

ESTTA Tracking number: **ESTTA331587**

Filing date: **02/11/2010**

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

Proceeding	91176791
Party	Defendant MATTEL, INC.
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Date	02/11/2010
Attachments	Objections to Caparis Decl.pdf ( 23 pages )(112593 bytes )

**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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**APPLICANT MATTEL, INC.'S EVIDENTIARY OBJECTIONS TO AND REQUESTS  
TO STRIKE PORTIONS OF TRIAL DECLARATION OF PETER CAPARIS**

Applicant Mattel, Inc. ("Applicant") hereby objects to and moves to strike portions of the Trial Declaration of Peter Caparis dated September 14, 2009.

The following format is used below:

- (1) the Declaration is copied verbatim;
- (2) where Applicant objects to all or a portion of a paragraph, the objected-to portion is shown as stricken (e.g., ~~The person told me that~~ ...) followed by a highlighted "objection number" (e.g., [Obj. 2]); and



**TRIAL DECLARATION OF PETER CAPARIS DATED SEPTEMBER 14, 2009**

**WITH OBJECTIONABLE PORTIONS STRICKEN**

**TRIAL DECLARATION OF PETER CAPARIS**

PETER CAPARIS declares under penalty of perjury as follows:

1. I am the founder of The Caparis Group LLC, a sales and marketing consulting firm. Specifically, ~~The Caparis Group is retained by sports, entertainment, consumer products, publishing and philanthropy clients to, among other things, provide integrated sales and marketing solutions involving areas such as sponsorship, licensing, product development, and strategic alliances. I have over 30 years experience in consumer sales and marketing, including an emphasis on sponsorship and licensing. During my career I have been involved in all aspects of marketing, including devising marketing plans, naming products, exploiting brands, and the advertising and promotion of branded and trademarked products. I have also taught a course at the UCLA Anderson School of Management that involved the use of entertainment and sports in marketing. My CV, fee statement and materials reviewed are attached hereto as Exhibit 1. [Obj. 1]~~

OBJECTION NO.	REFERENCE	GROUND	BOARD'S RULING
1	¶ 1	(a) Improper basis for expert testimony (Fed. R. Evid. 702);  (b) Exhibit speaks for itself (Fed. R. Evid. 1002); (c) Irrelevant (Fed. R. Evid. 402).	<input type="checkbox"/> Sustained/Stricken  <input type="checkbox"/> Overruled

2. I have read the Trial Declaration of Lawrence Ferrara submitted by Applicant, Mattel, Inc. I have prepared this declaration at the request of Opposer, UMG Recordings, Inc., in rebuttal to Mr. Ferrara's testimony. ~~As I will describe hereafter, Mr. Ferrara, who is a musicologist and does not indicate that he has any experience or expertise in marketing, has~~

~~missed the point. He has viewed this Opposition from a “musicological perspective” and engaged in what he calls “musicological research,” when in fact the trademark issue at hand is a marketing/branding issue. [Obj. 2]~~

OBJECTION NO.	REFERENCE	GROUNDS	BOARD’S RULING
2	¶ 2	(a) Improper expert testimony (Fed. R. Evid. 702); (b) Improper Speculation; (c) Irrelevant (Fed. R. Evid. 402); (d) Mischaracterizes testimony.	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

3. ~~The starting point for my analysis has to be the fame of the “Motown” trademark.~~ That Motown is “widely known as a record company” is clear, as Mr. Ferrara himself acknowledges. ~~Moreover, it is indisputable—and Mattel does not appear to dispute—that Motown is an extremely famous and highly recognizable trademark. I, of course, was familiar with the Motown trademark before I was retained in connection with this matter, and in addition~~ [Obj. 3] I have reviewed some of the history of the Motown mark. As Berry Gordy, the founder of Motown Record Corporation, reports in his own book, the name “Motown” was devised by him almost 50 years ago. (An excerpt from this book is attached as Exhibit 2.) The story of how Gordy used part of “Motor City” (a long-time nickname for Detroit) by taking the “Mo” from “Motor” and adding “town” is widely reported and apparently uncontradicted. For example, Mattel has submitted an excerpt from another book that explains, “Gordy returned to his favorite method of combining a couple of names. Detroit had long been known as the Motor City because of the car industry. In place of city, Gordy substituted town, and a contraction of the

two gave him Motown.” (See Applicant’s Notice of Reliance Re: Printed Publications, vol. 3 of 7, Exh. A, page 344.)

OBJECTION NO.	REFERENCE	GROUNDS	BOARD’S RULING
3	¶ 3	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (d) Irrelevant (Fed. R. Evid. 402); (e) Mischaracterizes testimony.	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

4. ~~Over the years, Motown has been the subject of enormous media attention, including in the popular press and in books. In addition to the works mentioned above, some of the numerous books written exclusively about Motown are P. Benjaminson, The Story of Motown (1979); D. Waller, The Motown Story: The Inside Story of America’s Most Popular Music (1985); S. Davis, Motown: The History (1988); J. R. Taraborelli, Hot Wax, City Cool and Solid Gold: Motown (1986); B. Fong-Torres, The Motown Album (1990); and G. L. Early, One Nation Under A Groove: Motown and American Culture (revised ed. 2004). (See Exhibit 3.)~~ The widespread media coverage of Motown’s recently celebrated 50th anniversary, which coincided with the release of a 10-CD boxed set containing all of Motown’s #1 singles, included feature articles in Vanity Fair (“It Happened In Hitsville” [December 2008]), and the New York

Times (“Motown Turns Fifty, But the Party’s Far from Over” [September 5, 2009]). (See Exhibits 4, 5.) [Obj. 4]

OBJECTION NO.	REFERENCE	GROUNDS	BOARD’S RULING
4	¶ 4	(a) Improper expert testimony (Fed. R. Evid. 702); (b) Exhibit speaks for itself (Fed. R. Evid. 1002); (c) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (d) Irrelevant (Fed. R. Evid. 402); (e) Hearsay (Fed. R. Evid. 802); (f) Lacks Authentication (Fed. R. Evid. 901).	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

5. For the past 50 years, Motown has been used as both the name of the Motown Record Corporation and the successors thereto, and a trademark for Motown products. (~~Of course, it has been registered several times with the U.S. Patent and Trademark Office.~~) Among other things, ~~Motown recordings have been in the marketplace continuously and have sold well over one hundred million copies. (The website of the Recording Industry Association of America, Inc., reflects that Motown’s sales of “Platinum” albums alone, i.e., albums certified by the Association to have sold more than one million copies, exceed 100 million copies.~~<sup>†</sup> See

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<sup>†</sup> According to the RIAA website, the certification of Platinum albums began in 1976. [Obj. 5]

~~Exhibit 6.) Motown recordings are also among the most successful and recognizable recordings in history, embodying the performances of such artists as The Jackson Five, The Supremes, The Temptations, Stevie Wonder, and Marvin Gaye, to name a few. The mark “Motown” has been widely advertised. (See examples provided in Exhibit 7.) There is a “Motown Museum” devoted to the record label. (See Exhibit 8.) As indicated above, Motown’s 50th anniversary has been celebrated with special events and products; its 40th Anniversary celebration likewise received widespread publicity and included a hit television special, “Motown 40: The Music Is Forever.” (See Exhibit 9.) [Obj. 5]~~

OBJECTION NO.	REFERENCE	GROUND	BOARD’S RULING
5	¶ 5	(a) Improper expert testimony (Fed. R. Evid. 702); (b) Exhibit speaks for itself (Fed. R. Evid. 1002); (c) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (d) Irrelevant (Fed. R. Evid. 402); (e) Hearsay (Fed. R. Evid. 802); (f) Lacks Authentication (Fed. R. Evid. 901).	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

6. ~~In these ways, among many others, the trademark “Motown” has become widely known and extremely strong. It is even referred to in dictionaries as a “trademark.” See, for example, The New Grove Dictionary of Music and Musicians (2d ed. 2001) attached as Exhibit~~

~~B, pp. 17-18 to the Ferrara Declaration, stating “Motown: American record company specializing in black soul music; the name is the registered trademark of the company”; and The World Book Dictionary (2003) referring to “Motown” as “a trademark of a Detroit record company.” (Excerpts from both works are provided in Exhibit 10.) [Obj. 6]~~

OBJECTION NO.	REFERENCE	GROUND S	BOARD’S RULING
6	¶ 6	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Exhibit speaks for itself (Fed. R. Evid. 1002); (c) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602).	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

7. ~~The Motown trademark also has been used and licensed, including as most important here, for toys, games, and playthings, such as board games, stuffed animals, video games, karaoke CDGs, musical toy keychains, novelty pens and pencils, superballs, and the like. (See e.g. Trial Declaration of William Waddell, Exhs. J-T; Declaration of Deanna Czapala, Exhs. 2-3; Declaration of William Schulte, Exh. 2; Declaration Michael Rajna, Exh. 2; Declaration of Anton Handal, Exh. 3; Declaration of Melissa K. Cote, Exh. 1.) There is a natural connection between such products and the Motown record label, since record companies are widely known to sell “merchandise,” which Motown does. In addition, the Motown trademark has been used on a variety of other products, including T-shirts, hats and other clothing, merchandise such as magnets, pins, wristbands, totebags, glassware, and coasters, comic books, and “Motown Cafés” in Orlando, New York, and Las Vegas. (See id. and examples provided in Exhibit 11 and Trial~~

~~Declaration of Jerry Juste, Exh. H.) When the Motown trademark was licensed in 2003 for use on a karaoke CDG, a UMG Strategic Marketing executive was quoted as stating that this license was “part of the ongoing merchandising initiative behind the Motown brand.” (See Exhibit 12.)~~

**[Obj. 7]**

OBJECTION NO.	REFERENCE	GROUNDS	BOARD’S RULING
7	¶ 7	(a) Improper expert testimony (Fed. R. Evid. 702); (b) Exhibit speaks for itself (Fed. R. Evid. 1002); (c) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (d) Irrelevant (Fed. R. Evid. 402); (e) Hearsay (Fed. R. Evid. 802); (f) Mischaracterizes testimony; (g) Lacks Authentication (Fed. R. Evid. 901).	<input type="checkbox"/> Sustained/Stricken  <input type="checkbox"/> Overruled

8. ~~Mr. Ferrara’s entire declaration is dedicated to showing that there is a “Motown style.” To the extent that is the case, that simply evidences the strength of the Motown mark. There is no doubt that the “Motown” in “Motown style” refers to the product and goods of Motown Record Corporation and the successors thereto. The fact that Motown has been used to describe a style of music does not denigrate, but rather strengthens, its trademark and branding significance. It is only very strong and famous trademarks that are used in this manner.~~

(Examples would be calling certain actions “mickey mouse” or a politician “teflon” or referring to “the Rolls Royce of products.”) I also note that most often in the illustrations provided by Mr. Ferrara the word “Motown” in “Motown style” is capitalized (as opposed to other types of music), further evidencing its use as a trademark. *However, most important here, the trademark Motown is not used by Mattel in the sense of a style of music but only as a purported trademark on the packaging of a product. [Obj. 8]*

OBJECTION NO.	REFERENCE	GROUNDS	BOARD’S RULING
8	¶ 8	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (d) Irrelevant (Fed. R. Evid. 402); (e) Mischaracterizes testimony.	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

9. ~~Similarly, the evidence submitted by Mattel that refers to the city of Detroit as “Motown” also shows the strength of the Motown trademark as it refers to the record company. (Of course, Detroit is also known as “the Motor City” and “the big D,” among other nicknames.) Moreover, all of the references to Motown as one of the nicknames for Detroit that were submitted by Mattel are references in various media articles. *They are not trademark uses or associated with a product, in distinction to the trademark uses of UMG and now Mattel. Any association of Motown in the minds of consumers with the city of Detroit is an association*~~

derived from the previous and ongoing fame and power of the Motown mark. The earliest use of “Motown” to refer to the record company, as reported in the Oxford English Dictionary Online, is 1961, while the earliest use of “Motown” to refer to the city of Detroit is ten years later in 1971. See Applicant’s Notice of Reliance Re: Printed Publications, vol. 3 of 7, Exh. A at 317-18, submitted by Mattel. An official Michigan website concerning historic preservation specifically refers to the record company’s influence: “In 1980 the Motown Historical Museum was established at Hitsville U.S.A. to commemorate the Motown Sound and to memorialize Motown’s distinctive heritage and its global impact.” (See Exhibit 13.) In essence, this “distinctive heritage” caused the city to become known (and sometimes referred to) by one of, if not its most, significant businesses and strongest trademarks: “Nashville has country music. Chicago has the blues. New Orleans has Dixieland. Seattle has grunge. *And Detroit will always identify itself with Motown, the 40-year-old record label that set new standards for black performers in the record industry and the rest of the business world.*” Crain’s Detroit Business, November 1, 1999. (See article attached as Exhibit 14, emphasis added.) **[Obj. 9]**

OBJECTION NO.	REFERENCE	GROUND	BOARD’S RULING
9	¶ 9	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Exhibit speaks for itself (Fed. R. Evid. 1002); (d) Lack of Foundation/Personal Knowledge (Fed. R. Evid.	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

		602); (e) Irrelevant (Fed. R. Evid. 402); (f) Hearsay (Fed. R. Evid. 802); (g) Mischaracterizes testimony; (h) Lacks Authentication (Fed. R. Evid. 901).	
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10. ~~I will now further describe, from a marketing perspective, the reasons that, in my opinion, the use by Mattel of the Motown mark likely will cause confusion and likely will dilute UMG's trademark.~~ [Obj. 10]

OBJECTION NO.	REFERENCE	GROUND S	BOARD'S RULING
10	¶ 10	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702).	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

11. ~~Initially, it should be pointed out that the fame of the Motown mark had reached those at Mattel who named their product "Motown Metal." They knew not only of the Motown label but also of its famous recording artists. However, Mattel's use of "Motown Metal" is curious. There is no doubt that Mattel purports to use it as a trademark (even seeking this registration), and indeed, in my opinion, it does use it, albeit confusingly, in that manner on its toy cars. But there were other choices that Mattel could have made that would have been more appropriately matched to the handful of Hot Wheels toys (or the "segment," as Mattel calls it) that are so-called "muscle cars." For example, in its internal documents that I have reviewed,~~

~~Mattel initially named these cars “Muscle Cars,” not Motown Metal. (See e.g. Exhibit 15.)~~

~~Indeed, the name Motown Metal does not specifically describe this genre of car, but “muscle cars” does just that. However, while “muscle cars” could refer to many of the hundreds of Hot Wheels cars, Mattel purported to use “Motown Metal” only on this one segment of five cars and does not use it anywhere else (as opposed to the widespread use by Motown Record Corporation and the successors thereto). Further, apparently Mattel used the “Motown Metal” name for only two years, has not used it since 2007, and has no plans to use it again. (See e.g. Mattel’s Responses to UMG Interrogatory Nos. 1, 11, 13, attached as Exh. B to UMG’s Notice of Reliance Re: Written Discovery Responses.) Thus, there would be no reason for the public or the consumer to associate Motown or Motown Metal with Mattel and every reason to associate it with UMG’s ubiquitous Motown trademark. [Obj. 11]~~

OBJECTION NO.	REFERENCE	GROUND	BOARD’S RULING
11	¶ 11	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Exhibit speaks for itself (Fed. R. Evid. 1002); (d) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (e) Improper Speculation; (f) Irrelevant (Fed. R. Evid. 402).	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

12. The Two “Marks” Are Identical: Probably most important from a marketing perspective (including the likelihood of confusion “Motown Metal” will engender) is the fact that the Motown trademark and Motown Metal are, from a consumer standpoint, identical. The reasons for this are multiple: first, the word “Motown” is the most dominant aspect of “Motown Metal”; it comes first, and it modifies the word “metal.” Second, the word “metal” is not part of the “brand” but is merely descriptive of the metal composition of the toy and would be ignored by consumers as a source of origin. Third, the typeface of the Motown trademark and “Motown Metal” is the same plain typeface. Finally, Mattel even uses a stylized “M” in connection with Motown Metal, just as Motown Record Company has used a stylized “M” in connection with its Motown trademark. See e.g. Exhibit 16 (Deposition of Raymond Adler at 75); Exhibit 17. Beyond being identical, in the second year of its use, Mattel even increased the size and prominence of “Motown Metal” on its packaging. (See Exhibit 17.) In sum, the appearance, the sound, and the impression of the two “marks” are the same. [Obj. 12]

OBJECTION NO.	REFERENCE	GROUNDS	BOARD’S RULING
12	¶ 12	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Exhibit speaks for itself (Fed. R. Evid. 1002); (d) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (e) Improper	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

		Speculation; (f) Hearsay (Fed. R. Evid. 802); (g) Mischaracterizes testimony.	
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13. ~~Type of Goods/Channels of Trade: Further contributing to likely consumer confusion are various factors relating to the type of goods on which the Motown mark is used and their channels of trade. Both Mattel and UMG use the Motown trademark on toys and playthings. Both products are leisure goods, nonessential, and collectible. (“Forever Collectibles,” one of the licensees of the Motown mark, is one of the largest manufacturers of collectible playthings.) In addition, both the toys and playthings licensed by UMG, and Motown recordings themselves, are sold in the same type of outlets as Motown Metal toys, and frequently in the same outlet itself, including in major retail stores and on the Internet. Those two sources are now the two largest sources for sales of Motown recordings and also sell Hot Wheels (including Motown Metal). Examples of where both Mattel’s Motown Metal toys and Motown Records are currently sold include the popular websites Amazon.com and eBay.com, and both have been sold by K Mart stores, Wal Mart stores, Target stores, and Toys “R” Us. (See Exhibit 18; Exhibit 16, Adler Deposition at 100-101.) [Obj. 13]~~

OBJECTION NO.	REFERENCE	GROUND	BOARD’S RULING
13	¶ 13	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Exhibit speaks for itself (Fed.	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

		R. Evid. 1002); (d) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (e) Improper Speculation; (f) Hearsay (Fed. R. Evid. 802); (g) Mischaracterizes testimony; (h) Lacks Authentication (Fed. R. Evid. 901).	
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14. Demographic: ~~The consumer group for Mattel’s Motown Metal product and UMG’s Motown-branded products are the same or at the least significantly overlap. Mattel has claimed that Motown Metal cars are aimed at children as well as adult collectors, and Mattel has maintained separate Hot Wheels websites for these two groups. (See Exhibit 19 and Mattel’s Response to UMG Interrogatory No. 15.) Together they cover a large age range. Of course, the Motown-licensed toys and playthings (and many other licensed items) also are for children; however, frequently they will be purchased by adult collectors who are very familiar with the Motown mark. Both recordings on the Motown record label and Motown Metal cars (which are circa 1970s) even evoke the same general era of approximately 40 to 50 years ago. (As a result, as noted, Motown had a large 40th Anniversary campaign, and Mattel released a “40th Anniversary Motown Metal” two-car collector set. See Exhibit 20.) Further, teenagers (or younger), who are among the largest group of purchasers of recordings, will be very familiar with the Motown name. Motown’s internal marketing materials highlight the brand’s~~

~~“inclusive” and “generational” appeal: it is thus no surprise that the label has released recordings especially geared to children, e.g. “Motown for Kids” in 2008 and, earlier, “A Flintstones Motown Christmas,” and, in addition to licensing other toys and games, has licensed videogames based on its recordings. (See e.g. Exhibit 21 and Notice of Reliance Re: Evidence Filed in UMG Records, Inc. v. O’Rourke, Trial Declaration of Lori Froeling, Exh. 24 at p. 11.) [Obj. 14]~~

OBJECTION NO.	REFERENCE	GROUNDS	BOARD’S RULING
14	¶ 14	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Exhibit speaks for itself (Fed. R. Evid. 1002); (d) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (e) Improper Speculation; (f) Hearsay (Fed. R. Evid. 802); (g) Mischaracterizes testimony; (h) Lacks Authentication (Fed. R. Evid. 901).	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

15. ~~Impulse Purchase/Level of Care: Both the Motown Metal toys and the Motown branded toys are classic impulse purchases. At a suggested retail list price of 99 cents, the Motown Metal toys are very inexpensive. The Motown Metal cars are interchangeable with~~

~~hundreds of other Hot Wheels cars and the specific models (and their names) are replaced often; therefore, any particular toy car (and any Motown Metal car) likely is bought on impulse, not by prior design or plan. Moreover, the fact that Mattel does not separately advertise Motown Metal cars (and retailers cannot even buy them individually but only in random groups which may or may not include the Motown Metal cars) evidences that buyers do not specifically target Motown Metal cars for purchase but rather that their purchase is impulsive. See Mattel's Supplemental Response to UMG Interrogatory No. 18 (in Exh. C to UMG's Notice of Reliance Re: Written Discovery Responses) and Exhibit 16, Adler Deposition at 98-99. Further, as Mattel has testified, color that attracts children to a particular car—another sign that they are purchased on impulse. (See e.g. Exhibit 16, Adler Deposition at 115.) Finally, the purchasers of Motown Metal cars are either children or adults purchasing for children. In either event, they are not sophisticated (nor need they be) in purchasing the inexpensive toy products involved. (Even the “collectors” version of Motown Metal cars are inexpensive, with a suggested retail price of \$19.99, and often also would be impulse buys.) [Obj. 15]~~

OBJECTION NO.	REFERENCE	GROUND S	BOARD'S RULING
15	¶ 15	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Exhibit speaks for itself (Fed. R. Evid. 1002); (d) Lack of Foundation/Personal Knowledge (Fed. R. Evid.	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

		602); (e) Improper Speculation; (f) Hearsay (Fed. R. Evid. 802); (g) Mischaracterizes testimony.	
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16. ~~As a marketing expert, I can explain the fact there is no evidence of actual confusion here. First, the Motown Metal cars were on the market for only a relatively short period of time (two years) and, as noted, were never advertised by Mattel. Second, and probably most important, if there were actual confusion as to source and a purchaser believed that Motown Metal was associated with Opposer there would be no cause for the consumer to complain, either the [sic] Mattel or to UMG. Therefore, I would not expect there to be actual consumer complaints evidencing confusion. [Obj. 16]~~

OBJECTION NO.	REFERENCE	GROUND	BOARD'S RULING
16	¶ 16	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (d) Improper Speculation.	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

17. ~~My conclusion, based on my experience and the materials I have reviewed, is that the use of "Motown Metal" by Applicant is likely to cause confusion as to source among~~

~~consumers who would likely believe that there is some connection between Motown Metal and UMG, and/or that UMG licensed its trademark in some fashion to Mattel, and that Motown Metal is another use of the famous Motown mark associated with UMG that has been used in connection with a variety of products (including toys and playthings). This conclusion is only reinforced by the fact that the packaging on the Motown Metal cars provides a lengthy list of other trademarks for which Mattel claims to have obtained a license. For that reason, the consumer would believe either that UMG licensed its trademark or that no license would be necessary to use the Motown mark. In either event, UMG would be significantly harmed, the Motown mark would be substantially diluted, the ability to license the mark for toys would be diminished, and its value lessened. [Obj. 17]~~

OBJECTION NO.	REFERENCE	GROUNDS	BOARD'S RULING
17	¶ 17	(a) Improper legal opinion (Fed. R. Evid. 701); (b) Improper expert testimony (Fed. R. Evid. 702); (c) Lack of Foundation/Personal Knowledge (Fed. R. Evid. 602); (d) Improper Speculation.	<input type="checkbox"/> Sustained/Stricken <input type="checkbox"/> Overruled

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on September 14, 2009, at Rolling Hills Estates, California.

*/S/*  
PETER CAPARIS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing Evidentiary Objections and Request to Strike has been personally served on counsel for Opposer UMG Recordings, Inc., both personally and through ESTTA, on February 11, 2010.

\_\_\_\_\_  
/crf/

Chad R. Fitzgerald