

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

In the matter of Application Serial No. 78/751,105  
Published for Opposition in the OFFICIAL GAZETTE on December 12, 2006

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UMG RECORDINGS, INC.

Opposition No.: 91176791

Opposer

v.

MATTEL, INC.,

Applicant

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**RESPONSE OF OPPOSER UMG RECORDINGS, INC., TO APPLICANT  
MATTEL, INC.'S EVIDENTIARY OBJECTIONS TO AND REQUESTS TO  
STRIKE PORTIONS OF DECLARATION OF DEANNA CZAPLA**

Opposer UMG Recordings, Inc. ("Opposer" or "UMG") hereby responds to Applicant, Mattel, Inc.'s ("Applicant" or "Mattel") evidentiary objections to and request to strike portions of Declaration of Deanna Czaplá, dated March 11, 2009, as follows:

<b>Evidence:</b>	<b>Applicant's Objection:</b>	<b>Opposer's Response:</b>
On or around December 1, 2001, CA One Services Inc. entered into a license agreement with Motown Record Company, L.P.	(a) Improper Legal Opinion (Fed. R. Evid. 701);  (b) Exhibit speaks for itself (Fed. R. Evid. 1002);  (c) Mischaracterizes	The witness has testified as to, <i>inter alia</i> , her position with her employer and her familiarity with its books and records. Her

<p>(collectively, with its successor-in-interest UMG Recordings, Inc., “UMG”) concerning the right to use the MOTOWN Marks and Motown memorabilia in connection with the Motown Store, including in connection with toys, games and playthings bearing the MOTOWN Marks available for sale at the Motown Store. A true and correct copy of the license agreement is annexed hereto as <u>Exhibit 1</u>. (Czapla Decl., ¶ 3.)</p>	<p>evidence.</p>	<p>introduction of a license agreement is appropriate non-opinion fact testimony. Her authentication thereof is likewise appropriate foundational testimony. This evidence is admissible under, <i>inter alia</i>, FRE 701, 1002, and 1003. Moreover, the witness does not mischaracterize evidence (nor does Applicant even attempt to explain what is purportedly mischaracterized).</p>
<p>Attached hereto as <u>Exhibit 2</u> are true and correct photographic depictions of the Motown Store. (Czapla Decl., ¶ 5.)</p>	<p>(a) Exhibit speaks for itself (Fed. R. Evid. 1002).</p>	<p>The witness has testified as to, <i>inter alia</i>, her position with his employer and her familiarity with its books and records. Her</p>

		<p>introduction and authentication of an image of one of her employer's stores is appropriate foundational testimony that is admissible under, <i>inter alia</i>, FRE 1002, 1003 and TBMP 703.01.</p>
<p>Available for sale at the Motown Store is an array of toys, games and playthings and other merchandise bearing the MOTOWN marks, including, for example, stuffed bear, a ball, a novelty pen and pencil, a miniature toy harmonica, and a "mood light" toy (collectively, the "MOTOWN Toys").</p> <p>Attached hereto as <u>Exhibit 3</u> are true and correct</p>	<p>(a) Exhibit speaks for itself (Fed. R. Evid. 1002);</p> <p>(b) Mischaracterizes evidence.</p>	<p>The witness has testified as to, <i>inter alia</i>, her position with her employer and her familiarity with its books and records. Her introduction and authentication of images of her employer's products is appropriate foundational testimony that is admissible under, <i>inter alia</i>, FRE 1002, 1003 and TBMP 703.01.</p> <p>Moreover, the witness does not mischaracterize</p>

<p>photographs of some of the toys, games and playthings available for sale in the Motown Store. (Czapla Decl., ¶ 6.)</p>		<p>evidence (nor does Applicant even attempt to explain what is purportedly mischaracterized).</p>															
<p>Delaware North has continuously sold toys, games, and playthings to adults and children in the Motown Store under the MOTOWN marks as follows:</p> <table border="0"> <thead> <tr> <th><u>Product</u></th> <th><u>Date First Sold</u></th> <th><u>Approximate Retail Price</u></th> </tr> </thead> <tbody> <tr> <td>Stuffed Bear</td> <td>February 2005</td> <td>\$10.99</td> </tr> <tr> <td>Ball</td> <td>October 2005</td> <td>\$4.99</td> </tr> <tr> <td>Novelty Pen</td> <td>November 2005</td> <td>\$5.99</td> </tr> <tr> <td>Novelty Pencil</td> <td>July 2006</td> <td>\$3.99</td> </tr> </tbody> </table>	<u>Product</u>	<u>Date First Sold</u>	<u>Approximate Retail Price</u>	Stuffed Bear	February 2005	\$10.99	Ball	October 2005	\$4.99	Novelty Pen	November 2005	\$5.99	Novelty Pencil	July 2006	\$3.99	<p>(a) Improper Speculation; (b) Mischaracterizes evidence.</p>	<p>The witness has testified as to, <i>inter alia</i>, her position with her employer and her familiarity with its books and records. Her testimony regarding prices at which her employer sells its merchandise, which occurred during the course of her employment, is not speculative. Moreover, the witness does not mischaracterize evidence (nor does Applicant even attempt to explain what is purportedly mischaracterized).</p>
<u>Product</u>	<u>Date First Sold</u>	<u>Approximate Retail Price</u>															
Stuffed Bear	February 2005	\$10.99															
Ball	October 2005	\$4.99															
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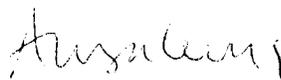
<p>Miniature Toy            July</p> <p>2007    \$4.99</p> <p>Harmonica</p> <p>"Mood Light" Toy</p> <p>                  October 2007    \$4,99</p> <p>(Czapla Decl., ¶ 7.)</p>														
<p>Attached hereto as <u>Exhibit 4</u></p> <p>are printouts of Delaware</p> <p>North's business records,</p> <p>which are kept in the</p> <p>ordinary course of business,</p> <p>depicting its annual sales of</p> <p>the MOTOWN Toys as</p> <p>follows:</p> <table data-bbox="219 1333 576 1753"> <thead> <tr> <th><u>Year</u></th> <th><u>Gross Sales</u></th> </tr> </thead> <tbody> <tr> <td>2005</td> <td>_____</td> </tr> <tr> <td>2006</td> <td>_____</td> </tr> <tr> <td>2007</td> <td>_____</td> </tr> <tr> <td>2008</td> <td>_____</td> </tr> <tr> <td>2009</td> <td>_____</td> </tr> </tbody> </table> <p>Delaware North pays UMG</p>	<u>Year</u>	<u>Gross Sales</u>	2005	_____	2006	_____	2007	_____	2008	_____	2009	_____	<p>(a) Improper Legal Opinion (Fed. R. Evid. 701);</p> <p>(b) Exhibit speaks for itself (Fed. R. Evid. 1002);</p> <p>(c) Mischaracterizes evidence.</p>	<p>The witness has testified as to, <i>inter alia</i>, her position with her employer and her familiarity with its books and records. Her introduction of and testimony regarding those business records is appropriate non-opinion fact testimony. Her authentication thereof is likewise appropriate foundational testimony.</p> <p>This evidence is admissible under, <i>inter alia</i>, FRE 701,</p>
<u>Year</u>	<u>Gross Sales</u>													
2005	_____													
2006	_____													
2007	_____													
2008	_____													
2009	_____													

<p>royalties based on its gross ;revenues as set forth in the license agreement between the parties. <i>See Exhibit 1.</i></p> <p>As reflected in <u>Exhibit 4</u>, Delaware North's total sales of the MOTOWN Toys are in excess of \$_____. (Czapla Decl., ¶ 8.)</p>		<p>1002, and 1003. Moreover, the witness does not mischaracterize evidence (nor does Applicant even attempt to explain what is purportedly mischaracterized).</p>						
<p>Annexed hereto as <u>Exhibit 5</u> are printouts of Delaware North's business records, which are kept in the ordinary course of Delaware North's business depicting its annual sales of the MOTOWN Toys as follows:</p> <table border="0"> <tr> <td><u>Year</u></td> <td><u>Number of Units</u></td> </tr> <tr> <td><u>Sold</u></td> <td></td> </tr> <tr> <td>2005</td> <td>_____</td> </tr> </table>	<u>Year</u>	<u>Number of Units</u>	<u>Sold</u>		2005	_____	<p>(a) Exhibit speaks for itself (Fed. R. Evid. 1002);</p> <p>(b) Mischaracterizes evidence.</p>	<p>The witness has testified as to, <i>inter alia</i>, her position with her employer and her familiarity with its books and records. Her introduction and authentication of those business records is appropriate foundational testimony, and is admissible under, <i>inter alia</i>, FRE 1002 and 1003. Moreover, the</p>
<u>Year</u>	<u>Number of Units</u>							
<u>Sold</u>								
2005	_____							

<p>2006 _____</p> <p>2007 _____</p> <p>2008 _____</p> <p>2009 _____</p> <p>As reflected in <u>Exhibit 5</u>, Delaware North's total sales of the MOTOWN Toys are in excess of _____. (Czapla Decl., ¶ 7.)</p>		<p>witness does not mischaracterize evidence (nor does Applicant even attempt to explain what is purportedly mischaracterized).</p>
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Dated: March 15, 2010

Respectfully submitted,




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Alexa L. Lewis, Esq.  
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11377 West Olympic Boulevard  
Los Angeles, CA 90064  
(310) 312-3100  
Attorneys for Opposer

**CERTIFICATE OF MAILING**

Date of Deposit: March 15, 2010

“Express Mail” mailing label number: EB519288551US

I hereby certify that this paper or fee, **RESPONSE OF OPPOSER UMG RECORDINGS, INC., TO APPLICANT MATTEL, INC.'S EVIDENTIARY OBJECTIONS TO AND REQUESTS TO STRIKE PORTIONS OF DECLARATION OF DEANNA CZAPLA**, is being deposited with the United States Postal Service “Express Mail Post Office to Addressee” on the date indicated above and is addressed to: UNITED STATES PATENT AND TRADEMARK OFFICE, Trademark Trial and Appeal Board , P.O. Box 1451, Alexandria, Virginia 22313-1451.

  
Kimberly Stewart

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683 .

On March 15, 2010, I served a copy of the foregoing document(s) described as **RESPONSE OF OPPOSER UMG RECORDINGS, INC., TO APPLICANT MATTEL, INC.'S EVIDENTIARY OBJECTIONS TO AND REQUESTS TO STRIKE PORTIONS OF DECLARATION OF DEANNA CZAPLA** on the interested parties in this action at their last known address as set forth below by taking the action described below:

Lawrence Y. Iser ([liser@kwikalaw.com](mailto:liser@kwikalaw.com))

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- BY MAIL:** I placed the above-mentioned document(s) in sealed envelope(s) addressed as set forth above, and deposited each envelope in the mail at Los Angeles, California. Each envelope was mailed with postage thereon fully prepaid.
- BY OVERNIGHT MAIL:** I placed the above-mentioned document(s) in sealed envelope(s) designated by the carrier, with delivery fees provided for, and addressed as set forth above, and deposited the above-described document(s) with \_\_\_\_\_ in the ordinary course of business, by depositing the document(s) in a facility regularly maintained by the carrier or delivering the document(s) to an authorized driver for the carrier.
- BY PERSONAL DELIVERY:** I placed the above-mentioned document(s) in sealed envelope(s), and caused personal delivery by FIRST LEGAL SUPPORT SERVICE of the document(s) listed above to the person(s) at the address(es) set forth above.
- BY PLACING FOR COLLECTION AND MAILING:** I placed the above-mentioned document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s) for collection and mailing following ordinary business practices. I

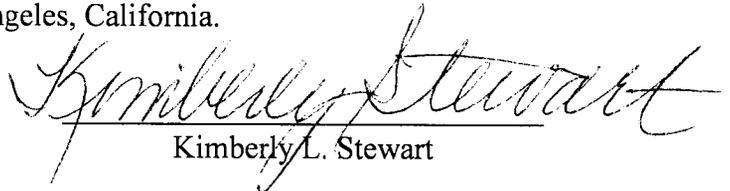
am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at 11377 West Olympic Boulevard, Los Angeles, California 90064-1683 in the ordinary course of business.

- BY ELECTRONIC MAIL:** I served the above-mentioned document electronically at \_\_\_\_:\_\_\_\_.m. on the parties listed at the email addresses above and, to the best of my knowledge, the transmission was complete and without error in that I did not receive an electronic notification to the contrary.
- BY FAX:** On \_\_\_\_\_, at \_\_\_\_\_ am/pm, from facsimile number (310) \_\_\_\_\_, before placing the above-described document(s) in sealed envelope(s) addressed as set forth above, I sent a copy of the above-described document(s) to each of the individuals set forth above at the facsimile numbers listed above. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and a copy of that report is attached hereto.

I declare that I am employed in the office of a member of the State Bar of California and various federal bars, at whose direction such service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 15, 2010, at Los Angeles, California.

  
Kimberly L. Stewart