporates by reference paragraphs 1 through 29 above.

**ANSWER:** Defendants incorporate by reference their responses to paragraphs 1 through 29 above.

31. This claim for relief arises under the common law of unfair competition.

**ANSWER:** Defendants deny that Ciber, Inc. has a claim for relief under the common law of unfair competition.

32. CCI's actions described above, with its continued use of a mark deceptively similar to CIBER's trademark or trade name, are intended to mislead the public and lead to confusion and mistake and constitute deliberate and willful unfair competition and unlawful business practice in violation of common law.

**ANSWER:** Denied.

33. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

**ANSWER:** Denied.

34. Unless restrained and enjoined by this court, Defendants' wrongful conduct will continue to cause irreparable harm to CIBER. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

ANSWER: Denied.

#### AFFIRMATIVE DEFENSES

##### THE TERM "CIBER" IS GENERIC

35. The terms "cyber" and "ciber" have become generic for computer and computer network related concepts, goods and services. The prefix "cyber-" or "ciber-" is commonly incorporated into words to create a word with a computer related meaning. Examples include cyberspace (computer networks where online communication takes place), cyberphobia (abnormal fear of computers) and cybernate (to control by computer).

36. The widespread use of the terms "cyber" and "ciber" in connection with computers has led to the generic understanding among consumers that these terms refer to computers and computer networks generally, and therefore these terms, used alone, do not serve to uniquely identify any single source of any good or service.

37. Ciber, Inc.'s failure to police the widespread use of the words "cyber" and "ciber" have led to these terms becoming generic in connection with computers and computer related goods and services.

38. Because the terms "cyber" and "ciber" are generic terms, Ciber, Inc. is not entitled to the exclusive right to use these terms.

##### LACHES

39. Ciber Consulting, Inc. was incorporated in Illinois in 1996.

40. Ciber Consulting, Inc. has used the business name "Ciber Consulting, Inc." continuously and conspicuously since 1996.

41. Ciber Consulting, Inc. adopted its trade name in good faith and without any desire or intent to capitalize on any goodwill or recognition of the trademarks or name of Ciber, Inc.

42. Ciber, Inc. took no action concerning Ciber Consulting, Inc.'s use of the term "ciber" in its business name until September 13, 2001 when it sent a letter to CCI requesting that it cease using the term "ciber" in its business name.

43. From 1996 to 2001, Ciber Consulting, Inc. built up valuable good will and recognition of its trade name with its customers and potential customers.

44. Ciber, Inc.'s failure to take any action from 1996 until 2001 concerning its alleged exclusive right to use the term "ciber" is inexcusable.

45. Because Ciber Consulting, Inc. built up valuable good will and recognition of its trade name from 1996 to 2001, Ciber, Inc.'s inexcusable delay has resulted in prejudice to Defendants.

46. If Ciber Consulting, Inc. were to now have to change its trade name after many years of use, the change would result in the loss of valuable good will and recognition with its customers and potential customers.

#### **COUNTERCLAIM**

#### **COUNT I: REQUEST FOR CANCELLATION OF THE MARK "CIBER"**

#### **15 U.S.C. § 1119**

47. Defendants reassert and incorporate by reference paragraphs 35-46 above.

48. Ciber, Inc. owns U.S. Trademark Registration No. 1,185,100 for the mark "CIBER" for goods and services in the following areas: management consulting services in the fields of business, engineering and research; and design, development and implementation of computer programming and software services.

49. Ciber, Inc. owns U.S. Trademark Registration No. 1,479,942 for the stylized mark "CIBER" for goods and services in the following areas: management consulting services in the fields of business, engineering and research; and design, development and implementation of computer programming and software services.

50. The word "ciber" has become generic for computer and computer network related concepts, goods and services and has ceased to function, if it ever did, as a unique identifier of the source of management consulting services in the fields of business, engineering and research and design, development and implementation of computer programming and software services.

51. Defendants request cancellation of the U.S. Trademark Registration Nos. 1,185,100 and 1,479,942 pursuant to 15 U.S.C. § 1119 on the grounds that these registrations are generic and not entitled to registration as trademarks.

52. Ciber, Inc. has failed to police and prohibit the use the term "ciber" in connection with management consulting services in the fields of business, engineering and research.

53. Ciber, Inc. has failed to police and prohibit the use the term "cyber" in connection with management consulting services in the fields of business, engineering and research.

54. Ciber, Inc. has failed to police and prohibit the use of the term "ciber" in connection with the design, development and implementation of computer programming and software services.

55. Ciber, Inc. has failed to police and prohibit the use of the term "cyber" in connection with the design, development and implementation of computer programming and software services.

56. As a result of Ciber, Inc.'s course of conduct as the owner of U.S. Trademark Registration Nos. 1,185,100 and 1,479,942, including its failure to police the use of these marks, the mark "CIBER" has become generic and thereby lost any significance as a trademark.

57. Because U.S. Trademark Registration Nos. 1,185,100 and 1,479,942 have become generic terms as a result of Ciber, Inc.'s acts of omission, namely, its failure to police the widespread use of the terms "ciber" and "cyber," the mark "CIBER" should be found to have been abandoned as that term is defined in 15 U.S.C. § 1127.

58. Defendants request cancellation of the U.S. Trademark Registration Nos. 1,185,100 and 1,479,942 pursuant to 15 U.S.C. § 1119 on the grounds that these registrations have been abandoned by Ciber, Inc. through its acts of omission in policing the marks.

#### **PRAYER FOR RELIEF**

Defendants respectfully request judgment against the Plaintiff Ciber, Inc. as follows:

- A. A declaration that Defendants do not infringe Plaintiff's alleged trademarks;
- B. A declaration that Plaintiff's alleged trademarks are invalid and unenforceable;
- C. Cancellation of Plaintiff's U.S. Trademark Registration Nos. 1,185,100 and 1,479,942 pursuant to 15 U.S.C. § 1119;
- D. An award of Defendant's reasonable costs in defending this action;
- E. Such other relief as is just and equitable.



Defendants request trial by jury.

Date: May 12, 2003

Respectfully submitted,

By:



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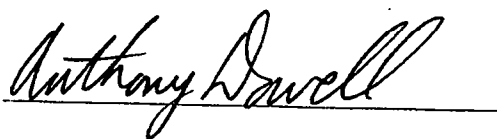
**Attorneys for KOUVATO, INC.**

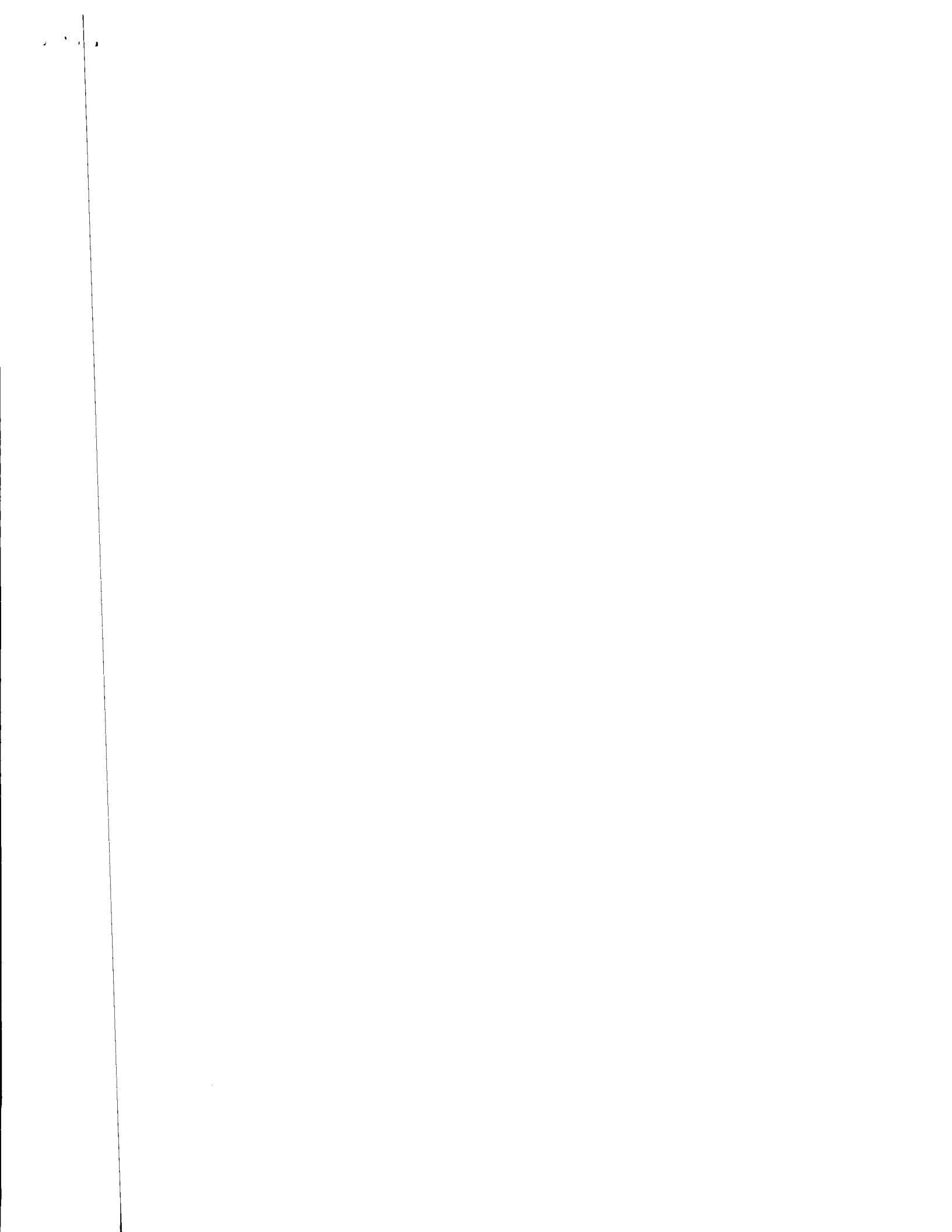
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a copy of the foregoing **ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM** was served via United States mail and email to:

David E. Sipiora  
Chad E. King  
1200 17th Street, Suite 2700  
Denver, CO 80202

on this 12th day of May, 2003.

  
\_\_\_\_\_



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

RECEIVED

MAY 07 2004

MICHAEL V. BERTHUIS  
CLERK, U.S. DISTRICT COURT

CIBER, INC., a Delaware corporation,

Plaintiff,

vs.

Civil Action No. 03-CV-840

CIBER CONSULTING, INC., a dissolved  
Illinois corporation; BRUCE F. EVANS, an  
individual; CYNTHIA B. EVANS, an  
individual; JOHN DOES 1 - 10, individuals,

Judge Robert W. Gettleman

Defendants.

---


**PLAINTIFF'S MOTION FOR VOLUNTARY  
DISMISSAL OF ACTION WITH PREJUDICE**

Plaintiff CIBER, Inc. ("CIBER") hereby moves this Court for an order: 1) dismissing all of CIBER's claims in this action with prejudice; and 2) dismissing the counterclaim of Defendants CIBER Consulting, Inc. ("CCI"), Bruce F. Evans, and Cynthia B. Evans (collectively, "Defendants") as moot. A complete statement of the grounds and legal support for CIBER's motion is set forth in the accompanying Memorandum of Law in Support of Plaintiff's Motion For Voluntary Dismissal of Action With Prejudice and the Declaration of Chad E. King.

Dated: May 7, 2004

Respectfully submitted,

WOOD, PHILLIPS, KATZ, CLARK & MORTIMER



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ATTORNEYS FOR PLAINTIFF CIBER, INC.

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of May, 2004, a true and correct copy of the foregoing documents entitled: 1) NOTICE OF MOTION: 2) PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL OF ACTION WITH PREDJUDICE; 3) MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION; and 4) DECLARATION OF CHAD E. KING was served by Federal Express for delivery on May 10, 2004 addressed to the following:

Anthony E. Dowell  
Dowell Baker  
1001 Main Street  
Lafayette, Indiana 47901

And by hand delivery to:

Christopher V. Carani  
McAndrews, Held & Malloy, LTD.  
500 West Madison Street  
Suite 3400  
Chicago, Illinois 60661

  
\_\_\_\_\_

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RECEIVED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

MAY 07 2004

CIBER, INC., a Delaware corporation,

Plaintiff,

vs.

Civil Action No. 03-CV-840

CIBER CONSULTING, INC., a dissolved  
Illinois corporation; BRUCE F. EVANS, an  
individual; CYNTHIA B. EVANS, an  
individual; JOHN DOES 1 - 10, individuals,

Judge Robert W. Gettleman

Defendants.

---

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR  
VOLUNTARY DISMISSAL OF ACTION WITH PREJUDICE**

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ATTORNEYS FOR PLAINTIFF CIBER, INC.

Plaintiff CIBER, Inc. ("CIBER") hereby moves this Court for an order dismissing all of CIBER's claims in this action with prejudice and dismissing the counterclaim of Defendants CIBER Consulting, Inc. ("CCI"), Bruce F. Evans, and Cynthia B. Evans (collectively, "Defendants") as moot.

## I. INTRODUCTION

CIBER originally filed this action in the belief that Defendants' use of the trade name "Ciber Consulting, Inc." was likely to create consumer confusion with CIBER's use of the registered trademark CIBER. Having taken discovery, CIBER now believes that Defendants' use of the mark CIBER is *de minimis* and has remained *de minimis*, without change, for a period of eight years, from the inception of Defendants' business in 1996 to the present. Given these facts, CIBER has concluded that Defendants' continued use of the CIBER mark is unlikely to create consumer confusion. For this reason, and to conserve judicial resources and prevent unnecessary expense for the parties, CIBER respectfully requests that this Court dismiss with prejudice all of CIBER's claims pending in this case. In addition, because this Court's dismissal with prejudice of CIBER's claims would eliminate any actual case or controversy in this proceeding, CIBER asks that the Court dismiss as moot Defendants' counterclaim, which seeks cancellation of CIBER's existing U.S. trademark registrations.

## II. BACKGROUND

CIBER owns several trademark registrations for the CIBER mark (including, *inter alia*, U.S. Trademark Registration Nos. 1,185,100 and 1,479,942, which are at issue in this case). CIBER provides a number of business and computer consulting services under that mark. In contrast, under the trade name "Ciber Consulting, Inc.," CCI provides a narrow set of services relating to the management of nuclear records for nuclear utilities. CCI never has filed to register its name as a trademark. Although allegedly in existence since 1996, CCI was unknown to CIBER until approximately two years ago.

Based on the similarities between CCI's trade name and CIBER's registered trademark, CIBER was concerned that Defendants' use of the trade name Ciber Consulting, Inc., if used as a trademark, would create a likelihood of confusion. When attempts to elicit CCI's voluntary cooperation failed, CIBER initiated this action, originally in the U.S. District Court for the



Northern District of Texas. Defendants moved for the dismissal or transfer of that action, arguing that the Northern District of Texas could not exercise personal jurisdiction over Defendants. Ultimately, the parties stipulated to the transfer of the action to this District.

In a limited deposition taken in December 2002 to determine Defendants' amenability to suit in Texas, the owner and principal of CCI, Bruce Evans, testified that CCI had no employees other than Mr. Evans, currently had two customers and, throughout its existence had provided services to total of only four customers. Exhibit A at 9:23-10:2;19:14-23 (excerpts of transcript of deposition of Bruce Evans).<sup>1</sup> Mr. Evans further testified that CCI has never done any advertising other than by word of mouth, has never produced "any written materials of any type that described [CCI's] business that [CCI has] used for purposes of promoting or describing [its] business to others," does not have a website, and "[does] not use the Internet to promote [its] business in any way." *Id.* at 21:19-22;25:23-26:4. In fact, Mr. Evans stated that he did not even know whether prospective clients know his business as "CIBER Consulting"; instead, they know Mr. Evans "by name and by face" as "Bruce Evans." *Id.* at 62:12-15.

Although the initial materials produced by Defendants suggested that Mr. Evans' testimony was incorrect, subsequent discovery has confirmed that: (i) Defendants' customer base is limited to, at most, five customers; (ii) Defendants have enjoyed absolutely no success in attempting to promote their services to any customers other than nuclear power plant operators; (iii) CCI still has no employees other than Mr. Evans; (iv) Defendants still have done no broadcast advertising; and (v) Defendants still have absolutely no Internet presence. In fact, as recently as February 2004, Defendants "den[ie]d that CCI's services are offered to the public."<sup>2</sup> Based on this extremely limited trademark use (if any) of the CIBER Consulting, Inc. trade name, CIBER has concluded that Defendants' current use of the trade name CIBER Consulting, Inc. must be considered *de minimis* and unworthy of the investment of further judicial and monetary resources.

Further, discovery has revealed that, for a number of reasons, it is highly unlikely that Defendants ever will expand either their business or their advertising. As noted above, Defendants have been completely unsuccessful in attempting to sell their services to anyone but nuclear utilities. Further, CCI is a one-man operation, with Bruce Evans as the sole officer,

<sup>1</sup> All references in this motion to exhibits refer to the exhibits attached to the Declaration of Chad E. King in Support of Plaintiff's Motion for Voluntary Dismissal of Action With Prejudice, filed concurrently herewith.

<sup>2</sup> Answer, Affirmative Defenses and Counterclaim to Plaintiff's Second Amended Complaint (D.E. 57) at 7.

employee, and owner, running his business out of his home.<sup>3</sup> Mr. Evans appears to lack resources sufficient to expand his business even if he wished to do so. Moreover, it is likely that the "personal health reasons" that prevented Mr. Evans from testifying by deposition between November 2003 and March 2004,<sup>4</sup> will prevent him from expanding either (i) CCI's customer base or (ii) the range of services offered under the CIBER Consulting, Inc. trade name -- particularly in light of the fact that in the eight years prior to his present health situation, Mr. Evans' labors generated essentially zero growth in both categories. Finally, Defendants no longer even hold the right to use the trade name Ciber Consulting, Inc. in their home state -- Illinois. Specifically, CCI was administratively dissolved as a corporation last year for failure to renew its trade name registration. In the meantime, CIBER has secured registration of the trade name Ciber Consulting, Inc. so that Defendants cannot re-register the trade name. For these reasons, among others, CIBER has concluded that, based on the all available facts and the eight year history of CCI's business, Defendant's existing use of the CIBER Consulting, Inc. trade name does not present a likelihood of confusion with the registered CIBER trademark.

In answering CIBER's complaint, Defendants asserted a counterclaim seeking the cancellation of CIBER's trademark registrations.<sup>5</sup> The stated basis of counterclaim is the allegation that word "ciber" has become generic for computers and computer networks and that the term cannot serve as a source identifier (that is, a trademark) for CIBER. Defendants' allegation is faulty on its face, since the term "ciber" is not generic for anything, but rather is a coined term created by CIBER from an acronym. The term "cyber," to which Defendants apparently are referring, is easily distinguishable from "ciber" and, in any event, is not generic for "management consulting services in the fields of business, engineering and research; and design, development and implementation of computer programming and software services" for which the CIBER mark is registered. This counterclaim for a declaration of "genericness" is the sole counterclaim interposed by Defendants and, as explained below, will become moot with the dismissal of CIBER's claims.

---

<sup>3</sup> Mr. Evans' wife, Cynthia Evans is also a nominal owner of the business (51%) and "President," but it appears her "ownership" and title is simply for the purpose of securing potential governmental preferences available to "woman-owned" businesses.

<sup>4</sup> Defendants' Opposition to Plaintiff's Motion to Modify Scheduling Order and Extend Time to Complete Discovery (D.E. 59) at 4.

<sup>5</sup> A copy of the Counterclaim is attached as Exhibit B to the King Declaration.

### III. ARGUMENT

#### A. CIBER Voluntarily Requests Dismissal of Its Claims.

Although CIBER initiated this action with the legitimate belief that Defendants' actions presented a likelihood of confusion, discovery has revealed that Defendants' use of the trade name CIBER Consulting, Inc. is *de minimis* and has been such for a period of nearly eight years. Given these facts, further litigation of this action would be wasteful of judicial resources and would cause both parties unnecessary expense. CIBER repeatedly has attempted to settle this dispute on reasonable terms, but Defendants have been utterly unwilling to negotiate. CIBER has concluded, therefore, that the only reasonable course of action is to move this Court to dismiss with prejudice all of CIBER's claims. Because CIBER is willing to accept a dismissal with prejudice of all claims, this motion should be granted.

#### B. If CIBER's Claims Are Dismissed, Defendants' Counterclaim Must Be Dismissed As Moot.

Normally, a defendant would be happy to accept a plaintiff's offer to dismiss its claims with prejudice. In this case, however, despite receiving such an offer from CIBER, Defendants have refused to a stipulated dismissal with prejudice, instead claiming a desire to continue litigation and to "liberate the CIBER mark." In other words, Defendants appear poised to *oppose* dismissal of this action. Because an insurance company is funding their defense, Defendants apparently desire to continue litigation with the hope of securing a windfall buy-out from CIBER in return for their cessation of use of the trade name. This does not provide, however, a principled or legitimate basis to deny dismissal of this action and CCI's counterclaim.

Even if Defendants' counterclaim had any merit (which it does not), the dismissal of CIBER's claims compels the dismissal of Defendants' counterclaim as well, since this Court will have no jurisdiction to adjudicate that counterclaim. Defendants' counterclaim seeks the cancellation of CIBER's trademark registrations, but without the underlying claim by CIBER against CCI for infringement, the cancellation claim cannot stand. The reason is clear:

For this Court to have subject matter jurisdiction to hear a case, a justiciable case must exist. Merely bringing suit for cancellation of a wrongfully registered generic trademark is insufficient to create a justiciable case or controversy.

*Thomas & Betts Corp. v. Panduit Corp.*, 48 F. Supp. 2d 1088, 1092-93 (N.D. Ill. 1999).

This Court has stated:

Under the Lanham Act, district courts have the power to cancel registrations, but only in an action “involving a registered mark.” 35 U.S.C. § 1119. “Involving” cannot mean the mere presence of a registered trademark, but must be read as involving the right to use the mark and thus the right to maintain the registration . . . . There must, therefore, be something beyond the mere competitor status of the parties to serve as the basis for the court’s jurisdiction. Such a basis may be, for example, a suit for trademark infringement or a “case of actual controversy” referred to in the Declaratory Judgment Act.

*Id.* at 1093 (quoting *Windsurfing, Int’l*, 828 F.2d 758-59) (quotation marks omitted).

The dismissal of CIBER’s claims with prejudice ends the suit “involving a registered mark” required by § 1119. Moreover, the dismissal with prejudice destroys any reasonable apprehension Defendants might have of a suit for trademark infringement; and without such an apprehension, there can be no case or controversy that might provide this Court with jurisdiction to hear Defendants’ counterclaim under the Declaratory Judgment Act, 28 U.S.C § 2201, or otherwise. *See Trippe Mfg. Co. v. Am. Power Conversion Corp.*, 46 F.3d 624, 627-28 (7th Cir. 1995) (finding no case or controversy and affirming the district court’s dismissal of a declaratory action for cancellation where the trademark holder conceded that the declaratory plaintiff’s accused trademark use was a fair use). Indeed, to provide jurisdiction under the Declaratory Judgment Act, “the ‘actual controversy must be extant at all stages of review, not merely at the time the complaint is filed,’” *Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054, 1058 (Fed. Cir.1995) (quoting *Presier v. Newkirk*, 422 U.S. 395, 401 (1995)), and the party asserting the counterclaim bears the burden “to establish that jurisdiction over its declaratory judgment action existed at, and has existed since, the time the [counterclaim] was filed.” *Id.* (quoting *Int’l Med. Prosthetic Research Assocs. v. Gore Enter. Holdings, Inc.*, 787 F.2d 572, 575 (Fed. Cir. 1986) (quotation marks omitted, modifications in original).

In this case, Defendants cannot demonstrate that an actual case or controversy remains to provide this Court with jurisdiction to hear Defendants’ counterclaim. CIBER has agreed to the dismissal with prejudice of all claims covering Defendants’ past and present use of its trade name, which effectively insulates Defendants from suit based on current or past use of the mark. Once CIBER’s claims are dismissed, this case presents no case or controversy that could confer

subject matter jurisdiction over Defendants' counterclaim. Thus, Defendants' counterclaim cannot stand and should be dismissed as moot.

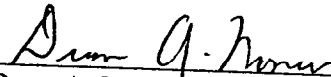
#### IV. CONCLUSION

For the reasons set forth above, CIBER respectfully requests that the Court dismiss with prejudice each of CIBER's claims against Defendants, dismiss as moot Defendants' counterclaim against CIBER, and enter judgment accordingly.

Dated: May 7, 2004

Respectfully submitted,

WOOD, PHILLIPS, KATZ, CLARK & MORTIMER



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ATTORNEYS FOR PLAINTIFF CIBER, INC.

RECEIVED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

MAY 07 2004

CIBER, INC., a Delaware corporation,

Plaintiff,

MICHAEL W. DOBINS  
CLERK, U.S. DISTRICT COURT

vs.

Civil Action No. 03-CV-840

CIBER CONSULTING, INC., a dissolved  
Illinois corporation;  
BRUCE F. EVANS, an individual;  
CYNTHIA B. EVANS, an individual;  
JOHN DOES 1 - 10, individuals,

Judge Robert W. Gettleman

Defendants.

---

**DECLARATION OF CHAD E. KING**

(in Support of Plaintiff's Motion for Voluntary Dismissal of Action with Prejudice):

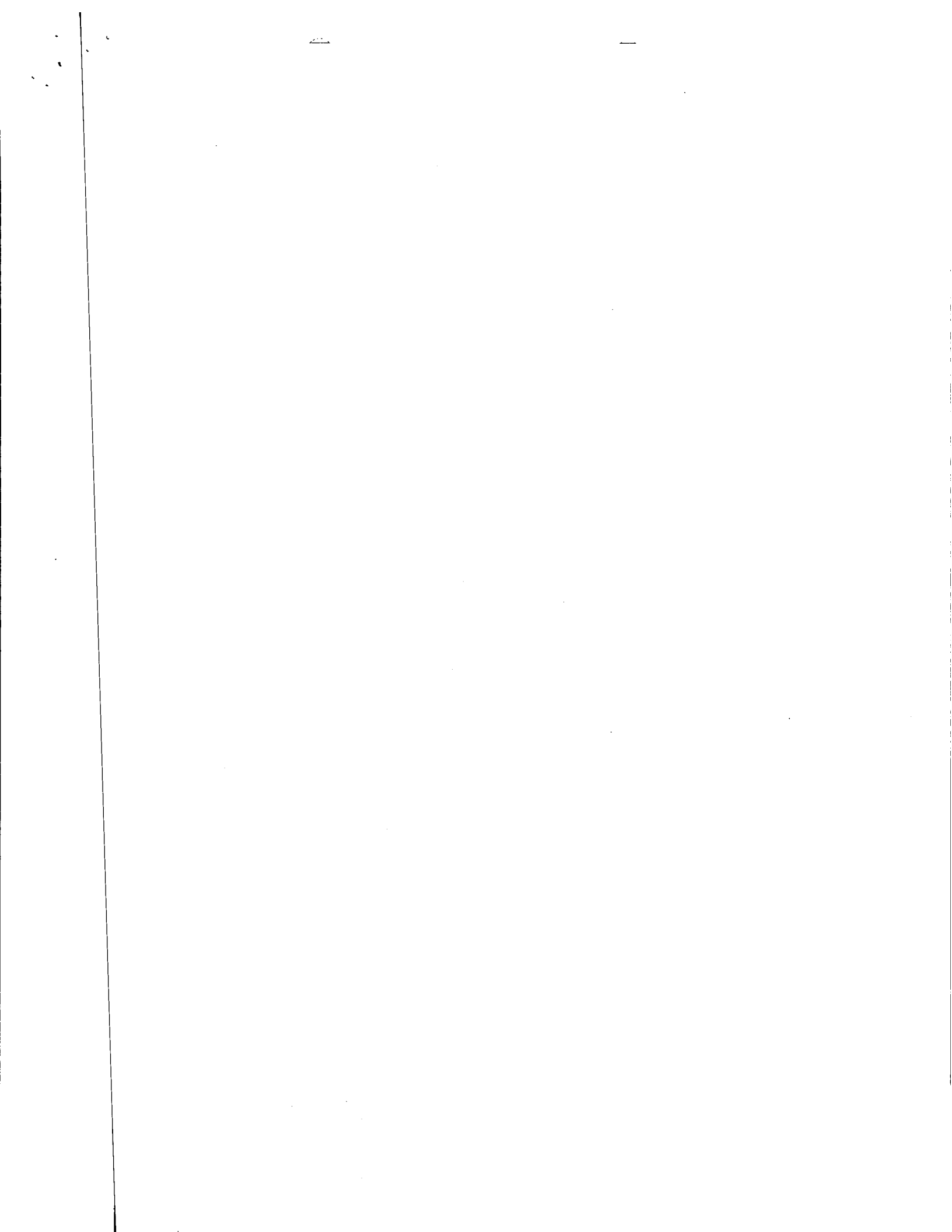
I, Chad E. King, declare as follows pursuant to 28 U.S.C. § 1746

1. I am licensed to practice law in the State of Colorado and have been admitted to practice in this District. I am a lawyer with the firm of Townsend and Townsend and Crew LLP, counsel of record for Plaintiff CIBER, Inc. ("CIBER"). This declaration is offered in support of Plaintiff's Motion For Voluntary Dismissal of Action with Prejudice.
2. A true and correct copy of excerpts from the transcript of the deposition of Bruce Evans, dated December 10, 2002, is attached hereto as Exhibit A.
3. A true and correct copy of excerpts from the Answer, Affirmative Defenses and Counterclaim to Plaintiff's Second Amended Complaint (D.E. 57), filed by Defendants on February 5, 2004, is attached hereto as Exhibit B.

I declare under penalty of perjury that the foregoing is true and correct.

Executed May 7, 2004 in Denver, Colorado.

  
Chad E. King







1 Q. To both of you for purposes of --  
 2 A. Okay.  
 3 Q. If you need to break it out at any  
 4 point, you can just tell me that, for me it is  
 5 this, and is that acceptable?  
 6 A. Sure.  
 7 Q. Now, I understand the name of your  
 8 company is CIBER Consulting and it's an Illinois  
 9 corporation, is that correct?  
 10 A. It's CIBER Consulting, Inc., it is an  
 11 Illinois corporation, correct.  
 12 Q. And it was incorporated in 1996?  
 13 A. Correct.  
 14 Q. Okay. Has it been in continuous  
 15 operation since 1996?  
 16 A. If you mean as with respect to papers  
 17 of incorporation or what do you mean by  
 18 continuous operation?  
 19 Q. Have you conducted business as CIBER  
 20 Consulting, Inc., on a continuing basis since  
 21 1996?  
 22 A. Yes.  
 23 Q. I understand from your declaration  
 24 that you currently have no employees at CIBER

L.A. REPORTING, 312-419-9292

1 does?  
 2 MR. DOWELL: I'm going to th  
 3 at this point. Can we limit this to T  
 4 because I think we're getting into an  
 5 general discovery and because this dep  
 6 limited to the jurisdictional issues at  
 7 course, you're entitled to information  
 8 when we get to the position where we're  
 9 going to be asking you the same questio  
 10 I'm reluctant to have him answer that  
 11 to our agreement.  
 12 MR. SIPIORA: I appreciate yo  
 13 concern. I have a few introductory que  
 14 along these lines. I'm not intending t  
 15 deep, just to understand what his six p  
 16 and understand what his business did.  
 17 want him to go very deep into it. It i  
 18 relevant because I need to know what th  
 19 people are doing. And, obviously, if t  
 20 people are working for him involved in  
 21 want to understand that. I can come ba  
 22 the other way and ask individually, if I  
 23 me to, each individual contractor, what  
 24 do.

L.A. REPORTING, 312-419-9292

PAGE 10

10

1 Consulting, Inc., other than yourself?  
 2 A. That is correct.  
 3 Q. Over time from 1996 to the present,  
 4 have you had any employees other than yourself?  
 5 A. No.  
 6 Q. Have you ever had any independent  
 7 contractors work for you at CIBER Consulting,  
 8 Inc.?  
 9 A. Yes, I have.  
 10 Q. Okay. How many have you had?  
 11 A. It varies.  
 12 Q. Do you have any currently employed?  
 13 A. Yes, I do.  
 14 Q. How many?  
 15 A. One, two -- four -- six. I'm sorry.  
 16 Q. Briefly, can you describe what these  
 17 six contractors do?  
 18 A. Support work for -- well, they perform  
 19 a variety of tasks. I'm not exactly sure --  
 20 Q. Are they programmers?  
 21 A. No.  
 22 Q. Perhaps we can jump ahead.  
 23 Generally, can you describe what your  
 24 business does, what CIBER Consulting, Inc.,

L.A. REPORTING, 312-419-9292

PAGE 12

1 MR. DOWELL: Can you do it the  
 2 because that is a fairly important defin  
 3 issue, what your business does?  
 4 MR. SIPIORA: All right. If t  
 5 what you want me to do, I'll be happy to  
 6 that.  
 7 BY MR. SIPIORA:  
 8 Q. Can you tell me, let's just go  
 9 the list, if we can, of the six contract  
 10 identify who they are and briefly just te  
 11 what they do?  
 12 A. Jessica Evans, who does office  
 13 work.  
 14 By the way, none of the six do  
 15 work in the state of Texas.  
 16 Q. Okay.  
 17 A. As a clarification, or work on  
 18 project related to the state of Texas.  
 19 Nicholas Evans is also doing of  
 20 support work.  
 21 Q. When you say office support wor  
 22 do you mean?  
 23 A. Typing, filing, administrative  
 24 work.

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1 Q. Have you had independent contractors  
2 work with you over the course of the last six  
3 years other than these individuals?  
4 A. Stuart Helgason.  
5 Q. What did Mr. Helgason do?  
6 A. He also did project support.  
7 Q. Similar to Yang?  
8 A. Yes.  
9 Q. Any work by Mr. Helgason outside of  
10 the state of Illinois?  
11 A. Yes.  
12 Q. Any work in the state of Texas?  
13 A. No.  
14 Q. Any contacts between -- are you aware  
15 of any contacts on behalf of Ciber by Mr.  
16 Helgason in the state of Texas, customers,  
17 clients?  
18 A. No.  
19 Q. The answer is no?  
20 A. No.  
21 Q. Any other individuals that have been  
22 independent contractors working for Ciber over  
23 the past six years?  
24 A. There is one other individual and I

L.A. REPORTING, 312-419-9292

1 individuals who have helped you in terms  
2 selling services?  
3 A. No.  
4 Q. Has your business always opera  
5 of your home residence?  
6 A. Yes.  
7 Q. Have you had any location for  
8 business other than your home residence?  
9 A. No.  
10 Q. How many customers do you have  
11 CIBER Consulting?  
12 A. Currently, in the past, collect  
13 in the state of Texas? I'm not sure.  
14 Q. Say currently, how many current  
15 customers do you have?  
16 A. Two.  
17 Q. And where are they located?  
18 A. In Illinois and Wisconsin.  
19 Q. Could you give me a ballpark, the  
20 number of customers you've had over the six  
21 years that you've worked with as CIBER  
22 Consulting?  
23 A. Four.  
24 Q. In addition to these two or total.

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1 can't remember his name, to be honest with you.  
2 It was several years ago. Oh, Steve Beeaker.  
3 Q. How would you spell that?  
4 A. B-E-E-A-K-E-R.  
5 Q. And what was Mr. Beeaker's role?  
6 A. Project support.  
7 Q. Similar to Mr. Yang?  
8 A. Correct.  
9 Q. Did he do any work outside of Illinois  
10 for Ciber?  
11 A. Yes.  
12 Q. Okay. Any work in the state of Texas?  
13 A. No.  
14 Q. To your knowledge, did Mr. Beeaker  
15 have any contacts with customers or did he  
16 solicit business in the state of Texas on behalf  
17 of Ciber?  
18 A. No.  
19 Q. Other than the individuals that you've  
20 named, who are independent contractors, have  
21 there been any other individuals who have done  
22 work on behalf of Ciber over the past six years?  
23 A. No.  
24 Q. Have you had any rep, sales reps or

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1 A. No, total.  
2 Q. Total.  
3 So, the other two customers, where  
4 have they been located?  
5 A. Pennsylvania, and currently Illinois.  
6 Q. So, total of four customers during  
7 entire time -- let me rephrase the question.  
8 During the entire time that CIBER  
9 Consulting has existed, it's had a total of  
10 customers?  
11 A. That is correct.  
12 Q. And those customers have been located  
13 in Wisconsin, Pennsylvania, and two have been  
14 the state of Illinois?  
15 A. That's correct. Stand corrected.  
16 There were five. One was in Tennessee.  
17 Q. Tennessee Valley area?  
18 A. No.  
19 Q. Since 1996, how many times have you  
20 been in the state of Texas?  
21 A. To the best of my recollection, three  
22 times.  
23 Q. And were those three occasions the  
24 three seminars that are referenced in the

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1 complaint?  
 2 A. Correct.  
 3 Q. Are you aware of any other activities  
 4 of any of the contractors that you've hired that  
 5 would have taken you into the state of Texas?  
 6 A. Are you referring to in association  
 7 with Ciber or independent of Ciber?  
 8 Q. No. Just for clarification throughout  
 9 this deposition, these independent contractors  
 10 had worked outside of -- worked for Ciber, I'm  
 11 not interested in that. I'm only interested in  
 12 their work on behalf of Ciber where they're  
 13 working on your behalf or for you.  
 14 A. No.  
 15 Q. The answer is no?  
 16 A. Correct.  
 17 Q. Do you do any advertising?  
 18 A. Do not.  
 19 Q. Have you ever done any advertising?  
 20 A. Could you define what you mean by  
 21 advertising?  
 22 Q. Broadly construed, anything where you  
 23 were soliciting business, brochures, pamphlets?  
 24 A. No.

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1 A. Well, no, you were asking if I had any  
 2 advertising materials. I put a letter together  
 3 or I can put a list of qualifications together,  
 4 but that's it.  
 5 Q. Okay. So, it's individualized?  
 6 A. Correct.  
 7 Q. And other than the letters that you  
 8 mentioned, in other words, if you're contacted,  
 9 you will write a letter describing what you do  
 10 and put forward your best foot?  
 11 A. Correct.  
 12 Q. And that is the extent of written  
 13 materials that you have relating to promoting or  
 14 describing your business?  
 15 A. Correct, that is the only thing I have  
 16 put together, correct.  
 17 Q. Over the course of the six years  
 18 you've been in business?  
 19 A. To the best of my recollection, yes.  
 20 Q. Have you ever sent any letter of that  
 21 type to anyone in the state of Texas?  
 22 A. Not to my recollection, no.  
 23 Q. You've never had an ad in a trade  
 24 publication?

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1 Q. Ads?  
 2 A. No.  
 3 Q. How do you get the word out about your  
 4 business?  
 5 A. Reputation.  
 6 Q. Word of mouth?  
 7 A. Correct.  
 8 Q. Have you had any written materials  
 9 that you provide to prospective customers or  
 10 customers?  
 11 A. No.  
 12 Q. So, you do not even have a brochure --  
 13 A. That's correct.  
 14 Q. -- who we are type statement?  
 15 A. That's correct.  
 16 Q. Historically, at any point in time,  
 17 have you had written materials of any type that  
 18 describe your business that you've used for  
 19 purposes of promoting or describing your  
 20 business to others?  
 21 A. No.  
 22 Q. So, when you're contacted, if you're  
 23 contacted by someone, the description of your  
 24 business you provide is all done by you orally?

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1 A. No.  
 2 Q. Have you ever been listed in a  
 3 registry or any list of service providers, any  
 4 type of industry publication?  
 5 A. No, not my knowledge.  
 6 Q. So, you've never put your name into  
 7 any -- I don't know what the industry relevant  
 8 publications are.  
 9 Are there publications relevant to  
 10 your industry, the nuclear industry that are  
 11 generally circulated?  
 12 A. Yes, there are.  
 13 MR. DOWELL: Objection, foundation.  
 14 BY MR. SPIORA:  
 15 Q. Have you ever put any kind of -- even  
 16 listed your name in any of those periodicals?  
 17 A. I have not, no.  
 18 Q. Has your name appeared in any of those  
 19 periodicals, to your knowledge?  
 20 A. Not to my knowledge.  
 21 Q. And by name I mean the name of your  
 22 company?  
 23 A. Correct.  
 24 Q. So, the answer is still no?

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1 A. Not to my knowledge.  
 2 Q. Have you ever used any direct  
 3 marketing in your promoting of business?  
 4 A. I'm not sure what you mean by direct  
 5 marketing.  
 6 Q. Telephone calls.  
 7 A. In general or in the state of Texas?  
 8 Q. Generally first.  
 9 A. Not for the purposes of advertising.  
 10 Q. Have you ever put any newsletters or  
 11 descriptions of general information about the  
 12 business or the industry?  
 13 A. No.  
 14 Q. So, based on that there is nothing  
 15 that you've ever sent in the way of an  
 16 advertisement or a letter or a promotional piece  
 17 or a brochure into the state of Texas?  
 18 A. That is correct.  
 19 Q. Do you use the Internet at all in your  
 20 business?  
 21 A. To advertise or --  
 22 Q. Let me rephrase the question.  
 23 Do you use the Internet to promote  
 24 your business in any way?

1 A. Do not.  
 2 Q. I understand from your declaration you  
 3 do not have a Website?  
 4 A. That's correct.  
 5 Q. Have you ever had a Website?  
 6 A. Have not.  
 7 Q. You're maybe the only person who  
 8 doesn't.  
 9 A. I'm an old-fashioned kind of guy.  
 10 Q. So, you've never used the Internet  
 11 for -- have you ever used e-mail to promote your  
 12 business, mailing e-mail or posting on other  
 13 people's Websites, banner ads, anything of that  
 14 type?  
 15 A. Have not.  
 16 Q. Have you ever done any seeding of  
 17 search engines or put your name out in such a  
 18 way that your name would come up if people were  
 19 searching the Internet?  
 20 A. Have not.  
 21 Q. Do you take any orders over the  
 22 Internet, in other words, request for services?  
 23 A. Can you define what you mean by  
 24 Internet in that case?

1 Q. Well, you use e-mail at you  
 2 A. Correct.  
 3 Q. So, you communicate with cu  
 4 e-mail?  
 5 A. Correct.  
 6 Q. Have you ever communicated t  
 7 prospective customer or a customer in  
 8 of Texas?  
 9 A. No.  
 10 Well, for clarification you  
 11 way of advertising or soliciting busin  
 12 Q. Any communication with someo  
 13 state of Texas via e-mail?  
 14 A. Certainly I've had communica  
 15 people in Texas but not for the purpos  
 16 soliciting business or advertising.  
 17 Q. What communications have you  
 18 A. Personal e-mails or e-mails t  
 19 associates or peers.  
 20 Q. Has anyone that has worked fo  
 21 ever operated out of the state of Texas  
 22 A. Not to my knowledge.  
 23 Q. Do your contractors physicall  
 24 in the state of Illinois?

1 A. Not all of them.  
 2 Q. Have any of your contractors e  
 3 over the course of your business of CIBE  
 4 Consulting, Inc., have any of your contr  
 5 ever worked for you while residing in th  
 6 of Texas?  
 7 A. Not to my knowledge.  
 8 Q. Has your business always been  
 9 CIBER Consulting, Inc., since you began  
 10 that name?  
 11 A. Correct.  
 12 Q. Is the Ciber always capital C  
 13 A. Correct.  
 14 Q. Where does that name, CIBER  
 15 Consulting, Inc., where does it appear w  
 16 respect to your business? Is it on lette  
 17 A. Yes.  
 18 Q. Do you have it on business card  
 19 A. Yes.  
 20 Q. Where else would it be, on invo  
 21 A. Yes.  
 22 Q. Any place else the name appears  
 23 A. Internal forms.  
 24 Q. Internal meaning within your co

1 few years, have there ever been occasions where  
2 people have asked you about, say, Bruce or Mr.  
3 Evans, can you do this or can you provide such a  
4 service or do you do this type of thing?

5 A. Oh, I'm sure there have been. I don't  
6 recall any specific instances or individuals,  
7 but I'm sure there have been.

8 Q. Is that part of what goes on at these  
9 type of conferences, where people find out what  
10 type of services other people provide and what  
11 type of activities are going on in the industry?

12 A. For an individual that has been around  
13 as long as I have, they pretty much know, so  
14 they may ask specifics about a particular  
15 project, but --

16 Q. So, is the answer yes?

17 A. Well, could you repeat the question  
18 for me again?

19 Q. Sure.

20 At conferences such as the NIRMA 2000  
21 conference in Dallas, is it the common practice  
22 or common at such conferences for people to  
23 inquire of others regarding what types of  
24 services the person might provide or things

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1 related to your business or someone asked you  
2 about your business or you talked about your  
3 business other than the presentation that you  
4 gave?

5 A. No, I don't remember any specific  
6 conversations. No.

7 Q. In connection with your attendance at  
8 any conferences or seminars, not just the 2000  
9 conference in Dallas, have you ever made an  
10 attempt in advance of the conference to schedule  
11 a meeting with someone relating to your  
12 business?

13 A. Not to my recollection, no.

14 Q. So, is it your -- it has never been  
15 the case in all of the conferences that you've  
16 attended that you have planned ahead to do some  
17 business while at the conference?

18 A. Not to my recollection, no.

19 Q. And would your testimony be that when  
20 you attended the NIRMA conference in Dallas that  
21 you did not engage in any business activity?

22 A. Well, you'd have to define business  
23 activities for me. Did we ever discuss the  
24 state of the industry or discuss what I was

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1 related to a person's business?

2 A. It's difficult for me to address what  
3 would be common for interactions between other  
4 individuals. It has happened with me but not  
5 with any frequency.

6 Q. Well, you say not with any frequency.  
7 Why do you say that? People do not ask you  
8 about your business very often?

9 A. Well, again, because I've been in  
10 these associations as long as I have, people  
11 typically know what I do.

12 Q. And they know about your business,  
13 CIBER Consulting?

14 A. I know they know me by name and by  
15 face.

16 Q. As Bruce Evans?

17 A. Correct.

18 Q. As Bruce Evans of CIBER Consulting,  
19 Inc.?

20 A. That I don't know. I don't know how  
21 they make the association. I just know that  
22 they know me.

23 Q. Do you recall anything specifically  
24 about the NIRMA 2000 conference in Dallas that

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1 doing in the business or discuss what projects I  
2 was working on, I don't remember specific  
3 conversations or individuals I had those  
4 conversations with but in all probability those  
5 kinds of conversations occurred.

6 No, I did not schedule meetings for  
7 the purpose of soliciting any business or  
8 providing services or advertising services or  
9 any of that kind of thing, no.

10 Q. Did you acquire any new business as a  
11 result of attending the 2000 conference in  
12 Dallas?

13 A. Did not, not that I recall any way.

14 Q. Did you obtain any -- let me rephrase  
15 that.

16 Did you receive any inquiries relating  
17 to new business as a result of your attendance  
18 at the 2000 conference Dallas?

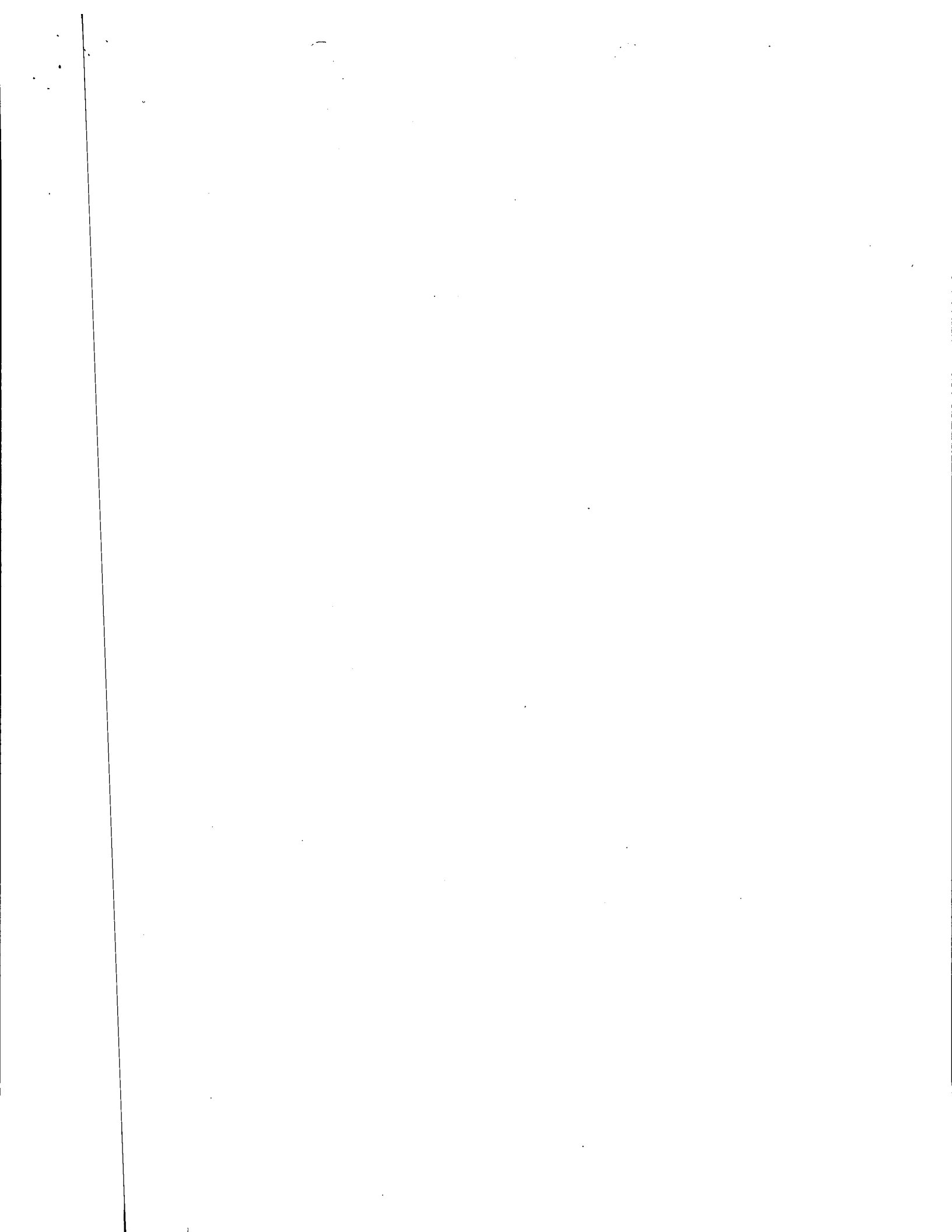
19 A. Not that I recall, no.

20 Q. Were you an exhibitor at the  
21 conference?

22 A. I was not.

23 Q. Have you been present -- let me  
24 rephrase that.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

CIBER, INC., a Delaware corporation,

Plaintiff,

v.

CIBER CONSULTING, INCORPORATED,  
a dissolved Illinois corporation; BRUCE F. EVANS,  
an individual; CYNTHIA B. EVANS, an individual;  
JOHN DOE 1, an individual; JOHN DOE 2, an  
individual; JOHN DOE 3, an individual; JOHN  
DOE 4, an individual; JOHN DOE 5, an individual;  
JOHN DOE 6, an individual; JOHN DOE 7, an  
individual; JOHN DOE 8, an individual; JOHN  
DOE 9, an individual; JOHN DOE 10, an individual,

Defendants.

Civil Action No. 03-CV-840

DOCKETED  
FEB 09 2004

FILED  
FEB 05 2004  
MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

ANSWER, AFFIRMATIVE DEFENSES AND  
COUNTERCLAIM TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants, Ciber Consulting, Inc. ("CCI"), Bruce F. Evans, and Cynthia B. Evans

answer Plaintiff Ciber, Inc.'s Second Amended Complaint as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction of this action under 28 U.S.C. § 1331 (federal question) in that Counts I and II arise under the Trademark Act of 1946, 15 U.S.C. §§ 1051-1127, as amended (the "Lanham Act").

ANSWER: Admitted.

2. This Court also has supplemental jurisdiction over Count III, IV and V of this complaint under 28 U.S.C. § 1367(a) because the claims arise from the same common nucleus of operative facts complained of in Counts I and II.

ANSWER: Admitted.

3. This Court has personal jurisdiction over Defendants because of Defendants' repeated use of the "CIBER" mark in the State of Illinois and in this District, as detailed below. Additionally, this Court has personal jurisdiction over Defendants because, upon information and belief, Defendants use the "CIBER" mark to solicit business in this District, including, upon information and belief, through the mails, by telephone and through other means.



**ANSWER:** Except as specifically admitted above, Defendants are without sufficient information to admit or deny the allegations of Paragraph 30.

31. Upon information and belief, Defendants knowingly have advertised, offered for sale and sold services using the term "CIBER" in interstate commerce. Defendants' actions have been willful and in knowing disregard of the rights of CIBER.

**ANSWER:** Denied.

32. Defendants' use of "CIBER" in connection with consulting services has caused, or is likely to cause, consumer confusion, deception or mistake.

**ANSWER:** Denied.

33. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

**ANSWER:** Denied.

34. CIBER has suffered and will continue to suffer irreparable harm unless Defendants cease use of or are enjoined from using the "CIBER" mark. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

**ANSWER:** Denied.

**COUNT II: Federal Unfair Competition and False Advertising**

**(15 U.S.C. § 1125(a))**

35. CIBER re-alleges and incorporates by reference paragraphs 1 through 33 above.

**ANSWER:** Defendants incorporate by reference their responses to paragraphs 1 through 33 above.

36. Defendants have used in interstate commerce in connection with consulting services a word, term, name, symbol, or device that, in commercial advertising or promotion misrepresents the nature, characteristics, qualities and/or origin of their goods, services or products in violation of 15 U.S.C. § 1125(a)(1)(B). Defendants' actions have been willful and in knowing disregard of the rights of CIBER.

**ANSWER: Denied.**

37. The marks and name utilized by Defendants are confusing similar to that of CIBER's unique mark and trade name. This attempt by Defendants to trade upon Plaintiff's good will and reputation and to unlawfully appropriate the benefits of CIBER's years of advertising constitutes unfair competition and has caused and is causing irreparable damage to CIBER by misleading the public to believe that Defendants are affiliated, associated with or sponsored by CIBER.

**ANSWER: Denied.**

38. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

**ANSWER: Denied.**

39. CIBER has suffered and will continue to suffer irreparable harm unless Defendants cease use of or are enjoined from using the "CIBER" mark. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

**ANSWER: Denied.**

**COUNT III: Unfair Competition and Unfair Business Practices**

40. CIBER re-alleges and incorporates by reference paragraphs 1 through 38 above.

**ANSWER: Defendants incorporate by reference their responses to paragraphs 1 through 38 above.**

41. This claim for relief arises under the common law of unfair competition.

**ANSWER: Defendants deny that Ciber, Inc. has a claim for relief under the common law of unfair competition.**

42. Defendants' actions described above, including their continued use of a mark deceptively similar to CIBER's trademark or trade name, are intended to mislead the public and lead to confusion and mistake and constitute deliberate and willful unfair competition and unlawful business practice in violation of common law.

**ANSWER: Denied.**

43. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

ANSWER: Denied.

44. Unless restrained and enjoined by this court, Defendants' wrongful conduct will continue to cause irreparable harm to CIBER. In this regard, CIBER has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

ANSWER: Denied.

**COUNT IV: Illinois Uniform Deceptive Trade Practices Act**

**(§ 815 ILCS 510/1 et seq.)**

45. CIBER re-alleges and incorporates by reference paragraphs 1 through 43 above.

ANSWER: Defendants incorporate by reference their responses to paragraph 1 through 43 above.

46. Defendants have engaged in deceptive trade practices by, in the course of business, causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; and/or causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another in violation of § 815 ILCS 510/2. Defendants' actions have been willful and in knowing disregard of the rights of CIBER.

ANSWER: Denied.

47. The marks and name utilized by Defendants are confusing [sic] similar to that of CIBER's unique mark and trade name. Defendants' attempt to trade upon Plaintiff's good will and reputation and unlawfully to appropriate the benefits of CIBER's years of advertising constitutes deceptive trade practices and has caused and is causing irreparable damages to CIBER by misleading the public to believe that Defendants are affiliated, associated with or sponsored by CIBER.

ANSWER: Denied.

48. As a direct and proximate result of Defendants' actions described above, CIBER has been injured and damaged in an amount to be determined at trial.

ANSWER: Denied.

77. Ciber, Inc. now asserts their misappropriation of the Ciber Consulting, Inc. name as further grounds in support of its existing causes of action and as grounds for its additional causes of action for violations of the Illinois Uniform Deceptive Trade Practices Act and Illinois Consumer Fraud and Deceptive Business Practices Act.

78. Ciber, Inc.'s own misappropriation of the Ciber Consulting, Inc. name, with full knowledge of Defendants active and continuous use of the name in the State of Illinois, was improper. Further, Ciber, Inc.'s actions were done in bad faith toward the party against whom it is seeking relief. These actions demonstrate Ciber, Inc.'s unclean hands. Ciber, Inc. now seeks to take advantage of its own improper and bad faith actions in order to obtain relief from this Court. The doctrine of unclean hands acts to bar such relief.

79. As a result of Plaintiff's improper and bad faith actions in these proceedings and unclean hands in the incorporation of a new subsidiary under the Ciber Consulting, Inc. name in the State of Illinois, Plaintiff is not entitled to the relief sought in its Second Amended Complaint.

#### **COUNTERCLAIM**

#### **COUNT I: REQUEST FOR CANCELLATION OF THE MARK "CIBER"**

#### **15 U.S.C. § 1119**

80. Defendants reassert and incorporate by reference paragraphs 35-46 above.

81. Ciber, Inc. owns U.S. Trademark Registration No. 1,185,100 for the mark "CIBER" for goods and services in the following areas: management consulting services in the fields of business, engineering and research; and design, development and implementation of computer programming and software services.

82. Ciber, Inc. owns U.S. Trademark Registration No. 1,479,942 for the stylized mark "CIBER" for goods and services in the following areas: management consulting services in the fields of business, engineering and research; and design, development and implementation of computer programming and software services.

83. The word "ciber" has become generic for computer and computer network related concepts, goods and services and has ceased to function, if it ever did, as a unique identifier of the source of management consulting services in the fields of business, engineering and research and design, development and implementation of computer programming and software services.

84. Defendants request cancellation of the U.S. Trademark Registration Nos. 1,185,100 and 1,479,942 pursuant to 15 U.S.C. § 1119 on the grounds that these registrations are generic and not entitled to registration as trademarks.

85. Ciber, Inc. has failed to police and prohibit the use the term "ciber" in connection with management consulting services in the fields of business, engineering and research.

86. Ciber, Inc. has failed to police and prohibit the use the term "cyber" in connection with management consulting services in the fields of business, engineering and research.

87. Ciber, Inc. has failed to police and prohibit the use of the term "ciber" in connection with the design, development and implementation of computer programming and software services.

88. Ciber, Inc. has failed to police and prohibit the use of the term "cyber" in connection with the design, development and implementation of computer programming and software services.

89. As a result of Ciber, Inc.'s course of conduct as the owner of U.S. Trademark Registration Nos. 1,185,100 and 1,479,942, including its failure to police the use of these marks, the mark "CIBER" has become generic and thereby lost any significance as a trademark.

90. Because U.S. Trademark Registration Nos. 1,185,100 and 1,479,942 have become generic terms as a result of Ciber, Inc.'s acts of omission, namely, its failure to police the widespread use of the terms "ciber" and "cyber," the mark "CIBER" should be found to have been abandoned as that term is defined in 15 U.S.C. § 1127.

91. Defendants request cancellation of the U.S. Trademark Registration Nos. 1,185,100 and 1,479,942 pursuant to 15 U.S.C. § 1119 on the grounds that these registrations have been abandoned by Ciber, Inc. through its acts of omission in policing the marks.

#### **PRAYER FOR RELIEF**

Defendants respectfully request judgment against the Plaintiff Ciber, Inc. as follows:

- A. A declaration that Defendants do not infringe Plaintiff's alleged trademarks;
- B. A declaration that Plaintiff's alleged trademarks are invalid and unenforceable;
- C. Cancellation of Plaintiff's U.S. Trademark Registration Nos. 1,185,100 and 1,479,942 pursuant to 15 U.S.C. § 1119;

- D. An Order requiring Plaintiff to return the name "Ciber Consulting, Inc." to Defendants and to complete and file all paperwork necessary to effectuate such a transfer with the State of Illinois;
- E. An award of Defendants' reasonable costs and attorneys' fees incurred in defending this action;
- F. Such other relief as is just and equitable.

Defendants request trial by jury.

Date: February 4, 2004

Respectfully submitted,

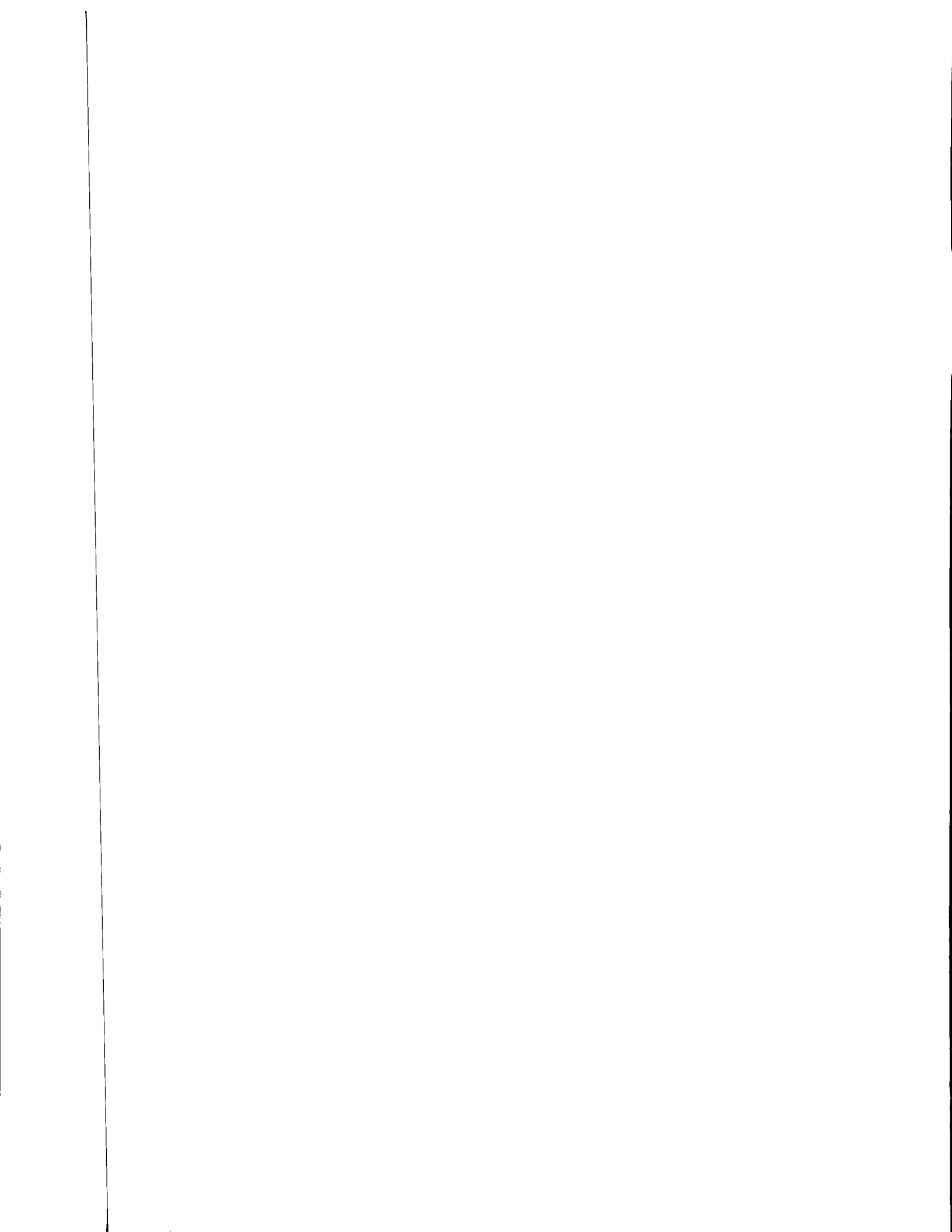
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Attorneys for Ciber Consulting, Inc., Bruce F.  
Evans and Cynthia B. Evans.





**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS**

CIBER, INC., a Delaware corporation,

Plaintiff,

vs.

CIBER CONSULTING, INC.,  
a dissolved Illinois corporation;  
BRUCE F. EVANS, an individual; and  
CYNTHIA B. EVANS, an individual

Defendants.

)  
)  
)  
)  
) **Civil Action No. 03-CV-840**

) **Judge Robert W. Gettleman**  
)  
)  
)  
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)

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR VOLUNTARY  
DISMISSAL OF ACTION WITH PREJUDICE**

Plaintiff Ciber, Inc. seeks the Court's approval for the voluntary dismissal with prejudice of all of Plaintiff's trademark infringement/unfair competition claims and, based on this voluntary dismissal, the involuntary dismissal of Defendants' counterclaim to invalidate the asserted trademark "CIBER" because it is generic. Defendants, of course, would welcome the dismissal of Plaintiff's baseless claims. Defendants, however, object to the involuntary dismissal of their counterclaim, which will afford them superior rights and a better remedy than the mere dismissal of Plaintiff's infringement claims. Defendants also object to the extent that any voluntary dismissal of Plaintiff's claims prejudices Defendants' right to recover their costs as the "prevailing party" in this litigation pursuant to Fed. R. Civ. P. 54 (d)(1) and their right to recover reasonable attorney fees defending this action pursuant to 15 U.S.C. § 1117(a).

Plaintiff's right to voluntarily dismiss its claims is governed by Fed. R. Civ. P. 41(a)(2). When a counterclaim has been pleaded by a defendant prior to a plaintiff's proposed voluntary dismissal of its claims, Rule 41(a)(2) provides that "the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication

by the court.” By the express terms of Rule 41(a)(2), the Court may not dismiss Defendants’ counterclaim for invalidity based on Plaintiff’s dismissal of its claims. Despite the dismissal, a defendant has a right to continue the fight to invalidate the trademark and/or recover attorney fees. “[T]he plaintiff must not be allowed to short circuit this right by dismissing the suit without cost when he sees the handwriting on the wall.” SmithKline Beecham Corp. v. Pentech Pharmaceuticals, Inc., 261 F. Supp. 2d 1002, 1006 (N.D. Ill. 2003).

Plaintiff Ciber, Inc. sees the handwriting on the wall and knows that the mark “CIBER” will be invalidated if this case continues. Although Plaintiff is willing to drop its current infringement claims, Defendants counterclaim is not moot. With the specter of the registered trademark “CIBER” hanging over their heads, Defendants are “still hampered and embarrassed by the necessity of avoiding trespass,” Trico Prods Corp. v. Anderson Co., 147 F.2d 721, 722 (7th Cir. 1945), and restricted from pursuing new clients, expanding the business with existing clients or selling the business. Only upon the liberation of the mark will Defendants be free to pursue all potential business opportunities.

Accordingly, Defendants consent to the dismissal of Plaintiff’s claims, provided that the counterclaim for invalidity “remain pending for independent adjudication by the court.” Fed. R. Civ. P. 41(a)(2). Rule 41(a)(2) also provides that “an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper.” Pursuant to this provision, as well as Fed. R. Civ. P. 54 (d)(1) and 15 U.S.C. § 1117(a), Defendants request that any voluntary dismissal of Plaintiff’s claims be conditioned on payment of Defendants’ costs and attorney fees incurred defending Plaintiff’s baseless claims.

## I. BACKGROUND

Plaintiff has repeatedly demonstrated that it will recharacterize the facts and change its position related to scope of Defendants' business if it meets Plaintiff's immediate tactical needs. In its original Complaint filed in Texas, Plaintiff's asserted that it had been damaged by Defendants' commercial activities. After learning that Defendants' defense costs were covered by insurance, Plaintiff filed a First Amended Complaint removing any claim for damages. Plaintiff changed its position in the obvious hope that this move would eliminate Defendants' insurance coverage.<sup>1</sup> When this tactic failed, and Defendants' insurance coverage continued, Plaintiff sought and obtained leave to again amend its Complaint.

In its Motion for Leave to File a Second Amended Complaint, Plaintiff alleged that discovery had revealed that Defendants' activities were not de minimus because Defendants engaged in significant advertising, offered services outside the nuclear power industry and employed many people other than Mr. Evans. Now, in its Motion for Voluntary Dismissal, Plaintiff has changed its position a third time and alleges that Defendants' activities are de minimus and not worthy of litigating. Notably, Plaintiff has taken no depositions since filing its Motion to for Leave to File a Second Amended Complaint nor identified any discovery responses that support Plaintiff's drastic change in position.

There is only one rational explanation for Plaintiff's most recent change in position—Plaintiff will soon be faced with a motion for summary judgment that its mark "CIBER" is generic and invalid. Defendants have amassed compelling evidence that the mark is generic,<sup>2</sup>

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<sup>1</sup> Plaintiff also attempted to take discovery of Defendants' insurance carrier to find out why the insurance company would continue to fund the defense of the case. Defendants sought and obtained a Protective Order from Magistrate Judge Schenkier to prevent this discovery.

<sup>2</sup> Although the word "ciber" may have once been an acronym with trademark potential, the word is now a generic term for all types of computer and internet related goods and services.

and have patiently waited for the close of discovery (as directed by the Court) to file a motion for summary judgment. With that date looming in the near future, Plaintiff is desperate, and is willing to drop this present case to avoid the inevitable invalidation of its mark. Defendants, however, are entitled to an adjudication of the validity of the mark so that they may avoid the threat of any future litigation based on Defendants' future use of the business name "Ciber Consulting, Inc."

As carefully noted in its Memorandum of Law in Support of Plaintiff's Motion for Voluntary Dismissal of Action with Prejudice, Plaintiff's voluntary dismissal of its claims concerns only Defendants' "past and present use" of the name Ciber Consulting, Inc.:

CIBER has agreed to the dismissal with prejudice of all claims covering Defendants' past and present use of its trade name, which effective insulates Defendants from suit based on current or past use of the mark.

Memorandum at 6. Plaintiff has also carefully laid out the basis for its voluntary dismissal—that Defendants are unable to expand the scope of their business because of Mr. Evans' lack of resources and "personal health concerns." As made explicitly clear by these statements, Plaintiff will most assuredly reassert a claim for trademark infringement if and when Defendants' business expands or changes in any way.

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Defendants have conducted a survey and produced an expert report written by Professor Timothy Cason of Purdue University demonstrating the genericness of the mark "CIBER." Plaintiffs have conducted no survey, recognizing by conspicuous omission that any survey testing the public perception of the word "ciber" would demonstrate the genericness of the word.

In addition, Ciber, Inc. has admitted the obvious—the word "cyber", spelled with a "y" rather than an "i", is generic for computer and internet related services. Under the law of the 7th Circuit, the misspelled phonetic equivalent of a generic word (i.e., spelling the admittedly generic "cyber" with an "i") is also generic. Miller Brewing Co. v. G. Heileman Brewing Co., Inc., 561 F.2d 75 (7th Cir. 1977) (finding misspelled "LITE" to be generic when applied to beer); American Aloe Corporation v. Aloe Crème Labs., 420 F.2d 1248, 1250 (7th Cir. 1970) (finding both "ALOE" and misspelled "ALO-" to be generic terms for use in connection with ointments and cosmetics).

"Ciber" is also the Spanish and Italian spelling for the word "cyber", making the mark "CIBER" invalid as generic under the Doctrine of Foreign Equivalents.

Defendants have every intention of expanding their business to serve additional clients and, if the opportunity presents itself, expanding the business into areas outside of the field of nuclear records management. Mr. Evans may also seek to one day sell the business, or merge with consultants or businesses in related fields. Plaintiff argues, without any support whatsoever, that Mr. Evans' "personal health concerns" prevent such expansion. Nothing could be further from the truth. Mr. Evans is in outstanding health and fully intends to continue operating and expanding the business of Ciber Consulting, Inc. for many years to come. However, so long as the mark "CIBER" remains a valid trademark, Mr. Evans' and Ciber Consulting, Inc.'s business opportunities are limited and uncertain. Accordingly, despite Plaintiff's voluntary dismissal of its infringement claims, Defendants continue to seek adjudication of the validity of the mark "CIBER."

**II. PLAINTIFF'S VOLUNTARY DISMISSAL OF ITS INFRINGEMENT CLAIMS DOES NOT MANDATE THE INVOLUNTARY DISMISSAL OF DEFENDANTS' COUNTERCLAIM FOR INVALIDITY**

**A. Rule 41(a)(2) Prevents Dismissal of Defendants' Counterclaim**

Fed. R. Civ. P. 41(a)(2) provides:

Except as provided in paragraph (1) of this subdivision of this rule [i.e., by stipulation], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

"Pursuant to Fed. R. Civ. P. 41(a)(2), this Court cannot dismiss plaintiffs' action against [defendant] unless defendant's counterclaims can remain pending for independent adjudication by the court." Hoffman-La Roche Inc. v. Genpharm Inc., 50 F. Supp. 2d 367, 371 (D.N.J. 1999).

In Lackner Co. v. Quehl Sign Co., 145 F.2d 932, 934 (6th Cir. 1944), the defendant in a patent infringement sought to have its counterclaim for invalidity of the patent decided even though plaintiff had moved to dismiss its claims with prejudice. Like Plaintiff Ciber, Inc. in this case, the plaintiff argued that there was no case or controversy because it had offered to dismiss its claims with prejudice. The Court found that Rule 41(a)(2) applied, and held that the district court had jurisdiction to hold the patent invalid. Id.

Plaintiff cites Trippe Mfg. V. Am. Power Conversion Corp., 46 F.3d 624, 627-28 (7th Cir. 1995) for the proposition that there can be no case or controversy to support a cancellation claim where a trademark holder has conceded that an accused trademark use was a fair use. Trippe, however, is inapplicable because Rule 41(a)(2) was not applicable to the facts of that case. In Trippe, the accused infringer filed a declaratory judgment action for non-infringement and invalidity of a trademark. No counterclaim was at issue, so Rule 41(a)(2) did not apply. In the present case, Rule 41(a)(2) does apply and prevents dismissal of Defendants' counterclaim.

In addition, the court in Trippe found that there was no case or controversy because the accused infringer never had a reasonable apprehension that it would be sued for infringement. Therefore, the accused infringer did not have standing when it filed suit. By contrast, in this case, Defendants clearly had standing to bring their counterclaim for invalidity after being sued for infringement by Plaintiff. The issue is whether Defendants retain that standing if Plaintiff voluntarily dismisses its claims—a subject that was never at issue or considered in the Trippe case.

**B. Defendants' Counterclaim to Invalidate the "CIBER" Mark is not Moot**

Defendants' counterclaim to invalidate the "CIBER" mark does not become moot if Plaintiff's infringement claims are dismissed with prejudice. Defendants' counterclaim is not

moot because Defendants can obtain superior rights by invalidating the mark as compared to merely prevailing on Plaintiff's present claims. In addition, in patent and trademark cases, courts have repeatedly held that a defendant does not lose standing to challenge the validity of the patent or trademark when it prevails on infringement.

**1. Defendants can obtain superior rights by invalidating the "CIBER" mark.**

The Seventh Circuit has recognized that the "mere exoneration from infringement does not always meet the necessities of a wrongfully accused defendant."

Our experience with patent infringement cases would lead to a conclusion that mere dismissal of a plaintiff's bill does not always adjudicate every aspect of the controversy or give the defendant all the relief to which he may be entitled. To illustrate: It frequently happens that the court, in a patent or trademark infringement suit, finding the defendant innocent of infringement, deems it unnecessary to determine issues of title, validity, or the scope of the patent claims. One defendant exonerated of infringement may be content with such adjudication—another may not. . . . [M]ere exoneration from infringement does not always meet the necessities of a wrongfully accused defendant. His activities are still circumscribed by the monopoly based upon the patent grant. Convinced that the patent is invalid, he is still hampered and embarrassed by the necessity of avoiding trespass. He wishes to be free from the restrictions of an invalid patent or trademark.

Trico Prods Corp. v. Anderson Co., 147 F.2d 721, 722 (7th Cir. 1945) (quoting Dominion Electrical Mfg. Co. v. Edwin L. Weigand Co., 126 F.2d 172, 174 (6th Cir. 1945)) (internal citations omitted). As noted in Trico, despite the dismissal of the plaintiff's infringement claim, a trademark infringement defendant retains a very real interest in invalidating the trademark to eliminate "the necessity of avoiding trespass" of the invalid trademark.

In Secular Organizations for Sobriety, Inc. v. Ullrich, 213 F.3d 1125, 1131-32 (9th Cir. 2000), the district court failed to rule on a defendant's counterclaim to cancel a registered trademark because the defendant had prevailed on a defense of fair use of the trademark. The

Ninth Circuit remanded the decision because the cancellation counterclaim would have afforded the defendant "rights and remedies not otherwise provided by the claims the district court resolved."

The district court's ruling, as it now stands, allows for SOS-West to use the marks, but only in the area in which it had established prior use. SOS-West is correct, then, to argue that prevailing on a cancellation claim affords it greater benefits than on the claims on which it did succeed. Those additional benefits mean that that the federal cancellation claim is not moot and that the district court should have decided the question.

Id. at 1132.

Mere exoneration from infringement will not meet the needs of the Defendants. Plaintiff's repeated changes in position in this litigation, as well as its explicit statement that the voluntary dismissal concerns only "Defendants' past and present use of its trade name", demonstrate Defendants' need to cancel the "CIBER" mark. Cancellation will afford Defendants greater rights than mere dismissal. Upon cancellation of the "CIBER" mark, Defendants will be free to expand and/or sell their business without the threat of litigation by Plaintiff. Because Defendants can obtain additional benefits by canceling the mark, the cancellation counterclaim is not moot.

**2. Defendants have not lost standing to challenge the validity of the "CIBER" mark by prevailing on Plaintiff's infringement claims.**

Plaintiff does not and cannot dispute that Defendants had standing to seek cancellation of Plaintiff's "CIBER" trademark registration at the time that they brought their counterclaim. The Defendants will not lose this standing by prevailing on Plaintiff's infringement claims. In Aerogroup International, Inc. v. Marlboro Footworks, Ltd., 977 F.Supp. 264, 266-67 (S.D.N.Y. 1997), the court found no likelihood of confusion between the Plaintiff's trademarked waffle pattern on its shoes and the pattern on Defendant's shoes. Nevertheless, the defendant sought to



cancel the registered trademark. Like the Plaintiff Ciber, Inc. in this action, the plaintiff argued that the defendant had no standing to contest the validity of the trademark because the court had found that there was no likelihood of confusion between the parties' shoes. The court rejected this argument, and held that the defendant continued to have standing to contest the validity of the registered trademark.

By prevailing in an infringement action, a defendant does not lose standing to bring its counterclaim for cancellation. Having been sued for trademark infringement, [defendant] has the requisite injury to confer standing.

Id. at 267. Similarly, although Defendants have prevailed on the infringement claims in this litigation, they retain standing to prosecute the counterclaim to invalidate the "CIBER" mark.

Plaintiff will likely assert that the dismissal of its Complaint raises a potential res judicata bar to additional trademark claims by Plaintiff and hence destroys Defendants' interest in prosecuting their counterclaim. The Federal Circuit has rejected the same argument. In International Order of Job's Daughters v. Lindeburg & Co., the Federal Circuit affirmed summary judgment canceling a federal trademark registration. 727 F.2d 1087, 1092 (Fed. Cir. 1984). The plaintiff brought a cancellation proceeding against a trademark owner after the Ninth Circuit had affirmed the dismissal of the trademark owner's infringement claims against the plaintiff. Id. at 1092. The trademark registrant argued that plaintiff lacked standing to challenge its trademark registration because the Ninth Circuit's dismissal of its infringement claims against plaintiff shielded the plaintiff from further risk of liability. Noting that permitting the registration to survive would afford the registrant, "should it file another infringement suit against [plaintiff], prima facie proof of an exclusive right to use the [trademark] in commerce,"

the Federal Circuit held that plaintiff retained standing to challenge the registration.<sup>3</sup> The court stated that:

Though [plaintiff] prevailed in the Ninth Circuit infringement action against it brought by [trademark registrant], we believe that it should not have to rely solely on the doctrine of former adjudication to bar appellant's use of its registration against [plaintiff] in another suit. There are enough exceptions to the doctrine of issue preclusion (see Restatement (Second) of Judgments § 28 (1980)) to render it impossible to say that former adjudication is an all-sufficient remedy, in itself, to preclude any attempt to use the registration against [plaintiff]. Even though appellee might prevail in its defense of former adjudication, it should not have to litigate that defense in order to be free of appellant's registration advantage.

Id. at 1092 n.4 (emphasis added).

As long as Plaintiff is permitted to assert that it has rights in the "CIBER" mark, Defendants face the risk of additional litigation due to Defendants continued use of the "Ciber Consulting, Inc." name. Defendants should not be forced to defend themselves from further unfounded claims by Plaintiff. "[I]f there is a possibility of a recurrence" of the activity that first gave the claimant standing, a case cannot be dismissed as moot. See Federal Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1237 (9th Cir. 1999) (emphasis in original) (holding that cessation of conduct which gave rise to plaintiffs claim for injunctive relief does not render claim moot). Defendants' use of the "Ciber Consulting, Inc." name in commerce gave rise to Plaintiff's trademark infringement claim and, thereby, gave Defendants standing to assert their Counterclaim for cancellation of the "CIBER" mark.

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<sup>3</sup> Because the Ninth Circuit had affirmed the dismissal of the trademark owner's infringement claims before plaintiff brought its suit seeking cancellation, the Federal Circuit applied the standard for standing rather than the more liberal mootness standard applicable here. Id. at 1089-90.

As the United States Supreme Court noted in City of Erie v. Pap's A.M., TBD "Kandyland", "[t]he underlying concern [as to whether a case is moot] is that, when the challenged conduct ceases such that 'there is no reasonable expectation that the wrong will be repeated,' then it becomes impossible for the court to grant 'any effectual relief whatever' to [the] prevailing party." 529 U.S. 277, 287 (2000) (internal citations omitted). In this case, however, there is a reasonable expectation that the complained of wrong will be repeated as Defendants continue to use the "Ciber Consulting, Inc." name in commerce and Plaintiff's dismissal of its claims of infringement as to past and present use of the name do not preclude subsequent litigation as to future instances of Defendants' use of the word "ciber" in its name. In this situation, the case or controversy between the parties is still "live" and any opinion as to the validity of the "CIBER" mark would not be advisory.

If the "CIBER" mark is declared invalid and this Court orders the cancellation of the trademark registration for the mark, then Defendants will be free of the possibility of future trademark infringement actions based on their future use of the word "ciber" in their business name. The availability of this relief is sufficient to prevent Defendants' counterclaim from being moot. See, e.g., City of Erie, 529 U.S. at 288 (holding that the court's ability to grant relief to plaintiff by declaring the challenged ordinance constitutional, and thereby freeing plaintiff to enforce the ordinance, was sufficient relief such as to prevent the case from being moot).

Even if Plaintiff had unconditionally promised never to sue Defendants again (which it certainly has not), Defendants' counterclaims still would not be rendered moot. Bankroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1085 (9th Cir. 2000) ("even if [registrant's] promise [not to sue] had been unqualified, it would not have mooted [claimant's] separate request for cancellation.... The Lanham Act authorizes district courts to order trademark

cancellation in any action involving a registered mark.” (citing 15 U.S.C. § 1119)). Likewise, a party forced to defend a trademark infringement claim is authorized to seek cancellation of the plaintiff’s mark even if the plaintiff’s claims have been dismissed and the plaintiff has been enjoined from using its mark in the geographical region where the defendant conducts its business. The inconvenience and costs Defendants have incurred already in being forced to defend Plaintiff’s meritless claims are sufficient alone to establish Defendants’ continuing interest in adjudication of their Counterclaim. See Aerogroup, 977 F.Supp. at 267; Procter & Gamble Co v. Johnson & Johnson, Inc., 485 F.Supp. 1185, 1212 (S.D.N.Y. 1980). Aerogroup and Procter & Gamble each held that being forced to defend a trademark infringement claim, without more, constituted an injury sufficient to sustain cancellation claims, even after the original infringement claim was dismissed. Aerogroup, 977 F. Supp. at 267; Procter & Gamble, 485 F. Supp. at 1212.

**C. Public Policy Requires a Decision on Defendants’ Counterclaim.**

Public policy further underscores the need for a determination on the merits of Defendants’ counterclaim. First, the public has a strong interest in removing invalid patents and trademarks from exclusive use by a single party. See Lackner, 145 F.2d at 934 (considering validity of patent; “the public interest requires that issues of this kind, seriously raised, should be litigated and decided.”). Second, “[t]o abandon the case at an advanced stage may prove more wasteful than frugal.” Friends of the Earth, 528 U.S. at 191-92, 120 S. Ct. at 710 (holding that preservation of judicial resources favors adjudicating claims in which the judicial system invested substantial resources).

In this case, the Court and parties have already invested substantial time, money and judicial resources to bring this case to this late stage of the litigation. If this Court were to not

retain jurisdiction over Defendants' counterclaim, the value of these efforts would be forever lost. These resources need not go to waste, however, for if this Court were to retain jurisdiction over Defendants' counterclaim and adjudicate the validity of the "CIBER" mark on a summary judgment motion, this Court could net a savings of judicial resources ten times over by finally resolving the question of the validity of the "CIBER" mark. A determination of invalidity would preclude Plaintiff from bringing further trademark infringement actions on its "CIBER" mark against Defendants or the many other businesses using the word "ciber" in their business names.

### **III. DEFENDANTS REQUEST COSTS AND ATTORNEY FEES AS A CONDITION OF PLAINTIFF'S VOLUNTARY DISMISSAL**

Pursuant to Fed. R. Civ. P. 41(a)(2), the Court may allow voluntary dismissal of Plaintiff's claims "upon such terms and conditions as the court deems proper." As a condition of dismissal, Defendants request that Plaintiff be required to pay Defendants' costs and attorneys fees to date.

"[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). As the "prevailing party" on Plaintiff's claims, Defendants are entitled to costs as a matter of right, and seek those costs as a condition of the dismissal of Plaintiff's claims.

Defendants also seek to recover their attorney fees in this action pursuant to 15 U.S.C. § 1117(a). Under the federal trademark statute, the "prevailing party" is entitled to an award of attorney fees "in exceptional cases." *Id.* Defendants intend to prove that Plaintiff's claims have been brought with full knowledge of the invalidity of the trademark. In addition, Plaintiff has manipulated its on-again, off-again damages claim at the expense of Defendants and for the improper and bad faith purpose of attempting to disrupt Defendants' insurance coverage, making this an "exceptional case" warranting attorney fees.

Accordingly, Defendants seek recovery of their attorney fees as a condition of the dismissal of Plaintiff's claims. Attorney fees may be awarded in conjunction with a voluntary dismissal with prejudiced pursuant to Rule 41(a)(2). See Gilbreath Int'l Corp. v. Lionel Leisure, Inc., 587 F. Supp. 605, 615 (E.D. Penn. 1983). In the alternative, Defendants request permission to provide further briefing and support for their claim for attorney fees.

#### IV. CONCLUSION

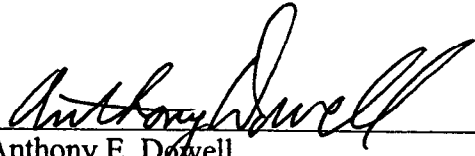
Defendants, of course, welcome the voluntary dismissal of Plaintiff's baseless claims. Plaintiff's voluntary dismissal, however, is merely a tactical ploy to avoid consideration of the validity of Plaintiff's trademark, which continues to loom like a dark cloud over Defendants' business. Regardless of any dismissal of Plaintiff's claims, Defendants are entitled to continue the fight the liberate the word "ciber" from the clutches of Plaintiff Ciber, Inc. Plaintiff started this fight, and Defendants should be allowed to finish it.

Defendants therefore object to the dismissal of Plaintiff's claims to the extent the dismissal would prevent the Court from adjudicating Defendants' counterclaim.

Date: May 27, 2004

Respectfully submitted,

By:

  
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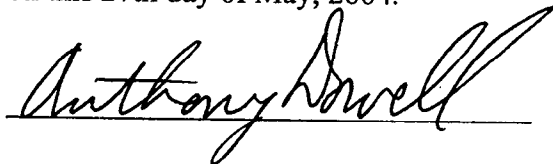
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a copy of the foregoing **DEFENDANTS'**  
**OPPOSITION TO PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL OF**  
**ACTION WITH PREJUDICE** was served via facsimile transmission and United States Mail  
on:

David E. Sipiora  
Chad E. King  
Townsend and Townsend and Crew  
1200 17th Street, Suite 2700  
Denver, CO 80202  
Facsimile 303-571-4321

Dean A. Monco  
John S. Mortimer  
Wood, Phillips, Katz Clark & Mortimer  
Citicorp Center #3800  
500 West Madison Street  
Chicago, IL 60661  
Facsimile 312-876-2020

on this 27th day of May, 2004.

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

CIBER, INC., a Delaware corporation, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 CIBER CONSULTING, INC., a dissolved Illinois )  
 corporation; BRUCE F. EVANS, an individual; )  
 CYNTHIA B. EVANS, an individual; JOHN )  
 DOES 1-10, individuals, )  
 )  
 Defendants. )

No. 03 C 0840  
Judge Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

Plaintiff CIBER, Inc. initiated the instant trademark infringement action against defendants CIBER Consulting, Inc., Bruce Evans, Cynthia Evans, and John Does 1-10, alleging that defendants' use of the trade name "Ciber Consulting, Inc." infringed plaintiff's "CIBER" mark. Specifically, plaintiff's second amended complaint asserts five claims: trademark infringement under the Lanham Act, 15 U.S.C. §§ 1051 et seq. (Count I); federal unfair competition and false advertising under the Lanham Act (Count II); common law unfair competition and unfair business practices (Count III); deceptive trade practices under the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 et seq. (Count IV); and unfair competition and deceptive trade practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. (Count V). Defendants have asserted a counterclaim under 15 U.S.C. § 1119, entitled "Request for Cancellation of the Mark 'CIBER,'" which, among other things, alleges that plaintiff's registrations are "generic and not entitled to registration as trademarks."

On May 7, 2004, plaintiff filed a motion to voluntarily dismiss its claims with prejudice and dismiss defendants' counterclaim as moot, which has been opposed by defendants. For the reasons stated herein, the court grants plaintiff's motion to dismiss its claims with prejudice, and dismisses defendants' counterclaim without prejudice.

### **FACTS**

Plaintiff owns several trademark registrations for the CIBER mark, including U.S. Trademark Registration Nos. 1,185,100 and 1,479,942. According to the instant motion, plaintiff provides a number of business and computer consulting services under that mark. Defendant CIBER Consulting, Inc. provides information management consulting services in the nuclear energy field. The instant suit for trademark infringement arose from defendants' use of the trade name CIBER Consulting, Inc.

Through discovery, plaintiff learned that: (1) CIBER Consulting, Inc.'s customer base does not exceed five customers; (2) Bruce Evans is CIBER Consulting, Inc.'s only employee; and (3) CIBER Consulting, Inc. has not done any broadcast advertising and does not have an internet presence. Moreover, in the instant motion plaintiff contends that "it is highly unlikely that defendants ever will expand either their business or their advertising," and notes that defendants no longer hold the right to use the trade name Ciber Consulting, Inc. in their home state of Illinois. According to plaintiff, it secured registration of the Ciber Consulting, Inc. trade name after defendant was administratively dissolved for failure to renew its trade name registration. Based on this information, plaintiff concluded that the use of the CIBER Consulting, Inc. trade name is de minimis, does not present a likelihood of confusion, and does not justify further litigation. Hence the instant motion to dismiss.

In its motion to dismiss, plaintiff requests "dismissal with prejudice of all claims covering Defendants' past and present use of its trade name, which effectively insulates Defendants from suit based on current or past use of the mark." According to plaintiff, dismissal with prejudice of its claims compels the dismissal of defendants' counterclaim for cancellation, as well, because once plaintiff's claims are dismissed, there will no longer be a case or controversy that would provide the court with jurisdiction under Article III of the Constitution to hear defendants' counterclaim. Defendants disagree, challenging plaintiff's characterization of their future business prospects (or lack thereof) and arguing, *inter alia*, that Fed. R. Civ. P. 41(a)(2) prevents dismissal of the instant action over defendants' objection. For the reasons stated below, the court rejects defendants' position and grants the instant motion to dismiss.

#### DISCUSSION

Article III of the United States Constitution limits the exercise of judicial power to "cases" and "controversies." Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937). In Aetna, the Supreme Court distinguished a "justiciable controversy" from a "difference or dispute of a hypothetical or abstract character." Id. at 241. According to the Aetna Court, a "justiciable controversy" must be "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Id. The question central to the instant motion, then, is whether defendants' counterclaim could be properly characterized as a "justiciable controversy" after the dismissal of plaintiff's claims with prejudice.

Relying on Windsurfing Int'l Inc. v. AMF Inc., 828 F.2d 755 (Fed. Cir. 1987), and its progeny, plaintiff maintains that the dismissal of its claims with prejudice divests this court of

jurisdiction over defendants' § 1119 counterclaim. In Windsurfing Int'l, after filing a suit for patent infringement, the plaintiff sent letters to the defendant demanding that it cease using "Windsurfer" to refer to one of its products and threatening "more formal proceedings" if the defendant did not comply with its request. Id. at 756. Defendant complied, but subsequently filed a counterclaim to cancel the plaintiff's "windsurfer" trademark, arguing that the "windsurfer" mark was generic and thus did not function as a trademark. The plaintiff moved to dismiss the defendant's trademark counterclaim for lack of subject matter jurisdiction, arguing that the defendant "had alleged insufficient facts to create a case or controversy under Article III of the Constitution." Id. The trial court denied the plaintiff's motion to dismiss and found in favor of the defendant on the merits of its counterclaim. The Federal Circuit vacated the judgment.

Noting that "[a] justiciable controversy is one that touches the legal relations of parties having adverse legal interests," id. at 758 (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937)), the court explained:

[T]he defendant's "desire" to use "windsurfer" and "windsurfing" descriptively may render its commercial interests adverse to those of [the plaintiff], but absent a combination of [the defendant's] use of the mark and threats or suits by [the plaintiff], the legal interests of [the plaintiff and defendant] are not adverse.

Id. at 758 (emphasis added).

The Windsurfing Int'l court continued:

Under the Lanham Act, district courts have the power to cancel registrations, but only in an "action involving a registered mark." 15 U.S.C. § 1119. "Involving" cannot mean the mere presence of a registered trademark, but must be read as involving the right to use the mark and thus the right to maintain the registration. There must, therefore, be something beyond the mere competitor status of the parties to confer jurisdiction. Such a basis may,

for example, be a suit for trademark infringement, or a "case of actual controversy" referred to in the Declaratory Judgment Act, 28 U.S.C. 2201.

Id. at 758-59 (internal citations omitted).

Relying on the Second Circuit's definition of "case or controversy," id. at 757, the court concluded that the defendant's status as a competitor of the plaintiff did not "create such an 'actual controversy' effective to create jurisdiction in the district court." Id. at 759.

The facts in the instant case compel a similar result. Plaintiff has sought dismissal of its claims with prejudice, which would bar any suit based on defendants' current or past use of the "CIBER" mark. In the absence of such an infringement suit, or the threat of such a suit, there is no justiciable case or controversy.

Defendants' assertion that "plaintiff will most assuredly reassert a claim for trademark infringement if and when defendants' business expands or changes in any way," does not dictate a contrary outcome. Defendants state that they "have every intention of expanding their business to serve additional clients and, if the opportunity presents itself, expanding the business into areas outside of the field of nuclear records management." Defendants' stated "intentions" with respect to their use of "CIBER," without more, however, are insufficient to create a justiciable controversy. As the court stated in Aetna, a "difference or dispute of a hypothetical or abstract character" does not qualify as a justiciable controversy under Article III. Compare G. Heileman Brewing Co., Inc. v. Anheuser-Busch, Inc., 873 F.2d 985, 991 (7<sup>th</sup> Cir. 1989) (finding "actual controversy" requisite to maintaining declaratory judgment action to invalidate trademark because "[b]y making active preparations [plaintiff] has shown that he has more than a mere speculative interest in the validity and applicability of the [defendant's trademark]. His interest

is direct, real, and immediate, not a mere academic one.”) (quoting 6A J. Moore, Moore’s Federal Practice ¶ 57.20, at 57-217).

A similar factual scenario was contemplated by the Federal Circuit in Super Sack Manufacturing Corp. v. Chase Packaging Corp., 57 F.3d 1054 (Fed. Cir. 1995). The plaintiff in Super Sack brought a patent infringement action against the defendant, who in turn filed a counterclaim for declaratory judgments of both noninfringement and invalidity. Before trial, the plaintiff filed a motion to dismiss, in which it “unconditionally agree[d] not to sue [defendant] for infringement as to any claim of the patents-in-suit based upon the products currently manufactured and sold by [defendant].” Id. at 1056. In light of the plaintiff’s representation, the district court dismissed the case for lack of an actual controversy under Article III. Id. at 1057.

The court of appeals affirmed. The Super Sack court rejected the defendant’s argument that the promise not to sue failed to eliminate the controversy between the parties:

Chase also contends that Super Sack’s promise not to sue fails to eliminate the controversy between them because, however absolute it may be with respect to past and present products, the promise does not cover products that Chase may make, sell or use in the future. But, as our cases have made clear, the second part of our test of declaratory justiciability respecting patent rights requires that the putative infringer’s “present activity” place it at risk of infringement liability. Chase has, of course, never contended that it has already taken meaningful preparatory steps toward an infringing activity by planning to make a new product that may later be said to infringe.... The residual possibility of a future infringement suit based on Chase’s future acts is simply too speculative a basis for jurisdiction over Chase’s counterclaim for declaratory judgments of invalidity.

Id. at 1059-60 (emphasis in original) (internal citations omitted).

Although Super Sack involved a counterclaim for declaratory judgment of patent invalidity, as opposed to a counterclaim for trademark cancellation under § 1119, the principles announced by the Federal Circuit inform the analysis of the instant motion. See Harris Trust &

Savings Bank v. E-II Holdings, Inc., 926 F.2d 636, 639 (7<sup>th</sup> Cir. 1991) (“actual controversy” requirement under § 2201(a) of the Declaratory Judgment Act “tracks the ‘cases’ or ‘controversies’ requirement of Article III”); G. Heileman Brewing Co., Inc., 873 F.2d at 990 (applying test for establishing actual controversy in patent infringement declaratory judgment action to trademark dispute); Windsurfing, Int’l, 828 F.2d at 757 (“Because declaratory judgment actions involving trademarks are analogous to those involving patents, we may also, when necessary, find guidance in the precedents of [the Federal Circuit].”) (internal citations omitted).

As in Super Sack, defendants’ stated intentions to expand their use of the “CIBER” mark, standing alone, are simply too speculative to create a case or controversy in the instant case. As plaintiff points out in its motion to dismiss, defendants no longer even hold the right to use the trade name Ciber Consulting, Inc. in their home state of Illinois because plaintiff registered the Ciber Consulting, Inc. trade name after defendants failed to register that trade name for their own use. Nor have defendants buttressed their stated goal of expanding their business beyond the nuclear records management industry with any factual support. These facts (or lack thereof), taken together with plaintiff’s voluntary dismissal of its claims with prejudice, convince the court that defendants’ counterclaim does not present a justiciable case or controversy. As plaintiff points out in its reply brief, “[d]efendants are free to continue their present conduct indefinitely with no fear of litigation from [plaintiff]”; and in the language of the Federal Circuit in Super Sack, “[t]he residual possibility of a future infringement suit based on [defendants’] future acts is simply too speculative a basis for jurisdiction over [defendant’s] counterclaim....”

The cases cited by defendants do not compel a different result. International Order of Job’s Daughters v. Lindeburg & Co., 727 F.2d 1087 (Fed. Cir. 1984), involved an appeal from a



decision of the Patent and Trademark Office's Trademark Trial and Appeal Board regarding a petition to cancel a trademark under Section 14 of the Lanham Act, 15 U.S.C. § 1064. The counterclaim at issue in the instant case, in contrast, was brought under 15 U.S.C. § 1119. Accordingly, the standing analysis employed by the International Order of Job's Daughters court does not control the justiciability analysis of defendants' counterclaim in the instant suit. See Windsurfing Int'l, 828 F.2d at 758 (explaining that "Section 14(c) of the Lanham Act does authorize persons interested in using marks that have become the common descriptive names of articles to petition the Patent and Trademark Office to cancel registration of those marks.... It does not, however, authorize suits for cancellation in district court.").

Secular Organizations for Sobriety, Inc. v. Ullrich, 213 F.3d 1125 (9<sup>th</sup> Cir. 2000), is similarly distinguishable. In Ullrich, the plaintiff brought a suit for trademark infringement and unfair competition, and the defendant counterclaimed for, inter alia, cancellation of the plaintiff's mark. After a bench trial, the district court ruled against the plaintiff on its trademark infringement and unfair competition claims and granted an injunction forbidding the plaintiff from using the disputed marks in California, where it had established prior use; the trial court declined to cancel the plaintiff's mark, however.

The plaintiff appealed and the defendant cross-appealed, arguing that the trial court improperly refused to reach the merits of its counterclaim for cancellation. The Ninth Circuit reversed the dismissal of the counterclaim, explaining that, had the district court ruled in defendant's favor on its cancellation counterclaim, the defendant "would consequently be able to expand its use of the marks beyond its current boundaries" and thus would obtain greater benefits than the injunction alone provided. Id. at 1131. The court concluded that "those additional

benefits mean that the federal cancellation claim is not moot and that the district court should have decided the question." Id. In contrast to the instant case, the Ullrich court was not squarely presented with the question of whether the voluntary dismissal of a plaintiff's infringement claims with prejudice divests a court of Article III jurisdiction over a defendant's counterclaim for cancellation; to the contrary, the infringement claims in Ullrich remained pending through a four day bench trial. Id. at 1129. The Ullrich court simply had no occasion to consider Aetna and its progeny.

Trico Products Corp. v. Anderson Co., 147 F.2d 721 (7<sup>th</sup> Cir. 1945), the only Seventh Circuit precedent cited by defendants, is also distinguishable from the instant case. In Trico Products, a patent infringement suit, the district court dismissed the defendant's counterclaim for a declaratory judgment of invalidity. On appeal, the Seventh Circuit concluded that the dismissal was improper, because a ruling of non-infringement at trial would not necessarily resolve the defendant's invalidity claim. See id. at 722. In that case, however, the infringement claims were still pending at the time the counterclaim was dismissed. Id. at 723. Accordingly, the Trico Products decision (rendered long before Aetna and Super Sack) did not contemplate the justiciability of a cancellation counterclaim in the absence of a pending infringement claim.

Defendants' last argument, that Fed. R. Civ. P. 41(a)(2) bars dismissal of the instant suit, is similarly unpersuasive. Rule 41(a)(2) provides:

Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court....

Rule 41(a)(2),<sup>1</sup> however, cannot trump the constitutional considerations raised by the instant motion to dismiss, which are outlined above. The court thus declines defendants' invitation to construe Rule 41(a)(2) in a manner that would conflict with the mandates of Article III.

This conclusion is consistent with Lackner Co., Inc. v. Quehl Co., 145 F.2d 932 (6<sup>th</sup> Cir. 1944), relied upon by defendants. In Lackner, a patent infringement case, the plaintiffs offered to dismiss with prejudice their suit for patent infringement, to give free license and to forgive past infringement by defendant, and further consented to dismissal of the defendant's counterclaim for invalidity. Id. at 933. The defendant refused to consent to the dismissal, however, and the court proceeded to enter judgment in defendant's favor on its counterclaim. On appeal, the plaintiffs argued that the district court lacked jurisdiction to adjudicate the counterclaim because no case or controversy existed.

The Sixth Circuit disagreed. Noting at the outset that "the controlling question is whether any controversy existed, for otherwise the District Court is without jurisdiction to grant declaratory relief," id. at 933, the Lackner court continued, id. at 934:

Here, while the plaintiffs offered to grant a free license and to dismiss the action with prejudice, they did not admit noninfringement, but forgave past infringement, and therefore continued to assert that the defendant had infringed. Hence the defendant is still entitled to attack the validity of the patent through an application for declaratory judgment.

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<sup>1</sup>The court notes that Rule 41(a)(2) prohibits dismissal of a claim when a counterclaim lacks independent grounds of jurisdiction. See 9 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure, § 2365; Technimark, Inc. v. Crellin, Inc., 14 F. Supp. 2d 762,767 (M.D.N.C. 1998) ("Dismissal is prohibited [under Rule 41(a)(2)] when it would destroy federal jurisdiction over a counterclaim. Where an independent jurisdictional basis exists for a counterclaim, Rule 41(a)(2) does not bar dismissal of a plaintiff's claim.").

After concluding that an actual controversy existed, the Lackner court added that Rule 41(a)(2) prohibited dismissal of the action over defendant's objection. Id. at 934. Contrary to defendants' representation to the court in the instant case, however, the Lackner court did not resolve the case or controversy issue on the basis of Rule 41(a)(2). Rather, the court did not reach the Rule 41(a)(2) issue until after concluding that an actual controversy existed that would confer jurisdiction on the district court. The court also notes that, like Trico, Lackner was decided 60 years ago, long before Aetna and Super Sack.

In the instant case, there is no justiciable controversy because plaintiff has issued a statement of non-liability with respect to defendants' current and past use of the CIBER mark, and agreed not to sue defendants for any past or current conduct relating to that mark. Rule 41(a)(2) is simply beyond the point. See, e.g., Intellectual Property Development, Inc. v. TCI Cablevision of California, Inc., 248 F.3d 1333, 1340, n.6 (Fed. Cir. 2001) (explaining that because dismissal of counterclaim in patent infringement suit was based on plaintiff's statement of nonliability, which divested district court of Article III jurisdiction, Rule 41(a) was inapplicable); Super Sack, 57 F.3d at 1057, n.2 (finding Rule 41(a)(2), to which district court referred in its dismissal order, inapplicable, but nonetheless determining that the district court properly dismissed the case for lack of an Article III controversy in light of plaintiff's promise not to sue for current or past acts of alleged infringement).

This leaves defendants' request for attorneys' fees, which the court denies. Defendants simply have not persuaded the court that this is an exceptional case under 15 U.S.C. § 1117(a) that would entitle them to fees.

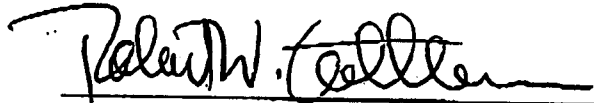
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**CONCLUSION**

For these reasons, plaintiff's motion to dismiss the instant action is granted. Plaintiff's claims are dismissed with prejudice, and defendants' claims are dismissed without prejudice.

The court also denies defendants' request for attorneys' fees.

**ENTER: July 6, 2004**



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**Robert W. Gettleman**  
**United States District Judge**

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