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

GIBSON GUITAR CORP.,)
)
) Petitioner,)
)
 vs.) Cancellation Nos.
) 92041175
) and
 J. D'ADDARIO & CO., INC.,) 92041688
)
) Registrant.)



04-23-2004
U.S. Patent & TMO/TM Mail Rcpt Dt. #22

Rebuttal Testimony Deposition of:
DAVID H. BERRYMAN
Taken on behalf of the Petitioner
April 16, 2004

APPEARANCES:

For the Petitioner: Edward D. Lanquist, Jr., Esq.
Waddey & Patterson
414 Union Street, Suite 2020
Nashville, TN 37219

For the Registrant: Gerald T. Bodner, Esq.
(via telephone) Bodner & O'Rourke, LLP
425 Broadhollow Road
Melville, NY 17747

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I N D E X

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E X H I B I T S

No. 17: E-mails, March 30, 2004, Lanquist to Brown; April 2, 2004, Brown to Lanquist (GIB 00650)	6
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Rebuttal Testimony of DAVID H. BERRYMAN

1 The rebuttal testimony deposition of DAVID
2 H. BERRYMAN was taken by counsel for the Petitioner,
3 pursuant to notice, at the offices of Waddey &
4 Patterson, 414 Union Street, Suite 2020, Nashville,
5 Tennessee, on April 16, 2004, pursuant to 37 CFR 2.123.

6 The formalities as to notice, caption,
7 certificate, et cetera, are waived. All objections,
8 except as to the form of the questions, are reserved to
9 the hearing.

10 It is agreed that Maxine Cleeton, being a
11 court reporter and notary public for the State of
12 Tennessee, may swear the witness, and that the reading
13 and signing of the completed deposition by the witness
14 are waived.

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* * *

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DAVID H. BERRYMAN

21

22 was called as a witness, and after having been first
23 duly sworn, testified as follows:

24

25

Rebuttal Testimony of DAVID H. BERRYMAN

DIRECT EXAMINATION

QUESTIONS BY MR. LANQUIST:

09:26:57 3 Q. Just for clarification, please state your name
09:26:59 4 for the record again.

09:27:00 5 A. David H. Berryman.

09:27:03 6 Q. Mr. Berryman, this is your rebuttal testimony
09:27:04 7 in the proceeding between Gibson Guitar Corp. and
09:27:09 8 J. D'Addario & Company, Inc., relating to a couple of
09:27:15 9 cancellation proceedings in front of the Patent and
09:27:18 10 Trademark Office.

09:27:23 11 Mr. Berryman, does Gibson Guitar Corp. -- when
09:27:26 12 I -- can I just use Gibson as Gibson Guitar Corp. as
09:27:31 13 shorthand?

09:27:31 14 A. Yes.

09:27:32 15 Q. Does Gibson have a policy as to what happens
09:27:34 16 when it learns of a third party infringing Gibson
09:27:39 17 intellectual properties?

09:27:40 18 A. Yes.

09:27:40 19 MR. BODNER: I object to that question.
09:27:42 20 It's not limited to rebuttal testimony.

09:27:45 21 Okay. Did you hear me okay on that?

09:27:55 22 MR. LANQUIST: Yes.

09:27:56 23 BY MR. LANQUIST:

09:27:57 24 Q. Okay. Go ahead and answer, Mr. Berryman.

09:27:59 25 A. Yes.

Rebuttal Testimony of DAVID H. BERRYMAN

09:27:59 1 Q. And what is that policy?

09:28:02 2 A. Well, the policy is that, you know, the
09:28:08 3 individual at Gibson that would become aware of it, it
09:28:11 4 would usually either come to myself or to Henry
09:28:15 5 Juskiewicz as CEO, and we would notify legal counsel
09:28:18 6 to immediately send out a cease and desist letter.

09:28:21 7 MR. BODNER: Again, the same objection.

09:28:23 8 BY MR. LANQUIST:

09:28:23 9 Q. And as part of that policy, do you know
09:28:25 10 whether Gibson took any steps regarding Ed Roman's use
09:28:31 11 of EXP in connection with guitars?

09:28:33 12 A. Yes, we did.

09:28:34 13 Q. And what --

09:28:34 14 MR. BODNER: Again, I'm not going to
09:28:35 15 interrupt but I'll say for all of his testimony it's
09:28:38 16 the same objection, that this is not limited to
09:28:41 17 rebuttal testimony.

09:28:43 18 BY MR. LANQUIST:

09:28:44 19 Q. And what steps did -- and what steps did
09:28:49 20 Gibson's counsel take with respect to Ed Roman?

09:28:52 21 A. Well, they sent him a cease and desist letter
09:28:55 22 on his use of EXP and selling product with that model
09:29:00 23 designation on his web site.

09:29:02 24 Q. And do you know whether the cease and desist
09:29:06 25 letter had any effect?

Rebuttal Testimony of DAVID H. BERRYMAN

09:29:08 1 A. Yes, it did. I checked his web site about a
09:29:12 2 week ago, and he has a statement on there saying that
09:29:18 3 due to legal problems and at Gibson's request, we have
09:29:23 4 discontinued this product.

09:29:25 5 Q. The "we" being Ed Roman has discontinued the
09:29:28 6 product.

09:29:29 7 A. Ed Roman, that's correct.

09:29:30 8 Q. Do you know whether as part of Gibson's
09:29:33 9 protection policy that its counsel sent a letter to
09:29:35 10 Legend Guitar over its use of EXP in connection with
09:29:39 11 guitars?

09:29:39 12 MR. BODNER: Again, same objection.
09:29:41 13 Sorry to interrupt. It's not limited to rebuttal
09:29:44 14 testimony.

09:29:45 15 THE WITNESS: Yes. Legal counsel did
09:29:47 16 send a letter to Legend Guitar.

17 BY MR. LANQUIST:

09:29:50 18 Q. And do you know whether that had any effect?

09:29:52 19 A. Yes. We got a response back from Legend
09:29:55 20 advising us that their web master will take the product
09:29:58 21 off their web site by the end of April.

09:30:01 22 MR. LANQUIST: Okay. Let me hand you
09:30:03 23 what we'll mark as Exhibit 17.

09:30:10 24 (Document marked Exhibit No. 17.)

09:30:10 25 BY MR. LANQUIST:

Rebuttal Testimony of DAVID H. BERRYMAN

09:30:10 1 Q. And can you identify Exhibit 17, please?

09:30:13 2 A. Yes. It's correspondence from Legend Guitar
09:30:16 3 Company regarding the infringement.

09:30:19 4 Q. Okay.

09:30:21 5 MR. BODNER: Mr. Lanquist, is that the
09:30:24 6 document that you sent me by e-mail yesterday?

09:30:27 7 MR. LANQUIST: Yes.

09:30:29 8 MR. BODNER: And is that labeled
09:30:30 9 GIB 00650?

09:30:32 10 MR. LANQUIST: Yes.

09:30:33 11 MR. BODNER: All right. I object to that
09:30:34 12 document. Again, this is not -- it's supposed to be
09:30:40 13 limited to rebuttal testimony. The document's not
09:30:42 14 authenticated and it's hearsay.

09:30:45 15 MR. LANQUIST: Okay.

09:30:46 16 BY MR. LANQUIST:

09:30:51 17 Q. Now, do you know whether as part of its
09:30:55 18 intellectual property policy whether Gibson took any
09:30:59 19 steps regarding Peavey's use -- Peavey being
09:31:04 20 P-E-A-V-E-Y -- use of EXP in connection with guitars?

09:31:08 21 A. Yes, we did.

09:31:09 22 Q. And what step was that?

09:31:11 23 A. Well, a letter was sent from our company by
09:31:16 24 our chairman and CEO, personal letter to Hartley
09:31:20 25 Peavey, advising him of our objection to their use of

Rebuttal Testimony of DAVID H. BERRYMAN

09:31:23 1 EXP.

09:31:24 2 MR. BODNER: Again, I object to this line
09:31:25 3 of questioning because it's not limited to rebuttal
09:31:28 4 testimony. And this is hearsay also.

09:31:31 5 BY MR. LANQUIST:

09:31:33 6 Q. And what is the present status of the dispute
09:31:36 7 between Gibson and Peavey?

09:31:39 8 A. The present status is that their corporate
09:31:43 9 counsel is in communication with our corporate counsel
09:31:45 10 regarding this to resolve the issue.

09:31:49 11 MR. LANQUIST: Okay. I have no further
09:31:50 12 questions.

13

09:31:52 14 CROSS-EXAMINATION

09:31:52 15 QUESTIONS BY MR. BODNER:

09:31:56 16 Q. Mr. Berryman, was that cease and desist letter
09:31:58 17 to Ed Roman, was that produced?

09:32:03 18 A. No.

09:32:03 19 Q. And why wasn't it produced?

09:32:08 20 A. I don't know.

09:32:09 21 Q. When was that cease and desist letter sent
09:32:14 22 out?

09:32:15 23 A. It was sent out a while ago.

09:32:17 24 Q. How long ago?

09:32:20 25 A. I can't recall.

Rebuttal Testimony of DAVID H. BERRYMAN

09:32:21 1 Q. A year, two years?

09:32:26 2 A. Well, I don't know. Ed Roman, we've sent many
09:32:29 3 cease and desist letters to him. He's a notorious
09:32:33 4 infringer of our intellectual property, and we sent out
09:32:38 5 several letters a year to Ed and I cannot recall
09:32:41 6 exactly when this letter was sent out.

09:32:43 7 Q. Well, was it after your January 2004
09:32:49 8 deposition when we brought that to your attention in
09:32:54 9 Exhibit E?

09:32:56 10 A. I don't know.

09:32:57 11 Q. It seems that you had -- you had stated to me,
09:33:03 12 and you can check the record if you want, but you
09:33:06 13 thanked me for bringing it to your attention and you
09:33:09 14 said that I have a big problem with them. Is that
09:33:13 15 correct?

09:33:14 16 A. Well, yes. Our company -- what I was alluding
09:33:18 17 to was the ongoing issues with Ed Roman copying and
09:33:23 18 infringing either our trademarks or using the names of
09:33:30 19 our product on his web site to sell product that he's
09:33:35 20 made or he gets somebody to make for him.

09:33:37 21 Q. Okay. But as far as your deposition which
09:33:41 22 occurred on January 7, 2004, it sounded to me that you
09:33:51 23 did not know that Ed Roman was using EXP on their
09:33:55 24 guitars; is that correct?

09:33:58 25 A. Well, I'm not sure. I checked his web site a

09:34:03 1 couple of times a year and I know our intellectual
09:34:08 2 property legal counsel checks his web site
09:34:11 3 independently of ourselves because we have an ongoing
09:34:15 4 problem of his compliance with our demands that he
09:34:19 5 cease and desist using a lot of our trademarks. And he
09:34:25 6 says he will comply and skirts the issue and then pops
09:34:28 7 up another time and you find out that he, in fact, did
09:34:31 8 not comply. So it's an ongoing issue with Ed Roman.

09:34:35 9 Q. Okay. Did you instruct your attorneys to send
09:34:40 10 the cease and desist letter to Ed Roman?

09:34:44 11 A. Well, I have, yes. On several issues. But
09:34:49 12 they have initiated many of the issues themselves in
09:34:55 13 terms of problems with compliance and his noncompliance
09:35:00 14 with our requests.

09:35:02 15 Q. So with respect to Ed Roman, after your
09:35:06 16 January 7, 2004, deposition, do you instruct -- did you
09:35:11 17 instruct your counsel to write to Ed Roman with a cease
09:35:15 18 and desist letter?

09:35:20 19 A. You know, I really don't know whether I did or
09:35:22 20 not.

09:35:23 21 Q. Why wouldn't you know? That was only about
09:35:27 22 two or three months ago.

09:35:28 23 MR. LANQUIST: Counsel, argumentative.

09:35:30 24 BY MR. BODNER:

09:35:31 25 Q. You can answer the question.

Rebuttal Testimony of DAVID H. BERRYMAN

09:35:32 1 MR. LANQUIST: Actually, I didn't see
09:35:33 2 where there was a question. He told you that he did
09:35:35 3 not know and now you're asking him why he doesn't know,
09:35:38 4 and that's argumentative and it's not really a
09:35:40 5 question.

09:35:40 6 MR. BODNER: I think that is a question.

7 BY MR. BODNER:

09:35:42 8 Q. I just want to know why you don't know whether
09:35:44 9 you instructed your counsel to write to Ed Roman.

09:35:47 10 MR. LANQUIST: I think, Counsel, what
09:35:49 11 he's saying is he doesn't remember. Now, if you want
09:35:51 12 us to get a brain physiologist to take a look to see
09:35:54 13 whether he doesn't -- why he doesn't remember
09:35:57 14 something, we can do that. But he just doesn't
09:35:59 15 remember. That's like asking me why I forgot my wife's
09:36:04 16 birthday a couple years ago. I don't know.

09:36:07 17 MR. BODNER: I appreciate your testimony
09:36:08 18 and your comments about your wife.

19 BY MR. BODNER:

09:36:09 20 Q. But I'm just trying to figure out why
09:36:11 21 something three months ago you just don't remember. Is
09:36:16 22 there any reason why you can't remember, Mr. Berryman?

09:36:19 23 MR. LANQUIST: Counsel, that's
09:36:20 24 argumentative and I'm going to instruct the witness not
09:36:22 25 to answer.

Rebuttal Testimony of DAVID H. BERRYMAN

09:36:23 1 MR. BODNER: Okay.

2 BY MR. BODNER:

09:36:24 3 Q. So you are not going to answer the question.

09:36:25 4 Is that correct, Mr. Berryman?

09:36:27 5 A. Well, I think I already answered the question.

09:36:30 6 Q. That you don't remember.

09:36:31 7 A. Well, you know, I know Ed Roman has offered

09:36:34 8 Explorer-shaped product on his web site that's a copy

09:36:38 9 of a Gibson Explorer. And I know we've talked about

09:36:44 10 this in the past -- oh, in the past year. And it's an

09:36:50 11 ongoing problem. And then he called the product EXP.

09:36:55 12 Frankly, I cannot directly remember whether when I saw

09:37:00 13 it a while ago whether he put EXP on it or not, but it

09:37:04 14 was our Gibson Explorer trade -- trademark body shape

09:37:09 15 and now it's called EXP. That's -- that's a big

09:37:13 16 problem.

09:37:14 17 Q. Well, we're distinguishing between EXP and the

09:37:16 18 body shape of the guitar; is that correct?

09:37:19 19 A. Well, yes. I mean, it's both.

09:37:22 20 Q. So what was the cease and desist letter about?

09:37:28 21 A. I don't know.

09:37:29 22 Q. Have you ever seen the cease and desist

09:37:31 23 letter?

09:37:37 24 A. I can't recall. I don't think so.

09:37:38 25 Q. What documents did you review to prepare for

Rebuttal Testimony of DAVID H. BERRYMAN

09:37:43 1 your deposition today?

09:37:46 2 MR. LANQUIST: Counsel, I'm going to

09:37:47 3 object to that as attorney-client privilege. I mean --

09:37:50 4 MR. BODNER: No, that's not.

5 BY MR. BODNER:

09:37:51 6 Q. You can answer the question.

09:37:54 7 MR. LANQUIST: Go ahead. That's fine.

09:37:55 8 THE WITNESS: Well, I reviewed the
09:37:57 9 document to Legend Guitar, the e-mail. E-mail --
09:38:02 10 e-mail exchange with Legend Guitar.

09:38:05 11 BY MR. BODNER:

09:38:05 12 Q. Right. And where did you get that document?

09:38:10 13 A. Well, I got that document from our legal
09:38:12 14 counsel.

09:38:13 15 Q. Mr. Lanquist?

09:38:15 16 A. Yes.

09:38:15 17 Q. Okay. When did you get that document?

09:38:18 18 A. Well, I got that document over a week ago.

09:38:23 19 Q. For what purpose?

09:38:28 20 A. Well, the purpose wasn't -- was because I
09:38:32 21 checked their web site and saw that they did not make a
09:38:35 22 change yet, and I asked Ed Lanquist what the specific
09:38:39 23 date was or did we have a specific date that they had
09:38:42 24 agreed to make the change. And he sent me the e-mail
09:38:50 25 advising that their web master would make it within 30

Rebuttal Testimony of DAVID H. BERRYMAN

09:38:53 1 days of our original -- or his original correspondence
09:38:59 2 to them.

09:38:59 3 Q. Was that original correspondence produced?

09:39:04 4 A. No.

09:39:05 5 Q. What did that original correspondence say?

09:39:09 6 A. I don't know. It wasn't produced.

09:39:11 7 Q. Oh, I mean, so you haven't seen it.

09:39:14 8 A. No.

09:39:15 9 Q. Oh, you haven't seen it at all, that's right.

09:39:17 10 Is that correct? You haven't seen it.

09:39:19 11 A. That's correct.

09:39:19 12 Q. Okay. Why did you -- well, on January 7,
09:39:29 13 2004, you testified that you had never heard of Legend
09:39:34 14 Guitar.

09:39:34 15 A. That's correct.

09:39:34 16 Q. And so was your writing to Legend Guitar a
09:39:42 17 result of our calling to your attention the use by
09:39:48 18 Legend Guitar of EXP?

09:39:50 19 A. Yes.

09:39:51 20 Q. Okay. Was that letter to Peavey that you
09:40:10 21 testified about, was that ever produced?

09:40:18 22 A. I have not seen the letter myself, no.

09:40:20 23 Q. At your deposition on January 7, 2004, I
09:40:29 24 believe you stated that you had not known whether a
09:40:32 25 letter went to Peavey or not. Is that correct?

Rebuttal Testimony of DAVID H. BERRYMAN

09:40:36 1 A. Well, I saw or I understood in conversations
09:40:43 2 between our company chairman and our legal counsel that
09:40:50 3 our company chairman said he was going to send them a
09:40:53 4 letter.
09:40:55 5 Q. Who is the company chairman?
09:40:57 6 A. Henry Juskiewicz.
09:40:59 7 Q. Have you had any conferences with
09:41:01 8 Mr. Juskiewicz? Concerning -- concerning this EXP
09:41:09 9 trademark situation.
09:41:11 10 MR. LANQUIST: Which EXP trademark
09:41:13 11 situation?
09:41:13 12 MR. BODNER: With D'Addario.
09:41:18 13 THE WITNESS: Not -- not recently, no.
09:41:20 14 BY MR. BODNER:
09:41:21 15 Q. Well, have you had any?
09:41:25 16 A. Going back several months, yes.
09:41:26 17 Q. What was discussed at those meetings?
09:41:29 18 MR. LANQUIST: Counsel, how does this
09:41:30 19 relate to the direct?
09:41:31 20 MR. BODNER: Well, we're talking about
09:41:33 21 he's saying that Peavey was written -- was written to
09:41:38 22 as far as the cease and desist letter by
09:41:41 23 Mr. Juskiewicz.
09:41:42 24 MR. LANQUIST: Yes, but now you're asking
09:41:44 25 him about conversations relating to the D'Addario

09:41:46 1 matter.

09:41:47 2 MR. BODNER: This is the D'Addario

09:41:49 3 matter.

09:41:49 4 MR. LANQUIST: Right. But I didn't talk
09:41:50 5 about the D'Addario matter on direct.

09:41:54 6 MR. BODNER: That's all right. Are you
09:41:55 7 instructing your witness not to answer?

09:41:57 8 MR. LANQUIST: I'm asking you to tell me
09:41:59 9 how it relates to my direct before I object.

09:42:01 10 MR. BODNER: I just did.

09:42:03 11 BY MR. BODNER:

09:42:04 12 Q. Mr. Berryman, will you please answer the
09:42:05 13 question?

09:42:06 14 MR. LANQUIST: Counsel, you have not told
09:42:07 15 me yet how it relates to the direct.

09:42:09 16 MR. BODNER: Yes, I did. I just told you
09:42:10 17 that this relates to Mr. Juskiewicz instructing you,
09:42:16 18 apparently, or Gibson's counsel to write to Peavey.

09:42:22 19 MR. LANQUIST: No, I think he said that
09:42:24 20 he wrote to Peavey, that Mr. Juskiewicz wrote to
09:42:26 21 Peavey.

09:42:27 22 MR. BODNER: That's exactly right.

09:42:28 23 MR. LANQUIST: And I think that your
09:42:29 24 client already has a copy of that letter from Peavey.

09:42:32 25 MR. BODNER: I don't have a copy. Did

09:42:33 1 you produce that copy?

09:42:34 2 MR. LANQUIST: No, but I think your
09:42:35 3 counsel does from his conversation with Peavey.

09:42:38 4 MR. BODNER: Well, you can think all you
09:42:41 5 want. Did you produce that?

09:42:42 6 MR. LANQUIST: I don't think so.

09:42:43 7 MR. BODNER: Okay.

09:42:44 8 BY MR. BODNER:

09:42:45 9 Q. Mr. Berryman, will you please answer the
09:42:46 10 question?

09:42:47 11 MR. LANQUIST: Counsel, I'm still waiting
09:42:48 12 for you to tell me how it relates to my direct
09:42:50 13 examination because --

09:42:50 14 MR. BODNER: I just did. Now, I'm asking
09:42:52 15 you, are you instructing your witness not to answer the
09:42:54 16 question?

09:42:55 17 MR. LANQUIST: Before I instruct the
09:42:56 18 witness not to answer, I want you to tell me how it
09:42:58 19 relates to either Ed Roman, Peavey, or Legend.

09:43:01 20 MR. BODNER: I just told you that Mr. --
09:43:03 21 from what Mr. Berryman said, that Mr. Juskiewicz
09:43:09 22 apparently instructed Gibson's counsel to write to
09:43:12 23 Peavey. And I asked him if he had any conferences
09:43:17 24 concerning the D'Addario matter with Mr. Juskiewicz.
09:43:20 25 And he said yes. And I want to know what those

09:43:23 1 conferences were about.

09:43:25 2 MR. LANQUIST: But that doesn't relate to
09:43:26 3 either Ed Roman, Peavey, or Legend.

09:43:29 4 MR. BODNER: That's as far as we're going
09:43:31 5 to go with that. I'm asking, are you instructing your
09:43:34 6 witness not to answer the question?

09:43:35 7 MR. LANQUIST: I'm still waiting for you
09:43:36 8 to tell me how it relates to either Ed Roman, Legend,
09:43:40 9 or Peavey.

09:43:41 10 MR. BODNER: Well, I think I did.

09:43:42 11 MR. LANQUIST: Well, I don't think you
09:43:43 12 did, Counsel.

09:43:44 13 MR. BODNER: Okay. So you're not --

14 BY MR. BODNER:

09:43:46 15 Q. Mr. Berryman, are you going to answer the
09:43:48 16 question or not?

09:43:48 17 MR. LANQUIST: I mean, I'll let you ask a
09:43:50 18 couple questions about that, but --

09:43:51 19 BY MR. BODNER:

09:43:53 20 Q. Mr. Berryman, can you answer the question,
09:43:54 21 please?

09:43:57 22 A. Well, what -- what I know is that our legal
09:44:02 23 counsel advised that they were going to write the
09:44:07 24 letter unless either myself or Henry Juskiewicz wished
09:44:14 25 to because we had, you know, a general relationship

Rebuttal Testimony of DAVID H. BERRYMAN

09:44:18 1 with Peavey. And Mr. Juskiewicz did say, I recall,
09:44:23 2 that he would write the letter to Peavey because he
09:44:27 3 knew Hartley Peavey and he felt that he wanted to
09:44:30 4 personalize the letter and not have our legal counsel
09:44:33 5 send them a cease and desist letter.

09:44:36 6 Q. So Mr. Juskiewicz -- if I understand
09:44:38 7 correctly, Mr. Juskiewicz wrote a letter to
09:44:43 8 Mr. Peavey; is that correct?

09:44:45 9 A. That's my understanding, yes.

09:44:46 10 Q. And counsel did not write a letter to
09:44:49 11 Mr. Peavey; is that correct?

09:44:50 12 A. That's my understanding.

09:44:51 13 Q. And so did you have discussions as to why
09:44:58 14 Mr. Peavey should be written to with Mr. Juskiewicz?

09:45:04 15 A. Well, yes. It was because of their use of
09:45:07 16 EXP.

09:45:07 17 Q. Okay. When did these conferences take place?

09:45:11 18 A. Last fall. In 2003.

09:45:16 19 Q. That was October or November?

09:45:20 20 A. Somewhere around there, yes. I can't recall
09:45:22 21 exactly.

09:45:23 22 Q. Okay. This is 2003.

09:45:25 23 A. Yes.

09:45:25 24 Q. Okay. Do you normally have discussions with
09:45:33 25 Mr. Juskiewicz concerning the EXP case with D'Addario?

Rebuttal Testimony of DAVID H. BERRYMAN

09:45:44 1 A. Well, unless there's a decision to be made,
09:45:49 2 no. I mean, it's not -- you know, only if there's
09:45:56 3 issues or decisions that have to be made.

09:45:59 4 Q. Okay. When was the last time you talked to
09:46:02 5 Mr. Juskiewicz about this particular case?

09:46:10 6 MR. LANQUIST: I want to instruct the
09:46:11 7 witness not to -- not to discuss any conversations that
09:46:15 8 he's had about this case relating to the conduct of
09:46:20 9 this case or conferences with counsel.

09:46:26 10 MR. BODNER: If counsel was not present
09:46:29 11 at these meetings, anything discussed between
09:46:34 12 Mr. Berryman and Mr. Juskiewicz is not privileged.

09:46:38 13 MR. LANQUIST: Well, there's also the
09:46:39 14 work product issue, Counsel.

09:46:41 15 MR. BODNER: But -- well, let's take this
09:46:44 16 one at a time now.

09:46:48 17 BY MR. BODNER:

09:46:48 18 Q. When was your last meeting with
09:46:49 19 Mr. Juskiewicz?

09:46:53 20 A. Concerning this?

09:46:55 21 Q. Regarding -- where you discussed the D'Addario
09:46:59 22 case.

09:47:00 23 A. Well, it was sometime in January, once or
09:47:09 24 twice. Either immediately after my deposition or
09:47:13 25 during the NAMM show in Anaheim.

Rebuttal Testimony of DAVID H. BERRYMAN

09:47:16 1 Q. Okay. Well, where was the first one? Was it
09:47:21 2 in your office?
09:47:23 3 A. No. It was probably in his office.
09:47:25 4 Q. Okay.
09:47:26 5 A. In his conference room when we were at a
09:47:29 6 meeting discussing other things, and it was just a
09:47:31 7 general update and -- of issues.
09:47:40 8 Q. All right. And who was present at that
09:47:42 9 meeting?
09:47:44 10 A. I have no idea. Probably myself and Henry and
09:47:48 11 maybe other people. I don't know. I mean, we have --
09:47:51 12 we have general managers meetings where we just
09:48:00 13 discuss, you know, what our agendas are and what we've
09:48:03 14 been involved in. And I think I probably brought it up
09:48:06 15 as I spent a half a day in a deposition.
09:48:08 16 Q. Okay. And what did you report?
09:48:13 17 MR. LANQUIST: Well, now, Counsel, again,
09:48:15 18 how does this relate to either Ed Roman, Peavey, or
09:48:19 19 Legend?
09:48:26 20 MR. BODNER: Well, we're going to find
09:48:27 21 out.
09:48:28 22 MR. LANQUIST: No, we're not going to
09:48:29 23 find out, Counsel. Now, you can ask him if he had any
09:48:32 24 conversations about this matter regarding Ed Roman,
09:48:35 25 Peavey, or Legend. But anything else is beyond the

Rebuttal Testimony of DAVID H. BERRYMAN

09:48:38 1 scope of direct and it's also irrelevant.

09:48:42 2 MR. BODNER: Well, I think that
09:48:44 3 Mr. Juskiewicz is the one that's instructing you to
09:48:46 4 write to Legend and Peavey and Ed Roman and everybody
09:48:49 5 else. And I think that, really, Mr. Juskiewicz is
09:48:52 6 calling the shots here. So I'm -- I just want to know
09:48:55 7 exactly what was discussed between Mr. Berryman and
09:48:59 8 Mr. Juskiewicz.

09:49:00 9 MR. LANQUIST: About Peavey, Roman -- Ed
09:49:03 10 Roman or Legend.

09:49:05 11 MR. BODNER: No, about this case.

09:49:06 12 MR. LANQUIST: If that's all you're going
09:49:07 13 to ask about, Counsel, we are going to adjourn the
09:49:10 14 deposition and you can file whatever motions you have
09:49:12 15 to with the TTAB.

09:49:14 16 MR. BODNER: You mean you're going to
09:49:15 17 adjourn the deposition because I'm asking this
09:49:17 18 question.

09:49:17 19 MR. LANQUIST: No, I'm -- because you're
09:49:19 20 asking a question that is beyond the scope of direct.

09:49:22 21 MR. BODNER: All right then. You're
09:49:23 22 going to have to adjourn it then because I have more
09:49:26 23 questions. And if you're going to cancel this
09:49:28 24 deposition, I'll just notify the TTAB on this.

09:49:32 25 MR. LANQUIST: Okay. And you can explain

Rebuttal Testimony of DAVID H. BERRYMAN

09:49:34 1 to them how any of this -- how any of your questions
09:49:37 2 relating to the conduct of the D'Addario case in
09:49:39 3 general relates to either Ed Roman, Legend, or Peavey.
09:49:44 4 Now, if you want to ask him about conversations he's
09:49:46 5 had with Henry Juskiewicz about Ed Roman, Legend, or
09:49:49 6 Peavey, that's fine. But if you're going to ask him
09:49:53 7 generally about the conduct of this case, it is work
09:49:57 8 product, it is privileged, and it's beyond the scope of
09:50:00 9 direct.

09:50:00 10 MR. BODNER: All right. We disagree with
09:50:02 11 respect to that. And as far as my question stands, you
09:50:08 12 would rather to close this deposition than to just
09:50:12 13 instruct your witness not to answer it; is that
09:50:15 14 correct?

09:50:15 15 MR. LANQUIST: All right. Then I want
09:50:18 16 you to phrase -- I want you to restate your question
09:50:20 17 for the record and then I'll instruct the witness not
09:50:23 18 to answer, if appropriate.

09:50:24 19 MR. BODNER: Okay. Can you read back the
09:50:26 20 question that I asked Mr. Berryman?

09:50:45 21 THE COURT REPORTER: "And what did you
09:50:46 22 report?"

09:50:50 23 MR. LANQUIST: And, Counsel, is that
09:50:51 24 question directed to the D'Addario case in general or
09:50:56 25 is it directed toward Peavey, Legend, or Ed Roman?

Rebuttal Testimony of DAVID H. BERRYMAN

09:51:01 1 MR. BODNER: This is directed to the
09:51:02 2 D'Addario case in general.

09:51:04 3 MR. LANQUIST: I'm going to instruct the
09:51:05 4 witness not to answer.

09:51:07 5 MR. BODNER: Okay.

6 BY MR. BODNER:

09:51:08 7 Q. Mr. Berryman, did you report on your
09:51:11 8 deposition which occurred on January 7, 2004?

09:51:18 9 A. Well, yes, I reported that I was involved in a
09:51:22 10 deposition and that was the substance of what I
09:51:25 11 reported.

09:51:27 12 Q. Did you report about our Internet search where
09:51:30 13 we found that Legend was using EXP and Ed Roman was
09:51:35 14 using EXP?

09:51:36 15 A. No.

09:51:36 16 Q. So how did Mr. Juskiewicz find out about Ed
09:51:42 17 Roman and Legend?

09:51:45 18 A. I don't think he knew about Ed Roman -- he
09:51:48 19 knows about Ed Roman in general going back several
09:51:50 20 years. As I mentioned, Ed Roman is -- has been a
09:51:54 21 notorious infringer of our -- all of our trademarks.
09:51:59 22 And I'm the one that instructed legal counsel on the
09:52:06 23 Legend case to pursue that and send him a cease and
09:52:12 24 desist letter. And Ed Roman, I and people that work
09:52:15 25 for me periodically check Ed Roman's site, or we try

Rebuttal Testimony of DAVID H. BERRYMAN

09:52:18 1 to, and see -- try to see all his infringements and get
09:52:24 2 legal counsel to get him to stop.

09:52:30 3 Q. And did you discuss Peavey at all at any of
09:52:32 4 these meetings?

09:52:35 5 A. I don't believe so, no.

09:52:36 6 Q. So in all of your conferences that you've had
09:52:42 7 with Mr. Juskiewicz, you've never discussed Peavey; is
8 that correct?

09:52:50 9 A. Well, all of my conferences with
09:52:54 10 Mr. Juskiewicz -- I have management conferences with
09:52:58 11 him all the time. We don't -- you know, we have not
09:53:01 12 been discussing this particular matter. It's all
09:53:07 13 operational issues having to do with the company.

09:53:09 14 Q. Okay. So you've never discussed Peavey with
09:53:12 15 Mr. Juskiewicz. That is your testimony. Is that
09:53:14 16 correct?

09:53:14 17 A. Well, I saw general correspondence regarding
09:53:19 18 the Peavey matter. I did not really discuss it with
09:53:21 19 him.

09:53:22 20 Q. Was that correspondence produced?

09:53:27 21 A. That was correspondence between
09:53:29 22 Mr. Juskiewicz and legal counsel and myself.

09:53:31 23 Q. Was that cor -- was that the letter from legal
09:53:42 24 counsel to you or from you to legal counsel?

09:53:45 25 MR. LANQUIST: Wait a minute, Counsel. I

09:53:47 1 think you're getting into attorney-client privilege
09:53:48 2 here.

09:53:50 3 MR. BODNER: I didn't ask what the
09:53:51 4 subject matter or what was said.

09:53:53 5 MR. LANQUIST: Okay.

09:53:54 6 MR. BODNER: I just want to know, you
09:53:55 7 know, because I have no idea. He just mentioned that
09:53:57 8 there is correspondence, and I just want to make sure
09:54:00 9 that we're not going to get into anything that's
09:54:02 10 privileged.

09:54:02 11 MR. LANQUIST: I just want to instruct
09:54:03 12 the witness not to mention the content of any of that
09:54:06 13 correspondence, but you can testify as to whether there
09:54:08 14 was correspondence about Peavey.

09:54:10 15 THE WITNESS: Yes, there was.

09:54:11 16 BY MR. BODNER:

09:54:12 17 Q. Was there any inter-office memo or e-mail sent
09:54:16 18 between you and Mr. Juskiewicz concerning Peavey?

09:54:22 19 MR. LANQUIST: You mean that did not go
09:54:23 20 to counsel?

09:54:28 21 MR. BODNER: That counsel was not
09:54:30 22 addressed as a cc on this.

09:54:35 23 THE WITNESS: No. It would have been
09:54:37 24 correspondence between counsel and Mr. Juskiewicz and
09:54:42 25 myself.

09:54:44 1 BY MR. BODNER:

09:54:44 2 Q. So there was no correspondence, e-mail or
09:54:47 3 inter-office memo, between you and Mr. Juskiewicz or
09:54:51 4 anyone else in your company without having your legal
09:54:56 5 counsel's name on that correspondence; is that correct?

09:55:00 6 A. That would be correct. I am typically copied
09:55:04 7 on all intellectual property matters, as well as
09:55:09 8 Mr. Juskiewicz, so that we're both aware of the issues
09:55:14 9 outstanding and what legal counsel is working on.

09:55:17 10 Q. At your January 7th, 2004, deposition, there
09:55:22 11 was another Exhibit F that we brought to your
09:55:27 12 attention. It was regarding Harmony Central and the
09:55:31 13 ESP and LTD Guitars that was using EXP. Do you happen
09:55:35 14 to recall that?

09:55:37 15 A. Generally, yes.

09:55:39 16 Q. Did you write to LTD or ESP Guitars?

09:55:47 17 A. Well, we have -- we have written to them about
09:55:53 18 product. I cannot recall specifically about their use
09:55:57 19 of EXP or not. And I have not checked their web sites
09:56:04 20 recently. So I really cannot say with -- with any
09:56:08 21 assurance.

09:56:08 22 Q. Also Exhibit G during your January 7th, 2004,
09:56:17 23 deposition we brought to your attention about Roland
09:56:22 24 using EXP on their effects processor pedals for
09:56:27 25 guitars. Did you write to Roland about their use of

Rebuttal Testimony of DAVID H. BERRYMAN

09:56:31 1 EXP?

09:56:34 2 A. I did not write to Roland, no.

09:56:36 3 Q. Do you know if anyone else wrote to Roland?

09:56:40 4 A. I do not know.

09:56:41 5 Q. Exhibit H on your January 7th, 2004,
09:56:46 6 deposition, that was for Bixonic, B-I-X-O-N-I-C. It's
09:56:55 7 an effects processor used for guitars. It's the
09:57:01 8 EXP-2001. Did you write to Bixonic about their use of
09:57:06 9 EXP on their effects processor?

09:57:08 10 A. I did not write to them, no.

09:57:10 11 Q. Do you know if anyone in your company did?

09:57:12 12 A. No, I do not.

09:57:13 13 Q. After your January 7, 2004, deposition, did
09:57:17 14 you conduct an Internet search? For -- I'm sorry, for
09:57:24 15 EXP.

09:57:25 16 A. No.

09:57:25 17 Q. Did you conduct an Internet search for Ed
09:57:30 18 Roman guitars?

09:57:37 19 A. Yes, I believe I did.

09:57:39 20 Q. Okay. Was that produced?

09:57:44 21 A. Was that produced? No. I mean, I just did
09:57:51 22 one the other day as well.

09:57:53 23 Q. Did you print anything out from that Internet
09:57:55 24 search?

09:57:55 25 A. No. I just -- he has a search function on his

Rebuttal Testimony of DAVID H. BERRYMAN

09:57:58 1 site, and I generally went through to make sure that he
09:58:05 2 didn't have any -- or that all the references to EXP
09:58:11 3 had a disclaimer that he no longer offered the product.
09:58:15 4 Q. And Legend Guitar, did you conduct a search of
09:58:21 5 their web site?
09:58:22 6 A. Yes.
09:58:22 7 Q. Okay. When did you do that?
09:58:25 8 A. About two weeks ago.
09:58:26 9 Q. Okay. Did you download or print out any of
09:58:33 10 the search results?
09:58:34 11 A. No.
09:58:35 12 Q. What about Harmony Central? Did you do a
09:58:40 13 search of their web site?
09:58:42 14 A. No, I did not.
09:58:43 15 Q. And what about Roland? Did you do a search of
09:58:47 16 their web site?
09:58:48 17 A. No.
09:58:48 18 Q. And Bixonic's?
09:58:51 19 A. No.
09:58:52 20 Q. Did you do a search for them?
21 A. No.
09:58:53 22 Q. Have you done any -- have you done any general
09:58:58 23 Internet searches like on Google or another search
09:59:02 24 engine for EXP?
09:59:06 25 A. No, I have not.

Rebuttal Testimony of DAVID H. BERRYMAN

09:59:10 1 Q. Okay. I'm almost done.

09:59:27 2 Are you planning to write to anyone else
09:59:41 3 concerning your trademark "EXP"?

09:59:46 4 MR. LANQUIST: Counsel, you mean ever or
09:59:48 5 are we aware of anyone else using EXP?

09:59:55 6 MR. BODNER: No.

7 BY MR. BODNER:

09:59:56 8 Q. Are you -- are you in -- are you preparing now
10:00:03 9 to write to anyone else concerning your trademark EXP?

10:00:09 10 MR. LANQUIST: You mean about which
10:00:11 11 Gibson is aware?

10:00:12 12 MR. BODNER: Yes.

10:00:15 13 THE WITNESS: Well, you know, it's part
10:00:21 14 of our normal procedure. If we're aware of
10:00:24 15 infringements, we will write to people.

16 BY MR. BODNER:

10:00:26 17 Q. Okay. But you're not -- you're not in the
10:00:28 18 midst of writing to anyone else.

10:00:31 19 A. No.

10:00:32 20 Q. Mr. Berryman, do you have any basis for
10:00:48 21 claiming that J. D'Addario committed fraud on the
10:00:53 22 Patent Office?

10:00:54 23 MR. LANQUIST: Objection. Beyond the
10:00:56 24 scope of direct. Instructing the witness not to
10:00:58 25 answer.

Rebuttal Testimony of DAVID H. BERRYMAN

10:01:00 1 BY MR. BODNER:

10:01:03 2 Q. Mr. Berryman, in your petition to cancel, you
10:01:04 3 stated in Paragraph 5 that -- and I'll quote it,
10:01:10 4 "According to the records of the U.S. Patent and
10:01:14 5 Trademark Office, someone, probably the Registrant,
10:01:17 6 told the Patent and Trademark Office that EXP COATED
10:01:23 7 meant "expired coated." If made by Registrant, such a
10:01:27 8 representative amounts to fraud of the Trademark Office
10:01:33 9 given that EXP COATED means, according to Registrant, a
10:01:39 10 coating that provides extended play."

10:01:42 11 Are you aware or do you have any basis for
10:01:45 12 stating that such a representation might amount to
10:01:53 13 fraud on the Trademark Office?

10:01:55 14 MR. LANQUIST: Which question do you want
10:01:56 15 him to answer?

10:01:58 16 MR. BODNER: I just -- that was the
10:01:59 17 question. I just read what was from the record.

10:02:02 18 MR. LANQUIST: Yeah, but you said whether
10:02:05 19 it was fraud on the Patent Office or whether it was a
10:02:07 20 misrepresentation.

10:02:13 21 BY MR. BODNER:

10:02:13 22 Q. Well, do you have any basis for claiming that
10:02:18 23 fraud -- that D'Addario committed fraud on the Patent
10:02:22 24 Office? I'm sorry. The Patent and Trademark Office.

10:02:26 25 MR. LANQUIST: I'm going to object but

Rebuttal Testimony of DAVID H. BERRYMAN

10:02:27 1 I'll let the witness answer. I mean, this is his own
10:02:30 2 knowledge. It's not the knowledge of the -- I mean
10:02:33 3 it's not -- it doesn't reference statements made by
10:02:36 4 D'Addario in Mr. D'Addario's deposition, so that's
10:02:39 5 fine. He can answer whatever he knows.

10:02:41 6 THE WITNESS: Well, I don't know.

10:02:44 7 BY MR. BODNER:

10:02:44 8 Q. Okay.

10:02:44 9 A. I mean, it may or may not. I don't know.

10:02:50 10 MR. BODNER: I don't think I have any
10:02:51 11 other questions.

10:02:52 12 MR. LANQUIST: All right. I don't have
10:02:53 13 anything further.

14 FURTHER DEPONENT SAITH NOT.

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C E R T I F I C A T E

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I, Maxine Cleeton, Registered Diplomate Reporter and Notary Public, State of Tennessee at Large, do hereby certify that I recorded to the best of my skill and ability by machine shorthand the deposition contained herein, that same was reduced to computer transcription by myself, and that the foregoing is a true, accurate, and complete transcript of the deposition testimony heard in this cause.

I further certify that the witness was first duly sworn by me and that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

This 22nd day of April, 2004.

Maxine Cleeton
Maxine Cleeton

My Commission Expires:
January 28, 2006

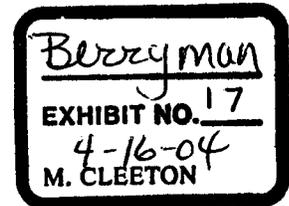
From: The Legend Guitar Company [robert@legendguitar.com]
Sent: Friday, April 02, 2004 11:56 PM
To: Ed Lanquist
Subject: Re: Infringement of Gibson Trademarks

Yes and you also asked how long it would take for us to comply? Since I have now researched it we have no problem complying with your request on behalf of Gibson Guitars although we do not acknowledge in any way an infringement of the "EXP" trade mark. We also do not have an issue in changing our marketing strategies and web information to further comply with your request and we have already decided on a different trade name and are waiting for our web master to finish the project to our web site. We will have completely complied with your request within 30 days of your first contact to us. We respect Gibson's Trade marks and have no problem in completing your request.

Robert N. B. Brown

----- Original Message -----

From: "Ed Lanquist" <edl@iplawgroup.com>
To: <robert@legendguitar.com>
Sent: Tuesday, March 30, 2004 8:45 AM
Subject: Infringement of Gibson Trademarks



When last we spoke, you stated that you were going to stop using EXP immediately. I also asked that you confirm this promise in writing. I have received no written response. Further, your website continues to include the "EXP" trademark.

Please provide me with written confirmation so that further legal action may be avoided.

Edward D. Lanquist, Jr.
Wadley & Patterson, P.C.
Suite 2020 Bank of America Plaza
414 Union Street
Nashville TN 37219
(615) 242-2400 (phone)
(615) 242-2221 (fax)

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GIB 00650

Registered Patent Attorneys

Mark J. Patterson

I. C. Wadley, Jr.

Edward D. Lanquist, Jr.

Lucian Wayne Beavers

James R. Cartiglia

Emily A. Shouse

Larry W. Brantley*

Martha B. Allard*

Douglas W. Schelling, Ph.D.

Phillip E. Walker

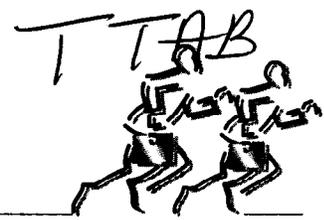
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April 23, 2004

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Box TTAB/NO FEE

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513



04-23-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #22

**RE: GIBSON GUITAR CORP V J. D'ADDARIO & CO., INC.
CONSOLIDATED CANCELLATION PROCEEDING
NOS. 92041175 AND 92041688
OUR DOCKET NO.: N8948**

Dear Sir or Madam:

Enclosed for filing please find the following:

- The Certified Transcript of the Rebuttal Testimony of David H. Berryman
- Exhibit 17

Please acknowledge your receipt of these documents by placing your date stamp on the enclosed, self-addressed stamped postcard and dropping it in the mail to us.

Please call me if you have any questions.

Very truly yours,

WADDEY & PATTERSON

Edward D. Lanquist
edl@iplawgroup.com

EDLJr/s

Enclosures

Cc: Gerald T. Bodner, Esq. (w/out enclosures)

Bank of America Plaza • 414 Union Street • Suite 2020 • Nashville, TN 37219
615.242.2400 • Fax: 615.242.2221 • www.iplawgroup.com

Offices also at:
AmSouth Center
200 Clinton Avenue
Suite 302
Huntsville, AL 35801
256.535.4400
Fax: 256.535.4402