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

Proceeding	92052150
Party	Plaintiff Wonderbread 5
Correspondence Address	CARI A COHORN PHILLIPS ERLEWINE & GIVEN LLP 50 CALIFORNIA STREET, 32nd FLOOR SAN FRANCISCO, CA 94111 UNITED STATES cac@phillaw.com, rac@phillaw.com, dmg@phillaw.com, nac@phillaw.com, aht@phillaw.com
Submission	Plaintiff's Notice of Taking Testimony
Filer's Name	Cari A. Cohorn
Filer's e-mail	cac@phillaw.com, rac@phillaw.com, nac@phillaw.com, aht@phillaw.com
Signature	/s/ Cari A, Cohorn
Date	11/11/2013
Attachments	Frank Lunney Trial Testimony.pdf(37168 bytes )

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

3

4   In re Registration No. 3691948 for the Word mark  
5   WONDERBREAD 5 (Registered on October 6, 2009)

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8   WONDERBREAD 5,

9                           Petitioner,

10   vs.

                          Cancellation No. 92052150

11   PATRICK GILLES,

12                           Registrant.

13   \_\_\_\_\_/

14                           Deposition of

15                           FRASER LUNNEY

16                           Wednesday, September 25th, 2013

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22   REPORTED BY:   JOAN F. MARTIN, CSR #6036

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24                           NOGARA REPORTING SERVICE  
25                           5 Third Street, Suite 415  
                          San Francisco, California 94103  
                          (415) 398-1889

I N D E X

1		
2		Page Number
3	EXAMINATION BY MR. TUZIN	4
4	EXAMINATION BY MR. SWYERS	10
5	---	
6		
7		
8		
9		
10		
11		
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1           BE IT REMEMBERED THAT, pursuant to Agreement of  
 2 the Parties, and on Wednesday, the 25th day of  
 3 September, 2013, commencing at the hour of 3:02 o'clock  
 4 p.m. thereof, at the Law Offices of Phillips, Erlewine  
 5 & Given LLP, 50 California Street, Suite 3240, San  
 6 Francisco, California, before me, JOAN F. MARTIN, a  
 7 Certified Shorthand Reporter of the State of  
 8 California, personally appeared via conference call

9   FRASER LUNNEY,  
 10 called as a witness by the Petitioner, having been by  
 11 me first duly sworn, was examined and testified as  
 12 hereinafter set forth.

13   ---oOo---

14   APPEARANCES OF COUNSEL

15   Representing Petitioner:

16           PHILLIPS, ERLEWINE & GIVEN LLP  
 17           50 California Street, Suite 3240  
 18           San Francisco, California 94111  
 19           BY: NICHOLAS A. CARLIN, Attorney at Law  
               ALEXANDER H. TUZIN, Attorney at Law  
               (415) 398-0900   nac@phillaw.com  
   aht@phillaw.com

20   Representing Registrant (appearing via conference  
 21   call):

22           MATTHEW H. SWYERS, Attorney at Law  
 23           The Trademark Company  
               344 Maple Avenue West, Suite 151  
               Vienna, Virginia 22180  
               (800) 906-8626   mswyers@thetrademarkcompany.com

24   Also present:   Patrick Gilles (via conference call)

25



1           A. I've been full-time for ten months -- no, it's  
2       been almost a year, actually. Yeah, full year.

3           Q. And what's your job title?

4           A. Contract specialist.

5           Q. Okay. Before that, what did you do?

6           A. I was a temp at Sony PlayStation for two and a  
7       half years.

8           Q. Okay.

9           A. And a part-time musician.

10          Q. Okay. Thanks.

11                        So would you please give a brief summary of  
12       your musical career.

13          A. A brief summary would be I began playing music  
14       when I moved to San Francisco in approximately 1990,  
15       1991. Like a lot of people, I thought I was going to  
16       be a rock star playing the songs that I wrote, but  
17       started playing in cover bands around 1999, in fact,  
18       and became a working musician in cover bands for the  
19       next -- ever since then.

20          Q. When did you begin playing with Wonderbread 5?

21          A. I can recall subbing for them approximately  
22       late '99, early 2000.

23          Q. Okay. In what capacity did you play with  
24       them?

25          A. The bass -- the regular bass player needed a

1 substitute for a few gigs, and so I began filling in  
2 for him on occasion.

3 Q. Who first approached you to start playing with  
4 the band?

5 A. Tommy Rickard approached me. He and I were  
6 involved in another musical project, and he approached  
7 me to sub for John McDill, the regular bass player.

8 Q. And he approached you in late --

9 A. In passing in -- yeah -- conversation.

10 Q. -- '99?

11 A. "Can you fill in for John?"

12 Q. Who were the members of the band at the time?

13 A. Original members, Pat Gilles, Jeff Fletcher,  
14 Chris Adams, John McDill, and Tommy Rickard.

15 Q. And let's see. Did that lineup change at one  
16 point?

17 A. Did not change until Pat left and Mike Taylor  
18 took over for him -- Michael Taylor.

19 Q. Okay. How do you know that these are the  
20 members of the band?

21 A. They're the only ones I played with initially.  
22 I guess I got that just from, you know, meeting with  
23 the guys and playing with them.

24 Q. Okay. Would you consider yourself a member?

25 A. No. Just a friend that played with them on

1 occasion.

2 Q. Okay. And why would you not consider yourself  
3 a member?

4 A. It was always implicit that I was just subbing  
5 and helping out. I was never committed to any  
6 long-term commitments or other shows beyond whatever I  
7 was asked to fill in for.

8 Q. Okay. How many shows have you played with  
9 Wonderbread 5 per year, that you played with them?

10 A. Well, there was a three-year period I lived in  
11 Los Angeles, from late 2003 through 2006. But I think  
12 I even did fly up for a couple of those. My guess is  
13 approximately 50 shows over, you know, 13 years.

14 Q. Okay. So that comes to almost -- right.  
15 Let's see. Three or four?

16 A. Per year.

17 Q. Or four or five a year?

18 A. Yeah. There were a couple of years where, you  
19 know, there were more than others, for sure. But I  
20 think that's a conservative estimate.

21 Q. And you still substitute for the band  
22 occasionally?

23 A. Yeah. I did a show beginning of the month.

24 Q. Okay. How many band rehearsals do you  
25 estimate you've participated in?

1           A. Let's see. Initially more, because I had a  
2 lot of material to learn. But since then, and with the  
3 advent of, you know, file sharing and stuff, probably  
4 not as many. I'm thinking 10 to 15, maximum, really.  
5 I don't think any more than about 15 rehearsals.

6           Q. Have you ever appeared on any of the posters  
7 or promotional materials for the band?

8           A. No. Not to my knowledge, no.

9           Q. Who contacts you to sub for one of the members  
10 of the band?

11          A. Well, I've only ever subbed for John McDill,  
12 because I'm just a bass player and he's the bass  
13 player. Occasionally it's been John via e-mail or  
14 phone or text; more often it has been Tommy Rickard  
15 because he's a friend that I'm in touch with a lot  
16 more.

17          Q. Okay. Was there ever any kind of written  
18 agreement regarding subbing for -- for John?

19          A. Nope. No, I never signed anything. No.  
20 None.

21          Q. Ever since you've -- you've played with the  
22 band, was Pat Gilles aware that the band was using the  
23 name and mark Wonderbread 5?

24          A. I'm not sure because -- I don't understand the  
25 question. Because Pat was playing with me when I first

1 played with them.

2 Q. So if he said that he was not aware that the  
3 band was using the name over this time, would that be a  
4 false statement?

5 A. Well, I mean, that's the -- that was the name  
6 of the band, and that's how we were listed in, you  
7 know, advertisements and et cetera. I mean, yeah.

8 Q. So he --

9 A. I'm sure he was aware that they were called  
10 the Wonderbread 5. That's --

11 Q. Okay.

12 A. He was in the band.

13 Q. Thanks.

14 How are you paid by the Wonderbread 5?

15 A. Most of the time I was paid directly by John  
16 McDill, a personal check; a couple of times by cash  
17 after the show; and a couple of times from the booking  
18 agent, Jay Siegan -- Jay Siegan Presents.

19 Q. How much would you make for each show?

20 A. It varied. You know, certainly some gigs paid  
21 a lot. And that was arranged in advance with John,  
22 usually. I was told what I was going to get in  
23 advance, anyway.

24 It ranged from, you know, \$150, you know, for  
25 a low-playing club gig to -- you know, I think I did a

1 couple of private parties there where we made a good 5-  
2 or \$600 -- or I made a good 5- or \$600.

3 Q. And how would it be determined what you --  
4 what you would be paid?

5 A. It was negotiated by John on a few occasions,  
6 saying, "I'll pay you this." A couple of times, you  
7 know, when Tommy asked me to do the subbing, he would  
8 say, you know, "These ones pay this much." He'd let me  
9 know a rough figure.

10 If it was a club gig, I didn't really ask  
11 because I knew it was in the 150, \$200 range. And  
12 sometimes I knew it was cash.

13 MR. TUZIN: Okay. Thanks. I think that's all the  
14 questions we have for you at this time.

15 MR. SWYERS: A couple of questions from me.

16 Again, my name is Matthew Swyers, and I  
17 represent Mr. Gilles.

18 EXAMINATION BY MR. SWYERS

19 MR. SWYERS: Q. You mentioned that from 2003 to  
20 2006 you lived down in Los Angeles; is that correct?

21 A. That's true.

22 Q. And you said occasionally you would actually  
23 commute up to -- I'm guessing the San Francisco area  
24 for shows with Wonderbread 5; is that correct?

25 A. That's correct. On one occasion I traveled

1 with them from Long Beach on a cruise that left from  
2 Southern California where I was living. But, yeah. I  
3 flew up for a couple shows, yeah.

4 Q. Is that one --

5 A. Excuse me. I actually might have a -- driven  
6 my car a couple of times.

7 Q. Okay. Is that one of those -- getting on to  
8 the cruise issue, is that one of those, what I've heard  
9 about, like, rock boat cruises or sort of themed  
10 cruises for musicians where you all go on and then  
11 people sort of enjoy it? Or were you part of the  
12 act -- part of the act on the boat?

13 A. No. As I recall, this was the Active 20-30  
14 Club of Sacramento had all their members on a cruise.  
15 There were maybe 500 persons out of -- I think 5,000  
16 people fit on the boat? Or something like that.  
17 2,000? A large number. So they were a small  
18 percentage.

19 And I think the band was obliged to perform  
20 twice over three days, you know, in a public space. I  
21 don't even think there were tickets sold or anything.

22 Q. Was this, like, out on the deck of the ship,  
23 like --

24 A. Yeah.

25 Q. -- by the pool area or --

1 A. Exactly.

2 Q. So you grossly estimated you performed around  
3 50 shows with Wonderbread 5 over 13 years. I believe  
4 that was your testimony. Is that about right?

5 A. Yeah. I believe so, yes.

6 Q. Do you know, off the top of your head, how  
7 many shows Wonderbread 5 has in general performed in  
8 those 13 years?

9 A. I can guess, because I've been in similar  
10 bands. I've been in a full-time band for a string of  
11 five years, and we were averaging 80 to 90 shows a  
12 year, although Wonderbread could have been, you know,  
13 more successful and busier, in fact.

14 So I would say that they're probably doing at  
15 least 80 to 100 shows a year.

16 Q. Okay. Let me just look at my notes for one  
17 second here and make sure I don't have any other  
18 questions for you.

19 A. Sure.

20 MR. SWYERS: I actually have no further questions  
21 for you at this time.

22 THE WITNESS: Okay.

23 MR. TUZIN: Okay. I think that will do it, then.

24 MR. SWYERS: Fair enough.

25 MR. TUZIN: Thanks a lot.

1 THE WITNESS: All right. Thanks very much. Take  
2 care.

3 MR. TUZIN: Bye.

4 THE WITNESS: Bye-bye.

5 (Whereupon, the deposition concluded  
6 at 1:18 o'clock p.m.)

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CERTIFICATE OF WITNESS

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I, FRASER LUNNEY, hereby declare under penalty of perjury that I have read the foregoing deposition testimony; and that the same is a true and correct transcription of my said testimony except as I have corrected pursuant to my rights under Section 2025 (Q) (1) of the California Code of Civil Procedure.

  
\_\_\_\_\_  
Signature  
  
10/08/2013  
\_\_\_\_\_  
Date

1 STATE OF CALIFORNIA )  
2 COUNTY OF SAN FRANCISCO )

3 I, JOAN MARTIN, a Certified Shorthand Reporter  
4 of the State of California, duly authorized to  
5 administer oaths pursuant to Section 8211 of the  
6 California Code of Civil Procedure, do hereby certify  
7 that

8 FRASER LUNNEY,  
9 the witness appearing via conference call in the  
10 foregoing deposition, was by me duly sworn to testify  
11 the truth, the whole truth and nothing but the truth in  
12 the within-entitled cause; that said testimony of said  
13 witness was reported by me, a disinterested person, and  
14 was thereafter transcribed under my direction into  
15 typewriting and is a true and correct transcription of  
16 said proceedings.

17 I further certify that I am not of counsel or  
18 attorney for either or any of the parties in the  
19 foregoing deposition and caption named, nor in any way  
20 interested in the outcome of the cause named in said  
21 caption.

22 Dated the 3rd day of October, 2013.

23

24

25

JOAN F. MARTIN  
CSR No. 6036 (California)

1 Mr. Fraser Lunney  
2 371 Second Avenue, Apt. 1  
3 San Francisco, California 94118

4 Date: Thursday, October 3, 2013  
5 Re: Wonderbread 5 vs. Gilles  
6 Deposition Date: Wednesday, September 25th, 2013

7 Dear Mr. Lunney,

8 Please be advised the original transcript of your  
9 deposition is ready for your review. Pursuant to CCP  
10 Section 2025.520(a), you have 30 days following the  
11 date of this notice to read, correct and sign your  
12 transcript unless the attending parties and the  
13 deponent agree on the record, or otherwise in writing,  
14 to a longer or shorter time period. The deponent may  
15 change the form or the substance of the answer to a  
16 question, and may either approve the transcript of the  
17 deposition by signing it, or refuse to approve the  
18 transcript by not signing it. You are not required by  
19 law to read and sign your deposition transcript. All  
20 parties will be informed of the corrections. The  
21 original transcript will then be sealed and sent to the  
22 examining attorney pursuant to the applicable law.

23 You may either come to our office to read and sign the  
24 original transcript, or you may contact your attorney  
25 or the attorney who arranged for you to be present at  
your deposition. If they have ordered a copy of the  
transcript, you may review their copy and make  
corrections by submitting, signing and returning the  
attached form. If you choose to review your transcript  
at our office, please call first to make an  
appointment.

Should you have any question regarding these  
instructions, please call.

Sincerely,

NOGARA REPORTING SERVICE  
5 Third Street, Suite 415  
San Francisco, California 94103  
(415) 398-1889

cc: Original deposition  
All counsel