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

U.S. Trademark Registration No.: 2,554,110 and  
2,554,111 EXP and  
EXP COATED

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

Petitioner )

vs. )

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

Registrant )

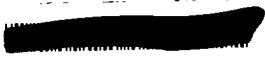
Cancellation Nos.  
92041175  
and  
92041688

Deposition of:

DAVIS H. BERRYMAN

Taken on behalf of the Petitioner

January 7, 2004



02-03-2004

U.S. Patent & TMOfc/TM Mail Rcpt Dt. #39

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ORIGINAL

TESTIMONY DEPOSITION OF DAVIS H. BERRYMAN

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18	No. 5	Epiphone DSM price list	
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1                   The deposition of DAVIS H. BERRYMAN,  
2 was taken by counsel for the Registrant, by  
3 Notice, at the offices of Waddey & Patterson, 414  
4 Union Street, Suite 2020, Nashville, Tennessee, on  
5 January 7, 2004, for all purposes under the  
6 Tennessee Rules of Civil Procedure.

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

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

16  
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23                   DAVIS H. BERRYMAN  
24 was called as a witness, and after having been  
25 first duly sworn, testified as follows:

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EXAMINATION

DIRECT EXAMINATION BY MR. LANQUIST:

Q. Please state your name for the record.

A. Davis H. Berryman.

Q. Mr. Berryman, what is your title?

A. President of Gibson Guitar Corporation.

Q. Please describe your background with Gibson Guitar Corporation.

A. Well, I'm one of the principals of Gibson Guitar, and acquired the company in January 1986. I'm currently President, and I've held various positions with the company such as Chief Financial Officer, and have run almost all of the operating divisions of the company at one point or another over the last really 18 years.

Q. Please describe briefly your educational background, beginning post high school.

A. I'm a graduate of Boston College, accounting and finance major, and I have an MBA from Harvard Business School.

Q. What are your responsibilities with Gibson Guitar Corporation on a daily basis?

A. Well, I have executive responsibilities overseeing divisions, as well as operating responsibilities for several of the divisions,

1 operating them myself.

2 Q. Now, is one of the responsibilities that  
3 you have operating Epiphone?

4 A. That's correct.

5 Q. And what is the relationship between  
6 Epiphone and Gibson Guitar Corporation?

7 A. Well, Epiphone is another brand that is  
8 owned by Gibson Guitar. It has a long history  
9 going back to the 1800's, and Gibson acquired it  
10 in 1957.

11 Q. Okay. As part of your responsibilities  
12 with Gibson Guitar Corp. and Epiphone, do you  
13 monitor third-party use of guitars and marks, et  
14 cetera?

15 A. Yes.

16 Q. Do you go to trade shows?

17 A. Oh, yes.

18 Q. And, in fact, you're just about to go to  
19 a trade show, correct?

20 A. Yes.

21 Q. As part of that, do you see which marks  
22 your competitors are using?

23 A. Yes.

24 Q. What is the Explorer guitar?

25 A. The Explorer guitar is a solid body

1 guitar that has offsetting angles, with a curved  
2 headstock, what we call the Explorer headstock  
3 that Gibson developed.

4 Q. How long has Gibson sold the Explorer  
5 guitar?

6 A. The Explorer guitar was introduced in  
7 1958.

8 Q. Okay. And is that one of the reasons why  
9 Gibson has a model called a 1958 Korina,  
10 K-o-r-i-n-a, Explorer?

11 A. Yes, that's correct.

12 Q. Is the Explorer known by any other marks?

13 A. Well, it's commonly referred to as the  
14 EXP, both Explorer and EXP. We abbreviate the  
15 names of most of our models.

16 Q. When you say it's commonly known as the  
17 EXP, who commonly knows it as the EXP?

18 A. Well, of course, everybody within the  
19 company; but our dealers, retail dealers, our  
20 international distributors, and really it's held  
21 out to the general public in many respects in that  
22 regard.

23 Q. Now, when you say "retail dealers," what  
24 do you mean by that?

25 A. I mean retail stores throughout the

1 United States.

2 Q. Okay. Now, does Gibson sell products  
3 other than guitars?

4 A. Yes.

5 Q. What products are those?

6 A. Well, they sell basses, mandolins,  
7 banjos, amplifiers, strings, accessories, really a  
8 full compliment of musical, stringed musical  
9 instruments, and accessories to be used on those  
10 instruments.

11 Q. Now, one of the accessories that you  
12 mentioned were strings. What kind of strings does  
13 Gibson sell?

14 A. They sell both Gibson strings and  
15 Epiphone branded strings, guitar strings, base  
16 strings.

17 Q. To whom are Gibson products such as the  
18 Explorer sold?

19 A. They are sold to retail dealers  
20 throughout the United States, approximately 800  
21 retail dealers. That's retail accounts, I should  
22 say. Store fronts would be much greater than  
23 that. It would be approximately 1,000, and sold  
24 to international distributors around the world.

25 Q. Okay. Then these distributors and

1 dealers, to whom on do they sell?

2 A. They sell to consumers.

3 Q. Now, do these retail dealers have the  
4 products of other companies, as well?

5 A. Oh, yes.

6 Q. Would these -- do these dealers have  
7 other companies' strings, as well?

8 A. Yes.

9 Q. Okay. Have you ever heard of D'Addario?

10 A. Oh, yes.

11 Q. And what is your understanding of  
12 D'Addario?

13 A. Well, I believe they're the -- they  
14 probably hold the largest market share in the  
15 string replacement market. They would probably  
16 have 30 to 35 percent market share.

17 Q. Okay. So these dealers that Gibson sells  
18 the Explorer to, would they also maintain  
19 inventory of D'Addario products?

20 A. Yes, I would think that almost all of  
21 them would carry D'Addario products.

22 Q. Okay. Now, you mentioned as one of the  
23 consumers of these guitars, guitar owners; is that  
24 correct? The end consumer, correct?

25 A. Yes. Right.

1 Q. I'm assuming that over time strings on a  
2 guitar such as an Explorer guitar would wear out  
3 over time; is that correct?

4 A. Oh, that's correct.

5 Q. And why is that?

6 A. Well, the string itself actually deadens  
7 after a time. It's under a great deal of  
8 pressure, under tension. And we recommend that  
9 strings be changed, if you play the guitar  
10 consistently, at least, you know, once a month.  
11 But strings -- the average consumer would probably  
12 replace the strings several times per year.

13 Q. Now, these Explorer owners would replace  
14 these strings with what products? Well, products  
15 from what source? That's a better question.

16 A. Well, they would go to the music store to  
17 purchase the strings, for the most part.

18 Q. Do you have an understanding as to  
19 whether the D'Addario strings would fit an  
20 Explorer guitar?

21 A. Oh, certainly they would. They would fit  
22 almost any guitar that's sold in the marketplace.

23 Q. Do you have any opinion as to whether  
24 consumers place EXP -- I'm sorry, let me rephrase  
25 that. Do you have an opinion as to whether

1 consumers place D'Addario strings on Explorer  
2 guitars?

3 A. Oh, I'm certain they do.

4 Q. Now, as part of your responsibility, you  
5 stated that you monitor use by third parties and  
6 you go to trade shows; is that correct?

7 A. Correct.

8 Q. Now, as such, other than Gibson and  
9 D'Addario, who else uses the EXP mark in the  
10 stringed instrument business?

11 A. I'm not aware of anybody else that uses  
12 that mark in the stringed instrument business.

13 Q. Now, unfortunately from time to time  
14 Gibson has problems with third parties copying the  
15 body shape of its guitars, correct?

16 A. That's correct.

17 Q. And, in fact, one of the guitar bodies  
18 that is copied is the EXP; is that correct?

19 A. That's correct.

20 Q. And when these third parties sell these  
21 counterfeit Explorer guitars, how do they refer to  
22 the Explorer guitar?

23 A. They usually refer to the guitar as  
24 "EXP."

25 Q. Okay. And another guitar that Gibson

1 makes is the Les Paul, correct?

2 A. That's correct.

3 Q. And, in fact, the Les Paul is one of the  
4 most famous guitars of all time; is that correct?

5 A. Yes, that's correct.

6 Q. And how did the -- and unfortunately  
7 third parties often copy Les Paul guitars,  
8 correct?

9 A. Correct.

10 Q. And what do they use as shorthand for the  
11 Les Paul guitars?

12 A. "LP."

13 (Document marked Exhibit No. 1.)

14 BY MR. LANQUIST:

15 Q. Now, let me hand you what we've marked  
16 for identification as Exhibit 1. And can you  
17 identify Exhibit 1, please?

18 A. Yes. It's an Epiphone U.S. Retail Price  
19 List dated September 15th, 1993.

20 Q. And does Gibson and Epiphone use price  
21 lists?

22 A. Yes, we do.

23 Q. And how many price lists are circulated  
24 from Gibson and Epiphone?

25 A. Well, it would be a minimum of two a

1 year. Could be more, but at a minimum two a year  
2 around the trade shows, which primarily domestic  
3 trade shows are January and July.

4 Q. Okay. And of each of these retail price  
5 lists, how many copies are distributed?

6 A. Well, several thousand copies. Copies  
7 are sent to every retailer we have, and copies are  
8 also made available to consumers.

9 Q. Okay. And is it true that some retailers  
10 actually request more than one copy?

11 A. Oh, yes. Yes. Many of them like copies  
12 for all their retail sales people. Many of them  
13 like extra copies for consumers to refer to or  
14 have consumers refer to when they're looking at  
15 the product.

16 Q. Let's talk about the Explorer guitar  
17 again. And do you know how many Explorer guitars  
18 are sold each year?

19 A. Well, I would estimate that it would be  
20 probably in the five to 10,000 range, varying on  
21 the year. But combined Gibson and Epiphone?

22 Q. Yes.

23 A. Thousands.

24 Q. Okay. Now, going back to what we've  
25 marked as Exhibit 1, can you identify whether the

1 EXP mark is used?

2 A. Yes, it is. On page, I guess it would be  
3 GIB 88, "EXP" is right up near the top of the  
4 page --

5 Q. Okay.

6 A. -- by Explorer, "EXP."

7 Q. Now, these price lists, such as  
8 Exhibit 1 -- well, let's just refer specifically  
9 to Exhibit 1. Now, you said that Gibson does have  
10 a practice of issuing these price lists, correct?

11 A. Correct.

12 Q. And that someone at Gibson prepares these  
13 price lists, correct?

14 A. Correct.

15 Q. And then someone at Gibson has a  
16 responsibility to prepare these price lists,  
17 correct?

18 A. That's correct.

19 Q. Now, these price lists are routinely used  
20 by Gibson; is that correct?

21 A. Oh, yes.

22 Q. And copies of these price lists are kept  
23 in the ordinary course of business by Gibson,  
24 correct?

25 A. Correct.

1 (Document marked Exhibit No. 2.)

2 BY MR. LANQUIST:

3 Q. Let me hand you what we've marked for  
4 identification as Exhibit 2, and I'd ask that you  
5 identify Exhibit 2, please.

6 A. Exhibit 2 is an Epiphone dealer and  
7 retail price list dated May 15th, 1994.

8 Q. And would this price list have been  
9 circulated in 1994?

10 A. Yes, it would.

11 Q. And would this have been the only price  
12 list that would have been circulated in 1994?

13 A. No. It would be one of at least two, and  
14 possibly more.

15 Q. Okay. Can you identify whether "EXP,"  
16 the mark "EXP" is used on Exhibit 2?

17 A. Yes, it is, on the second page of the  
18 price list, which would be GIB 84, "Explorer,"  
19 "EXP" is indicated as the model.

20 Q. Okay. Is Exhibit 2 a document that  
21 someone at Gibson has a responsibility to prepare?

22 A. Oh, yes.

23 Q. And is Exhibit 2 routinely used by  
24 Gibson, at least in 1994?

25 A. Yes.

1 Q. And are copies of Exhibit 2 kept in the  
2 ordinary course of business by Gibson?

3 A. Yes.

4 (Document marked Exhibit No. 3.)

5 BY MR. LANQUIST:

6 Q. Let me hand you what we've marked as  
7 Exhibit 3, and I'd ask that you identify  
8 Exhibit 3, please.

9 A. Exhibit 3 is a retail price list for  
10 Epiphone dated February 1st, 1995.

11 Q. Would this have been the only retail  
12 price list distributed by Gibson or Epiphone in  
13 1995?

14 A. No, it would not.

15 Q. And can you identify where the "EXP" mark  
16 is used on Exhibit 3?

17 A. Yes. On the second page of Exhibit 3,  
18 which is marked GIB 55, the Explorer model and  
19 "EXP" are listed in the top third of the page.

20 Q. Okay. Now, over to the right, there is  
21 also something called a "Case Code."

22 A. That's correct.

23 Q. And what is the case code for the  
24 Explorer?

25 A. The case code is "EXP," and it's a case

1 that only fits the Explorer model.

2 Q. Now, is the document designated by  
3 Exhibit 3 a document regularly used by Gibson?

4 A. Yes.

5 Q. And does someone or did someone at Gibson  
6 have the responsibility to prepare Exhibit 3?

7 A. Yes.

8 Q. And are copies of Exhibit 3 kept in the  
9 ordinary course of business by Gibson?

10 A. Yes.

11 (Document marked Exhibit No. 4.)

12 BY MR. LANQUIST:

13 Q. Let me hand you what we've marked for  
14 identification as Exhibit 4. And unfortunately  
15 I'm going to have to put it vertically because  
16 there's just not enough room. Can you identify  
17 Exhibit 4, please?

18 A. Yes. It's an Epiphone retail price list  
19 dated August 15th, 1996.

20 Q. Can you identify where "EXP" is used on  
21 Exhibit 4?

22 A. Yes. "EXP" would be on the second page  
23 of the document, labeled GIB 74. Again, it's in  
24 the top third of the page, of the second page.

25 Q. And does someone at Gibson issue this

1 price list?

2 A. Yes.

3 Q. And did someone at Gibson have the  
4 responsibility of preparing this price list?

5 A. Yes.

6 Q. And are these price lists routinely used  
7 by Gibson?

8 A. Yes.

9 Q. And are copies of this price list kept in  
10 the ordinary course of business by Gibson?

11 A. Yes, they are.

12 Q. Would this be the only price list Gibson  
13 circulated in 1996 that included the "EXP"?

14 A. No.

15 (Document marked Exhibit No. 5.)

16 BY MR. LANQUIST:

17 Q. Let me hand you what we've marked as  
18 Exhibit 5. Unfortunately, I'm going to have to  
19 put the sticker over part of it, but I'll try to  
20 put it over something that's not critical. Can  
21 you identify Exhibit 5, please?

22 A. Yes. It's a retail price list for  
23 Epiphone dated February 15th, 1997.

24 Q. Can you identify where the "EXP" mark is  
25 used on Exhibit 5?

1 A. Yes. It's toward the bottom of the first  
2 page, labeled GIB 70.

3 Q. And did someone at Gibson prepare this  
4 price list?

5 A. Oh, yes.

6 Q. And are price lists such as Exhibit 5  
7 routinely kept -- I'm sorry, routinely used by  
8 Gibson?

9 A. Yes.

10 Q. And are copies of price lists such as  
11 Exhibit 5 kept in the ordinary course of business  
12 by Gibson?

13 A. Yes.

14 (Document marked Exhibit No. 6.)

15 BY MR. LANQUIST:

16 Q. Let me hand you what we've marked as  
17 Exhibit 6, and I'd ask that you identify  
18 Exhibit 6, please.

19 A. It's an Epiphone retail price list dated  
20 July 1st, 1998.

21 Q. And would this have been the only price  
22 list that would have been distributed by Gibson in  
23 1998?

24 A. No.

25 Q. Well, let me ask the preliminary

1 question. When a date is on one of these price  
2 lists, does that designate when the price list was  
3 distributed?

4 A. It's normally distributed a week or two  
5 before that date. That's the effectivity date of  
6 the prices on the sheet.

7 Q. And then for how long are these price  
8 lists usually used?

9 A. Up until a new price list is issued.

10 Q. Okay. Can you identify on Exhibit 6  
11 where "EXP" is used?

12 A. Yes. On the second or third page of the  
13 document it is listed about a third of the way  
14 down the page, "1958 Explorer," "EXP."

15 Q. Okay.

16 A. It's GIB 3.

17 Q. Now, did someone at Gibson have the  
18 responsibility of preparing Exhibit 6?

19 A. Yes.

20 Q. And are price lists such as Exhibit 6  
21 routinely used by Gibson?

22 A. Yes.

23 Q. And are copies of price lists such as  
24 Exhibit 6 kept in the ordinary course of business  
25 by Gibson?

1 A. Yes, they are.

2 (Document marked Exhibit No. 7.)

3 BY MR. LANQUIST:

4 Q. Let me hand you what we've marked as  
5 Exhibit 7, and I'd ask that you identify  
6 Exhibit 7, please.

7 A. Exhibit 7 is an invoice to a U.S.A.  
8 dealer, dated February 1st, 1998.

9 Q. Okay. Could you review Exhibit 7 to  
10 determine whether it's a single invoice or whether  
11 there are several invoices attached, please?

12 A. Well, there are several individual  
13 invoices to various dealers throughout the United  
14 States.

15 Q. Okay. And can you verify whether these  
16 invoices evidenced sales in 1998?

17 A. Yes. Yes, they're all in calendar 1998.

18 Q. Okay. Now, the date in the upper left  
19 corner, I'm assuming that is the date that the  
20 invoice was prepared.

21 A. That is correct.

22 Q. Okay. Can you identify whether the mark  
23 "EXP" is used on Exhibit 7?

24 A. "EXP" is used on every invoice.

25 Q. And what is it used to denote?

1 A. It's used to denote the shipment and sale  
2 of an Explorer guitar.

3 Q. Okay. And in some of the instances --  
4 well, let me ask you this question. What does the  
5 "Quantity" header mean on these invoices?

6 A. It means the number of units that were  
7 shipped to the dealer.

8 Q. Okay. So if that quantity number is one,  
9 it means one guitar was sold; is that correct?

10 A. That's correct.

11 Q. Whereas if you flip back to GIB 00011 of  
12 Exhibit 7, the quantity is five, correct?

13 A. That's correct.

14 Q. So that would be that five guitars were  
15 sold; is that correct?

16 A. Correct.

17 Q. Are invoices used by Gibson regularly?

18 A. Yes.

19 Q. And does someone at Gibson have the  
20 responsibility of preparing invoices?

21 A. Yes.

22 Q. And are the copies of the invoices  
23 collectively marked as Exhibit 7 kept in the  
24 ordinary course of business by Gibson?

25 A. Yes.

1 (Document marked Exhibit No. 8.)

2 BY MR. LANQUIST:

3 Q. Now let me hand you what's been marked as  
4 Exhibit 8. And I'd ask that you identify that,  
5 please.

6 A. That is an invoice to a U.S.A. domestic  
7 dealer, dated February 21, 1999.

8 Q. Okay. And then what does the second page  
9 of Exhibit 8 show?

10 A. The same, to a domestic dealer, dated  
11 December 21, 1999.

12 Q. Okay. And is the "EXP" mark used on  
13 these invoices?

14 A. Yes. It's used on both.

15 Q. And did someone at Gibson have a  
16 responsibility to prepare these invoices?

17 A. Yes.

18 Q. And are invoices routinely used by  
19 Gibson?

20 A. Yes, they are.

21 Q. And are the invoices of Exhibit 8 kept in  
22 the ordinary course of business?

23 A. Yes.

24 Q. Let me ask sort of a diverting question  
25 at this point in time, and that is: You said that

1 at one point in time you were the Chief Financial  
2 Officer of Gibson, correct?

3 A. Correct.

4 Q. And as such, did you obtain an  
5 understanding of the record keeping procedures of  
6 Gibson Guitar Corporation?

7 A. Yes.

8 (Document marked Exhibit No. 9.)

9 BY MR. LANQUIST:

10 Q. Let me hand you what we've marked as  
11 Exhibit 9, please. And I'd ask that you identify  
12 Exhibit 9.

13 A. It's a U.S.A. retail price list,  
14 Epiphone, for Epiphone division, dated  
15 August 15th, 2000.

16 Q. And can you determine whether the "EXP"  
17 mark is used on Exhibit 9?

18 A. Yes, it is. It's -- let me just find it.  
19 It's on the second page, about two-thirds of the  
20 way down.

21 Q. Okay. And is or was Exhibit 9 prepared  
22 by someone at Gibson?

23 A. Yes.

24 Q. And did that person preparing this price  
25 list have a responsibility to prepare the price

1 list at Gibson?

2 A. Yes.

3 Q. And are copies of Exhibit 9 kept in the  
4 ordinary course of business by Gibson?

5 A. Yes.

6 (Document marked Exhibit No. 10.)

7 BY MR. LANQUIST:

8 Q. Let me hand you what we've marked as  
9 Exhibit 10, please. And I'd ask that you identify  
10 Exhibit 10.

11 A. Exhibit 10 is an invoice to a U.S.A.  
12 domestic dealer, dated November 5th, 2000.

13 Q. Okay. And then going back into  
14 Exhibit 10, are there also other invoices shown?

15 A. Yes, there are.

16 Q. And do each of these invoices use the  
17 "EXP" mark?

18 A. Yes, they do.

19 Q. Now, does someone at Gibson have the  
20 responsibility to prepare the invoices of  
21 Exhibit 10?

22 A. Yes.

23 Q. And are the invoices of Exhibit 10 kept  
24 in the ordinary course of business by Gibson?

25 A. Yes, they are.

1 (Document marked Exhibit No. 11.)

2 BY MR. LANQUIST:

3 Q. Let me hand you what we've marked as  
4 Exhibit 11. And can you identify Exhibit 11,  
5 please?

6 A. It's a U.S.A. retail price list for  
7 Epiphone dated November 15th, 2001.

8 Q. And can you determine whether the "EXP"  
9 mark is used on this price list?

10 A. Yes. It's on the second page labeled  
11 GIB 57. It's about halfway down the page.

12 Q. Did someone at Gibson have the  
13 responsibility of preparing Exhibit 11?

14 A. Yes.

15 Q. And are copies of Exhibit 11 kept in the  
16 ordinary course of business by Gibson?

17 A. Yes.

18 (Document marked Exhibit No. 12.)

19 BY MR. LANQUIST:

20 Q. Let me hand you what we've marked as  
21 Exhibit 12, please. And can you identify  
22 Exhibit 12?

23 A. It is a U.S.A. retail price list dated  
24 February 1, 2001, Epiphone, for the Epiphone  
25 division.

1 Q. And can you determine whether the "EXP"  
2 mark is used on Exhibit 12?

3 A. Yes. It is on the second page labeled  
4 GIB 59. It's at the bottom of the page.

5 Q. And did someone at Gibson have the  
6 responsibility of preparing Exhibit 12?

7 A. Yes.

8 Q. And are copies of Exhibit 12 kept in the  
9 ordinary course of business by Gibson?

10 A. Yes.

11 Q. Now, looking back at Exhibits 11 and 12,  
12 both of them are dated 2001. Do you see that?

13 A. That's correct.

14 Q. Is this what you were talking about when  
15 you said that at least two price lists were issued  
16 each year by Gibson?

17 A. Yes.

18 (Document marked Exhibit No. 13.)

19 BY MR. LANQUIST:

20 Q. Let me hand you what we've marked as  
21 Exhibit 14 -- or 13. And can you identify that  
22 document, please?

23 A. This is an invoice to a U.S.A. domestic  
24 dealer evidencing the shipment of product. One of  
25 the units is an Explorer guitar.

1 Q. And when was this invoice issued?

2 A. It's dated January 9th, 2001.

3 Q. And does someone at Gibson have the  
4 responsibility of preparing this invoice?

5 A. Yes.

6 Q. And are these price lists -- I'm sorry,  
7 these invoices, copies of these invoices kept in  
8 the ordinary course of business by Gibson?

9 A. Yes.

10 (Document marked Exhibit No. 14.)

11 BY MR. LANQUIST:

12 Q. Let me hand you what we've marked as  
13 Exhibit 14. And I'd ask that you identify it,  
14 please.

15 A. This is a warranty booklet that goes out  
16 with every Epiphone instrument.

17 Q. And when did this -- when did Gibson's  
18 practice begin? In other words, when did the  
19 practice of -- well, first of all, let me ask a  
20 preliminary question. Can you identify whether  
21 the "EXP" mark is used on this?

22 A. Yes, it is.

23 Q. And where is it?

24 A. It is -- it is listed on the cover and  
25 also on the pre-pack checklist, as indicated.

1 Q. And these -- Exhibit 14 is attached to  
2 guitars; is that correct?

3 A. That's correct.

4 Q. And if it has an "EXP" on it, what kind  
5 of guitar are they attached to?

6 A. Attached to an Explorer instrument.

7 Q. When did this begin, the practice of  
8 attaching these to Explorer guitars?

9 A. April 2001.

10 MR. BODNER: I'll object to  
11 Exhibit 14 because this was never produced by the  
12 petitioner.

13 BY MR. LANQUIST:

14 Q. Now, just a couple clarifying questions.  
15 Again, we've looked at many invoices along the  
16 way. Do you remember looking at those invoices?

17 A. Yes.

18 Q. Now, do these invoices represent every  
19 sale of every Explorer guitar by Gibson or  
20 Epiphone --

21 A. No.

22 Q. -- throughout that time period?

23 A. No.

24 Q. Okay. Now, earlier you stated that  
25 parties outside of Gibson also used the "EXP" mark

1 as -- to connote the Explorer guitar; do you  
2 remember that?

3 A. Yes.

4 Q. Okay. Have you ever seen the "EXP" mark  
5 used in any catalogs by any third parties?

6 A. Yes.

7 MR. LANQUIST: Okay. That's all I  
8 have.

9 Do you need a moment?

10 MR. BODNER: Yeah, I think that's the  
11 best thing. Five minutes, all right?

12 MR. LANQUIST: Okay.

13 (Respite.)

14 (Document marked Exhibit A.)

15 CROSS-EXAMINATION BY MR. BODNER:

16 Q. Okay. As Exhibit A, I'd like to mark a  
17 copy of a letter from Mr. Lanquist to me, dated  
18 February 27, 2003, in which it states, "Dear  
19 Mr. Bodner: I am enclosing the signature page  
20 from the Petitioner's Responses to Registrant's  
21 First Set of Interrogatories."

22 MR. BODNER: Mr. Lanquist, I may not  
23 have a courtesy copy. Is that all right?

24 MR. LANQUIST: That's fine.

25 BY MR. BODNER:

1 Q. I'd like for to you take a look at that.  
2 If you could, take a look at page two of that  
3 document. Do you recognize that signature to be  
4 yours?

5 A. Yes.

6 (Document marked Exhibit B.)

7 BY MR. BODNER:

8 Q. Thank you. I'd like to mark as Exhibit B  
9 a letter from Mr. Lanquist to me dated April 22,  
10 2003. And it says, "Dear Gerald: I am enclosing  
11 a copy of the Corporate Acknowledgment for  
12 Petitioner's Responses to Registrant's First Set  
13 of Interrogatories in the EXP cancellation."

14 And I'd like you to take a look at that,  
15 if you don't mind, Mr. Berryman. And could you  
16 take a look at page two of that document?

17 A. Yes.

18 Q. And is that your signature?

19 A. Yes.

20 Q. Thank you. Mr. Berryman, did you ever  
21 hear of a company called Peavey?

22 A. Yes.

23 Q. That's P-e-a-v-e-y. What is Peavey; do  
24 you know?

25 A. Peavey is a company in Mississippi that

1 predominantly makes electronic product.

2 (Document marked Exhibit C.)

3 BY MR. BODNER:

4 Q. Okay. I'm going to give you a document  
5 marked Exhibit C, and I'd like you to take a look  
6 at it. It's several pages. And you can take your  
7 time and look at that.

8 MR. LANQUIST: I just want to lodge  
9 an objection to the extent that it wasn't  
10 previously produced.

11 THE WITNESS: Um-hum.

12 BY MR. BODNER:

13 Q. Okay?

14 A. Um-hum.

15 Q. Do you see on the first page of that  
16 document, Exhibit C, is there a -- is there a  
17 heading that says "Electric and Acoustic Guitars"?

18 A. Yes, there is.

19 Q. Okay. And could you go down about, I  
20 don't know, eight or nine places under that?

21 A. Yes.

22 Q. Is there something called "Generation  
23 EXP"?

24 A. Yes, there is.

25 Q. Could you read the description right

1 after that one?

2 A. "Limited EXP".

3 Q. Okay. Do you know what that refers to?

4 A. No, I do not.

5 Q. Okay. Can you go to the third page of  
6 the document?

7 A. (Witness complies.)

8 Q. Could you read what's in bold on that  
9 third page about halfway through the page?

10 A. It says, "Peavey Announces V-Type EXP".

11 Q. It's cut off, probably.

12 A. "G-u-i," but I assume it's "Guitar".

13 Q. Right. And you said that Peavey is a  
14 manufacturer of guitars; is that correct?

15 A. Well, it's primarily a manufacturer of  
16 electronics. They do a very limited number of  
17 guitars.

18 Q. Okay. Can you turn to -- go two more  
19 pages into this document. And I think at the top  
20 it says "ZZ Sounds" or "Zounds".

21 A. "Zounds."

22 Q. "Z Zounds"?

23 A. Correct.

24 Q. And there's some bold writing also about  
25 halfway -- maybe a third of the page down. It

1 starts with "Peavey". Could you just read that?

2 A. "Peavey Raptor Plus EXP Electric Guitar."

3 Q. Okay. About four more pages in you'll  
4 come to a page that says at the top, "Music Gear  
5 Review". Do you have that page?

6 A. Yes.

7 Q. Okay. About one-third of the page down,  
8 could you just read what's in bold on that page?

9 A. "Peavey V-Type EXP Electric Guitars".

10 Q. About two more pages in from where you  
11 are now, at the top of the page it says  
12 "musiciansfriend.com." Do you have that page?

13 A. Yes.

14 Q. All right. It describes right above a  
15 guitar, a picture of a guitar, I should say,  
16 something written in bold. Can you just read what  
17 that is?

18 A. "Predator Plus EXP Guitar".

19 Q. And turn to the last page -- I'm sorry,  
20 the second to the last page, if you don't mind.

21 A. (Witness complies.)

22 Q. And can you read what's in bold at the  
23 top of the page, about one inch down from the top?

24 A. It says, "Predator Plus EXP Guitar Candy  
25 Apple Red".

1 MR. LANQUIST: Are we done with  
2 Exhibit C?

3 MR. BODNER: For now, yes.

4 MR. LANQUIST: I want to object to  
5 Exhibit C on the basis that there's no foundation,  
6 and also that it's inadmissible hearsay. Okay.

7 BY MR. BODNER:

8 Q. Do you know if Gibson has ever written to  
9 Peavey to complain about their use of "EXP"?

10 A. I do not know.

11 Q. Who would know that?

12 A. Well, I -- one of two people: Either  
13 Wayne Beavers, who handles most of our  
14 intellectual property matters; or Henry  
15 Juskiewicz, our CEO and Chairman that has a  
16 relationship with Hartley Peavey, who is the  
17 Chairman of Peavey Corporation.

18 Q. You said Mr. --

19 A. Henry Juskiewicz.

20 Q. Who is Mr. Henry Juskiewicz?

21 A. He's the Chairman and CEO of Gibson  
22 Guitar.

23 Q. Do you know, we noticed Mr. Juskiewicz  
24 for his deposition but your attorneys refused to  
25 provide him because they said that you would be

1 the one to answer all these questions.

2 MR. LANQUIST: Well, first of all,  
3 counsel, I'm going to object to the  
4 mischaracterization, because when you put forward  
5 your 30(b)(6) Notice, it didn't have anything  
6 about an EXP guitar that was manufactured and  
7 distributed by Peavey.

8 MR. BODNER: No. But we asked for  
9 all information concerning the EXP and any  
10 conflicting marks or anyone else using it in the  
11 industry. We didn't necessarily mention Peavey.

12 MR. LANQUIST: To be honest with you,  
13 I believe that this is the first time that we're  
14 aware that Peavey has an EXP guitar.

15 THE WITNESS: Had I known, I would  
16 have written Hartley Peavey myself. Hartley  
17 Peavey has never hesitated to write me concerning  
18 any use of any trademarks that he feels they have,  
19 and I certainly wouldn't hesitate to write him,  
20 nor would Henry Juskiewicz.

21 BY MR. BODNER:

22 Q. Did you say Mr. Juskiewicz has a  
23 relationship with Peavey?

24 A. Well, he knows Hartley Peavey. I've  
25 never met Hartley Peavey.

1 Q. So Gibson doesn't have a business  
2 relationship with Peavey Electronics?

3 A. No, we do not.

4 Q. Okay. Are they competitors?

5 A. They are, generally. Peavey primarily  
6 sells to retailers exclusively, in that they do  
7 not deal with all retailers throughout the United  
8 States.

9 Q. Is it a less expensive guitar?

10 A. Typically, yes.

11 Q. How long has Peavey been selling guitars?

12 A. It would be just a guess, but I would say  
13 maybe ten years. Not a long history in guitars.  
14 They launched their guitar line with the Eddie Van  
15 Halen model probably approximately ten years ago.  
16 They've been primarily for a long, long time in  
17 the electronics business. That's where they  
18 developed the majority, probably 75 or 85 percent  
19 of their sales would be in electronics.

20 Q. Okay. But they primarily sell to  
21 consumers; is that the situation?

22 A. No. They sell to retailers. But they  
23 have a limited number of retailers that they sell  
24 to.

25 Q. Do you sell primarily to retailers?

1 A. We do, but we sell to a broader base of  
2 retailers that would carry a broader range of  
3 brands of product.

4 Q. What do you mean by "electronics" as far  
5 as Peavey Electronics is concerned and what they  
6 sell?

7 A. Well, it would be -- it would be rack  
8 mount audio amplifiers, professional sound, sound  
9 reinforcement, amplifiers.

10 Q. Does Gibson sell amplifiers?

11 A. To a limited extent, we do, yes.

12 Q. And when I say Gibson, of course I mean  
13 Epiphone, as well.

14 A. Correct.

15 Q. Okay. I'm just going to refer to it as  
16 Gibson sort of collectively to include Epiphone,  
17 if that's all right.

18 A. Fine.

19 Q. The electronics that Peavey sells, would  
20 that be used with a guitar?

21 A. It could be, yes. They do also a lot in  
22 keyboards. You know, anything that needs  
23 amplification, any instrument, could potentially  
24 use Peavey electronics.

25 Q. So I imagine an electric guitar needs

1 amplification; is that correct?

2 A. Yes.

3 Q. Okay. You mentioned the name Wayne. I  
4 didn't get the last name, but he works with  
5 Gibson.

6 A. No. He works for this law firm, Waddey &  
7 Patterson.

8 Q. Oh. Can I have that last name again,  
9 then, please?

10 A. Beavers, B-e-a-v-e-r-s.

11 Q. Okay. So you don't know who wrote -- you  
12 don't know if anyone wrote to Peavey; is that  
13 correct?

14 A. Well, I did not. Either -- had I been  
15 aware of this, I would have either written or  
16 directed Wayne Beavers to write that.

17 Q. Why would you not be aware of it if  
18 you're the President of the company?

19 A. Because I'm not aware of everything  
20 that's going on in Gibson.

21 Q. But I thought you had said that you go to  
22 trade shows and you monitor what your competitors  
23 do; is that correct?

24 A. Well, generally that's correct. But  
25 there are -- I have not -- I had not seen this

1 model, nor do I think that the sales are broad  
2 enough that I would have seen it. Had I seen it,  
3 I would have taken action.

4 Q. So then someone may be -- someone without  
5 your knowledge may have written to Peavey; is that  
6 correct?

7 A. Well, it's possible, but -- but I am  
8 typically the person that would -- that would  
9 review carefully, you know, walk trade shows and  
10 see new product that's introduced and take action  
11 on this. And I was not aware of this model, nor  
12 was it brought to my attention by anybody in our  
13 company.

14 Q. So there was only one person that you  
15 mentioned at Gibson that may direct Mr. Beavers to  
16 write to Peavey, and that was Henry Juskiewicz?

17 A. Other than myself, yes. I'm normally the  
18 person that -- that would bring this up to our  
19 intellectual property attorneys to write a cease  
20 and desist letter.

21 (Document marked Exhibit D.)

22 BY MR. BODNER:

23 Q. Okay. I'd like to mark as Exhibit D  
24 another document, a series of pages, which has at  
25 the top "Legend Guitars." And I'd like to show it

1 to Mr. Berryman.

2 MR. LANQUIST: I'm going to object to  
3 Exhibit D on the grounds that there is no  
4 foundation, and that it was not previously  
5 produced, and it's inadmissible hearsay.

6 BY MR. BODNER:

7 Q. Okay.

8 A. Um-hum.

9 Q. Have you ever heard of a company called  
10 Legend Guitars?

11 A. No.

12 Q. Do you ever read "Guitar News Weekly"?

13 A. "Guitar News Weekly"?

14 Q. Yeah.

15 A. No, not normally. I've probably looked  
16 at it a couple of times over the last years; but  
17 normally, no.

18 Q. But you have read it in the past?

19 A. I've glanced at it. It's probably a very  
20 small circulated -- very low circulation in the  
21 guitar business.

22 Q. Do you review the Internet at all for  
23 competitors' products?

24 A. Not normally, no. I mean, I would look  
25 at music, the major music magazines, music trades.

1 There's trade publications and there's general  
2 consumer magazines, of which there are about three  
3 major magazines.

4 Q. Is there a person or group of people in  
5 your company that reviews advertisements or the  
6 Internet for competitors' products?

7 A. No.

8 Q. So basically you're the only one that  
9 does that in the company; is that correct?

10 A. No.

11 Q. Who else would be doing this?

12 A. Well, generally, it would be people or  
13 product managers in their respective areas if they  
14 came in contact with something. But, you know, we  
15 would -- we would have to -- I mean, there's --  
16 it's a pretty broad market. And, really, you keep  
17 your eye on generally what your major competitors  
18 are doing in the marketplace. Companies like  
19 Legend, I mean, I can take you to the trade show  
20 that's going to happen at the end of next week,  
21 and I can take you to a floor where, and I've been  
22 in this industry 18 years, and most of the floor  
23 is made up of companies that are new or start-up  
24 companies that I've never heard of, and it's the  
25 first time they're exhibiting. I can't even

1 remember all the names.

2 And I look generally and I walk that  
3 floor and I look for infringements for our shapes,  
4 for our names, generally, and I have other people  
5 that do that. Some people catch something, some  
6 people miss something. But generally we try to  
7 track and enforce, take general enforcement  
8 actions. But can I sit here and say that I pour  
9 over the Internet ten hours a day? No, I can't,  
10 you know.

11 Q. No, I didn't say ten hours a day; I was  
12 just asking if you refer to the Internet when  
13 looking for any competitors' products.

14 A. Not generally, no. I would go to a  
15 retail store like Guitar Center and I'd look for a  
16 competitor's products.

17 Q. Okay. Do you subscribe to any magazines  
18 or trade journals? Does the company itself, I  
19 should say.

20 A. Oh, yes. Yes.

21 Q. And do you use -- could you name some of  
22 those magazines, if you don't mind?

23 A. "Guitar Player," "Guitar One," "Guitar  
24 World". Those are probably the three major  
25 magazines in our industry.

1 Q. Okay. And do you review those magazines  
2 for competitors' products?

3 A. Generally. Generally, I do. I try to  
4 page through them monthly. But I have a stack of  
5 periodicals that I try to go through, and then  
6 sometimes you can't get through them all.

7 Q. If you will, look at the first page of  
8 this document. Can you read just what's written  
9 in bold about a third of the page down?

10 A. "Legend Guitars Introduces ERA and EXP".

11 Q. All right. Right below that it says:  
12 "The Legend Guitar Company was formed in the  
13 latter days of 1998 by master luthiers Jeff  
14 Sigurdson, Michael Soper and Jesse Brace, with the  
15 able assistance of business partner and renowned  
16 guitar broker, Robert Brown."

17 Do you know any of these people?

18 A. No. Never heard of any of the names.

19 Q. Can you just read the first sentence of  
20 the last paragraph on that first page?

21 A. "Legend's latest addition, it's EXP  
22 Series, is aimed at an even wider market."

23 Q. Okay. And you're not familiar -- your  
24 testimony is that you're not familiar with the EXP  
25 guitar that is being introduced by Legend Guitar?

1 A. No. This is the first time I've -- I've  
2 ever seen this.

3 (Document marked Exhibit E.)

4 BY MR. BODNER:

5 Q. Okay. I'd like to mark as Exhibit E a  
6 document containing several pages that at the top  
7 says, "Ed Roman Guitars," and underneath that it  
8 says "Abstract." And I just want to show it to  
9 Mr. Berryman. Take your time looking at it.

10 A. (Witness complies.)

11 Q. Okay?

12 A. Um-hum.

13 Q. Have you ever heard of Abstract Guitars?

14 A. No.

15 Q. Can you turn to the second page?

16 A. (Witness complies.)

17 Q. There seems to be a picture of a Paul  
18 Crook, C-r-o-o-k, and after that it says,  
19 "Anthrax, Meatloaf, Sebastian Bach." Do you know  
20 who Paul Crook is?

21 A. No, I do not.

22 Q. Right below that it says, "Abstract  
23 History." Can you read the first sentence right  
24 under "Abstract History"?

25 A. "Abstract has actually been available for

1 about 12 years, during that time all the guitars  
2 have been built by the same few people."

3 Q. Okay. So you still haven't heard of  
4 Abstract Guitars?

5 A. No. But thank you for bringing this to  
6 my attention, because I have a big problem with  
7 Abstract Guitars.

8 Q. And what problem is that?

9 A. They're infringing on several of our  
10 trademarks.

11 Q. What kind of trademarks?

12 A. Well, first of all, I would complain  
13 about their use of the name "EXP".

14 Q. Okay. That's on about the fourth page  
15 in; is that correct?

16 A. Yes.

17 Q. Is that on the page that says, "Abstract  
18 Guitar Models," with "Conservative" on the left  
19 side, "Radical" in the middle, and "V Shaped" on  
20 the right side?

21 A. That's correct.

22 Q. Okay. And where does it show "EXP"?

23 A. It says, "EXP Traditional" and "EXP  
24 Deluxe."

25 Q. And is that shown next to a guitar?

1 A. Yes, it is.

2 Q. Okay.

3 A. That's an Explorer, a Gibson Explorer  
4 shape. That's a federally registered trademark.

5 Q. The shape of the Explorer guitar is  
6 federally registered; is that correct?

7 A. That's correct. That's exactly the use  
8 that I brought up before that I'm complaining  
9 about.

10 Q. The shape of the guitar?

11 A. Well, the use. "EXP," the shape of the  
12 guitar. It communicates to the general public  
13 that it's an Explorer guitar.

14 Q. Now, further in after that page there are  
15 some larger views of the EXP Traditional model and  
16 the EXP Deluxe. So after looking at those, it  
17 still doesn't -- you still have -- you can still  
18 say you have not seen these models before?

19 A. No, I have not. The EXP Traditional  
20 model is -- I mean, it's -- it looks -- appears to  
21 be an exact copy of a Gibson Explorer model, which  
22 is registered, and also the headstock is a  
23 registered shape. It seems to be an exact copy of  
24 that, as well.

25 Q. Who has the responsibility for protecting

1 Gibson's trademarks --

2 MR. LANQUIST: Objection. Vague.

3 BY MR. BODNER:

4 Q. -- in your -- in your company, who has  
5 the responsibility of protecting Gibson's  
6 trademarks?

7 MR. LANQUIST: Objection. Vague. To  
8 determine responsibility, are you talking about  
9 corporate responsibility or legal responsibility?

10 MR. BODNER: Corporate.

11 MR. LANQUIST: If you understand the  
12 question, you can go ahead and answer.

13 THE WITNESS: Well, it's not  
14 designated in anyone's particular job description.  
15 It would -- it would typically be -- I mean, I  
16 share in that responsibility because I understand  
17 generally the trademark issues and have been  
18 dealing with them for many, many years, both  
19 domestically in the United States and  
20 internationally. As well as other people in our  
21 organization, sales people, generally make -- can  
22 make me aware of things that I am unaware of or  
23 have not seen. And I have not seen this product  
24 in the marketplace or on Ed Roman's website, which  
25 historically I have visited. I have a big problem

1 with Ed Roman. He is a notorious copier of Gibson  
2 product.

3 Q. So you know Ed Roman, then?

4 A. Well, I know him generally, yes. He --  
5 we've had several problems with Ed Roman over the  
6 years on copying Gibson product.

7 Q. Okay. But no one at your company made  
8 you aware of this?

9 A. This is the first I've seen of this.

10 Q. Okay. Now, who makes the decision at  
11 Gibson to apply for registration of a trademark?

12 MR. LANQUIST: Objection. Relevance.

13 BY MR. BODNER:

14 Q. You can answer the question.

15 MR. LANQUIST: Well, this is a --  
16 this is a testimony deposition, so I think you  
17 have to at least make a basic showing of  
18 relevance.

19 MR. BODNER: Well --

20 MR. LANQUIST: It's not a discovery  
21 deposition, this is a testimony deposition.

22 MR. BODNER: I understand. But I  
23 believe you stated that -- in your examination of  
24 Mr. Berryman you said that the guitar shape is  
25 registered; isn't that correct?

1 MR. LANQUIST: No, I did not.

2 MR. BODNER: I believe you did.

3 MR. LANQUIST: No.

4 MR. BODNER: And this relates to  
5 the -- this relates to the "EXP" and the "EX"  
6 which you have -- which you have sought  
7 registration for.

8 MR. LANQUIST: But it's Gibson's  
9 prior proof of use of the EXP mark as opposed to  
10 their registration of the mark that was provided  
11 on direct.

12 MR. BODNER: But Mr. Berryman said  
13 that the shape is registered --

14 MR. LANQUIST: Right.

15 MR. BODNER: -- in answer to a  
16 question, and I'm following up on that.

17 MR. LANQUIST: But how does  
18 registration of a body shape relate to the  
19 proceeding in front of the Trademark Trial and  
20 Appeal Board?

21 MR. BODNER: Well, the question was  
22 generally who is in charge of seeking protection  
23 by way of a registration for trademarks of Gibson  
24 Guitar and Epiphone.

25 MR. LANQUIST: It's still not

1 relevant to the issues in front of the Trademark  
2 Trial and Appeal Board, which are -- which has to  
3 do with priority and ownership of the EXP mark. I  
4 mean, if it's going to be a quick hit, I don't  
5 mind letting Mr. Berryman answer it. But, I mean,  
6 if we're going to spend a lot of time asking about  
7 which body styles are registered and who made the  
8 decisions to register those body styles, then  
9 obviously, you know, it's going to take a long  
10 time.

11 MR. BODNER: I'm not interested in  
12 the registration of body styles, per se. It's a  
13 quick hit.

14 MR. LANQUIST: Okay.

15 MR. BODNER: I just want to know if  
16 he makes the decisions to register, what is to be  
17 registered, and what is not to be registered.

18 MR. LANQUIST: Okay. Go ahead, if  
19 you understand the question.

20 THE WITNESS: Well, I have input in  
21 the decision. That decision is oftentimes made in  
22 general discussions with myself and with our  
23 intellectual property counsel.

24 MR. LANQUIST: Now I want to caution  
25 the witness not to mention anything that was

1 discussed specifically between you and  
2 Mr. Beavers, or you and myself; but you can  
3 discuss generally how decisions are made.

4 BY MR. BODNER:

5 Q. But is it you who makes that decision to  
6 say, Yes, let's trademark this?

7 A. Well, I mean, oftentimes it is. Is it  
8 100 percent of the time? No, I cannot say that.  
9 I mean, I make many of the decisions. Trademark  
10 counsel often makes recommendations. Sometimes we  
11 follow those recommendations; sometimes we do not.

12 Q. Well, with the marks "EXP" and "EX," was  
13 it your decision to seek registration of those  
14 marks?

15 A. Well, I remember having input in that  
16 decision, and I recommended that we do so.

17 Q. You stated that you visit trade shows,  
18 and I believe you said you saw J. D'Addario's EXP  
19 guitar strings at a trade show; is that correct?

20 MR. LANQUIST: I don't remember him  
21 saying that.

22 THE WITNESS: I did not say that, no.

23 BY MR. BODNER:

24 Q. Well, what was -- okay. Strike that.

25 Who else would make that decision to

1 register trademarks before the Patent and  
2 Trademark office?

3 A. You mean who else would have the  
4 authority to direct intellectual property counsel  
5 to do a filing on our behalf?

6 Q. Yes. Are there other people that are  
7 making that decision to direct your counsel to  
8 file trademark applications for various  
9 trademarks?

10 A. Well, it would either have to be done by  
11 myself or by our Chairman and CEO,  
12 Mr. Juskiewicz, my partner.

13 (Document marked Exhibit F.)

14 BY MR. BODNER:

15 Q. I'm going to mark as Exhibit F a  
16 several-paged document that has at the upper  
17 left-hand corner, "Harmony Central," and I'll show  
18 it to Mr. Berryman.

19 MR. LANQUIST: While Mr. Berryman is  
20 reviewing Exhibit F, I want to object to Exhibit E  
21 on the bases it was not previously produced,  
22 there's no foundation as to it's authenticity, and  
23 it's inadmissible hearsay.

24 BY MR. BODNER:

25 Q. Okay. Have you reviewed it?



1 A. Yes.

2 Q. Have you ever heard of a company called  
3 ESP Guitars?

4 A. Yes, I have.

5 Q. How have you heard of them?

6 A. Well, they are a competitor that's based  
7 in Japan that competes with Epiphone, and really  
8 over the years has copied a lot of the product, of  
9 Epiphone, Gibson, as well as other companies.

10 Q. Do they sell their guitars in the United  
11 States?

12 A. Yes, they do. Probably not as broadly as  
13 our lines would be sold, but they do sell in the  
14 United States.

15 Q. Can you just read on the first page  
16 what's written in bold? It starts with "ESP."

17 A. It's, "ESP EXP-250."

18 Q. Have you ever heard of that before?

19 A. No.

20 Q. Okay. Down below under "Features," and  
21 it says, colon, "8." Can you just read that first  
22 sentence?

23 A. It says, "Although everybody calls this  
24 guitar an ESP, it's actually made by LTD, the  
25 'cheapo' ESP sub-company."

1 Q. Have you ever heard of a company called  
2 LTD?

3 A. Well, LTD is another brand that they  
4 would use.

5 Q. That you're saying ESP Guitars would use?

6 A. Yes.

7 Q. Okay. Have you ever seen them at any  
8 trade shows? ESP Guitars, that is.

9 A. ESP Guitars, yes, I have.

10 Q. What about LTD?

11 A. LTD, yes. Most of the Japanese companies  
12 use two or three or four different brand names to  
13 designate price points in the marketplace.

14 Q. These are electric guitars?

15 A. Yes.

16 Q. About the fourth page from the end, at  
17 the top of the page it says, "Chris B's Music."  
18 If you could just turn to that page, I'd  
19 appreciate it.

20 A. Okay. "Chris B's Music."

21 Q. About halfway down it has a bullet point  
22 or a bullet, and it says "EXP-200," and below that  
23 it says "EXP-300".

24 A. Yes.

25 Q. And you have not heard of these two

1 guitars?

2 A. No, I have not.

3 Q. If you turn to the next page, about  
4 halfway down there are three bullet points, and it  
5 says "LTD EXP-200," "LTD EXP-200 Lefty," "LTD  
6 EXP-300." Have you ever heard of those guitars?

7 A. No, I have not.

8 MR. LANQUIST: I want to object to  
9 Exhibit F on the grounds that it was not  
10 previously produced, that there's no foundation as  
11 to it's authenticity, and it's inadmissible  
12 hearsay.

13 BY MR. BODNER:

14 Q. I believe you mentioned in your testimony  
15 that your guitars are sold in music stores; is  
16 that correct?

17 A. Yes.

18 Q. And I also believe that there were some  
19 other things that you mentioned that would be sold  
20 in music stores where your guitars would be sold.  
21 Could you name some of those items again?

22 A. Well, there's a -- there's a broad range  
23 of music stores. Some are guitar-only stores;  
24 some are what we call a full-line store; some  
25 music stores specialize in drums and/or

1 electronics, so there's different retailers. The  
2 guitar stores would typically sell guitars, bass  
3 guitars, and strings and accessory items  
4 specifically related to guitar.

5 Q. Okay.

6 A. Many stores are full-line stores or  
7 combination stores that would sell guitars,  
8 fretted musical instruments, would sell drums,  
9 percussion, and would sell keyboards, and would  
10 sell amplifiers and PA gear.

11 Q. And other electronics that go along with  
12 that?

13 A. Yes.

14 Q. What are some of the really broad stores  
15 that your guitars might be sold in where they sell  
16 a line of different items?

17 A. Well, I mean, we sell to all segments of  
18 the market.

19 Q. Well, I'm sorry. I'm looking for a name  
20 of a store. Like I know one up in New York, it's  
21 called Sam Ash. I don't know what's down here or  
22 elsewhere in the United States. But are there  
23 stores that you know of -- could you name some  
24 retail stores where your guitars are sold that has  
25 a host of different items relating to music?

1 A. Well, yes. Like Guitar Center is the  
2 largest retailer in the United States.

3 Q. The name of it is Guitar Centers?

4 A. Guitar Center.

5 Q. Center. Is that a chain of stores?

6 A. Yes, it is.

7 Q. Okay. Are there any others?

8 A. Well, I mean, Sam Ash is a very big  
9 retailer in the United States.

10 Q. Okay. So you know Sam Ash, then?

11 A. Yes. Um-hum. I mean, there are stores  
12 that are -- there's not a lot of chain stores in  
13 the musical instrument industry. The majority of  
14 the stores, according to the National Association  
15 of Music Merchants, there's about 5,000 music  
16 retailers in the United States. The majority of  
17 them would be single-store ownership, with only  
18 one location. But there are chains, Guitar Center  
19 being the largest, and they're in excess of 100  
20 stores.

21 Q. Okay. And in those large stores like  
22 Guitar Center and Sam Ash, you're saying they  
23 would be selling amplifiers, in other words,  
24 electronics, and they'd be selling all different  
25 types of instruments; is that correct?

1 A. Well, yes, they would. They have  
2 departments. They would have a guitar department  
3 that would sell guitar products and related  
4 accessory items. They would have a percussion  
5 area that would sell drums and symbols and snare  
6 drums and all those related products. They would  
7 have a keyboard area that would sell all the  
8 keyboard product. And then they would have an  
9 electronics area that would sell the majority of  
10 the their electronic product.

11 Q. Okay. Would the electronics products  
12 include, let's say, an effects processor?

13 A. Well, yes. I mean, they would sell  
14 effects processors. It's a question of where that  
15 would be displayed. It could be displayed with  
16 the guitars or it could be displayed in a separate  
17 area with the other electronics product.

18 Q. So are some of the accessories for  
19 guitars sold in a separate area in these stores?

20 A. Well, some are. But usually guitar  
21 accessory items would be sold at the guitar  
22 counter, which is kind of the center of activity  
23 in the guitar department, where you would have the  
24 guitars either on the wall, in front of the  
25 counter, in a kiosk, in a display area, what you

1 would call a riser. And you would have a counter  
2 with guitar pickups in the counter, and guitar  
3 related items and strings and other accessory  
4 items right there, strings and straps, everything  
5 to go along with the guitar, to outfit the guitar.

6 Q. Would these stores like Guitar Center and  
7 Sam Ash, would they also sell sheet music?

8 A. They would, but in a different area of  
9 the store. Guitar Center does not sell sheet  
10 music. Sam Ash would. Sam Ash is -- they're  
11 really one of the only retailers that would sell  
12 sheet music.

13 Q. Have you ever heard of a company called  
14 Roland, R-o-l-a-n-d?

15 A. Yes. They're a keyboard company.

16 (Document marked Exhibit G.)

17 BY MR. BODNER:

18 Q. Okay. I'd like to mark as Exhibit G a  
19 two-page document that at the top says, "Musicians  
20 Buy Musical Instruments." I'd like to show it to  
21 Mr. Berryman. Okay?

22 A. (Nodding head yes.)

23 Q. This document shows a "Roland EV7 EXP  
24 Pedal." Have you ever heard of that before?

25 A. No, I haven't.

1 Q. Do you know what that is?

2 A. Well, it looks to be an effects pedal. I  
3 don't know whether it's made to plug into one of  
4 their keyboards or one of their -- they do make a  
5 line of amplifiers that were primarily used with  
6 their keyboards. They sell some for guitar, but  
7 limited. But this -- this pedal doesn't say what  
8 it does, so I can't -- I can't tell if it -- you  
9 know, if it's made for a guitar to plug into it  
10 and then to plug into an amplifier, guitar  
11 amplifier. That I can't tell.

12 Q. What is an effects pedal?

13 A. Well, an effects pedal would introduce  
14 sound effects into the electronic signal from the  
15 guitar into the amplifier before the amplifier to  
16 change the sound. You can change the sound of an  
17 electronic guitar. The sound from the electronic  
18 pickup is passed through the amplifier. Many  
19 amplifiers have effects built into the amplifier  
20 itself. Some players prefer to have the effects  
21 foot controlled so that they don't have to go over  
22 and change knobs on the amplifier; they just step  
23 on the effect that they want as they're playing  
24 the instrument.

25 Q. Okay. And this effects pedal, is that

1 the same thing as an effects processor or similar  
2 to it?

3 A. Well, not necessarily. Most effects are  
4 analogue. But like an effects processor, when you  
5 introduce the name "processor," you get into  
6 "DSP," digital signal processing, which is the  
7 digital world, which a lot of amplifiers are  
8 digital. And so -- generally, though, it changes  
9 the sound. It modifies the sound that is being  
10 generated by a source, whether it be guitar or  
11 keyboard.

12 Q. So this effects pedal might be found in a  
13 music store such as Sam Ash; is that correct?

14 A. Yes, it may be. Yes. Although Roland is  
15 not known for effects pedals, nor did I even know  
16 they had any effects pedals.

17 Q. Okay.

18 MR. LANQUIST: I want to object to  
19 Exhibit G on the grounds that it was not  
20 previously produced, that there is no foundation  
21 as to its authenticity, and that it's inadmissible  
22 hearsay.

23 (Document marked Exhibit H.)

24 BY MR. BODNER:

25 Q. Okay. I'd like to mark as Exhibit H a

1 document having several pages that has the  
2 notation "harshnoise.com" on it. And I'd like to  
3 show it to Mr. Berryman for his review. Have you  
4 ever heard of a company called Bixonic?

5 A. No. Never.

6 Q. This product that this document describes  
7 is a Bixonic Expandora II, that's  
8 E-x-p-a-n-d-o-r-a, and that's a Roman numeral II,  
9 EXP-2001.

10 Now, on page three of this document, or I  
11 should say the third page into this document,  
12 there's a much larger view of this. Have you ever  
13 seen this before?

14 A. No.

15 Q. Do you know what this is?

16 A. Well, it would appear to be an effects  
17 pedal, but the shape is certainly very unusual. I  
18 would have definitely read it if I saw it. And, I  
19 mean, that's what -- that's what it appears to be.

20 Q. Is this something that might be used with  
21 a guitar?

22 A. I would assume it would be, yes.

23 Q. Is this product also something that might  
24 be found in a music store?

25 A. Well, I would assume that -- I mean, this

1 harshnoise.com I've never heard of; but I assume  
2 they have some distribution of this product in  
3 music stores, yes. I mean, I would think so. It  
4 appears to be available. As to how broadly that  
5 availability is, is questionable.

6 Q. At the top of the third page with that  
7 expanded or enlarged view of that effects pedal it  
8 says, "Boston Guitar Works, Inc." And I believe  
9 they're in Massachusetts, Brockton, Massachusetts.  
10 Have you ever heard of Boston Guitar Works, Inc.?

11 A. No, I have not.

12 Q. You don't know if you sell guitars to  
13 Boston Guitar Works, Inc.; is that correct?

14 A. I don't believe we do.

15 Q. On the second to the last page of this  
16 document at the top of the page it says,  
17 "Musician's Friend." This also relates to the  
18 third page, the one preceding that page. It's  
19 musiciansfriend.com. Below that it says, "World's  
20 Largest Music Gear Company." Have you ever heard  
21 of musiciansfriend.com?

22 A. Yes, I have.

23 Q. How have you heard of them?

24 A. Well, we sell product to them.

25 Q. Is this a store or an Internet website?

1 A. It's an Internet website.

2 Q. Do you know what musiciansfriend.com  
3 sells?

4 A. Well, they sell just about everything in  
5 the music business. I think they have probably --  
6 generally, they told me, I believe, something like  
7 20,000 SKU's. It's huge, more than any store  
8 would sell, which you can effectively do if you're  
9 an Internet website. In a store you'd have a  
10 problem displaying all that. On an Internet  
11 website you're shipping from one warehouse to the  
12 consumers, so you can have that many SKU's.

13 Q. S-K-U apostrophe "s"?

14 A. S-K-U.

15 Q. The third page from the end of this  
16 document it lists some of the items that are sold  
17 by this company, Musician's Friend. I believe it  
18 says under "Books & Videos" it says, "Sheet Music"  
19 and it says "Recorded Music." Is that possible?

20 A. Well, of course it's possible. I mean,  
21 they sell -- Musician's Friend would typically  
22 sell much more product and essentially try to  
23 carry everything that's available in the  
24 marketplace to any musician, whether they be  
25 guitar player, drummer, keyboard player.

1 Q. And under the heading "Effects," it has  
2 "Single Effects" and "Multi Effects." Do you know  
3 what that means?

4 A. Well, "multi effects" would be a device  
5 that would introduce several effects in the same  
6 unit. So whether it be chorus or flanger or  
7 delay, modifying the sound of the instrument,  
8 whether again it would be guitar or keyboard or  
9 whatever.

10 Q. Did you ever hear of a company called  
11 megaguitars.com?

12 A. No.

13 MR. LANQUIST: I'm going to object to  
14 Exhibit H on the ground that there's no foundation  
15 as to its authenticity, that it's inadmissible  
16 hearsay, and was not previously produced.

17 (Document marked Exhibit I.)

18 BY MR. BODNER:

19 Q. Okay. I'd like to mark as Exhibit I a  
20 document that at the top says, "Equalizer." And  
21 it's several pages stapled together. I'd like to  
22 show it to Mr. Berryman.

23 A. Um-hum.

24 Q. Okay?

25 A. (Nodding head yes.)

1 Q. Do you know what an equalizer is?

2 A. Well, an equalizer typically is used in  
3 electronic equipment to modify the sound by the  
4 frequency of the sound.

5 Q. Okay. There's some bold print about  
6 one-third of the way down, and I believe it says  
7 "Expand to Peak Controller EXP/EX3." Do you see  
8 that?

9 A. Yes, I do.

10 Q. Right above it it says "For Electric  
11 Guitar," and then -- that's in brackets, and right  
12 next to it in brackets it says "For Bass Guitar."

13 A. Yes.

14 Q. So do you know what this is, this  
15 controller, expand to peak controller?

16 A. Do I know what it is or have I ever heard  
17 of it?

18 Q. Have you ever heard of it?

19 A. No, I have not.

20 Q. Have you heard of something similar to it  
21 used with guitars?

22 A. Not really. I mean, this -- this looks  
23 to be that they have some effects that they are  
24 incorporating into a control knob on the  
25 instrument itself rather than an effects pedal, or

1 rather than in the amplifier itself, and they're  
2 looking to mount this or have people mount it in  
3 the guitar itself.

4 Q. So this might be another effects  
5 processor, if you will?

6 A. Well, it looks to be. But I did not know  
7 that they were making this product or that it was  
8 available.

9 Q. It says, "Applications: Electric Guitar  
10 and Electric Bass Guitar." And also the first  
11 sentence says, "EXP is the combined equalizer that  
12 has three unique functions in one unit." And let  
13 me just read the next sentence. "First is the  
14 frequency expander, second is a mid-band peak  
15 control and third is a flat booster."

16 Is that in keeping with a type of effects  
17 processor?

18 A. Well, typically, you know, in a guitar  
19 you have bass, middle, treble. I mean, that's  
20 kind of your three-band EQ, like you'd have in  
21 stereo equipment. So, I mean, it's really  
22 changing -- changing the band width of the sound.  
23 It's manipulating it. But the company is Kimex  
24 Trading, and I know Kimex Trading. I did not know  
25 they offered this. But they are a Korean company

1 that we have had infringement issues with in the  
2 past.

3 Q. In the United States?

4 A. In the United States.

5 Q. In what -- in what respect?

6 A. Well, they had a line of guitars that  
7 copied several of our products; our Les Paul, I  
8 believe the Explorer, the Flying V, they copied  
9 the entire line of products many years ago. I'm  
10 not sure they're even in that business anymore.

11 Q. Okay. Are any of your guitars sold in  
12 stores where there might be a CD player, an MP3 CD  
13 player?

14 A. MP3 CD player? Possibly. Although I  
15 would make a general statement that guitar  
16 retailers typically would not sell that kind of  
17 product because they feel they cannot compete  
18 against electronic retailers such as Best Buy,  
19 Circuit City, places like that, where you would --  
20 you would be able to buy that product at probably  
21 less than what a music store retailer would want  
22 to sell it for.

23 Q. Okay. But it is possible?

24 A. It's possible, yes.

25 (Document marked Exhibit J.)

1 BY MR. BODNER:

2 Q. Okay. I'd like to mark as Exhibit J a  
3 three-page document that describes a Philips EXP  
4 303 MP3 CD Player. I'm just going to show it to  
5 Mr. Berryman.

6 A. Um-hum.

7 MR. LANQUIST: While Mr. Berryman is  
8 reviewing Exhibit J, I want to object to Exhibit I  
9 on the grounds there's been no demonstration of  
10 authenticity, that it was not previously produced,  
11 and it is inadmissible hearsay.

12 BY MR. BODNER:

13 Q. Have you ever heard of Philips before?

14 A. Yes.

15 Q. Okay. And what is Philips?

16 A. They're a very large Dutch electronics  
17 company that invented CD technology

18 Q. Have you ever heard of an MP3 CD player?

19 A. Yes. That plays the MP3 format of CD's.

20 Q. Have you ever heard of this model,  
21 Philips EXP 303 MP3 CD player?

22 A. No, I have not. I mean, this type of  
23 player I would think would be primarily sold at a  
24 Best Buy or Target store, maybe even Wal-Mart. It  
25 would sell Philips, Sony, RCA, all the basic big

1 consumer electronic products.

2 Q. Okay. Have you ever heard of a company  
3 called EXP Records?

4 A. No.

5 MR. LANQUIST: I want to object to  
6 Exhibit J on the grounds that there's been no  
7 foundation laid as to its authenticity, that it's  
8 inadmissible hearsay, and was not previously  
9 produced.

10 (Document marked Exhibit K.)

11 BY MR. BODNER:

12 Q. I'd like to mark that as Exhibit K. And  
13 this is just a one page blurb or abstract from a  
14 Google search, and it says "Google Search" at the  
15 top. And I just want to show it to Mr. Berryman.  
16 This describes EXP Records. I just want to see if  
17 that refreshes your recollection as to whether you  
18 ever heard of it before.

19 A. No, I haven't. No, I haven't heard of  
20 them at all. I would have recognized it because  
21 of the -- they have a capital "X" -- a small "e,"  
22 a capital "X," and a small "p". And, I mean, it  
23 probably would have registered if I would have  
24 ever seen it before, and I have not.

25 Q. Well, why do you say that would have

1 registered with you with that configuration?

2 A. Well, because I've never seen a record  
3 label do something like that.

4 Q. In other words, does it catch your eye  
5 with the capital "X"; is that what you're saying?

6 A. Well, it's unusual for any name of a  
7 product to start with a lower case letter, with an  
8 "e," with a small "e," because typically that's  
9 just -- that's not done. I can't recall too many  
10 companies that do that.

11 Q. Okay. Have you ever heard of a band or a  
12 group of musicians named EXP?

13 A. No.

14 MR. LANQUIST: I'm going to object to  
15 Exhibit K on the grounds that there's been no  
16 foundation laid to its authenticity, that it's  
17 inadmissible hearsay, and it was not previously  
18 produced.

19 (Document marked Exhibit L.)

20 BY MR. BODNER:

21 Q. I'd like to mark this as Exhibit L. It's  
22 a one-page document that in the upper left-hand  
23 corner says, "stonedgods.com". And I'd like to  
24 show it to Mr. Berryman. I just want to know if  
25 this refreshes your recollection at all if you've

1 ever heard of what appears to be a group E.X.P.

2 A. No. Never heard of them.

3 MR. LANQUIST: I want to object to  
4 Exhibit L on the grounds that there has been no  
5 foundation laid to its authenticity, that it's  
6 inadmissible hearsay, and it was not previously  
7 produced.

8 BY MR. BODNER:

9 Q. Does Wal-Mart sell guitars?

10 A. They do on their website. Very limited  
11 offering. They are starting, I think, to add a  
12 few instruments in their stores; but very, very  
13 limited.

14 Q. And Wal-Mart's would also sell accessories  
15 for guitars, I'm assuming; is that correct?

16 A. They typically do not. In the stores  
17 themselves?

18 Q. Or on their website.

19 A. Well, I would have to look. You know,  
20 that is -- that is not a retail channel that we  
21 sell into. You know, we're selling to the 1,000  
22 musical instrument stores throughout the U.S., so  
23 we do not have any dealings with Wal-Mart. I shop  
24 there as a consumer. I have never seen guitar  
25 strings or accessories or really guitars in the

1 Wal-Marts that I have shopped in. But they do  
2 generally offer, I believe, entry level electric  
3 and acoustic guitar packages to consumers for  
4 beginning players.

5 Q. Okay.

6 A. That may, I think, have strings and a  
7 strap and picks in one package.

8 MR. BODNER: Um-hum. Okay. Do you  
9 want to take a break, if you don't mind?

10 MR. LANQUIST: How much longer until  
11 we're done?

12 MR. BODNER: A couple of hours.

13 MR. LANQUIST: Okay. Let's go off  
14 the record.

15 (Off-the-record discussion.)

16 (Document marked Exhibit M.)

17 BY MR. BODNER:

18 Q. I'd like to mark as Exhibit M documents  
19 produced by Gibson under production numbers GIB  
20 00001 through 00004.

21 Mr. Berryman, could you take a look at  
22 that?

23 A. (Witness complies.)

24 Q. Mr. Berryman, can you describe what that  
25 document is?

1 A. It's an Epiphone U.S.A. retail price list  
2 dated July 1, 1998.

3 Q. Okay. And you've seen this document  
4 before, haven't you?

5 A. Yes.

6 Q. If you'd turn to the third page of the  
7 document, which is marked GIB 00003, at the top of  
8 the document is the notation, I-n-s-t-r, period,  
9 "Code."

10 A. Yes.

11 Q. Do you know what that stands for?

12 A. That's "Instrument Code."

13 Q. And what does "Instrument Code" mean to  
14 you?

15 A. Well, it's the -- it's the model  
16 designation of the instrument.

17 Q. Okay. So if you go down a little bit on  
18 that instrument code column, there's an "ENJRP."  
19 It's about ten lines down. Do you see that?

20 A. Yes.

21 Q. What does that mean to you, "ENJRP"?

22 A. Well, "ENJR" would be -- typically the  
23 "JR" is "Junior," which we have a junior and we  
24 also have a Special-II.

25 Q. But what is "Junior"?

1 A. "Junior" is a model of instrument.

2 Q. Okay.

3 A. Les Paul Junior.

4 Q. So how can you tell that -- you're saying  
5 that this represents also a Special-II?

6 A. Well, a Special-II is a Junior with two  
7 pickups instead of one pickup. Typically a Junior  
8 historically has one electronic pickup in it, so  
9 we have a version with two electronic pickups.

10 Q. Okay. So the "ENJRP" refers to a  
11 Special-II, and the other one you mentioned?

12 A. Well, it's the Junior family, yes, so  
13 it's a Junior with two pickups. And the "P" is  
14 for "Plus."

15 Q. Okay. On here, on this instrument code  
16 there's also an "ENL5." Do you know what that  
17 means, "ENL5"?

18 MR. LANQUIST: Objection. Relevance.  
19 Counsel, you're fishing, and this is not a  
20 discovery deposition. Can you explain the  
21 relevance, please?

22 MR. BODNER: Yes. This has to do  
23 with -- well, this has to do with the use of your  
24 designations on your products.

25 MR. LANQUIST: On the EXP?

1 MR. BODNER: Yes, it does.

2 MR. LANQUIST: Okay. How?

3 MR. BODNER: It relates to all of  
4 this, how you're using the instrument code on your  
5 products.

6 MR. LANQUIST: Okay.

7 BY MR. BODNER:

8 Q. Please answer the question.

9 A. Well, the "ENL" was a designation that  
10 had to be developed for the Studio because the  
11 Studio model was a more recent addition to the  
12 Epiphone line, and we could not -- the naming  
13 convention was such that we couldn't call it  
14 "Studio" or with an "S" for "Studio" designation.

15 Q. I'm sorry. I don't follow that. Could  
16 you just explain that?

17 A. Well, the designations for Epiphone  
18 typically follow Gibson designations, except where  
19 the designation's already used and not available.  
20 So an alternate designation has to be developed.

21 Q. Okay. Is that the same with "EGJC," for  
22 example?

23 A. "EGJC"?

24 MR. LANQUIST: The Junior Double  
25 Cutaway at the top.

1 BY MR. BODNER:

2 Q. Is it hard to find these on the code?

3 A. Yes. Well, the print's a little small  
4 and I'm trying to strain here. I don't have my  
5 reading glasses.

6 Right. Junior Single Cutaway, right.

7 Q. Is "EBACL" another instrument code?

8 A. "EBACL." Yes.

9 Q. What does that stand for?

10 A. Well, the "L" indicates "left-handed," so  
11 it would be an Epiphone bass, Accu Bass. The "EB"  
12 is "Epiphone Bass," and "A" would be "Accu Bass,"  
13 and the "L" would be "left-handed."

14 Q. All right. I'll give you one more:

15 "EBFV."

16 A. Yes.

17 Q. What does that stand for?

18 A. That would be "Epiphone Bass Flying V".

19 Q. Okay. Have you ever -- well, that last  
20 one -- strike that.

21 EBFV, Epiphone Bass Flying V. Is  
22 "Flying V" a registered trademark of Gibson?

23 A. Yes.

24 Q. Okay. Have you ever sought registration  
25 of "EBFV"?

1 A. I believe we've sought registration of  
2 "FV".

3 Q. Of just "FV"?

4 A. Yes.

5 Q. Okay. Of the others that I mentioned to  
6 you, and we can have it read back, have you ever  
7 sought registration of any of those?

8 A. Well, we seek registration of our top  
9 selling models, which would be "LP," "SG," "EXP,"  
10 "FV," our basic model designations of our most  
11 popular selling instruments.

12 Q. So is "LP" registered, then?

13 A. I believe it is. Or it was -- I mean, I  
14 believe we would. I don't know what the current  
15 status is, but I believe we would have, yes.

16 Q. Do you see on this page next to any of  
17 these instrument codes a "TM" designation?

18 A. No.

19 Q. Do you know what "TM" stands for?

20 A. "Trademark."

21 Q. Next to any of these codes, do you see an  
22 "R" and a circle?

23 A. No.

24 Q. So of these codes, what you're saying is  
25 that some you seek -- well, you're saying you're

1 seeking trademark protection for some of these  
2 codes but not others; is that correct?

3 A. Well, are you talking about filing for  
4 federal registration --

5 Q. Yes.

6 A. -- of a designation?

7 Q. Yes. That's right.

8 A. Well, we would -- we would typically seek  
9 filing on our most popular selling models. It's  
10 not cost effective to seek it on every possible  
11 product that you ever sell. These are models that  
12 have a long history, 50 years of sales or more.  
13 And the most significant problem we have is people  
14 trying to benefit by the good will created from  
15 thousands and thousands of units sold over the  
16 years by using either the shape or the designation  
17 of the model to help sell a model that would look  
18 similar.

19 Q. So someone looking at this page, this GIB  
20 00003, would they know which models -- which  
21 instrument code designations you have sought  
22 trademark registration for or are registered and  
23 which you have not?

24 MR. LANQUIST: Objection. Calls for  
25 speculation as to what one person would know or

1 what one person would not know.

2 BY MR. BODNER:

3 Q. Can you tell from looking at this -- can  
4 you tell from looking at this whether certain  
5 models are -- certain instrument code designations  
6 are registered or applied for registration and  
7 which are not?

8 MR. LANQUIST; objection. Relevance.  
9 Counsel, how does that have anything to do with  
10 this case?

11 MR. BODNER: This has everything to  
12 do with this case.

13 MR. LANQUIST: Explain it to me,  
14 then.

15 MR. BODNER: No. I think we should  
16 go on.

17 MR. LANQUIST: No, because I'm going  
18 to instruct him not to answer because, counsel.  
19 You and I are both aware that registration is not  
20 necessary to obtain trademark protection in prior  
21 use interstate commerce.

22 MR. BODNER: The issue of whether you  
23 had registered your mark or trademarked your mark  
24 is very relevant.

25 MR. LANQUIST: But given that Gibson

1 is petitioning to cancel a mark based on prior use  
2 is totally irrelevant.

3 MR. BODNER: This has to do with how  
4 you're using the mark in commerce and how someone  
5 would perceive that mark as being used as a  
6 trademark.

7 MR. LANQUIST: And how is  
8 Mr. Berryman going to testify as to how someone  
9 else would perceive that that document would be  
10 perceived?

11 MR. BODNER: I'm asking him how he  
12 can tell from this document which ones are  
13 registered or applied for and which are not.

14 MR. LANQUIST: But again, it's not  
15 relevant as to whether Gibson has ever registered  
16 any of these marks.

17 MR. BODNER: I think it is relevant.

18 MR. LANQUIST: No, it's not.

19 MR. BODNER: Oh, very much so.

20 MR. LANQUIST: How?

21 MR. BODNER: Because I want to see  
22 how you can tell from this code itself, from this  
23 designation itself if it's registered or if it's a  
24 trademark of Gibson.

25 MR. LANQUIST: That's not your

1 question. The second part is not your question.  
2 We're not saying that Gibson has registered the  
3 EXP mark.

4 MR. BODNER: I said "or applied for  
5 registration."

6 MR. LANQUIST: Well, we're not saying  
7 that the fact that Gibson has applied for  
8 registration of the mark is particularly relevant.  
9 It's Gibson's prior use in interstate commerce  
10 that is particularly relevant, and that's it.

11 MR. BODNER: But this has to do with  
12 how it's perceived by whoever this list is going  
13 to, whether this is viewable as a trademark or as  
14 just a designation code.

15 MR. LANQUIST: That's not your  
16 question, then. Your question asked how does  
17 someone determine if the mark is registered or  
18 applied to be registered.

19 MR. BODNER: Or applied for. Can  
20 someone tell from this document whether that is  
21 true? Can Mr. Berryman tell from this document  
22 whether that's true?

23 MR. LANQUIST: And I'll say that is  
24 irrelevant, and you have not established whether  
25 it's relevant or not. You just keep saying that.

1 It is the use that is relevant; and whether  
2 someone can tell whether Gibson considers that a  
3 trademark, that is relevant. The fact that Gibson  
4 has or has not applied to register the mark is  
5 totally irrelevant.

6 MR. BODNER: Mr. Berryman testified  
7 there is no "TM" designation next to any of these  
8 instrument codes.

9 MR. LANQUIST: Correct.

10 MR. BODNER: Right. How can he tell  
11 whether any of these are trademarked?

12 MR. LANQUIST: Well, first of all,  
13 the term "trademark" is an improper use because  
14 it's either registered or not. The fact that  
15 Gibson used the mark in interstate commerce means  
16 that they are -- they have trademark protection in  
17 the market. That's all that means. "Trademark"  
18 is an incorrect verb.

19 MR. O'ROURKE: Would you repeat what  
20 he just said?

21 MR. LANQUIST: I'm sorry, are you  
22 part of this deposition?

23 MR. BODNER: Yes, he is. He's going  
24 to be asking questions, also.

25 MR. LANQUIST: No, he's not going to

1 be asking questions. I'll adjourn the deposition  
2 if he tries to ask questions. That is tag-teaming  
3 the witness and it's improper.

4 MR. BODNER: Tag-teaming is asking  
5 questions at the same time.

6 MR. LANQUIST: I tell you we're going  
7 to adjourn the deposition if he tries to ask one  
8 question.

9 MR. BODNER: We've put that on the  
10 record and that's fine.

11 MR. LANQUIST: That's fine.

12 MR. BODNER: You can could do that.  
13 That's your prerogative.

14 MR. LANQUIST: Okay.

15 MR. BODNER: Tag-teaming is when each  
16 person alternates asking the questions. We're  
17 allowed to break this up.

18 MR. LANQUIST: No, you cannot.

19 MR. BODNER: And I can stop in the  
20 afternoon and Mr. O'Rourke can do it.

21 MR. LANQUIST: No, you can't.

22 MR. BODNER: Yes, I can.

23 MR. LANQUIST: No. It is not allowed  
24 in Federal Court and it's not allowed before the  
25 TTAB.

1 MR. BODNER: It is allowed in Federal  
2 Court and we have done it. But that's your  
3 prerogative, and we call him and bring him up to  
4 New York, and we'll ask the questions again and go  
5 before the TTAB and have it resolved that way. No  
6 problem.

7 MR. LANQUIST: Okay.

8 MR. BODNER: Now I'd like you to read  
9 back the last statement that Mr. Berryman made.  
10 I'm sorry, that Mr. Lanquist made.

11 THE COURT REPORTER: I don't know how  
12 long it would take me to find it.

13 MR. BODNER: Let's just go back to  
14 the question.

15 Q. On this page three that's GIB 00003,  
16 underneath the Instrument Code column, next to  
17 each instrument code on this entire page you  
18 stated there is no "TM" notation; is that correct?

19 A. Yes.

20 Q. All right. On this page, underneath the  
21 Instrument Code, there is "EXP2"; do you see that  
22 there?

23 A. Yes.

24 Q. Okay. How can someone tell that "EXP2"  
25 is considered a trademark of Gibson guitar?

1 MR. LANQUIST: By whom?

2 MR. BODNER: From looking at this  
3 page.

4 MR. LANQUIST: As considered a  
5 trademark by whom?

6 MR. O'ROURKE: By Gibson Guitar.

7 MR. LANQUIST: Counsel, I object to  
8 your involvement in this deposition again.

9 MR. BODNER: Okay. You can ask me  
10 the question. By Gibson Guitar.

11 MR. LANQUIST: Okay. And how is that  
12 relevant?

13 MR. BODNER: I'm not going to go  
14 through this again. This is very relevant in the  
15 sense that someone looking at this -- you're using  
16 this and you're saying that "EXP" is a mark, and  
17 you referred to it as a mark on this price list,  
18 okay? Now I'm asking how can someone tell by  
19 looking at this whether this is a trademark of  
20 Gibson Guitar.

21 MR. LANQUIST: Okay. I'm going to  
22 let the witness answer. But whether or not  
23 someone can determine whether Gibson considers  
24 this a mark or not, is irrelevant.

25 But go ahead.

1 THE WITNESS: Well, they couldn't,  
2 because there's no markings on this page.

3 BY MR. BODNER:

4 Q. Okay. And that would be the same  
5 conclusion for any other designation code under  
6 the instrument code that Gibson considers to be a  
7 trademark on this list; is that correct?

8 A. Well, yes. On the model or the  
9 instrument code.

10 Q. Can you go to page 00004? And under the  
11 heading "Professional Instrument Amplification"  
12 and under the subheading "Model," "Audio  
13 Accessories," there is an FS-100, and the model  
14 code says "EPAFS100." Can you describe what that  
15 is?

16 A. Well, it's a foot switch.

17 Q. Okay. What is a foot switch?

18 A. It's a -- it's a switch to turn on and  
19 off the amplifier.

20 Q. Using your foot?

21 A. Using your foot. It's a simple on/off  
22 switch.

23 Q. Is that similar to that switch, that  
24 pedal that's used by or sold by Roland?

25 A. No.

1 MR. LANQUIST: Objection, because  
2 there's been no proof that it was actually sold or  
3 used by Roland.

4 MR. BODNER: Well, the Roland  
5 document that I showed you.

6 MR. LANQUIST: Objection. There's  
7 been no proof that there was a Roland document.

8 MR. BODNER: We showed Mr. Berryman a  
9 document.

10 MR. LANQUIST: And the document had  
11 some information in it, but there was no  
12 foundation laid as to what information was  
13 contained in there or if it was a true document.

14 MR. BODNER: I believe he testified  
15 that he saw --

16 MR. LANQUIST: If your testimony is  
17 whether it's an effects pedal or not, then that's  
18 fine. I mean, if your question is is this pedal  
19 similar to an effects pedal, then that's a good  
20 question. But if you're asking him to make  
21 reference to a Roland document that he has no  
22 knowledge about, then that's another question.

23 MR. BODNER: Well, he does have  
24 knowledge of the Roland document since I showed it  
25 to him; but I'll ask the question just to move

1 this along.

2 Q. Is that similar in some respects to the  
3 Roland EV7 EXP pedal?

4 MR. LANQUIST: First of all, I  
5 object, because he's testified that he didn't know  
6 anything about the Roland EV7 EXP pedal.

7 BY MR. BODNER:

8 Q. Well, is this similar to an effects  
9 pedal?

10 A. No.

11 Q. What is the difference between the two?

12 A. This is an on/off switch. It turns the  
13 amplifier on; it turns the amplifier off.

14 Q. Okay. But it's still a foot switch?

15 A. It's a switch, but it does not change the  
16 sound of the amplifier or the audio signal going  
17 into the amplifier from the guitar.

18 Q. This is an accessory that's still used  
19 with a guitar; is that correct?

20 A. Well, it's an accessory that is used with  
21 the amplifier to make it convenient to turn an  
22 amplifier on or off.

23 Q. Is it plugged into the amplifier or into  
24 the guitar?

25 A. Into the amplifier.

1 Q. It's used with guitars and amplifiers?

2 MR. LANQUIST: I think he's testified  
3 twice it's used in connection with an amplifier.

4 BY MR. BODNER:

5 Q. Yes. But is it also used in connection  
6 with a guitar?

7 A. Well, it wouldn't be used for the guitar.

8 Q. So it's never been used in connection  
9 with a guitar?

10 A. Well, it's used -- it's like an on/off  
11 switch that is on the unit, except it makes it  
12 easy to turn it on or off without having to touch  
13 the unit.

14 Q. Okay. The amplifier that this would be  
15 used with, would guitars be plugged into that  
16 amplifier?

17 A. Well, they can be, yes.

18 Q. This document exhibit -- whatever it is.  
19 Just flip it over.

20 A. "M".

21 Q. Exhibit M, the suggested retail prices,  
22 GIB 00001 through 4, this is marked  
23 "Confidential." Has this been shown to consumers?

24 A. Yes.

25 Q. Why is it stamped "Confidential"?

1 MR. LANQUIST: Because our paralegal  
2 made a mistake.

3 THE WITNESS: We don't stamp them  
4 "Confidential."

5 BY MR. BODNER:

6 Q. I understand. What consumer was this  
7 shown to?

8 A. Any consumer that would send into the  
9 company and request the price list.

10 Q. Do you have a specific name?

11 MR. LANQUIST: First of all, I want  
12 to object to the term "consumer," because the  
13 definition of "consumer" means dealers as well as  
14 the person who buys it and takes it home and plays  
15 it.

16 MR. BODNER: Okay.

17 Q. Well, let's just talk about this. Has  
18 this been shown to any dealers?

19 A. Yes.

20 Q. Okay. What dealer was this shown to?

21 MR. LANQUIST: Do you want him to  
22 list all 800?

23 MR. BODNER: I'll take a few.

24 MR. LANQUIST: Okay.

25 THE WITNESS: Well, a good starting

1 point would be the invoices that we have to those  
2 U.S.A. domestic dealers from 1998, 1999, 2000. At  
3 a minimum, it would be those dealers that have  
4 purchased the product.

5 BY MR. BODNER:

6 Q. Okay. So those dealers have seen this  
7 suggested -- this suggested retail price list?

8 A. Yes.

9 Q. What about the end user, the guitar  
10 player who actually purchases the guitar from the  
11 dealer; has this been shown to an end user?

12 A. Well, it could have been. If consumers  
13 call us and want a price list and say, "Here's my  
14 address, send me a price list," we drop it in the  
15 mail to them.

16 Q. Do you know if this has occurred?

17 A. Yes.

18 Q. Can you name a consumer -- I'm sorry.  
19 Can you name an end user that you've sent this to?

20 A. Not offhand, no. I mean, the mailing  
21 label is written out by the person and put on an  
22 envelope and away it goes. There's no reason to  
23 keep a record of that, typically.

24 Q. Can you get me the name of an end user  
25 who you have mailed this to?

1 MR. LANQUIST: Objection.  
2 Irrelevant. Discovery is closed in this case, so  
3 whether he can or can't is irrelevant to the  
4 issues before the Board.

5 MR. BODNER: Okay. I'm just putting  
6 this on the record. This is a request.

7 MR. LANQUIST: It's -- we're done  
8 with requests. This is a testimony deposition.

9 MR. BODNER: Okay. It wasn't  
10 produced before; but, okay, I'm putting it on the  
11 record.

12 MR. LANQUIST: I don't think you  
13 requested it before. But if you want to get into  
14 whether documents should have been produced or not  
15 produced, we'll be happy to fight that battle on  
16 Exhibits A through L.

17 MR. BODNER: That's fine.  
18 Q. Do you have a list of consumers that  
19 you've mailed these retail price lists to?

20 MR. LANQUIST: Objection.  
21 Irrelevant. Again, this is not a discovery  
22 deposition; this is a testimony deposition.

23 MR. BODNER: I understand. But this  
24 gets to the point of who is actually reviewing,  
25 seeing this use of "EXP1" and "EXP2" from the

1 price list. You --

2 MR. LANQUIST: And you are entitled  
3 to get that information during discovery. And if  
4 you had taken his deposition during discovery, we  
5 could have gone into these issues. But you did  
6 not, and we will not.

7 MR. BODNER: Okay. On cross you  
8 raised this. You have this as an exhibit, and you  
9 said that these were supplied to consumers.

10 Q. I'm trying to find out what consumers you  
11 supplied this to.

12 MR. LANQUIST: And if you had taken  
13 this deposition during discovery, you would have  
14 been able to ask him those questions, but this is  
15 a testimony deposition. It's not a discovery  
16 deposition.

17 MR. BODNER: That's what I'm asking.

18 Q. I'm entitled to find out exactly what  
19 consumers you sent this to.

20 MR. LANQUIST: And he said that he  
21 sent it to consumers, and now you're saying does  
22 he have a list.

23 MR. BODNER: Does he have a list?

24 MR. LANQUIST: And what we're saying  
25 is it's too late in the proceeding for you to get

1 a list.

2 MR. BODNER: So are you telling him  
3 not to answer the question of whether he has a  
4 list of consumers that you've mailed this  
5 suggested retail price list to?

6 MR. LANQUIST: Go ahead.

7 MR. BODNER: Thank you.

8 THE WITNESS: I have not kept a list  
9 of names and addresses of people that it was sent  
10 to, no.

11 BY MR. BODNER:

12 Q. So right now your testimony is that you  
13 could not tell what consumers you sent this list  
14 to; is that correct?

15 MR. LANQUIST: No, it's not correct,  
16 because he's already testified that a good place  
17 to start where he sent that to would be to look at  
18 those invoices from 1998 and 1999. Those  
19 consumers received that price sheet.

20 MR. BODNER: But those consumers were  
21 retailers or wholesalers or distributors.

22 MR. LANQUIST: Your question was, So  
23 you can't tell me at this point in time which  
24 consumers that was sent to, and that is a  
25 mischaracterization of what he said.

1                   MR. BODNER: I think it's correct.  
2 He can't tell me today what consumers that was  
3 sent to and users that was sent to; is that  
4 correct?

5                   MR. LANQUIST: That wasn't your  
6 question.

7                   MR. BODNER: Well, that's my  
8 question.

9 Q.               Can you tell me today what end users this  
10 price list was sent to?

11 A.              Of the 300 million people in the United  
12 States, what people this got mailed to? I cannot  
13 tell you. But I can -- I can assure you that it  
14 was sent to anybody that requested it from our  
15 company.

16 Q.              But 300 million did not request this from  
17 your company; is that correct?

18 A.              We did not print 300 million of these,  
19 no, I can assure you.

20 Q.              Of the 300 million that you just referred  
21 to, 300 million did not request a suggested retail  
22 price list from you; is that correct?

23 A.              I would say that's probably correct, yes.

24 Q.              All right. Do you think it's one or two?  
25 Can you give me a number?

1 A. Oh, it's more than one or two.

2 Q. How many do you think it is on a yearly  
3 basis?

4 A. That I don't know, but it's -- it's a lot  
5 of people.

6 Q. And you don't keep records of who this is  
7 sent to; is that correct?

8 MR. LANQUIST: Objection. Asked and  
9 answered. Do you want him to answer again?

10 MR. BODNER: Yes.

11 MR. LANQUIST: Are you saying do they  
12 keep a list of end consumers, or end users, or  
13 consumers.

14 MR. BODNER: End users.

15 MR. LANQUIST: Okay.

16 Do you keep a list or not?

17 THE WITNESS: No.

18 BY MR. BODNER:

19 Q. Would anyone else at Gibson keep a list?

20 MR. LANQUIST: If you know.

21 THE WITNESS: Well, I don't know.

22 BY MR. BODNER:

23 Q. What department at Gibson would handle  
24 this?

25 A. Typically, the Customer Service

1 Department.

2 Q. Do you know how many of these are printed  
3 up? This is exhibit whatever it is, 00001 through  
4 00004.

5 A. Several thousand. The exact number, I do  
6 not know; but several thousand.

7 Q. Okay.

8 A. We usually -- we can do multiple  
9 printings as we run out.

10 (Document marked Exhibit N.)

11 BY MR. BODNER:

12 Q. I'd like to mark as Exhibit N a document  
13 that states at the top "Epiphone Supplemental  
14 Price List," and it's marked with production  
15 number GIB 00005. And I'd like to show it to  
16 Mr. Berryman.

17 Okay. Are you familiar with that  
18 document?

19 A. Yes, I am.

20 Q. Okay. This is stamped "Confidential."  
21 Is this document confidential?

22 A. This is not a stamp that we would use,  
23 no, so I believe it's from the law firm.

24 Q. Is this something that is supplied to  
25 purchasers of guitars?

1 A. Yes.

2 Q. I'm not talking about dealers, I'm  
3 talking about end users.

4 A. (Nodding head yes.)

5 Q. The consuming public, if you will.

6 A. Yes.

7 Q. Do you send this to the consuming public  
8 by a mailing?

9 A. On request.

10 Q. Only if they request it?

11 A. Yes.

12 Q. What does "Family Code" mean?

13 A. It's the product or the instrument. It's  
14 the same as the instrument code in the other price  
15 list.

16 Q. Okay. Is "EXP1" listed as a Family Code?

17 A. Yes, it is.

18 Q. And so is "EFD1"?

19 A. Yes.

20 Q. Okay. And "EEP7"?

21 A. Yes.

22 Q. And "EA20"?

23 A. Yes.

24 Q. I'd like you to look down the "Family  
25 Code" column, and are there any designations there

1 that are marked with a "TM"?

2 A. No.

3 Q. Are there any marked with an "R" and a  
4 circle?

5 A. No.

6 Q. I take it, then, that you're saying this  
7 was supplied to the consumer, and I'm saying the  
8 "consuming public," and that again your attorneys  
9 made a mistake in stamping this "Confidential"; is  
10 that correct?

11 A. Well, the stamp "Confidential" had to be  
12 a stamp that was added afterwards, I think, for  
13 purposes of this exhibit. It's not part of the  
14 original document that was copied and sent out to  
15 our network of U.S.A. dealers and consumers upon  
16 request, no.

17 (Document marked Exhibit O.)

18 BY MR. BODNER:

19 Q. Okay. I'd like to mark as Exhibit O an  
20 invoice with the Gibson document production number  
21 GIB 00006, and I'd like to show it to  
22 Mr. Berryman. Do you recognize this document?

23 A. Yes. It's a copy of an invoice  
24 evidencing the shipment of an Explorer guitar.

25 Q. Okay. To whom?

1 A. To Moeller Music in Franklin, Ohio.

2 Q. May I see that for one second?

3 A. (Document tendered.)

4 Q. Okay. We can use that. The document  
5 number, the production number is GIB 00007 on  
6 that. And what does the product number mean on  
7 that document?

8 A. Well, it means the guitar model that was  
9 shipped to the dealer.

10 Q. And what does it say under "Product  
11 Number"?

12 A. "EXP1EBCT1."

13 Q. Okay. One, two, three -- how many  
14 letters and numbers are in that product number  
15 altogether?

16 A. Well, in combination, it's seven letters  
17 and two numbers.

18 Q. Okay. And they're all the same size?

19 A. Yes.

20 Q. Okay. And no one letter or number is in  
21 bold or -- is in bold, I'll leave it at that; is  
22 that correct?

23 A. They appear to be all the same font and  
24 size, yes.

25 Q. Okay. So "EXP1" is not bold with respect

1 to the whole product number; is that correct?

2 A. No.

3 Q. Moeller Music, is that a dealer?

4 A. Yes.

5 Q. Would an invoice like this -- has an  
6 invoice like this ever been shipped to an end  
7 user, the consuming public?

8 MR. LANQUIST: Objection to the term  
9 "consuming public" equating it to "end user." The  
10 "consuming public" includes the dealer as well as  
11 end users.

12 MR. BODNER: Okay. When I refer to  
13 the "consuming public," I'm referring to really  
14 the end user. The one who's going to be playing  
15 the guitar.

16 MR. LANQUIST: Then why don't you  
17 refer to that as the "end user" as opposed to the  
18 "consuming public," which means something else?

19 MR. BODNER: All right. We'll do it  
20 that way. We don't agree with that, but to us the  
21 consuming public is the end user. The one who is  
22 ultimately going to purchase the guitar from the  
23 dealer.

24 Q. But just to move this deposition along,  
25 has this ever been shipped to a consumer who will

1 be playing the guitar? Has an invoice ever been  
2 shipped -- I take that back. Strike that.

3 This invoice in particular is going to a  
4 dealer not to a consumer who will ultimately  
5 purchase and play the guitar; is that correct?

6 A. Well, that appears to be the case.  
7 Moeller Music, no individual at Moeller Music is  
8 specified on it, so....

9 Q. Okay. I guess what I'm getting at is:  
10 This document is also stamped "Confidential." Is  
11 there a reason for this being confidential?

12 A. No. Again, I believe that's the stamp  
13 from our law firm, Waddey & Patterson.

14 MR. LANQUIST: Actually, I do want to  
15 interject that the purpose behind the protective  
16 order was so that, for example, if you did not --  
17 if your client did not already know the existence  
18 of Moeller Music, they could not go out and sell  
19 to Moeller Music, so that's the reason why this is  
20 actually confidential.

21 (Document marked Exhibit P.)

22 BY MR. BODNER:

23 Q. Okay. I'd like to mark as Exhibit P an  
24 invoice with the document production number GIB  
25 00006, and I'll show it to Mr. Berryman. Do you

1 recognize this document?

2 A. It -- it's an invoice dated February 1,  
3 1998, to Guitar Center.

4 Q. Okay. And what is Guitar Center?

5 A. A large musical instrument retailer in  
6 the United States.

7 Q. Okay. What is the product number for  
8 this product that was sold to Guitar Center?

9 A. "EXP1EBCH1."

10 Q. I believe that's "CT1"?

11 A. Or, I'm sorry, "CT1".

12 Q. Okay. Is there any space between any of  
13 the letters or numbers in that product number?

14 A. No.

15 Q. And how many letters altogether and  
16 numbers are in that product number?

17 A. Nine.

18 Q. Is any portion of that product number in  
19 bold?

20 A. No.

21 Q. Is "EXP1" in bold?

22 A. No.

23 Q. Is there a "TM" next to that product  
24 number used on that invoice?

25 A. No.

1 Q. And there's no "R" and a circle next to  
2 that product number; is that correct?

3 A. That's correct.

4 (Documents marked Exhibit Q.)

5 BY MR. BODNER:

6 Q. Okay. I'm going to mark as Exhibit Q  
7 several invoices that have the document production  
8 number GIB 00008 through GIB 00022, and I'm going  
9 to show it to the witness. I'd like you to review  
10 this, please, Mr. Berryman.

11 A. (Witness complies.)

12 Q. Okay. Do you recognize these documents?

13 A. Yes.

14 Q. Okay. And can you explain what these  
15 documents are?

16 A. They're all invoices from Epiphone  
17 evidencing shipment of Explorer guitars, and in  
18 some cases Explorers plus other instruments.

19 Q. If you look through the invoices in this  
20 exhibit, are all of these guitars shipped to a  
21 dealer?

22 A. Yes, it appears that is the case. Well,  
23 yeah. I mean, the first is Deutsche Financial,  
24 which is a bank --

25 Q. Okay.

1 A. -- but all the other ones appear to be  
2 dealers.

3 Q. Now, on any of these invoices, under  
4 "Product Number," is the "TM" used?

5 A. No.

6 Q. On any of these invoices is "EXP" ever  
7 used alone without any other numbers or letters  
8 next to it or before it?

9 A. No.

10 Q. Is an "R" and a circle used after any of  
11 these product numbers?

12 A. No.

13 Q. Is "EXP" used on any of these invoices in  
14 bold?

15 A. No.

16 Q. Or in larger letters?

17 A. No. Everything on the invoice appears to  
18 be the same size letters.

19 Q. Now, on the other invoices that we  
20 discussed before and that we marked as exhibits,  
21 has "EXP" ever been used alone in your product  
22 number on any of those invoices?

23 A. Not on the ones you've shown me, no.

24 Q. On any of these invoices, is there any  
25 designation that you consider indicates "EXP" to

1 be a trademark of Gibson Guitar?

2 A. Well, I consider it to be a trademark of  
3 Gibson Guitar.

4 Q. Well, could you read back my question,  
5 please?

6 THE COURT REPORTER: "On any of these  
7 invoices, is there any designation that you  
8 consider indicates 'EXP' to be a trademark of  
9 Gibson Guitar?"

10 BY MR. BODNER:

11 Q. If you understand my question, is there  
12 any notation or any indication on these invoices  
13 that "EXP" is a trademark of Gibson Guitar?

14 A. Well, I mean, not being a lawyer, but as  
15 a businessman I would say, yes, I consider "EXP"  
16 to be a trademark of Gibson Guitar.

17 Q. I asked -- I'm sorry. Maybe I'm  
18 confusing you. Is there a designation -- you  
19 already testified there is no "R" and a circle or  
20 "TM" next to the product number. What I'm asking  
21 you is that is there anything else written on  
22 these invoices that says in effect that "EXP" is a  
23 trademark of Gibson Guitar?

24 A. Well, there's no other statement on these  
25 invoices, no.

1 (Document marked Exhibit R.)

2 BY MR. BODNER:

3 Q. Thank you. I'd like to mark as Exhibit R  
4 a one-page document, GIB 00023. Have you ever  
5 seen that document before?

6 A. No.

7 Q. Are you familiar with what it is?

8 A. It appears to be a retail price list  
9 dated June 1, 1982.

10 Q. Do you know if this is only a one-page  
11 document?

12 A. No, I do not.

13 Q. Do you know if the Explorer guitar was  
14 sold in 1982?

15 A. I believe it was, yes.

16 Q. Is the Explorer guitar noted anywhere on  
17 this price list?

18 A. Well, it's listed under "Solid Body  
19 Series," "The Explorer."

20 Q. Okay. Is "EXP" used on this price list  
21 anywhere?

22 A. No.

23 (Document marked Exhibit S.)

24 BY MR. BODNER:

25 Q. Okay. I'd like to mark as Exhibit S a

1 two-page document having production numbers 00024  
2 and 00025. I'd like to show it to the witness.  
3 And do you know what this document is?

4 A. It would appear to be a retail price list  
5 dated June 15th, 1983.

6 Q. Was the Explorer guitar sold in 1983?

7 A. It should have been, yes.

8 Q. Okay. Is it listed anywhere on this  
9 price list?

10 A. It appears to be in several places:  
11 "Explorer Korina," "The Explorer," "Explorer 83,"  
12 "Explorer Case."

13 Q. Okay. Can you tell me if "EXP" is used  
14 anywhere on this price list?

15 A. No.

16 (Document marked Exhibit T.)

17 BY MR. BODNER:

18 Q. Okay. I'd like to mark as Exhibit T a  
19 three-page document with production numbers 00026  
20 through 00028, and I'd like to have Mr. Berryman  
21 take a look at it. Mr. Berryman, do you know what  
22 this document is?

23 A. It appears to be a retail price list  
24 dated January 15th, 1984.

25 Q. Do you know if the Explorer guitar was

1 sold in 1984?

2 A. It should have been, yes.

3 Q. Is the Explorer guitar listed anywhere on  
4 this price list?

5 A. It's listed on the second page of what  
6 you gave me: "Explorer 83," "Explorer CMT" and  
7 "Explorer Case."

8 Q. Do you know if "EXP" is used anywhere on  
9 this price list?

10 A. It doesn't appear to be, no.

11 (Document marked Exhibit U.)

12 BY MR. BODNER:

13 Q. Okay. I'd like to mark as Exhibit U a  
14 one-page document having production number 00029.  
15 I'll show it to the witness. Do you know what  
16 this document is?

17 A. It appears to be a Gibson retail price  
18 list dated June 23, 1984.

19 Q. Okay. Do you know if there's more to  
20 this price list than just this one page?

21 A. No, I do not. I would assume there is;  
22 but that was before I got involved in the company,  
23 and I do not have a copy of this, nor did I  
24 prepare it, so I cannot say.

25 Q. Okay. But I'm assuming that a price list

1 would have prices of Gibson products; is that  
2 correct?

3 A. It should, yes.

4 (Documents marked Exhibit V.)

5 BY MR. BODNER:

6 Q. I'd like to mark as Exhibit V several  
7 documents starting with production numbers GIB  
8 00030 through GIB 00035.

9 Hold on one second. Well, I'll let you  
10 look at this for now. Can you recognize what this  
11 document is?

12 A. It's a Gibson retail price list dated  
13 October 15th, 1986.

14 Q. Okay. Was the Explorer guitar sold in  
15 1986?

16 A. Yes.

17 Q. Do you know if it's listed anywhere on  
18 this price list?

19 A. It's listed under the "Designer  
20 Collection," "Explorer" and "Explorer 400".

21 Q. Okay. Anywhere else on this price list?

22 A. I don't believe so. Oh, under basses,  
23 yeah, on page GIB 00033, "Explorer/Exp. Bass".

24 Q. Okay. What does E-x-p, period, Bass  
25 refer to?

1 A. It would be the case, the guitar case  
2 that the Explorer would fit in. It's the Explorer  
3 case.

4 Q. Okay. Oh, so that's under the  
5 designation "Model," slash, "Case"; is that  
6 correct?

7 A. Yes. Correct.

8 Q. May I just see your copy for one second?  
9 I want to staple it together, too. But before I  
10 do, I want to make sure I don't have two -- I do  
11 have two price lists together. Okay. We can do  
12 that. That's all right.

13 On the -- on document production number  
14 00034 and 00035, can you describe what this is?

15 A. Yes. It's a Gibson retail price list  
16 dated March 31, 1987.

17 Q. Okay. Now, the Explorer guitar was sold  
18 in 1987, I assume; is that correct?

19 A. I believe so, yes.

20 Q. All right. If you turn to the second  
21 page of that, that's -- I guess that's 00035, at  
22 the bottom, under "Designer Collection" --

23 A. Yes.

24 Q. -- is the Explorer shown there?

25 A. Yes, it is.

1 Q. Okay. There's a Family Code next to it.  
2 Can you just read what that Family Code is?

3 A. Well, it's cut off, so it's difficult to  
4 tell. I assume it's a -- might have a "D" in  
5 front of it. "DSX".

6 Q. Okay. I'll have to get you a better copy  
7 of that, but there is a "D" in front of it. And  
8 it looks like "DSX8," since your copy is not good.  
9 Do you know what that means?

10 A. The "DS" would probably be "Designer  
11 Series."

12 Q. So why wouldn't "EXP1" or "EXP2" be used  
13 under the family code in connection with that  
14 Explorer guitar?

15 A. Well, that I do not know.

16 Q. Can you have multiple designations --  
17 strike that. Can you have multiple family codes  
18 for different -- for the same guitar?

19 A. No, should not, unless it's a different  
20 instrument.

21 Q. Is the Designer Series Explorer guitar  
22 different from a regular Explorer guitar?

23 A. Well, it could be. I mean, the models  
24 have changed over the years. The product offering  
25 has changed. Even some of the names generally

1 have changed. You see "Explorer 58," and this and  
2 that. Just like the Les Paul and everything else,  
3 the instruments have evolved, and so that -- that  
4 has changed.

5 Q. Okay. After Explorer there's a slash and  
6 it says E-x-p-l, period.

7 A. Um-hum.

8 Q. Is that short for Explorer?

9 A. That most likely would be an abbreviation  
10 for Explorer, yes.

11 Q. Or does that stand for the case? It says  
12 at the top "Model," slash, "Case".

13 A. It would probably be the case, yes. It  
14 would be the Explorer case.

15 Q. So if you looked two from the top, it  
16 says "DSIN" family code, "Invader," slash,  
17 "Pro II," Roman numeral II. That would be a model  
18 Invader and the case Pro II?

19 A. Yes. Gibson had at that time a Pro II  
20 case.

21 Q. Okay. So that's what -- that's how  
22 you're designating it, with a slash?

23 A. Um-hum.

24 Q. And the model would represent the guitar  
25 and the case would represent what the guitar goes

1 into; is that correct?

2 A. Yes.

3 (Document marked Exhibit W.)

4 BY MR. BODNER:

5 Q. Okay. I'm going to mark as Exhibit W a  
6 two-page document, 00036 through 00037, Gibson's  
7 document production numbers. I'm going to staple  
8 it so it doesn't fall apart. There.

9 If you would take a look at that,  
10 Mr. Berryman, I would appreciate it.

11 A. (Witness complies.)

12 Q. And do you recognize what this is?

13 A. A Gibson retail price list dated  
14 October 3 of 1998, it would appear. It's a little  
15 cut off at the bottom, but I would say it's '98.

16 Q. I know. That's the way we got it, and  
17 it's a little hard to read, but I agree there.

18 The Explorer guitar was sold in 1998; is  
19 that correct?

20 A. Yes, that's correct.

21 Q. Okay. Can you find it on this price  
22 list?

23 A. Yes. It's under the "Gibson Designer  
24 Collection," "Explorer 90."

25 Q. Okay. Is "EXP" used anywhere on this

1 document?

2 A. "EXP" by itself, no.

3 Q. There is "Expl 90," and I -- after the  
4 slash, and I assume that's the case that the  
5 guitar goes into; is that correct?

6 A. That's correct.

7 (Documents marked Exhibit X.)

8 BY MR. BODNER:

9 Q. Okay. I have a series of additional  
10 invoices that I'd like to mark Exhibit X. And it  
11 starts with GIB 00038 and it goes through 00053.  
12 And again, I'm going to staple it so we don't lose  
13 track of it. There you go.

14 And, if you could, review those and let  
15 me know what they are.

16 A. Well, they're invoices to dealers  
17 evidencing the shipment of product.

18 Q. Okay. And if you'd just take a look at  
19 00038, that's the first one --

20 A. Right.

21 Q. -- in this exhibit. Can you just tell me  
22 what the product number is that's listed?

23 A. It's "EXP1EBCH" or "CT1".

24 Q. I want you to look through these  
25 invoices. Do all the product numbers -- I should

1 say on any of the product numbers listed, is "EXP"  
2 used alone?

3 A. It does not appear to be.

4 Q. So under the product number, generally  
5 the code that's used in relation to the Explorer  
6 guitar is about an eight or nine or ten digit code  
7 with letters or numbers.

8 A. Yes. The model is "EXP," Explorer. "EB"  
9 is ebony, and "CT" is chrome tremolo, so that  
10 would describe the instrument.

11 Q. And what would the "1" be after "CT"?

12 A. "First Quality".

13 (Document marked Exhibit Y.)

14 BY MR. BODNER:

15 Q. Okay. I'd like to mark as Exhibit Y a  
16 two-page document with production numbers 00054  
17 and 00055. I'll show it to Mr. Berryman.

18 Okay. Are you familiar with this  
19 document?

20 A. Yes.

21 Q. Can you tell me what it is?

22 A. Epiphone retail price list dated  
23 February 1st, 1995.

24 Q. Okay. Is the Explorer listed anywhere on  
25 this price list?

1 A. Yes, on the second page.

2 Q. Okay. And under "Instrument Code," what  
3 do you find?

4 A. "EXP1."

5 Q. Is there a "TM" next to "EXP1"?

6 A. No, there is not.

7 Q. Is there a "TM" listed on any of these  
8 codes listed on either of these two pages?

9 A. No.

10 Q. Is there an "R" and a circle listed next  
11 to any of these codes on these two pages?

12 A. No.

13 MR. LANQUIST: Are we at a good  
14 stopping spot?

15 MR. BODNER: Do you want to take a  
16 break?

17 MR. LANQUIST: Yeah, for just a  
18 couple of minutes.

19 MR. BODNER: Sure.

20 (Respite.)

21 (Document marked Exhibit Z.)

22 BY MR. BODNER:

23 Q. I'd like to mark as Exhibit Z a two-page  
24 document having production numbers 00056 and  
25 00057. I'd like to show it to Mr. Berryman,

1 please. Do you recognize this document?

2 A. Well, it doesn't have the logo on it, but  
3 I assume it's an Epiphone retail price list dated  
4 November 15th, 2001.

5 Q. This is the way we received it from your  
6 attorneys. Is the Explorer guitar mentioned  
7 anywhere on this price list?

8 A. Yes. It's mentioned on the second page:  
9 "1958 Explorer" and "1958 Korina Explorer."

10 Q. Okay. There is an instrument code across  
11 from the "1958 Korina Explorer".

12 A. Yes.

13 Q. Can you tell me what that instrument code  
14 is?

15 A. "EXP2."

16 Q. All right. And you said Explorer was  
17 mentioned somewhere else? Oh, there it is. I'm  
18 sorry.

19 A. Down below.

20 Q. Well, I was going to say right above it  
21 is a 1958 Explorer.

22 A. Yes. "1958 Explorer" and "1958 Korina  
23 Explorer."

24 Q. And the instrument code that is across  
25 from the 1958 Explorer, can you just tell me what

1 that is?

2 A. "EXP2".

3 Q. And you mentioned the Explorer was  
4 somewhere else on this document?

5 A. No.

6 MR. LANQUIST: No.

7 THE WITNESS: That's --

8 BY MR. BODNER:

9 Q. Oh, I'm sorry. There is. If you look  
10 down under "Acoustic Bass Collection" --

11 A. Um-hum.

12 Q. -- or under "Electric Bass Collection" it  
13 says "Explorer Bass".

14 A. "Explorer Bass," yes.

15 Q. All right. And what is the code that's  
16 across from "Explorer Bass"?

17 A. "EBEX".

18 Q. Okay. Is there a "TM" designation next  
19 to any of these instrument codes on any of these  
20 two pages?

21 A. No.

22 Q. What about an "R" and a circle?

23 A. No.

24 (Documents marked Exhibit AA.)

25 BY MR. BODNER:

1 Q. Okay. I'd like to mark -- oh, hold on a  
2 second. Yeah. Mark as Exhibit AA a series of  
3 documents starting with GIB 00058 through 00084.  
4 I'm going to clip these together so you don't lose  
5 them, but you can look at these in the meanwhile.  
6 Actually, you have them, you have the numbers, so  
7 they won't get confused. I'd ask you to take a  
8 look at those, Mr. Berryman, and just let me know  
9 what they are.

10 A. They're Epiphone retail price lists from  
11 the years 2001, 2000, 1998, '97, and prior, back  
12 to 1995 or '94.

13 Q. Okay. Now, these price lists seem to be  
14 marked "Confidential" in the upper right-hand  
15 corner; is that correct?

16 A. That's correct.

17 Q. What does that mean to you?

18 A. Well, they're only to be used by the  
19 dealer, because these price lists, unlike the  
20 other price lists, these price lists contain the  
21 pricing after the dealers' discount, which  
22 obviously we would never send these to the  
23 consumer. They would be for the dealer because  
24 they contain his actual pricing.

25 Q. Okay. You referred to the consumer as

1 the "end user"?

2 A. The "end user," yes.

3 Q. The ultimate purchaser of your guitars?

4 A. Yes. The purchasing dealer, this is the  
5 price he's paying.

6 Q. Right.

7 A. You have the retail price and what price  
8 the dealer pays, and then the dealer sells it for  
9 whatever he wants to sell it for.

10 Q. So you wouldn't want the purchasing  
11 public to see this information?

12 A. Well, generally, no.

13 Q. Okay. What does "For DSM Use Only" mean?

14 A. That's our designation for sales  
15 managers.

16 Q. What does "DSM" mean?

17 A. "District sales manager".

18 Q. So this would only be shown to the  
19 district sales managers of Gibson, the ones that  
20 are marked --

21 A. The ones that are marked "For DSM Use  
22 Only," yes.

23 Q. And there are several in here that are  
24 marked so; is that correct?

25 A. Yes. When we put out a price list, we

1 put out the retail price list, the dealer net  
2 pricing price list, and a DSM price list, because  
3 that also shows varying prices based on the sales  
4 commitment or the designation of the dealer.  
5 Depending on the volume that the dealer does will  
6 determine his price.

7 Q. If you take a look at, it's probably  
8 about three stapled documents in, and it's at the  
9 top of the document that has your production  
10 number GIB 00065, and these are all in order --

11 A. 65?

12 Q. Yeah. It's the second page in on the  
13 third stapled --

14 A. Oh, okay. Right. Yes.

15 Q. Now, this one at the top says "For DSM  
16 Use Only"; is that correct?

17 A. That is correct.

18 Q. And it says "Confidential"?

19 A. That is correct.

20 Q. Is the Explorer guitar listed here?

21 A. Yes, it is.

22 Q. Okay. And the instrument code across  
23 from the Explorer guitar, can you tell me what  
24 that is?

25 A. "EXP2".

1 Q. All right. Anywhere on here is there a  
2 "TM" designation next to any of these codes?

3 A. No.

4 Q. Is there an "R" and a circle next to any  
5 of these codes?

6 A. No.

7 Q. Next to "Instrument Code" on that same  
8 page, that 00065, there's a "Color" column; is  
9 that correct?

10 A. Yes, that's correct.

11 Q. And are there codes used for the color of  
12 various instruments listed on this price list?

13 A. Yes.

14 Q. Could you just give me an example, say  
15 what "VC" might mean? That's at the top of the  
16 page under the "Color" column.

17 A. "Vintage cherry."

18 Q. Okay. And like "TQ" would mean  
19 something, also?

20 A. Yes. All the abbreviations for those  
21 colors are spelled out in the last page of the  
22 price list.

23 Q. Oh, okay. Oh. So there are color codes  
24 and there are hardware codes, is that correct --

25 A. That's correct.

1 Q. -- looking at the last page, 00066?

2 A. Correct.

3 Q. Is there a code anywhere on here that  
4 shows that "EXP" refers to Explorer?

5 A. No. That typically wouldn't be  
6 considered necessary since the reader would see  
7 "EXP" and say it's "Explorer."

8 Q. Okay. But it's not on here; is that  
9 correct?

10 A. That's correct.

11 Q. If you go to the first stapled package of  
12 documents, and the last page of that, which is  
13 00060 --

14 A. Yes.

15 Q. -- under the "Legacy Collection," is the  
16 Explorer also listed?

17 A. Yes, "Explorer Bass."

18 Q. And what is the instrument code that's  
19 across from "Explorer Bass"?

20 A. "EBEX".

21 Q. Okay. Why isn't it "EXP1" or "EXP2"?

22 A. You need the "B" to designate a bass. If  
23 you notice, all the basses have a "B". The "B"  
24 immediately notifies the reader it's a bass.

25 Q. Then what does -- the "B" in the "EBEX"

1 means "Bass"; is that what you're saying?

2 A. Yes.

3 Q. And what does the "E" mean, the first  
4 "E"?

5 A. Well, these codes vary from the Gibson  
6 codes, so the "E" would typically indicate -- if  
7 you saw this code and you didn't see anything  
8 else, I mean, you'd know immediately it was an  
9 Epiphone.

10 Q. So "E" stands for "Epiphone"?

11 A. In this case, it would, yes.

12 Q. And what does the "EX" at the end stand  
13 for?

14 A. The "EX" at the end?

15 Q. In other words, "EBEX".

16 A. Well, yeah. Well, "EX" would be  
17 "Explorer." It should have a "P," but we don't  
18 have a designation to put a "P" at the end because  
19 we're out of room. In other words, we're --

20 Q. But you have other designations that have  
21 five letters, is that correct, like "EBACL" next  
22 to "Accu Bass."

23 A. Well, yeah. Left-handed, yes. It's  
24 difficult to explain, but you're basic designation  
25 is four characters only.

1 Q. So "E" represents Epiphone; "B" is a  
2 bass; and "EX" might be standing for the Explorer?

3 A. Yes. "EX," just like "LP" is -- I mean,  
4 it's "EX" or "EXP". We have used "EXP". "EX" has  
5 been used in the past, also.

6 Q. To designate an Explorer guitar in an  
7 instrument code?

8 A. Well, in this case, it is, yes. So we  
9 use both designations, "EX" and "EXP". Just like  
10 the instrument above it, "FV" is "Flying V".

11 (Document marked Exhibit AB.)

12 BY MR. BODNER:

13 Q. I'd like to mark as Exhibit AB a  
14 four-page document starting with production number  
15 00085 and ending with 00088. I'd like to you take  
16 a look at this, please. Can you tell me what this  
17 document is?

18 A. It's an Epiphone retail price list dated  
19 September 15th, 1993.

20 Q. Okay. There is a letter in here, it  
21 appears, dated August 10th, 1993, from Jim "Epi"  
22 Rosenberg. Can you tell me who Mr. Rosenberg is?

23 A. Yes. Mr. Rosenberg is President of The  
24 Epiphone Company and in charge of marketing for  
25 the Epiphone line.

1 Q. Okay. And is he addressing this letter  
2 to the dealers of Epiphone?

3 A. Yes.

4 Q. So does that mean that this price list  
5 was directed to the dealers of Epiphone?

6 A. Yes, it would appear so. It's usually a  
7 separate cover letter. In this case, it's  
8 incorporated actually in the retail price list  
9 itself.

10 Q. Okay. Is "Explorer" listed anywhere on  
11 this document?

12 A. Yes.

13 Q. Okay. And the family code that's to the  
14 left of "Explorer," can you just tell me what that  
15 is?

16 A. Yes. It's "EXP1".

17 Q. Okay. And there's no "TM" next to  
18 "EXP1"; is that correct?

19 A. That's correct.

20 Q. And there's no "R" and a circle next to  
21 "EXP1"; is that correct?

22 A. That's correct.

23 Q. And on that entire price list there's no  
24 "TM" or "R" listed next to any code in the family  
25 code designation; is that correct?

1 A. Yes.

2 (Document marked Exhibit AC.)

3 BY MR. BODNER:

4 Q. Okay. I'd like to mark as Exhibit AC a  
5 three-page -- I'm sorry, a four-page document  
6 starting with GIB 00089 and ending with 00092. If  
7 you could, just take a look at that. And, if you  
8 would, just identify what that is.

9 A. Epiphone retail price list dated April 1,  
10 1993.

11 Q. Okay. And is there also a letter in here  
12 from Jim "Epi" Rosenberg directed to the dealers?

13 A. Yes.

14 Q. Is "Explorer" listed, the Explorer  
15 guitar, is it listed anywhere on here?

16 A. Let's see. Yes, it is, on the third  
17 page.

18 Q. Okay. And like the other exhibit we just  
19 looked at, the other retail price list, to the  
20 left of that is a family code, can you just tell  
21 me what that code is?

22 A. "EXP1".

23 Q. Again, you don't see any "TM" designation  
24 or "R" in a circle designation anywhere on this  
25 price list?

1 A. No.

2 MR. LANQUIST: You're talking about  
3 with respect to the product codes, correct?

4 MR. BODNER: I'm sorry?

5 MR. LANQUIST: Are you talking  
6 specifically with respect to the product codes?

7 MR. BODNER: I think they're family  
8 codes not product codes.

9 MR. LANQUIST: That's fine. Family  
10 codes.

11 MR. BODNER: Yes.

12 MR. LANQUIST: Okay. Because there  
13 are -- and you're last question was limited to  
14 that, correct?

15 MR. BODNER: Yes, to the family  
16 codes.

17 MR. LANQUIST: Okay.

18 THE WITNESS: Yes.

19 (Documents marked Exhibit AD.)

20 BY MR. BODNER:

21 Q. Okay. I'm going to mark as Exhibit AD  
22 several documents. It starts with 00093 through  
23 00095. I'm leaving out of this sequence 00096 and  
24 00097, and continuing with 00098 through --

25 MR. O'ROURKE: 134.

1 BY MR. BODNER:

2 Q. 00134. If you could, take a look at  
3 that, Mr. Berryman.

4 A. Um-hum.

5 Q. Okay. Can you just identify what those  
6 documents are?

7 A. They are confidential dealer price lists  
8 of various dates, but for the years 2000, 2001,  
9 2000, 1999, '98, '97, '96, '95 and 1994.

10 Q. So I take it, then, that these are sent  
11 to the dealers and not to the consuming public,  
12 slash, end user?

13 A. That is correct.

14 Q. Okay. And again, when it says "For DSM  
15 Use Only," that means for district --

16 A. The district sales managers' use.

17 Q. Okay. Thank you.

18 Generally, are the Explorer guitars  
19 listed on these invoices? I'm sorry, on these  
20 price lists.

21 A. Yes, they are. The same as the retail  
22 price list, yes.

23 Q. And would the instrument code for the  
24 Explorer Bass listed on these price lists be  
25 "EX" -- I'm sorry, "EBEX"?

1 A. Let me see.

2 Q. And I can show you that it's listed on  
3 00095, if you'd like to look at it.

4 A. Yes. I mean, it's listed as "EBEX,"  
5 correct. I do not believe the Explorer Bass was  
6 always offered. Sales of Explorer models were  
7 predominately in guitar, not in bass.

8 Q. Okay. And the instrument code across  
9 from, let's say, the 1958 Explorer or the 1958  
10 Korina Explorer, can you just tell me what that  
11 code is?

12 A. "EXP2".

13 (Document marked Exhibit AE.)

14 BY MR. BODNER:

15 Q. Okay. I'd like to mark as Exhibit AE a  
16 single-page document, GIB 00135. When you're  
17 free, just tell me what this document is.

18 A. Yes. This is an Epiphone price list  
19 addendum for the winter NAMM show, 1994.

20 Q. Okay. Is the Explorer guitar mentioned  
21 anywhere on here?

22 A. Let's see. It would not appear to be,  
23 no.

24 Q. Okay. Under the heading "New Basses,"  
25 "Model," "Expert 6-String."

1 A. Right.

2 Q. There's a family code. Can you just read  
3 what that is?

4 A. "EBEX".

5 Q. Do you know what the Expert six-string  
6 is?

7 A. Well, it was a form of bass at the time  
8 that was -- that was discontinued. It was --

9 Q. Okay.

10 A. I don't believe it was offered for very  
11 long. As a matter of fact, it may not have been  
12 offered at all if it wasn't successful --  
13 successfully introduced at the show. If we did  
14 not receive orders for it, it would have  
15 immediately disappeared.

16 Q. Then why are you using a family code of  
17 "EBEX" with respect to that bass guitar?

18 A. Because I think prior to this we did not  
19 have an "EBEX" designation for Explorer Bass.

20 Q. Okay.

21 A. This is just new product, new models only  
22 that were introduced at a trade show, so this  
23 would have been the piece that was given out to  
24 the dealers --

25 Q. Okay.

1 A. -- at the show.

2 (Document marked Exhibit AF.)

3 BY MR. BODNER:

4 Q. I just want to mark as Exhibit AF a  
5 two-page document having production numbers GIB  
6 00096 and 00097. And, Mr. Berryman, when you get  
7 a chance, can you just tell me what that is?

8 A. It's an Epiphone retail price list dated  
9 November 15th, 2001.

10 Q. Okay. And is the Explorer mentioned  
11 anywhere on this price list?

12 A. Yes. On the second page.

13 Q. Okay. And across from "Explorer," what  
14 is the instrument code?

15 A. "EXP2".

16 Q. Okay. And again, there's an Explorer  
17 Bass under "Electric Bass Collection," and what is  
18 the instrument code for that?

19 A. "EBEX".

20 Q. Okay. And again, like the other retail  
21 price lists, is there an "R" in a circle or a "TM"  
22 next to any of these instrument codes listed  
23 anywhere on these pages?

24 A. No.

25 (Documents marked Exhibit AG.)

1 BY MR. BODNER:

2 Q. Okay. I'd like to attach as Exhibit AG  
3 two stapled documents. The first stapled group is  
4 GIB 00136 through 00139, and the second group is  
5 00140 through 00143. I'd like you to just take a  
6 look at that. If you'd like, you can clip that  
7 together, too, so they're not lost.

8 Now, these are really two separate  
9 documents, and, if you can, just identify what  
10 these two documents are.

11 A. These are Epiphone retail price lists  
12 dated September 15th, 1993 and April 1st, 1993.

13 Q. Okay. And again, in each of these two  
14 documents is there a letter from Jim "Epi"  
15 Rosenberg?

16 A. Yes.

17 Q. And the letter is addressed to whom?

18 A. "Dear Authorized Epiphone Dealer."

19 Q. Are these two retail price lists similar  
20 to the other retail price lists we've discussed  
21 before in the sense that "Explorer" is mentioned  
22 in each one?

23 A. Yes.

24 MR. LANQUIST: Counsel, do you know  
25 that these are identical to the Exhibits AC and

1 AB?

2 THE WITNESS: I thought I saw it  
3 before.

4 MR. BODNER: I'm sorry, what is your  
5 question?

6 MR. LANQUIST: Exhibit AG is  
7 identical to Exhibits AB and AC.

8 MR. BODNER: No, I wouldn't know.  
9 These were produced to us by you. They have  
10 different numbers.

11 MR. LANQUIST: Okay. But they're  
12 otherwise identical.

13 MR. BODNER: I wouldn't know that.  
14 You produced them.

15 MR. LANQUIST: If you would have  
16 reviewed them, you'd have known that.

17 MR. BODNER: Not necessarily. I  
18 assumed that you did.

19 Q. And the family code used in each of these  
20 price lists across from "Explorer," could you just  
21 tell me what that code is?

22 A. "EXP1".

23 Q. And in the family codes for any of the  
24 guitars or products listed, is there a "TM" or an  
25 "R" designation?

1 A. No.

2 (Document marked Exhibit AH.)

3 BY MR. BODNER:

4 Q. I'd like to mark as Exhibit AH a two-page  
5 document having production numbers GIB 00144 and  
6 GIB 00145. Can you just tell me what these  
7 documents are?

8 A. Well, 145 is a blank page. 145 is a  
9 blank page with just some little scribbling at the  
10 top. Well, I mean, I don't know. It perhaps was  
11 a -- an ad on behalf of Gibson, but I don't know  
12 what date it would be.

13 Q. Okay. Is "Explorer" mentioned anywhere  
14 in this ad?

15 A. Yes.

16 Q. Okay. Is "EXP" mentioned anywhere in  
17 this ad?

18 A. No.

19 Q. On the next page there's a marking. It  
20 says -- it looks like it says "GP 4," slash, "80";  
21 is that correct?

22 A. Yeah. I'm guessing it would be 1980,  
23 because it says, "Since their introduction 22  
24 years ago," and they were introduced in 1958.  
25 Fifty-eight plus 22 is 80.

1 Q. Okay. So "4" probably means April; is  
2 that correct?

3 A. Probably. "GP" probably means "Guitar  
4 Player."

5 Q. What is "Guitar Player"?

6 A. One of the magazines.

7 Q. Oh, okay. Do you place a lot of  
8 advertisements in "Guitar Player"?

9 A. Well, in the principal consumer  
10 magazines, we have product actively promoted in  
11 all of them, as well as artists that are seen  
12 playing the instrument, as well as review articles  
13 and so on, yes. I mean, we're one of the major  
14 brands in the industry, and so even if we didn't  
15 place an ad in a specific issue, you would see our  
16 product throughout the issue.

17 (Document marked Exhibit AI.)

18 BY MR. BODNER:

19 Q. Okay. I'd like to mark as Exhibit AI,  
20 it looks like about a five-page document starting  
21 with GIB 00146 through GIB 00151.

22 MR. LANQUIST: Counsel, I've noticed  
23 that you're asking the witness about every  
24 document that was produced by Gibson, which leads  
25 me to believe that you are conducting a discovery

1 deposition as opposed to a testimony deposition.

2 Is that correct?

3 MR. BODNER: No.

4 MR. LANQUIST: So what is the --

5 BY MR. BODNER:

6 Q. I'd like you to take a look at this,  
7 please.

8 MR. LANQUIST: Okay. What's the  
9 relevance of Exhibit AI?

10 MR. BODNER: It has to do with  
11 Exhibit AI --

12 MR. LANQUIST: Yes.

13 MR. BODNER: -- which is this one.

14 MR. LANQUIST: Yes, these are.

15 MR. O'ROURKE: It's the catalogs.

16 MR. BODNER: I don't know what it is.  
17 I'm assuming it's a catalog.

18 MR. LANQUIST: So you don't know what  
19 the relevance is?

20 MR. BODNER: No. I think it's  
21 relevant. I'm going to find out from Mr. Berryman  
22 how this is used.

23 MR. LANQUIST: Okay.

24 BY MR. BODNER:

25 Q. Now, if you could, just tell me what that

1 document is, and whether it's complete.

2 A. Well, it's an Epiphone catalog. I can't  
3 tell what the date of the catalog is. And the  
4 second one is an Epiphone 1994 catalog.

5 Q. Oh, these are two separate catalogs?

6 A. They would appear to be.

7 Q. So the second catalog would start on GIB  
8 00149; is that correct?

9 A. It appears so, yes.

10 Q. And it's a two-page catalog? I'm sorry,  
11 it's a three-page catalog, the second one?

12 A. No. I think what we're looking at here  
13 is just the page specific to Explorer.

14 Q. So there's more to this catalog than --  
15 in the original catalog than what has been  
16 provided to us; is that correct?

17 A. Well, I think it would list all the  
18 products that is on the specification list.

19 Q. Which is on the second page of, let's  
20 see, 00147?

21 A. Yes. Yes.

22 Q. Okay. Is "Explorer" listed anywhere on  
23 the Epiphone specification on 00147?

24 A. Yes, it is.

25 Q. Okay. Is "EXP" used anywhere on that

1 page?

2 A. Not on this page, no.

3 Q. Okay. On the next page, which is 00148,  
4 it has a series of pictures, it looks like, of  
5 guitars; is that correct?

6 A. That's correct.

7 Q. Okay. Is the Explorer guitar shown?

8 A. Yes, it is.

9 Q. Okay. Is "EXP" used anywhere on that  
10 page?

11 A. No.

12 Q. Is this a catalog that's distributed to  
13 the public?

14 A. Well, it's distributed to deal -- it's  
15 essentially the same as the price list, in a way.  
16 It's mailed out to the dealer for distribution to  
17 the public, to consumers that have an interest in  
18 our product. And similar to the price list, when  
19 people call to our company and say, "Can you  
20 please send me information on your product," they  
21 would get a catalog and they would get a price  
22 list.

23 Q. Okay. But this is made available to the  
24 public?

25 A. Yes.

1 Q. And what about the second one, then, the  
2 00149; this is also made available to the public,  
3 correct?

4 A. Yes. To the dealer and to the public.

5 Q. On the second page, which is 00150, is  
6 the Explorer guitar shown?

7 A. Yes, it is.

8 Q. Okay. Is there a "TM" designation next  
9 to "Explorer"?

10 A. Yes, there is.

11 Q. And what does that mean to you?

12 A. Well, it means "Trademark," to me.

13 Q. Okay. And is "EXP" used anywhere on that  
14 page?

15 A. No.

16 Q. "TM" is also used after "Flying V"; is  
17 that correct?

18 A. Yes, correct.

19 Q. And again, what does that mean to you?

20 A. Well, it means "Trademark."

21 Q. What is trademarked?

22 A. Well --

23 MR. LANQUIST: Objection. What's the  
24 relevance to this, counsel?

25 MR. BODNER: I'm comparing it to

1 "Explorer TM."

2 MR. LANQUIST: They both say "TM"  
3 next to them.

4 MR. BODNER: Well, I'd like the  
5 testimony from Mr. Berryman.

6 MR. LANQUIST: I'd like the relevance  
7 of this, counsel.

8 MR. BODNER: I just told you.

9 MR. LANQUIST: No, you didn't. You  
10 said what it meant. He's told you that it's  
11 "Trademark."

12 BY MR. BODNER:

13 Q. What does trademark mean?

14 MR. LANQUIST: That's not relevant.

15 MR. BODNER: Yes, it is.

16 MR. LANQUIST: I'm going to call the  
17 Board because you are wasting his time.

18 MR. BODNER: You can call the Board.

19 MR. LANQUIST: And you're wasting our  
20 time.

21 MR. BODNER: You can call the Board  
22 if you want to.

23 MR. LANQUIST: Are we going to have  
24 an issue about Mr. O'Rourke taking -- asking  
25 questions?

1 MR. BODNER: We may. We haven't  
2 gotten there yet.

3 MR. LANQUIST: If we're going to call  
4 them, we can call them about both issues.

5 MR. BODNER: Why not resolve this  
6 issue?

7 MR. LANQUIST: No. We'll resolve  
8 both issues at the same time.

9 MR. BODNER: Let's ask him this one  
10 question. Go ahead. Call them up if you'd like  
11 to.

12 MR. LANQUIST: Okay. That's fine.

13 BY MR. BODNER:

14 Q. This is the Flying V.

15 MR. LANQUIST: I'm objecting because  
16 what his definition of "Trademark" means is  
17 entirely irrelevant to this case.

18 Let's go off the record for a second.

19 (Off-the-record discussion.)

20 MR. BODNER: I want to put that on  
21 the record. Mr. Lanquist said "off the record,"  
22 and he went off the record for this, that "When  
23 your client is going to be deposed, I'm going to  
24 have fun with this." Is that correct,  
25 Mr. Lanquist?

1 MR. LANQUIST: No, that's not what I  
2 said, actually.

3 MR. BODNER: What did you say,  
4 Mr. Lanquist?

5 MR. LANQUIST: I didn't say that.

6 MR. BODNER: What did you say?

7 MR. LANQUIST: I said "I'm looking  
8 forward to deposing your client."

9 MR. BODNER; I don't think that's  
10 exactly what you said.

11 MR. LANQUIST: What are you referring  
12 to? What are you inferring, too? Why don't you  
13 answer the question? Do you want to answer the  
14 questions? Why aren't you saying anything?

15 Thank you.

16 MR. BODNER: Now we can go off the  
17 record.

18 (Respite.)

19 BY MR. BODNER:

20 Q. Okay. In this price list that we're  
21 referring to, which is starting with 00149 and  
22 ending at 00151, is "Explorer" mentioned anywhere  
23 on here?

24 A. Yes, on 00150.

25 Q. Okay. And is "EXP" mentioned anywhere on

1 here?

2 A. No.

3 MR. BODNER: Okay. Let's hold this  
4 in abeyance.

5 (Document marked Exhibit AJ.)

6 BY MR. BODNER:

7 Q. Okay. I'd like to mark as Exhibit AJ a  
8 single document which has the production number  
9 GIB 00152, and I'll show it to Mr. Berryman.  
10 Mr. Berryman, do you know what this is?

11 A. It appears to be an ad for a Gibson  
12 Explorer.

13 Q. Okay. And you don't know when this was  
14 advertised, do you?

15 A. No, I do not.

16 Q. Okay. And you don't know to whom -- in  
17 what magazine, or trade journal, or whatever this  
18 was, this was placed, do you?

19 A. I don't know what magazine; but it would  
20 have been a magazine, yes.

21 Q. Okay. Is "EXP" used anywhere on here?

22 A. No. No.

23 (Document marked Exhibit AK.)

24 BY MR. BODNER:

25 Q. Okay. I'd like to mark as Exhibit AK a

1 two-page document having production numbers 00153  
2 and 00154. And, Mr. Berryman, can you just tell  
3 me what that document is?

4 A. Well, it looks like a piece of literature  
5 from "The Historic Collection of Gibson."

6 Q. What does that mean, Mr. Berryman?

7 A. Well, that means a reissued product.

8 Q. Is this a catalog or an advertisement?

9 MR. LANQUIST: Objection. Isn't a  
10 catalog an advertisement?

11 MR. BODNER: Not necessarily.

12 THE WITNESS: Well, it could be -- it  
13 could be either. It could have been run like  
14 this. I don't know. This has been an  
15 advertisement.

16 BY MR. BODNER:

17 Q. Is this something that would be placed in  
18 a trade journal or a magazine?

19 A. Yes. I mean, this would be available to  
20 consumers.

21 Q. Okay.

22 A. And consumers, yes.

23 Q. On the second page is the Explorer guitar  
24 shown anywhere?

25 A. Yes, it is.

1 Q. And is "EXP" found anywhere on this page?

2 A. No.

3 Q. And you don't know the date of this, do  
4 you?

5 A. No, I do not.

6 (Document marked Exhibit AL.)

7 BY MR. BODNER:

8 Q. Okay. I'd like to mark as Exhibit AL a  
9 two-page document starting with GIB 00155 and  
10 including or ending with 00156. Mr. Berryman, can  
11 you just tell me what this is?

12 A. Well, it looks like an advertisement for  
13 "Historic Solid Body Electrics."

14 Q. Okay. Is this something that would go  
15 into a trade journal or a magazine?

16 A. It could, or part of a catalog, yes.

17 Q. Do you know when this was -- when this  
18 was created?

19 A. No, I do not. It's not dated.

20 Q. Is the Explorer guitar mentioned anywhere  
21 here?

22 A. Yes. "'58 Korina Explorer".

23 Q. Okay. Is the designation "EXP" shown  
24 anywhere on here?

25 A. No.

1 (Document marked Exhibit AM.)

2 BY MR. BODNER:

3 Q. Okay. I'd like to mark as Exhibit AM a  
4 two-page document having designation 00157 and  
5 00158. Mr. Berryman, can you just identify what  
6 this is?

7 A. Well, it's a picture of a 1976 Explorer  
8 in ebony, and an explanation of the product.

9 Q. Okay. Can you tell me if "EXP" is  
10 mentioned anywhere on here?

11 A. No. It says "'76 Explorer".

12 (Document marked Exhibit AN.)

13 BY MR. BODNER:

14 Q. Okay. I'd like to mark as Exhibit AN a  
15 two-page document having production numbers 00159  
16 and 00160. Mr. Berryman, if you could, tell me  
17 what this is.

18 A. This looks like a -- some kind of  
19 promotional flyer for selected product.

20 Q. Okay. Is "Explorer" -- well, is this  
21 something that goes to the public?

22 A. It would have gone to the dealer and the  
23 public, yes.

24 Q. Okay. Is "Explorer" mentioned anywhere  
25 on here?

1 A. Yes. Along with the instrument it says  
2 "Explorer," "Ebony."

3 Q. Okay. Is the designation "EXP" mentioned  
4 anywhere on this document?

5 A. No.

6 MR. LANQUIST: Can we get at a good  
7 stopping point?

8 MR. BODNER: Why? The phone call,  
9 you mean?

10 MR. LANQUIST: No. I would just like  
11 to take a break.

12 MR. BODNER: Oh, sure. Of course, we  
13 can do that.

14 (Respite.)

15 (Document marked Exhibit AO.)

16 BY MR. BODNER:

17 Q. I'd like to mark as Exhibit AO two  
18 documents -- I'm sorry, a two-page document with  
19 00161 and 00162. And I'd like you to just tell  
20 me, Mr. Berryman, what this document is.

21 A. Well, it would appear to be a catalog, a  
22 Gibson catalog.

23 Q. Okay. Is this a complete document?

24 A. I don't think it is, no.

25 Q. Okay. On the second page, which is

1 00162, is the Explorer guitar shown?

2 A. Yes.

3 Q. And "Explorer" is mentioned?

4 A. Yes.

5 Q. Is "EXP" mentioned anywhere here?

6 A. No.

7 Q. Kay. And you don't know the date of this  
8 document, do you?

9 A. No, I do not.

10 (Document marked Exhibit AP.)

11 BY MR. BODNER:

12 Q. I'd like to mark as Exhibit AP a two-page  
13 document having production numbers 00163 and  
14 00164. Mr. Berryman, if you could, tell me what  
15 this document is.

16 A. It looks to be an ad from a magazine, a  
17 one-page ad.

18 Q. And there are some handwritten notations  
19 on 00164. Can you just tell me what that is?

20 A. Well, "GP" with an underline, and then  
21 "2/83," "6/83," "8/83," "4/84," "9/83," which may  
22 be issues of magazines that this one-page ad was  
23 placed in.

24 Q. And does "GP" stand for a magazine?

25 A. It could be "Guitar Player." That I'm

1 not certain of, but it would be a guess.

2 Q. Is the Explorer name and guitar shown  
3 anywhere in this document?

4 A. Yes.

5 Q. Okay. Is "EXP" mentioned anywhere here?

6 A. No.

7 (Document marked Exhibit AQ.)

8 BY MR. BODNER:

9 Q. Okay. I'd like to mark as Exhibit AQ a  
10 two-page document having designation production  
11 numbers 00165 and 00166. Mr. Berryman, can you  
12 tell me what this is?

13 A. It looks to be an ad for the Explorer  
14 guitar.

15 Q. Okay. And on the second page it also has  
16 a handwritten notation, what appears to be "GP  
17 10/84" and "12/84."

18 A. That's correct.

19 Q. Can you tell me what your understanding  
20 of that is?

21 A. Well, I don't really have an  
22 understanding, it's just a guess that it would  
23 be -- it would be months of placement for an ad.

24 Q. Okay. Is "EXP" found anywhere on this  
25 document?

1 A. No.

2 (Document marked Exhibit AR.)

3 BY MR. BODNER:

4 Q. Okay. I'd like to mark as Exhibit AR a  
5 two-page document starting with 00167 and ending  
6 with 00168. Mr. Berryman, can you, when you have  
7 a chance, just take a look at this and tell me  
8 what this is?

9 A. This looks to be the same ad that I  
10 looked at previously, one of the same ads.

11 Q. Okay.

12 A. The same as GIB 00152, Exhibit AJ, except  
13 it's followed by a single page, again, with -- it  
14 says "GP" with "3/85," "4/85," "10/85".

15 Q. Okay. I take it these are the --  
16 probably the dates of advertisements in "Guitar  
17 Player"?

18 A. Could be, yes.

19 Q. All right. Is "Explorer" mentioned  
20 anywhere on here?

21 A. "Explorer," yes.

22 Q. Okay. Is "EXP" mentioned anywhere on  
23 here?

24 A. No.

25 (Document marked Exhibit AS.)

1 BY MR. BODNER:

2 Q. Okay. I'd like to mark as Exhibit AS a  
3 two-page document having 00169 and 00170  
4 production numbers. And, if you could, tell me  
5 what that is, Mr. Berryman.

6 A. It looks to be a one-page ad in a  
7 magazine for four different guitars, Gibson.

8 Q. Is Explorer one of those guitars that are  
9 shown?

10 A. Yes.

11 Q. Okay. Is "EXP" mentioned anywhere on  
12 this advertisement?

13 A. No.

14 Q. Okay. On the second page, 00170, it has  
15 at the top, "GW." Do you know what "GW" might be?

16 A. Probably "Guitar World."

17 (Document marked Exhibit AT.)

18 BY MR. BODNER:

19 Q. Okay. Let's mark as Exhibit AT a  
20 three-page document having production numbers GIB  
21 00173 through 00175. Mr. Berryman, if you could,  
22 tell me what that is.

23 A. An Epiphone catalog.

24 Q. Okay. Is that the complete catalog?

25 A. I don't believe so.

1 Q. Is this something that is made available  
2 to the public?

3 A. Yes. Sent to the dealers and made  
4 available to the public.

5 Q. And do you know what the date of this  
6 catalog is?

7 A. No, I do not.

8 Q. Okay. There is a copyright notice in the  
9 lower right-hand corner, and it says "1995 The  
10 Epiphone Company."

11 A. Okay.

12 Q. Could that be around the time when this  
13 catalog was --

14 A. It could be, yes.

15 Q. -- generated?

16 A. Um-hum.

17 Q. Do you see the Explorer guitar and the  
18 Explorer name anywhere in this catalog?

19 A. Yes.

20 Q. Is "EXP" mentioned anywhere on here?

21 A. No.

22 (Document marked Exhibit AU.)

23 BY MR. BODNER:

24 Q. Let's mark as Exhibit AU a document  
25 starting with production numbers 00176 and ending

1 with 00184. This is a document which was supplied  
2 to us by your counsel. And, if you would,  
3 identify what it is.

4 A. It looks to be a catalog of products sold  
5 by Interstate Musician Supply.

6 Q. Okay. So this is not your catalog?

7 A. No.

8 Q. Did you authorize them to use the name  
9 "Explorer" and the picture of the guitar in this  
10 catalog?

11 A. I don't know.

12 Q. On the second to the last page, which is  
13 production number 00183, it says "Gibson Custom  
14 Division." Is that part of this catalog?

15 A. These may have been combined. It  
16 probably was not part of the catalog.

17 Q. Is the last page, which is 00184, part of  
18 the first catalog, the Interstate Musician Supply  
19 catalog, or is that something that's generated by  
20 Gibson Guitar?

21 A. I don't know. That I cannot tell you.

22 Q. Okay. On that last page, 00184, is the  
23 Explorer guitar shown anywhere?

24 A. Yes, it is. It's the first guitar shown.

25 Q. Okay. And is the word "Explorer"

1 mentioned?

2 A. Yes, it is.

3 Q. Is "EXP" mentioned anywhere on here?

4 A. No, it's not.

5 (Document marked Exhibit AV.)

6 BY MR. BODNER:

7 Q. Okay. I'd like to show you another  
8 document. It's going to be Exhibit AV, and it's a  
9 three-page document with 00185 through 00187. Can  
10 you tell me what this document is?

11 A. Well, it looks to be something that was  
12 printed by "Billboard" and "Musician Magazine"  
13 saluting Gibson.

14 Q. Is this an advertisement that was placed  
15 in the "Billboard" by Gibson?

16 A. No. It looks like it was to saluting  
17 Gibson's 100th year anniversary in 1994.

18 Q. So this advertisement was not generated  
19 by Gibson; is that correct?

20 A. Yes, that would most likely be correct.  
21 It was written by Paul Verna. I do not know Paul  
22 Verna; but, you know, there's a lot of writers  
23 that write about Gibson because we were founded in  
24 1894.

25 (Document marked Exhibit AW.)

1 BY MR. BODNER:

2 Q. Okay. The next exhibit is Exhibit AW,  
3 and it consists of production numbers 00188  
4 through 00191. Please just tell me what that is.

5 A. Well, it looks to be like -- the same  
6 information as one of the other exhibits here.  
7 It's essentially the same as what we already  
8 talked about.

9 Q. Okay. Can you look to see if "EXP" is  
10 used on any of these advertisements, if you will?

11 A. (Witness complies.) No.

12 Q. And do you know the date of this or these  
13 advertisements?

14 A. No.

15 (Document marked Exhibit AX.)

16 BY MR. BODNER:

17 Q. Okay. I'd like to mark as Exhibit AX, a  
18 two-page document -- I'm sorry, a three-page  
19 document, 00192 through 00194. And could you tell  
20 me what this document is?

21 A. Looks to be part of an Epiphone product  
22 catalog.

23 Q. It's not the whole catalog, then; is that  
24 correct?

25 A. No, but I think it's identical to what we

1 just went over a little while ago.

2 Q. All right. That's all right. I just  
3 want you to look at this document and tell me if  
4 "Explorer" is mentioned here and is the Explorer  
5 guitar shown in here.

6 A. Yes, the Explorer guitar is shown here.

7 Q. Okay. And if you'd turn to the last  
8 page, which is 00194 --

9 A. Yes.

10 Q. -- is "Explorer" mentioned on that page?

11 A. "Explorer" is mentioned on that page;  
12 yes, it is.

13 Q. Okay. Can you tell me if "EXP" is shown  
14 anywhere in this document?

15 A. No.

16 Q. Again, on the second page, 00193, there  
17 is a "TM" next to "Explorer"; is that correct?

18 A. That's correct.

19 Q. And there's a "TM" next to "Flying V"; is  
20 that correct?

21 A. Yes, that's correct.

22 (Document marked Exhibit AY.)

23 BY MR. BODNER:

24 Q. I'd like to mark as Exhibit AY a  
25 three-page document having production numbers

1 00195 through 00197. And, if you could, tell me  
2 what that is, please.

3 A. It's a 1988 Gibson catalog.

4 Q. Okay. Is that the whole catalog?

5 A. No.

6 Q. So there's more to this catalog, you're  
7 saying?

8 A. Yes. Each model would be a separate  
9 page.

10 Q. Okay. Is this something that is made  
11 available to the public?

12 A. Yes.

13 Q. Okay. Is the Explorer guitar shown  
14 anywhere on this document?

15 A. Yes.

16 Q. And is that at 00196?

17 A. That's correct.

18 Q. And the word "Explorer" is also  
19 mentioned; is that correct?

20 A. Yes.

21 Q. As the model of the guitar; is that  
22 correct?

23 A. Yes. The model name is spelled out,  
24 "Explorer," yes.

25 Q. Okay. Is "EXP" mentioned anywhere in

1 this document?

2 A. No, it's not.

3 (Document marked Exhibit AZ.)

4 BY MR. BODNER:

5 Q. I have a two-page document I'm going to  
6 mark as Exhibit AZ, which has production numbers  
7 00198 and 00199. And, if you could, just tell me  
8 what this is.

9 A. Well, I think it looks like a piece of  
10 promotional literature identical to one that you  
11 asked me about. It's on Exhibit AN.

12 Q. Is this made available to the public?

13 A. It would be through our dealer network,  
14 yes.

15 Q. Okay. There's a copyright notice on  
16 here, "1987 Gibson Guitar." It's on 00199.

17 A. Right.

18 Q. Do you think this brochure occurred  
19 around that time?

20 A. Yes, it probably would be.

21 Q. Okay. Is the Explorer name shown  
22 anywhere on this document?

23 A. Yes.

24 Q. And the Explorer guitar is also shown?

25 A. Yes.

1 Q. Is "EXP" mentioned anywhere on this  
2 document?

3 A. No.

4 (Document marked Exhibit BA.)

5 BY MR. BODNER:

6 Q. Okay. I'm going to mark as Exhibit BA a  
7 two-page document with production numbers 00200  
8 and 00201. And, if you would, just explain what  
9 that is.

10 A. It's an Epiphone product catalog, it  
11 looks like for the year 2000.

12 Q. Okay. Is that the complete catalog?

13 A. No.

14 Q. Is the Explorer guitar shown anywhere on  
15 here?

16 A. Yes, it is, on the second page.

17 Q. Okay. Which is 00201?

18 A. Right.

19 Q. Is the Explorer name shown anywhere on  
20 here?

21 A. Yes, "'58 Korina Explorer."

22 Q. Right. Is there a "TM" next to  
23 "Explorer"?

24 A. Yes.

25 Q. Is "EXP" shown anywhere on this document?

1 A. No.

2 (Document marked Exhibit BB.)

3 BY MR. BODNER:

4 Q. Okay. I'd like to mark as Exhibit BB a  
5 three-page document having production numbers  
6 00202 through 00204.

7 A. This is an Epiphone 1999 product catalog.

8 Q. Okay. And is this a complete catalog?

9 A. No.

10 Q. All right. And on what we have here is  
11 the Explorer guitar and name shown anywhere?

12 A. Yes. On pages two and three the Explorer  
13 guitar, and page three is the Explorer bass.

14 Q. Okay. Is "EXP" mentioned anywhere on  
15 this document?

16 A. No.

17 Q. Okay. Is this a document that's made  
18 available to the public?

19 A. Yes.

20 (Document marked Exhibit BC.)

21 BY MR. BODNER:

22 Q. I'm going to mark as Exhibit BC a  
23 four-page document starting with 00205 and ending  
24 with 00208. Can you tell me what this document  
25 is?

1 A. Looks like an Epiphone price list from  
2 1994.

3 Q. Okay. Is this a complete document?

4 A. No. It's -- looks to be the same as what  
5 we've previously reviewed.

6 Q. Okay. Well, is the Explorer name and  
7 guitar shown anywhere on this document?

8 A. Yes. There's a picture of the  
9 instrument, and the Explorer name is spelled out.

10 Q. Okay. On 00207, which is the third page  
11 in --

12 A. Right.

13 Q. -- is "Explorer" shown anywhere on that  
14 page?

15 A. Yes.

16 Q. And it's under what heading?

17 A. Under the "Model" heading.

18 Q. Okay. And is "EXP" shown anywhere on  
19 this document?

20 A. No.

21 (Document marked Exhibit BD.)

22 BY MR. BODNER:

23 Q. I'd like to mark as Exhibit BD a two-page  
24 document, which is 00209 and 00210. If you could,  
25 tell me what that document is.

1 A. It's an Epiphone new product promotional  
2 flyer for 2002.

3 Q. Okay. Is this flyer made available to  
4 the public?

5 A. Well, it would be, along with the catalog  
6 and price list, yes.

7 Q. Okay. Is this the complete new product  
8 catalog?

9 A. I don't believe so. This would be only  
10 the page with the Explorer product on it.

11 Q. Okay. Is the Explorer product shown on  
12 this catalog?

13 A. Yes.

14 Q. Is "EXP" mentioned anywhere on this  
15 product -- on this catalog?

16 A. No.

17 Q. Explorer has a "TM" next to it; is that  
18 correct?

19 A. Yes, that's correct.

20 Q. And is that because you consider  
21 "Explorer" to be a trademark of Gibson guitar?

22 A. Well, that's a good question. I didn't  
23 put the "TM" there, so I don't know. Sometimes it  
24 was included, sometimes it was not, so I don't  
25 know. I can't explain the -- when it was included

1 and when it was not.

2 Q. But you know the significance of "TM"  
3 after "Explorer"; is that correct?

4 A. Well, I believe it stands for  
5 "Trademark." I don't know the legal significance  
6 of --

7 Q. That's all right.

8 A. -- what that means versus the "R".

9 (Document marked Exhibit BE.)

10 BY MR. BODNER:

11 Q. Okay. I'd like to submit as Exhibit BE,  
12 it looks like a five-page document starting with  
13 00211 and ending with 00205. And, if you could,  
14 tell me, Mr. Berryman, what that is.

15 A. That is an Epiphone catalog. I'm not  
16 sure what year it's from, but it's an Epiphone  
17 catalog.

18 Q. Is that the complete catalog?

19 A. No. I think the complete catalog would  
20 be about 40 to 50 pages.

21 Q. Huh. All right. And is "Explorer" -- is  
22 the Explorer guitar and the Explorer name shown  
23 anywhere in this catalog?

24 A. Yes.

25 Q. And is that on 00213?

1 A. Yes.

2 Q. Okay.

3 A. 212, 213, 214.

4 Q. Okay. And also on 00215; is that  
5 correct?

6 A. Correct.

7 Q. Is "EXP" mentioned anywhere on this  
8 catalog?

9 A. No.

10 (Document marked Exhibit BF.)

11 BY MR. BODNER:

12 Q. Okay. I'd like to mark as Exhibit BF a  
13 three-page document starting with 00216 and ending  
14 with 00218. Can you tell me, Mr. Berryman, what  
15 this document is?

16 A. It's an Epiphone product catalog.

17 Q. Okay. Is this the complete catalog?

18 A. No.

19 Q. Okay. And do you know the date of this  
20 catalog?

21 A. No, I do not.

22 Q. Is the Explorer guitar and the name used  
23 anywhere in this catalog?

24 A. Yes. There's a picture of the Explorer  
25 guitar on the third page, Korina Explorer.

1 Q. And is "EXP" mentioned anywhere in this  
2 catalog?

3 A. No.

4 (Document marked Exhibit BG.)

5 BY MR. BODNER:

6 Q. I'd like to mark as Exhibit BG a  
7 multipage document starting with 00222 and ending  
8 with 00249. And, if you would, just tell me what  
9 that document is.

10 A. It's an Epiphone product catalog.

11 Q. Do you know when this was -- what date  
12 this catalog is?

13 A. No, I do not. I don't see any copyright  
14 notices on it, so I can't tell.

15 Q. Is this the complete catalog?

16 A. It looks to be the complete catalog.

17 Q. Okay. So usually your catalogs are  
18 around this size; is that correct?

19 A. Well, you know, all the product that we  
20 saw in the price list, there's a picture of each  
21 one of those products in the catalog.

22 Q. Is this catalog made available to the  
23 public?

24 A. Yes.

25 Q. Okay. Can you turn to page 00231?

1 A. (Witness complies.)

2 Q. And can you tell me if the Explorer  
3 guitar is shown anywhere on this page?

4 A. Yes, it's shown on this page.

5 Q. Okay. Is the name Explorer also shown on  
6 this page?

7 A. Yes, it is.

8 Q. And is there a designation after the name  
9 Explorer?

10 A. There's an "R" and a circle.

11 Q. Okay. And do you know what that means?

12 A. Well, I believe it means "Registered."

13 Q. Okay. On this page is "EXP" mentioned  
14 anywhere?

15 A. No.

16 Q. Do you know if "EXP" is mentioned  
17 anywhere in this catalog?

18 A. I do not know.

19 Q. Could you take a quick look to see if  
20 it's mentioned anywhere in the catalog?

21 A. It does not -- it does not appear to be.

22 Q. Can you turn to page 00233?

23 A. (Witness complies.)

24 Q. Okay. It looks like there are some  
25 guitars shown there, and there's "Firebird" and

1 "Nighthawk" with a "TM" next to it; but "Pro-2,"  
2 "S-310" and "T-310" do not have a "TM" next to it.  
3 Do you know why that's the case?

4 A. I have no idea why.

5 Q. Is there anyone at your company who would  
6 know why?

7 A. I don't know. I mean, I honestly don't  
8 know.

9 Q. Who sets up the catalogs as far as what  
10 goes in them?

11 A. Well, we have a -- we have a graphic  
12 artist, independent graphic artist that would do  
13 it, and a photographer that we would pay to take  
14 the shots. And the layout and all of that is done  
15 by an art person.

16 Q. And does he get information from -- is  
17 this an outside person? I'm sorry, switch trends  
18 here.

19 A. It can be. In many cases, it is, yes. I  
20 mean, it all starts with the price list. The  
21 price list is developed, and then the product that  
22 we want in the catalog should be reflective of  
23 product that's in the price list.

24 Q. Okay. And does this outside person  
25 receive instructions from Gibson as to what should

1 have a "TM" next to it or an "R" and a circle or  
2 nothing?

3 A. Well, the "R" and the circle  
4 instructions, I believe typically that would come  
5 from our intellectual property attorneys when  
6 something is registered. Other than that,  
7 frankly, I don't know.

8 Q. So I believe you stated you looked  
9 through this catalog and --

10 A. Yeah. I looked through it quickly, and I  
11 can't find any. That's not to say conclusively  
12 there isn't, but it doesn't appear to be.

13 Q. It doesn't appear to have "EXP" mentioned  
14 in this catalog?

15 A. It would be in the company price list.

16 Q. Okay. That's where it would be  
17 primarily?

18 A. Yes, because that's where you're listing  
19 also all your colors.

20 Q. Right. With the "EXP"?

21 A. The colors are not listed in here.  
22 There's just not enough room to list everything --

23 Q. Right. But you --

24 A. -- with a picture.

25 Q. But there are a lot of other things with

1 that "EXP" that now it becomes a ten-letter or  
2 eight-letter product number; is that correct?

3 MR. LANQUIST: I don't believe that's  
4 what he said. Are you talking about in the price  
5 list?

6 THE WITNESS: No. Like EXP1 or 2.  
7 "EXP" is Explorer; "1" is one pickup; "2" is two  
8 pickups.

9 BY MR. BODNER:

10 Q. Okay.

11 A. Then you have your color. You'll notice  
12 in several pictures, maybe not in this one but in  
13 the prior ones, it would be "EB" in parentheses,  
14 which would be ebony would be the color code of  
15 what's in the picture.

16 (Document marked Exhibit BH.)

17 BY MR. BODNER:

18 Q. Okay. That's fine. I'd like to mark as  
19 Exhibit BH a multipage document starting with  
20 00250 and ending with 00285. And, if you can,  
21 take a look at that, and when you're free, just  
22 let me know what that is.

23 A. It is another Epiphone product catalog.

24 Q. Okay. Do you know when this was sent out  
25 or published?

1 A. No, I do not.

2 Q. Is this something that's made available  
3 to the public?

4 A. Yes.

5 Q. And is the Explorer guitar advertised in  
6 here?

7 A. It should be pictured in here, yes.

8 Q. Would that be on 00259?

9 A. Yes.

10 Q. Okay.

11 A. Korina Explorer.

12 Q. Okay. And I notice that you have a "TM"  
13 next to "Explorer."

14 A. Yes.

15 Q. As you do with "Korina," "Flying V" and  
16 "Special" and "Del Rey." And these are all  
17 trademarks of Gibson?

18 A. I don't think they're registered  
19 trademarks.

20 Q. No. That's not what I'm saying.

21 A. All right. I mean, I can't explain it,  
22 because on the prior page, 258, there's "Les Paul  
23 Studio," "Les Paul 100" with no "R" in a circle,  
24 no "TM," so I don't understand -- there's an  
25 inconsistency which I do not understand.

1 Q. Can you look through here -- well, you  
2 can look at this page in particular, this 00259,  
3 where the Explorer guitar is shown, and can you  
4 tell me if "EXP" is shown anywhere on this page?

5 A. (Witness complies.) No.

6 Q. All right. Can you briefly look through  
7 this catalog and tell me if "EXP" is shown  
8 anywhere in this catalog?

9 A. (Witness complies.) No, I don't believe  
10 so. It would be in the price list.

11 MR. BODNER: Okay. Well, in that  
12 case, maybe we can go rather quickly through the  
13 rest of these.

14 (Document marked Exhibit BI.)

15 BY MR. BODNER:

16 Q. I'd like to mark as Exhibit BI a  
17 multipage document with 00273 and ending with  
18 00285. And, if you can, identify what that is,  
19 and also let me know if this is part of another  
20 catalog.

21 A. I mean, it would appear to be part of the  
22 prior exhibit.

23 Q. But this shows "EXP" -- I mean, I'm  
24 sorry, this shows "Explorer," it lists "Explorer"  
25 on 00283 under "Epiphone Specifications".

1 A. Yes. The same as 284 in the prior  
2 exhibit.

3 Q. Okay. Again, then, "EXP" is not shown  
4 anywhere in this portion of the catalog?

5 A. Yes.

6 (Document marked Exhibit BJ.)

7 BY MR. BODNER:

8 Q. Okay. I'll mark as Exhibit BJ a  
9 multipage document having production numbers 00286  
10 through 00321. And, if you can -- sorry.

11 A. Yes. This is the full catalog version of  
12 Exhibit BA.

13 Q. Thank you very much. We may find that  
14 out in some of these later catalogs that were  
15 produced. So this is a year 2000 catalog; is that  
16 correct?

17 A. Yes.

18 Q. Again, I'm going to ask you if "Explorer"  
19 is shown anywhere in here. And I can refer you to  
20 page 00300?

21 A. Yeah. An upside down Explorer, yeah.

22 Q. Okay. On 00300?

23 A. Yes.

24 Q. Okay. And under the model at the bottom  
25 of the page it says "'58 Korina Explorer"; is that

1 correct?

2 A. That's correct.

3 Q. And again, are you going to find any  
4 mention of "EXP" in this catalog?

5 A. I don't know. I know it would be in the  
6 price list, but not necessarily in the catalog.

7 Q. If you could, take a quick look.

8 A. Doesn't appear to be, no.

9 (Document marked Exhibit BK.)

10 BY MR. BODNER:

11 Q. The next one is Exhibit BK, which is a  
12 four-page document starting with 00322 and ending  
13 with 00325. If you could, just identify what that  
14 is.

15 A. This is an Epiphone Summer 1999 catalog,  
16 which would be for new product.

17 Q. Okay. Is the Explorer guitar shown  
18 anywhere in here?

19 A. No, I don't see that it is.

20 Q. Okay. And is "EXP" mentioned anywhere in  
21 here?

22 A. No. This would just be for new product  
23 introduced the summer of '99.

24 (Document marked Exhibit BL.)

25 BY MR. BODNER:

1 Q. The next one is a multipage document,  
2 Exhibit BL, starting with 00326 and ending with  
3 00377. And, if you could, identify what that is.

4 A. It's a 1999 Epiphone product catalog.  
5 Again, I believe we went over this previously  
6 somewhere.

7 Q. That's all right. You don't have to look  
8 through the pile of exhibits.

9 A. Exhibit BB.

10 Q. Thank you. And this is the complete  
11 catalog; that's what you said?

12 A. Yes.

13 Q. Okay. Is the Explorer guitar shown  
14 anywhere in this catalog?

15 A. Yes. It's shown on 00339.

16 Q. Okay. I believe I also saw it on --

17 A. Maybe under basses, as well. I don't  
18 know.

19 Q. Yes. 00348, if you want to take a look  
20 at that and confirm that.

21 A. Yes, under basses.

22 Q. Okay. At least on those --

23 A. One model of bass.

24 Q. At least on those two pages is "EXP"  
25 mentioned anywhere?

1 A. No.

2 Q. Okay. Do you know if "EXP" is mentioned  
3 anywhere in this catalog?

4 A. No.

5 Q. Could you just briefly take a look to see  
6 if it is?

7 A. (Witness complies.) No.

8 (Document marked Exhibit BM.)

9 BY MR. BODNER:

10 Q. Okay. I'd like to mark as Exhibit BM a  
11 multipage document starting with production number  
12 00378 and ending with 00416. If you could, take a  
13 look at that, Mr. Berryman, and just identify what  
14 that is.

15 A. Well, this looks to be the full version  
16 of a prior exhibit again.

17 Q. That would be fine. We don't have to try  
18 to find that prior exhibit.

19 A. An Epiphone product catalog.

20 Q. Okay. And do we know what year this was  
21 distributed?

22 A. Well, it looks to be 1994. That's the  
23 copyright notice on the last page.

24 Q. Okay. Again, like the other catalogs, is  
25 this made available to the public?

1 A. Yes.

2 Q. And is the Explorer mark and guitar  
3 advertised in here?

4 A. Yes.

5 Q. I found it on 00394. Can you confirm  
6 that?

7 A. Yes, that's correct.

8 Q. And is there a "TM" designation after  
9 "Explorer"?

10 A. Yes.

11 Q. Okay. I also saw it listed on 00415.

12 A. Under "Product Specifications," yes.

13 Q. Right. Okay. And it's under "Model"; is  
14 that correct?

15 A. That's correct.

16 Q. On this page is "EXP" mentioned anywhere?

17 A. No.

18 Q. Okay. On the previous page, which was  
19 00394, was "EXP" anywhere?

20 A. No.

21 Q. Do you know if "EXP" is mentioned  
22 anywhere in this catalog?

23 A. No, it didn't appear to be.

24 (Document marked Exhibit BN.)

25 BY MR. BODNER:

1 Q. I'd like to mark as Exhibit BN a  
2 multipage document starting with 00417 and ending  
3 with 00424. And, if you can, just tell me what  
4 that document is.

5 A. This appears to be the new product  
6 catalog introduced -- for product introduced in  
7 2002. Again, this looks to be the full version of  
8 a prior exhibit where you had just the cover page  
9 and the specific page containing the Explorer  
10 product.

11 Q. Okay. Is the Explorer guitar shown  
12 anywhere or advertised anywhere in this document?

13 A. Yes, on 422.

14 Q. Okay. That's 00422. Is this document  
15 made available to the public?

16 A. Yes.

17 Q. Okay. And is the name "Explorer" shown  
18 anywhere on this document?

19 A. Yes.

20 Q. Okay. Is there a "TM" after "Explorer"?

21 A. Yes, there is.

22 Q. Okay. And can you tell me if "EXP" is  
23 mentioned anywhere in this document?

24 A. No.

25 (Document marked Exhibit BO.)

1 BY MR. BODNER:

2 Q. Okay. The next one is Exhibit BO. It's  
3 a multipage document starting with 00425 and  
4 ending at 00476. If you can, identify what that  
5 catalog is.

6 A. This is the full version, again, of a  
7 prior exhibit, a full catalog version.

8 Q. Okay. And do you know when this was  
9 distributed?

10 A. No, I do not.

11 Q. On the last page, 00476, there is a  
12 copyright notice, "2002 The Epiphone Company".

13 A. Oh, on the side, yeah, 2002.

14 Q. So do you think it might be around that  
15 time?

16 A. Should be around that time most likely,  
17 yes.

18 Q. Do you know if the Explorer guitar is  
19 advertised anywhere in this catalog?

20 A. It should be. Let's see. On page 00444.

21 Q. Right. And I also believe it was shown  
22 at 00441, if you could confirm that.

23 A. Oh, yes. They've got -- which is a new  
24 product that we saw in the other flyer, yes.

25 That's correct.

1 Q. Okay. And I also saw it at 00451.

2 A. Yes, the bass version.

3 Q. Okay. On these three pages, at least,  
4 can you tell me if "EXP" is mentioned anywhere?

5 A. No, it is not.

6 Q. Okay. And in this catalog, can you tell  
7 me if "EXP" is mentioned?

8 A. No, it doesn't appear to be.

9 (Document marked Exhibit BP.)

10 BY MR. BODNER:

11 Q. The next one is Exhibit BP. It's a  
12 multipage document starting with 00477 and ending  
13 with 00504. And, if you could, just tell me what  
14 that document is.

15 A. Well, again, it's a full version of an  
16 Epiphone catalog that I think we've already looked  
17 at the specific pages of, but it's the full  
18 catalog copy.

19 Q. Okay. And this one, like the one before  
20 you looked at, is a catalog which is made  
21 available to the public?

22 A. Yes.

23 Q. Okay. Do you know if "Explorer," the  
24 Explorer guitar is shown anywhere in this catalog?  
25 I might be able to ease the pain by directing you

1 to 00495.

2 A. Yes, that's correct, 495.

3 Q. And on that page, if you'd just go back  
4 to that page for a second --

5 A. Yes.

6 Q. -- do you know if "EXP" is mentioned  
7 anywhere?

8 A. No, it's not.

9 Q. Okay. Can you just turn to page 00501?

10 A. Yes.

11 Q. And can you tell me if that's a separate  
12 catalog or part of this other catalog?

13 A. That would be a separate catalog.

14 Q. Okay.

15 A. It would just, again, be new product in  
16 the summer of 1998. It would be strictly new  
17 product that was introduced, so it wouldn't be a  
18 full catalog.

19 Q. Okay. So that would be from 00501  
20 through 00504; is that correct?

21 A. Yes.

22 Q. And is the Explorer guitar advertised  
23 anywhere in that catalog?

24 A. No, it doesn't appear to be.

25 Q. And is that catalog made available to the

1 public?

2 A. Yes. No new models were introduced of  
3 the Explorer.

4 Q. In either catalog I just identified, is  
5 "EXP" mentioned anywhere?

6 A. No.

7 (Document marked Exhibit BQ.)

8 BY MR. BODNER:

9 Q. The next one is Exhibit BQ, which is a  
10 multipage document starting with 00505 and ending  
11 at 00522. And, if you could, just identify what  
12 that document is.

13 A. Well, it's again a full version of an  
14 Epiphone product catalog that --

15 Q. That we saw earlier?

16 A. -- that we saw. I thought we looked at  
17 the full version awhile earlier, but maybe we  
18 didn't.

19 Q. Which is perhaps a different date?

20 A. Every year has a different cover, so  
21 it --

22 Q. Oh.

23 A. -- I recognize the cover.

24 Q. On the last page, which is 00522, it has  
25 a copyright notice of "1995 The Epiphone Company".

1 A. Okay.

2 Q. Do you think it was distributed around  
3 that time?

4 A. Should have been, yes.

5 Q. And this was also made available to the  
6 public, correct?

7 A. Yes.

8 Q. Is the Explorer guitar advertised in this  
9 catalog?

10 A. Yes. Page 00511.

11 Q. Okay. And can you tell me if "EXP" is  
12 mentioned anywhere in this catalog?

13 A. No.

14 (Document marked Exhibit BR.)

15 BY MR. BODNER:

16 Q. I'd like to mark as Exhibit BR a  
17 multipage document starting with 00545 and ending  
18 with 00556. If you could, just identify what this  
19 is.

20 A. This is an Epiphone Elite catalog.

21 Q. And so are there any Explorers advertised  
22 in here?

23 A. No.

24 Q. So therefore would there be any mention  
25 of "EXP" in here?

1 A. No.

2 (Document marked Exhibit BS.)

3 BY MR. BODNER:

4 Q. Okay. I'd like to mark the next one as  
5 Exhibit BS starting with GIB 00557 and ending with  
6 00564. And, if you would, just tell me what this  
7 is.

8 A. It would appear to be a product flyer for  
9 the Epiphone acoustic product line.

10 Q. So therefore the Explorer guitar is not  
11 advertised in here?

12 A. That is correct.

13 Q. And "EXP" is not mentioned in here?

14 A. That is correct.

15 Q. Is this something that's distributed to  
16 the public, also?

17 A. Yes.

18 MR. BODNER: Okay. Why don't we take  
19 a five-minute break? I don't have too much more  
20 to go.

21 MR. LANQUIST: Okay.

22 (Respite.)

23 BY MR. BODNER:

24 Q. Mr. Berryman, have you ever used "EXP  
25 Coated" on any of your products?

1 A. "EXP" coded on any of our products?

2 Q. Yes. That's "coated," c-o-a-t-e-d?

3 A. C-o-a-t-e-d?

4 Q. C-o-a-t-e-d. "Coated." In fact, before  
5 you answer, I will ask it more broadly. Have you  
6 ever used "EXP Coated" --

7 A. C-o-a-d-e-d?

8 Q. No, c-o-a-t-e-d.

9 A. Oh, "coated." You mean like a -- when I  
10 think of "coating," I think of finish, like a  
11 paint or something.

12 Q. Like a composite, two words, "EXP  
13 Coated." In other words, you use "Flying V," is  
14 that correct, on your guitars?

15 A. "Flying V"? Well, that's the name of the  
16 model, yeah.

17 Q. Yeah. Do you ever use "EXP Coated"?

18 A. On our guitars?

19 Q. On any of your products.

20 A. Well, I -- I'm not aware of it, no. It  
21 would just be "EXP".

22 Q. Do you run advertisements on the  
23 television for your products?

24 A. On the television? Not normally, no. I  
25 mean, we've done some cable ads and things like

1 that, you know, that we've run; but not general  
2 ads on television stations throughout the U.S.,  
3 no.

4 Q. Well, on cable you run ads?

5 A. Well, we have in the past, yes. Not  
6 normally, because it -- about ten percent of the  
7 population are musicians; so, I mean, you're  
8 really spending a lot of money for reaching very  
9 few people.

10 Q. Okay. So basically I take it that you  
11 really don't.

12 A. Typically, no.

13 Q. Okay. What about on the radio?

14 A. Yes. Yeah, we'll do sponsorships with  
15 dealers where they will advertise product for us.

16 Q. Okay. And you advertise your guitars on  
17 radio?

18 A. Yes. We would promote the guitars on  
19 radio, yes.

20 Q. And you have more or less prepared  
21 commercials for your guitars?

22 A. Well, yes, uh-huh. Twenty-second spot,  
23 30-second spot kind of thing for select product.

24 Q. And do you run advertisements in  
25 newspapers or magazines for your products?

1 A. Well, magazines, primarily. Newspapers  
2 would be very local, very regional. And dealers  
3 may, and we'll cooperate with them in promoting  
4 our product.

5 Q. Okay. And do you advertise your guitars  
6 in the magazines?

7 A. Well, yes.

8 Q. Okay. These advertisements that you run  
9 on the radio for your guitars or in the newspapers  
10 or magazines, do you ever use the term "EX" or  
11 "EXP"?

12 A. I don't believe we have, no.

13 Q. Do you know how much money you spend on  
14 advertising and promotion that the consumer, and  
15 I'm talking about the ultimate purchaser of your  
16 guitars, would see it?

17 A. You mean would see our product?

18 Q. Yeah, in the advertisements that the  
19 ultimate purchaser of your guitars would see.

20 A. Well, that's a rather broad question.  
21 You know, we do -- I mean, there's direct  
22 specific, model specific advertising, and then  
23 there's general brand recognition and guitar shape  
24 recognition.

25 Q. Okay.

1 A. Okay.

2 Q. But as far as a dollar figure, would  
3 you --

4 A. Oh, millions of dollars.

5 Q. How expensive are the Explorer guitars to  
6 the ultimate purchaser? Not to the dealer.

7 A. Well, the Gibson product would be, and  
8 I'm unsure of the exact specific price, but the  
9 Gibson model would be probably in the \$1,500  
10 range. And the Epiphone product would be pretty  
11 price competitive. A couple hundred dollars.

12 Q. Okay. So you're saying Epiphone makes a  
13 product and Gibson makes a product?

14 A. Yes.

15 Q. Which is the product that's made by  
16 Epiphone?

17 A. Epiphone branded product.

18 Q. And it's an Explorer guitar?

19 A. Yes.

20 Q. And what is the -- and is also there an  
21 Explorer guitar that's made by Gibson?

22 A. Yes. Yeah. We looked at the instances  
23 that were Gibson brand and Epiphone.

24 Q. Okay. So what is the range of price  
25 let's say if the purchaser, the ultimate purchaser

1 bought an Epiphone versus a Gibson Explorer  
2 guitar?

3 A. Well --

4 Q. I can explain it further. I'm looking  
5 for 500 to \$1,000, something like that, or \$1,000  
6 to \$2,000?

7 A. Oh, Epiphone would be under \$500. It  
8 would be a couple hundred dollars.

9 Q. Okay.

10 A. The Korina version is a little more  
11 expensive. And when you get into the Gibson  
12 market, you're consumer would pay roughly let's  
13 say \$1,000 on up to, if he bought an Explorer from  
14 a custom shop made out of Korina wood, he would  
15 pay up to \$5,000. I mean, we have that product in  
16 the entire price range, depending whether it's  
17 made in the U.S.A. or made in the Orient, and what  
18 the materials are that it's made out of.

19 Q. So why is Gibson more expensive than  
20 Epiphone?

21 A. Well, Gibson is all handcrafted and it's  
22 made in the United States in our factory. And  
23 Epiphone -- no Explorer product is made in the  
24 U.S.A. It would be all made offshore.

25 Q. Okay. Where offshore?

1 A. Japan, Korea, China, Indonesia.

2 Q. But these are not \$99 guitars, these are  
3 still expensive guitars to the ultimate purchaser,  
4 if you will?

5 MR. LANQUIST: Objection to the term  
6 "expensive." I mean, he's testified they're 200  
7 to about over \$1,000, so I guess "expensive" is an  
8 arbitrary term that means different things to  
9 different people.

10 BY MR. BODNER:

11 Q. There are other guitars that are sold for  
12 under \$99; is that correct?

13 A. Under 99? None that you can play more  
14 than an hour or two without falling apart. \$99 is  
15 about rock bottom. I mean, your average  
16 entry-level package would be 149, 199, 249; but  
17 that 249 range, that's where you start to get into  
18 the Epiphone Explorer.

19 Q. Right.

20 A. So it's very close to that range, yes.

21 Q. But a person who would be interested in  
22 your guitar, I mean, would be more of a  
23 sophisticated purchaser?

24 A. The Gibson would. The Epiphone would be  
25 beginner, mid-level, entry level, beginner to

1 mid-level and would not really know a lot about  
2 guitar, necessarily. We do a huge business in  
3 that end of the market.

4 Q. Is some of the advertisements that you  
5 provide or information that you provide to the  
6 ultimate purchaser, is that important for the  
7 ultimate purchaser making that decision whether to  
8 buy that guitar or not?

9 A. Well, I think a lot of those decisions  
10 are made when they're in the store.

11 Q. Why is that?

12 A. Because I don't think a beginner  
13 really -- I think the beginner needs some  
14 guidance. I mean, there's a fashion element to  
15 the instrument, to the color and to the shape and  
16 style of the instrument; but I think the more  
17 sophisticated a guitar player gets, the more he's  
18 looking for specific shapes for a reason, because  
19 of the tonality of the instrument and the carriage  
20 of the instrument. When you get into the Epiphone  
21 line, it's more price point driven than just the  
22 general shape or the style.

23 Q. But the sophisticated buyer would then  
24 probably be purchasing a Gibson as opposed to an  
25 Epiphone?

1 A. Well, there are beginners who buy Gibson  
2 because they have the money and they feel it's a  
3 very good investment and that there's an  
4 opportunity for it to appreciate over time, not  
5 depreciate. But we cover -- between Epiphone and  
6 Gibson, we cover all the price points in the  
7 marketplace, from the very entry level, don't have  
8 a lot of money, all the way up to the collector  
9 that wants a unique piece, because the Flying V  
10 and the Explorer are very famous, and they came  
11 out in 1958, and if you bought one of those  
12 guitars then, it would be worth \$100,000 today.  
13 Very famous. Probably the most famous guitars out  
14 there in terms of value of instruments.

15 Q. Okay. So the name Explorer, then, those  
16 in the field would know that's a good guitar and  
17 they would want that guitar to purchase? In other  
18 words, what I'm getting at is you're saying it's  
19 a -- the Explorer is a good quality guitar --

20 A. Well, all the Gibsons are great quality  
21 and all the Epiphones are great quality guitars.

22 Q. Why would someone be attracted to a  
23 Gibson guitar as opposed to that \$99 guitar?

24 A. Well, why is somebody attracted to a  
25 Mercedes Benz versus a Volkswagen? They both

1 provide transportation; they both get the job  
2 done; but somebody wants to pay \$100,000 more.  
3 That's -- if I had all the answers to that, I'd be  
4 an expert marketer.

5 Q. But -- okay.

6 A. It's the brand.

7 Q. On one of the documents, which is  
8 Exhibit AA, you don't have to look at it, I'm just  
9 going to tell you what I can see on here, and it's  
10 production number 00059, it looks like the  
11 Explorer is priced at around -- I'm sorry, the  
12 U.S. suggested retail price is around \$729. And  
13 is that what it would be sold for --

14 A. No.

15 Q. -- or are you saying it's a whole lot  
16 less than that?

17 A. This is an Epiphone price list?

18 Q. This is an Epiphone price list. I can  
19 show it to you, if you'd like.

20 A. Epiphone is known as a deep discount  
21 line, and --

22 Q. Do you see it towards the bottom of the  
23 page?

24 A. Yeah, the '58 Explorer. Now, this is --  
25 this is -- right. \$729, right. So, I mean, this

1 guitar would be sold in the three hundreds. It  
2 would be sold for about half of that, if the  
3 dealer advertises the product at 40 percent off,  
4 because we have restrictions on them not  
5 advertising our product more than 40 percent off  
6 of retail.

7 Q. Um-hum.

8 A. So kind of the starting price for the  
9 consumer is 60 percent of that retail price, and  
10 it goes down from there, depending on what you can  
11 negotiate with the dealer.

12 MR. BODNER: Okay. Excuse me for one  
13 minute.

14 (Respite.)

15 MR. BODNER: I have no further  
16 questions.

17 MR. LANQUIST: Just one -- well, a  
18 couple questions.

19 REDIRECT EXAMINATION BY MR. LANQUIST:

20 Q. You came to Gibson in 1986, correct?

21 A. Right. January 16th, '86.

22 Q. Okay. And you saw that Gibson was using  
23 some product designations for its various guitars,  
24 correct?

25 A. Yes.

1 Q. And you changed those, correct?

2 A. Correct.

3 Q. And, in fact, one of those that you  
4 changed was the Explorer product designation,  
5 correct?

6 A. That's correct.

7 Q. And why did you change it?

8 A. Because nobody could make sense of the  
9 product designations that the company had.

10 Q. Okay. And you changed it to "EXP1" or  
11 "EXP2," correct?

12 A. Indicating Explorer single pickup, double  
13 pickup, yes, that's correct.

14 Q. So why did you choose the "EX" for  
15 Explorer?

16 A. Because everybody knows it's Explorer.

17 MR. LANQUIST: That's all I have.

18 RE-CROSS-EXAMINATION BY MR. BODNER:

19 Q. Now, when you say "everybody knows it's  
20 Explorer," who do you mean by "everybody"?

21 A. Well, when I say "everybody," people that  
22 deal with the product are dealers, sales people,  
23 even some consumers. I mean, you know, you go to  
24 a trade show, you have half dealers, half  
25 consumers. People abbreviate things all the time.

1 And, I mean, people say "Les Paul" when they write  
2 about a Les Paul, but people will say, Well,  
3 that's a nice "LP," you know. It's just -- it's  
4 common. So "EXP" has become the term that's used.  
5 It's kind of a shorthand, in a way, for Explorer.

6 MR. BODNER: Okay. I'll object to  
7 this because it's hearsay evidence, but other than  
8 that, I have no further questions.

9 MR. LANQUIST: Okay. I don't have  
10 anything else.

11 FURTHER DEPONENT SAITH NOT.  
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C E R T I F I C A T E

I, Laurie Francisco, court 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 forgoing 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 28th day of January 2004.



*Laurie Francisco*  
-----  
Laurie Francisco

My Commission Expires:  
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CONSOLIDATED CANCELLATION PROCEEDING  
NOS. 92041175 AND 92041688  
OUR DOCKET NO.: N8948**

Dear Sir or Madam:

Enclosed for filing please find the following:

- Notice of Filing of Certified Transcript of Deposition of David H. Berryman
- Exhibits 1-14

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**

  
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02-03-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #39

EDLJr/gs

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