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

Proceeding	91165753
Party	Plaintiff QMT Associates, Inc. QMT Associates, Inc. QMT Associates, Inc. 8431 Euclid Avenue Manassas Park, VA 20111 UNITED STATES
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No. 78/213,865
Filed on February 12, 2003
For the Mark MISCELLANEOUS DESIGN
Published in the Official Gazette on June 14, 2005

QMT ASSOCIATES, INC.,)
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Opposer,) Opposition No. 91165753
)
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v.)
)
SARA NEAL ESKEW,)
)
)
Applicant.)

**OPPOSER'S MOTION TO COMPEL PROPER DISCOVERY
RESPONSES AND FOR AN ORDER AS TO APPLICANT'S
INSUFFICIENT RESPONSE TO REQUESTS FOR ADMISSION**

Opposer QMT Associates, Inc. ("QMT") moves pursuant to TBMP § 523.01 and 524.01 to compel Applicant Sara Neal Eskew to provide complete and proper responses to Opposer's Interrogatories and Requests for Production of Documents and to determine the sufficiency of Applicant's response to Opposer's Requests for Admission. Opposer's Interrogatories, Requests for Admission and Requests for Production of Documents are attached to QMT's Brief in Support of its Motion to Compel Proper Discovery Responses and for an Order as to Applicant's Insufficient Responses to Requests for Admission as Exhibit D. Pursuant to TBMP §§ 523.02 and 524.02, QMT's counsel certifies that it has made a good faith effort, through correspondence, to resolve the issues presented in this motion. Those efforts have been unsuccessful. In support of its motion, QMT relies on the accompanying brief and states as follows:

1. QMT and Applicant both manufacture and sell wind chimes similar in appearance.

2. Applicant seeks registration of alleged trade dress in its wind chimes.

3. QMT and Applicant previously were engaged in trade dress litigation brought by Applicant in the Southern District of Texas, captioned *Eskew d/b/a Music of the Spheres v. QMT Associates, Inc.*, Cir. No. 01-CV-1001 (the "Litigation") That matter was amicably resolved and the parties entered into a Settlement Agreement and Stipulated Mutual Final Injunction prior to trial.

4. QMT filed its timely opposition in this matter on July 5, 2005.

5. Applicant moved to dismiss this opposition for alleged lack of standing. In her motion to dismiss, Applicant made false assertions regarding the resolution of the Litigation, including that QMT consented to the sought after registration and that the federal court in the Litigation made certain findings of fact and/or law.

6. The Board denied Applicant's Motion to Dismiss on November 7, 2005 and entered trial dates, which included the closing of discovery on March 1, 2006 and a close of the testimony period for the party in the position of plaintiff on May 30, 2006.

7. QMT timely served interrogatories, requests for admission, and requests for production of documents on March 1, 2006 (the "Requests")

8. Applicant filed purported responses to QMT's Requests on April 3, 2006.

9. Applicant's responses are improper and defective in numerous respects and fail to substantively provide any information in response to the Requests.

10. TBMP §§ 523.01 and 524.01 authorize the filing of a motion to compel with respect to interrogatories and document requests and a motion to test the sufficiency of responses to requests to admit. This motion is timely filed prior to the commencement of the first testimony period in accordance with the TBMP §§ 523.03 and 524.03.

11. As set forth more fully in the accompanying brief, Applicant's responses are defective, include baseless objections, and fail to provide any substantive response to QMT's Requests.

CONCLUSION

For the foregoing reasons, QMT requests the Board:

1. With respect to Applicant's baseless denials in response to QMT's Requests for Admission, each and every matter set forth in QMT's requests to admit should be deemed admitted and an appropriate order entered.

2. With respect to QMT's interrogatories, Applicant should be ordered to respond in full to the interrogatories without further objection.

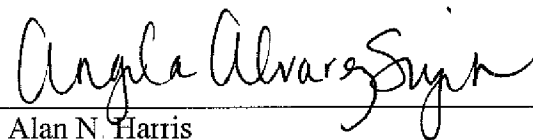
3. With respect to QMT's requests for the production of documents, the Board should enter an order: (a) requiring Applicant to produce copies of any and all documents identified in response to QMT's interrogatories; (b) requiring Applicant make available for inspection and copying, at a mutually convenient date and time, all documents responsive to Request for Production No. 2; (c) precluding Applicant from relying on any information related

to Document Request Nos. 3, 5, 6, 7, and 8 or from introducing information sought in the requests as part of evidence in the matter (TBMP 527.01(b)); (d) requiring Applicant to produce a privilege log with respect to any documents being withheld under claim of "privilege;" and (e) requiring Applicant to answer in full and state whether any such documents exist in response to Request No. 9.

4 Under TBMP § 523.01 and 37 CFR § 2 120(c)(h), this Opposition should be suspended with respect to all matters not germane to this motion

BODMAN LLP

By: _____



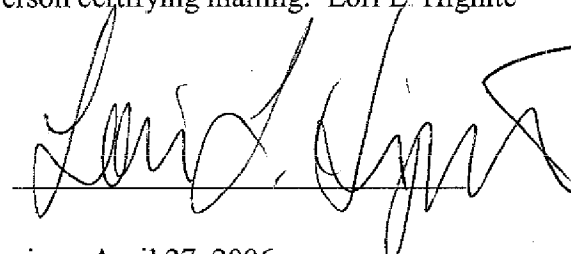
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Certificate of Mailing

I hereby certify that the enclosed Opposer's Motion to Compel Proper Discovery Responses and for An Order to Applicant's Insufficient Responses to Requests for Admission (Opposition No. 91165753), regarding the mark "MISCELLANEOUS DESIGN," Serial No. 78/213,865, which will be filed electronically with the Trademark Trial and Appeal Board as of today's date, is being sent via U.S. Mail to:

Daniel Lundeen
1916 Baldwin
Houston, Texas 77002

Name of person certifying mailing: Lori L. Hignite

Signature: 

Date of Signing: April 27, 2006

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

In the matter of Application Serial No. 78/213,865

Filed on February 12, 2003

For the Mark MISCELLANEOUS DESIGN

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QMT ASSOCIATES, INC.,)	
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Opposer,)	Opposition No 91165753
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v.)	
)	
SARA NEAL ESKEW,)	
)	
Applicant)	

**QMT ASSOCIATES, INC.'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL
PROPER DISCOVERY RESPONSES AND FOR AN ORDER AS TO APPLICANT'S
INSUFFICIENT RESPONSES TO REQUESTS FOR ADMISSION**

This is a case in which Applicant seeks to register alleged trade dress in the configuration of her wind chimes. The records of the USPTO database confirm that no person or entity has a registration for purported trade dress in wind chimes, and for good reason. As concluded by the Examiner when it originally rejected the Application at issue, such configurations are functional.

Opposer QMT Associates, Inc. ("QMT") files this Brief in support of its Motion to Compel Proper Discovery Responses and for an Order as to Applicant's Insufficient Responses to Requests for Admission. QMT timely served discovery requests in this matter which Applicant, through a response replete with improper objections and baseless denials, effectively ignored. Counsel for QMT has attempted to resolve these issues through an exchange of correspondence with counsel for Applicant, Sara Neal Eskew ("Applicant"), but to no avail. The

exchange of correspondence, consisting of counsel for QMT's letter of April 7, 2006, counsel for Applicant's response dated April 10, 2006, and counsel for QMT's follow up letter of April 21, 2006 are all attached as Exhibit A to this Brief. QMT asks the Board to: (a) enter an order deeming QMT's Requests for Admission admitted under TBMP § 524.01; (b) enter an order under TBMP § 527.01(e) precluding Applicant's reliance on certain information at trial; and (c) enter an order requiring Applicant to answer the remaining discovery requests immediately, fully and without objection.

FACTS AND PROCEDURAL HISTORY

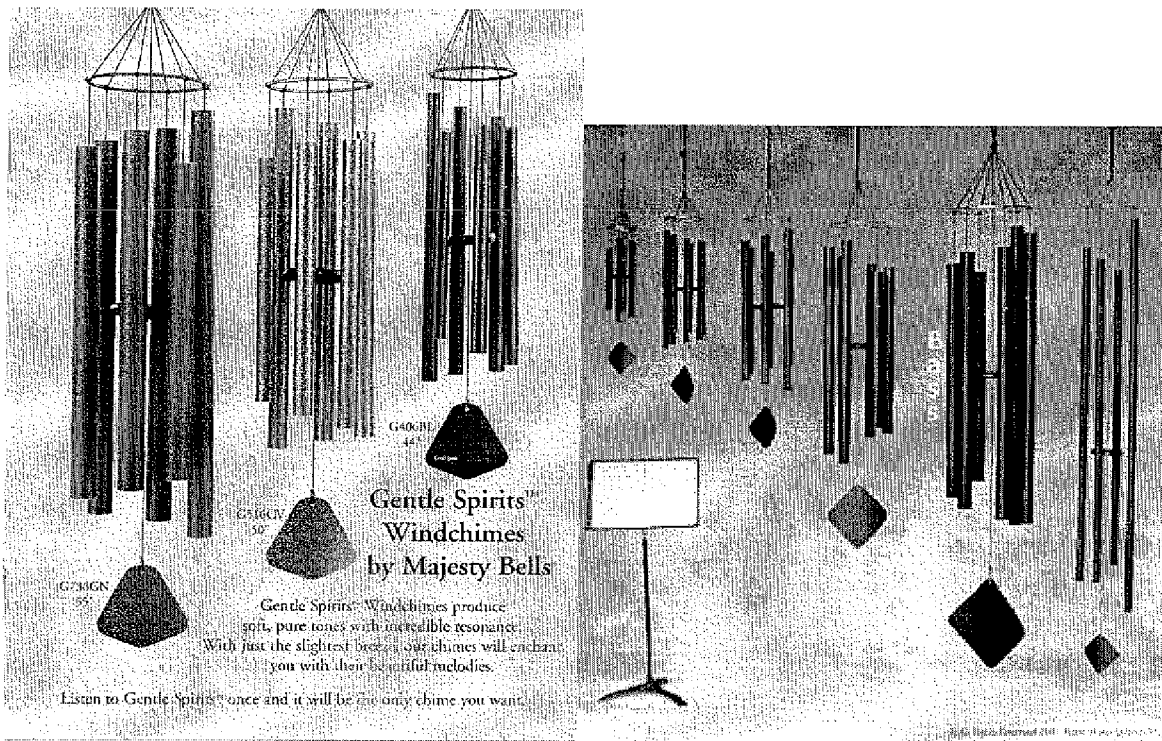
A. QMT and MOIS Wind Chimes.

QMT has been designing, manufacturing and selling wind chimes since 1991. It offers several lines of wind chimes with varying visual and sound characteristics. In 1998, QMT began manufacturing and selling a line of "hand-tuned" wind chimes and, in 2001, introduced its GENTLE SPIRITS® line. As set forth in the table, below, the elements of the GENTLE SPIRITS wind chimes (including an open ring suspension, a metallic circular top ring, deburred tubes, a clapper, and a diamond-shaped, curved "sail") reflect considerations of sound quality, manufacturing processes, safety, modern design, and response to market demand:

ELEMENTS OF WIND CHIME	FUNCTION
"Open-ring" suspension system	Improves the quality and duration of the sound created when the clapper hits the tube, and reduces cord abrasion. Instead of drilling holes into the side of the tubes and suspending the tubes by cord strung through the holes, an open ring suspension ties the cord to a pin that runs the diameter of the tube.
Two "dots" visible on the outside of the tube	The dots are not aesthetic "dots" added to the wind chime but result from the pin that runs the diameter of the tube (onto which the cord is tied to suspend the tube) meeting the tube.
Silver "ring" at the bottom of the tube	There is no silver ring applied to the tube. After the metal tube is cut to the desired length, the metal edge is smoothed.

	(deburred) to avoid cuts from handling rough metal. The “ring” at the bottom of the tube is the emergence of the metal beneath the paint color that has been applied to the tube.
“Clapper”	The clapper hits the suspended tubes and creates the sound.
“Sail”	The sail, attached to the clapper, catches the wind, enabling the clapper to hit the tubes.

Applicant, d/b/a Music of the Spheres (“MOTS”), sells a line of hand-tuned wind chimes also generally consisting of an open-ring suspension system, a metallic circular top ring, deburred black tubes, a clapper, and a diamond-shaped curved “sail.” Images of the wind chimes of QMI (under its trade name “Majesty Bells”) and Applicant are set forth below:



As the above pictures demonstrate, the parties’ wind chimes are visually similar in several aspects.

B The Prior Federal Trade Dress Litigation.

In April 2001, Applicant sued QMT in the Southern District of Texas, alleging that QMT's Gentle Spirits® wind chimes infringed her alleged trade dress rights (the "Litigation")
Discovery revealed fatal flaws in Applicant's case, including that the alleged trade dress changed over time, the elements of the claimed trade dress were functional, the wind chimes lacked secondary meaning, and that other companies manufactured wind chimes identical to or substantially similar to those of Applicant.¹

The Litigation revealed the functionality of Applicant's wind chimes, including admissions by Applicant on her web site:

- the "[c]entral tube suspension with smoothly polished tube ends prevent cord abrasion typical of other, less labor-extensive suspension techniques."
- the "[h]eavy gauge polished stainless steel rings provide sturdy support and enduring beauty."
- "[t]he corrosion protective finish preserves chimes and increases durability in hostile environments "
- the "wind catcher, of the same finish and materials as the tubes, is the ideal size, weight, and shape for optimal chime performance . . ."
- "[t]he corrosion protective finish provides durability in all kinds of outdoor environments "

¹ For example, Applicant's complaint described the alleged trade dress as the "original and unique look and tone" consisting of "black-coated chime tubes, the *black* clapper, the black, generally actuate diamond-shaped wind catcher, the manner of tube suspension and the use of *black cordage*, [and] the open ring support platform" Applicant's Amended Complaint, QMT's Brief in Opposition to Motion to Dismiss, Exhibit B, ¶¶ 7-8 (emphasis added). In her application for trademark registration of the same product and her rejected motion to dismiss, Applicant offered a different description, claiming "a combination of features consisting of a *metallic silver top ring* with a circular cross section, a central tube suspension system, black tubes *with metallic silver exposed ends interior and side dots*, a disk-shaped clapper, and a *black*, diamond-shaped wind catcher with a curvature about a vertical axis." Applicant's Memorandum in Support of Motion to Dismiss at 2 (emphasis added). Her "expert report" submitted to the Examiner describes the claimed trade dress a third way

See printout from Applicant's web site, attached as Exhibit B. These admissions alone are more than enough to demonstrate the functionality of Applicant's claimed trade dress. See, e.g., *Valu Engineering, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1272 (Fed. Cir. 2002) (citing an applicant's touting of the utilitarian advantages of the design as one of the principal factors in a functionality analysis). Although Applicant submitted an expert report during the Litigation in an attempt to support her claim that her wind chimes had acquired secondary meaning, the federal court did not ultimately rule as to whether that report was deficient in its methodology or met the standard for reliability and admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny.

Applicant decided not to have her claim of trade dress tested by the applicable legal principals and *settled* the Litigation without any judicial determination as to functionality (an issue on which Applicant maintained the burden of proving by a preponderance of the evidence, see 15 U.S.C. 1125(a)(3)) and without any judicial determination as to whether her wind chimes had acquired secondary meaning. Indeed, the Litigation concluded with Applicant agreeing that QMT could continue selling its wind chimes without any significant changes at all.

C The PTO Refused Registration of Applicant's Wind Chimes
Because They Were "Functional" and Because They Were "Highly Descriptive."

The PTO refused registration of Applicant's wind chimes on the grounds that the "proposed mark appears to be functional" ("Configuration Refusal") and on the grounds that the wind chimes were "highly descriptive." The PTO stated that the allegation of five years use was insufficient to establish distinctiveness and sought "actual evidence to prove the distinctiveness of the mark in commerce."

D. Applicant Abandons, then Revives, Her Application.

Applicant received the Action Letter and refusal from the PIO while the parties were litigating the very issue as to whether Applicant owned any trademark rights in her wind chimes. After settling the Litigation, Applicant failed to timely respond to that Action Letter and the application was abandoned. Applicant later filed a petition to revive, citing an “unintentional” delay in filing a response to the Office Action and, in support of that petition, falsely asserted that a court had established legal rights in her wind chimes. She also falsely asserted that competitors had agreed her chimes were protected by trade dress rights. Based upon her statements, the PIO published the application for opposition. *See Applicant’s Response to Office Action, attached as Exhibit C, at 7.*

E. QMT’s Opposition and Discovery Requests.

QMT timely filed this Opposition on July 5, 2005. Following denial of Applicant’s motion to dismiss, QMT served a narrow set of interrogatories and document requests on March 1, 2006. QMT also served a narrow set of requests for admission, the majority of which sought confirmation as to certain documents in the Litigation and confirmation as to certain statements appearing on Applicant’s website (collectively, the “Requests”). *See Opposer’s Interrogatories, Requests for Admission and Requests for Production of Documents, attached as Exhibit D.*

Applicant served responses in a document entitled “Response to Opposer’s Interrogatories, Requests for Admission, Requests for Production of Documents” on April 3, 2006. *See Exhibit E.* Applicant began its response by complaining that QMT’s request was “served by overnight delivery on the last day at the very close of discovery March 1, 2006.” *Id.* at 1. Applicant made the following general objection to QMT’s eight interrogatories:

“The eleventh hour interrogatories are oppressive, harassing, overly board and unduly burdensome. Eskew believes that the number of interrogatories served, including subparts, exceeds the 75-interrogatory limit specified in 37 CFR § 2.120(g)(1). Eskew is not willing to waive this basis for objection, and within and time for (and instead of) serving answers and specific objections to the interrogatories, hereby serves a general objection on the ground of their excessive number. TBMP § 405.03(e)” See Exhibit E at 1-2

Based on its general objection, Applicant provided no response to any of QMT’s interrogatories *Id*

QMT served twenty straightforward requests to admit. Fourteen of the requests simply asked Applicant to admit that certain language quoted in the requests for admission appeared on her website, www.musicofspheres.com, as of the date Applicant filed the subject Application. While counsel for QMT has been able to determine that the language unquestionably appeared both immediately before and after the date (through an Internet archive search engine), Applicant denied each and every request. See, Exhibit F (archived website pages). QMT also sought straightforward admissions as to certain documents (which it attached) and events related to the resolution of the Litigation, namely, that there was no final ruling, but rather the parties entered into a Settlement Agreement. It asked for admissions as to the accuracy of the attached Settlement Agreement, the Amended Complaint, and certain of Applicant’s discovery responses in the Litigation. Lastly, QMT asked for an admission that the federal court in the Litigation did not “acknowledge” any exclusive right to the alleged wind chime trade dress (as Applicant claimed in her Motion to Dismiss (denied by the Board)). Applicant denied each and every request, including the requests that merely sought acknowledgment that pleadings in the Litigation were true and correct copies. See Exhibit E at 5-10.

As to QMT’s Requests for Production of Documents, Applicant again objected to each and every request and made a variety of objections, including that the requests were defective

because it didn't specify a date and time for production (thereby supposedly making it "impossible" for Applicant to agree to production), burdensome objections, alleged privileged objections (without production or a privilege log) and objections that the document requests are "vague," "ambiguous," "argumentative," and "harassing". See Exhibit E at 10-13.

ARGUMENT

Applicant's objections to each and every interrogatory, request for admission and request for production of documents are improper. Taken as a whole, it is evident that Applicant does not wish to properly prosecute this matter and, instead, wishes to further protract the matter through baseless filings.² QMT's motion should be granted.

A. Applicant's Objection Regarding the Time of Service is Baseless.

Applicant's response states that it is responding to requests "served by overnight delivery on the last day at the very close of discovery, March 1, 2006" and calls the "eleventh-hour interrogatories . . . oppressive, harassing, overly broad and unduly burdensome." See Exhibit E at 1

The interrogatories were properly served. As the Board is well aware, "Interrogatories, requests for production of documents and things, and requests for admission may be served on an adversary on the day the discovery period opens through the last day of the discovery period, even though the answers thereto will not be due until after the discovery period has closed"

² As the Board will recall, Eskew previously filed a Motion to Dismiss, which was denied. As set forth in QMT's response to the Motion to Dismiss, the purported basis for dismissal flowed from false statements and characterizations of what transpired in the Litigation. Indeed, the examiner in this matter initially rejected the application for some of the very reasons QMT puts forth in this opposition. It was only after Applicant submitted false filings in response to the Office Action Letter in which it misrepresented the nature of the Settlement Agreement and misrepresented what transpired in the federal court litigation that this matter even proceeded to publication and opposition. Applicant's counsel's letter preceding this motion confirms that Applicant and her counsel simply view themselves as the fact finder and do not want this Opposition to proceed.

TBMP 403.02 (emphasis added) Applicant's objections in this regard are baseless. *See Luemme Inc v. D.B. Plus, Inc.*, 53 U.S.P.Q.2d 1758, 1761 (TTAB 1999).

B. Applicant's Objection as to the 75-Interrogatory Limit is Made in Bad Faith.

Applicant states that "the number of interrogatories served, including subparts, exceeds the 75-interrogatory limit specified in 37 CFR § 2.120(d)(1)." *See* Exhibit E at 1. Based on this objection, Applicant refused to answer any of QMT's interrogatories.

Applicant's objection is baseless and made in bad faith. QMT served eight interrogatories. *See* Exhibit D. The TBMP is clear:

"If an Interrogatory requests information concerning more than one issue, such as information concerning both 'sales and advertising figures,' or both 'adoption and use,' the Board will count each issue on which information is sought as a separate interrogatory. In contrast, if an interrogatory requests 'all relevant facts and circumstances' concerning a single issue, event, or matter; or asks that a particular piece of information, such as, for example, annual sales figures under a mark, be given for multiple years, and or each of the responding party's involved marks, it will be counted as a single interrogatory." TBMP 405.03(d).

QMT's interrogatories are straightforward. For example, QMT sought identification of facts known to Applicant in support of the claim non-functionality and distinctiveness of the alleged trade dress. *See* Exhibit D, Interrogatory No. 3. QMT sought the identity of the "arbitrary design features" of the wind chimes claimed by Applicant in her response to the Office Action Letter. *See* Exhibit D, Interrogatory No. 6. In an attempt to understand what QMT believes to be a misrepresentation to the Board, QMT asked for the identification, with specificity, of the language in the Stipulated Mutual and Final Injunction in which the court "acknowledged" Applicant's exclusive right, as she has represented to this Board. *See* Exhibit D, Interrogatory No. 7. Interrogatory No. 8 simply asked for the basis for any denial made in

response to QMT's requests for admission. Even counting each and every issue and subpart of each interrogatory and counting each of the requests to admit (all of which were improperly denied), this would at most be seventy-two discrete interrogatories.

Thus, taking the most extreme and charitable version of Applicant's interpretation of the requests, it is impossible to calculate any version of the interrogatories which exceeds 75

C Applicant's Denials of QMT's Requests to Admit are Improper.

Fourteen of QMT's requests to admit simply sought admissions that certain statements appeared on Applicant's website. For example, QMT sought an admission that Applicant makes the following claim on her website: "heavy gauge polished stainless steel rings provide sturdy support and enduring beauty." Exhibit D, Request to Admit No. 4³. This statement appeared at the relevant date (and still appears) on the website. *See* Exhibit B (current) and *see* Exhibit F (1/27/03 archive). This is true for many of the statements set forth in the request to admit. (Compare Exhibit B and Exhibit F.) QMT attached certain pages of Applicant's current website and simply requested admission that they were accurate and correct copies. Applicant denied this as well. *See* Exhibit E.

QMT also sought Applicant's admission that the Litigation "was not tried and there was no final ruling by the court, rather the parties negotiated and entered into a Stipulated and Mutual Final Injunction and Settlement Agreement." Applicant admitted only that there was negotiation of a Settlement Agreement and denied the remainder.

QMT attached the Settlement Agreement from the Litigation, the Amended Complaint, and one set of discovery responses from the Litigation. Applicant wrongfully denied the

³ The date chosen in the "Requests" is contemporaneous with the date of Application.

accuracy of these documents. *See* Exhibit E. As to her earlier discovery response, Applicant stated that “an answer to a request for admission is inadmissible and may not be used against the party in any other proceeding for any purpose under Fed. R. Civ. P. 36(b) and the requested admission is therefore denied.” *See* Exhibit E at 10. Supposed inadmissibility is no basis for denial of a request to admit which simply seeks to establish the authenticity of the document.

Finally, QMT sought admission that the Southern District of Texas court did not “acknowledge” any exclusive right to the trade dress as Applicant has represented to the Board. Again, without basis, Applicant denied this request. *See* Exhibit E.

D. Applicant Improperly Refused to Respond to QMT’s Requests for Production of Documents.

As she did for QMT’s other written discovery, Applicant improperly responded to the Requests for Production of Documents. Applicant first objected to the “purported” request as “defective, improper and unfair” because it supposedly failed to specify a date or time for production. Applicant states “it is impossible” to say whether inspection can be permitted given this omission. Applicant is correct that there is no specific date and time set for the requested production of documents. Of course, rather than wait to raise this as a basis for not substantively responding (a position never before seen by counsel of record in any matter), counsel could have picked up the phone and asked whether production was intended to be at its office, at its client’s place of business, or elsewhere. This objection is not a valid basis to refuse to provide a substantive response as to the existence of responsive documents. Moreover, the TBMP states that the place for production is governed by 37 CFR § 2.120(d)(2), which in turn provides that the production of documents and things under Rule 34 of the Federal Rules of Civil Procedure “will be made at the place where the documents and things are usually kept, or where the parties agree, or where and in the manner in which the Trademark Trial and Appeal Board, upon

motion, orders ” The Manual goes on to state that “parties often extend each other the courtesy of producing the requested documents by copying the documents and forwarding them to the responding party.” TBMP at 400-49.

Here, these parties have a history of prior discovery. QMT is well aware that Applicant’s documents are maintained at its business facility in Austin, Texas and that it was required to travel to Austin, Texas during the Litigation to review documents. It was reasonable for QMT to expect similar arrangements would be made in this case if Applicant’s counsel chose not to “extend . . . the courtesy” contemplated under the TBMP

In addition to its general objection regarding the alleged “impossibility” to respond, Applicant made further improper objections. With respect to Request No. 2, Applicant refused to produce documents submitted to or received from the USPTO, claiming that it was “unduly burdensome” because the documents are already of record. *See* Exhibit E at 11. Applicant improperly cites TBMP 704.03(a) as a basis for its objection. This rule merely provides that an application against which a notice of opposition is filed is of record and reference may be made to it. Of course, this rule does not speak to discoverability of such information. The fact that either party may cite to matters of record is distinct from QMT’s ability to obtain a complete copy of such documents from Applicant. Moreover, the rule cited by Applicant specifically provides that allegations, specimens, documents, exhibits and other materials filed in the USPTO are not necessarily capable of being cited as evidence, but rather must be identified and introduced in accordance with the rules during the testimony period.

QMT also asked for documents referring or relating to Applicant’s creation and/or development of the alleged trade dress in the wind chimes. Applicant’s response simply is

“N/A.” *See* Exhibit E. QMT takes this as a response that no such documents exist and an appropriate order should enter disallowing any such documents or evidence by Applicant.

QMT also sought documents “referring or relating to every objection that Applicant has made to another’s use or registration of trade dress which [she] contends is confusingly similar to the alleged trade dress (other than QMT).” *See* Exhibit D, Request No. 4. Applicant objected that the request was overly broad, unduly burdensome, subject to confidentiality objections, attorney and client work product privilege/immunity and not relevant or likely to lead to admissible evidence. *Id* If Applicant’s contention is that there are far too many such communications (presumably therefore making it burdensome), this merely begs the question as to how Applicant’s supposed trade dress could be registered. As to confidentiality, Applicant took the initiative to have a protective order entered in this case. Applicant has not provided any privilege log to support its contention of attorney work product or the supposedly privileged materials in response to this request. Lastly, Applicant’s relevance objection is absurd. Third parties’ use or registration of trade dress which Applicant contends is confusingly similar to her alleged trade dress may go directly to the heart of the registrability issues.

QMT also sought documents supporting Applicant’s contention that the alleged trade dress is distinctive. Again, Applicant’s response is to state that the request is overly broad and unduly burdensome. Applicant similarly objected that it is overly broad and unduly burdensome to provide documents supporting her contention that the alleged trade dress has obtained secondary meaning. Applicant makes the same objection with respect to documents supporting the contention that the alleged trade dress is non-functional. These issues are at the core of this Opposition.

Finally, QMT simply sought “a copy of the ruling in which a court of competent jurisdiction ‘acknowledged’ that ESKEW’S Trade Dress Is Legally Protectible” Applicant has specifically represented to this Board that a court made such a finding. *See Exhibit C at 7* Applicant’s response: “vague and ambiguous; argumentative; harassing; unduly burdensome.” *See Exhibit E*

It is clear from the above (and upon one reading of Applicant’s discovery responses) that Applicant intends to further mislead this Board, fail to comply with its obligations under the applicable rules, and obstruct the ultimate determination of its Application

E Appropriate Remedy.

As the Board is aware, Applicant abandoned the subject Application on January 23, 2004, when she failed to respond to the USPTO’s outstanding Office Action Letter. She then, through misrepresentation to the Examiner, was able to resurrect the Application. In fact, when faced with a proper opposition, Applicant sought to summarily dismiss the opposition by making further misrepresentations as to what previously had taken place in the Litigation. Now, when faced with discrete and proper discovery requests, Applicant refuses to substantively respond and interposes baseless objections which do not comport with its or its counsel’s obligations under the applicable rules of practice. *See* IBMP 318 (making Federal Rules of Civil Procedure 11 applicable in matters before the Board). The Board should act to reject such repeated behavior

With respect to Applicant’s baseless denials in response to QMT’s Requests for Admission, each and every matter set forth in QMT’s requests to admit should be deemed admitted and an appropriate order entered.

With respect to QMT’s interrogatories, Applicant should be ordered to respond in full to the interrogatories without further objection.

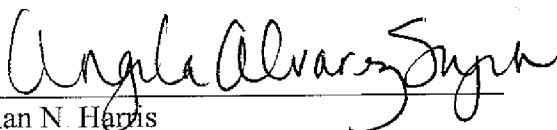
With respect to QMT's request for the production of documents, the Board should enter an order: (a) requiring Applicant to produce copies of any and all documents identified in response to QMT's interrogatories; (b) requiring Applicant make available for inspection and copying, at a mutually convenient date and time, all documents responsive to Request for Production No. 2; (c) precluding Applicant from relying on any information related to Document Request Nos. 3, 5, 6, 7, and 8 or from introducing information sought in the requests as part of evidence in the matter (TBMP 527.01(b)); (d) requiring Applicant to produce a privilege log with respect to any documents being withheld under claim of "privilege;" and (e) requiring Applicant to answer in full and state whether any such documents exist in response to Request No. 9.

The Board is empowered to sanction improper conduct, up to and including entry of judgment, through applicability of Fed. R. Civ. P. 11 and the Board's inherent authority. *Central Mfg., Inc. v Third Millennium Technology, Inc.*, 61 U.S.P.Q.2d 1210 (TTAB 2001); *Carrini, Inc v. Carla Carini S.R.L.*, 57 U.S.P.Q.2d 1067 (TTAB 2000); see Trademark Rule 2.116(a); TBMP § 529.01. Sanctions under this authority are appropriate for filings presented to the Board "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1).

CONCLUSION

For the foregoing reasons, QMT requests the Board grant its motion.

BODMAN LLP

By: 

Alan N. Harris
Angela Alvarez Sujek
Attorneys for Opposer
110 Miller, Suite 300
Ann Arbor, Michigan 48104
734-761-3780

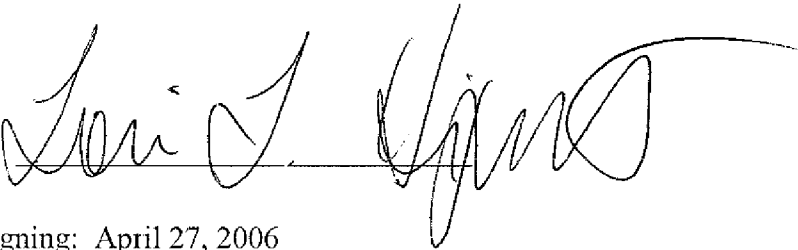
Certificate of Mailing

I hereby certify that the enclosed Brief in Response to Applicant's Motion to Compel Proper Discovery Responses and for an Order as to Insufficient Responses to Requests for Admission (Opposition No. 91165753), regarding the mark "MISCELLANEOUS DESIGN," Serial No. 78/213,865, which will be filed electronically with the Trademark Trial and Appeal Board as of today's date, is being sent via U.S. Mail to:

Daniel Lundeen
1916 Baldwin
Houston, Texas 77002

Name of person certifying mailing: Lori L. Hignite

Signature:

A handwritten signature in cursive script, appearing to read "Lori L. Hignite", written over a horizontal line. The signature is fluid and includes a long, sweeping flourish that extends to the right.

Date of Signing: April 27, 2006

ALAN N. HARRIS

ALSO ADMITTED IN WASHINGTON D C
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AHARRIS@BODMANLLP.COM
734-930-0236

April 7, 2006

VIA FACSIMILE 713-652-2556

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ANN ARBOR MICHIGAN 48104
734-930-2494 FAX
734-761-3780

Daniel N Lundeen
Lundeen & Dickinson, LLP
1916 Baldwin
Houston, Texas 77002

Re: TTAB Opposition No 91165753

Dear Dan:

As this matter continues, I would appreciate if you either would direct filings and communications to me or provide a copy to me, if possible.

I am writing in an attempt to resolve your response to Opposer's Interrogatories, Requests for Admission and Requests for Production of Documents without the need to file a motion in the TTAB. Please let me know immediately whether you will serve complete and proper responses and make responsive documents available for inspection so that we can avoid filing such a motion and the automatic suspension and resulting delays in this matter that will result.

I do not wish to engage in a lengthy letter writing campaign back and forth. Your responses only can be interpreted as a wholesale attempt to refuse to disclose any information in this matter. I will point out a few obvious examples. For example, please explain the basis for the belief that the interrogatories exceed a 75 interrogatory limit. There are eight specific interrogatories. Interrogatory No. 2 does have eight "subparts" (assuming my itemization of those topics qualifies as a subpart under the rule). The question seeks the identity of expert witnesses and includes a fairly typical itemization of topics related to such anticipated testimony. Unless Ms. Eskew intends to call dozens of experts, I do not see how this Interrogatory can lead to a good faith objection. Of course, a responding party cannot manipulate a rule through such an interpretation. Similarly, Interrogatory No. 4, the only other interrogatory with "subparts," looks for information pertaining to any and all legal proceedings involving Ms. Eskew's chimes. Again, unless there has been an incredible flurry of litigation since our last dispute, it is impossible to see how this Interrogatory could have lead to your objection. Our eight interrogatories were intended to narrowly address specific issues given the understanding already in each party's possession from the past litigation. Please confirm whether you will serve a proper response.

Your overarching objection as to the timing of service also is improper. The TTAB Manual of Procedure expressly provides that discovery requests "may be served on

Daniel N. Lundeen

April 7, 2006

Page 2

an adversary . . . through the last day of the discovery period, even though the answers thereto will not be due until after the discovery period has closed.”

Your responses to the Requests to Admit also are improper. For example, information available through the Internet Archive (www.archive.org) confirms the language from which we quoted appeared on your client's website. If the denial is actually based upon the contention that language did not appear on the website, please let me know the factual basis for the denial. Please also clarify the basis for denial as to pleadings in the earlier matter. It is not a basis to deny a request to admit because of alleged “inadmissibility,” which of course you are free to argue before the ITAB at the appropriate time. The Requests simply sought confirmation as to the document.

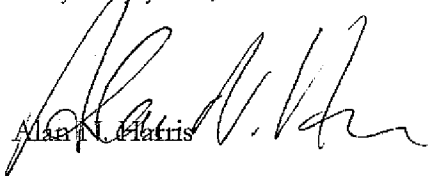
As to your global objection to the Request for Production of Documents, again, the ITAB Manual provides that documents requested to be produced “will be made available at the place where the documents and things are usually kept, or where the parties agree” It also confirms that “parties often extend each other the courtesy of producing requested documents by copying the documents and forwarding them to the requesting party.” If your objection is to communicate that you will not extend this courtesy, please let me know and we can arrange a mutually convenient date and location.

Lastly, this confirms our understanding that your use of the reference “N/A” in your response means that there are no such documents responsive to the Request. If that is incorrect, please provide a complete response.

Again, I have not attempted here to outline each and every failure in regard to your responses because the responses as a whole read as if you have no intent to provide a substantive response to move this matter forward. Please simply confirm that there is no further response forthcoming and we will proceed with a motion.

I look forward to hearing from you.

Very truly yours,


Alan N. Mattis

ANH/lh

c: Angela A Sujek

*** TX REPORT ***

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TX/RX NO 0246
CONNECTION TEL 2#418#17136522556
CONNECTION ID
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RESULT OK

FAXMAIL

BODMAN LLP
SUITE 300
110 MILLER
ANN ARBOR MICHIGAN 48104
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734-761-3780

RECIPIENT: DAVID DICKINSON
DAN LUNDEEN
COMPANY: Lundeen & Dickinson, LLP
FAX: 713-652-2556
PHONE:

FROM: ALAN N. HARRIS
DATE/TIME: APRIL 7, 2006
PHONE: 734-930-0236
TOTAL PAGES: 3

bodman
ATTORNEYS & COUNSELORS

MESSAGE

LUNDEEN & DICKINSON, L.L.P.

Attorneys and Counselors - Intellectual Property Law

DANIEL N. LUNDEEN
DAVID B. DICKINSON*
MARCEE G. LUNDEEN
SCOTT A. SIMMONS

*BOARD CERTIFIED, CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
ALSO ADMITTED LOUISIANA

April 10, 2006

VIA FAX AND FIRST CLASS MAIL

Susan M. Kornfield
Bodman LLP
110 Miller, Suite 300
Ann Arbor, MI 48104

Re: US Trademark Opposition 91165753, pending before the
Trademark Trial and Appeals Board in the United States Patent
and Trademark Office

Dear Susan:

This letter responds to Mr. Harris's fax letter of April 7, 2006. I am writing to you because you are the attorney of record, and I have previously received communications from Mr. Harris that are generously characterized as inconsistent with yours.

We have provided proper responses to your improper discovery requests that are more complete than required. For example, we provided preliminary responses to the categories of documents specified even though no request was made to inspect them.

I do not wish to engage in tit-for-tat correspondence. Your discovery requests, and indeed, the very initiation of this proceeding, can only be characterized as harassment by an intermeddler attempting to run up the cost of administrative proceedings for which it has no real hope of success. For example, Interrogatory No. 8 constitutes 20 parts for each request for admission referred to, with 2 subparts (a description as well as an identity) for each part, for a total of 40 subparts for this interrogatory alone. The Board rules specifically limit the number of interrogatories, including subparts to 75, and we have every right to resist and object to such vexation.

EMAIL • dan@ldiplaw.com
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1916 BALDWIN • HOUSTON, TEXAS 77002
TELEPHONE • 713-652-2555 • FACSIMILE • 713-652-2556

Ms. Susan Kornfield
BODMAN
April 10, 2006
Page 2 of 3

Moreover, unless the request is reasonably limited to the allowed number, we understandably have no obligation to address the merits of any specific interrogatories. See TBMP § 405.03(e).

We do not view the Rules as requiring the respondent to provide any further explanation or factual basis for denial of the requested admissions. Mr. Harris indicates in his letter a desire to understand if we deny that the cited language in several requests for admission was quoted from our client's website; that issue is academic because, unfortunately, this is not what was asked for in your requests for admission. Likewise, you requested admission with respect to the authenticity of the attached documents from the earlier litigation "pleadings," which were either improperly identified, incomplete and/or included extraneous documents, and so properly denied for this reason, in good faith.

Regarding the authenticity of the responses to requests for admission from the earlier litigation, which Mr. Harris improperly alludes to as "pleadings" in his letter, such admissions cannot be used for any purpose whatsoever in any other action such as the present proceeding, and therefore it was indeed proper to deny their attempted use in your requests for admission in the present proceeding. Any filing with the Board that includes a copy of admissions from an earlier proceeding will be met with a motion to strike. Your persistence on this issue clearly will not lead to the discovery of any admissible evidence, and will be seen as typifying the meddlesome, harassing and vexatious nature of your conduct in this proceeding.

As to the purported request for production of documents, it is basic courtesy that "[t]he request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts." TBMP § 403.05 (emphasis in original). Any objection we may or may not have had to producing the documents where the documents are usually kept, as well as any agreement we may or may not have made to provide photocopies as an alternative, is purely hypothetical because you never timely made any proper request for the inspection in the first place.

As noted above, we provided some preliminary objections to the specified categories, but could not fully provide these because you neglected to specify the location, date, time and manner of inspection and related

Ms. Susan Kornfield
BODMAN
April 10, 2006
Page 3 of 3

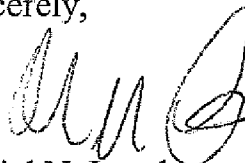
activities. We reserve the right to supplement or amend our responses to the requests if the location, date, time and manner of inspection and related activities are specified in a timely and proper request for production.

Moreover, the documents specified but not requested appear to be duplicative of and/or cumulative to the documents already produced to you in the earlier litigation. Their production would not permit you to introduce them in evidence. See TBMP §403.05(b). The purported request for reproduction to you a second time is nothing but a transparent and rather blatant attempt to harass, embarrass and/or subject Ms. Eskew to the undue burden and expense of going through the motion of repetitive document productions.

It is unfortunate that you did not serve any discovery before the last day of the discovery period so that you would have had time remaining for follow-up discovery to address the deficiencies. See TBMP §406.03. In fact, because we did not receive them until after discovery had closed, we were unable to timely alert you to the potential problems.

The late timing of your highly improper discovery requests, the overly burdensome, harassing and vexatious nature of the discovery requests, and the entirely baseless nature of the opposition proceeding, on the whole, read as if your sole purpose for pursuing this case is to harass and vex our client and force her to spend needless time and resources re-trying issues you previously agreed to in settlement of the federal litigation. Any motion to compel you may file will be met by appropriate counter-motions.

Sincerely,



Daniel N. Lundeen
Attorney at Law

DNL/jtc

C: Mr. Alan N. Harris

ALAN N. HARRIS

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734-930-0236

April 21, 2006

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734-930-2494 FAX
734-761-3760

Daniel N. Lundeen
Lundeen & Dickinson, LLP
1916 Baldwin
Houston, Texas 77002

Re: TTAB Opposition No. 91165753

Dear Dan:

We are writing in a further effort to avoid motion practice as to your client's insufficient discovery responses. We agree that lengthy back and forth is not productive. You may recall that we requested that the parties discuss and agree to allow the use of certain materials from the federal court matter in an effort to minimize any burden and reduce costs. You rejected this approach. The PTO rejected your motion to dismiss, thus your continued mischaracterizations as to the basis for this opposition are misplaced and, regardless, do not excuse the failure to meaningfully participate in discovery.

We will only briefly address the comments in your letter of April 10 as you do not appear willing to resolve the issues. If we are incorrect, please us know immediately so that we can avoid a motion.

1. Your main objection appears to be to the number of interrogatories submitted for response. We disagree with your assessment that Interrogatory No. 8 constitutes 40 separate interrogatories. The TTAB rules are clear:

“If an Interrogatory requests information concerning more than one issue, such as information concerning both ‘sales and advertising figures,’ or both ‘adoption and use,’ the Board will count each issue on which information is sought as a separate interrogatory. In contrast, if an interrogatory requests ‘all relevant facts and circumstances’ concerning a single issue, event, or matter; or asks that a particular piece of information, such as, for example, annual sales figures under a mark, be given or multiple years, and or each of the responding party's involved marks, it will be counted as a single interrogatory.”

Daniel N. Lundeen

April 21, 2006

Page 2

Even if Interrogatory No. 8 is counted as 40 questions (with which we disagree), the total number of interrogatories (including each and every clause and subpart) is 72 which is within the 75 interrogatory limit

2. With regard to the Requests for Admission, the questions pertained to language/statements made on your client's website as of the date of filing of the Application for U.S. Trademark Registration of the trade dress. While you have denied the Requests, we have been able to use the Internet archive to print out pages from your client's website both before and after the date which show that the statements did exist as of that date. Thus, we seek to understand the basis for the denials.

3 We disagree that the prior pleadings cannot be used for any purpose, e.g., impeachment, among others.

4 We fail to see the purpose of the denial that the attached Settlement Agreement (we did not attach the Stipulated Injunction which is already in the record, as you recognize), Amended Complaint (which has all the attachments), and the Answers to Requests for Admissions are accurate copies of those documents. The documents appear to be accurate copies, and none seem to have extraneous matter attached

5. Lastly, we continue to remain willing to discuss an agreeable time and place for production.

We look forward to hearing from you promptly if a motion is to be avoided.

Regards,


Alan N. Harris

ANH:lh

*** TX REPORT ***

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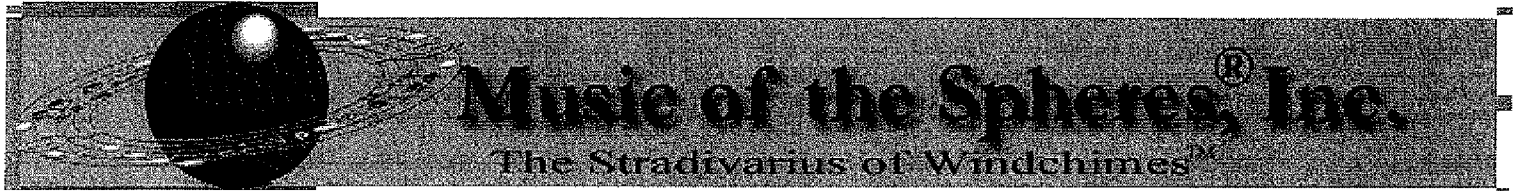
BODMAN LLP
SUITE 300
110 MILLER
ANN ARBOR, MICHIGAN 48104
734-930-2494 FAX
734-761-3780

RECIPIENT: DAN LUNDEEN
COMPANY: Lundeen & Dickinson, LLP
FAX: 713-652-2558
PHONE:

FROM: ALAN N. HARRIS
DATE/TIME: APRIL 21, 2006
PHONE: 734-930-0236
TOTAL PAGES: 3

MESSAGE

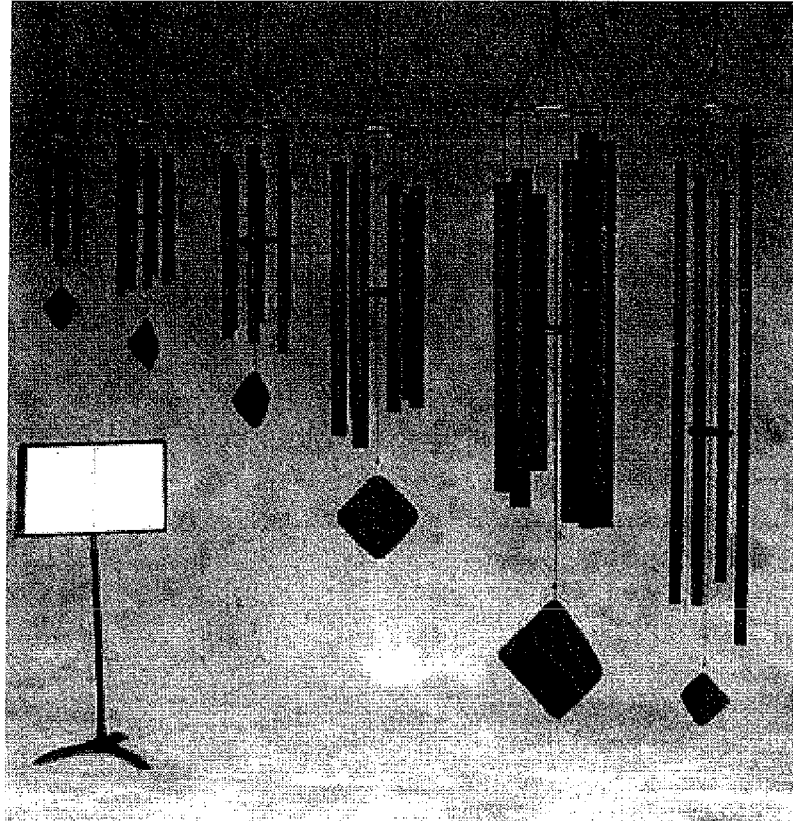
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ATTORNEYS & COUNSELORS



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"World Peace - One Backyard at a Time"

-- Larry Roark, Founder



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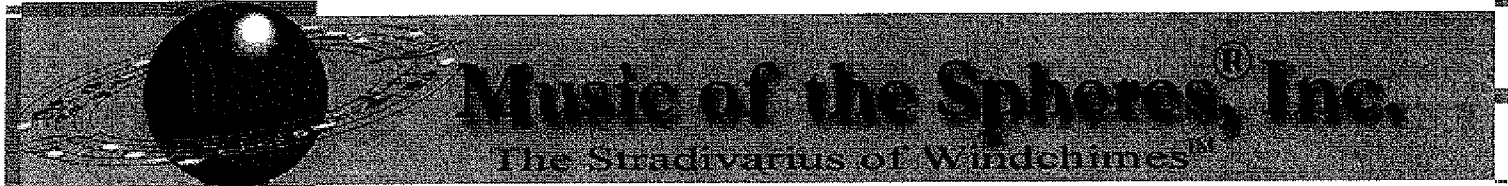
Hand-crafted, Symphonic Quality Chimes

Satisfaction Guaranteed!-- 30 day unconditional return policy

- Six sizes spanning four octaves
- Ten musical scales, plus the unique Westminster
- The amazing, 14' Basso Profundo wind chime
- Standard orchestral pitch (A 440)
- Custom tunings available
- Black, powder-coated, aluminum alloy tubing
- Adjustable activity control
- Durability also guaranteed:
 - 7 years outdoors for Soprano, Mezzo-Soprano and Alto
 - 15 years outdoors for Tenor and Bass
 - 15 years outdoors Basso Profundo

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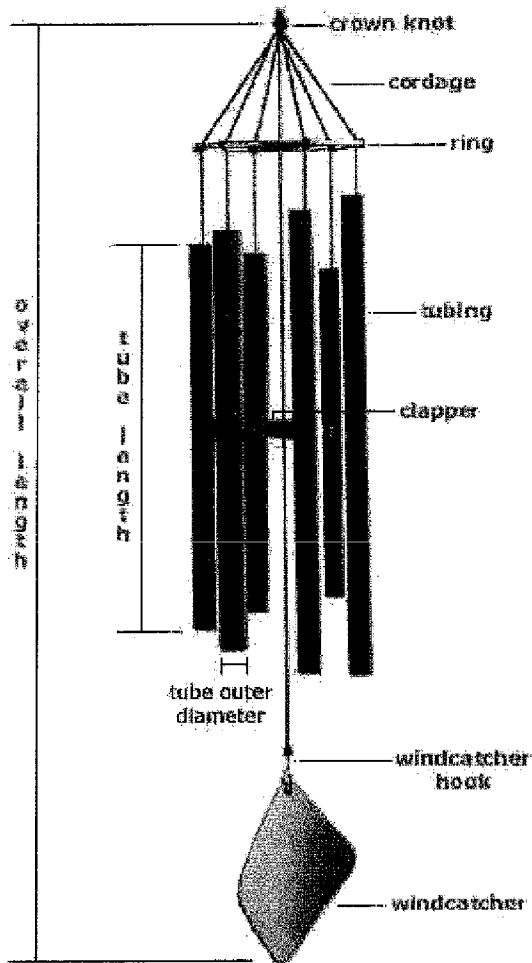
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Materials & Construction

High quality materials, exacting tolerances and methodical assembly protocols ensure lasting quality and beauty.



Ⓜ Home

- Tough synthetic cordage is highly resistant to abrasion, ultra-violet degradation, rot and mildew. Central tube suspension with smoothly polished tube ends prevent cord abrasion typical of other, less labor-intensive suspension techniques.
- Heavy gauge polished stainless steel rings provide sturdy support and enduring beauty.
- Tempered aluminum alloy tubing is custom manufactured to our exacting specifications and will never rust.
- Our corrosion-protective finish preserves chime's appearance and increases durability in hostile environments (acid rain, salt air).
- We cut and precisely tune each tube by hand using just intonation, except for the whole tone scale, which uses equal temperament.
- Tubes are tuned to A440, standard orchestral pitch, using the latest in technology.
- Solid polyethylene clappers provide superior tonal quality and outdoor durability
- The windcatcher, of the same finish and material as the tubes, is the ideal size,

weight, and shape for optimal chime performance in 8 - 10 mph wind velocity. The corrosion protective finish provides durability in all kinds of outdoor environments (acid rain, salt air, etc.)

- The windcatcher hook assembly provides simple but effective method of varying the chime's activity level.
- The clapper slides on the central cord up into the ring creating a convenient "off-on" feature.
- Windcatchers can also be easily removed to subdue chime activity under blustery conditions.
- A rigorous final inspection ensures that your chime is up to our high standards of acoustic and visual quality.

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Frequently Asked Questions About Our Chimes

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Q: I don't understand the difference between "sizes/voices" and "tunings"?

A: Use this analogy to buying a shirt: you could think of tuning as the color and pitch range as the size. You can get a shirt in pink, blue and yellow; and you can also choose small, medium and large. You may also think of our tunings as songs. Each of them is available in various pitch ranges (sizes). A musical instrument must be made larger to create lower pitches (For example, a higher pitched violin is smaller than its cousin, the lower pitched cello. Each can play the same melody, but in different pitch ranges.) Please go to the "Hear Our Chimes" section of the website to hear the different tunings in the different pitch ranges.

Q: Can I hang my Music of the Spheres windchimes outside?

A: Yes, they are designed for lasting outdoor durability. Please refer to our "Materials & Construction" section of the website for descriptions of our durable materials and method of construction. If you want to appreciate the beauty and ambience of your Music of the Spheres windchime indoors you can "power" the chime with an oscillating fan or a pull cord. Children have also been taught to gently "play" the chime for their parents. One customer even positioned the windcatcher in the path of the cat door!

Q: Are my Music of the Spheres windchimes covered by a warranty?

A: Yes, our Soprano, Mezzo-Soprano, Alto and Westminster chimes are warranted for 7 years from the date of purchase against defects in materials and workmanship. Tenor, Bass and Basso Profundo chimes are similarly warranted for 15 years.

Q: What are the specifications and prices for your windchimes?

A: Please refer to the specification chart for this information

Q: Can I get my chimes repaired if they should be damaged?

A: Yes, please call or email for a return or repair authorization. If a repair is covered by warranty, there will be no charge. If not, a \$25 charge plus the cost of any additional components and return freight will apply. If you have a non-Music of the Spheres chime and would like it repaired, the policy is the same as for a non-warranted chimes.

Q: How can I increase (or decrease) the activity of my Music of the Spheres windchime?

A: 1. Hang the chime in a different location, either more or less exposed to wind.
 2. Hang the chime from the first knot above the ring for greater activity and from the second knot for lower activity.
 3. Adjust the size of the windcatcher. To identify your windcatcher you may refer to the diagram on the "How They're Made" page. The wind catcher at the bottom of your chime is the "motor" that makes it work. Windcatchers harness the power of the wind and transfer it to the clapper, which moves to strike the tubes and play the music. The larger the windcatcher surface area for any given size chime, the less wind is needed to activate it. We design our chimes to play in eight to ten mile-per-hour breezes. If your chimes hang in an extraordinarily enclosed or exposed area, they will require a correspondingly larger or smaller wind catcher than the standard one, to achieve a "standard" activity level. If you feel you need a different size windcatcher, return yours, asking for either the next size up or down and we will send a replacement at no charge.

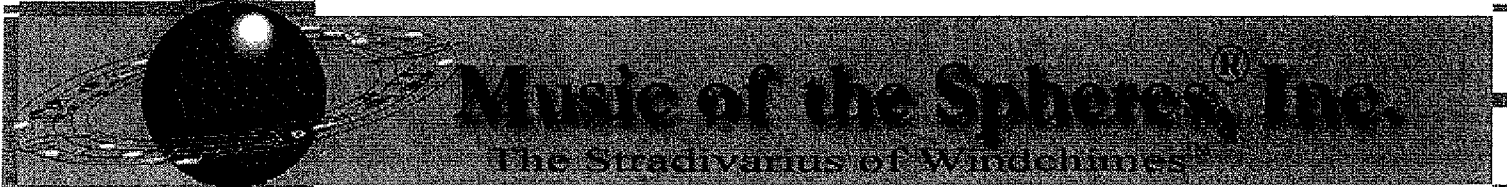
If you would like to keep yours and buy an extra, [click here](#).

Q: How should I hang my chime?

A: There are a number of safe ways to hang your chime. The "best" for a particular circumstance will depend on which chime size you're hanging and where it is you would like it to hang. In all cases, simply using some basic common sense is a great start. In many cases, hanging a chime "properly" is not a complicated matter. Some chime hanging basics are:

- Don't hang your chime on anything that is sharp or abrasive. Over time the cord will be cut or worn and will eventually break. For instance, instead of hanging the chime from an old rusty nail, take the time to get a carabiner or some other sort of metal ring. Hang the chime from the ring, then hang the ring from the nail.
- Do consider the fact that the forces on the chime support will vary and will increase substantially during severe weather conditions. When planning the support for your chime, take the time to "do it right" by preparing for stormy conditions.
- Do test the installation by giving a "tug" on the chime after hanging it to make sure it stays put. For the smaller chimes, a gentle downward pull will suffice; whereas for the larger, heavier chimes, a good solid downward test pull is a good idea. A good rule of thumb is to test the installation with a force that is between two and three times the weight of the chime.
- Do be considerate of your tree. When hanging chimes from a tree limb, use a blanket or a piece of rubber to spread out the load on the limb. This will avoid cutting into the bark and damaging the tree. A section of an old bicycle tire works very well for this purpose.
- Do use a [deck hook](#) as a safe and convenient way to hang the chimes from a deck railing.
- Do use a [wall bracket](#) to hang the chime from a wall. If mounting the bracket on a brick, stone or masonry wall, use the proper inserts for the job.
- Do be creative and consider as many options as you can think of when trying to hang a chime. When in doubt, feel free to contact us for advice.

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- Ⓞ Our Chimes
- Ⓞ **Chime Sizes**
- Ⓞ Soprano
- Ⓞ MezzoSoprano
- Ⓞ Alto
- Ⓞ Tenor
- Ⓞ Bass
- Ⓞ Basso Profundo
- Ⓞ Chime Tunings
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CHIME SIZES

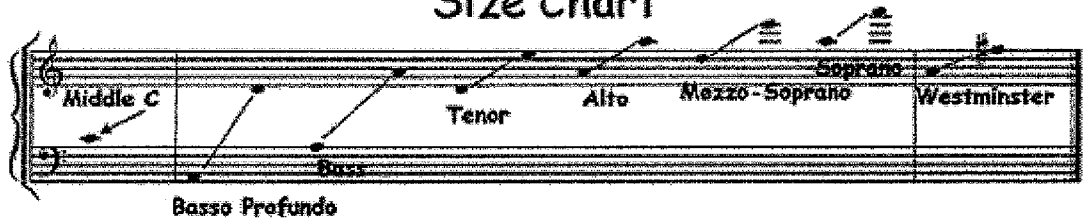
Our Chimes come in several sizes, which is the same as saying pitch ranges.

The larger chimes have a lower pitch and smaller chimes have a higher pitch.

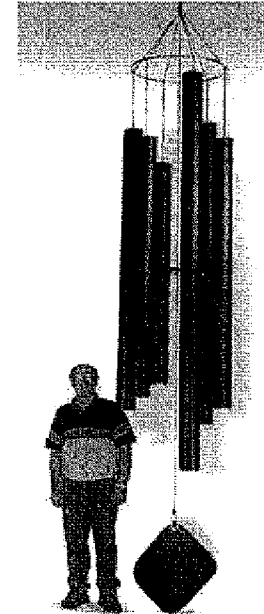
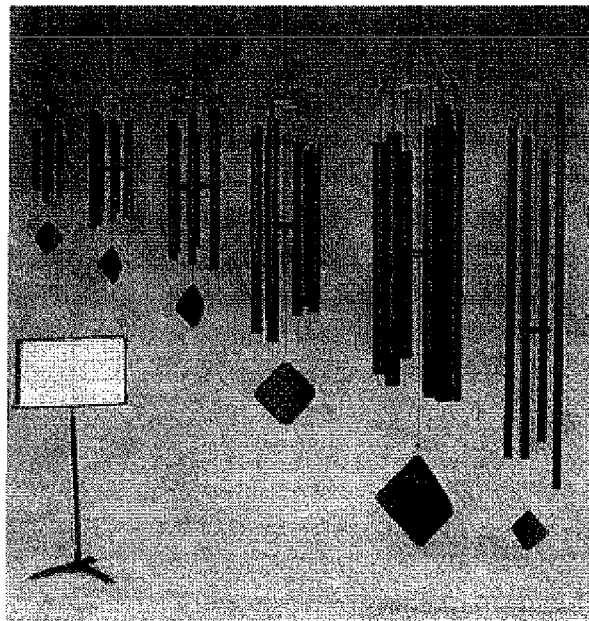
We have designed our chime sizes so that their pitch ranges overlap and complement each other.

Select one of the pitch ranges shown on the musical staff or one of the chimes in the image below for more information about that size.

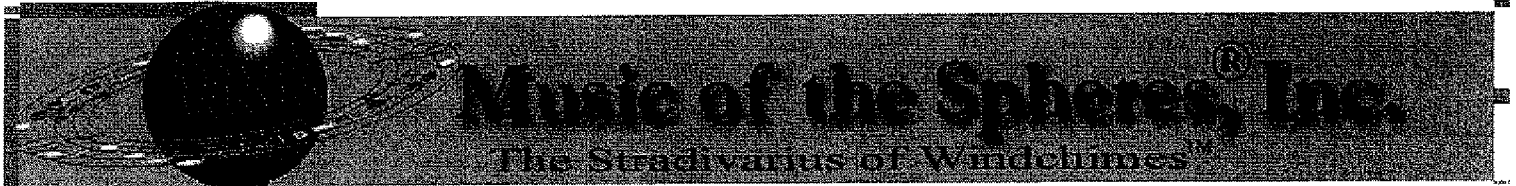
Size Chart



- Ⓞ Home



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- [Musical Scales](#)
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CHIME TUNINGS



Pentatonic



Chinese



Aquarian



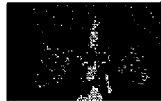
Mongolian



Hawaiian



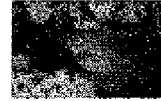
Balinese



Japanese



Gypsy



Whole Tone



Quartal



Westminster

- [Home](#)

Our founder, Larry Roark, designed our chimes in a variety of musical scales so you could choose the one that sings most sweetly to you. The eleven musical scales we make are divisible into two main categories of music which we can simply call the "more familiar" and the "more exotic" sound.

FAMILIAR	EXOTIC
Pentatonic Quartal Chinese Mongolian Westminster	Hawaiian Japanese Balinese Whole Tone Aquarian Gypsy

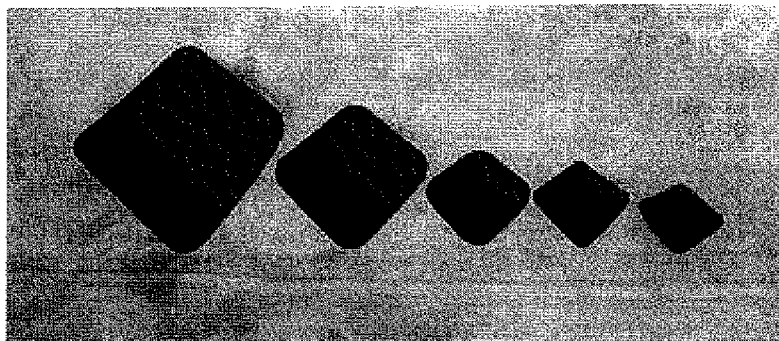
You will find the distinctions between the categories easier to make than the distinctions between windchimes within a category. The "familiar" major scales are quite similar one to the other, while the exotic scales are only somewhat similar one to the other. If you are having trouble deciding what you like, first determine the category that pleases you and focus there. Listen and watch for a tuning that seems to make the lines in your forehead relax more quickly, or one that begins to bring a sense of ease or calm. Let your mind relax and enjoy the process, it's not an intellectual exercise. And besides, there's no wrong answer.

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AUXILIARY PRODUCTS - Windcatchers

- Ⓞ [Our Chimes](#)
- Ⓞ [Chime Sizes](#)
- Ⓞ [Chime Tunings](#)
- Ⓞ [About Us](#)
- Ⓞ [Auxiliary Products](#)
- Ⓞ [CD and Cassette](#)
- Ⓞ [Windcatchers](#)
- Ⓞ [Brackets and Hooks](#)
- Ⓞ [Shop Online](#)



- Ⓞ [Home](#)

The diamond-shaped wind catcher at the bottom of your Music of the Spheres® , Inc. chime is the "motor" that makes the chime work. Wind catchers harness the power of the wind and transfer it to the clapper, which moves to strike the tubes and play the music.

The larger the surface area of the wind catcher for a given size chime, the less wind is needed to activate it. We design our chimes to play in eight to ten mile-per-hour breezes. If your chimes hang in an extraordinarily enclosed or exposed area, they will require a correspondingly larger or smaller wind catcher than the standard one, to achieve a "standard" activity level. When ordering a larger windcatcher, you should also order, in most cases, the next larger hook attachment. The hook attachment works like a safety pin and permits easy removal and reattachment so that you can exchange wind catcher sizes. This ease of removal also permits you to "turn down" the chime easily during intermittent windy weather.

Our Music of the Spheres® , Inc. wind catchers are made of tempered aluminum alloy with a powder coat finish. This finish provides corrosion protection and durability in all kinds of outdoor environments (acid rain, salt air, etc.)

Size and pricing information for extra wind catchers appear in the table below. Please place your order on our order page.

Wind Catcher Size	Size (Square)	Price	Shipping	Total
Soprano (small)	4 5/8"	\$8 00	\$5 00	\$13 00
Mezzo-Soprano/Westminster (medium small)	5 1/4"	\$9 00	\$5 00	\$14 00
Alto (medium)	6"	\$10 00	\$5 00	\$15 00
Tenor (medium large)	8 1/2"	\$12 00	\$5 00	\$17 00
Bass (large)	12"	\$15 00	\$5 00	\$20 00

Basso Profundo (XXL)	18"	\$35.00	\$5.00	\$40.00
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CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 on the date shown below:

Date

4/14/04


Marcée Lundeen

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

U.S. SER. NO. 78/213865

ATTY DOCKET: ESK-004

FILING DATE: 2/12/2003

APPLICANT: Sara Neal Eskew

Examining Attorney: Naakwama Ankrah

MARK: Goods and Services:
Tuned Wind Chimes

LAW OFFICE: 106

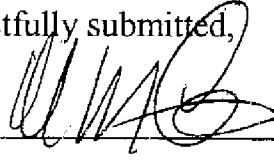
CLASS NO : 028

PETITION TO REVIVE

Applicant hereby petitions to revive the above-identified application. The application went abandoned on **March 30, 2004**. This petition is filed within two months of that date. The delay in filing the response on or before the due date was unintentional. A copy of the proposed response filed of even date herewith accompanies this petition, and payment from deposit account no. 501285 in the amount of \$100.00 for the petition fee is authorized. The commissioner is hereby authorized to charge any missing fee or fee deficiency, or credit any fee overpayment to deposit account no. 501285. A duplicate copy of this sheet is enclosed.



Respectfully submitted,



Daniel N. Lundeen

LUNDEEN & DICKINSON, L.L.P.

P.O. Box 131144

Houston, Texas 77219-1144

Telephone (713) 652-2555

Facsimile (713) 652-2556

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 on the date shown below:

4/14/04
Date
Marcee G. Lundeen
Marcee G. Lundeen

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT:	Sara Neal Eskew	§	
		§	
SERIAL NO.:	78/213865	§	
		§	
FILED:	February 12, 2003	§	EXAMINER:
		§	Naakwama Ankrah
FOR:	Goods and Services:	§	
	Tuned Windchimes	§	
		§	

RESPONSE TO OFFICE ACTION DATED JULY 23, 2003

Atty. Docket No.: ESK-04
Date: July 24, 2003

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514
ecom106@uspto.gov

Dear Sir or Madam:

This proposed response accompanies a Petition to Revive the application. In response to the office action of July 23, 2003 please consider the following amendment, remarks and the attached evidence of distinctiveness and non-functionality.

Classification.

Please amend the application to reflect that the class of goods is International Class 21.

Introduction.

Concurrent with this application, Applicant sought protection of her trade dress under the Lanham Act and Applicant filed a lawsuit against a competitor. As a result, the parties entered into a Stipulated Mutual Final Injunction. This order from *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas (October 28, 2003) is attached as Exhibit 2. "It can be safely taken as fundamental that reputable businessmen-users of valuable trademarks have no interest in causing public confusion." *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 1362, 177 USPQ 563, 568 (CCPA 1973). Here, a competitor, who is intimately familiar with the market for tuned wind chimes, has agreed to abstain from replicating the unique combination, admittedly, seen only in Applicant's wind chimes.

Distinctiveness.

Applicant's trademark consists of the black-and-silver trade dress of a wind chime with black notes or tubes in combination with an open metallic silver suspension ring and a black diamond-shaped wind catcher, which has been used extensively, continuously, and substantially exclusively by applicant and predecessors-in-interest since 1994. The office action asserts that this extensive use is insufficient to establish that the trade dress has acquired distinctiveness. Applicant respectfully traverses and submits the results of a 2002 consumer survey (*See* Gelb Survey, attached as Exhibit 1) as further competent evidence to establish that the mark has acquired distinctiveness – that the purchasing public associates the trade dress with a

single source. See *Ralston Purina Company, Inc. v. Thomas J. Lipton, Inc.*, 173 U.S.P.Q. 820, 825 (S.D.N.Y. 1972).

Consumer surveys are highly persuasive evidence of secondary meaning. See *Tone Bros., Inc. v. Sysco Corp.*, 31 U.S.P.Q.2d 1321 (Fed. Cir. 1994) (quoting *Co-Rect Prods., Inc. v. Marvy! Advertising Photography*, 228 U.S.P.Q. 429, 434 n. 9 (8th Cir. 1985) concluding that "[c]onsumer surveys are recognized by several circuits as the most direct and persuasive evidence of secondary meaning"). The results of the Gelb Survey were that 56 percent of those surveyed believed the trade dress was from a single source. The authority supports a universally unequivocal finding of secondary meaning where surveys yield results higher than 50 percent. See McCarthy § 32:190 (illustrating secondary meaning can be established with as little as 37 percent); *In re Jockey Int'l Inc.*, 192 U.S.P.Q. 579, 581 (TTAB 1976) (finding acquired distinctiveness with 51.6 percent); *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 217 U.S.P.Q. 988 (5th Cir. 1983) (concluding that a 23-28 percent favorable response was sufficient to establish secondary meaning). The Gelb Survey, considered in view of Applicant's long and substantially exclusive use of the mark, since 1994, is clearly sufficient to establish that the mark has acquired secondary meaning.

Non-functionality.

The office action refused registration on the ground of functionality. Applicant traverses and submits that the trade dress for which registration is sought is merely a discrete combination of largely arbitrary design features for a wind chime, and is not legally functional. The functionality of a product design can be determined by scrutinizing the mark under the

Morton-Norwich factors. 213 U.S.P.Q. 9, 15-16 (CCPA 1982).¹ Analysis of the mark under these factors demonstrates the non-functionality of the trade dress.

(1) There is no utility patent disclosing the advantages of the product design.

Applicant's wind chime design is discrete from any functional attributes that might result in the superiority of sound. None of the arbitrary design features for which applicant seeks trade dress protection are patentable as utilitarian; applicant and predecessors-in-interest have never filed for or obtained any patents disclosing the utility of black tubes, open ring suspension systems with a metallic silver ring and diamond-shaped wind catchers or the thematic color schemation for wind chimes.

(2) Utilitarian features of the wind chime are independent from the look.

The combination of design features, i.e. black tubes, black diamond wind catcher, metallic silver suspension ring, etc., is arbitrary and not dictated by utilitarian function. Applicant's wind chimes have a black and silver color scheme, i.e. metallic silver suspension ring, note ends, note interiors and note side dots, and a matte black note exterior, cordage and diamond-shaped wind catcher. The notes in the product wind chimes of applicant are matte, black powder-coated aluminum-alloy tubing. Because aluminum does not rust, the color of the powder coating is entirely arbitrary. Corrosion resistance is not a function of the powder coating, or more particularly the black color that is included in the trade dress for which applicant seeks protection. It does not matter what the aluminum notes

¹ The Trademark Trial and Appeal Board, in *Valu Engineering Inc v. Rexnord Corp.*, held that analysis of a product design under *Morton-Norwich* is still appropriate, even in light of the Supreme Court's opinion in *Marketing Displays, Inc. v. TrafFix Devices, Inc.*, 532 U.S. 23 (2001) 61 U.S.P.Q. 1422, 1427 (2002).

and/or windcatcher and/or top ring are coated with, or what the color of the coating (or anodization) is insofar as the performance of the chime is concerned.

Moreover, the use of a coating creates handling problems to keep from scratching or chipping during manufacture. Coated tubes and wind catchers, regardless of color, are also more expensive than uncoated tubes/wind catchers. The tonal quality difference between uncoated and coated tubing used in the wind chimes are rather slight if at all, and in any case the coating (regardless of color) is disadvantageous in that it tends to reduce the sustain time. In general, how carefully the notes are tuned is much more important for sound quality than the material of construction.

The metallic silver open ring suspension platform from which the cordage depends to support the tubes in applicant's distinctive wind chime design has nothing to do with tonal quality whatsoever. The shape and color of the ring do not at all affect the sound of the tubes. The material of the ring is not significant so long as it does not rust, and there are many materials that do not rust, e.g. aluminum, stainless steel and coated steel. The choice of a ring material visually contrasting with the black tubes is highly distinctive and does not affect the cost or quality of the product. Indeed, a competitor wanting to use a matching suspension ring would select a black one or would pair it with uncoated tubes, or some other color combination from which applicant's wind chime design would be readily distinguishable.

Applicant's wind catcher is functional only in the sense that it is three-dimensional to enhance motion from a cross-wind, but the two dimensional shape of a diamond, the black color and even the selection of curving as the means for imparting three-dimensionality are entirely arbitrary. There are

commercially available a virtually infinite number of alternative three-dimensional designs other than curved, an unlimited number of colors other than black, and no end of shapes other than diamond. Competition would not be hindered at all by requiring a chime manufacturer to select a visually distinct alternative from the wide number of functionally equivalent designs that are available. Note the commercially available competitive designs in the Gelb Survey, Exhibit 1, and the “nose” design allowed in the Stipulated Mutual Final Injunction from *Eskew v QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas (October 28, 2003), attached as Exhibit 2.

(3) Competitors currently manufacture functional equivalents.

The *Morton-Norwich* court highlighted that the effect upon competition of granting trade dress protection should be the major concern. *Morton-Norwich*, 213 U.S.P.Q. at 16. In the present case, competitors are not only *able* to make equivalents, but such wind chimes currently exist on the market. The manufacturer of the Grace Note wind chime produces a similar quality wind chime, while utilizing a substantially different *overall look*. (See Photo of Grace Note Chime in Gelb Survey, Exhibit 1.) Note also the black note/nose-shaped wind catcher/coated top ring design available from the defendant under the injunction of Exhibit 2.

(4) The design is more expensive and time-consuming than the alternatives.

As noted above, coated or colored tubes and wind catchers, regardless of the color selected, are more expensive than uncoated materials and create handling problems to keep from scratching or chipping during manufacture.

(5) The court and competitors acknowledge the exclusive right of applicant to manufacture black-and-silver wind chimes with black tubes, diamond-shaped wind catcher, and metallic silver suspension ring.

Applicant submits herewith a copy of the Stipulated Mutual Final Injunction from *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas (October 28, 2003), attached as Exhibit 2, in which the defendant and the court acknowledged applicant's exclusive right to the wind chime trade dress consisting of black tubes, an uncoated metallic silver suspension ring, and a black, diamond-shaped wind catcher. Competitors and the court thus acknowledge that the trade dress is legally protectable to applicant.

Applicant is entitled to registration of the trade dress, consisting solely of arbitrary, non-functional design features including the combination of black tubes, an open ring suspension with a metallic silver ring, and a black, diamond-shaped wind catcher, as evidenced by the analysis under the *Morton-Norwich* factors.

Conclusion.

For the reasons outlined above, applicant respectfully requests further examination of the application and reconsideration of the refusal to register. Upon consideration of the enclosed evidence and foregoing remarks, early acceptance of the application for publication is respectfully solicited. If there are any remaining issues or questions, undersigned counsel is available for a telephonic or personal interview.

Respectfully submitted,



Daniel N. Lundeen
LUNDEEN & DICKINSON LLP
PO Box 131144
Houston, Texas 77219-1144
(713) 652-2555 Telephone
(713) 652-2556 Facsimile

I. Qualifications

I am founder and senior consultant of Gelb Consulting Group Inc., a market research and marketing consulting firm established in 1965. Our firm collects and analyzes information that helps organizations improve their decision-making, from new product development to advertising and brand image to customer satisfaction measurement.

With a staff of 10 professionals, Gelb Consulting is retained by a wide range of companies, not-for-profit and government agencies to advise them on marketing issues, including, but not limited to consumers' purchase decision process. These clients include:

American Airlines, American Express Publishing, American Automobile Association, AOL Time Warner, Bristol-Myers Squibb, Compaq Computer, Dallas-Fort Worth Airport, Houston Chronicle, Houston Symphony Orchestra, Kimberly-Clark, Kroger Food Stores, Michelin North America, M. D. Anderson Cancer Center, Pebble Beach Golf Links, Pennzoil-Quaker State Co., Pfizer Inc. and Oprah Winfrey

In addition, we have conducted studies for the following educational institutions – Baylor College of Medicine, South Texas College of Law, University of Arkansas, University of Houston, and University of Texas.

My individual practice includes consulting and/or serving as expert witness in cases involving trademarks, trade dress, brand names, and product and market analysis.

I have participated in about 30 such lawsuits. The Fifth Circuit has cited, with approval, my expert report in *Two Pesos Inc v Taco Cabana Inc.*, and so has the Fourth Circuit in *Resorts of Pinehurst v. Pinehurst National and Pinehurst Plantation*.

The State Bar of Texas has accredited my course on "Uses and Misuses of Surveys in IP Litigation" for two hours of CLE credit. I have also presented a workshop for the Houston Intellectual Property Lawyers Association and currently serve as a guest lecturer on trademark and trade dress litigation in trademark classes at the University of Houston Law Center.

See my C V, [*Exhibit A*], for my publications and the list of cases in the last four years in which I have participated.

II. Opinion Formed in this Case

Based on the consumer survey I conducted in Chicago and Houston, the Music of the Spheres wind chimes have acquired secondary meaning among their relevant population.

III. Bases of Opinion

I base my opinions on 37 years of market analysis, including over 600 market studies conducted by my firm. My background in communications includes a master's degree from the University of Missouri School of Journalism.

In preparing this report, I reviewed the MOTS trademark application, the conditions under which the MOTS wind chimes are marketed.

I also read various copies of the relevant trade magazine, Garden Center Products & Supplies. In addition, I toured the office and plant of Music of the Spheres in Austin and observed its manufacturing process. I also visited retailers in Austin and Houston that displayed various types of wind chimes for sale.

IV. Discussion and Analysis

A principal requirement for proving protectable trade dress on a product configuration is that the claimant proves that its product or line of products has acquired secondary meaning. The test of secondary meaning is whether a significant portion of the relevant population, believes that only one manufacturer makes a product or line of products, that is, it comes from a single source.

This is typically accomplished in an objective survey of purchasers and potential purchasers of the subject product.

Objective:

The objective of the study was to determine whether the relevant population in two different cities, after viewing the MOTS wind chimes and three controls, believe that MOTS chimes originate from a single source.

I conducted the survey in two major markets: Chicago and Houston. Given the relatively high price of what are called tuned wind chimes, I defined the relevant population as individuals who had bought or had considered buying wind chimes that cost over \$45.

Implementation

In the survey, a total of 198 qualified respondents were intercepted at shopping malls and brought to a research facility where chimes from four different manufacturers were displayed on a rack. [See *Exhibit B* for photograph of actual rack with chimes]

The locations were First Colony Mall in Sugar Land (Houston) TX and Orland Square Mall in Orland Park (Chicago), IL.

Survey participants were told {see *Exhibit C* for the questionnaire}:

“Please look at these four wind chimes. Let me know when you have looked carefully at each one (A letter identifies each wind chime – “O,” “L,” “R”, and “N”. Ask all questions for each wind chime. Rotate order asked)

“I’m going to ask you a question about each wind chime. If you don’t know the answer, it’s OK to say so.

“Do you think that this wind chime is made and offered by only one manufacturer or do you think that this winds chime is available from more than one manufacturer?”

and then:

“Why do you say that?”

The four wind chimes, rather than just one, were displayed so that respondents would not be focusing on a single chime; the same set of questions was asked about each chime. The rack was rotated at different times during the day so that successive respondents were faced with different chimes.

Survey Results

Fifty-six percent, 56%, of the survey respondents said that MOIS chime-- identified only with the letter “L”-- is made and offered by only one manufacturer.

Twenty-nine percent, 29%, said the chime identified as “L” were available from more than one manufacturer, and 15% said they don’t know.

[See *Exhibit D* for Tables of Data from the survey]

Asked why they said MOIS chime came from a single manufacturer, the most-mentioned answers were as follows:

Has an original/modern/unique design	38% (of those who said one source)
Black tubes/color makes it different	25%
Professional/quality work	14%
Sound is different/ richer	14%
Never saw one like it/cone on top	10%
Ring on top is unique	7%

Quality Control

Marilyn MacRill, manager of research operations at Gelb Consulting, briefed and trained interviewers at the two shopping mall sites, and observed their initial work. She did not inform the interviewers or their supervisors the nature of the study or the study sponsor.

Interviewer instructions were presented in a written document. Another document in the survey was the validation script [See both in *Exhibit E*]

The completed interviews were validated as follows: On-site supervisors observed 20% of the interviews and an additional 30% of the survey respondents were called by an independent survey firm to confirm that the interview took place; thus, 50% of the survey participants were validated as to having taken part in this survey.

The completed questionnaires were sent to the Gelb offices for tabulation and coding by Ms. McRill.

Summary:

A survey of the relevant population determined that over half of a sample of qualified respondents said that the MOIS chime came from a single source and many identified components of the claimed trade dress as the major reasons for their answers.

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


Gabriel M. Gelb

Dated: February 17, 2003

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
ENTERED

OCT 28 2003

Michael N. Milby, Clerk of Court

SARA NEAL ESKEW, INDIVIDUALLY §
AND AS REPRESENTATIVE OF THE §
ESTATE OF LAWRENCE GLENN ROARK §
d/b/a MUSIC OF THE SPHERES §
Plaintiff §

VS §

QMI ASSOCIATES, INC. §
Defendant §

CIVIL ACTION NO. H-01-CV-1001

STIPULATED MUTUAL FINAL INJUNCTION

Plaintiff, Sarah Neal Eskew, individually and as representative of the Estate of Lawrence Glenn Roark d/b/a Music of the Spheres ("SPHERES"), and defendant QMI Associates, Inc ("QMI"), have entered into a Settlement Agreement and Release resolving this case. Pursuant to that Agreement and this Stipulated Mutual Final Injunction, the parties hereby stipulate and agree to the entry of the following:

Beginning no later than the date of this Order, QMI shall not make, sell or offer to sell an open-ring, centrally suspended, black-tubed wind chime with: (a) an uncoated metal ring; or (b) a wind-catcher in any shape more diamond shaped than its current "nose shaped" wind-catcher. For purposes of this injunction, the metal ring is uncoated unless the metal surface is covered with a non-silver, opaque coating or paint; and "more diamond shaped" means a four-sided shape with outer left-right points or curves proportionately closer to the top point or curve than those in the current QMI Gentle Spirits windcatcher. SPHERES acknowledges and agrees that all chimes currently sold by QMI or its affiliates, and that were produced for inspection or to SPHERES in this lawsuit or otherwise identified in discovery, comply with this paragraph. This injunction shall apply prospectively only and does not apply to chimes shipped to third-party retail locations by QMI prior to the date of this Order and/or already at third-party retail locations, but shall apply immediately to displays by QMI's sales reps or at wholesale locations.

Notwithstanding the limitation in the preceding paragraph, if QMT learns of any other manufacturer making, selling or offering for sale in the United States an open-ring, centrally suspended, black-tubed wind chime with: (a) an uncoated metal ring; or (b) a wind-catcher in any shape more diamond shaped than QMT's current "nose shaped" wind-catcher and SPHERES fails to commence legal action on its own initiative, including immediately seeking injunctive relief, to cause the cessation of such selling or offering for sale by others, or to undertake such steps no later than thirty (30) days after receiving notice from QMT, then QMT shall no longer be subject to the within provisions. If SPHERES fails to aggressively pursue and successfully cause the cessation of other parties' making, selling or offering to sell the wind chime described above, then this injunction shall expire and QMT and SPHERES shall no longer be liable for continued compliance with its terms and conditions.

Beginning no later than twenty (20) days from the date of this Order, and for three years from the date of this Order, unless earlier notified to the contrary in writing by SPHERES, QMT shall, on all Gentle Spirits open-ring, centrally suspended chimes with black tubes, use a hangtag prominently featuring the disclaimer "Not affiliated with Music of the Spheres™" on the front cover or back cover set off by at least 12 points from other text appearing on the same cover and in a typeface with a font size at least as large as the prevailing font in the hangtag. QMT, during the three-year period, shall cease use of the disclaimer upon 30 days notice by SPHERES, but can thereafter distribute any already packaged chimes. For purposes of this Stipulated Mutual Injunction, "Gentle Spirits" chimes are those style of QMT chimes identified in the SPHERES Amended Complaint, in their configuration as of the date of this Order, irrespective of whether they may be marketed by QMT under another trademark as a later date.

Beginning no later than twenty (20) days from the date of this Order, and for three years from the date of this Order, QMT shall place an adhesive label designed to be permanent and weather resistant on all black knockers of Gentle Spirits open-ring, centrally suspended chimes

with black tubes identifying its corporate or assumed name and providing contact information including at least the phone number or address of its corporate headquarters.

QMT shall have the right to ship and/or sell any inventory already packaged before the date of this Order.


For three (3) years from the date of this Order, SPHERES shall not make, sell or offer to sell open-ring, centrally suspended windchimes with tubes in a color other than black

This injunction shall be binding upon the parties, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this injunction by personal service or otherwise. If either party believes the other has failed to comply with the terms of this Stipulated Mutual Injunction, it shall first give written notice to counsel of record of the claimed non-compliance and the other party shall have thirty (30) days to cure any alleged non-compliance. This notice and opportunity to cure shall be a prerequisite to seeking further Court intervention.

This Order is FINAL, closing this case. Each party shall bear its own costs and attorneys fees.

IT IS SO ORDERED

SIGNED: October 27, 2003



HON. LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

SO STIPULATED AND AGREED AND ENTRY REQUESTED:

BODMAN, LONGLEY & DAHLING LLP

By: 

Susan M. Kornfield (P41071)
Alan N. Harris (P56324) - Attorney-In-Charge For Defendant
J. Adam Behrendt (P58607)
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Dated: October 17, 2003

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Attorneys for Plaintiff

Dated: 10/23, 2003

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No. 78/213,865
Filed on February 12, 2003
For the Mark MISCELLANEOUS DESIGN
Published in the Official Gazette on June 14, 2005

QMT ASSOCIATES, INC.,)
)
)
Opposer,) Opposition No. 91165753
)
v.)
)
SARA NEAL ESKEW,)
)
)
Applicant.)

**OPPOSER'S INTERROGATORIES, REQUESTS
FOR ADMISSION AND REQUESTS FOR PRODUCTION
OF DOCUMENTS**

Opposer QMT Associates, Inc. ("QMT"), by its attorneys, Bodman LLP, requests that Applicant Sara Neal Eskew d/b/a Music of the Spheres (collectively "ESKEW") respond in writing and under oath to the following discovery requests ("Requests") within thirty days of the date of service of these Requests. These Requests are continuing. Supplemental answers are to be submitted to counsel for QMT if ESKEW directly or indirectly obtains additional or different information from that provided in response to these Requests from the time ESKEW's response is served:

INTERROGATORIES

1. Identify each person whom ESKEW expects to provide testimony as a witness in this action, and with respect to such person, describe and identify the subject matter on which the person is expected to testify, and the substance of the expected testimony.

ANSWER:

2. Identify each person whom ESKEW expects to provide testimony as an expert witness in this action, and with respect to such person, describe and identify:
 - (a) The subject matter on which each such expert is expected to testify, and the substance of each such expert's expected testimony;
 - (b) Each document the expert has been shown, has summarized, or otherwise made available for review in connection with his or her testimony in this matter and/or upon which the expert intends to rely;
 - (c) Any and all opinions to be offered by each expert, the basis and reasons therefore, the data or other information considered by the expert, the basis and reasons therefore, the data or other information considered by the expert in forming any opinion to be offered;
 - (d) Any report, summary or other written opinion prepared by the expert;
 - (e) Any exhibits to be used as a summary or in support of any opinion to be offered by the expert;

- (f) The expert's qualifications, including a list of all publications authorized by the expert within the preceding ten years;
- (g) Any compensation to be paid for the expert's study, opinions, report and/or testimony; and
- (h) A list of all other cases in which the expert has testified at trial or by deposition within the preceding four years.

ANSWER:

- 3. Describe all facts known to ESKEW in support of the claimed non-functionality and distinctiveness of the alleged trade dress and identify and describe any customer or market surveys in support of the claims.

ANSWER:

- 4. Identify all legal proceedings involving ESKEW's sale/offering of the wind chimes containing the alleged trade dress (other than the instant opposition), including:
 - (a) the title, civil action number and tribunal of each proceeding;
 - (b) The date, nature and basis of the controversy;
 - (c) the specific good (e.g., which specific type or style of wind chime) involved;

- (d) the parties involved;
- (e) the disposition of the proceeding, including the terms of any settlement of the controversy and the date thereof;
- (f) if not disposed of, its current status; and
- (g) the citation of each reported controversy.

ANSWER:

5. State with specificity any knowledge of ESKEW relating to any current or past use by a third party of trade dress ESKEW contends is similar to that claimed by ESKEW.

ANSWER:

6. Identify with specificity each and every "arbitrary design feature" of the wind chimes as claimed in your Response to Office Action dated July 23, 2003.

ANSWER:

7. Identify with specificity in the Stipulated Mutual Final Injunction in *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas (October 28, 2003) the exact statement of the court or QMT in which either acknowledged applicant's exclusive right to the wind chime trade dress claimed by ESKEW in the subject application.

ANSWER:

8. If ESKEW's responses to QMT's requests for admissions below are anything other than a categorical admission, state all facts and identify all documents upon which ESKEW relies to support any denials

ANSWER:

REQUESTS FOR ADMISSION

1. Admit that as of February 12, 2003, ESKEW made the following claim on the website (www.musicofspheres.com) ("Website") pertaining to its wind chimes: "high quality materials, exacting tolerances and methodical assembly protocols ensure lasting quality and beauty."

ANSWER:

2. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “tough synthetic cordage is highly resistant to abrasion, ultra-violet degradation, rot and mildew.”

ANSWER:

3. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “central tube suspension with smoothly polished tube ends prevent cord abrasion typical of other, less labor-intensive suspension techniques.”

ANSWER:

4. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “heavy gauge polished stainless steel rings provide sturdy support and enduring beauty.”

ANSWER:

5. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “tempered aluminum alloy tubing is custom manufactured to our exacting specifications and will never rust.”

ANSWER:

6. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “our corrosion-protective finish preserves chime’s appearance and increases durability in hostile environments (acid rain, salt air).”

ANSWER:

7. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “solid polyethylene clappers provide superior tonal quality and outdoor durability.”

ANSWER:

8. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “the windcatcher, of the same finish and material as the tubes, is the ideal size, weight, and shape for optimal chime performance in 8-10 mph wind velocity.”

ANSWER:

9. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “the clapper slides on the central cord up into the ring creating a convenient “off-on” feature.”

ANSWER:

10. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “[Music of the Spheres windchimes] are designed for lasting outdoor durability.”

ANSWER:

11. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “the diamond-shaped wind catcher at the bottom of your Music of the Spheres, Inc. chime is the “motor” that makes the chime work.”

ANSWER:

12. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “windcatchers harness the power of the wind and transfer it to the clapper, which moves to strike the tubes and play the music.”

ANSWER:

13. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “the larger the surface area of the wind catcher for a given size chime, the less wind is needed to activate it ”

ANSWER:

14. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “wind catchers are made of tempered aluminum alloy with a powder coat finish” and that “this finish provides corrosion protection and durability in all kinds of outdoor environments (acid rain, salt air, etc.)”

ANSWER:

15. Admit that the matter entitled *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas was not tried and there was no final ruling by the court, rather the parties negotiated and entered into a Stipulated Mutual Final Injunction and Settlement Agreement.

ANSWER:

16. Admit that the pages attached as Exhibit A hereto are true, correct and accurate copies of select pages from ESKEW's Website at musicofspheres.com.

ANSWER:

17. Admit that the document attached as Exhibit B hereto is a true, correct and accurate copy of the Settlement Agreement in the matter entitled *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas.

ANSWER:

18. Admit that the document attached as Exhibit C hereto is a true, correct and accurate copy of the Amended Complaint in the matter entitled *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas.

ANSWER:

19. Admit that the document attached as Exhibit D hereto is a true, correct and accurate copy of Plaintiff's Answers to Defendant's Second Set of Requests for Admission in the matter entitled *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas.

ANSWER:

20. Admit that in *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas (October 28, 2003), the court did not "acknowledge" applicant's exclusive right to the wind chime trade dress claimed by ESKEW in this application.

ANSWER:

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All documents identified in ESKEW's responses to Opposer's Interrogatories.

ANSWER:

2. All documents submitted to or received from the U.S. Patent and Trademark Office in connection with ESKEW's claims of trade dress protection as to the wind chimes, including, but not limited to, any applications, declarations and/or correspondence.

ANSWER:

3. All documents referring or relating to ESKEW's creation and/or development of the alleged trade dress in the wind chimes.

ANSWER:

4. All documents referring or relating to every objection that ESKEW has made to another's use or registration of trade dress which plaintiff contends is confusingly similar to the alleged trade dress (other than QMT).

ANSWER:

5. All documents referring or relating to every objection that ESKEW has received regarding use or registration of the alleged trade dress in the wind chimes.

ANSWER:

6. All documents supporting ESKEW's contention that the trade dress is distinctive.

ANSWER:

7. All documents supporting ESKEW's contention that the alleged trade dress has obtained secondary meaning, including, but not limited to, any customer or market surveys.

ANSWER:

8. All documents supporting ESKEW's contention that the alleged trade dress is non-functional.

ANSWER:

9. A copy of the ruling in which a court of competent jurisdiction “acknowledged” that ESKEW’s trade dress is legally protectible.

ANSWER:

Respectfully submitted:

BODMAN LLP

By: 

Susan M. Kornfield (P41071)

Alan N. Harris (P56324)

Angela A. Sujek (P58864)

110 Miller, Suite 300

Ann Arbor, Michigan 48104

734-930-2488, Telephone

734-930-2492, Facsimile

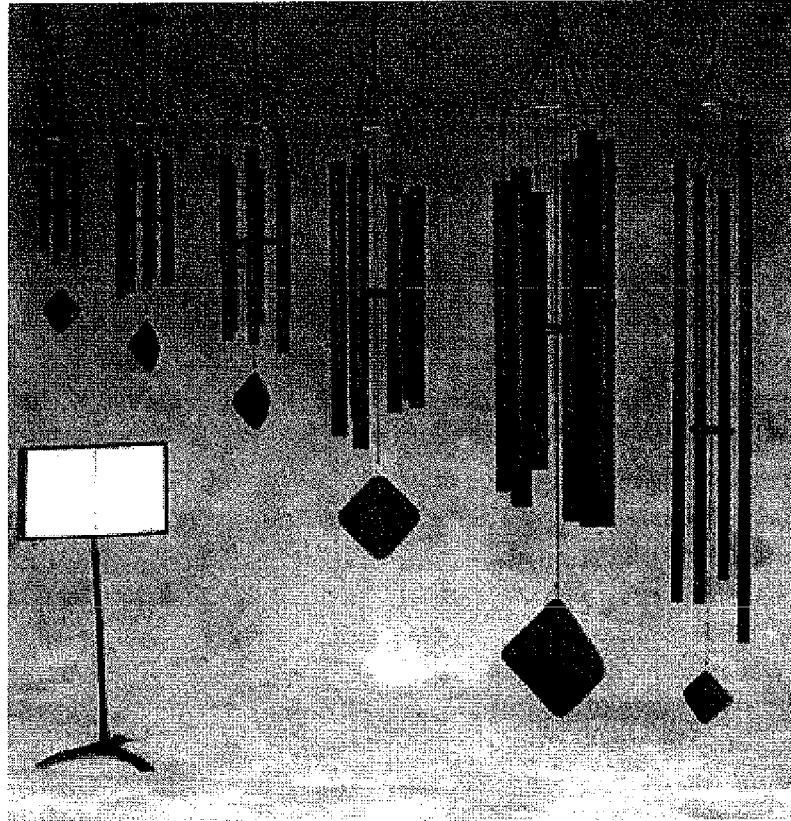
Dated: March 1, 2006



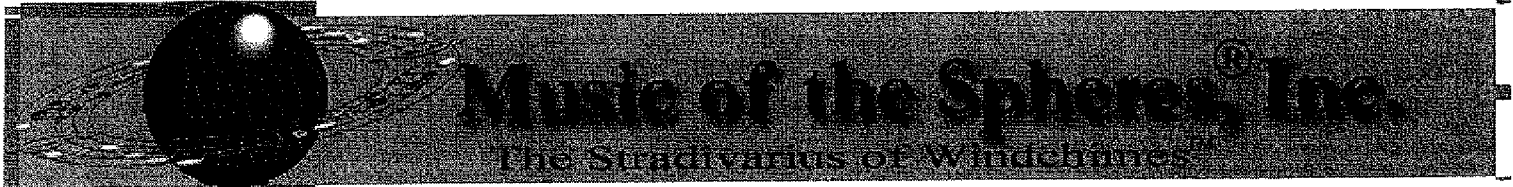
- Our Chimes
- Chime Sizes
- Chime Tunings
- About Us
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"World Peace - One Backyard at a Time"

-- Larry Roark, Founder



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- [Our Chimes](#)
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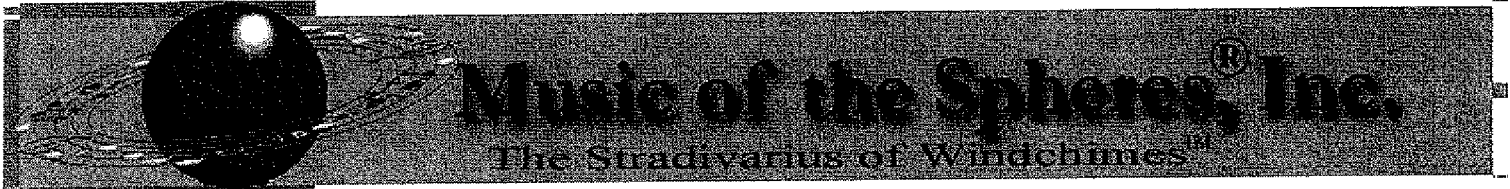
Hand-crafted, Symphonic Quality Chimes

Satisfaction Guaranteed!-- 30 day unconditional return policy

- Six sizes spanning four octaves
- Ten musical scales, plus the unique Westminster
- The amazing, 14' Basso Profundo wind chime
- Standard orchestral pitch (A 440)
- Custom tunings available
- Black, powder-coated, aluminum alloy tubing
- Adjustable activity control
- Durability also guaranteed:
 - 7 years outdoors for Soprano, Mezzo-Soprano and Alto
 - 15 years outdoors for Tenor and Bass
 - 15 years outdoors Basso Profundo

[Home](#)

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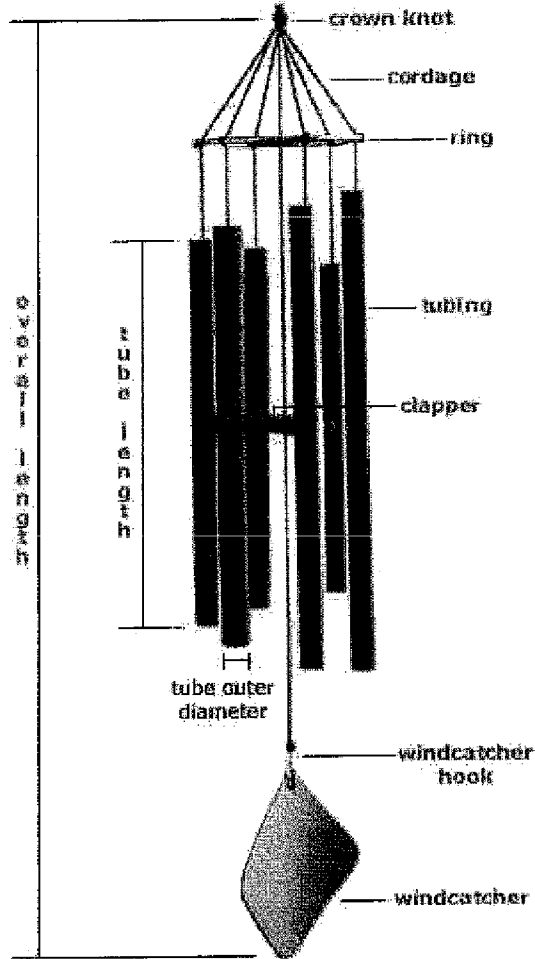


- Ⓜ Our Chimes
- Ⓜ **Materials & Construction**
- Ⓜ FAQ
- Ⓜ Hear Our Chimes
- Ⓜ Chime Sizes
- Ⓜ Chime Tunings
- Ⓜ About Us
- Ⓜ Auxiliary Products
- Ⓜ Shop Online

Ⓜ Home

Materials & Construction

High quality materials, exacting tolerances and methodical assembly protocols ensure lasting quality and beauty.

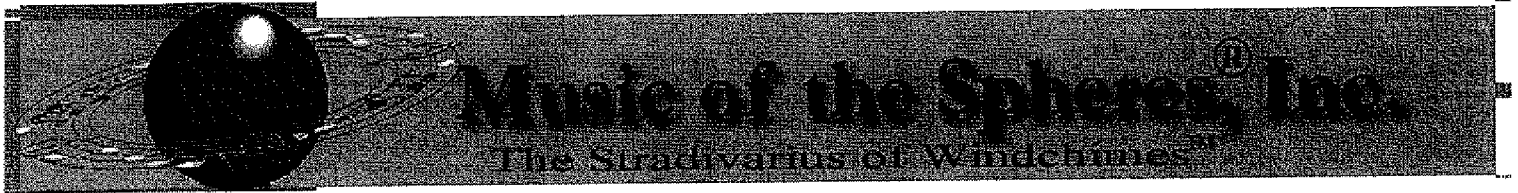


- Tough synthetic cordage is highly resistant to abrasion, ultra-violet degradation, rot and mildew. Central tube suspension with smoothly polished tube ends prevent cord abrasion typical of other, less labor-intensive suspension techniques.
- Heavy gauge polished stainless steel rings provide sturdy support and enduring beauty.
- Tempered aluminum alloy tubing is custom manufactured to our exacting specifications and will never rust.
- Our corrosion-protective finish preserves chime's appearance and increases durability in hostile environments (acid rain, salt air).
- We cut and precisely tune each tube by hand using just intonation, except for the whole tone scale, which uses equal temperament.
- Tubes are tuned to A440, standard orchestral pitch, using the latest in technology.
- Solid polyethylene clappers provide superior tonal quality and outdoor durability.
- The windcatcher, of the same finish and material as the tubes, is the ideal size,

weight, and shape for optimal chime performance in 8 - 10 mph wind velocity. The corrosion protective finish provides durability in all kinds of outdoor environments (acid rain, salt air, etc.)

- The windcatcher hook assembly provides simple but effective method of varying the chime's activity level.
- The clapper slides on the central cord up into the ring creating a convenient "off-on" feature.
- Windcatchers can also be easily removed to subdue chime activity under blustery conditions.
- A rigorous final inspection ensures that your chime is up to our high standards of acoustic and visual quality.

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Frequently Asked Questions About Our Chimes

- Ⓜ Our Chimes
- Ⓜ Materials & Construction
- Ⓜ - FAQ
- Ⓜ Hear Our Chimes
- Ⓜ Chime Sizes
- Ⓜ Chime Tunings
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Q: I don't understand the difference between "sizes/voices" and "tunings"?

A: Use this analogy to buying a shirt: you could think of tuning as the color and pitch range as the size. You can get a shirt in pink, blue and yellow; and you can also choose small, medium and large. You may also think of our tunings as songs. Each of them is available in various pitch ranges (sizes). A musical instrument must be made larger to create lower pitches (For example, a higher pitched violin is smaller than its cousin, the lower pitched cello. Each can play the same melody, but in different pitch ranges.) Please go to the "Hear Our Chimes" section of the website to hear the different tunings in the different pitch ranges.

Q: Can I hang my Music of the Spheres windchimes outside?

A: Yes, they are designed for lasting outdoor durability. Please refer to our "Materials & Construction" section of the website for descriptions of our durable materials and method of construction. If you want to appreciate the beauty and ambience of your Music of the Spheres windchime indoors you can "power" the chime with an oscillating fan or a pull cord. Children have also been taught to gently "play" the chime for their parents. One customer even positioned the windcatcher in the path of the cat door!

Q: Are my Music of the Spheres windchimes covered by a warranty?

A: Yes, our Soprano, Mezzo-Soprano, Alto and Westminster chimes are warranted for 7 years from the date of purchase against defects in materials and workmanship. Tenor, Bass and Basso Profundo chimes are similarly warranted for 15 years.

Q: What are the specifications and prices for your windchimes?

A: Please refer to the specification chart for this information.

Q: Can I get my chimes repaired if they should be damaged?

A: Yes, please call or email for a return or repair authorization. If a repair is covered by warranty, there will be no charge. If not, a \$25 charge plus the cost of any additional components and return freight will apply. If you have a non-Music of the Spheres chime and would like it repaired, the policy is the same as for a non-warranted chimes.

Q: How can I increase (or decrease) the activity of my Music of the Spheres windchime?

A: 1. Hang the chime in a different location, either more or less exposed to wind.
 2. Hang the chime from the first knot above the ring for greater activity and from the second knot for lower activity.
 3. Adjust the size of the windcatcher. To identify your windcatcher you may refer to the diagram on the "How They're Made" page. The wind catcher at the bottom of your chime is the "motor" that makes it work. Windcatchers harness the power of the wind and transfer it to the clapper, which moves to strike the tubes and play the music. The larger the windcatcher surface area for any given size chime, the less wind is needed to activate it. We design our chimes to play in eight to ten mile-per-hour breezes. If your chimes hang in an extraordinarily enclosed or exposed area, they will require a correspondingly larger or smaller wind catcher than the standard one, to achieve a "standard" activity level. If you feel you need a different size windcatcher, return yours, asking for either the next size up or down and we will send a replacement at no charge.

If you would like to keep yours and buy an extra, [click here](#)

Q: How should I hang my chime?

A: There are a number of safe ways to hang your chime. The "best" for a particular circumstance will depend on which chime size you're hanging and where it is you would like it to hang. In all cases, simply using some basic common sense is a great start. In many cases, hanging a chime "properly" is not a complicated matter. Some chime hanging basics are:

- Don't hang your chime on anything that is sharp or abrasive. Over time the cord will be cut or worn and will eventually break. For instance, instead of hanging the chime from an old rusty nail, take the time to get a carabiner or some other sort of metal ring. Hang the chime from the ring, then hang the ring from the nail.
- Do consider the fact that the forces on the chime support will vary and will increase substantially during severe weather conditions. When planning the support for your chime, take the time to "do it right" by preparing for stormy conditions.
- Do test the installation by giving a "tug" on the chime after hanging it to make sure it stays put. For the smaller chimes, a gentle downward pull will suffice; whereas for the larger, heavier chimes, a good solid downward test pull is a good idea. A good rule of thumb is to test the installation with a force that is between two and three times the weight of the chime.
- Do be considerate of your tree. When hanging chimes from a tree limb, use a blanket or a piece of rubber to spread out the load on the limb. This will avoid cutting into the bark and damaging the tree. A section of an old bicycle tire works very well for this purpose.
- Do use a deck hook as a safe and convenient way to hang the chimes from a deck railing.
- Do use a wall bracket to hang the chime from a wall. If mounting the bracket on a brick, stone or masonry wall, use the proper inserts for the job.
- Do be creative and consider as many options as you can think of when trying to hang a chime. When in doubt, feel free to contact us for advice.

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- Ⓞ Our Chimes
- Ⓞ **Chime Sizes**
- Ⓞ Soprano
- Ⓞ MezzoSoprano
- Ⓞ Alto
- Ⓞ Tenor
- Ⓞ Bass
- Ⓞ Basso Profundo
- Ⓞ Chime Tunings
- Ⓞ About Us
- Ⓞ Auxiliary Products
- Ⓞ Shop Online

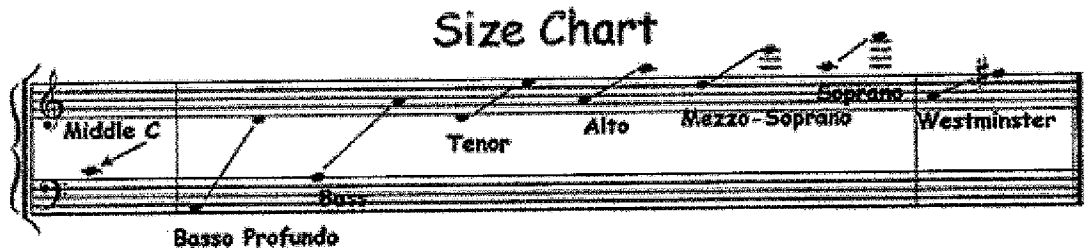
CHIME SIZES

Our Chimes come in several sizes, which is the same as saying pitch ranges.

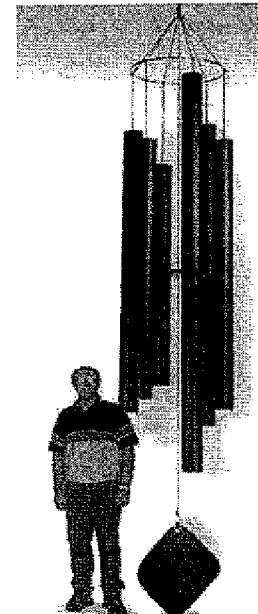
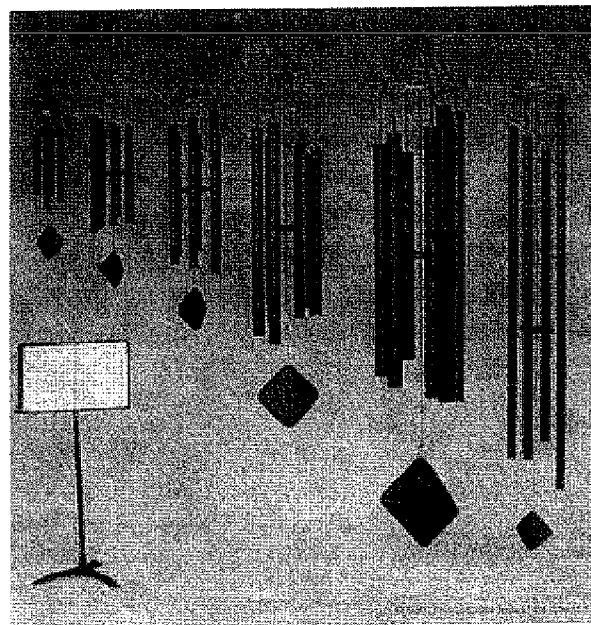
The larger chimes have a lower pitch and smaller chimes have a higher pitch.

We have designed our chime sizes so that their pitch ranges overlap and complement each other.

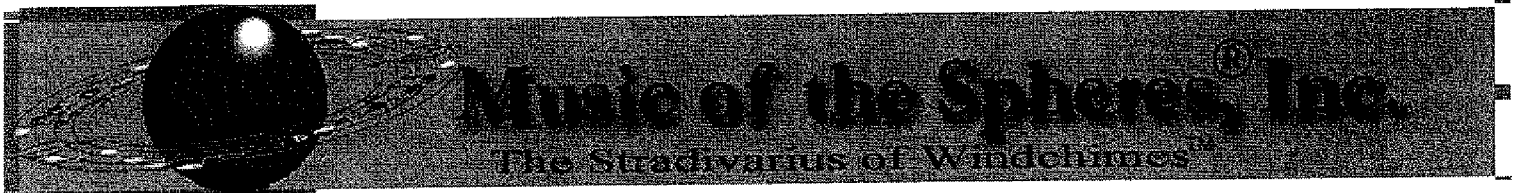
Select one of the pitch ranges shown on the musical staff or one of the chimes in the image below for more information about that size.



- Ⓞ Home



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- Ⓢ [Our Chimes](#)
- Ⓢ [Chime Sizes](#)
- Ⓢ [Chime Tunings](#)
- Ⓢ [Musical Scales](#)
- Ⓢ [Ensembles](#)
- Ⓢ [Testimonials](#)
- Ⓢ [About Us](#)
- Ⓢ [Auxiliary Products](#)
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- Ⓢ [Home](#)

CHIME TUNINGS



Pentatonic



Chinese



Aquarian



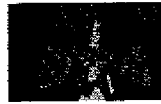
Mongolian



Hawaiian



Balinese



Japanese



Gypsy



Whole Tone



Quartal



Westminster

Our founder, Larry Roark, designed our chimes in a variety of musical scales so you could choose the one that sings most sweetly to you. The eleven musical scales we make are divisible into two main categories of music which we can simply call the "more familiar" and the "more exotic" sound.

FAMILIAR	EXOTIC
Pentatonic Quartal Chinese Mongolian Westminster	Hawaiian Japanese Balinese Whole Tone Aquarian Gypsy

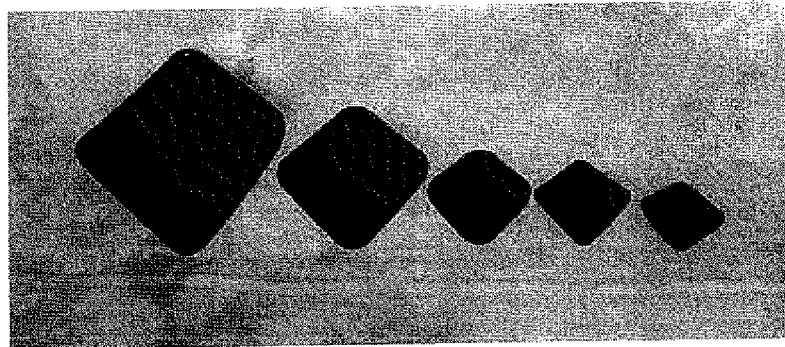
You will find the distinctions between the categories easier to make than the distinctions between windchimes within a category. The "familiar" major scales are quite similar one to the other, while the exotic scales are only somewhat similar one to the other. If you are having trouble deciding what you like, first determine the category that pleases you and focus there. Listen and watch for a tuning that seems to make the lines in your forehead relax more quickly, or one that begins to bring a sense of ease or calm. Let your mind relax and enjoy the process, it's not an intellectual exercise. And besides, there's no wrong answer.

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AUXILIARY PRODUCTS - Windcatchers

- Ⓢ Our Chimes
- Ⓢ Chime Sizes
- Ⓢ Chime Tunings
- Ⓢ About Us
- Ⓢ **Auxiliary Products**
- Ⓢ - CD and Cassette
- Ⓢ - Windcatchers
- Ⓢ - Brackets and Hooks
- Ⓢ Shop Online



- Ⓢ **Home**

The diamond-shaped wind catcher at the bottom of your Music of the Spheres® , Inc. chime is the "motor" that makes the chime work. Wind catchers harness the power of the wind and transfer it to the clapper, which moves to strike the tubes and play the music.

The larger the surface area of the wind catcher for a given size chime, the less wind is needed to activate it. We design our chimes to play in eight to ten mile-per-hour breezes. If your chimes hang in an extraordinarily enclosed or exposed area, they will require a correspondingly larger or smaller wind catcher than the standard one, to achieve a "standard" activity level. When ordering a larger windcatcher, you should also order, in most cases, the next larger hook attachment. The hook attachment works like a safety pin and permits easy removal and reattachment so that you can exchange wind catcher sizes. This ease of removal also permits you to "turn down" the chime easily during intermittent windy weather.

Our Music of the Spheres® , Inc. wind catchers are made of tempered aluminum alloy with a powder coat finish. This finish provides corrosion protection and durability in all kinds of outdoor environments (acid rain, salt air, etc.)

Size and pricing information for extra wind catchers appear in the table below. Please place your order on our order page.

Wind Catcher Size	Size (Square)	Price	Shipping	Total
Soprano (small)	4 5/8"	\$8 00	\$5 00	\$13 00
Mezzo-Soprano/Westminster (medium small)	5 1/4"	\$9 00	\$5.00	\$14.00
Alto (medium)	6"	\$10 00	\$5 00	\$15 00
Tenor (medium large)	8 1/2"	\$12 00	\$5.00	\$17.00
Bass (large)	12"	\$15 00	\$5.00	\$20.00

Basso Profundo (XXL)	18"	\$35.00	\$5.00	\$40.00
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SETTLEMENT AGREEMENT

This Settlement Agreement and Release ("Agreement") is by and between Sara Neal Eskew, d/b/a Music of the Spheres, individually and as representative of the Estate of Lawrence Glenn Roark (collectively, "SPHERES") and QMI Associates, Inc ("QMI")

1. Background and Purpose.

A SPHERES and QMI are parties to the action *Sara Neal Eskew, individually and as representative of the Estate of Lawrence Glenn Roark d/b/a Music of the Spheres v QMI Associates, Inc*, No H-01-1001 (S D. Tex) (the "Lawsuit")

B To avoid the further costs and uncertainty of litigation, the parties entered into a settlement of the Lawsuit on August 19, 2003. This Agreement sets forth in writing the material terms of their settlement

2. Charitable Contribution.

On or before December 31, 2003, QMI shall cause a donation to be made in the amount of \$150,000 to a tax deductible organization or scholarship fund in euphonium studies affiliated with the University of North Texas, in the name of Larry Roark, substantially in accord with the draft Memorandum of Understanding between the University of North Texas and QMI attached hereto as Exhibit "A" and made a part hereof for all purposes

3. Entry of Final Order.

Spheres and QMI shall direct their respective counsel to execute and tender to the Clerk of the Court for the United States District Court for Southern District of Texas, the Stipulated Mutual Final Injunction attached hereto as Exhibit "B" requesting entry thereof by the Court, within three (3) days from the execution of this agreement

4. No Admission.

The parties expressly agree that this Agreement, including, but not limited to the Stipulated Mutual Final Injunction, does not in any way constitute an admission of fault, liability, fact or the validity or invalidity of a legal assertion

5. Release.

Subject to the terms and conditions set forth in this Agreement, and except as set forth in Exhibit B and the enforcement thereof, SPHERES hereby fully, forever, irrevocably, and unconditionally releases and discharges QMI, including, as applicable, its officers, directors, shareholders, owners, agents, affiliates, employees, representatives, and attorneys, from any and all claims it may have against it, which arose or could have arisen out of or are in any way related to any act or omission that is or could have been a subject of the Lawsuit, whether such claims are now known or unknown, accrued or unaccrued, and asserted or unasserted, including, but not limited, to those claims set forth in SPHERES unfiled Third Amended Complaint

EXHIBIT 2

Subject to the terms and conditions set forth in this Agreement, and except as set forth in Exhibit B and the enforcement thereof, QMI hereby fully forever, irrevocably, and unconditionally releases and discharges SPHERES, including, as applicable, its officers, directors, shareholders, owners, agents, affiliates, employees, representatives, and attorneys, from any and all claims it may have against it, which arose or could have arisen out of or are in any way related to any act or omission that is or could have been a subject of the Lawsuit, whether such claims are now known or unknown, accrued or unaccrued, and asserted or unasserted, including, but not limited, to those claims set forth in any pleadings in the Lawsuit.

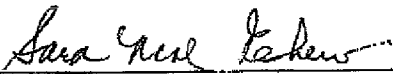
Each party shall remain subject to the terms of the Stipulated Protective Order previously entered by the Court and shall return to the other all documents produced by that party marked "Confidential" and/or "Confidential-Attorney's Eyes Only"

6. Binding Upon Successors and Assigns

The provisions and stipulations in this Agreement and the Stipulated Mutual Final Injunction shall inure to the benefit of and shall be binding upon the heirs, executors, administrators, assigns, or successors in interest of the parties to this Agreement.

Executed as of the date set forth below.

Dated: 10/21/03, 2003


Sara Neal Eskew, d/b/a Music of the Spheres,
individually and as representative of the Estate of
Lawrence Glenn Eskew ("MOIS")

Dated: 10/13/03, 2003

QMI ASSOCIATES, INC ("QMI")

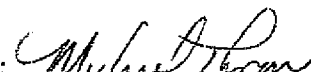
By: 
Michael Throne, its President

Exhibit "A"
THE LARRY ROARK SCHOLARSHIP FOR EUPHONIUM
Memorandum of Understanding

This Memorandum of Understanding contains the expressions of instructions, understandings and commitments made by QMT Associates, Inc ("the Donor"), the University of North Texas ("the University"), and the University of North Texas Foundation, Inc ("the Foundation"), concerning **The Larry Roark Scholarship for Euphonium**. By their signatures below, the Donor and the responsible officers of the other organizations accept the instructions, understandings and commitments contained herein, individually in the case of the Donor, and on behalf of their respective organizations in the cases of the executives.

1. The Donor agrees to give to the Foundation a gift of at least \$150,000.00 on or before December 31, 2003, to create this permanent endowment fund. The account established to support this Scholarship fund will remain open for additional donations, should they occur. No further obligation on the part of the donor is expressed or implied by this Memorandum. Once gifts are contributed to this permanent endowment fund, they will not ever be spent, except as described in paragraph 4 below.
2. The Foundation agrees to accept the gift to it described above, to invest the monies as they are received according to its regular investment program, and to pay out any distributions according to the instructions, understandings and commitments of this Memorandum. The Foundation will administer this Fund in accord with applicable Federal and Texas Laws, and in accord with applicable national accounting standards.
3. Annually, subject to the availability of income and reserves for this fund, the Foundation will make a distribution for this award to the University based on the Distribution Policy established by the Board of Directors of the Foundation, as it may be revised from time to time, and the instructions, understandings and commitments contained herein. Distributions for this endowed fund will normally be created by its current income and reserves, and when this fund's market value is below its historic cost, by the net current yield (interest and dividends less management fees) from this fund. Once the Foundation has distributed money in the manner described, then the Foundation shall have no further responsibility as to such funds or their application.
4. This fund will operate as a temporary Quasi-Endowment under the following circumstance: During an initial two (2) year period which commences with the thirteenth (13th) month after at least \$150,000 in gifts has been received by the Foundation to create this endowment, if current income and reserves for this fund are inadequate to meet an annual distribution amount of at least \$6,000.00, the principal may be utilized to meet this annual distribution amount. This is the only cause for which the principal may be utilized. At the end of the initial two (2) year period, this principal utilization feature is eliminated, and this fund will permanently operate as an Endowment Fund, and no longer as a Quasi-Endowment Fund.
5. The University will create **The Larry Roark Scholarship for Euphonium**, a fund in memory of Larry Roark, a creative euphonium artist whose love of jazz, new music, world music, music theory, teaching, composition and performance impacted the lives of many, and in support of students enrolled in euphonium studies at the University, after total gifts to this

fund equal or exceed the minimum gift level established by the University Board of Regents for a Scholarship

- 6 The University will receive all distributions from the Foundation and credit them to College of Music (or its successor), which will utilize a Scholarship Committee for the College of at least three (3) faculty members, to administer the application and selection process for the Scholarship, in accord with this Memorandum and all University policies and procedures.
- 7 To be eligible for consideration, an applicant for the Scholarship must possess the following characteristics:
 - a. Meet the minimum entrance and continuing academic performance standards of the College of Music in effect at the time of any award;
 - b. Maintain full time enrollment at the University, unless they have fewer than twice the number of semester hours required to be full time remaining in their degree program;
 - c. Enroll as a full-time student with euphonium as a concentration. Preference will be given to students who demonstrate a creative commitment to jazz, performance, new music, world music, music theory and/or music composition at the University.
 - d. In the event no applicant possesses this 'euphonium as a concentration' characteristic described in section 7 c., then the scholarship will be unexpended and will roll over to the next year, when the previous year's and the current year's award shall be available for distribution. In the event that the euphonium department ceases to exist, then students enrolling full-time in music at the University will be eligible for consideration.
- 8 The College of Music Scholarship Committee will administer the application and selection process in accord with this Memorandum and with all University policies and procedures. All decisions regarding the size and number of awards shall rest with this committee; however, it is recommended that six or more \$1,000.00 awards be made. The University acknowledges that in accordance with Texas law in effect at the time of the execution of this Memorandum, a competitive award of \$1000.00 or more that complies with the requirements of Section 54.064 of the Texas Education Code including but not limited to the requirement that Texas students must be included in the competition for the award, entitles an out of state student to have out of state tuition waived for the period the award is to cover. The parties to this Memorandum understand and agree that this law is subject to revision by the Texas State Legislature and may not apply in the future.

This Memorandum of Understanding becomes effective on the last date signed below.

Donor

QMT Associates, Inc

Date

University of North Texas

Dean, College of Music

Date

President

Date

University of North Texas Foundation, Inc

Chairman

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SARA NEAL ESKEW, INDIVIDUALLY §
AND AS REPRESENTATIVE OF THE §
ESTATE OF LAWRENCE GLENN ROARK §
d/b/a MUSIC OF THE SPHERES §
Plaintiff §

VS.

CIVIL ACTION NO. 01-CV-1001
JURY TRIAL DEMANDED

QMT ASSOCIATES, INC. §
Defendant §

AMENDED COMPLAINT

Sara Neal Eskew, individually and as representative of the estate of Lawrence Glenn Roark, deceased, d/b/a Music of the Spheres, hereinafter Plaintiff, for her complaint herein against QMT Associates, Inc., hereinafter Defendant, states as follows:

1. Plaintiff is an individual residing in Austin, Travis County, Texas, and does business in this and other districts of the State of Texas under the name Music of the Spheres.

2. Defendant QMT Associates, Inc is a Virginia Corporation doing business in the state of Texas, but which has not registered with the Texas Secretary of State Defendant routinely contracts by mail or otherwise with Texas residents to sell goods in this state. Further, Defendant has offered and continues to offer its products in the State of Texas, including the knock-off copies of Plaintiff's wind chimes that are the subject of this suit.

3 This is an action for trade dress and copyright infringement under Section 43(a) of the Lanham Act, 15 U.S.C. §1125, and Title 17 U.S.C. This Court has jurisdiction over this case under 15 U.S.C. §1121, 15 U.S.C §1125(a) and 28 U.S.C §1338(a). Venue is proper in this district under 28 U.S.C. §§1391(c) and 1400(a). This Court also has jurisdiction of the action under 28 U.S.C. §1332, as there is diversity of

C

citizenship between the parties, and the amount in controversy exceeds the sum of \$50,000.00, exclusive of interests and costs.

4. Plaintiff is the manufacturer of high quality wind chimes that are sold nationwide directly by Plaintiff and through a network of sales representatives to wholesale customers who offer them to the retail market. Plaintiff has enjoyed continual growth and market acceptance of her wind chime products, which are offered in a number of sizes and musical scales to the consuming public.

5. Since 1989, Plaintiff's husband, Lawrence Glenn Roark, initially alone and later with Plaintiff, improved and perfected the manufacture of wind chimes, which are distinctive in their overall look and design, including shape, color, size, and sound quality, and which are provided with a distinctive wind catcher that is generally diamond in shape. The overall look and design of the wind chimes has become associated with Plaintiff and Plaintiff's business, and has acquired secondary meaning throughout Texas and the United States.

6. Plaintiff's husband Lawrence Glenn Roark was the creator and co-owner of the original art work embodied in the wind chimes shown in Exhibits A-1 through A-6 attached hereto, all of which embody original art work and design. Plaintiff has complied in all respects with the federal Copyright Act's registration and deposit requirements, and the copyright registrations are expected to be issued to Plaintiff by the Copyright Office of the United States, in due course.

7. Over the years, Plaintiff has expended substantial amounts of money on the advertising, promotion and distribution of the original and unique look and tone of the wind chimes that have become associated with the trade name "Music of the Spheres."

8. Today, the black-coated chime tubes, the black clapper, the black, generally arcuate diamond-shaped wind catcher, the manner of tube suspension and the use of black cordage, the open metal ring support platform, all in combination or as an assembly, as shown in Exhibits A-1 through A-6, are virtually universally identified with Plaintiff, Plaintiff's tradename, "Music of the Spheres," and superior quality.

9. On information and belief, Defendant QMT Associates, Inc. in January 2001 or earlier, embarked upon a plan or scheme to usurp the valuable goodwill of Plaintiff by offering at trade shows around the United States and specifically in Texas, a "knock-off"

of the wind chimes for which Plaintiff has become well known. Without Plaintiff's consent and in complete disregard of Plaintiff's rights, Defendant has infringed and is infringing Plaintiff's aforementioned copyrights in this judicial district and elsewhere throughout the United States by publishing and offering for sale wind chimes advertised as "Gentle Spirits" by "Majesty Bells," using brochures which are attached hereto, marked Exhibit B. Defendant's copyright infringement has been willful.

10. Actual confusion occurred between the knock-off wind chimes Defendant has advertised with those made and sold by Plaintiff. Defendant's chimes are of inferior quality and construction, and do not offer the same high quality sound as the wind chimes sold by Plaintiff.

11. The taking of orders for this new line of knock-off wind chimes has resulted in the loss of sales of Plaintiff's product and will result in substantial loss of sales in the future unless Defendant's tortious behavior is enjoined.

12. The infringement of Plaintiff's trade dress by Defendant has been willful and deliberate, designed specifically to trade upon the enormous good will associated with Plaintiff's trade dress for quality, appearance and sound.

13. Plaintiff has no control over the nature and quality of the knock-off wind chime product line manufactured and sold by Defendant. Any failure, neglect, or default by Defendant in providing such products to the wind chime market will reflect adversely upon Plaintiff as the believed source of origin thereof, hampering efforts by Plaintiff to continue to protect her outstanding reputation for high quality, distinctive appearance and rich tonality wind chime products, resulting in loss of sales thereof and considerable additional expense to promote her products, all to her irreparable harm.

WHEREFORE, Plaintiff prays:

(a) That a preliminary and permanent injunction issue restraining Defendant, its agents, servants, employees, successors and assigns and all others in concert and privity with them from infringement of Plaintiff's trade dress and from injuring Plaintiff's business reputation, from unfairly competing with Plaintiff and from engaging in unfair and deceptive practices;

(b) That Defendant be required to account to Plaintiff for Defendant's profits, the actual damages suffered by Plaintiff as a result of Defendant's acts of infringement,

false designation of origin, unfair competition, and unfair and deceptive trade practices together with interest and costs;

(c) That Defendant be required to pay statutory damages for each of Defendant's acts of copyright infringement that occurred after the effective date of copyright registration, and that such statutory damages be increased for the willful acts of Defendant's copyright infringement under 17 U.S.C. §504(c)(2).

(c) That Defendant be ordered to surrender for destruction all products, nameplates, labels, advertisements and other materials constituting infringement of Plaintiff's designation of origin and infringement of her trade dress;

(d) That Defendant be ordered to surrender for destruction all copies made or used in violation of the Plaintiff's exclusive rights as the copyright owner in the Plaintiff's wind chimes, and of all articles by means of which such copies may be reproduced;

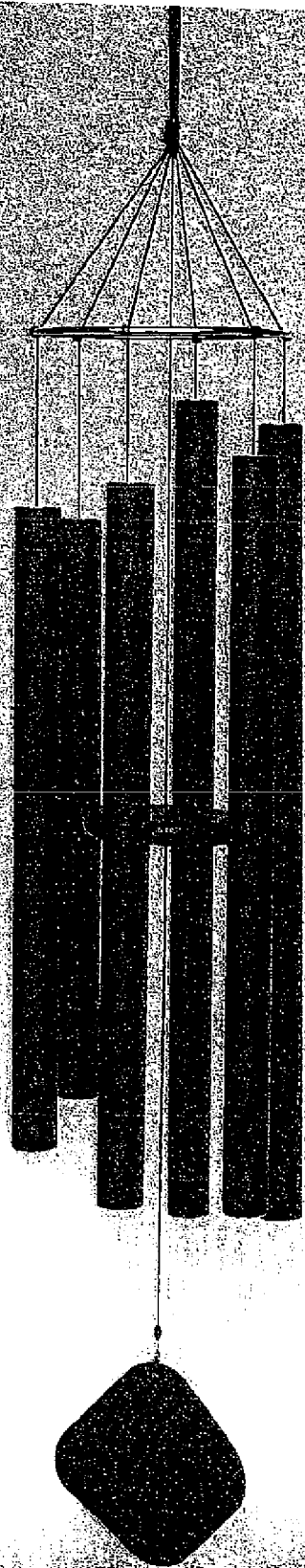
(e) That Defendant be compelled to pay Plaintiff's attorney's fees, together with all costs of this suit; and

(f) For such other and further relief as may be just and equitable.

Respectfully submitted,
Lundeen & Arismendi, L.L.P.
1916 Baldwin
Houston, Texas 77002
713.652.2555, telephone
713.652.2556, facsimile

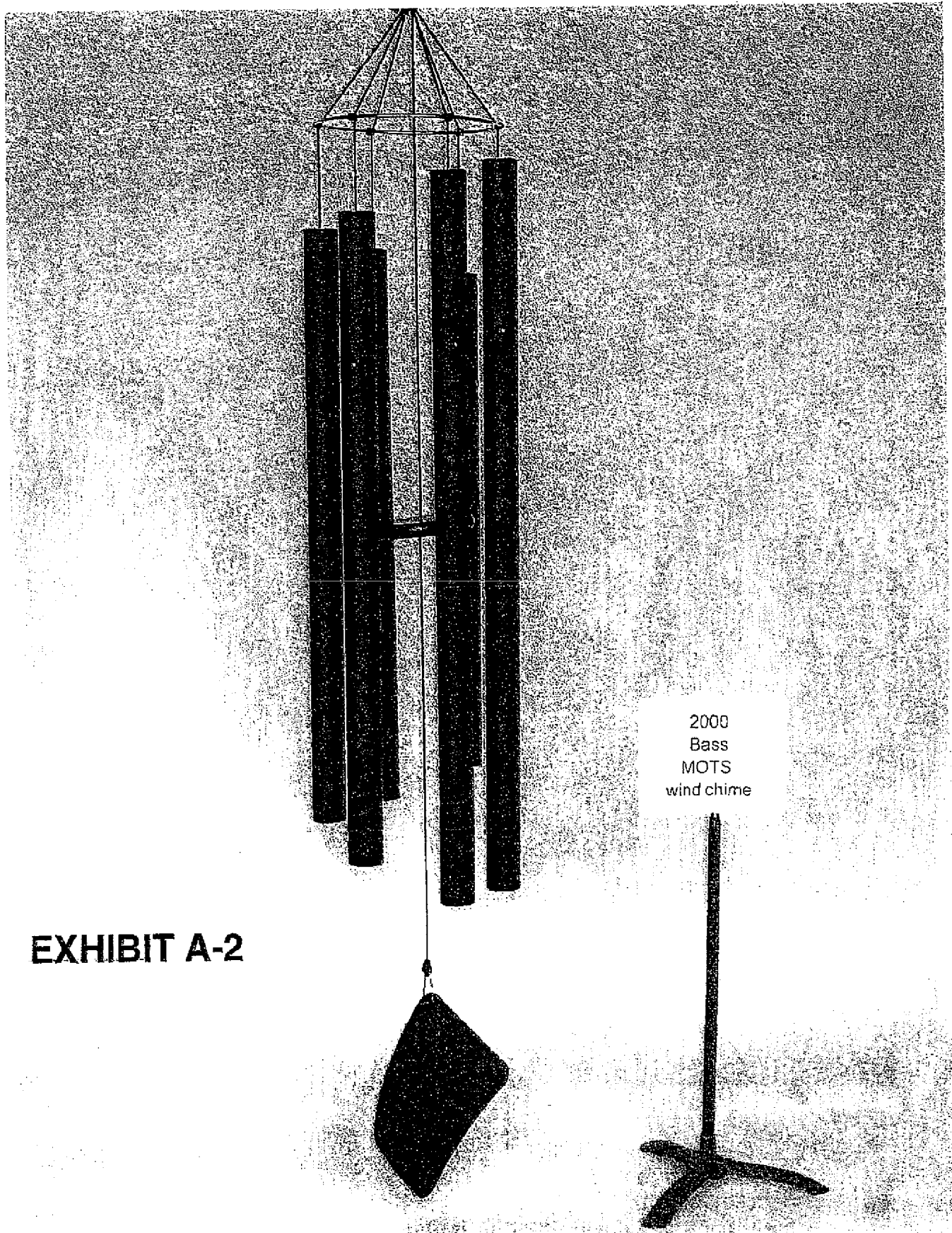


David B. Dickinson, SBOT#05833800
Attorney in Charge for Plaintiff



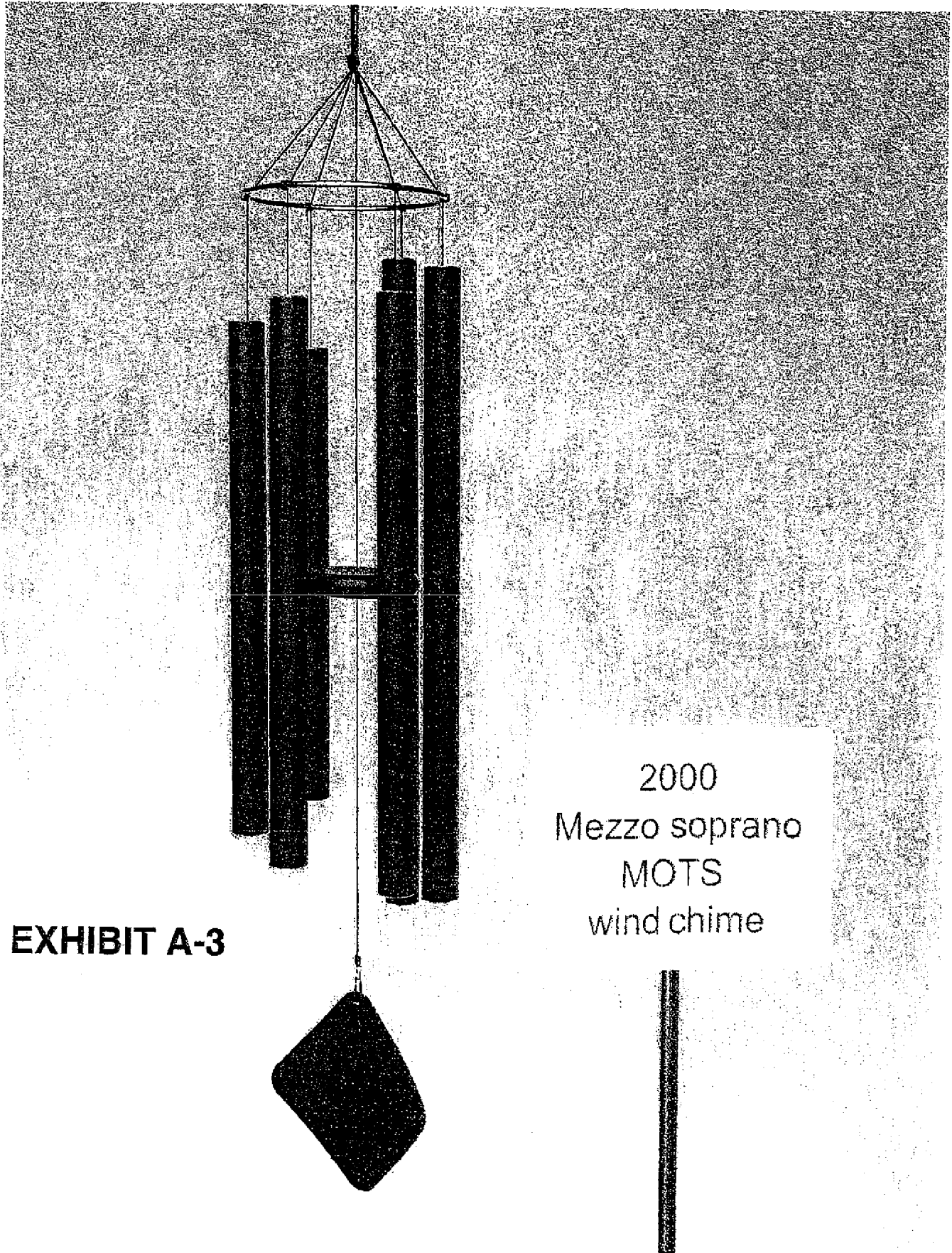
2000
Alto
MOTS
wind chime

EXHIBIT A-1



2000
Bass
MOTS
wind chime

EXHIBIT A-2



2000
Mezzo soprano
MOTS
wind chime

EXHIBIT A-3

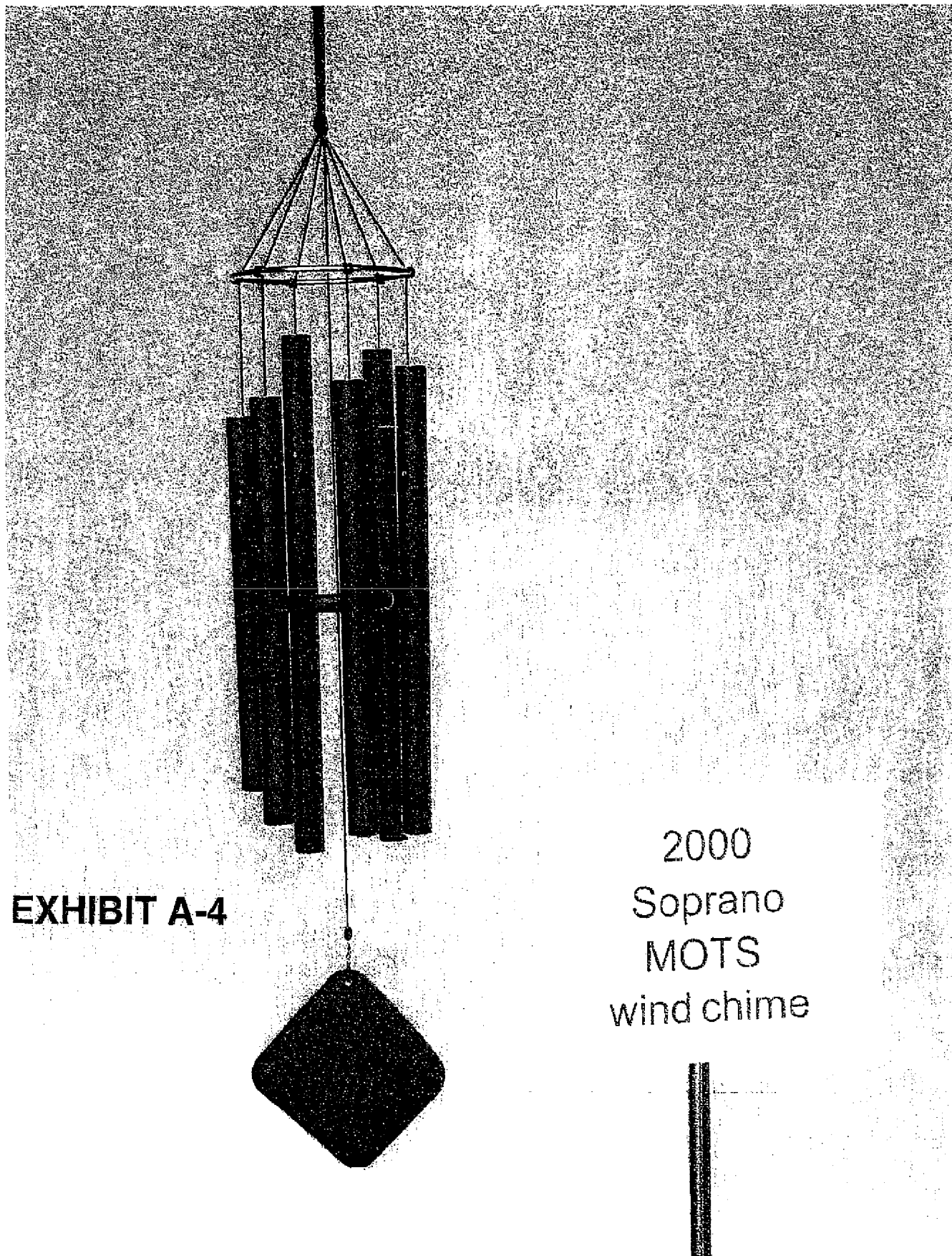


EXHIBIT A-4

2000
Soprano
MOTS
wind chime



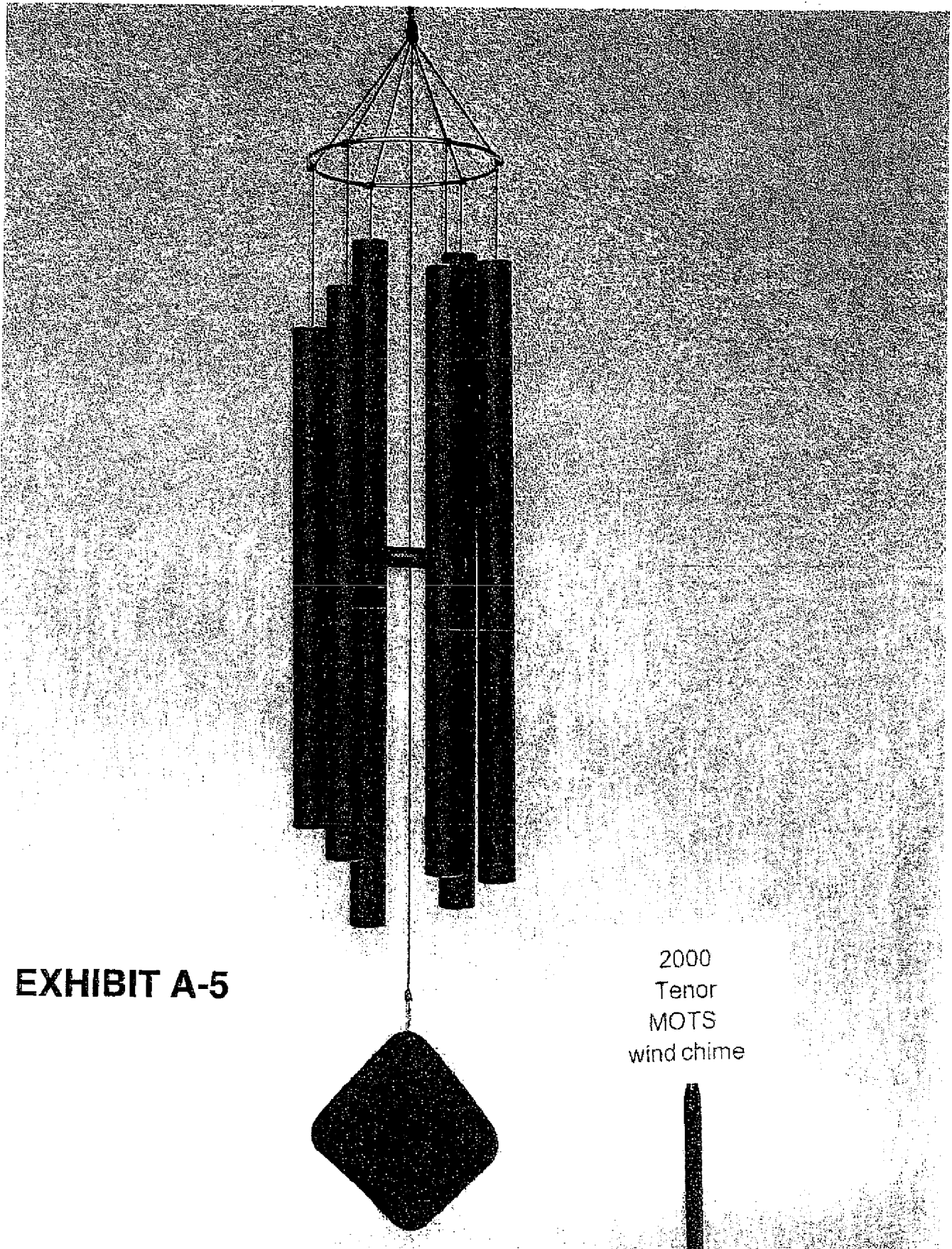


EXHIBIT A-5

2000
Tenor
MOTS
wind chime

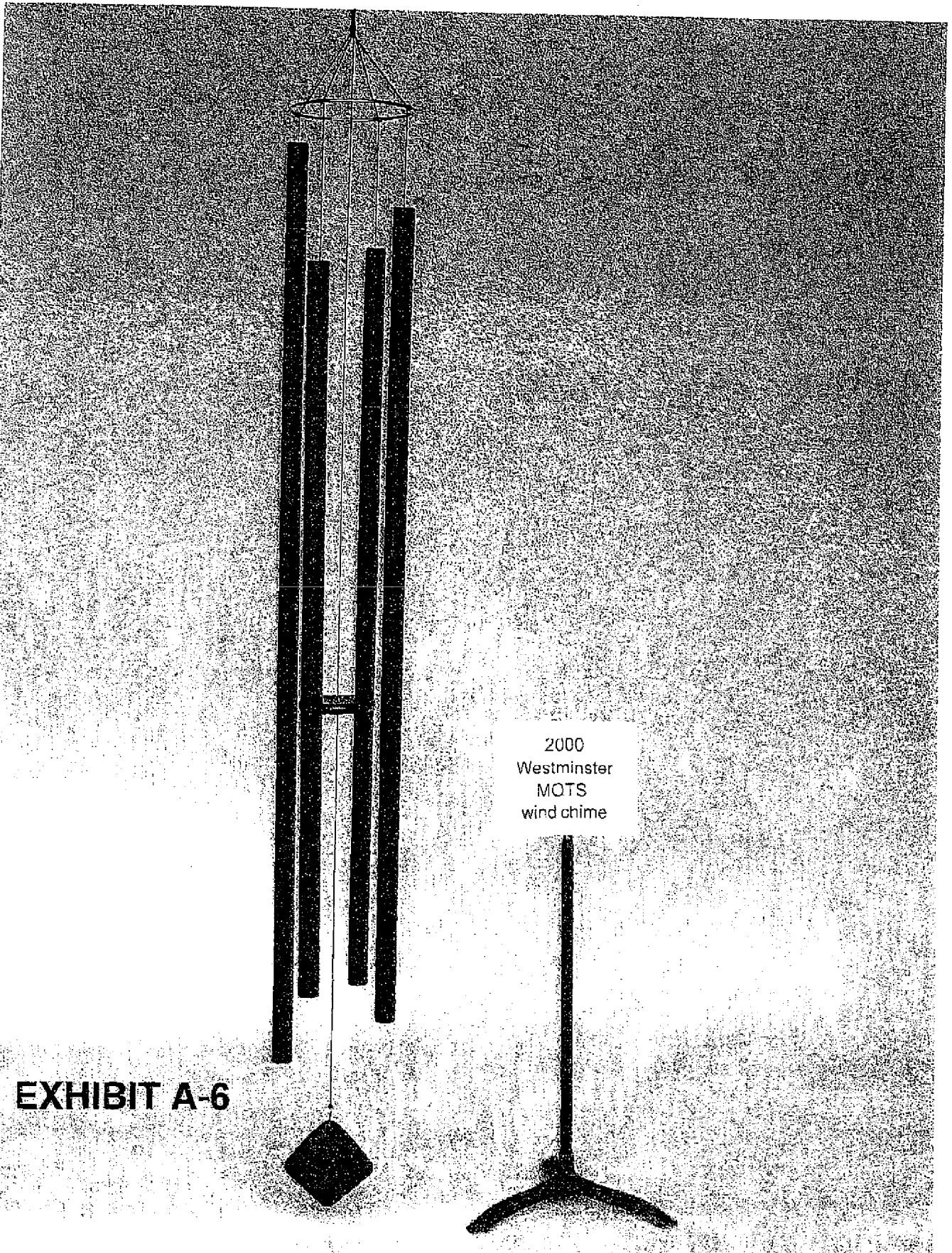


EXHIBIT A-6



EXHIBIT B

Gentle Spirits™

By
Majesty Bells®

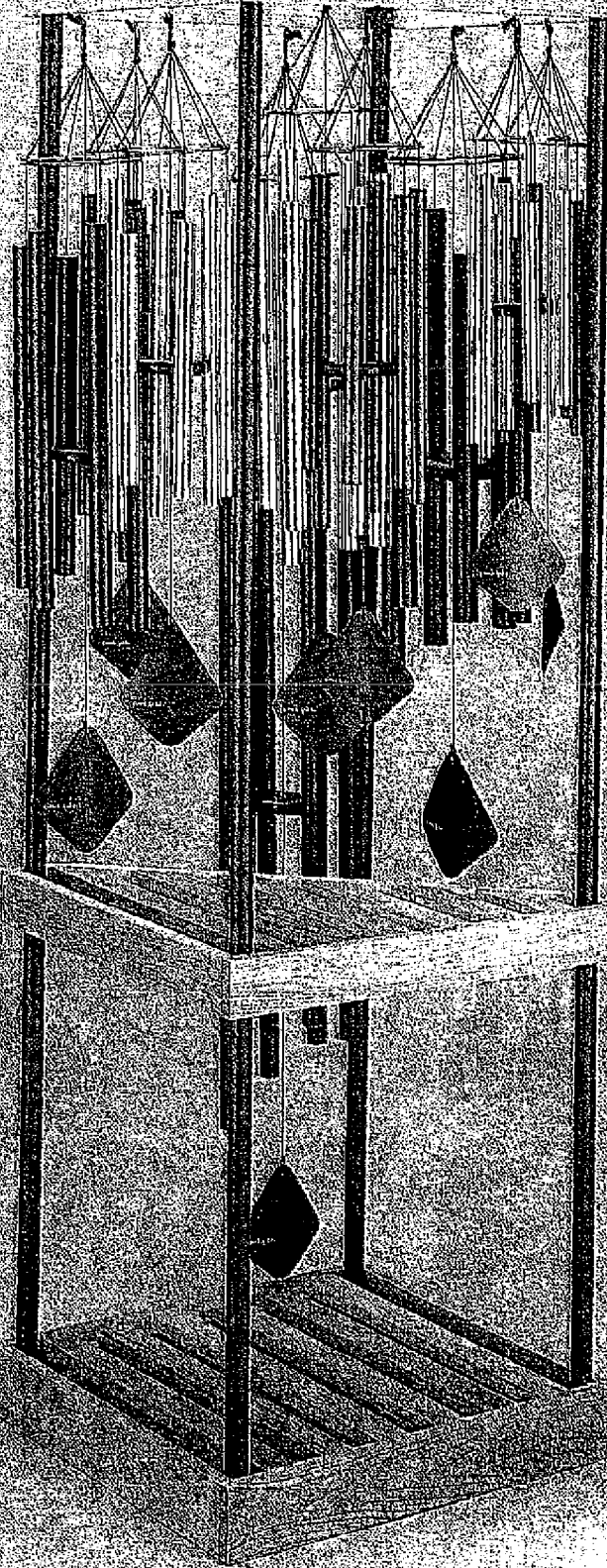
Gentle Spirits™ windchimes produce soft, beautiful tones with resonance that you have to hear to believe. Available in black or silver, these gentle windchimes will enchant you with their calming musical tones.

One ring, and your customers will hear the difference...

800-338-1342 (phone)

Majesty Bells®

703-365-7306 (fax)



Crown Display

Gentle Spirits™

*By
Majesty Bells®*

*Our Crown display
beautifully showcases
nine Gentle Spirits™
windchimes, each at eye
level, so your customers
can ring and enjoy every
chime we offer.*

*In just 28" x 28", our
Crown display is an
excellent selling tool for
your Gentle Spirits™
windchimes, and makes
an attractive addition to
your store.*

*Call us today at:
800-338-1342 (phone)
703-365-7306 (fax)*

Majesty Bells®

LUNDEEN & ARISMENDI, L.L.P.

Attorneys and Counselors ~ Intellectual Property Law

DANIEL N. LUNDEEN*
A.M. (ANDY) ARISMENDI, JR.**
DAVID B. DICKINSON**

*A PROFESSIONAL CORPORATION
**BOARD CERTIFIED, CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
ALSO ADMITTED LOUISIANA

April 5, 2001

VIA CMRRR No. 7099 3220 0001 8904 3993
Mr. Michael Throne
QMT ASSOCIATES, INC.
P.O. Box 823
Manassas Park, VA 20111
8431 Euclid Ave
Manassas Park, VA 20111

RE: *Civil Action No. H01-1001; Sara Neal Eskew, individually and as representative of the Estate of Lawrence Glenn Roark, d/b/a Music of the Spheres v. QMT Associates, Inc., U.S. District Court for the Southern District of Texas, Houston Division*

Dear Mr. Throne:

Enclosed is a copy of an Order for Conference and Disclosure of Interested Parties for the civil action 01-CV-1001 in the United States District Court – Southern District of Texas, Houston Division, which was inadvertently omitted from the waiver of service and complaint package sent to you this date

Sincerely,



David B. Dickinson

DBD/rjb
Enclosure

EMAIL • dave@lunarpatent.com
MAILING ADDRESS • P.O. BOX 131144 • HOUSTON, TEXAS • 77219-1144
1916 BALDWIN • HOUSTON, TEXAS 77002
TELEPHONE • 713-652-2555 • FACSIMILE • 713-652-2556

United States Court
Southern District of Texas
FILED

APR 02 2001 [LF

Michael H. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NUMBER **H - 01 - 1001**

ORDER FOR CONFERENCE
AND
DISCLOSURE OF INTERESTED PARTIES

1. Counsel and all parties appearing pro se shall appear for an initial pretrial and scheduling conference before

Judge Lee H. Rosenthal
on July 27, 2001, at 8:45 a.m
at United States Courthouse
Court Room 11-B, 11th Floor
515 Rusk Avenue
Houston, Texas 77002

2. Counsel shall file with the clerk within fifteen days from receipt of this order a certificate listing all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other entities that are financially interested in the outcome of this litigation. If a group can be specified by a general description, individual listing is not necessary. Underline the name of each corporation whose securities are publicly traded. If new parties are added or if additional persons or entities that are financially interested in the outcome of the litigation are identified at any time during the pendency of this litigation, then each counsel shall promptly file an amended certificate with the clerk.

3. After the parties meet as required by Fed. R. Civ. P. 26(f), counsel and all parties appearing pro se shall prepare and file not less than 10 days before the conference a joint discovery/case management plan containing the information required on the attached form as required by Fed. R. Civ. P. 26(f).

4. The court will enter a Docket Control Order and may rule on any pending motions at the conference.

5. Counsel and pro se parties who file or remove an action must serve a copy of this order with the summons and complaint or with the notice of removal.

6. Attendance by an attorney who has authority to bind each represented party is required at the conference.

7. Counsel and all parties appearing pro se shall discuss whether alternative dispute resolution is appropriate and at the conference shall advise the Court of the results of their discussions.

8. Fed. R. Civ. P. 4(m) requires defendant(s) to be served within 120 days after the filing of the complaint. The failure of plaintiff(s) to file proof of service within 120 days after the filing of the complaint may result in dismissal of this action by the court on its own initiative.

9. Failure to comply with this order may result in sanctions, including dismissal of the action and assessment of fees and costs.

By Order of the Court

ATTORNEY'S
COPY

JUDGE LEE H. ROSENTHAL
October 1998

**THE ATTACHED MUST BE SERVED
WITH THE SUMMONS AND COMPLAINT
OR REMOVAL PAPERS**

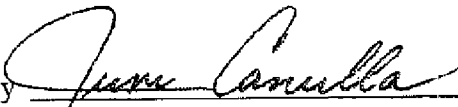
Your attention is directed to the court procedures and attachments which are distributed in cases assigned to Judge Rosenthal.

Plaintiff must serve these materials and the Order for Conference on all defendants with the summons and complaint.

A party removing a case to this court has the same obligation as a plaintiff filing an original complaint. Proof reflecting service of these materials must be filed with the Clerk. A form of certificate for use in removed cases is attached at the end of these materials. A directory of telephone numbers for the Southern District of Texas, Houston Division is also attached.

The accompanying procedures are to be used in conjunction with the Local Rules and not as a substitute for them.

MICHAEL N. MILBY, CLERK

By 
June Canulla
Case Manager to
JUDGE LEE H. ROSENTHAL

**ATTORNEY'S
COPY**

JUDGE LEE H. ROSENTHAL
United States Courthouse
515 Rusk Street, Room 11535
Houston, Texas 77002
(713) 250-5980 (Telephone)
(713) 250-5213 (Fax)

June Canulla, Case Manager
United States District Clerk
Post Office Box 61010
Houston, Texas 77208
(713) 250-5517 (Telephone)
(713) 250-5213 (Fax)

COURT PROCEDURES

1. Contact with Court Personnel
2. Emergencies
3. Continuances
4. Appearances
5. Motion Practice
6. Briefs
7. Initial Pretrial Conferences and Scheduling Order
8. Required Pretrial Materials
9. Trial Settings
10. Exhibits
11. Equipment
12. Courtroom Procedures
13. Voir Dire
14. Depositions
15. Settlements and Orders of Dismissal

1 CONTACT WITH COURT PERSONNEL

- A Case-related telephone inquiries should be made to the case manager. Inquiries should not be made to the court's secretary or law clerks.
- B The case load will not allow the case manager to respond to casual telephone inquiries about motions and case status generally. Inquiries regarding motions, status of the case, and similar matters should be in writing unless time does not permit.
- C Information about the filing of documents, entry of orders, or docket entries should be obtained from the United States District Clerk's Office, at telephone number (713) 250-5115.
- D Case-related correspondence should be addressed to:

United States District Clerk
Post Office Box 61010
Houston, Texas 77208
- E Do not address substantive issues in letter form because letters are not docketed or included in the appellate record.
- F Copies of urgent motions or documents that require prompt attention by the court may be sent to chambers as well as to the clerk's office, with a transmittal letter that states why the court's prompt attention is required.

2 EMERGENCIES

- A Applications for restraining orders or for other immediate relief shall be made through the case manager. Applications shall be presented to the court by the case manager following counsel's affirmation that the opposing party has been contacted and that both parties can be available for a conference before the court. *Ex parte* applications for restraining orders will not be entertained by the court unless the requirements of Fed R Civ P 65(b) have been satisfied.
- B Motions for extension of deadlines in the Docket Control Order are not emergencies.

3 CONTINUANCES

- A Joint motions for continuances are not binding and will be granted at the court's discretion.
- B Vacation requests will be respected if presented well in advance of a court setting.

- C. A trial will not be continued because of the unavailability of a witness. Counsel are expected to anticipate such possibilities and should be prepared to present testimony by written deposition, videotaped deposition, or by stipulation.

4 APPEARANCES

- A. An attorney or *pro se* litigant who appears at a hearing or conference shall
- (1) be familiar with the case,
 - (2) have authority to bind the party, and
 - (3) be in charge for that appearance.
- B. If out-of-town counsel wish to participate in a conference by telephone, a written request should be made to the case manager as far as reasonably possible before the date of conference. The court will attempt to accommodate such requests.
- C. Counsel or a *pro se* litigant will notify the case manager immediately of the resolution of any matter that is set for trial or hearing.

5 MOTION PRACTICE

- A. The court follows the written motion practice described in the local rules. Because most motions will be ruled on without an oral hearing, brief, clear motion papers are very important. The court will consider the motion and response after the submission date.
- B. A submission date may be extended by agreement of counsel except when the extension violates a court-imposed deadline. Counsel should immediately notify the case manager, in writing, of such an agreement. If you have pending motions as to which the submission date has passed and the motions require resolution on an expedited basis or by a certain date, please advise the court by sending a letter to chambers. In the letter, set out the reason that the motion requires prompt attention, such as an approaching docket call.
- C. Most discovery disputes, especially those dealing with: (1) scheduling; (2) the number, length, or form of oral or written questions; (3) the responsiveness of answers to oral or written questions; and (4) the mechanics of document production, including protective orders and the proper method of raising claims of privilege, should be resolved by counsel without the intervention of the court.
- D. The court will not hear any discovery motions unless moving counsel advises the court, in the motion, that counsel have conferred in a good faith effort to resolve the matters in dispute but are unable to reach an agreement. The statement shall recite

the date, time, and place of such conference and the names of all parties who took part. If moving counsel has been unable to confer because of the unavailability or unwillingness of opposing counsel, the statement shall recite the facts concerning attempts to hold such conferences

- E Any party wishing to make any discovery motion should arrange for a conference with the court before the preparation and submission of any motion papers. Call or, preferably, fax Ms. Canulla to arrange for a pre-motion conference and notify your adversary of the date and time fixed for the conference, subject to the availability of opposing counsel. The telephone number is (713) 250-5517; the fax number is (713) 250-5213. To the extent that the proposed motion can be disposed of upon oral presentation at the conference, this will be done. If papers are necessary, the issues to be addressed and a schedule for briefs will be set in the conference.
- F Motions for extension of discovery must be filed far enough in advance of the deadline to enable opposing counsel to respond before the deadline
- G Requests for oral argument on motions are not necessary. The case manager will notify counsel if the court determines that oral argument would be beneficial.
- H Discovery and other pretrial motions may be referred to a magistrate.
- I The court will rule on motions as soon as possible. Counsel will be furnished with copies of orders.

6. BRIEFS

- A The court requires concise, pertinent, and well-organized briefs and memoranda of law. Any brief or memorandum shall be limited to 25 pages unless counsel obtains leave of court for longer submissions. All briefs and memoranda must contain items (3), (4), (6), and (7) from the list below. Any brief or memorandum that has more than 10 pages of argument must contain the following items.
- (1) A table of contents setting forth the page number of each section, including all headings designated in the body of the brief or memorandum.
 - (2) A table of citations of cases, statutes, rules, textbooks, and other authorities, alphabetically arranged.
 - (3) A short statement of the nature and stage of the proceeding.
 - (4) A statement of the issues to be ruled on by the court and a short statement, supported by authority, of the standard of review for each issue.

- (5) A short summary of the argument
 - (6) The argument shall be divided under appropriate headings succinctly setting forth separate points
 - (7) A short conclusion stating the precise relief sought
- B Any brief, memorandum, or motion that cites authorities not found in the United States Code, United States Supreme Court Reporter, Federal Reporter, Federal Supplement, Southwestern Reporter Second or Vernon's Revised Statutes and Codes Annotated should have attached as an appendix copies of the relevant parts of authorities other than cases and complete copies of cases. Copies of any affidavits, deposition testimony, or other discovery referred to should also be contained in the appendix. All appendices should contain a paginated table of contents and should be tabbed at the right margin so the materials can be easily located.

7 INITIAL PRETRIAL CONFERENCES AND SCHEDULING ORDERS

Refer to Local Rule 16.1 and the court's Order for Conference. Counsel will prepare and file a joint Discovery/Case Management Plan in the form provided before the initial pretrial conference.

A form of Scheduling and Docket Control Order is attached. The parties may agree on deadlines for completion of pretrial matters and bring a proposed Scheduling and Docket Control Order with them to the initial pretrial conference. The Scheduling and Docket Control Order will control the subsequent course of the case and shall not be modified except by leave of this court upon a showing of good cause.

If new parties are joined after the Scheduling and Docket Control Order is entered, the party causing such joinder shall provide copies of all orders previously entered in the case, along with the Scheduling and Docket Control Order and the court's procedures manual, to the new parties.

8 REQUIRED PRETRIAL MATERIALS

A Joint Pretrial Order

The plaintiff is responsible for ensuring that the complete Joint Pretrial Order is filed on time. A form Joint Pretrial Order is attached. Follow the form, adapting it within reason to the size and type of case. Joint Pretrial Orders must be signed by all counsel and parties appearing *pro se*.

B. Other Required Documents

With the filing of the pretrial order, each party must also file two copies of the following:

(1) For All Trials and Evidentiary Hearings:

- a. Exhibit list
- b. Objections to exhibits
- c. Witness list

(2) For Jury Trials

- a. A **single** proposed jury charge, including all instructions, definitions, and questions

Each requested instruction, definition, and question must be numbered and presented on a separate sheet of paper with authority

Even if the parties, in good faith, cannot agree on all instructions, definitions, or questions, the parties will nonetheless submit a single charge. Each disputed instruction, definition, or question is to be set out in bold type, or italics, or underlined, and identified as disputed. Each disputed item should be labeled to show which party is requesting the disputed language. Accompanying the charge will be all authority on which the offering or opposing party relies.

The charge must also be submitted on a 3 ½ inch diskette compatible with Corel WordPerfect 8 word processing.

- b. Memorandum of law

(3) For Non-Jury Trials

- a. Proposed findings of fact and conclusions of law
- b. Memorandum of law

9 TRIAL SETTINGS

- A. The court holds docket call the last Friday of each month. Unless counsel are notified to the contrary, the court will use docket call as a final pretrial conference. All pending motions may be ruled on at docket call. The court maintains a two-week trailing docket during which a case is subject to call to trial on 48 hours telephone notice.
- B. Unless an attorney has actually begun trial in another court, prior trial settings will not cause a case to be continued or passed after the court has set it for trial.
- C. If a case is not reached for trial when set, it will be reset as soon as possible.

10 EXHIBITS

- A. All exhibits must be marked and exchanged among counsel *before* trial. The offering party will mark his own exhibits with the party's name, case number, and exhibit number on each exhibit to be offered.
- B. Any counsel requiring authentication of an exhibit must notify offering counsel in writing within five (5) business days after the exhibit is identified as a trial exhibit and made available for examination. Failure to do so is an admission of authenticity.
- C. The court will admit all exhibits listed in the Joint Pretrial Order into evidence unless opposing counsel files written objections supported by authority at least three (3) business days before trial.
- D. Counsel will not pass exhibits to the jury during trial without obtaining permission in advance from the court. All admitted exhibits will go to the jury during its deliberations.
- E. Counsel for each party is required to provide the court with a copy of that party's exhibits in a properly tabbed and indexed notebook.
- F. Counsel should become familiar with the local rule regarding disposition of exhibits following trial.

11 EQUIPMENT

- A. Counsel are responsible for providing sound and video equipment. Inform the case manager before trial so arrangements can be made to accommodate building security.
- B. Easels with writing pads, blackboards, and an x-ray viewbox are available for use in the courtroom.

12 **COURTROOM PROCEDURES**

- A. **Hours:** The court's hours during trial will vary depending on the type of case and the needs of the parties, counsel, witnesses, and the court. Court will normally convene at 9:00 a.m. and adjourn at 5:00 p.m., recessing for lunch between 12:00 p.m. and 1:15 p.m.
- B. **Access at Other Times:** Counsel needing access to the courtroom to set up equipment or exhibits outside normal hours must arrange in advance with the case manager to have the courtroom open.
- C. **Telephones:** Telephone messages will not be taken by the judge's staff and counsel shall refrain from requesting use of telephones in chambers. Public telephones are available beside the elevators.
- D. **Filing of Documents:** Two copies of documents filed immediately before and during trial should be submitted to the case manager.
- E. **Attorney Conference Rooms:** Attorney conference rooms are available upon request to the judge's secretary. A key will be given to counsel by the secretary for use throughout the trial, and counsel will be responsible for clearing the room of all materials and returning the key to the secretary at the conclusion of the trial.
- F. **Decorum:**
- (1) Counsel and parties will comply with the local rule regarding courtroom behavior.
 - (2) Counsel will ensure that all parties and witnesses refrain from chewing gum, drinking, eating, smoking, or reading newspapers, books, etc. in the courtroom. Telephone beepers, pagers, or cell phones must be turned off in the courtroom.
- G. **Witnesses:**
- (1) Counsel are responsible for summoning witnesses into the courtroom and instructing them on courtroom decorum. Counsel may question witnesses either from counsel table or a podium. Counsel shall conduct opening statements and closing arguments either from a lectern, standing before the jury, or facing the court.
 - (2) Counsel shall make every effort to elicit from the witnesses only information relevant to the issues in the case and to avoid cumulative testimony.
 - (3) Counsel should bear in mind the court's hours and arrange for witnesses accordingly. The court will not recess to permit counsel to

call a missing witness unless he or she has been subpoenaed and has failed to appear

H **Seating:**

(1) In civil cases, seating at counsel tables is generally determined on a first-come, first-served basis on the first day of trial.

(2) Enter and leave the courtroom only by the front doors; do not use the court's entrance or the side entrances.

I While the jury is deliberating, counsel are to remain near the courtroom to be available promptly for jury notes or a verdict unless given permission to leave by the court.

J After the jury and counsel are excused, counsel may not contact jurors unless otherwise permitted by the court

13. **VOIR DIRE**

The court will conduct a preliminary examination of the jury panel. Following the court's examination, each side may be allowed briefly to examine the panel. Proposed voir dire questions must be submitted as part of the Joint Pretrial Order.

14. **DEPOSITIONS**

A. The court will accept the parties' agreement to use a deposition at trial even though the witness is available; otherwise, follow Fed. R. Civ. P. 32.

B. Before trial, counsel must provide the case manager with a copy of any deposition to be used at trial.

C. Counsel will designate the portions of any deposition to be read or shown by videotape by citing pages and lines in the Joint Pretrial Order. Objections to those portions (citing pages and lines) with supporting authority must be filed at least three (3) business days before trial.

D. Use of videotaped depositions is permitted if counsel edit to resolve objections and incorporate the court's rulings on objections.

E. In a *bench trial*, counsel shall offer the entire deposition as a trial exhibit. In addition, counsel shall attach to the front of the deposition exhibit a summary of what each party intends to prove by such testimony.

15 **SETTLEMENTS AND ORDERS OF DISMISSAL****A Settlements**

- (1) Counsel shall immediately notify the case manager of a settlement of any case set for conference, hearing, or trial.
- (2) Announcement of settlement must be followed by the closing papers within thirty days or the court will dismiss the case.
- (3) Upon settlement of a suit involving a minor plaintiff, counsel will jointly move for appointment of a guardian ad litem if there is a potential conflict of interest between the parent(s) and the minor. If counsel cannot agree on a guardian ad litem, each counsel will submit the names of three proposed ad litem, and the court will appoint a guardian ad litem. With the motion for appointment, counsel will notify the case manager by letter requesting a settlement conference.

B Orders of Dismissal

Any defendant upon whom service has not been perfected within 120 days after the complaint is filed will be dismissed for want of prosecution in accordance with Fed R. Civ. P. 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

	§ § § § § § § § § §	CIVIL ACTION NO. H-_____
Plaintiff(s),		
v		
Defendant(s)		

JOINT PRETRIAL ORDER

Appearance of Counsel

List the parties, their respective counsel, and the addresses and telephone numbers of counsel in separate paragraphs

Statement of the Case

Give a brief statement of the case for the information of the court and/or jury which the court may read to the jury panel to see if the panel is acquainted with the facts of, or parties to, the case. Include names, dates, and places

Jurisdiction

Briefly set out why the court has full and complete jurisdiction of the subject matter and the parties. If there is an unresolved jurisdictional question, state the problem

Motions

List any pending motions.

Contentions of the Parties

State concisely in separate paragraphs what each party claims.

Admissions of Fact

List all facts that require no proof

Contested Issues of Fact

List all factual issues in controversy necessary to the final disposition of this case.

Agreed Applicable Propositions of Law

State the legal propositions not in dispute

Contested Issues of Law

State briefly the disputed issues of law. A memorandum of authorities should be filed which addresses these issues.

Exhibits

Each party will attach to this Joint Pretrial Order two copies of a list in the form shown by attachment A (or a similar form) of all exhibits expected to be offered. Each party will make the exhibits available for examination by the opposing parties. This rule does not apply to rebuttal exhibits, which cannot be anticipated.

All parties requiring authentication of an exhibit must notify the offering counsel in writing within five business days after the exhibit is listed and made available to opposing parties. Failure to do so is an admission of authenticity.

The court will admit all exhibits listed in the final Joint Pretrial Order into evidence unless the opposing parties file written objections with authorities at least three business days before trial.

The offering party will mark his own exhibits before trial to include the party's name, case number, and exhibit number on each exhibit.

Witnesses

List the names and addresses of witnesses who will or may be called and include a brief statement of the subject matter and substance of their testimony. If a witness is to appear by deposition, cite the inclusive pages and lines to be read. Objections to those portions (citing pages and lines) with supporting authority must be filed at least three business days before trial.

Each party will also attach to the Joint Pretrial Order two copies of a list of witnesses' names for use only by court personnel.

Include in this section the following statement:

"In the event there are any other witnesses to be called at the trial, their names, addresses and the subject matter of their testimony shall be reported to opposing counsel as soon as they are known. This restriction shall not apply to rebuttal or impeachment witnesses, the necessity of whose testimony cannot reasonably be anticipated before the time of trial."

Settlement

Include a statement as to the status of settlement negotiations, and, if applicable, that all settlement efforts have been exhausted. State the current settlement demand and offer and whether the case can reasonably be expected to settle.

Trial

Include in this paragraph:

- (a) whether the trial will be jury or non-jury;
- (b) the probable length of trial;
- (c) the availability of witnesses; and
- (d) any foreseeable logistical problems

Additional Required Attachments

For Jury Trials include two copies of:

- (a) proposed questions for the voir dire examination
- (b) a single, joint proposed jury charge, including all instructions, definitions, and questions, separately numbered and presented on a separate sheet of paper with authority. If there are instructions, definitions, or questions as to which the parties cannot agree, the disputed language shall be set out in bold type, italics, or underlined; identified as disputed; and labeled to indicate which party is requesting the disputed language. The charge must also be submitted on a 3 ½ inch diskette compatible with Corel WordPerfect 8 word processing.
- (c) memorandum of law.

For Non-Jury Trials include two copies of:

- (a) proposed findings of fact and conclusions of law; and
- (b) memorandum of law

_____	_____
Date	LEE H ROSENTHAL UNITED STATES DISTRICT JUDGE

APPROVED:

_____	_____
Counsel for Plaintiff(s)	Date
_____	_____
Counsel for Defendant(s)	Date

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

_____	§	
	§	
Plaintiff(s),	§	
	§	
v.	§	CIVIL ACTION NO. H- _____
	§	
_____	§	
	§	
Defendant(s)	§	

**SCHEDULING AND
DOCKET CONTROL ORDER**

The disposition of this case will be controlled by the following schedule:

DEADLINES

1. _____ **MOTIONS TO ADD NEW PARTIES**
The attorney causing the addition of new parties will provide copies of this Order to new parties.

2. _____ **AMENDMENTS TO PLEADINGS**
All parties may amend before this deadline without filing a motion.

3a. _____ **EXPERTS**
Plaintiff (or the party with the burden of proof on an issue) will designate expert witnesses in writing and provide the report required by Rule 26(a)(2) of the Federal Rules of Civil Procedure.

3b. _____ The opposing party will designate expert witnesses in writing and provide the report required by Rule 26(a)(2) of the Federal Rules of Civil Procedure

4. _____ **MEDIATION/ADR**
The parties are to file a joint status report with the court stating whether mediation or other form of ADR would be helpful. If not, the parties are to state the reasons in detail. If so, the parties are to state the form of ADR they think will best suit the case; whether they wish to select a mediator and, if so, who they have agreed to select; when they want to

mediate; and any other information relevant to the entry of a court order on mediation/ADR

5 _____

COMPLETION OF DISCOVERY

Written discovery requests are not timely if they are filed so close to this deadline that under the Federal Rules of Civil Procedure the response would not be due until after the deadline

6 _____

LIMITS ON DISCOVERY

7 _____

DISPOSITIVE MOTIONS DEADLINE

8 _____

OTHER PRETRIAL MOTIONS DEADLINE

No motion shall be filed after this date except for good cause.

9 _____

JOINT PRETRIAL ORDER AND MOTION IN LIMINE DEADLINE

The Joint Pretrial Order will contain the pretrial disclosures required by Rule 26(a)(3) of the Federal Rules of Civil Procedure Plaintiff is responsible for timely filing the complete Joint Pretrial Order Failure to file a Joint Pretrial Order timely may lead to dismissal or other sanction in accordance with applicable rules

10 _____

DOCKET CALL

Docket Call will be held at 2:00 p.m. in Courtroom 11-B, United States Courthouse, 515 Rusk, Houston, Texas. No documents filed within seven (7) days of the Docket Call will be considered. All pending motions may be ruled on at docket call, and the case will be set for trial

Date

LEE H ROSENTHAL
UNITED STATES DISTRICT JUDGE

APPROVED:

Counsel for Plaintiff(s)

Date

Counsel for Defendant(s)

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

	§	
Plaintiff(s),	§	
v	§	
	§	CIVIL ACTION NO H-_____
Defendant(s)	§	

JOINT DISCOVERY/CASE MANAGEMENT PLAN
UNDER RULE 26(f)
FEDERAL RULES OF CIVIL PROCEDURE

Please restate the instruction before furnishing the information

1. State where and when the meeting of the parties required by Rule 26(f) was held, and identify the counsel who attended for each party
2. List the cases related to this one that are pending in any state or federal court with the case number and court.
3. Briefly describe what this case is about
4. Specify the allegation of federal jurisdiction
5. Name the parties who disagree and the reasons
6. List anticipated additional parties that should be included, when they can be added, and by whom they are wanted
7. List anticipated interventions
8. Describe class action issues
9. State whether each party represents that it has made the initial disclosures required by Rule 26(a). If not, describe the arrangements that have been made to complete the disclosures
10. Describe the proposed agreed discovery plan, including:
 - A. Responses to all the matters raised in Rule 26(f)
 - B. When and to whom the plaintiff anticipates it may send interrogatories

- C. When and to whom the defendant anticipates it may send interrogatories
 - D. Of whom and by when the plaintiff anticipates taking oral depositions
 - E. Of whom and by when the defendant anticipates taking oral depositions
 - F. When the plaintiff (or the party with the burden of proof on an issue) will be able to designate experts and provide the reports required by Rule 26(a)(2)(B), and when the opposing party will be able to designate responsive experts and provide their reports
 - G. List expert depositions the plaintiff (or the party with the burden of proof on an issue) anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).
 - H. List expert depositions the opposing party anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).
11. If the parties are not agreed on a part of the discovery plan, describe the separate views and proposals of each party
 12. Specify the discovery beyond initial disclosures that has been undertaken to date
 13. State the date the planned discovery can reasonably be completed
 14. Describe the possibilities for a prompt settlement or resolution of the case that were discussed in your Rule 26(f) meeting.
 15. Describe what each party has done or agreed to do to bring about a prompt resolution
 16. From the attorneys' discussion with the client, state the alternative dispute resolution techniques that are reasonably suitable, and state when such a technique may be effectively used in this case
 17. Magistrate judges may now hear jury and non-jury trials. Indicate the parties' joint position on a trial before a magistrate judge.
 18. State whether a jury demand has been made and if it was made on time
 19. Specify the number of hours it will take to present the evidence in this case
 20. List pending motions that could be ruled on at the initial pretrial and scheduling conference
 21. List other motions pending
 22. Indicate other matters peculiar to this case, including discovery, that deserve the special attention of the court at the conference

- 23. Certify that all parties have filed the Disclosure of Interested Persons as directed in the Order for Conference and Disclosure of Interested Persons, listing the date of filing for original and any amendments.
- 24. List the names, bar numbers, addresses and telephone numbers of all counsel.

Counsel for Plaintiff(s)

Date

Counsel for Defendant(s)

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

v. _____

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CA/CR NO

LEE H. ROSENTHAL
JUDGE

June Canulla
COURTROOM CLERK

COURT REPORTER

PROCEEDING

EXHIBIT LIST OF

NO.	DESCRIPTION	OFFER	OBJ	DATE	
				ADMIT	N/ADM
1					
2					
3					
4					
5					
6					
7					
8					
9					

**NOTICE OF THE RIGHT TO CONSENT TO THE
DISPOSITION OF A CIVIL CASE BY A MAGISTRATE JUDGE**

Upon the consent of all the parties, the United States magistrate judge of this court may conduct all proceedings in a civil case, including a jury trial and entry of a final judgment. Consent forms are available from the Clerk.

Your decision to consent to the referral of your case referred to a United States magistrate judge is entirely voluntary and should be communicated solely to the Clerk. Only if all the parties consent will either the district judge or magistrate judge be informed of your decision.

The district judge to whom your case is assigned must approve the reference of the case to a magistrate judge.

At the time of consenting to trial by a magistrate judge, a choice must be made between an appeal (a) to the court of appeals or (b) to a district judge.

Michael N. Milby, Clerk
United States District Court
Southern District of Texas

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

versus

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§

CIVIL ACTION

Consent to Proceed Before a Magistrate Judge

All parties to this case waive their right to proceed before a district judge and consent to have a United States Magistrate Judge conduct all further proceedings, including the trial and judgment. 28 U.S.C. § 636(c).

Order to Transfer

This case is transferred to United States Magistrate Judge

_____ to conduct all further proceedings, including final judgment.

Date

United States District Judge

configuration for the tubes, and (4) a black, curved, diamond shape for the wind catcher, is not necessary for her chimes to operate.

2. Admit that there a limited number of ways a wind chime manufacturer can arrange the Basic Elements and still have it operate as a wind chime.

ANSWER: Denied.

3. Admit that a wind chime must contain a suspension system to hold the tubes.

ANSWER: Denied.

4. Admit that plaintiff was not the first wind chime manufacturer to use an open-ring suspension system to hold its wind chime tubes.

ANSWER: Noting that novelty is not a requirement of trade dress, plaintiff denies the request except to the extent that several manufacturers have used the particular design and appearance of different rings in an open-ring suspension system to help distinguish their chimes from those of other manufacturers, and while at least one of these different ring designs were used before plaintiff's, plaintiff specifically denies that she was not the first to use a polished stainless steel ring with a circular cross-sectional profile in a distinctive overall appearance and trade dress.

5. Admit that wind chime manufacturers other than plaintiff and QMT currently use an open-ring suspension system.

ANSWER: Denied except to the extent that the current use by several other wind chime manufacturers of different specific designs of a ring besides plaintiff's polished stainless steel having a circular cross section in an open-ring suspension system serves to help distinguish their chimes from those of other manufacturers and shows that the appearance of plaintiff's trade dress represented by this feature is distinctive and non-functional, noting that plaintiff and QMT are the only manufacturers currently using a polished stainless steel ring with a circular cross-sectional profile in a wind chime with black-and-silver tubes producing an overall appearance identical to or confusingly similar to plaintiff's trade dress.

6. Admit that plaintiff's chimes are designed to permit outdoor use and, that as a result, the components of the chimes are selected, at least in part, for their durability and weathering characteristics.

ANSWER: Denied since plaintiff's selection of her trade dress and the

appearance of the wind chimes had nothing to do with outdoor use, except to the extent that many materials of construction, such as aluminum used by other wind chime manufacturers in ring shapes from which plaintiff's ring shape is distinguishable, have suitable durability and weathering characteristics.

7. Admit that the quality of plaintiff's wind chimes would be diminished if the open-ring in the suspension system consisted of materials that could not withstand adverse outdoor weather conditions, such as rain and/or snow.

ANSWER: Denied since plaintiff's trade dress and the appearance of her wind chimes are unrelated to quality as represented by weathering resistance to rain and snow, except to the extent that many materials of construction, such as aluminum used by other wind chime manufacturers in ring shapes from which plaintiff's ring shape is distinguishable, have suitable weathering characteristics.

8. Admit that using a material for the open-ring that reduces the effects of rusting improves the quality of plaintiff's wind chimes.

ANSWER: Denied since the shape and appearance of the ring do not affect rust resistance, except to the extent that rusting is undesirable and noting that many materials of construction regardless of shape would deter rust, including the materials of construction used by other wind chime manufacturers who have not copied plaintiff's distinct design.

9. Admit that plaintiff's stainless steel ring in its wind chimes: (a) reduces the effects of rusting; (b) provides a durable framework for the wind chime because stainless steel is capable of holding the weight of the chimes.

ANSWER: Denied since the shape, finish texture and appearance of plaintiff's ring do not affect rusting, except to the limited extent that stainless steel is one of many materials of construction which (a) reduces effects of rust and (b) is strong enough to support the weight of chimes in the dimensions and shapes employed by plaintiff, noting that the appearance to plaintiff's trade dress contributed by the ring, including an open circular ring with a right circular cross sectional profile and polished finish, is NOT necessary for rust inhibition and/or strength.

10. Admit that two alternative ways to suspend wind chime tubes are: (a) using cordage that attaches hidden from view, within the center of the tubes and without penetrating the side walls of the tubes ("Centrally-Suspended Tubes") or (b) strung through holes in the side walls of the tubes ("Strung Tubes").

ANSWER: Admitted with respect to wind chime manufacturers generally,

but plaintiff does not admit that these are the only two ways or that plaintiff and/or defendant use either of them.

11. Admit that plaintiff was not the first wind chime manufacturer to use Centrally Suspended Tubes.

ANSWER: Denied since plaintiff does not use "Centrally Suspended Tubes" as defined above and since novelty is not a requirement for protection of trade dress, except to the extent that at least one other wind chime manufacturer used Centrally Suspended Tubes *without* a visible attachment pin penetrating the side walls of the tubes before plaintiff adopted her trade dress. Plaintiff has no knowledge of any manufacturer using centrally suspended tubes *with* a visible attachment pin penetrating the side walls of the tubes before plaintiff.

12. Admit that plaintiff uses a Centrally-Suspended Tube suspension system, in part, because it: (a) reduces cord wear; (b) improves the sound quality of the wind chime.

ANSWER: Denied.

13. Admit that the quality of plaintiff's wind chimes would be diminished if it used a suspension system that (a) less effectively reduced cord wear than a Centrally-Suspended Tube system; (b) sounded inferior to the Centrally-Suspended Tube system.

ANSWER: Denied.

14. Admit that plaintiff was not the first wind chime manufacturer to use centrally suspended tubes in combination with an open-ring suspension system.

ANSWER: Novelty is not a requirement for the protection of trade dress. Denied to the extent that plaintiff does not use Centrally Suspended Tubes *without* visibly penetrating the side walls of the tubes as defined above, and has no knowledge of any other earlier or later wind chime manufacturer using centrally suspended tubes *with* a visible attachment pin penetrating the side walls of the tubes in combination with a suspension ring with the appearance of an open circular ring with a right circular cross sectional profile and polished finish.

15. Admit that wind chime manufacturers other than plaintiff and QMT currently use centrally suspended tubes with an open-ring suspension system.

ANSWER: Plaintiff does not use Centrally Suspended Tubes *without* visibly

penetrating the side walls of the tubes, and has no knowledge of any other wind chime manufacturer besides Music of the Spheres and QMT using centrally suspended tubes *with* a visible attachment pin penetrating the side walls of the tubes in combination with a stainless steel suspension ring having the appearance of an open circular ring with a right circular cross sectional profile and polished finish. Other wind chime manufacturers use Centrally Suspended Tubes *without* visibly penetrating the side walls of the tubes with an open ring suspension system that do not copy plaintiff's trade dress like defendant did and are not confusingly similar thereto.

16. Admit that plaintiff's wind catcher affects the operation of its wind chime.

ANSWER: Since the specific shape, color, texture and appearance of plaintiff's wind catcher does not affect the operation of her chime beyond any generic dimensionality requirements found in all other three-dimensional wind catchers not having an appearance similar to plaintiff's, denied except to the extent that plaintiff admits any wind catcher, including many designs that are not confusingly similar to plaintiff's wind catcher appearance used by many manufacturers who did not imitate plaintiff's wind catcher design like defendant did, will operate a wind chime equally well.

17. Admit that each of the following affect the performance of plaintiff's wind chimes: (a) the size of plaintiff's wind catcher, (b) the shape of plaintiff's wind catcher; (c) the placement of plaintiff's wind catcher.

ANSWER: (a) Denied except to the extent that the relative size and wind resistance of the wind catcher can affect the activity of the wind chime at different wind speeds, a characteristic the desirability of which varies from consumer to consumer. (b) See response to request for admission no. 16. (c) Plaintiff is unable to respond as the request is ambiguous and unclear what is meant by "placement."

18. Admit that the curved/convex shape of plaintiff's wind catcher is designed to increase the wind catcher's ability to "catch" the wind and move the clapper into the tubes, as compared to a flat wind catcher.

ANSWER: Denied, except to the extent that three-dimensionality in general has improved wind catching ability relative to two-dimensional wind catchers in cross winds, but no different or worse wind catching ability in direct winds, and the specific curved/convex shape and other factors relating to the appearance of plaintiff's wind chime are equivalent in terms of wind catching ability to other three-dimensional wind catchers that do not look like plaintiff's wind catcher or

confusingly similar thereto.

19. Admit that the curved/convex shape of plaintiff's wind catcher more effectively catches wind than a flat wind catcher with a two-dimensional surface area.

ANSWER: Denied except to the extent that three-dimensionality in general has improved wind catching ability relative to two-dimensional wind catchers in cross winds, but no different or worse wind catching ability in direct winds, and the specific curved/convex shape and other factors relating to the appearance of plaintiff's wind chime are equivalent in terms of wind catching ability to other three-dimensional wind catchers that do not look like plaintiff's or confusingly similar thereto which are used by other wind chime manufacturers.

20. Admit that plaintiff's wind catcher hangs below the tubes in order to expose the wind catcher to the wind.

ANSWER: Denied.

21. Admit that the quality of plaintiff's wind chime would be diminished if it used a wind catcher that less effectively catches wind than its current wind catcher.

ANSWER: Denied.

22. Admit that plaintiff was not the first manufacturer to incorporate (a) black tubes, (b) a black clapper; and (c) black cordage, either individually or in combination.

ANSWER: Plaintiff, and subsequently QMT, are the only manufacturers to use a black tube with identical silver accents, and to use them in combination with a black disk-shaped clapper and black cordage in a confusingly similar overall trade dress, and further noting that plaintiff has no knowledge of a previous black, disk-shaped clapper, it is admitted to the extent that plaintiff was not the first manufacture to separately use individually, but not in combination with each other, black tubes without silver accents, a black clapper of a shape other than a disk, and black cordage, in a wind chime that was not confusingly similar to plaintiff's trade dress.

23. Admit that plaintiff began using black tubes to satisfy consumer desires.

ANSWER: Denied.

24. Admit that using a cord that does not show dirt improves the

quality of plaintiff's wind chime.

ANSWER: Denied.

25. Admit that plaintiff's matte black powder coated tubes hide: (a) fingerprints; (b) dirt, better than silver tubes.

ANSWER: Denied.

26. Admit that black tubes and silver tubes are, historically, the two most common colors of wind chime tubes.

ANSWER: Denied as to black and silver-accentuated black, but it is admitted that unicolor silver tubes without black accents are historically the most common color of wind chime tubes.

27. Admit that the silver color on the tops and bottoms of plaintiff's tubes results from the manufacturing process that removes the sharp edges from black powder coated tubes ("de-burring"), revealing the silver beneath.

ANSWER: Denied.

28. Admit that the tops and bottoms of plaintiff's tubes would be sharp or rough if they were not de-burred.

ANSWER: Admitted.

29. Admit that de-burring the tops and bottoms of plaintiffs tubes: (a) reduces cord wear; (b) provides a tube that is safer to be handled.

ANSWER: Admitted.

30. Admit that using a tube and suspension system that results in the cord lasting longer improves the quality of plaintiff's wind chimes.

ANSWER: It is admitted that the longevity and durability of the cord may improve the quality of the plaintiff's wind chimes to some consumers, but it is denied that the type of tube and suspension system in plaintiff's wind chime has any beneficial effect on this.

31. Admit that plaintiff uses a transverse pin through its tubes as a part of the Centrally-Suspended Tube suspension system in order to connect the tubes to the suspension system.

ANSWER: Denied for the reasons specified in response to request nos. 10-11.

32. Admit that plaintiff was not the first wind chime manufacturer to use a transverse pin as a part of its suspension system.

ANSWER: Denied since novelty is not a requirement for protection of trade dress, except to the extent that at least one other wind chime manufacturer used Centrally Suspended Tubes *without* a visible attachment pin penetrating the side walls of the tubes before plaintiff; plaintiff has no knowledge of any manufacturer using Centrally Suspended Tubes *with* visible penetration of the side walls of the tubes before plaintiff.

33. Admit that manufacturers other than plaintiff and QMT currently use a transverse pin as part of their suspension systems.

ANSWER: Denied, except to the extent that other wind chime manufacturers use Centrally Suspended Tubes *without* visibly penetrating the side walls of the tubes in wind chime designs that do not imitate plaintiff's trade dress, noting specifically that plaintiff has no knowledge of any manufacturer using Centrally Suspended Tubes *with* a visible attachment pin penetrating the side walls of the tubes other than defendant's copying of this feature.

34. Admit that plaintiff uses stainless steel as its material for the transverse pin, in part, because: (a) it is strong enough to support the weight of the tubes, (b) it reduces the effects of rusting.

ANSWER: Denied.

35. Admit that plaintiff's black and silver color scheme in its wind chimes results from: (a) the selection of a stainless steel material for the open-ring in plaintiff's suspension system, (b) the selection of a stainless steel material for the transverse pin placed in the center of the tubes as a part of the Centrally-Suspended Tube suspension system, and (c) the de-burring process conducted on the end of the tubes, (i.e., not from painting the ends of the tubes).

ANSWER: Denied.

36. Admit that consumers desire wind chimes with an overall uniform color scheme among the various wind chime components.

ANSWER: Denied.

37. Admit that each of the following affect a wind chime's sound or tonal qualities: (a) the type of material used for the clapper, (b) the size of the clapper, (c) the shape of the clapper; (d) the placement of the clapper.

ANSWER: (a) Denied except to the relatively minor extent that the hardness of the clapper material may affect the tone; (b) Denied; (c) Denied; (d) Denied except to the extent that the clapper must be positioned to strike a tube to produce a sound.

38. Admit that each of the following affect the sound or tonal quality of plaintiff's wind chimes: (a) the size of plaintiff's tubes; (b) the placement or arrangement of plaintiff's tubes.

ANSWER: (a) It is admitted that the relative physical dimensions of the tubes determine the particular relative pitch or frequency heard according to the laws of physics. (b) Denied.

39. Admit that plaintiff's arrangement and combination of the following elements results from considerations relating to improving wind chime quality, performance and/or durability, not solely as result of aesthetic considerations: (a) open-ring suspension system with a stainless-steel ring; (b) Centrally Suspended Tubes containing a stainless steel transverse pin; (c) the shape and size of the clapper as well as its placement; (d) the curved/convex shape and size of the wind catcher as well as its placement; (e) the size of the tubes.

ANSWER: Denied.

Respectfully submitted,
LUNDEEN & DICKINSON, L.L.P.
1916 Baldwin
Houston, TX 77002
713.652.2555 telephone
713.652.2556 facsimile




David B. Dickinson
Attorney in Charge for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **PLAINTIFF'S ANSWERS TO DEFENDANT'S SECOND SET OF REQUESTS FOR ADMISSIONS** upon lead attorney of record on or before the 7th day of April 2003, via first class mail:

Mr. Alan Harris
Mr. Paul Van Slyke
Locke Lidell
600 Travis, Suite 3400
Houston, Texas 77002

Mr. Alan Harris
Mr. Paul Van Slyke
Bodman, Longley & Dahling LLP
110 Miller, Suite 300
Ann Arbor, Michigan 48104
734-930-2494 Facsimile


David B. Dickinson

Certificate of Mailing

I hereby certify that Opposer's Interrogatories, Requests for Admission and Requests for Production of Documents (Opposition No 91165753), pertaining to the Application for U.S. Registration of the mark "MISCELLANEOUS DESIGN" Serial No. 78/213,865, are being deposited with the U.S. Postal Service as U S. Express Mail as of today's date to:

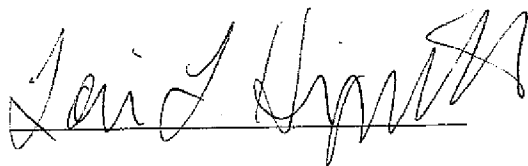
Daniel Lundeen
Lundeen & Dickinson, L.L.P.
PO Box 131144
Houston, TX 77219-1144

And

Daniel Lundeen
Lundeen & Dickinson, L.L.P.
1916 Baldwin
Houston, TX 77002

Name of person certifying mailing: Lori L. Hignite

Signature:

A handwritten signature in black ink, appearing to read "Lori L. Hignite", written over a horizontal line.

Date of Signing: March 1, 2006

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

In the matter of Application Serial No. 78/213,865, filed February 12, 2003
For the Mark MISCELLANEOUS DESIGN

QMT ASSOCIATES, INC.,
Opposer

v.

SARA NEAL ESKEW,
Applicant

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Opposition No. 91165753

**RESPONSE TO OPPOSER'S INTERROGATORIES, REQUESTS FOR
ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

The Applicant, Sara Neal Eskew (Eskew), by its attorneys, Lundeen & Dickinson, LLP, hereby responds to the interrogatories, requests for admission, and request for production of documents propounded by QMT Associates, Inc. (QMT) and served by overnight delivery on the last day at the very close of discovery March 1, 2006.

INTERROGATORIES

General Objection: The eleventh-hour interrogatories are oppressive, harassing, overly broad and unduly burdensome. Eskew believes that the number of interrogatories served, including subparts, exceeds the 75-interrogatory limit specified in 37 CFR § 2.120(d)(1). Eskew is not willing to waive this basis for objection, and within the time for (and instead of) serving answers and specific

objections to the interrogatories, hereby serves a general objection on the ground of their excessive number. TBMP § 405.03(e).

1. Identify each person whom ESKEW expects to provide testimony as a witness in this action, and with respect to such person, describe and identify the subject matter on which the person is expected to testify, and the substance of the expected testimony.

ANSWER: See objection above.

2. Identify each person whom ESKEW expects to provide testimony as an expert witness in this action, and with respect to such person, describe and identify:

- (a) The subject matter on which each such expert is expected to testify, and the substance of each such expert's expected testimony;

- (b) Each document the expert has been shown, has summarized, or otherwise made available for review in connection with his or her testimony in this matter and/or upon which the expert intends to rely;

- (c) Any and all opinions to be offered by each expert, the basis and reasons therefore, the data or other information considered by the expert, the basis and reasons therefore, the data or other information considered by the expert in forming any opinion to be offered;

- (d) Any report, summary or other written opinion prepared by the expert;
- (e) Any exhibits to be used as a summary or in support of any opinion to be offered by the expert;
- (f) The expert's qualifications, including a list of all publications authored by the expert within the preceding ten years;
- (g) Any compensation to be paid for the expert's study, opinions, report and/or testimony; and
- (h) A list of all other cases in which the expert has testified at trial or by deposition within the preceding four years.

ANSWER: See objection above.

3. Describe all facts known to ESKEW in support of the claimed non-functionality and distinctiveness of the alleged trade dress and identify and describe any customer or market surveys in support of the claims

ANSWER: See objection above.

4. Identify all legal proceedings involving ESKEW's sale/offering of the wind chimes containing the alleged trade dress (other than the instant opposition), including:

- (a) the title, civil action number and tribunal of each proceeding;
- (b) The date, nature and basis of the controversy;

- (c) the specific good (e.g., which specific type or style of wind chime) involved;
- (d) the parties involved;
- (e) the disposition of the proceeding, including the terms of any settlement of the controversy and the date thereof;
- (f) if not disposed of its current status; and
- (g) the citation of each reported controversy.

ANSWER: See objection above.

5. State with specificity any knowledge of ESKEW relating to any current or past use by a third party of trade dress ESKEW contends is similar to that claimed by ESKEW.

ANSWER: See objection above.

6. Identify with specificity each and every "arbitrary design feature" of the wind chimes as claimed in your Response to Office Action dated July 23, 2003.

ANSWER: See objection above.

7. Identify with specificity in the Stipulated Mutual Final Injunction in *Eskew v. QMT Associates, Inc.*, Civil Action No H-01-CV-1001, U.S. District Court, Southern District of Texas (October 28, 2003) the exact statement of

the court or QMT in which either acknowledged applicant's exclusive right to the wind chime trade dress claimed by ESKEW in the subject application.

ANSWER: See objection above.

8. If ESKEW's responses to QMT's requests for admissions below are anything other than a categorical admission, state all facts and identify all documents upon which ESKEW relies to support any denials.

ANSWER: See objection above.

REQUESTS FOR ADMISSION

1. Admit that as of February 12, 2003, ESKEW made the following claim on the website (www.musicofspheres.com) ("Website") pertaining to its wind chimes: "high quality materials, exacting tolerances and methodical assembly protocols ensure lasting quality and beauty"

ANSWER: The requested admission is incomplete, out of context, vague, mischaracterized, misleading, inaccurate and/or irrelevant, and is therefore DENIED.

2. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: "tough synthetic cordage is highly resistant to abrasion, ultra-violet degradation, rot and mildew."

ANSWER: DENIED.

3. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “central tube suspension with smoothly polished tube ends prevent cord abrasion typical of other, less labor-intensive suspension techniques.”

ANSWER: DENIED.

4. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “heavy gauge polished stainless steel rings provide sturdy support and enduring beauty.”

ANSWER: DENIED.

5. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “tempered aluminum alloy tubing is custom manufactured to our exacting specifications and will never rust.”

ANSWER: DENIED.

6. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “our corrosion-protective finish preserves chime’s appearance and increases durability in hostile environments (acid rain, salt air).”

ANSWER: DENIED.

7. Admit that as of February 12, 2003, ESKEW made the following claim on

the Website pertaining to its wind chimes: “solid polyethylene clappers provide superior tonal quality and outdoor durability”

ANSWER: DENIED.

8. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “the windcatcher, of the same finish and material as the tubes is the ideal size, weight, and shape for optimal chime performance in 8-10 mph wind velocity.”

ANSWER: DENIED.

9. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes. “the clapper slides on the central cord up into the ring creating a convenient “off-on” feature.”

ANSWER: DENIED.

10. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes. “[Music of the Spheres windchimes] are designed for lasting outdoor durability.”

ANSWER: DENIED.

11. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “the diamond-shaped wind catcher at the bottom of your Music of the Spheres, Inc. chime is the

“motor” that makes the chime work.”

ANSWER: DENIED.

11. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “windcatchers harness the power of the wind and transfer it to the clapper, which moves to strike the tubes and play the music.”

ANSWER: DENIED.

13. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “the larger the surface area of the wind catcher for a given size chime, the less wind s needed to activate it.”

ANSWER: DENIED.

14. Admit that as of February 12, 2003, ESKEW made the following claim on the Website pertaining to its wind chimes: “wind catchers are made of tempered aluminum alloy with a powder coat finish” and that “this finish provides corrosion protection and durability in all kinds of outdoor environments (acid rain, salt air, etc.)”

ANSWER: DENIED.

15. Admit that the matter entitled *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas was not

tried and there was no final ruling by the court, rather the parties negotiated and entered into a Stipulated Mutual Final Injunction and Settlement Agreement.

ANSWER: ADMITTED as to negotiation of a Settlement Agreement, in connection with which QMT acted in bad faith and/or breached, and entry of a Stipulated Mutual Final Injunction which QMT has violated; DENIED as to the remainder.

16. Admit that the pages attached as Exhibit A hereto are true, correct and accurate copies of select pages from ESKEW's Website at musicofspheres.com.

ANSWER: DENIED.

17. Admit that the document attached as Exhibit B hereto is a true, correct and accurate copy of the Settlement Agreement in the matter entitled *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas.

ANSWER: DENIED.

18. Admit that the document attached as Exhibit C hereto is a true, correct and accurate copy of the Amended Complaint in the matter entitled *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court,

Southern District of Texas.

ANSWER: DENIED.

19. Admit that the document attached as Exhibit D hereto is a true, correct and accurate copy of Plaintiff's Answers to Defendant's Second Set of Requests for Admission in the matter entitled *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas.

ANSWER: An answer to a request for admission is inadmissible and may not be used against the party in any other proceeding for any purpose under Fed. R. Civ. P. 36(b) and the requested admission is therefore DENIED.

20. Admit that in *Eskew v. QMT Associates, Inc.*, Civil Action No. H-01-CV-1001, U.S. District Court, Southern District of Texas (October 28, 2003), the court did not "acknowledge" applicant's exclusive right to the wind chime trade dress claimed by ESKEW in this application.

ANSWER: DENIED.

REQUEST FOR PRODUCTION OF DOCUMENTS

Eskew objects to the purported request for production of documents as defective, improper and unfair because (1) it fails to specify any date or time for production; (2) it fails to specify any place or location for production; and (3) it fails to specify any manner of production, i.e. it fails to specify or request

inspection, copying, testing, sampling or any other acts related to the produced documents. Eskew does not waive the requirement for a proper and timely request under 37 CFR § 2.120(d)(2) that specifies the place, time and manner of production. See TBMP 406.03. It is therefore impossible for Eskew to state whether or not inspection and related activities will be permitted “as requested” because the date, time, place, and manner of production, inspection and/or related acts are all unspecified in the eleventh-hour request. Eskew states that inspection and unspecified related activities will NOT be permitted at an unspecified time, unspecified location, and/or in an unspecified manner.

FURTHER RESPONSES TO SPECIFIED CATEGORIES OF DOCUMENTS:

1. All documents identified in ESKEW’s responses to Opposer’s Interrogatories.

RESPONSE: N/A

2. All documents submitted to or received from the U.S. Patent and Trademark Office in connection with ESKEW’s claims of trade dress protection as to the wind chimes, including, but not limited to, any applications, declarations and/or correspondence.

RESPONSE: Objection; the request is unduly burdensome since the documents are already of record. 37 CFR 2.122(b); TBMP 704.03(a).

3. All documents referring or relating to ESKEW's creation and/or development of the alleged trade dress in the wind chimes.

RESPONSE: N/A

4. All documents referring or relating to every objection that ESKEW has made to another's use or registration of trade dress which plaintiff contends is confusingly similar to the alleged trade dress (other than QMT),

RESPONSE: Objection; the request is overly broad and unduly burdensome; subject to confidentiality obligations to a third party; attorney-client and work product privilege/immunity; not relevant or likely to lead to admissible evidence.

5. All documents referring or relating to every objection that ESKEW has received regarding use or registration of the alleged trade dress in the wind chimes.

RESPONSE: N/A

6. All documents supporting ESKEW's contention that the trade dress is distinctive.

RESPONSE: Objection; the request is overly broad and unduly burdensome.

7. All documents supporting ESKEW's contention that the alleged trade dress

has obtained secondary meaning, including, but not limited to, any customer or market surveys.

RESPONSE: Objection; the request is overly broad and unduly burdensome. To the extent this request seeks market surveys, those are already of record herein.

8. All documents supporting ESKEW's contention that the alleged trade dress is non-functional.

RESPONSE: Objection; the request is overly broad and unduly burdensome.

9. A copy of the ruling in which a court of competent jurisdiction "acknowledged" that ESKEW's trade dress is legally protectible.

RESPONSE: Vague and ambiguous; argumentative; harassing; unduly burdensome.

Respectfully submitted,

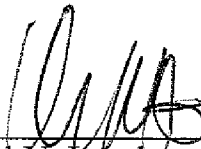


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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2006, a true and correct copy of this Response to Opposer's Interrogatories, Requests for Admission and Requests for Production of Documents has been served by United States mail, postage prepaid, upon the parties below:

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(734)-930-2494 (facsimile)
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Daniel N. Lundeen

Our Chimes

- Materials & Construction

- FAQ

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Chime Tunings

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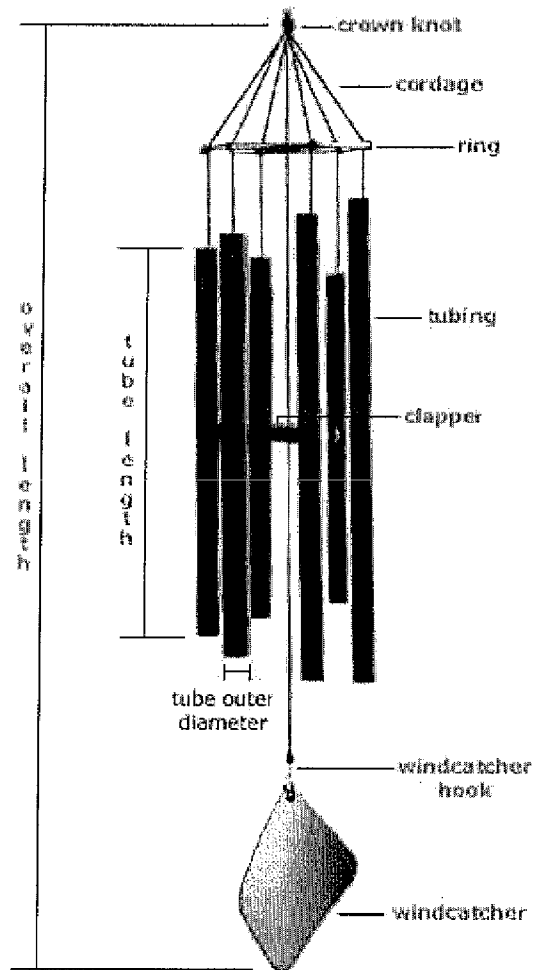
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Materials & Construction

High quality materials, exacting tolerances and methodical assembly protocols ensure lasting quality and beauty.



- Tough synthetic cordage is highly resistant to abrasion, ultra-violet degradation, rot and mildew. Central tube suspension with smoothly polished tube ends prevent cord abrasion typical of other, less labor-intensive suspension techniques.
- Heavy gauge polished stainless steel rings provide sturdy support and enduring beauty.
- Tempered aluminum alloy tubing is custom manufactured to our exacting specifications and will never rust.
- Our corrosion-protective finish preserves chime's appearance and increases durability in hostile environments (acid rain, salt air).
- We cut and precisely tune each tube by hand using just intonation, except for the

whole tone scale, which uses equal temperament.

- Tubes are tuned to A440, standard orchestral pitch, using the latest in technology.
- Solid polyethylene clappers provide superior tonal quality and outdoor durability
- The windcatcher, of the same finish and material as the tubes, is the ideal size, weight, and shape for optimal chime performance in 8 - 10 mph wind velocity. The corrosion protective finish provides durability in all kinds of outdoor environments (acid rain, salt air, etc.)
- The windcatcher hook assembly provides simple but effective method of varying the chime's activity level.
- The clapper slides on the central cord up into the ring creating a convenient "off-on" feature.
- Windcatchers can also be easily removed to subdue chime activity under blustery conditions.
- A rigorous final inspection ensures that your chime is up to our high standards of acoustic and visual quality

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x

 Our Chimes
 - Materials & Construction

 - FAQ

 - Hear Our Chimes

 Chime Sizes

 Chime Tunings

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Frequently Asked Questions About Our Chimes

Q: I don't understand the difference between "sizes/voices" and "tunings"?

A: Use this analogy to buying a shirt: you could think of tuning as the color and pitch range as the size. You can get a shirt in pink, blue and yellow; and you can also choose small, medium and large. You may also think of our tunings as songs. Each of them is available in various pitch ranges (sizes). A musical instrument must be made larger to create lower pitches (For example, a higher pitched violin is smaller than its cousin, the lower pitched cello. Each can play the same melody, but in different pitch ranges.) Please go to the "Hear Our Chimes" section of the website to hear the different tunings in the different pitch ranges.

Q: Can I hang my Music of the Spheres windchimes outside?

A: Yes, they are designed for lasting outdoor durability. Please refer to our "Materials & Construction" section of the website for descriptions of our durable materials and method of construction. If you want to appreciate the beauty and ambience of your Music of the Spheres windchime indoors you can "power" the chime with an oscillating fan or a pull cord. Children have also been taught to gently "play" the chime for their parents. One customer even positioned the windcatcher in the path of the cat door!

Q: Are my Music of the Spheres windchimes covered by a warranty?

A: Yes, Our Soprano, Mezzo-Soprano, Alto and Westminster chimes are warranted for 7 years from the date of purchase against defects in materials and workmanship. Tenor, Bass and Basso Profundo chimes are similarly warranted for 15 years.

Q: What are the specifications and prices for your windchimes?

A: Please refer to the specification chart for this information.

Q: Can I get my chimes repaired if they should be damaged?

A: Yes, please call or email for a return or repair authorization. If a repair is covered by warranty, there will be no charge. If not, a \$25 charge plus the cost of any additional components and return freight will apply. If you have a non-Music of the Spheres chime and would like it repaired, the policy is the same as for a non-warranted chimes

Q: How can I increase (or decrease) the activity of my Music of the Spheres windchime?

A: 1. Hang the chime in a different location, either more or less exposed to wind.
 2. Hang the chime from the first knot above the ring for greater activity and from the second knot for lower activity.
 3. Adjust the size of the windcatcher. To identify your windcatcher you may refer to the diagram on the "How They're Made" page. The wind catcher at the bottom of your chime is the "motor" that makes it work. Windcatchers harness the power of the wind and transfer it to the clapper, which moves to strike the tubes and play the music. The larger the windcatcher surface area for any given size chime, the less wind is needed to

activate it. We design our chimes to play in eight to ten mile-per-hour breezes. If your chimes hang in an extraordinarily enclosed or exposed area, they will require a correspondingly larger or smaller wind catcher than the standard one, to achieve a "standard" activity level. If you feel you need a different size windcatcher, return yours, asking for either the next size up or down and we will send a replacement at no charge. If you would like to keep yours and buy an extra, [click here](#).

Q: How should I hang my chime?

A: There are a number of safe ways to hang your chime. The "best" for a particular circumstance will depend on which chime size you're hanging and where it is you would like it to hang. In all cases, simply using some basic common sense is a great start. In many cases, hanging a chime "properly" is not a complicated matter. Some chime hanging basics are:

- Don't hang your chime on anything that is sharp or abrasive. Over time the cord will be cut or worn and will eventually break. For instance, instead of hanging the chime from an old rusty nail, take the time to get a carabiner or some other sort of metal ring. Hang the chime from the ring, then hang the ring from the nail.
- Do consider the fact that the forces on the chime support will vary and will increase substantially during severe weather conditions. When planning the support for your chime, take the time to "do it right" by preparing for stormy conditions.
- Do test the installation by giving a "tug" on the chime after hanging it to make sure it stays put. For the smaller chimes, a gentle downward pull will suffice; whereas for the larger, heavier chimes, a good solid downward test pull is a good idea. A good rule of thumb is to test the installation with a force that is between two and three times the weight of the chime.
- Do be considerate of your tree. When hanging chimes from a tree limb, use a blanket or a piece of rubber to spread out the load on the limb. This will avoid cutting into the bark and damaging the tree. A section of an old bicycle tire works very well for this purpose.
- Do use a [deck hook](#) as a safe and convenient way to hang the chimes from a deck railing.
- Do use a wall bracket to hang the chime from a wall. If mounting the bracket on a brick, stone or masonry wall, use the proper inserts for the job.
- Do be creative and consider as many options as you can think of if when trying to hang a chime. When in doubt, feel free to contact us for advice.

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