

ESTTA Tracking number: **ESTTA983206**

Filing date: **06/25/2019**

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

Proceeding	92065794
Party	Plaintiff The Marshall Tucker Band, Inc.
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Date	06/25/2019
Attachments	Cedar Boschan Declaration with Exhibit A.pdf(751097 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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The Marshall Tucker Band, Inc.,)	Cancellation No.: 92065794
)	Registration Nos. 4616427 and 4616428
Petitioner,)	Mark: THE MARSHALL TUCKER BAND
)	
v.)	
)	
M T Industries, Inc.,)	DECLARATION OF CEDAR
)	BOSCHAN IN SUPPORT OF
Respondent.)	THE MARSHALL TUCKER
)	BAND INC.'S PETITION FOR
)	CANCELLATION
_____)	

I, Cedar Boschan, declare as follows:

1. I am the founder and CEO of Boschan Corp., which provides forensic accounting, consulting and contract audit services.

2. I have 26 years of music industry experience, including over 17 years of providing consulting services ranging from music contract negotiation to valuing damages in intellectual property and entertainment matters.

3. I have testified at trial and at deposition as an expert.

4. I serve as faculty at Los Angeles College of Music where I teach music royalty accounting and applied economics courses. I also served for four years as the national treasurer of The Association of Independent Music Publishes (AIMP), where I spoke on topics of valuation in the music industry and was responsible for New York, Nashville, and Los Angeles finances. I have engaged in dozens of speaking engagements, as well as authored publications on various music industry financial topics.

5. My expert opinions and conclusions in the matter of The Marshall Tucker Band, Inc. v. MT Industries, Inc. are contained in the July 4, 2018 expert report, hereto attached as Exhibit A.

6. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed in Culver City, CA on:

Date: Tuesday, June 25, 2019


Cedar Boschan

EXHIBIT A



BOSCHAN CORP.
FORENSIC ACCOUNTING & AUDITS

CONFIDENTIAL

Wednesday, July 4, 2018

Expert Report by Cedar Boschan

Matter of

The Marshall Tucker Band, Inc.
("Petitioner")

v.

MT Industries, Inc.
("Registrant")

Table of Contents:

1. Assignment (Page 3)
2. Expert Qualifications (Page 5)
3. Facts & Opinions:
 - i. Background Facts (Page 8)
 - ii. The Public's Perception of The Identity of The Marshall Tucker Band (Page 9)
 - iii. Registrant is a Licensee Under the 1984 Agreement and Industry Standards (Page 14)
 - a. The 1984 Agreement (Page 14)
 - b. Intentions (Page 18)
 - c. Conclusions (Page 23)
 - iv. How Petitioner Is Damaged by Registrant's Trademark Claims (Page 24)
 - a. Assumptions (Page 24)
 - b. Damages (Page 26)
 1. Value of Marks
 2. Recording Earnings
 3. Petitioner's Costs
4. Summary & Signature (Page 29)
5. Appendices (Page 30)
 - Appendix A ... Compensation
 - Appendix B ... Curriculum Vitae
 - Appendix C ... Publications
 - Appendix D ... Testimony Experience
 - Appendix E ... Documents Relied Upon

1. ASSIGNMENT

Boschan Corp. was retained by Venable LLP to provide expert services in connection with the matter of The Marshall Tucker Band, Inc. (“Petitioner”) v. MT Industries, Inc. (“Registrant”). Such matter may be referred to below as the “Matter.”

Specifically, Boschan Corp. was retained to offer specialized expertise in the music sector, including but not limited to standard music industry rights agreements and practices as well as damages. As Boschan Corp.’s music practice leader, my analysis and opinions to-date are described in the text herein.

The purpose of this report is to summarize my opinions based on my expert review of the available facts concerning the following:

- i. The Public’s Perception of The Identity of The Marshall Tucker Band
- ii. Analysis of the 1984 Agreement, Other Relevant Documents and Industry Standards
- iii. How Petitioner Is Damaged by Registrant’s Trademark Claims

This report includes information customarily provided by experts in litigation matters (as required by Federal Rule of Civil Procedure 26(a)(2)(B)). Such information includes:

- Disclosure of compensation for this engagement (Appendix A)
- Qualifications of the expert (see below “Qualifications” section and my curriculum vitae attached as Appendix B)
- List of publications over the past decade (Appendix C)
- Testimony experience over the past four years (Appendix D)
- List of documents relied upon (Appendix E)

I understand that Boschan Corp. may potentially be asked to provide future analysis and insight, if any, concerning the Matter. Therefore, I reserve the right to issue subsequent reports if requested to do so.

2. EXPERT QUALIFICATIONS OF CEDAR BOSCHAN

I have 26 years of music industry experience, including over 17 years of providing consulting services ranging from music contract negotiation to valuing damages in intellectual property and entertainment matters.

During college at the University of Southern California I earned a Bachelor of Science in music industry, the most respected music industry degree, with an emphasis on the business side of the industry, especially accounting, economics, and copyright. During college I also worked in the music industry, and then was hired as an account executive at a music public relations and marketing firm, Innovative Media & Marketing.

As summarized in my curriculum vitae (see Appendix B hereto), after college I took a position at the boutique music royalty accounting firm Wolinsky, Becker & Hurewitz, LLP, where I launched my music industry consulting and forensic accounting career.

I conducted music royalty and participation compliance examinations, valuations, and forensic accounting investigations, among other consulting services, for eight (8) years at Wolinsky, Becker & Hurewitz. I then continued this practice as a manager at Miller, Kaplan, Arase & Co., LLP, as partner at Hurewitz, Boschan & Co., LLP, and a principal at Green Hasson Janks, where I was the music practice leader and head of the forensics department.

Examples of past matters on which I worked during my tenure at past firms include those involving Apple Corps. (which owns The Beatles marks), ALAD (which owns Avril Lavigne's marks) and 19 Recordings (which owns *American Idol's* marks).

In 2015 I founded Boschan Corp., which provides forensic accounting, consulting and contract audit services. A sample of current music-related clients at Boschan Corp. for which my work includes one or more elements of trademark rights and/or damages claims valuation include:

- BMG Rights Management

- Counsel for Elias Arts Music Library
- Counsel for Evilive Music (Owns Danzig marks)
- Julia Negron (re: The Doors)
- Katy Perry
- Tom Petty Estate

Beyond long track record of providing consulting and forensic accounting services to the music industry, my qualifications include serving as faculty at Los Angeles College of Music, where I currently teach music royalty accounting and applied economics courses, both of which cover certain economic damages valuation techniques as part of the school's four-year music business degree programs.

I also served for four (4) years as the national treasurer of The Association of Independent Music Publishers (AIMP), where I have spoken on the topic of valuation in the music industry and was responsible for New York, Nashville and Los Angeles finances.

Frequently I am engaged to speak on music industry financial topics and have completed dozens of speaking engagements. These include public speakerships at South by Southwest, The Sports & Entertainment Symposium, California Lawyers for the Arts, The California Copyright Conference, The Beverly Hills Bar Association, Loyola Law School and The University of Southern California as well as private speakerships such as at law firms such as Glaser weil and Trope & Trope.

Over the past decade, I have authored the publications set forth in Appendix C hereto and was recently asked to write an article regarding copyright valuation for a legal publication. I have served as a source about the value of certain music copyrights to publications including *USA Today*, *Billboard*, and *The Wall Street Journal* and am known as one of the leading experts worldwide in the field of music rights, royalties and damages valuation.

It may be worth noting that over 170 individuals have publicly endorsed my industry knowledge of licensing, over 130 individuals have endorsed my music industry knowledge, and over 90 individuals have endorsed my knowledge of

intellectual property, many of them accomplished experts themselves.

Please see Appendix D for a list of cases in which I have testified over the past four years, not including testimony I am scheduled to give on July 10, 2018 in the matter of Evilive Music v. The End Records.

3. FACTS AND OPINIONS

i. Background Facts

Based on my review of documents listed on Appendix E, and an interview on June 27 with Mr., Harold Douglas Gray (aka "Doug Gray"), I understand the following background facts:

- Petitioner was incorporated in January 1974
- Registrant was incorporated in February 1978
- Registrant purchased masters recorded by the Marshall Tucker Band on October 22, 1980
- Registrant purchased songs written by members of the Marshall Tucker Band on October 22, 1980 and sold them on August 5, 1998
- As of the date hereof:
 - Gray is the sole owner/shareholder of Petitioner
 - Gray is 20% owner of Registrant
 - Mr. Ronald Rainey is the 80% and controlling shareholder of Registrant
- Rainey is the former artist manager of The Marshall Tucker Band

ii. The Public's Perception of The Identity of The Marshall Tucker Band

According to a report by BTI Appraisal commissioned by Registrant:

"In 2014, The Marshall Tucker Band logo was voted by Grammy magazine as one of the top 10 most distinctive logos of all time."

In order to assess rights to The Marshall Tucker Band name, logo, service marks and trademarks (collectively, the "Marks"), one must first answer the question: who does the public think the Marshall Tucker band is?

This is because, as Donald Passman, Esq. paraphrases in his book *"All You Need to Know About the Music Business"* (referred by the *Los Angeles Times* as the "industry bible"):

"The rule is that you get rights in a mark by actually using the name and having it associated with you in the mind of the public."

Registrant claimed in its first set of interrogatory responses that:

"MTI was using the Name 'The Marshall Tucker Band' or 'Marshall Tucker Band' in connection with recordings and masters as of February 22, 1984 ... and earlier, and was using the name in connection with all of the band's recorded songs from the date MTI was formed in 1978."

Upon investigation, we found this claim to be at least partly untrue. Namely, the above-referenced masters, recordings, and songs that the band recorded were not acquired by Registrant until 1981 (not 1978). As for the songs (i.e., musical compositions), in the music industry, songs are attributed to individual songwriters, not to recording artists, so the Marks should not have been used in connection with songs, only masters. However, in any case, the songs were sold by Registrant in 1998. Therefore, according to the available information, in the unlikely event that Registrant used the Marks in connection with exploitation of songs ever, Registrant could not have been using the name “The Marshall Tucker Band” in connection with the songs since 1998, when it sold the songs. Further, it has not used the Marks in connection with any Marshall Tucker Band services for decades.

On the other hand, the available information clearly demonstrates that The Marshall Tucker Band has been using its name since 1971 and Petitioner - The Marshall Tucker Band and its business entity, MTB, Inc. (also referred to herein as “MTB”) - has been using the name The Marshall Tucker Band continuously in interstate commerce for both products and services since January 15, 1974, years before Registrant was established.

As the public’s encyclopedia *wikipedia* summarizes:

“The Marshall Tucker Band is an American rock band from Spartanburg, South Carolina...The Marshall Tucker Band helped establish the southern rock genre in the

early 1970s...[and] the band has recorded and performed continuously under various lineups for 45 years.”

The most comprehensive and well-established online music guide, AllMusic.com, states:

“During the years since the original band dissolved, the group has had country chart hits, toured constantly, made forays into the blues and adult contemporary, and suffered the loss of founding member Toy Caldwell, who died in 1993. Some bandmembers left, some joined, and some stayed right where they were, but through it all, the Marshall Tucker Band endured. The band continued to record steadily, maintained a loyal fan base, and eventually began to receive their due as southern rock pioneers.”

Therefore, it is not surprising that during my research of facts regarding this matter I was not able to identify a single case when a member of the public perceived The Marshall Tucker Band to be a record label, a publisher, a recording, a CD, a stream, a song, a license, a product or a download.

Instead, the results of my research of public information revealed that the public perceives the Marshall Tucker Band to be that certain band of musical artists:

- a. whose website, marshalltucker.com, they visit
- b. whose authorized merchandise (e.g., tee-shirts) they buy
- c. whose Facebook fan page they like
- d. who they buy concert tickets from TicketMaster or eBay to see perform
- e. whose recordings – released by various labels – they buy or subscribe to music services to hear

- f. whose photos, backstage passes, and other memorabilia is sold on eBay for hundreds of dollars
- g. who was recently nominated for induction into the Rock 'n' Roll Hall of Fame and nominated for a 1976 Grammy Award for "Best Country Instrumental Performance" its recorded single *Long Hard Ride*

Moreover, my findings include that the public does not perceive The Marshall Tucker Band Marks to be directly associated with Registrant in any meaningful manner, just as it does not perceive The Allman Brothers Band or The Doors names and logos to be owned by their respective labels (Universal Music Group, Sony, and Warner Music Group, which respectively own Allman Brothers Band's and The Doors' master recordings).

Instead, the public perceives that, as the United States Patent and Trademark Office ("USPTO") itself states on its website:

"Intellectual property rights give musicians and artists control over their artistic works ... as well as their name and brand."

Accordingly, (i.e., since the public generally assumes use of a band name is controlled by the band) it is no surprise that, according to a recent Google search of "Marshall Tucker Band," one of the Google searches most associated with "Marshall Tucker Band" is "Doug Gray Marshall Tucker Band," because Doug Gray is one of the founding members of the band and the owner of Petitioner (see Figure 1).



Figure 1 Screenshot of Searches for "Marshall Tucker Band" Per Google.com on June 22, 2018

Incidentally, if the public's perception of a band name was more commonly associated with the owner of the master recordings than the artists whose works are thereon embodied, the boilerplate language in recording or master acquisition agreements would transfer ownership of artists' trademarks, service marks or name and likenesses. However, in the tens of hundreds of record agreements I have seen, I have never seen any band or recording artist trademark or service mark or name and likeness ownership transferred to a record company. (Even in the case where the owner of a former music client's masters required him to change his name from "Tip" (to "T.I.") to avoid confusion with the recording artist "Q-Tip," the owners of the masters did not claim ownership to the name or marks related to "T.I.")

Instead of claiming names and marks for themselves, the industry standard is for owners of masters to take measures to make sure that the public exclusively associates a band name with *the band itself* and that the band controls any relevant marks. As stated by my former college professors and world-renowned music business experts Jeffrey Brabec, Esq. and Todd Brabec, Esq. in the seventh edition of their book *Music, Money & Success* (Schirmer Trade Books, A Part of the Music Sales Group, 2011) (described by the American Bar Association as the "Leading work dealing with the nuts and bolts economics of the music industry") (bold added for emphasis):

“Most recording agreements will contain a warranty by the artist that the group or professional name being used is actually owned by the artist and that no other performer has the right to use that name in the record business. In this regard, many contracts will give the record company the right to conduct a trademark search investigation to find out whether or not the group name is being used by anyone else. The record company is many times also given the right to file a federal trademark registration for the name in favor of the group if protection has not already been secured...”

Thus, it appears that both the general recording industry and I share the opinion that the public associates band names and marks with bands such as Petitioner, as opposed to master owners such as Registrant. I conclude based on my research, that this Matter is no exception and that, were the United States Patent Trademark Office “USPTO” to fail to cancel the registration of the Marks to Registrant, it would contravene the intentions of trademark and service mark rights to protect consumers from confusion (i.e., as to who the Marshall Tucker Band is).

iii. **Registrant is a Non-Exclusive Licensee Under the 1984 Agreement and Industry Standards**

a. **The Plain Language of the 1984 Agreement is Merely a License to MTI**

Aside from the fact that the public overwhelmingly associates the Marks with Petitioner, the contractual basis cited by Registrant to support its claim to the Marks is invalid in my opinion.

As Donald Passman, Esq. states in the seventh edition of his book *All You Need to Know About the Music Business* (RosettaBooks, LLC, 2010)

(called the “industry bible” by the *Los Angeles Times* and written for musicians):

“Can you guess what your most important asset is?”

Apart from your good looks, charm, and talent, your most important asset is the group name. So, whatever else you do, by all means figure out what to do with your group name...if you only deal with your name in a written agreement, I will be happy...”

Based on the similar and best available advice of Passman’s esteemed colleague, Ronald Taft, Esq. who counseled the members of The Marshall Tucker Band, the band indeed did diligently “deal with” its name in the written agreement dated February 22, 1984 between The Marshall Tucker Band, Inc., M.T. Industries, Inc., Toy Caldwell, Jerry Eubanks, Doug Gray, George McCorkle and Paul Riddle (the “1984 Agreement”).

In various answers to interrogatories, the basis cited by the Registrant for its claim of ownership of the Marks for products and services is such 1984 Agreement.

Under the plain language of the first sentence of Section 4 of the 1984 Agreement, which very clearly sets forth the agreement among the parties as who exactly *solely* and *exclusively own* the Marks (line breaks, bold and identifiers in brackets added for clarity):

*“Marshall Tucker Band Name
[Band members] Toy, Paul and George
agree that the name Marshall Tucker*

Band and any names similar thereto (collectively "Name") shall be the sole and exclusive property of:

- (i) MTB [Petitioner] with respect to - future live performances,*
- (ii) such companies as [band members] Doug and Jerry may elect with respect to the recordings recently financed by Doug ("Doug's Record") and any and all other recordings to be done in the future, and*
- (iii) MTB with respect to any and all other media, areas and uses. ..."*

To my knowledge, Registrant has failed to cite any reason why the above language, which effectively grants to Petitioner nearly all exclusive ownership rights to the Marks, is inapplicable.

Note that in my investigation, I found that pursuant to an agreement dated January 31, 1996 between H. Douglas Gray, Jerry W. Eubanks, Marshall Tucker Band, Inc. and MTB, Inc. (the "1996 Agreement"), Eubanks relinquished his rights to the name "The Marshall Tucker Band" and similar names. Registrant was not a party to this agreement and did not pay consideration to Eubanks for his rights to the name because Registrant merely had a license to use the name and was not impacted by this change in ownership of the Marks.

In any case, since Registrant is undoubtedly granted no ownership of the Marks in the first sentence of the “Marshall Tucker Band Name” section 4 of the 1984 agreement, I believe it must be relying on the sentences that follow for the basis of its claims. Section 4 of the 1984 agreement continues:

“...without limiting the foregoing, everyone agrees that MTB, Doug, Jerry and such companies shall have the right to so use said Name with a band comprised of such persons, and number of persons, as MTB, Doug and Jerry may elect. Anything to the contrary notwithstanding, MTI [Registrant] shall have the right to use, and to permit others to use, the Name in connection with all previously released masters of the band and, all, other recordings of the band made prior to the date hereof (other than Doug's Record). Neither Toy, Paul, nor George shall have the right to use the Name in any manner whatsoever, whether with respect to live performance or otherwise, but they shall have the right to state as part of - their biography on the back (but not the front) of an album jacket (or similar packaging) that they were formerly with The Marshall Tucker Band.”

However, such last three sentences of section 4 of the 1984 agreement do not convey ownership to any party. They merely convey licenses to

use the name in manners that might not otherwise be allowed – or were definitely not otherwise allowed without a separate license agreement in the case of Registrant’s uses – by the first sentence. Thus, the following sentence:

“Anything to the contrary notwithstanding, MTI shall have the right to use, and to permit others to use, the Name in connection with all previously released masters of the band and, all, other recordings of the band made prior to the date hereof (other than Doug's Record)”

constitutes a non-exclusive license for specific uses, plain and simple.

b. Intentions of Parties in Light of Other Documents and Industry Standards

Although the 1984 Agreement language alone is clear and sufficient to form the basis for an opinion as to the exclusive owners of the Marks, when we consider in our analysis the intentions of the parties based on other documents and then-current industry standards, we arrive at the same conclusion, as detailed below.

1. Other Documents:

Until relatively recently, Registrant evidently shared the opinion that Petitioner is the primary owner of the Marks. In fact, according to my June 27, 2018 telephone conversation with him, minority shareholder of Registrant Doug Gray – a founding member of The Marshall Tucker Band – still shares this opinion and it is *only* the now-majority shareholder of Registrant, Ron Rainey, formerly the manager of The Marshall

Tucker Band, who has changed his views on the owner(s) of the Marks.

According to the documents provided by counsel for Petitioner as listed on Appendix E hereto, as the then manager of The Marshall Tucker Band, Rainey in 1999 effectuated the engagement on behalf of Petitioner of experienced music trademark attorney Cheryl H. Hodgson, Esq. to register Petitioner's Marks in New York, California, Tennessee and South Carolina. I have personally had the occasion to work with Ms. Hodgson and can attest to how thorough she is in her work and do not believe that she would have incorrectly registered the marks in the wrong entity's name. Perhaps more germane to this matter is the fact that Rainey himself in his own related correspondence did not attribute the Marks to Registrant, but to Doug Gray (who was by that point the 100% shareholder of Petitioner and by that point was party to the 1996 Agreement whereby Eubanks sold his ownership in the Marks, leaving only Petitioner and Gray as the sole and exclusive owners of the Marks).

Petitioner's legal counsel at the Wilkes Law Firm PA asked Rainey in 2004 if he was handling the renewal of such registrations, however, I understand from Petitioner's counsel that the state registrations of the Marks, which cover a variety of services and products including recordings, may not all have been renewed. However, Petitioner's counsel provided us with renewal documentation of Petitioner's South Carolina renewals of Marks registration, which Petitioner's counsel states "have been maintained consistently since they were first registered, perhaps in the 1970s. We have the renewal certificates from 1999, 2004, 2009 and

2014..., and we will be renewing next year, also.”

Not only did Rainey oversee the registration and renewals (or lack thereof as the case may be) in Petitioner’s name, but in his own document dated March 3, 2010 entitled “Marshall Tucker Roadmap,” Rainey stated that Petitioner “is the owner of the band name, logo, merchandise rights, and is the legal touring entity” of The Marshall Tucker Band.

Notably, Rainey’s description of the role of Registrant is simply that it “owns the master recording rights to the first seven Marshall Tucker Band albums.”

This document shows that the 1984 agreement did not transfer ownership of the Marks to Registrant. (And no subsequent documentation substantiating the basis for Registrant’s claim of ownership of the Marks has been produced to my knowledge.)

According to all of the documents we reviewed, it was only relatively recently that Rainey first claimed that Registrant was an owner of the Marks.

- 2. Industry Standards:** Beyond documents, during my analysis I considered whether section 4 of the 1984 Agreement made sense in light of industry standards during the 1980s. During the course of my career, I have reviewed at least dozens (if not hundreds) of 1970s and 1980s contracts between artists (including bands) and master rights holders.

As shown in the chart on the following page, I compared to section 4 of the 1984 Agreement the typical 1970s and early 1980s deal points governing uses by master

rights holders of artists' name and likeness. Given the brevity of the 1984 Agreement and its letter format, based on such analysis, I conclude that the third sentence of section 4 of the 1984 Agreement largely comports with then-current industry standards for a name and likeness license to a master rights holder, so it is unlikely that the parties, who were represented by counsel who were knowledgeable about industry standards, intended anything significantly different than what the language in section 4 states.

Industry Standard	1984 Agreement
Allows the master owners the right to use and allow others to use the names and likeness concerning artists	Specified in the third sentence of the 1984 Agreement.
The scope of use is limited to be in connection with phonograph records made from the delivered under the agreement masters and for related marketing and advertising purposes	The 1984 agreement specifies that Registrant is allowed to use the name Marshall Tucker Band only in connection with particular masters.
There are approval rights for endorsements or premium uses	Although this is not mentioned in the 1984 Agreement, based on the controlling ownership of the licensee (i.e., Registrant), it may have been assumed that the owners would only authorize uses that the owners of the Marks also approved.
The artist is restricted from using its name and likeness to compete with the master owner solely during the term of the agreement (generally a maximum of seven years covering the periods when new albums are delivered by the artist to the master owner) (however, once the term of the agreement is expired, no such restrictions apply)	Since the term of the agreement under which the relevant masters had expired prior to the 1984 Agreement, it is congruent with industry standards that this restriction on the Marshall Tucker Band was not included in the license set forth in the third sentence of section 4 thereof.

c. **Conclusions:** As detailed above, based on my experience with similar agreements and my review of the plain language of the 1984 Agreement, the 1986 Agreement, prior trademark registrations and related correspondence, and considering the likely intentions of the parties in light of industry standards, I am of the opinion that, while Registrant certainly has a *non-exclusive license* to use the Marks in order to fulfill its then-current mission of exploiting pre 1984 masters, Petitioner is the *exclusive owner* of the Marks for all uses, with the sole exception of post-1984 master recording exploitations, the rights to which are now property of Doug Gray, who, incidentally, according to my June 27 conversation with Gray, has designated Petitioner as the licensee of any future Marshal Tucker Band recordings.

iv. How Petitioner Is Damaged by Registrant's Trademark Claims:

a. Assumptions:

Registrant's first interrogatory responses state [bold added for emphasis]:

"Registrant believes that to the best of its knowledge, that ...no other person or entity may use... the trademark/service mark which was subject of its applications on the same goods and services as MTI, i.e. in connection with the, commercial use of masters and recordings made prior to February, 1984..."

And

"Registrant does not claim that MTI has the exclusive right to use the Name 'The Marshall Tucker Band' or 'Marshall Tucker Band' for all purposes or uses."

However, I understand from Petitioner's counsel that the registration may be deemed to cover all exploitations of masters and recordings and not merely those owned by Registrant as of February 1984 and that the registration application(s) do not comport with the above statements by Registrant. If so, the registrations themselves exceed the Marks rights that Registrant itself has claimed in the interrogatories it answered (and Petitioner's counsel has explained that Registrant and/or its counsel acknowledged this fact in other communications).

It should be noted that should Registration of the Marks cover uses in addition to the “commercial use of masters and recordings” the magnitude of damages would be extraordinarily greater than described below. Particularly, if the registration covers the live performance services that Petitioner has historically and currently rendered, or the merchandise that it historically and currently licenses and/or sells, then we estimate Petitioner’s actual damages will amount to several million dollars.

In fact, because Petitioner cannot furnish the actual Mark registrations to customs enforcement and certain sellers such as eBay, Petitioner’s counsel informed me that it has already experienced an inability to enforce compliance with trademark laws by merchandise bootleggers. Petitioner’s counsel specifically mentioned its “unsuccessful attempts ...to have eBay shut down sales of infringing merchandise” because eBay demands trademark registration documentation before it will demand that a seller cease to sell infringing items.

As I teach in my Applied Economics course at Los Angeles College of Music, the inability to control the supply of bootleg merchandise in the marketplace is known to reduce demand for legitimate merchandise for a variety of reasons and can also damage the public’s overall perception of a brand (e.g., if quality is poor, prices too low or supply too plentiful). For these reasons, not to mention the expense of legal fees related to enforcing trademark compliance, I am of the opinion that Petitioner’s merchandise business has already been damaged by the grant of registration to Registrant (and potentially its other lines of business that utilize the Marks might have been negatively impacted as well).

Nevertheless, solely for purposes of the specific damages analysis described below, we assumed that the USPTO’s grant to Registrant covers only the

“commercial use of masters and recordings,” and not other products or any services.

b. Damages**1. Foregone Value of the Marks**

Registrant commissioned a “Valuation of a 20% Interest of MT Industries, Inc. as of December 31, 2017” by BTI Appraisal (the “BTI Valuation”, which Petitioner’s counsel provided to us for use in our analysis herein. Although the valuation incorrectly assumes that Registrant owns the Marks, the report is useful solely from the standpoint that it demonstrates that Registrant believes that the Marks are valuable assets.

According to the BTI Valuation, the only non-financial assets (i.e., assets other than cash, stocks and bonds) purportedly owned by Registrant are intangible assets consisting of the Marks and recordings and inventory thereof, which BTI estimated was worth a maximum of \$60,000. Thus, it follows that the value of the intangible assets is \$2,676,191 according to the BTI Valuation (i.e., Registrant total valuation of \$3,040,000, less Registrant’s financial assets of \$303,809 and less its inventory assets of approximately \$60,000). Clearly some portion of such over \$2.6 million is attributable to ownership of the Marks, although BTI failed to report the value of intangible assets in the BTI Valuation.

Thus, if Petitioner is denied ownership of the Marks, it will suffer the loss of the value of owning the Marks, to which the BTI Valuation commissioned by Registrant itself has appraised value (i.e., some unspecified portion of \$2.6 million).

Note that, if requested, we may be able to assess the specific value of the Marks independently.

2. Forgone Recording Earnings

If the USPTO does not cancel the Marks registration it granted to Registrant, Petitioner will continue to suffer damages and will suffer additional damages as described below:

- **FUTURE RECORDINGS:** In my June 27, 2018 conversation with Doug Gray (i.e., the majority shareholder of Petitioner and minority shareholder of Respondent and founding member of The Marshall Tucker Band), he explained that, while touring, radio stations and fans alike invariably ask when the next Marshall Tucker Band album will be released. He also stated that he intends for Petitioner to be the licensor of such new recordings to music services and distributors. However, Gray and Petitioner have been holding off on releasing new recordings pending the outcome of this case. Thus, Petitioner has already foregone direct and indirect profits associated with releasing a new record ranging from record sales revenues and synch license fees to increased ticket and merchandise sales as a result of the publicity surrounding the release new material.
- **PAST RECORDINGS:** Should Gray and/or the other authors (and their heirs, as applicable) of certain past Marshall Tucker Band recordings terminate certain copyright grants in connection with past recordings under the US Copyright Act or British Reversionary Rights laws, the remaining party other than Registrant with the right to the Marks is Petitioner (since the license to Registrant was non-exclusive). Therefore, the authors are most likely to elect that Petitioner exploit such

reclaimed master recording rights. However, if the USPTO does not cancel Registrant's registration, Petitioner will not have this potentially profitable opportunity, or it will have to engage in further litigation in order to secure its lawful rights.

Further, if the USPTO does not cancel the registration by Registrant, and Petitioner does not succeed in securing such cancellation or other resolution through litigation, in order to release new or past Marshall Tucker Band recordings, Petitioner will either need to obtain a license from Registrant or face trademark infringement liability, both of which could potentially amount to hundreds of thousands or even millions of dollars.

c. Petitioner's Costs to Secure Marks

Based on my firm's own anticipated billings and information from Petitioner's counsel, petitioner's costs for challenging Registrant's registration of the Marks has thus far exceeded one hundred thousand dollars. Should the USPTO fail to cancel Registrant's registration, Petitioner is likely to incur material future legal costs in an attempt to resolve the claims.

Further, to the extent that Registrant's registration covers all recorded uses (despite the facts described above), if the USPTO does not cancel the Marks registration it granted to Registrant, Petitioner, Eubanks and Gray will have lost the consideration they either relinquished or paid in order to secure ownership of the Marks for future recordings in 1984 and 1986 and Petitioner will have lost the trademark registration and legal fees that it paid (ironically under current majority-shareholder-of-Registrant Rainey's management), for prior trademark searches, registrations and related attorney's services, not to mention the commissions that Petitioner paid to Rainey, which

covered his management services including overseeing that the Marks were properly registered and renewed.

In conclusion, both Petitioner and other parties have already suffered damages as a result of the Marks registrations granted to Registrant and if the Marks are not cancelled, the damages may be greater. Upon request, we can quantify damages to Petitioner for the areas described above and other potential areas that may be identified upon more extensive analysis.

4. SUMMARY & SIGNATURE PAGE

The above sets forth our expert opinions that the US Patent and Trademark Office and the Trial Appeal Board may wish to consider regarding the ownership and use of the Marks as well as the damages to the Petitioner in the event that the Registrant is awarded ownership of the Marks. We can provide further analysis upon request (e.g., quantification of damages).

Respectfully,



Cedar Boschan
Founder
Boschan Corp.

5. Appendices

Appendix A – Compensation

Our engagement letter calls for Boschan Corp. to be compensated at the hourly rates in effect at the time when our work is performed, which are currently:

BOSCHAN.COM (424) 248-8866 FORENSIC ACCOUNTING & AUDITS		
Service Team	2018 Hourly Rates	
	Standard Services	Deposition, Mediation, Arbitration Or Trial*
Cedar Boschan	\$400	\$480
Consultant	TBD	TBD
Director	340	400
Manager	270	N/A
Senior	210	N/A
Supervisor	180	N/A
Staff	150	N/A
Administrative	70	N/A
* 4-hour minimum per day		

Note: Boschan Corp.'s compensation is not in any way contingent on our analysis, opinions or performance with respect to this engagement and we have no receivables as of the date hereof.


**Appendix B – Curriculum Vitae
Cedar M. Boschan, Founder of Boschan Corp.**

**CEDAR
BOSCHAN**

**CURRICULUM
VITAE**



CONTACT :

 (424) 248-8866

 @Auditrix



 cedar@boschan.com

RANGE OF EXPERIENCE

Cedar M. Boschan founded the boutique forensic accounting firm **Boschan Corp.** in 2015. Ms. Boschan has 26 years experience in the music industry, including 18 years in forensic accounting & consulting. she focuses on royalty audits and valuation services while also teaching royalty accounting and applied economics at **Los Angeles College of Music.**

PAST PROFESSIONAL EXPERIENCE

*Principal – Green Hasson & Janks, LLP
(2013 – 2015)*

Music and interactive practice leader and leader of non-film and TV forensics and contract compliance department

*Partner – Hurewitz, Boschan & Co., LLP
(2009 – 2013)*

Royalty compliance audits, litigation support and consulting

*Manager – Miller, Kaplan, Arase & Co., LLP
(2008 – 2009)*

Royalty audits, corporate research

*Manager – Wolinsky, Becker & Hurewitz, LLP
(2001 – 2008)*

Royalty and participation examinations, statement preparation, IP and damages valuations, due diligence

BOSCHAN CORP.
10833 Washington Blvd., #1
Culver City, CA 90232
United States

Phone: (424) 248-8866
E-mail: ClientService@boschan.com
Web Site: boschan.com
Twitter: @BoschanCorp



**Appendix B – Curriculum Vitae (Continued)
Cedar M. Boschan, Founder of Boschan Corp.**

**CEDAR
BOSCHAN**



**AFFILIATIONS &
NON-PROFIT
SERVICE**

*Treasurer & CFO –
ROAR As One
(2017 – Present)*

*Member – Beverly
Hills Bar Assoc.
(2009 – Present)*

*National Treasurer –
Association of
Independent Music
Publishers
(2012 – 2016)*

*Director – California
Copyright Conference
(2009 – 2013)*

CURRICULUM VITAE (PAGE 2)

EXPERT WITNESS TESTIMONY:

- *Greer v. Electronic Arts (Case No. C10-3601 RS (JSC))*
- *Proprietary Technologies, Inc. v. Danaher Corporation, et al. (Case No. 18-133-Y-01377-U)*
- *Samir Abu Lughod v. Suhail Calis, et al. (Case No. CV13-02792-DMG(RZX))*
- *Robert Azinian, et al. v. Vachik Abadisians, et al. (Case No. SC118469)*
- *Matter of the Estate of Lou Rawls, Deceased (Case No. Pb2006-001904)*
- *Art & Coin Television, LLC, et al. v. Havas LLC, et al. (Case No. BC630989)*

PUBLIC SPEAKING & MEDIA COVERAGE

Cedar Boschan has spoken at South by Southwest (SXSW), the California Copyright Conference, the Beverly Hills Bar Association, Loyola Law School and the University of Southern California. *Accounting Today*, *KTLA 5 News*, *MusicBizCast*, *The Daily Journal* have featured interviews of Ms. Boschan and she has served as a source to *Billboard*, *USA Today* and *The Wall Street Journal*.

EDUCATION

University of Southern California - 1995-1999; B.S. in Music Industry; Studied:

- Accounting
- calculus
- Data Processing
- Distribution of Recorded Music
- Legal writing
- Macroeconomics
- Math for Business & Economics
- Microeconomics
- Music Law
- Music Publishing

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Twitter: @BoschanCorp



Appendix C – Cedar Boschan’s Publications Over Past 10 Years

- “Copyright Infringement Damages” Presentation at The Beverly Hills Bar Association on May 31, 2017 (PDF Materials and video)
- “Monetization Reports” and “Enforce Your Interactive Deal,” published August 3, 2016 by the Beverly Hills Bar Association (PDF Materials and video)
- “Economics of Music in the Digital Era” May 18, 2016 presentation at California Lawyers for the Arts
- “A Royalty Auditor’s Audit Clause Drafting Tips,” published October 27, 2015 by LinkedIn Pulse
- “Visualizing Decimated Revenue in the Record Business,” published October 19, 2015 by LinkedIn Pulse
- “Revenue in the Evolving Music Market,” published October 17, 2015 by The University of Southern California Entertainment Law and Business Institute.
- Controlled Composition Clause Myths Dispelled, published October 16, 2015 by LinkedIn Pulse
- “How Content Creators Are Paid” Presentation at The Grammy Museum on May 5, 2015
- “Music Valuation: Beyond the Multiple” April 2015 video published on AIMP.org (accessible to members only)
- Episode 29 of “MusicBizCast with Kelly Castor,” published December 3, 2014 (co-authored with Kelly Castor)
- “Video Game Audits: what You Need to Know,” published November 5, 2014 by the International Game Developers Association (co-authored with Tom Buscaglia, Esq.)
- Q&A with Edwin F. McPherson, Esq., California Talent Agencies Act Expert,” published October 28, 2014 in Green Hasson Janks' Entertainment Newsletter: Volume 3, Issue 4 (co-authored with Edwin F. McPherson, Esq.)
- “Video Game Deal Making: Playing to win” DVD Original Program Date: July 16, 2014 published by the Beverly Hills Bar Association (co-authored with Enrico D'Angelo, Gerard Fox, Esq., Wayne Kazan, Esq., and Vincent Scheurer)
- “Royalty Income Meets Marital Dissolution Dividing, Managing and Accounting” DVD Original Program Date: May 28, 2014 published by the Beverly Hills Bar Association (co-authored with Kristin Edmonds and Cheryl Hodgson, Esq.)

Appendix C – Cedar Boschan’s Publications Over Past 10 Years

Continued from Prior Page

- “Business Managers Brainstorm on Royalties” Presentation at the Association of Independent Music Publishers on April 16, 2014
- “Business Managers Brainstorm on Royalties” Presentation at South by Southwest on March 12, 2014
- “Q&A with Lisa A. Alter, Esq., Copyright Grant Termination Expert,” published April 2014 in Green Hasson Janks' Entertainment Newsletter: Volume 3, Issue 2 (co-authored with Lisa A. Alter, Esq.)
- “Using Digital Audio Recognition to Unlock Revenue Streams,” published January 2014 in Green Hasson Janks' Entertainment Newsletter: Volume 3, Issue 1 (co-authored with Peter Klass)
- “5 Must-Know Facts About French Collection Society SACEM,” published April 16, 2013 in The California Copyright Conference’s Newsletter
- “Q&A with Cedar Boschan,” published in 2013 by The Law Office of Jaia Thomas’ Sports & Entertainment Blog
- “Q&A with Teri Nelson Carpenter,” published April 13, 2011 in The California Copyright Conference’s Newsletter (co-authored with Teri Nelson Carpenter)
- “How to Recover Your Client’s Fair Share,” published October 5, 2010 in The California Copyright Conference’s Newsletter
- “How to Enforce Contract Compliance,” published October 4, 2010 at SwanLegalSearch.com
- “Negotiate a Better Contract,” published September 7, 2010 at SwanLegalSearch.com
- Blog entries at blog.auditrix.net (June 2009 to Present)
- Editor of California Copyright Conference Newsletter during 2009, 2010 and 2011

Appendix D – Cedar Boschan’s Testimony Experience (Past 4 Years)

I have testified nine times as an expert in the following litigation matters:

- Greer vs. Electronic Arts
(Case No. C10-3601 RS (JSC))
Engaged by counsel to Greer
Testified at deposition
- Proprietary Technologies, Inc. vs. Danaher Corporation,
et al.
(Case No. 18-133-Y-01377-U)
Engaged by counsel to Proprietary Technologies, Inc.
Testified at deposition as well as at arbitration
- Samir Abu Lughod vs. Suhail Calis, et al.
(Case No. CV13-02792-DMG(RZx))
Engaged by counsel to Suhail Calis
Testified at two depositions
- Robert Azinian, et al. vs. Vachik Abadisians, et al.
(Case No. SC118469)
Engaged by counsel to Robert Azinian
Testified at one deposition
- Matter of the Estate of Lou Rawls, Deceased
(Case No. Pb2006-001904)
Engaged by counsel to Nina Rawls
Testified at one deposition as well as at trial
- Art & Coin Television, LLC, et al. v. Havas LLC,
et al.
(Case No. BC630989)
Engaged by counsel to Barry Chappel
Testified at one deposition

Appendix E – Documents Relied Upon

- The Marshall Tucker Band, Inc. Articles of Incorporation (Effective January 15, 1974)
- Agreement dated July 1, 1974 between No Exit Music Co., Inc. and Toy Caldwell, Jerry Eubanks, Doug Gray, George McCorkle and Paul Riddle
- Agreement dated November 8, 1978 between Warner Bros. Records and Registrant
- Agreement dated February 8, 1979 between Capricorn Records, Inc. and No Exit Music Co., Inc. (collectively “Capricorn” herein) and Registrant
- Agreement dated October 22, 1980 between Capricorn and Registrant
- Agreement dated February 22, 1984 between The Marshall Tucker Band, Inc., Registrant, Toy Caldwell, Jerry Eubanks, Doug Gray, George McCorkle and Paul Riddle
- Agreement dated January 31, 1996 between H. Douglas Gray, Jerry W. Eubanks, Marshall Tucker Band, Inc. and MTB, Inc. as well as earlier drafts of the agreement and related correspondence
- Copyright Purchase and Administration Agreement dated August 5, 1998 between Registrant and Spirit One Music Group (BMI), a division of Spirit Music Group
- Various Marshall Tucker Band, Inc. trademark and service mark registration and renewal documents in the name of Marshall Tucker Band, Inc.:
 - Cover letters from Cheryl L. Hodgson, Esq.’s office to Ron Rainey Management, Inc.
 - New York state documents
 - Tennessee documents
 - South Carolina documents
 - California documents
 - Cover letters from Ron Rainey Management, Inc. to Doug Gray and The Ward Law Firm, P.A.
- February 3, 2004 letter from Michael Wilkes Law Firm, P.A. asking Ron Rainey Management, Inc. whether Rainey was handling renewals of trademark registrations

**Appendix E – Documents Relied Upon
(Continued from Prior Page)**

- “Marshall Tucker Roadmap” by Ron Rainey, majority shareholder of Registrant, dated March 3, 2010
- Various 2015 correspondence between the offices of Michael Wilkes Law Firm, P.A. and Ron Rainey Management, Inc.
- Agreement dated March 15, 2017 between The Marshall Tucker Band, Inc. and BubbleUp, LLC
- Valuation of a 20% Interest of MT Industries, Inc. as of December 31, 2017 by BTI Appraisal
- Registrant’s Response to the First set of Interrogatories from Petitioner
- Registrant’s Response to the Second set of Interrogatories from Petitioner
- Links:
 - <https://www.uspto.gov/learning-and-resources/ip-policy/musicians-and-artists-profile>
 - <http://www.nextbook.com/nxtbooks/grammy/2013fall/#/31>
 - https://en.wikipedia.org/wiki/The_Marshall_Tucker_Band
 - <https://www.facebook.com/themarshalltuckerband/>
 - <https://www.marshalltucker.com/>
 - https://www.ebay.com/sch/i.html?_from=R40&_nkw=marshall+tucker+band&_sacat=0&_sop=16
 - <https://www.allmusic.com/artist/the-marshall-tucker-band-mn0000052382/biography>
 - <https://www.gopetition.com/petitions/marshall-tucker-band-induction-into-the-rock-and-roll-hall-of-fame.html>
 - <http://www.cmt.com/news/1563782/marshall-tucker-band-member-george-mccorkle-dies/>
 - https://www.google.com/search?biw=1922&bih=949&ei=nzctw7bGKozw_wSoh5iqAg&q=marshall+tucker+band&oq=marshall+tucker+band&gs_l=psy-ab.3..35i39k1l2j0i20i263i264k1j0l7.29631.29761.0.29946.2.2.0.0.0.85.166.2.2.0....0...1.1.64.psy-ab..0.2.165...0i67k1j0i20i264k1.0.bfu7z5zHkNs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DECLARATION OF CEDAR BOSCHAN IN SUPPORT OF THE MARSHALL TUCKER BAND INC.'S PETITION FOR CANCELLATION** was served upon Registrant's counsel, Richard L. Albert, by forwarding said copy on June 25, 2019, via email to rick@albertlawoffices.com.

/s/ Sarah S. Brooks Date: June 25, 2019

Name: Sarah S. Brooks