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

U.S. Trademark Registration Nos.: 2,554,110 and 2,554,111
Trademarks: EXP and EXP COATED

04-29-2004
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #78

GIBSON GUITAR CORP.
309 Plus Park Blvd.
Nashville, Tennessee 37217
Petitioner,

v.

J. D'ADDARIO & CO., INC.
595 Smith Street
Farmingdale, New York 11735
Registrant.

Cancellation Nos. 92041175
and 92041688 (Consolidated)

THIRD NOTICE OF RELIANCE BY REGISTRANT

J. D'Addario and Co., Inc. ("J. D'Addario"), the Registrant of U.S. Registration Nos. 2,554,110 for the mark EXP and 2,554,111 for the mark EXP COATED, hereby gives notice to Petitioner, Gibson Guitar Corp. ("Gibson"), under TBMP 704.02, that it intends to rely on the following document:

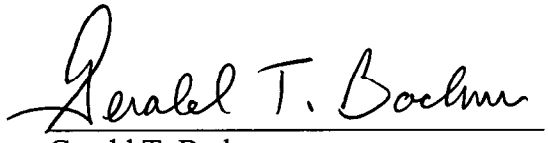
27) Page 8, line 14 through Page 33, line 25 of the Deposition Testimony of David Berryman dated April 16, 2004.

A true and accurate copy of each of the above documents is being submitted herewith to the Trademark Trial and Appeal Board.

If there is any fee associated with this Third Notice of Reliance, please charge Deposit Account No. 502335. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

Dated: April 29, 2004



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CERTIFICATE OF SERVICE

MARK:	EXP and EXP COATED
REGISTRATION NO.:	2,554,110 and 2,554,111
CANCELLATION NO.:	92041175 and 92041688 (Consolidated)
NAME OF PARTY SERVING PAPERS:	Gerald T. Bodner on behalf of Registrant, J. D'Addario & Co., Inc.
TYPE OF PAPERS:	THIRD NOTICE OF RELIANCE BY REGISTRANT

I, Gerald T. Bodner, an attorney, hereby certify that the above-identified document is being forwarded to: Edward D. Lanquist, Jr., Esq., WADDEY & PATTERSON, 414 Union Street, Suite 2020, Nations Bank Plaza, Nashville, Tennessee 37219 on April 29, 2004, via Express Mail, Post Office to Addressee, Express Mail No. ER 579121655 US.

Gerald T. Bodner
Person Signing Certificate

Gerald T. Bodner
Signature

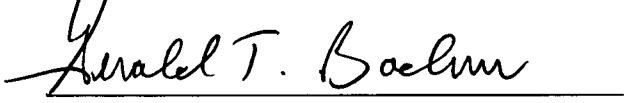
April 29, 2004
Date of Signature

CERTIFICATE OF EXPRESS MAIL

MARK:	EXP and EXP COATED
REGISTRATION NO.:	2,554,110 and 2,554,111
CANCELLATION NO.:	92041175 and 92041688 (Consolidated)
NAME OF PARTY SERVING PAPERS:	Gerald T. Bodner on behalf of Registrant, J. D'Addario & Co., Inc.
TYPE OF PAPERS:	THIRD NOTICE OF RELIANCE BY REGISTRANT

I, Gerald T. Bodner, an attorney, hereby certify that the above-identified document is being forwarded to: United States Patent and Trademark Office, Trademark Trial and Appeal Board, 2900 Crystal Drive, Arlington, Virginia 22202-3513 on April 29, 2004, via Express Mail, Post Office to Addressee, Express Mail No. ER 577965946 US.

Gerald T. Bodner
Person Signing Certificate



Signature

April 29, 2004
Date of Signature

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

COPY

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.
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I N D E X

Direct Examination by Mr. Lanquist 4

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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

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

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

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

* * *

DAVID H. BERRYMAN

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

DIRECT EXAMINATION

QUESTIONS BY MR. LANQUIST:

09:26:57 Q. Just for clarification, please state your name
09:26:59 for the record again.
09:27:00 A. David H. Berryman.
09:27:03 Q. Mr. Berryman, this is your rebuttal testimony
09:27:04 in the proceeding between Gibson Guitar Corp. and
09:27:09 J. D'Addario & Company, Inc., relating to a couple of
09:27:15 cancellation proceedings in front of the Patent and
09:27:18 Trademark Office.
09:27:23 Mr. Berryman, does Gibson Guitar Corp. -- when
09:27:26 I -- can I just use Gibson as Gibson Guitar Corp. as
09:27:31 shorthand?
09:27:31 A. Yes.
09:27:32 Q. Does Gibson have a policy as to what happens
09:27:34 when it learns of a third party infringing Gibson
09:27:39 intellectual properties?
09:27:40 A. Yes.
09:27:40 MR. BODNER: I object to that question.
09:27:42 It's not limited to rebuttal testimony.
09:27:45 Okay. Did you hear me okay on that?
09:27:55 MR. LANQUIST: Yes.
09:27:56 BY MR. LANQUIST:
09:27:57 Q. Okay. Go ahead and answer, Mr. Berryman.
09:27:59 A. Yes.

09:27:59 Q. And what is that policy?
09:28:02 A. Well, the policy is that, you know, the
09:28:08 individual at Gibson that would become aware of it, it
09:28:11 would usually either come to myself or to Henry
09:28:15 Juszkiewicz as CEO, and we would notify legal counsel
09:28:18 to immediately send out a cease and desist letter.
09:28:21 MR. BODNER: Again, the same objection.
09:28:23 BY MR. LANQUIST:
09:28:23 Q. And as part of that policy, do you know
09:28:25 whether Gibson took any steps regarding Ed Roman's use
09:28:31 of EXP in connection with guitars?
09:28:33 A. Yes, we did.
09:28:34 Q. And what --
09:28:34 MR. BODNER: Again, I'm not going to
09:28:35 interrupt but I'll say for all of his testimony it's
09:28:38 the same objection, that this is not limited to
09:28:41 rebuttal testimony.
09:28:43 BY MR. LANQUIST:
09:28:44 Q. And what steps did -- and what steps did
09:28:49 Gibson's counsel take with respect to Ed Roman?
09:28:52 A. Well, they sent him a cease and desist letter
09:28:55 on his use of EXP and selling product with that model
09:29:00 designation on his web site.
09:29:02 Q. And do you know whether the cease and desist
09:29:06 letter had any effect?

09:29:08 A. Yes, it did. I checked his web site about a
09:29:12 week ago, and he has a statement on there saying that
09:29:18 due to legal problems and at Gibson's request, we have
09:29:23 discontinued this product.
09:29:25 Q. The "we" being Ed Roman has discontinued the
09:29:28 product.
09:29:29 A. Ed Roman, that's correct.
09:29:30 Q. Do you know whether as part of Gibson's
09:29:33 protection policy that its counsel sent a letter to
09:29:35 Legend Guitar over its use of EXP in connection with
09:29:39 guitars?
09:29:39 MR. BODNER: Again, same objection.
09:29:41 Sorry to interrupt. It's not limited to rebuttal
09:29:44 testimony.
09:29:45 THE WITNESS: Yes. Legal counsel did
09:29:47 send a letter to Legend Guitar.
BY MR. LANQUIST:
09:29:50 Q. And do you know whether that had any effect?
09:29:52 A. Yes. We got a response back from Legend
09:29:55 advising us that their web master will take the product
09:29:58 off their web site by the end of April.
09:30:01 MR. LANQUIST: Okay. Let me hand you
09:30:03 what we'll mark as Exhibit 17.
09:30:10 (Document marked Exhibit No. 17.)
09:30:10 BY MR. LANQUIST:

09:30:10 Q. And can you identify Exhibit 17, please?
09:30:13 A. Yes. It's correspondence from Legend Guitar Company regarding the infringement.
09:30:16
09:30:19 Q. Okay.
09:30:21 MR. BODNER: Mr. Lanquist, is that the document that you sent me by e-mail yesterday?
09:30:24
09:30:27 MR. LANQUIST: Yes.
09:30:29 MR. BODNER: And is that labeled GIB 00650?
09:30:30
09:30:32 MR. LANQUIST: Yes.
09:30:33 MR. BODNER: All right. I object to that document. Again, this is not -- it's supposed to be limited to rebuttal testimony. The document's not authenticated and it's hearsay.
09:30:34
09:30:40
09:30:42
09:30:45 MR. LANQUIST: Okay.
09:30:46 BY MR. LANQUIST:
09:30:51 Q. Now, do you know whether as part of its intellectual property policy whether Gibson took any steps regarding Peavey's use -- Peavey being P-E-A-V-E-Y -- use of EXP in connection with guitars?
09:30:55
09:30:59
09:31:04
09:31:08 A. Yes, we did.
09:31:09 Q. And what step was that?
09:31:11 A. Well, a letter was sent from our company by our chairman and CEO, personal letter to Hartley Peavey, advising him of our objection to their use of
09:31:16
09:31:20

EXP.

MR. BODNER: Again, I object to this line of questioning because it's not limited to rebuttal testimony. And this is hearsay also.

BY MR. LANQUIST:

Q. And what is the present status of the dispute between Gibson and Peavey?

A. The present status is that their corporate counsel is in communication with our corporate counsel regarding this to resolve the issue.

MR. LANQUIST: Okay. I have no further questions.

CROSS-EXAMINATION

QUESTIONS BY MR. BODNER:

Q. Mr. Berryman, was that cease and desist letter to Ed Roman, was that produced?

A. No.

Q. And why wasn't it produced?

A. I don't know.

Q. When was that cease and desist letter sent out?

A. It was sent out a while ago.

Q. How long ago?

A. I can't recall.

09:32:21 Q. A year, two years?
09:32:26 A. Well, I don't know. Ed Roman, we've sent many
09:32:29 cease and desist letters to him. He's a notorious
09:32:33 infringer of our intellectual property, and we sent out
09:32:38 several letters a year to Ed and I cannot recall
09:32:41 exactly when this letter was sent out.
09:32:43 Q. Well, was it after your January 2004
09:32:49 deposition when we brought that to your attention in
09:32:54 Exhibit E?
09:32:56 A. I don't know.
09:32:57 Q. It seems that you had -- you had stated to me,
09:33:03 and you can check the record if you want, but you
09:33:06 thanked me for bringing it to your attention and you
09:33:09 said that I have a big problem with them. Is that
09:33:13 correct?
09:33:14 A. Well, yes. Our company -- what I was alluding
09:33:18 to was the ongoing issues with Ed Roman copying and
09:33:23 infringing either our trademarks or using the names of
09:33:30 our product on his web site to sell product that he's
09:33:35 made or he gets somebody to make for him.
09:33:37 Q. Okay. But as far as your deposition which
09:33:41 occurred on January 7, 2004, it sounded to me that you
09:33:51 did not know that Ed Roman was using EXP on their
09:33:55 guitars; is that correct?
09:33:58 A. Well, I'm not sure. I checked his web site a

09:34:03 couple of times a year and I know our intellectual
09:34:08 property legal counsel checks his web site
09:34:11 independently of ourselves because we have an ongoing
09:34:15 problem of his compliance with our demands that he
09:34:19 cease and desist using a lot of our trademarks. And he
09:34:25 says he will comply and skirts the issue and then pops
09:34:28 up another time and you find out that he, in fact, did
09:34:31 not comply. So it's an ongoing issue with Ed Roman.
09:34:35 Q. Okay. Did you instruct your attorneys to send
09:34:40 the cease and desist letter to Ed Roman?
09:34:44 A. Well, I have, yes. On several issues. But
09:34:49 they have initiated many of the issues themselves in
09:34:55 terms of problems with compliance and his noncompliance
09:35:00 with our requests.
09:35:02 Q. So with respect to Ed Roman, after your
09:35:06 January 7, 2004, deposition, do you instruct -- did you
09:35:11 instruct your counsel to write to Ed Roman with a cease
09:35:15 and desist letter?
09:35:20 A. You know, I really don't know whether I did or
09:35:22 not.
09:35:23 Q. Why wouldn't you know? That was only about
09:35:27 two or three months ago.
09:35:28 MR. LANQUIST: Counsel, argumentative.
09:35:30 BY MR. BODNER:
09:35:31 Q. You can answer the question.

09:35:32 MR. LANQUIST: Actually, I didn't see
09:35:33 where there was a question. He told you that he did
09:35:35 not know and now you're asking him why he doesn't know,
09:35:38 and that's argumentative and it's not really a
09:35:40 question.
09:35:40 MR. BODNER: I think that is a question.
BY MR. BODNER:
09:35:42 Q. I just want to know why you don't know whether
09:35:44 you instructed your counsel to write to Ed Roman.
09:35:47 MR. LANQUIST: I think, Counsel, what
09:35:49 he's saying is he doesn't remember. Now, if you want
09:35:51 us to get a brain physiologist to take a look to see
09:35:54 whether he doesn't -- why he doesn't remember
09:35:57 something, we can do that. But he just doesn't
09:35:59 remember. That's like asking me why I forgot my wife's
09:36:04 birthday a couple years ago. I don't know.
09:36:07 MR. BODNER: I appreciate your testimony
09:36:08 and your comments about your wife.
BY MR. BODNER:
09:36:09 Q. But I'm just trying to figure out why
09:36:11 something three months ago you just don't remember. Is
09:36:16 there any reason why you can't remember, Mr. Berryman?
09:36:19 MR. LANQUIST: Counsel, that's
09:36:20 argumentative and I'm going to instruct the witness not
09:36:22 to answer.

09:36:23 MR. BODNER: Okay.

BY MR. BODNER:

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

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

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

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

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

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

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

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

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

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

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

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

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

09:37:13 problem.

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

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

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

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

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

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

09:37:31 letter?

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

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

your deposition today?

MR. LANQUIST: Counsel, I'm going to object to that as attorney-client privilege. I mean --

MR. BODNER: No, that's not.

BY MR. BODNER:

Q. You can answer the question.

MR. LANQUIST: Go ahead. That's fine.

THE WITNESS: Well, I reviewed the document to Legend Guitar, the e-mail. E-mail -- e-mail exchange with Legend Guitar.

BY MR. BODNER:

Q. Right. And where did you get that document?

A. Well, I got that document from our legal counsel.

Q. Mr. Lanquist?

A. Yes.

Q. Okay. When did you get that document?

A. Well, I got that document over a week ago.

Q. For what purpose?

A. Well, the purpose wasn't -- was because I checked their web site and saw that they did not make a change yet, and I asked Ed Lanquist what the specific date was or did we have a specific date that they had agreed to make the change. And he sent me the e-mail advising that their web master would make it within 30

days of our original -- or his original correspondence to them.

Q. Was that original correspondence produced?

A. No.

Q. What did that original correspondence say?

A. I don't know. It wasn't produced.

Q. Oh, I mean, so you haven't seen it.

A. No.

Q. Oh, you haven't seen it at all, that's right. Is that correct? You haven't seen it.

A. That's correct.

Q. Okay. Why did you -- well, on January 7, 2004, you testified that you had never heard of Legend Guitar.

A. That's correct.

Q. And so was your writing to Legend Guitar a result of our calling to your attention the use by Legend Guitar of EXP?

A. Yes.

Q. Okay. Was that letter to Peavey that you testified about, was that ever produced?

A. I have not seen the letter myself, no.

Q. At your deposition on January 7, 2004, I believe you stated that you had not known whether a letter went to Peavey or not. Is that correct?

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

matter.

MR. BODNER: This is the D'Addario matter.

MR. LANQUIST: Right. But I didn't talk about the D'Addario matter on direct.

MR. BODNER: That's all right. Are you instructing your witness not to answer?

MR. LANQUIST: I'm asking you to tell me how it relates to my direct before I object.

MR. BODNER: I just did.

BY MR. BODNER:

Q. Mr. Berryman, will you please answer the question?

MR. LANQUIST: Counsel, you have not told me yet how it relates to the direct.

MR. BODNER: Yes, I did. I just told you that this relates to Mr. Juszkiewicz instructing you, apparently, or Gibson's counsel to write to Peavey.

MR. LANQUIST: No, I think he said that he wrote to Peavey, that Mr. Juszkiewicz wrote to Peavey.

MR. BODNER: That's exactly right.

MR. LANQUIST: And I think that your client already has a copy of that letter from Peavey.

MR. BODNER: I don't have a copy. Did

09:42:33 you produce that copy?
09:42:34 MR. LANQUIST: No, but I think your
09:42:35 counsel does from his conversation with Peavey.
09:42:38 MR. BODNER: Well, you can think all you
09:42:41 want. Did you produce that?
09:42:42 MR. LANQUIST: I don't think so.
09:42:43 MR. BODNER: Okay.
09:42:44 BY MR. BODNER:
09:42:45 Q. Mr. Berryman, will you please answer the
09:42:46 question?
09:42:47 MR. LANQUIST: Counsel, I'm still waiting
09:42:48 for you to tell me how it relates to my direct
09:42:50 examination because --
09:42:50 MR. BODNER: I just did. Now, I'm asking
09:42:52 you, are you instructing your witness not to answer the
09:42:54 question?
09:42:55 MR. LANQUIST: Before I instruct the
09:42:56 witness not to answer, I want you to tell me how it
09:42:58 relates to either Ed Roman, Peavey, or Legend.
09:43:01 MR. BODNER: I just told you that Mr. --
09:43:03 from what Mr. Berryman said, that Mr. Juszkiewicz
09:43:09 apparently instructed Gibson's counsel to write to
09:43:12 Peavey. And I asked him if he had any conferences
09:43:17 concerning the D'Addario matter with Mr. Juszkiewicz.
09:43:20 And he said yes. And I want to know what those

conferences were about.

MR. LANQUIST: But that doesn't relate to either Ed Roman, Peavey, or Legend.

MR. BODNER: That's as far as we're going to go with that. I'm asking, are you instructing your witness not to answer the question?

MR. LANQUIST: I'm still waiting for you to tell me how it relates to either Ed Roman, Legend, or Peavey.

MR. BODNER: Well, I think I did.

MR. LANQUIST: Well, I don't think you did, Counsel.

MR. BODNER: Okay. So you're not --

BY MR. BODNER:

Q. Mr. Berryman, are you going to answer the question or not?

MR. LANQUIST: I mean, I'll let you ask a couple questions about that, but --

BY MR. BODNER:

Q. Mr. Berryman, can you answer the question, please?

A. Well, what -- what I know is that our legal counsel advised that they were going to write the letter unless either myself or Henry Juszkiewicz wished to because we had, you know, a general relationship

09:44:18 with Peavey. And Mr. Juszkiewicz did say, I recall,
09:44:23 that he would write the letter to Peavey because he
09:44:27 knew Hartley Peavey and he felt that he wanted to
09:44:30 personalize the letter and not have our legal counsel
09:44:33 send them a cease and desist letter.
09:44:36 Q. So Mr. Juszkiewicz -- if I understand
09:44:38 correctly, Mr. Juszkiewicz wrote a letter to
09:44:43 Mr. Peavey; is that correct?
09:44:45 A. That's my understanding, yes.
09:44:46 Q. And counsel did not write a letter to
09:44:49 Mr. Peavey; is that correct?
09:44:50 A. That's my understanding.
09:44:51 Q. And so did you have discussions as to why
09:44:58 Mr. Peavey should be written to with Mr. Juszkiewicz?
09:45:04 A. Well, yes. It was because of their use of
09:45:07 EXP.
09:45:07 Q. Okay. When did these conferences take place?
09:45:11 A. Last fall. In 2003.
09:45:16 Q. That was October or November?
09:45:20 A. Somewhere around there, yes. I can't recall
09:45:22 exactly.
09:45:23 Q. Okay. This is 2003.
09:45:25 A. Yes.
09:45:25 Q. Okay. Do you normally have discussions with
09:45:33 Mr. Juszkiewicz concerning the EXP case with D'Addario?

09:45:44 A. Well, unless there's a decision to be made,
09:45:49 no. I mean, it's not -- you know, only if there's
09:45:56 issues or decisions that have to be made.
09:45:59 Q. Okay. When was the last time you talked to
09:46:02 Mr. Juszkiewicz about this particular case?
09:46:10 MR. LANQUIST: I want to instruct the
09:46:11 witness not to -- not to discuss any conversations that
09:46:15 he's had about this case relating to the conduct of
09:46:20 this case or conferences with counsel.
09:46:26 MR. BODNER: If counsel was not present
09:46:29 at these meetings, anything discussed between
09:46:34 Mr. Berryman and Mr. Juszkiewicz is not privileged.
09:46:38 MR. LANQUIST: Well, there's also the
09:46:39 work product issue, Counsel.
09:46:41 MR. BODNER: But -- well, let's take this
09:46:44 one at a time now.
09:46:48 BY MR. BODNER:
09:46:48 Q. When was your last meeting with
09:46:49 Mr. Juszkiewicz?
09:46:53 A. Concerning this?
09:46:55 Q. Regarding -- where you discussed the D'Addario
09:46:59 case.
09:47:00 A. Well, it was sometime in January, once or
09:47:09 twice. Either immediately after my deposition or
09:47:13 during the NAMM show in Anaheim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

09:51:01 MR. BODNER: This is directed to the
09:51:02 D'Addario case in general.
09:51:04 MR. LANQUIST: I'm going to instruct the
09:51:05 witness not to answer.
09:51:07 MR. BODNER: Okay.
BY MR. BODNER:
09:51:08 Q. Mr. Berryman, did you report on your
09:51:11 deposition which occurred on January 7, 2004?
09:51:18 A. Well, yes, I reported that I was involved in a
09:51:22 deposition and that was the substance of what I
09:51:25 reported.
09:51:27 Q. Did you report about our Internet search where
09:51:30 we found that Legend was using EXP and Ed Roman was
09:51:35 using EXP?
09:51:36 A. No.
09:51:36 Q. So how did Mr. Juszkiewicz find out about Ed
09:51:42 Roman and Legend?
09:51:45 A. I don't think he knew about Ed Roman -- he
09:51:48 knows about Ed Roman in general going back several
09:51:50 years. As I mentioned, Ed Roman is -- has been a
09:51:54 notorious infringer of our -- all of our trademarks.
09:51:59 And I'm the one that instructed legal counsel on the
09:52:06 Legend case to pursue that and send him a cease and
09:52:12 desist letter. And Ed Roman, I and people that work
09:52:15 for me periodically check Ed Roman's site, or we try

to, and see -- try to see all his infringements and get legal counsel to get him to stop.

Q. And did you discuss Peavey at all at any of these meetings?

A. I don't believe so, no.

Q. So in all of your conferences that you've had with Mr. Juszkiewicz, you've never discussed Peavey; is that correct?

A. Well, all of my conferences with Mr. Juszkiewicz -- I have management conferences with him all the time. We don't -- you know, we have not been discussing this particular matter. It's all operational issues having to do with the company.

Q. Okay. So you've never discussed Peavey with Mr. Juszkiewicz. That is your testimony. Is that correct?

A. Well, I saw general correspondence regarding the Peavey matter. I did not really discuss it with him.

Q. Was that correspondence produced?

A. That was correspondence between Mr. Juszkiewicz and legal counsel and myself.

Q. Was that cor -- was that the letter from legal counsel to you or from you to legal counsel?

MR. LANQUIST: Wait a minute, Counsel. I

think you're getting into attorney-client privilege here.

MR. BODNER: I didn't ask what the subject matter or what was said.

MR. LANQUIST: Okay.

MR. BODNER: I just want to know, you know, because I have no idea. He just mentioned that there is correspondence, and I just want to make sure that we're not going to get into anything that's privileged.

MR. LANQUIST: I just want to instruct the witness not to mention the content of any of that correspondence, but you can testify as to whether there was correspondence about Peavey.

THE WITNESS: Yes, there was.

BY MR. BODNER:

Q. Was there any inter-office memo or e-mail sent between you and Mr. Juszkiewicz concerning Peavey?

MR. LANQUIST: You mean that did not go to counsel?

MR. BODNER: That counsel was not addressed as a cc on this.

THE WITNESS: No. It would have been correspondence between counsel and Mr. Juszkiewicz and myself.

09:54:44 BY MR. BODNER:
09:54:44 Q. So there was no correspondence, e-mail or
09:54:47 inter-office memo, between you and Mr. Juszkiewicz or
09:54:51 anyone else in your company without having your legal
09:54:56 counsel's name on that correspondence; is that correct?
09:55:00 A. That would be correct. I am typically copied
09:55:04 on all intellectual property matters, as well as
09:55:09 Mr. Juszkiewicz, so that we're both aware of the issues
09:55:14 outstanding and what legal counsel is working on.
09:55:17 Q. At your January 7th, 2004, deposition, there
09:55:22 was another Exhibit F that we brought to your
09:55:27 attention. It was regarding Harmony Central and the
09:55:31 ESP and LTD Guitars that was using EXP. Do you happen
09:55:35 to recall that?
09:55:37 A. Generally, yes.
09:55:39 Q. Did you write to LTD or ESP Guitars?
09:55:47 A. Well, we have -- we have written to them about
09:55:53 product. I cannot recall specifically about their use
09:55:57 of EXP or not. And I have not checked their web sites
09:56:04 recently. So I really cannot say with -- with any
09:56:08 assurance.
09:56:08 Q. Also Exhibit G during your January 7th, 2004,
09:56:17 deposition we brought to your attention about Roland
09:56:22 using EXP on their effects processor pedals for
09:56:27 guitars. Did you write to Roland about their use of

09:56:31 EXP?

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

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

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

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

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

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

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

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

09:57:25 A. No.

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

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

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

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

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

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

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

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

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

09:59:41 MR. LANQUIST: Counsel, you mean ever or are we aware of anyone else using EXP?

09:59:46 MR. BODNER: No.

09:59:48 BY MR. BODNER:

09:59:55 Q. Are you -- are you in -- are you preparing now to write to anyone else concerning your trademark EXP?

09:59:56 MR. LANQUIST: You mean about which Gibson is aware?

10:00:03 MR. BODNER: Yes.

10:00:09 THE WITNESS: Well, you know, it's part of our normal procedure. If we're aware of infringements, we will write to people.

10:00:11 BY MR. BODNER:

10:00:12 Q. Okay. But you're not -- you're not in the midst of writing to anyone else.

10:00:15 A. No.

10:00:24 Q. Mr. Berryman, do you have any basis for claiming that J. D'Addario committed fraud on the Patent Office?

10:00:26 MR. LANQUIST: Objection. Beyond the scope of direct. Instructing the witness not to answer.

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10:01:00 BY MR. BODNER:

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

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

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

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

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

10:02:13 BY MR. BODNER:

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

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

10:02:27 I'll let the witness answer. I mean, this is his own
10:02:30 knowledge. It's not the knowledge of the -- I mean
10:02:33 it's not -- it doesn't reference statements made by
10:02:36 D'Addario in Mr. D'Addario's deposition, so that's
10:02:39 fine. He can answer whatever he knows.
10:02:41 THE WITNESS: Well, I don't know.
10:02:44 BY MR. BODNER:
10:02:44 Q. Okay.
10:02:44 A. I mean, it may or may not. I don't know.
10:02:50 MR. BODNER: I don't think I have any
10:02:51 other questions.
10:02:52 MR. LANQUIST: All right. I don't have
10:02:53 anything further.
FURTHER DEPONENT SAITH NOT.

C E R T I F I C A T E

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