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Filing date: **06/17/2015**

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

Proceeding	91203192
Party	Plaintiff Beats Electronics, LLC
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Submission	Motion to Compel Discovery
Filer's Name	Michael G. Kelber
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Signature	/Michael G. Kelber/
Date	06/17/2015
Attachments	Motion to Compel discovery Redacted 21430045_5.pdf(27344 bytes) #21432780v2 - (Declaration of K Nye in support of URBAN BEATZ motion to compel).pdf(1539977 bytes) EXhibit 1- Requests.pdf(269464 bytes) Exhibit 2- Rogs.pdf(358158 bytes) Exhibit 3 slipsheet Public Version.pdf(6687 bytes) Exhibit 4- initial dep notices.pdf(23167 bytes) Exhibit 5- first amended dep notices.pdf(73213 bytes) Exhibit 6- May 12 letter.pdf(1164555 bytes) Exhibit 7- May 13.pdf(169740 bytes) Exhibit 8- June 10 and second amended deps.pdf(2325183 bytes) Exhibit 9- June 11 .pdf(192800 bytes)

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

BEATS ELECTRONICS, LLC)	
)	
Opposer,)	
)	
v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

MOTION TO COMPEL DISCOVERY

Opposer, Beats Electronics, LLC (“Beats”), hereby moves the Board pursuant to TBMP §§ 411 and 523, Fed. R. Civ. P. 37(a), and 37 CFR §§ 2.120(a) and 2.120(e) for an order compelling Applicant, Merkury Innovations, LLC (“Merkury”), to produce Ki Kang and Steven Levy for deposition. With discovery set to close on June 18, 2015, Merkury has refused to produce these deponents. As set forth in detail herein, the Board should compel the testimony of Messrs. Kang and Levy because Merkury has failed to previously object to the depositions, and more importantly, the testimony is highly relevant and not available through any other source. Additionally, Merkury has committed to search for and potentially produce some additional documents, and, based on that representation, Beats reserves its rights to seek to compel if that production is not forthcoming, or is inadequate.

I. THE BOARD SHOULD COMPEL MERKURY TO PRESENT ITS EMPLOYEES FOR DEPOSITION

Beats is entitled to depose Ki Kang, Merkury’s Creative Director, and Steven Levy, its co-founder and Vice President, because they possess unique knowledge that is not available through any other sources. Merkury’s Rule 30(b)(6) witness—the single witness Merkury has produced for deposition—identified Messrs. Kang and Levy as the only people with knowledge of (1) who first proposed the mark URBAN BEATZ; (2) what other marks (if any) Merkury

considered before adopting URBAN BEATZ; (3) why URBAN BEATZ was selected by Merkury; (4) why Merkury decided to file a trademark application for URBAN BEATZ; (5) whether a trademark clearance search for URBAN BEATZ was performed; and (6) if any such search was performed, who performed the search.

Furthermore, Merkury has produced a mere 77 pages of documents to date (Dec. of K. Nye; ¶ 5), and has refused to produce any e-mails (*Id.* at ¶15). The paucity of Merkury's document production further shows that Messrs. Kang and Levy possess knowledge that cannot be obtained elsewhere.

On May 7, 2014, Beats noticed the depositions of Messrs. Kang and Levy. Merkury did not object to those notices, nor did Merkury object to the amended deposition notices that Beats served on April 29, 2015, after settlement discussions proved unfruitful and these proceedings resumed. In fact, not only did Merkury fail to object to the deposition notices, on April 30, 2015, Merkury informed Beats that Messrs. Kang and Levy were available to be deposed on May 19, and May 20, 2015. (*Id.* at ¶ 9.) When counsel for Beats wrote to Merkury on May 12, 2015 to confirm those dates, and ensure that Messrs. Kang and Levy were deposed within the discovery period (*i.e.*, by June 18, 2015), Merkury did a sudden about-face. On May 13, 2015—more than a year after Beats originally noticed Messrs. Kang and Levy's depositions—Merkury objected for the first time and has now refused to provide the witnesses for their depositions. (*Id.* at ¶ 11.)

Beats has attempted to resolve these matters without the involvement of the Board. Specifically, on May 14, 2015 and again on May 19, 2015, counsel for Beats and counsel for Merkury discussed the issues addressed in the May 12 and May 13 letters via telephone. (*Id.* at ¶ 12.) Counsel for Beats provided relevant cases regarding those issues to counsel for Merkury, and counsel for Merkury indicated its willingness to consider that case law and respond. (*Id.*)

However, when no response was immediately received, Beats served second amended deposition notices, along with a further letter regarding its concerns. (*Id.* at Ex. 8.) The parties met and conferred regarding these issues on June 15, 2015 via phone. (*Id.* at ¶ 15.) At that point, counsel for Merkury stated that it stood on its objections and would refuse to produce Messrs. Kang and Levy for deposition. (*Id.*) Accordingly, Beats has been forced to file this Motion.

For the reasons discussed below, Merkury should be compelled to produce Messrs. Kang and Levy for their depositions.

A. Merkury Has Waived Its Right To Object.

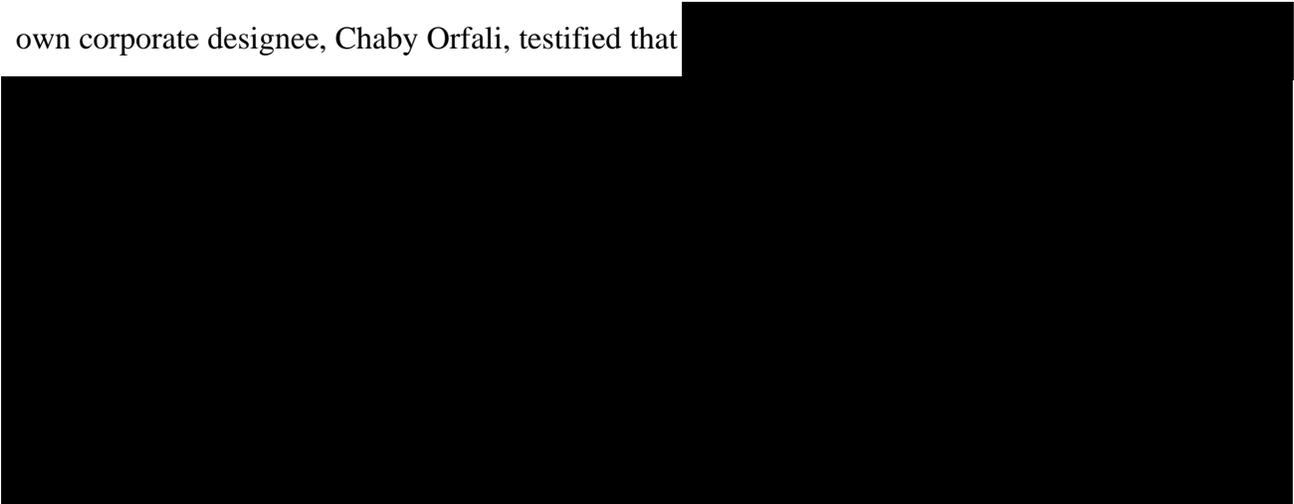
Beats served deposition notices for Ki Kang and Steven Levy on May 7, 2014, after the deposition of Merkury's corporate designee, Chabi Orfali, showed they were likely to have discoverable information. A few weeks after the service of the initial deposition notices, the parties began discussing settlement seriously, proceedings were suspended (Dckt. 31 and 32), and the depositions were put on hold. (*Id.* at ¶ 8.) After settlement discussions proved unfruitful and proceedings resumed, on April 29, 2015, Beats served first amended deposition notices. (*Id.* at Ex. 5.) In a phone call on April 30, 2015, counsel for Merkury stated that while the noticed dates (May 12 and 13, 2015) were not suitable for the witnesses' schedules, the witnesses were available on May 19 and 20, 2015. (*Id.* at ¶ 9.)

On May 12, 2015, counsel for Beats wrote to counsel for Merkury to, among other things, confirm May 19 and 20 for the depositions of Messrs. Kang and Levy. (*Id.* at Ex. 6.) In response—despite never having raised an issue or objection regarding these depositions in the preceding year—and in fact having just days before provided suggested dates for these depositions, Merkury's counsel wrote back on May 13, 2015 referring to these depositions as “harassment” and “unacceptable” and refusing to produce the witnesses. (*Id.* at Ex. 7.) Because Merkury failed to timely object to the deposition notices—and in fact, conceded they were

proper—Merkury has waived its right to object to the depositions of Messrs. Kang and Levy at this late date. “A failure to respond or object to a discovery request in a timely manner waives any objection which may have been available.” *See Cohalan v. Genie Indus., Inc.*, 276 F.R.D. 161, 163 (S.D.N.Y. 2011) (finding untimely objections to requests for production were waived); *Eldaghar v. City of New York Department of Citywide Administrative Services*, No. 02 cv 9151(KMW)(HBP), 2003 WL 22455224, at *1 (S.D.N.Y. Oct. 28, 2003) (holding that failure to object to a document request must constitute a waiver because “[a]ny other result would . . . completely frustrate the time limits contained in the Federal Rules and give a license to litigants to ignore the time limits for discovery without any adverse consequences.”) (internal quotation marks and citations omitted).

B. The Employees’ Testimony Is Highly Relevant and Not Available Through Any Other Sources.

The Board permits a party to “depose any person, including a party. . . .” *See* TBMP § 404.02 (quoting Fed. R. Civ. P. 30(a)). Merkury has nevertheless refused to produce Messrs. Kang and Levy for deposition. Merkury maintains its untenable position despite the fact that its own corporate designee, Chaby Orfali, testified that



This testimony alone is sufficient to warrant the taking of their depositions. *See* TBMP § 414

(providing that information concerning, *inter alia*, a party's (particularly a defendant's) selection and adoption of its mark, and a party's plans for expansion, are discoverable).

The need for the depositions of Messrs. Kang and Levy is exacerbated by the fact that Mr. Orfali was unable to recall, among other things, [REDACTED]

[REDACTED]

Mr. Orfali also testified he was unable to recall [REDACTED]

[REDACTED]

Beats is entitled to depose Messrs. Kang and Levy in order to obtain the discoverable information that Mr. Orfali was unable to provide, and that Mr. Orfali testified Messrs. Kang and Levy could provide. This is true regardless of whether Mr. Orfali testified to the same or related topics. *Progress Bulk Carriers v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, 939 F. Supp. 2d 422, 430 (S.D.N.Y. 2013) (permitting deposition of three of defendant's employees, who were not designated as 30(b)(6) witnesses, because plaintiff identified a reasonable independent basis for deposing the individual, and as such, the deposition would not be "unnecessarily repetitive" of a 30(b)(6) deposition). Moreover, because Mr. Orfali was unable to testify regarding several topics set forth in Beats' Rule 30(b)(6) notice to Merkury—including the circumstances of key decisions, relevant to Merkury's intent in this case—Merkury is required to produce Messrs. Kang and Levy for depositions. *See, e.g., Fieldturf USA, Inc. v. Astroturf, LLC*, 2015 U.S. Dist. LEXIS 64498, *1 (E.D. Mich. Apr. 14, 2015) (plaintiff permitted to take personal deposition of defendant's employee to seek information on topic that defendant's 30(b)(6) witness was unable

to testify to); TBMP § 404.06(b) (providing that if a Rule 30(b)(6) witness is unable to testify, “the organization is obliged to provide a substitute and to prepare a designee to provide testimony in areas as to which its other representatives were uninformed”).

C. Merkury’s Meager Document Production Makes Kang and Levy’s Testimony Critical.

The need for Messrs. Kang and Levy’s depositions is compounded by the fact that to date, Merkury has produced, in total, 77 pages of documents. (*Id.* at ¶5.) Moreover, counsel for Merkury stated that it has not and will not search e-mail for relevant correspondence. (*Id.* at ¶15.) The scant document production suggests that significant communication regarding the crucial issues of the case likely happened via e-mail or in person, further supporting the need for Beats to take the depositions of more than one witness. Thus, this motion should be granted, and Merkury be ordered to produce Messrs. Kang and Levy for deposition at a time mutually convenient for the parties.

II. BEATS RESERVES ITS RIGHTS REGARDING MERKURY’S DISCOVERY RESPONSES

On August 29, 2012, Beats originally served on Merkury its first set of Requests for the Production of Documents (*id.* at Ex. 1, the “Requests”) and first set of Interrogatories (*Id.* at Ex. 2, the “Interrogatories”). Among the Requests are (i) documents sufficient to identify all product(s) and services offered by Merkury under the URBAN BEATZ mark and the manner in which Merkury uses or intends to use the URBAN BEATZ mark (Request 2); (ii) documents sufficient to identify the prices Merkury charges and Merkury’s sales (in units and dollars) of each product offered under the URBAN BEATZ mark (Request 3); and (iii) documents that disclose or describe the characteristics or profiles of the type of person or entity that purchases products sold under the URBAN BEATZ mark (Request 5). Merkury produced responsive documents regarding its sales, customers, and product catalogs on November 29, 2012, but has

refused to produce any e-mails. (Nye Dec. at ¶ 4.) Similarly, Interrogatory 6 requests that Merkury identify every trade show at which any URBAN BEATZ product is or has been advertised or promoted. Merkury responded to the Interrogatories on November 29, 2012. (*Id.*)

On June 10, 2015, counsel for Beats requested that Merkury supplement the now years-old document production and interrogatory response. (*Id.* at Ex. 8.) On June 11, 2015, counsel for Merkury indicated that it would not do so because supplementation would be “unduly burdensome and unnecessary” (*id.* at Ex. 9), notwithstanding Merkury’s ongoing duty to supplement its responses. *See* TBMP § 408.03; Fed. R. Civ. P. 26(e). On June 16, 2015, however, counsel for Merkury agreed to supplement its production. (*Id.* at ¶ 14.) Accordingly, Beats reserves its right to review the sufficiency of that production and move to compel further production — including of e-mails — as may be necessary.

III. CONCLUSION

Beats has been forced to bring this Motion to Compel by Merkury’s sudden and unjustified decision to withhold the deposition testimony of its Creative Director, Ki Kang, and Co-Founder, Steven Levy. Additionally, though Merkury has stated it may produce supplemental documents, it has not yet done so, and Beats has therefore not had an opportunity to review and test the sufficiency of any such production prior to the close of discovery. Therefore, pursuant to TBMP §§ 411 and 523, Fed. R. Civ. P. 37(a), and 37 CFR §§ 2.120(a) and 2.120(e), Beats moves this Board for an order compelling Merkury to produce Messrs. Kang and Levy for deposition in addition to full and complete responses to all pending discovery requests.

Respectfully submitted,

Date: June 17, 2015

s/ Michael G. Kelber _____
One of the Attorneys for Opposer,
Beats Electronics, LLC

Michael G. Kelber
Katherine Dennis Nye
Neal, Gerber & Eisenberg LLP
2 N. LaSalle Street, Suite 1700
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Dale Cendali
Bonnie Jarrett
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(212) 446-4800

CERTIFICATE OF SERVICE

I, Michael G. Kelber, an attorney, state that I served a copy of *Motion to Compel Discovery* on:

Marc Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via U.S. Mail on this 17th day of June, 2015.

Respectfully submitted,

By: s/Michael G. Kelber

One of Their Attorneys

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

BEATS ELECTRONICS, LLC)	
)	
Opposer,)	
)	
v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

DECLARATION OF KATHERINE DENNIS NYE

I, Katherine Dennis Nye, an attorney, state and depose on oath that, if called to testify as a witness in this matter, I could competently testify as follows:

1. I am licensed to practice law in the State of Illinois. I am an associate at the law firm Neal, Gerber & Eisenberg LLP, and serve as counsel to Opposer Beats Electronics, LLC (“Beats”) in the above-captioned matter.

2. On August 29, 2012, Beats served its First Set of Requests for the Production of Documents on Applicant (the “Requests”). A true and correct copy of the Requests for the Production of Documents is attached hereto as Exhibit 1.

3. On August 29, 2012, Beats served its First Set of Interrogatories on Applicant (the “Interrogatories”). A true and correct copy of the Interrogatories is attached hereto as Exhibit 2.

4. Applicant responded to the Requests and Interrogatories on November 29, 2012, including producing responsive documents regarding its sales, customers, and product catalogs.

5. To date, Applicant’s total document production includes 77 pages of materials.

6. On February 27, 2014, Beats deposed Mr. Chaby Orfali as the corporate designee of Applicant pursuant to Federal Rule of Civil Procedure 30(b)(6). A true and correct copy of

portions of the transcript of Mr. Orfali's is attached hereto as Exhibit 3. These transcript portions have been designated as Confidential- Attorneys' Eyes Only, and are accordingly being filed under seal.

7. On May 7, 2014, Beats served deposition notices for Ki Kang and Steven Levy on Applicant. True and correct copies of the initial deposition notices are attached collectively hereto as Exhibit 4.

8. A few weeks after the service of the initial deposition notices, the parties began discussing settlement seriously, proceedings were suspended, and the depositions put on hold. After settlement discussions proved unfruitful and proceedings resumed, on April 29, 2015, Beats served amended deposition notices. True and correct copies of the first amended deposition notices are attached collectively hereto as Exhibit 5.

9. In a phone call on April 30, 2015, counsel for Applicant indicated that while the noticed dates (May 12 and 13, 2015) were not suitable for the witnesses' schedules, the witnesses were available on May 19 and 20, 2015.

10. On May 12, 2015, counsel for Beats wrote to counsel for Applicant to, among other things, indicate that it would not produce one of the witnesses for whom Applicant had served a deposition notice, and confirm May 19 and 20 for the depositions of Messrs. Kang and Levy. A true and correct copy of the May 12 letter is attached hereto as Exhibit 6.

11. On May 13, 2015, counsel for Applicant wrote back on May 13, 2015 referring to these depositions as "harassment" and "unacceptable" and indicating that it would refuse to produce the witnesses, despite never having raised an issue regarding these depositions in the preceding year, and in fact having just days before provided suggested dates for these depositions. A true and correct copy of the May 13 letter is attached hereto as Exhibit 7.

12. On May 14, 2015 and again on May 19, 2015, counsel for Beats and counsel for Applicant discussed the issues addressed in the May 12 and May 13 letters via phone. Counsel for Beats provided relevant cases regarding those issues to counsel for Applicant, and counsel for Applicant indicated its willingness to consider that case law and respond.

13. On June 10, 2015, I sent a further letter to counsel for Applicant attempting to reschedule the depositions of Messrs. Kang and Levy, enclosing revised deposition notices for the same, and requesting supplementation of prior document productions. A true and correct copy of the June 10 letter, including the Second Amended Deposition Notices for Messrs. Kang and Levy, are attached collectively hereto as Exhibit 8.

14. On June 11, 2015, counsel for Applicant responded to these requests via letter. A copy of the June 11 letter is attached hereto as Exhibit 9.

15. On June 15, 2015, counsel for the parties met and conferred telephonically regarding the issues raised in the June 10 letter. During the course of that conversation, counsel for Applicant, Marc Jason and Anthony LoCicero, indicated that (1) Applicant would not produce Mr. Kang or Mr. Levy for deposition, (2) it would speak to its client regarding supplementing its prior document productions, and (3) that it would not search e-mail records in supplementing its productions.

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

Dated: June 17, 2015



Katherine Dennis Nye

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

BEATS ELECTRONICS, LLC)	
)	
Opposer,)	
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v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

Declaration of Katherine Dennis Nye

Exhibit 1

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

BEATS ELECTRONICS, LLC

Opposer,

v.

MERKURY INNOVATIONS, LLC

Applicant.

Opposition No. 91203192

**OPPOSER'S FIRST SET OF REQUESTS FOR
THE PRODUCTION OF DOCUMENTS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, Opposer Beats Electronics, LLC, hereby requests that Applicant, Merkury Innovations, LLC, produce to Applicant's attorneys the items described hereafter for inspection and copying at the offices of Neal, Gerber & Eisenberg LLP, Two North LaSalle Street, Suite 1700, Chicago, Illinois, 60602, within thirty (30) days after the service hereof. These document requests are intended to be continuing in nature and shall include documents which are discovered subsequent to any initial compliance herewith. Such later discovered documents shall be produced within thirty (30) days after their discovery.

Requests for Production

1. Documents sufficient to fully describe the following:
 - (a) when and where Applicant first obtained a licensed to do business, was registered to do business or was qualified to do business;
 - (b) all other places where Applicant is licensed to do business, is registered to do business or is qualified to do business; and
 - (c) all corporations or other entities in which Applicant has a controlling interest.
2. Documents sufficient to identify:

- (a) all product(s) and services offered by Applicant under the URBAN BEATZ designation;
- (b) the manner in which Applicant uses or intends to use the URBAN BEATS designation;
- (c) the geographic scope of Applicant's efforts to market any product(s) under the URBAN BEATZ designation;
- (d) the geographic scope in which Applicant sells or otherwise provides any product under the URBAN BEATZ designation;
- (e) the date on which Applicant first marketed or offered to provide any product(s) under the URBAN BEATZ designation;
- (f) the date on which Applicant first sold or provided any product(s) under the URBAN BEATZ designation in: (i) intrastate commerce in the United States; (ii) interstate commerce in the United States; and (iii) foreign commerce (if applicable).

3. For each and every product offered by Applicant under the URBAN BEATZ designation, documents sufficient to identify:

- (a) the prices the Applicant charges for each such product;
- (b) Applicant's sales (in units and dollars) of each such product, by state; and
- (c) Applicant's current inventory of each such product.

4. All documents that identify, constitute, disclose, depict or otherwise relate to:

- (a) the manner by which Applicant advertises or promotes, or has advertised or promoted, its products under the URBAN BEATZ designation;
- (b) any publications in which Applicant has placed print advertisements, articles or other information concerning Applicant's products offered using the URBAN BEATZ designation;
- (c) any Internet website referencing Applicant's use of the URBAN BEATZ designation, including but not limited to printouts of all such website pages.

5. All documents that disclose, describe, or otherwise relate to:

- (a) the characteristics or profiles of the type of person or entity that purchases or otherwise receives the types of products sold and/or provided by Applicant under the URBAN BEATZ designation.

- (b) any incident(s) wherein any persons or entities have indicated that they understood or believed that Opposer's business or products, and Applicant's business or products, were in any way affiliated, associated or connected with one another; and
- (c) with regard to any such incident(s), produce all documents that disclose, describe or are related to:
 - (i) the place of such incident;
 - (ii) the date of such incident;
 - (iii) the identify of all persons or entities involved in or having knowledge of such incident, and the nature of their involvement or knowledge;
 - (iv) the products involved in such incident;
 - (v) the nature of the incident;
 - (vi) how the incident came to the attention of Applicant; and
 - (vii) efforts to ascertain or monitor such incidents.

6. All documents constituting, describing, referring to or otherwise related to:

- (a) misdirected correspondence (including electronic mail) or telephone calls received by Applicant that appear to be intended for Opposer, and
- (b) Opposer or Opposer's product (other than documents filed with the Trademark Trial and Appeal Board in connection with this matter), including but not limited to message slips and telephone logs.

7. All documents that disclose, describe, constitute or otherwise relate to:

- (a) whether Applicant has conducted or caused to be conducted a search, investigation or other inquiry, including any trademark search in the United States Patent and Trademark Office, concerning whether any marks similar to the URBAN BEATZ designations had been or were being used by other parties, or whether other parties had applied for or received registrations for such designations;
- (b) the decision by Applicant to apply for registration of the URBAN BEATZ designation, including but not limited to all documents related to any discussions concerning such decision; and
- (c) all documents filed with either the United States Patent and Trademark Office or any state's trademark office concerning any attempted

registration by Applicant of any mark with the URBAN BEATZ designation.

8. All documents that disclose, describe, constitute or otherwise relate to:
 - (a) statements or reports concerning the quality or perceived standards of quality of any products or services offered by Applicant under the URBAN BEATZ designation;
 - (b) any litigation involving any products offered or to be offered by Applicant under the URBAN BEATZ designation; and
 - (c) any complaints concerning any products offered at any time by Applicant.
9. Documents sufficient to identify the date on which Applicant first became aware of Opposer's use of any mark in its Beats Family of Marks.
10. Representative specimens of packaging, wrappings, promotional literature, and labeling of every product marketed, distributed, sold or offered for sale by Applicant under the URBAN BEATZ designation.
11. All documents consulted in the preparation of, or which are requested to be identified in, Applicant's responses to Opposer's First Set of Interrogatories to Applicant.
12. All documents relating to any document retention policy of Opposer or the destruction of documents by Opposer at any time.

Definitions and Instructions

As used herein, the words and phrases set out below shall have the following meaning or meanings prescribed for them:

1. The term "Opposer" shall mean Beats Electronics, LLC, as well as its subsidiaries, divisions, officers, directors, employees, licenses, agents and assignees.
2. The term "Applicant" shall mean Merkury Innovations, LLC and its officers, directors, subsidiaries, divisions, representatives, employees, licensors, licensees, agents and assignees.

3. The term "Beats Family of Marks" shall mean Opposer's marks comprised of the term BEATS identified in the Notice of Opposition in these proceedings.

4. The term "person" shall mean any individual, firm, partnership, corporation, proprietorship, association, or other organization or entity.

5. The term "documents" shall mean any and all writings of any nature whatsoever or other means by which information is retained in retrievable form, as well as drafts and all non-identical copies thereof, including but not limited to memoranda, stenographic or handwritten notes, contracts, agreements, records, audio and video recordings, correspondence, communications, reports, studies, summaries, surveys, statistical compilations, minutes, charts, manuals, brochures, schedules, price lists, telegrams, teletypes, facsimiles, e-mail, signage, certificates of registration, labels, specimens, writings, sketches, and computer disks, and any other documents as defined in Rule 34 of the Federal Rules of Civil Procedure.

6. The terms "relate to," "related to," or "relating to" shall mean directly or indirectly mentioning or describing, pertaining to, connected with, or reflecting upon a state subject matter.

7. The singular shall include the plural and the plural shall include the singular.

8. A masculine, feminine or neuter pronoun shall not exclude the other genders.

9. The terms "and" as well as "or" shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of the document request all responses which might otherwise be construed to be outside its scope.

10. All objections to document requests in which Opposer fails or refuses to fully respond on the ground of any claim of privilege of any kind whatever shall:

(a) state the nature of the claim of privilege;

- (b) state all facts relied upon in support of the claim of privilege or related thereto;
- (c) identify all documents related to the claim of privilege;
- (d) identify all persons having knowledge of any facts related to the claim of privilege; and
- (e) identify all events, transactions or occurrences related to the claim of privilege.

Respectfully submitted,



One of the Attorneys for Opposer,
Beats Electronics, LLC

Date: August 29, 2012

Michael G. Kelber
Katherine Dennis Nye
Neal, Gerber & Eisenberg LLP
2 N. LaSalle Street, Suite 1700
Chicago, Illinois 60602
312.269.8000

CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of *Opposer's First*

Set of Requests for the Production of Documents to:

Holly Pekowsky, Esq.
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via U.S. Mail on this 29th day of August, 2012.


Katherine Dennis Nye

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

BEATS ELECTRONICS, LLC)	
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Opposer,)	
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v.)	Opposition No. 91203192
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MERKURY INNOVATIONS, LLC)	
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Applicant.)	

Declaration of Katherine Dennis Nye

Exhibit 2

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

BEATS ELECTRONICS, LLC

Opposer,

v.

MERKURY INNOVATIONS, LLC

Applicant.

Opposition No. 91203192

OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, Opposer Beats Electronics, LLC, hereby requests that Applicant, Merkury Innovations, LLC, serve Opposer's attorneys sworn answers to the interrogatories set forth below within thirty (30) days after the service hereof. These interrogatories are intended to be continuing in nature and any information which may be discovered subsequent to the service of Applicant's initial answers should be brought to the attention of Opposer's attorneys through supplemental answers within thirty (30) days following such discovery.

Interrogatories

1. State the full name and place of incorporation or organization of all corporations or other legal entities that are a parent, subsidiary or affiliate of Applicant, or that are controlled by Applicant, and all corporations or other legal entities that exert control over Applicant.

2. State the full name of each business, company, person, or other entity affiliated with the Applicant that has at any time used the designation URBAN BEATZ, and for each, identify its principal(s) and, if applicable, its state or country of organization.

3. Identify each transaction by which it is claimed that any rights or license in any of the designations URBAN BEATZ have passed to Applicant, including setting forth the date of

each such transaction and identifying the parties to the transaction and all documents related thereto.

4. Identify by common commercial name each and every product marketed, distributed, sold or offered for sale by the Applicant under or in connection with the designation URBAN BEATZ, and with respect to each such product, identify:

- (a) the geographic scope of such use;
- (b) the price at which the product is sold;
- (c) the annual volume of sales of the product in both dollars and units;
- (d) unit sizes in which the product is sold;
- (e) each class of purchasers of the product;
- (f) the channels of trade by which the product is or have been offered or sold;
- (g) all types of stores or forums in which the products in which the products are or have been offered or sold; and
- (h) the persons most knowledgeable of such use and all documents relating thereto.

5. With respect to each product identified in response to Interrogatory No. 4, identify all means by which the product is or has been advertised or promoted, set forth the annual expenditures for each and the persons most knowledgeable thereof.

6. Identify every trade show at which each product identified in response to Interrogatory No. 5 is or has been advertised or promoted.

7. Identify each employee of Applicant that has primary responsibility for the following services or functions with respect to Applicant's products sold under or in connection with the designation URBAN BEATZ:

- (a) package design
- (b) product design

- (c) market research
- (d) advertising, marketing, and promotion

8. Identify each package or label designer, advertising agency, market research expert or consultant who is not an employee of Applicant, who has performed services or will perform services in connection with products promoted or sold in association with the designation URBAN BEATZ, and for each such entity, describe in detail the services performed and the inclusive dates of such services.

9. Identify all persons involved on behalf of the Applicant in planning the advertising, marketing, promotion, distributing and selling of products under or in connection with the designation URBAN BEATZ.

10. State whether Applicant has ever issued or published, or caused to be issued or published, any press or publicity release concerning any product promoted in association with the designations URBAN BEATZ, and, if so, identify each such release and all publications or other media in or through which information contained therein was disseminated and the person(s) responsible therefor.

11. Identify all agreements to which Applicant or any business, company, or other entity identified in response to Interrogatory No. 1 has been or is a party which refer or relate in any way to the designation URBAN BEATZ, including all amendments and modifications thereto, and with respect to each:

- (a) the names and addresses of all participating parties;
- (b) the terms, including dates of commencement and termination, and the nature of the rights involved;
- (c) the channels of trade through which such products are marketed; and
- (d) the person(s) most knowledgeable about each such agreement, authorization, license or grant.

12. Explain the reason(s) for Applicant's adoption of the designation URBAN BEATZ, for each product identified in response to Interrogatory No. 4 as well as the procedure followed by Applicant in its decision to adopt such designation for each product, and identify all persons who participated in each such decision as well as all documents relating thereto, including but not limited to any trademark search reports.

13. Identify each term, symbol, or designation other than the designation URBAN BEATZ considered for use on or in connection with each product identified in response to Interrogatory No. 4, and state whether such term, symbol or designation was ever used in association with any other products, explain why or why not, and identify the person(s) most knowledgeable thereof and all documents relating thereto.

14. Describe in detail each poll, survey, consumer study or market research effort initiated by or on behalf of Applicant relating in any way to the designation URBAN BEATZ and identify all persons involved in or knowledgeable of such poll, survey, consumer study or market research, as well as all documents relating thereto.

15. Describe in detail how Applicant first became aware of Opposer's use of any of the marks in the Beats Family of Marks, including but not limited to stating the date of first becoming aware and the persons most knowledgeable of how such knowledge was acquired.

16. State whether Applicant has ever received any mail, inquiries, complaints, requests for refunds, orders, checks, or other communications which in any manner were intended for Opposer or which in any way indicated an association or connection between Applicant and Opposer, and if so, with respect to each:

- (a) identify:
 - (i) each such caller, sender, addresser, or communicator;
 - (ii) the date and place of occurrence;

- (iii) the substance of such communication;
- (iv) the person receiving the communication;
- (b) state whether or not any response to, or record of, the communication was made; and
- (c) identify all persons most knowledgeable thereof.

17. With respect to URBAN BEATZ, state whether Applicant has ever received any objection to its use or registration of the designation other than the instant proceedings, and with respect to each such objection, identify (a) the nature and basis of the objection, (b) when the objection was made, the disposition of the objection, (c) the persons most knowledgeable about the objection, and (d) all documents relating to the objection.

18. State whether Applicant has ever objected to the use or registration of any other mark comprised of the term "BEAT" or "BEATS" or "BEATZ" on the ground of confusing similarity, and if so, with respect to each such objection, identify (a) the mark or term to which the objection was made, (b) the nature of the objection, (c) the disposition of the objection, (d) the persons most knowledgeable about the objection, and (e) all documents relating to the objection.

19. Identify by title, index number, and tribunal each civil action or inter partes proceeding in which Applicant or any business, company, or other entity identified in response to Interrogatory No. 1 has been or is a party which refer or relate in any way to a designation comprised of the term "BEAT" or "BEATS" or "BEATZ," including all amendments and modifications thereto, and identify (a) the persons most knowledgeable thereof, and (b) all documents relating thereto.

20. Identify all agreements to which Applicant or any business, company, or other entity identified in response to Interrogatory No. 1 has been or is a party which refer or relate in

any way to a designation comprised of the term "BEAT" or "BEATS" or "BEATZ," including all amendments and modifications thereto, and identify (a) the persons most knowledgeable thereof, and (b) all documents relating thereto.

21. Identify, on an interrogatory-by-interrogatory basis, each person furnishing information upon which any part of any answer to these interrogatories is based, indicate the parts based on information so furnished by each such person, and whether such information is within the personal knowledge of such person, and if not within such person's knowledge, identify the source of the information so furnished.

Definitions and Instructions

As used herein, the words and phrases set out below shall have the following meaning or meanings prescribed for them:

1. The term "Opposer" shall mean Beats Electronics, LLC, as well as its subsidiaries, divisions, officers, directors, employees, licenses, agents and assignees.

2. The term "Applicant" shall mean Merkurs Innovations, LLC, and its officers, directors, subsidiaries, divisions, representatives, employees, licensors, licensees, agents and assignees.

3. The term "Beats Family of Marks" shall mean Opposer's marks comprised of the term BEATS identified in the Notice of Opposition in these proceedings.

4. The term "person" shall mean any individual, firm, partnership, corporation, proprietorship, association, or other organization or entity.

5. The term "identify" shall mean:

- (a) in connection with natural persons, state their full names, titles and job descriptions, if applicable, and their present or last known business and home addresses;

- (b) in connection with firms, partnerships, corporations, proprietorships, associations or other entities, state their name, and each of their present or last known addresses;
- (c) in connection with documents, describe the documents, setting forth their dates, titles, authors, addresses, parties thereto and the substance thereof, with such reasonable particularity as would be sufficient to permit them to be sought by subpoenas duces tecum or under the provisions of Rule 34 of the Federal Rules of Civil Procedure. Documents to be identified shall include both documents in your possession, custody and control and all other documents of which you have knowledge;
- (d) in connection with oral statements and communications, (i) state when and where they were made; (ii) identify each of the makers and recipients thereof as well as all others present at the time such statement or communication was made; (iii) indicate the medium of communication; and (iv) state their substance.

6. The term "documents" shall mean any and all writings of any nature whatsoever or other means by which information is retained in retrievable form, as well as drafts and all non-identical copies thereof, including but not limited to memoranda, stenographic or handwritten notes, contracts, agreements, records, audio and video recordings, correspondence, communications, reports, studies, summaries, surveys, statistical compilations, minutes, charts, manuals, brochures, schedules, price lists, telegrams, teletypes, facsimiles, E-mail, signage, certificates of registration, labels, specimens, writings, sketches, and computer disks, and any other documents as defined in Rule 34 of the Federal Rules of Civil Procedure.

7. The singular shall include the plural and the plural shall include the singular.

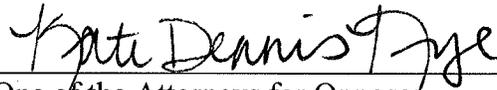
8. A masculine, feminine or neuter pronoun shall not exclude the other genders.

9. The terms "and" as well as "or" shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of the interrogatory all responses which might otherwise be construed to be outside its scope.

10. All objections or answers to interrogatories which fail or refuse to fully respond to any interrogatory on the ground of any claim of privilege of any kind whatever shall:

- (b) state all facts relied upon in support of the claim of privilege or related thereto;
- (c) identify all documents related to the claim of privilege;
- (d) identify all persons having knowledge of any facts related to the claim of privilege; and
- (e) identify all events, transactions or occurrences related to the claim of privilege.

Respectfully submitted,



One of the Attorneys for Opposer,
Beats Electronics, LLC

Date: August 29, 2012

Michael G. Kelber
Katherine Dennis Nye
Neal, Gerber & Eisenberg LLP
2 N. LaSalle Street, Suite 1700
Chicago, Illinois 60602
312.269.8000

CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of *Opposer's First*

Set of Requests for the Production of Documents to:

Holly Pekowsky, Esq.
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via U.S. Mail on this 29th day of August, 2012.


Katherine Dennis Nye

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

BEATS ELECTRONICS, LLC)	
)	
Opposer,)	
)	
v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

Declaration of Katherine Dennis Nye

Exhibit 3

Confidential Filed Under Seal

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

BEATS ELECTRONICS, LLC)	
)	
Opposer,)	
)	
v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

Declaration of Katherine Dennis Nye

Exhibit 4

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

Beats Electronics, LLC)	
)	
Opposer)	
)	
v.)	Opposition No. 91203192
)	
Merkury Innovations, Inc.)	
)	
Applicant.)	

NOTICE OF DEPOSITION

To: Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

PLEASE TAKE NOTICE THAT Opposer Beats Electronics, LLC by and through its attorneys, and pursuant to Rule 30 of the Federal Rules of Civil Procedure, will take the oral deposition of Ki Kang at the offices of Esquire Deposition Solutions at 1384 Broadway, 19th Floor, New York, NY 10018, before a duly-qualified notary public or other person authorized by law to record depositions, beginning at 1:30 p.m. on May 27, 2014, and continuing thereafter until completed.

Respectfully submitted,

Dated: May 7, 2014

/Katherine Dennis Nye/
One of the Attorneys for Opposer,
Beats Electronics, LLC

Michael G. Kelber
Lawrence E. James
Katherine Dennis Nye
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street, Suite 2200
Chicago, Illinois 60602
(312) 269-8000

CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of the foregoing Notice of

Deposition upon:

Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via e-mail transmission and U.S. Mail, First Class postage prepaid on this 5th day of March, 2014.

/Katherine Dennis Nye/
Katherine Dennis Nye

NGEDOCs: 2156830.1

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

Beats Electronics, LLC)	
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Opposer)	
)	
v.)	Opposition No. 91203192
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Merkury Innovations, Inc.)	
)	
Applicant.)	

NOTICE OF DEPOSITION

To: Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

PLEASE TAKE NOTICE THAT Opposer Beats Electronics, LLC by and through its attorneys, and pursuant to Rule 30 of the Federal Rules of Civil Procedure, will take the oral deposition of Steven Levy at the offices of Esquire Deposition Solutions at 1384 Broadway, 19th Floor, New York, NY 10018 before a duly-qualified notary public or other person authorized by law to record depositions, beginning at 9:30 a.m. on May 28, 2014, and continuing thereafter until completed.

Respectfully submitted,

Dated: May 7, 2014

/Katherine Dennis Nye/
One of the Attorneys for Opposer,
Beats Electronics, LLC

Michael G. Kelber
Lawrence E. James
Katherine Dennis Nye
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street, Suite 2200
Chicago, Illinois 60602
(312) 269-8000

CERTIFICATE OF SERVICE

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Deposition upon:

Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via e-mail transmission and U.S. Mail, First Class postage prepaid on this 5th day of March, 2014.

/Katherine Dennis Nye/
Katherine Dennis Nye

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

BEATS ELECTRONICS, LLC)	
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Opposer,)	
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v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

Declaration of Katherine Dennis Nye

Exhibit 5

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

Beats Electronics, LLC)	
)	
Opposer)	
)	
v.)	Opposition No. 91203192
)	
Merkury Innovations, Inc.)	
)	
Applicant.)	

AMENDED NOTICE OF DEPOSITION

To: Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

PLEASE TAKE NOTICE THAT Opposer Beats Electronics, LLC by and through its attorneys, and pursuant to Rule 30 of the Federal Rules of Civil Procedure, will take the oral deposition of Ki Kang at the offices of Esquire Deposition Solutions at 1384 Broadway, 19th Floor, New York, NY 10018, before a duly-qualified notary public or other person authorized by law to record depositions, beginning at 9:30 a.m. on May 12, 2015, and continuing thereafter until completed.

Respectfully submitted,

Dated: April 29, 2015

/Katherine Dennis Nye/
One of the Attorneys for Opposer,
Beats Electronics, LLC

Michael G. Kelber
Katherine Dennis Nye
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street, Suite 2200
Chicago, Illinois 60602
(312) 269-8000

CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of the foregoing Notice of

Deposition upon:

Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via e-mail transmission and U.S. Mail, First Class postage prepaid on this 29^h day of April, 2015.

 /Katherine Dennis Nye/
Katherine Dennis Nye

NGEDOCs: 2156830.1

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

Beats Electronics, LLC)	
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Opposer)	
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v.)	Opposition No. 91203192
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Merkury Innovations, Inc.)	
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Applicant.)	

AMENDED NOTICE OF DEPOSITION

To: Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

PLEASE TAKE NOTICE THAT Opposer Beats Electronics, LLC by and through its attorneys, and pursuant to Rule 30 of the Federal Rules of Civil Procedure, will take the oral deposition of Steven Levy at the offices of Esquire Deposition Solutions at 1384 Broadway, 19th Floor, New York, NY 10018 before a duly-qualified notary public or other person authorized by law to record depositions, beginning at 9:30 a.m. on May 13, 2015, and continuing thereafter until completed.

Respectfully submitted,

Dated: April 29, 2015

/Katherine Dennis Nye/
One of the Attorneys for Opposer,
Beats Electronics, LLC

Michael G. Kelber
Katherine Dennis Nye
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street, Suite 2200
Chicago, Illinois 60602
(312) 269-8000

CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of the foregoing Notice of

Deposition upon:

Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via e-mail transmission and U.S. Mail, First Class postage prepaid on this 29^h day of April, 2015.

/Katherine Dennis Nye/
Katherine Dennis Nye

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

BEATS ELECTRONICS, LLC)	
)	
Opposer,)	
)	
v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

Declaration of Katherine Dennis Nye

Exhibit 6

May 12, 2015

VIA EMAIL

Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

Re: Beats Electronics, LLC v. Merkury Innovations LLC; Opp. No. 91203192

Dear Marc:

We write to follow up your conversation with my colleague Kate Dennis Nye prior to the INTA annual meeting. We have now had a chance to confer with our client and write to respond regarding several discovery-related matters.

As you anticipated and we now confirm, Beats objects to Merkury's Notice of Deposition of Andre Young and will therefore not produce him. Mr. Young does not have any information relevant to the issues in the proceeding. We understand from your representations that Merkury intends to depose Mr. Young on Beats' decision to adopt the BEATS mark and Beats' approval process for approving adoption of new marks. Both of these topics are beyond the scope of discoverable information as they have no bearing on Beats' claims or defenses in this proceeding. Specifically, as the senior user of the now famous BEATS family of marks, Beats' intent in adopting and decision to adopt the BEATS mark is wholly irrelevant to whether a likelihood of confusion exists between Merkury's URBAN BEATZ mark and Beats' family of BEATS mark or whether, as Merkury asserts, Beats' BEATS mark is merely descriptive for its goods and services. Moreover, even if either of the identified topics were relevant, information can be obtained more readily through a less intrusive method of discovery, including through one of Beats' appropriate 30(b)(6) designees or through interrogatories and requests for admission. Thus, given that Mr. Young does not possess relevant information and given his prominence, fame, and high-profile status, we can only assume that rather than legitimately seeking discovery, your attempt to depose Mr. Young is simply a harassing and improper discovery strategy.

In addition, with respect to the timing for the depositions of Ki Kang and Steven Levy, if the dates you suggested, namely May 19, 2015 and May 20, 2015, still work, we will re-issue the Notices accordingly and will plan to move forward in that regard. Our client's designee can be available on June 16-19 in the Cupertino, California area for the 30(b)(6) deposition. Please let us know your availability during that window.

Marc J. Jason
May 12, 2015
Page 2

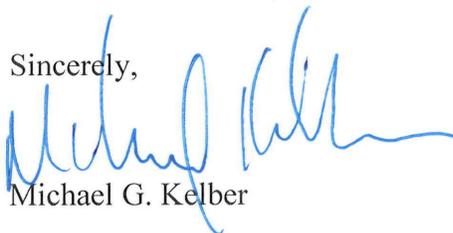
Finally, Merkury has committed to producing the following documents:

- A signed verification of all interrogatory responses
- Documents sufficient to show wholesale prices of all URBAN BEATZ branded products
- Documents sufficient to show suggested retail prices for all URBAN BEATZ branded products
- Representative samples of “sell sheets” promoting URBAN BEATZ branded products
- Trademark searches concerning the URBAN BEATZ mark

Additionally, responses to Beats’ Second Set of Document Requests, Second Set of Requests to Admit, and Second Set of Interrogatories, served on February 17, 2014, are still outstanding. Please produce these outstanding documents and responses prior to May 18, the close of discovery. Merkury’s failure to do so will force us to file a motion to compel.

Please contact me or Kate at your earliest convenience so that we may discuss these matters.

Sincerely,



Michael G. Kelber

cc: Katherine Dennis Nye, Esq.
Andrea S. Fuelleman, Esq.

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

BEATS ELECTRONICS, LLC)
)
 Opposer,)
)
 v.)
)
MERKURY INNOVATIONS, LLC)
)
 Applicant.)

Opposition No. 91203192

Declaration of Katherine Dennis Nye

Exhibit 7

**AMSTER
ROTHSTEIN
& EBENSTEIN LLP**

Intellectual Property Law

90 Park Avenue
New York NY 10016

Main 212 336 8000

Fax 212 336 8001

Web www.arelaw.com

May 13, 2015

Via E-Mail

Michael G. Kelber, Esq.
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street
Chicago, IL 60602

Partners

Daniel Ebenstein
Philip H. Gottfried
Neil M. Zipkin
Anthony F. Lo Cicero
Kenneth P. George
Abraham Kasdan, Ph.D.
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Chester Rothstein
Craig J. Arnold
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Michael V. Solomita
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Founding Partners

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Jesse Rothstein (1934-2003)

Senior Counsel

Marion P. Metelski
Alan D. Miller, Ph.D.
Marc J. Jason
Richard S. Mandaro
Max Vern
Holly Pekowsky
Brian A. Comack
Matthieu Hausig

Benjamin M. Halpern*
Jung S. Hahn

Associates

Patrick Boland*
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Mark Berkowitz
Samuel Lo
Suzue Fujimori
Jessica Capasso
Brian Amos, Ph.D.
Addie Bendory
William M. Frank

Hajime Sakai, Ph.D.
Amit Parikh
Richard P. Zemsy*
Brendan O'Dea
David P. Goldberg

* Not admitted in New York

Marc J. Jason
Direct 212 336 8099
E-mail mjason@arelaw.com

Re: Beats Electronics, LLC v. Merkurs Innovations LLC
TTAB Opposition No. 91203192
Our File: 58188/44

Dear Michael:

We write in response to your letter of May 12, 2015. We note at the outset that, after speaking with Kate Dennis Nye on April 30, 2015 regarding depositions, we waited 12 days for a response, which we received at 6 pm last evening. We now have less than one week until the discovery deadline.

With respect to your refusal to produce Andre Young for deposition, and your alternative offer of "less intrusive" methods of discovery, such as a 30(b)(6) designee, we note that the Beats Rule 30(b)(6) designee, Tyler Williamson, was already unable to testify regarding the selection and meaning of the BEATS mark. As Mr. Williamson clearly testified at his deposition, he was not familiar with the creation of the name itself; "it was Dre [Andre Young] who had had the name of Beats, as you know. It was his idea to call the company Beats." Williamson Tr. at 18-9. Mr. Young's selection of the term "Beats" is relevant to issues of descriptiveness/suggestiveness, the strength of the mark, and the ability of Beats to prevent others from using the term, even if spelled alternatively and used with other modifiers. This issue is central to the case, and we demand that Mr. Young be produced for deposition.

Indeed, Beats has taken the deposition of one of Merkurs's principals, Chaby Orfali, on precisely the same issues, and much more. Mr. Orfali was asked (and was able to answer) numerous question regarding the creation of the URBAN BEATZ mark, as well as extensive questions about Merkurs's use of the mark, channels of trade, customers, pricing, etc. Merkurs is a small company with a handful of employees, and Mr. Orfali was able to testify regarding all relevant issues in the case. Nevertheless, Beats now seeks to depose Merkurs's other principal, Steve Levy, and Ki Kang, Merkurs's Creative Director, regarding the very same issues that Mr. Orfali already testified to. This is harassment and it is unacceptable.

Unlike Mr. Young, Mr. Levy has a business to run, and Mr. Kang has work to do. The harassment of Merkury by Beats (and now Apple) has lasted for almost four years now, and it is a cloud hanging over Merkury's head. We have suspended the proceedings time and time again, at your instigation, to allow the parties to discuss settlement. Meanwhile, Merkury waited 7 months (from July 2014 to February 2015) for a response to its last settlement offer -- a response that we believe Beats did not make in good faith.

Now, with mere days left until the discovery deadline, you decline to produce a witness on a topic your Rule 30(b)(6) witness was unable to testify about; and for the first time you threaten us with a motion to compel if we do not respond immediately to discovery that was propounded 15 months ago. Aside from the fact that most, if not all, of the information requested was already provided (to the extent it exists and is not objectionable), we do not appreciate your threat after the numerous delays and abundant discovery that have taken place.

We will be providing the documents referenced on page 2 of your letter that Merkury committed to producing, except for trademark searches, as we have ascertained that none exist.

Please let us know when you are available for a call to further discuss these issues.

Very truly yours,

AMSTER, ROTHSTEIN & EBENSTEIN LLP



Marc J. Jason

MJJ:

cc: Katherine Dennis Nye, Esq.
Anthony F. LoCicero, Esq.

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

BEATS ELECTRONICS, LLC)	
)	
Opposer,)	
)	
v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

Declaration of Katherine Dennis Nye

Exhibit 8

June 10, 2015

VIA EMAIL AND U.S. MAIL

Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

Re: Beats Electronics, LLC v. Merkury Innovations LLC; Opp. No. 91203192

Dear Marc:

We write to follow up on our recent conversations regarding the conclusion of discovery in this matter, as well as the responses to discovery requests you served last Monday. Additionally, you will find enclosed Beats' Third Sets of Requests to Admit, Requests for Production, and Interrogatories.

As you presumably know, the Board ruled today on our consented motion to extend the discovery period, so discovery is now set to close on June 18. Accordingly, we have noticed the depositions of Ki Kang and Steven Levy for Wednesday, June 17, 2015, and Thursday, June 18, 2015, respectively. Please note that our client has additionally retained Dale Cendali of Kirkland & Ellis, who will be taking these depositions, so we will need to coordinate schedules with her as well.

As noted above, we received your client's responses to Beats' Second Sets of Requests for Documents, Requests for Admission, and Interrogatories last week. We note that Merkury has refused to respond to any of the requests directed at information regarding the Flux headphones on relevance grounds. As you know, the Flux headphones are strikingly similar in design to Beats' well-known Solo headphones. Accordingly, the design and marketing of the Flux headphones under the URBAN BEATZ mark shows Merkury's intent to create an association with Beats.

Furthermore, Merkury agreed to produce documents sufficient to identify the date on which it first sold or provided any products under the URBAN BEATZ designation. *See* Applicant's Responses and Objections to Opposer's First Set of Requests for the Production of Documents, dated Nov. 19, 2012 ("Applicant's Responses to First RFPs"), at 2-4 (response to Request No. 2(f)). Based on our review of Merkury's documents, Merkury has not produced any such documents.

In addition, Merkury must supplement the documents it produced in response to Beats' requests for documents related to its sales, customers, product catalogs, and any other document

Marc J. Jason
June 10, 2015
Page 2

requests. For example, while Merkury has produced documents regarding its sales, customers, and product catalogs (*see* MERK00012-18, MERK00033, MERK00035, MERK00036, MERK00037-47, and MERK00048-64), Merkury must provide updated documents, as those documents are now out-of-date. Similarly, Merkury must supplement its response to Interrogatory No. 6, related to trade shows at which Merkury has promoted its URBAN BEATZ products. *See* Applicant's Responses and Objections to Opposer's First Set of Interrogatories, dated Nov. 19, 2012, at 4.

Please let us know if you will supplement these responses, or provide us with times in the next few days that would work for you to meet and confer so that we may determine whether a motion to compel will be necessary before the close of discovery.

We look forward to hearing from you promptly.

Sincerely,



Katherine Dennis Nye

cc: Michael G. Kelber, Esq.
Dale Cendali, Esq.

Enclosures

21409161.2

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

BEATS ELECTRONICS, LLC

Opposer,

v.

MERKURY INNOVATIONS, LLC

Applicant.

Opposition No. 91203192

OPPOSER'S SECOND AMENDED NOTICE OF DEPOSITION OF KI KANG

PLEASE TAKE NOTICE that pursuant to the provisions of Federal Rule of Civil Procedure 30 and 37 C.F.R. § 2.120(b), Opposer Beats Electronics, LLC (“Beats Electronics”) will take the deposition upon oral examination of Ki Kang, on Wednesday, June 17, 2015, at 9:30 a.m., or on a date to be agreed upon by counsel, until completed.

The deposition will be held at the offices of Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, telephone: (212) 446-4800. The deposition will be taken before a notary public or other officer authorized to administer oaths and will be recorded by stenographic, sound and visual means. The stenographic recordation method may provide for the instant visual display of the testimony at the deposition.

Respectfully submitted,



One of the Attorneys for Applicant,
Beats Electronics, LLC

Date: June 10, 2015

Michael G. Kelber
Katherine Dennis Nye
Neal, Gerber & Eisenberg LLP
2 N. LaSalle Street, Suite 2300
Chicago, Illinois 60602
312.269.8000

CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of *Opposer's*

Second Amended Notice of Deposition of Ki Kang to:

Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via U.S. Mail and email on this 10th day of June, 2015.


Katherine Dennis Nye

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

BEATS ELECTRONICS, LLC

Opposer,

v.

MERKURY INNOVATIONS, LLC

Applicant.

Opposition No. 91203192

OPPOSER'S SECOND AMENDED NOTICE OF DEPOSITION OF STEVEN LEVY

PLEASE TAKE NOTICE that pursuant to the provisions of Federal Rule of Civil Procedure 30 and 37 C.F.R. § 2.120(b), Opposer Beats Electronics, LLC ("Beats Electronics") will take the deposition upon oral examination of Steven Levy, on Thursday, June 18, 2015, at 9:30 a.m., or on a date to be agreed upon by counsel, until completed.

The deposition will be held at the offices of Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, telephone: (212) 446-4800. The deposition will be taken before a notary public or other officer authorized to administer oaths and will be recorded by stenographic, sound and visual means. The stenographic recordation method may provide for the instant visual display of the testimony at the deposition.

Respectfully submitted,



One of the Attorneys for Applicant,
Beats Electronics, LLC

Date: June 10, 2015

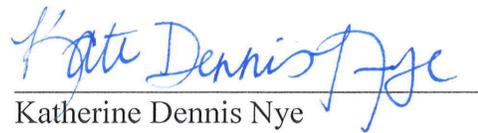
Michael G. Kelber
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CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of *Opposer's*
Second Amended Notice of Deposition of Steven Levy to:

Marc J. Jason
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016

via U.S. Mail and email on this 10th day of June, 2015.


Katherine Dennis Nye

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

BEATS ELECTRONICS, LLC)	
)	
Opposer,)	
)	
v.)	Opposition No. 91203192
)	
MERKURY INNOVATIONS, LLC)	
)	
Applicant.)	

Declaration of Katherine Dennis Nye

Exhibit 9

**AMSTER
ROTHSTEIN
& EBENSTEIN LLP**

Intellectual Property Law

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June 11, 2015

Via E-Mail

Katherine Dennis Nye, Esq.
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street
Chicago, IL 60602

Re: Beats Electronics, LLC v. Merkury Innovations LLC
TTAB Opposition No. 91203192
Our File: 58188/44

Dear Kate:

We write in response to your letter dated June 10, 2015. We note that we received your letter at the close of business yesterday; we had not heard from you since May 19, more than 3 weeks ago; and we are now 1 week from the discovery deadline.

With respect to depositions of Steven Levy and Ki Kang, as we told you previously, Mr. Levy is a principal of Merkury, which is a very small company. His availability is not flexible, and you have given only one week's notice for a deposition. Regardless of the timing, however, as I stated to you previously, the topics on which you wish to depose Mr. Levy (e.g., creation of the URBAN BEATZ mark, product line, channels of trade, etc.) have already been addressed at length during the deposition of Merkury's other principal, Chaby Orfali. We believe that Beats' notice of Mr. Levy's deposition amounts to nothing more than harassment and a scorched earth tactic that is unwarranted in this case, which has been pending for 3 ½ years. Similarly, Ki Kang, Merkury's Creative Director, has nothing to add to the testimony of Mr. Orfali regarding creation of the URBAN BEATZ mark. Noticing his deposition also constitutes harassment.

Beats, on the other hand, has objected to producing Andre Young for deposition. Mr. Young actually possesses relevant knowledge regarding selection and meaning of the BEATS mark that is not only relevant to the case, but also has not been addressed by other witnesses. Beats' Rule 30(b)(6) witness was unable to testify about selection of the mark. As we stated to you previously, Beats' Rule 30 (b)(6) witness, Tyler Williamson, clearly testified at his deposition that he was not familiar with the creation of the "Beats" name itself; "it was Dre [Andre Young] who had had the name of Beats, as you know. It was his idea to call the company Beats." Williamson Tr. at 18-9. Mr. Young's selection of the term "Beats" is relevant

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to issues of descriptiveness/suggestiveness, the strength of the mark, and the ability of Beats to prevent others from using the term, even if spelled alternatively and used with other modifiers. This issue is central to the case. We understand that Beats disputes the relevance of Mr. Young's testimony. However, the cases you cited to us in support of your position were not relevant at all, let alone persuasive. We are prepared to let the TTAB rule on this issue.

With respect to the Flux headphones and your discovery requests related thereto, we stand by our objections. Your requests appear to us to be intended to harass and intimidate, nothing more. Again, we are prepared to let the TTAB rule on this issue.

With respect to your requests for documents reflecting first sale of URBAN BEATZ products, we initially note that this is the first we are hearing of this alleged deficiency in connection with our responses and objections dated November 19, 2012. Aside from the more than 2 ½ year delay in voicing this objection, we note that priority is not an issue in this proceeding. The URBAN BEATZ application was filed as an intent-to-use application. Moreover, we did produce documentation -- including a summary of URBAN BEATZ sales starting in 2011 (MERK00033) and an invoice dated April 29, 2011 (MERK00034) -- indicating first use of the mark in 2011. First use of the mark in 2011 was also confirmed by Mr. Orfali during his deposition. In view of the above, Merkury will not be producing additional documents regarding this issue.

With respect to Beats' third set of requests to admit, requests for production and interrogatories, Merkury will provide its responses and objections in due course.

Finally, with respect to supplementation of previously produced documents, such as sales documents, customer lists, catalogs and the like, Merkury objects to supplementation because it is unduly burdensome and unnecessary. The numerous extensions of time in this proceeding were requested by Beats. The bottom line is that Beats has sufficient information it needs to try the case.

We are available to discuss these issues early next week. Please let us know when you are available.

Very truly yours,

AMSTER, ROTHSTEIN & EBENSTEIN LLP



Marc J. Jason

MJJ:

cc: Anthony F. LoCicero, Esq.