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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, L.L.C., et al,
Plaintiffs,

-v- Case No. 07-CV-13164

APPLY COMPUTER, INC., et al,
Defendants./

**PLAINTIFFS' MOTION TO COMPEL DISCOVERY
BEFORE THE HONORABLE DONALD A. SCHEER**

United States Magistrate Judge
648 U.S. Courthouse
231 West Lafayette
Detroit, Michigan 48226

(Thursday, June 12, 2008)

APPEARANCES: HOWARD HERTZ, ESQUIRE
RICHARD S. BUSCH, ESQUIRE
Appearing on behalf of the
Plaintiffs.

DANIEL D. QUICK, ESQUIRE
KELLY M. KLAUS, ESQUIRE
Appearing on behalf of the
Defendants.

TRANSCRIBED BY: MARIE METCALF, CSMR, CVR, CM
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Proceedings - Thursday, June 12, 2008

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Detroit, Michigan
Thursday, June 12, 2008
At about 3:04 p.m.

* * *

DEPUTY COURT CLERK: Please rise.

United States District Court for the Eastern District of Michigan is now in session, the Honorable Donald A. Scheer, United States Magistrate Judge, presiding.

The Court calls case number 07-13164, Eight Mile Style vs. Apple Computer.

THE COURT: Good afternoon.

MR. KLAUS: Good afternoon, Your Honor.

MR. BUSCH: Good afternoon, Your Honor.

THE COURT: Will counsel please state appearances for the record?

MR. BUSCH: Richard Busch, on behalf of Eight Mile Style.

MR. HERTZ: Howard Hertz, on behalf of Eight Mile Style.

MR. KLAUS: Kelly Klaus, on behalf of the defendants.

MR. QUICK: Dan Quick for the defendants.

THE COURT: Thank you. Please be seated.

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1 We are here pursuant to an order of
2 reference from Judge Taylor for consideration of
3 Plaintiff's Motion to Compel Discovery. I've looked at
4 the motion, response and the list of unresolved issues.

5 Has anything additional been resolved
6 since the delay of the hearing?

7 MR. BUSCH: Yes, Your Honor, we have
8 resolved a few of the issues and we have not resolved
9 several of the issues. And if it would be all right
10 with Your Honor, I can just go through and -- on behalf
11 of the plaintiffs and go through our points and take it
12 one by one.

13 THE COURT: Any objection, Mr. Klaus?

14 MR. KLAUS: No, Your Honor. I think
15 that -- I believe that just as a supplement to what Mr.
16 Busch has said, I think we have remaining between us
17 three live issues that were identified and ensconced in
18 the statement and then we've also got an issue that
19 we've been discussing with respect to one of the
20 130(b)(6) notices that was mentioned at the end. And
21 we may want to take that up separately.

22 But I think there are -- there are two
23 deponents and one interrogatory that I think we've got by
24 my count.

25 MR. BUSCH: I'm not certain that's

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1 right. I'd just like to go through it one by one and
2 make sure --

3 THE COURT: You may proceed.

4 MR. BUSCH: Thank you, Your Honor. And
5 I've got the list of unresolved issues documented in
6 front of me and I'll just take it point by point with
7 respect to that.

8 THE COURT: Thank you.

9 MR. BUSCH: Your Honor, I think it's
10 important -- just a very bit of background, just so
11 that Your Honor understands the nature of the case a
12 little bit and the issues that we are disputing.

13 Essentially, Your Honor, this case
14 involves the contention of Eight Mile Style that Apple
15 has not obtained what is called a mechanical license,
16 which allowed its compositions to be sold on I-Tunes from
17 Eight Mile Style.

18 Aftermath, which is part of Universal,
19 intervened in the case on the grounds that a sister
20 company of Eight Mile Style called FBT Productions, which
21 has rights in what's called the master recording. Master
22 recording is the sound, the tape, the recording. The
23 composition is the underlying musical work. That they
24 have a contract with FBT.

25 And in that contract there's what's called

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1 a controlled composition clause, and that under the
2 controlled composition clause, it had the right to make
3 the master and the composition available to Apple and
4 Apple did not have to get a direct license from Eight
5 Mile Style.

6 It is Eight Mile Style's position that
7 that controlled composition clause does not apply to
8 Apple or to licenses, does not give Universal the right
9 to license the composition to Apple. And it is Eight
10 Mile Style's position that there is no separate license
11 that Universal or Aftermath could have used to pass
12 through the right to use the composition to Apple.
13 Rather, Apple had to get a separate license directly from
14 Eight Mile Style.

15 So that's the dispute. On the one hand,
16 Universal says, "We have the control of what's called the
17 controlled composition clause and we're allowed to make
18 use of that to make the songs available to Apple without
19 Apple having to come to you, Eight Mile Style."

20 And it's our position that that controlled
21 composition clause does not apply and that Apple had to
22 get a license directly from us.

23 So that's the dispute in the case and that
24 gives rise to many of the discovery issues that we'll be
25 talking about here today.

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1 Item number six, Interrogatory Number Six,
2 asks Apple to disclose what the basis is for their belief
3 that they have the right to basically make the
4 composition available without obtaining a license from
5 Eight Mile Style.

6 And it is our position that Apple should
7 so state. The defendants have objected to answering that
8 interrogatory, but Apple should be required to say
9 whether they have a license from Universal or Aftermath.
10 They can either say, "Look, we have a license for the
11 publishing from Aftermath or from Universal, and where
12 they sub-licensed it to us, Apple."

13 Or they can say, "We're just a reseller.
14 We're a seller of music and we don't need a license. We
15 got the right to reproduce the master recording, and as a
16 result of that, we don't need a license because we're
17 just a reseller of goods."

18 Because one of their positions in another
19 case is that they're just a reseller of the music and
20 they're not a licensee. So we want to know, is your
21 basis for making these compositions available, is it
22 based upon your status as a licensee or are you saying
23 you don't need a license, one or the other.

24 The defendants are refusing to answer that
25 question or saying they answered it in connection with

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1 another interrogatory, which we believe evades the point.
2 And we just want a direct answer to that question. And
3 that item still remains open between the parties.

4 THE COURT: Thank you. Mr. Klaus?

5 MR. KLAUS: Thank you, Your Honor. Just
6 briefly, on the background of the case, in terms of
7 what the dispute is between the parties, we think it's
8 important to note that there's -- the defendants
9 actually have a -- filed a Summary Judgment Motion that
10 is before Judge Taylor. There is an opposition brief
11 that is due from plaintiffs in a couple of weeks.

12 But the argument that is made by the
13 defendant is not simply that there was a controlled
14 composition clause. In fact, the controlled composition
15 clause was not just by this company called FBT, which is
16 owned by exactly the same -- the same individuals who own
17 the plaintiff Eight Mile Style in this case.

18 But was a controlled composition clause
19 executed by the artist himself, who was -- who has
20 admitted by the plaintiffs to be an author of the
21 compositions and who, therefore, have the right to do it,
22 and that is Marshall Mathers or Eminem. So there is an
23 express controlled composition clause. There have been
24 individual agreements that the plaintiffs in the case
25 have executed with respect to these compositions, which

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1 it's our position, even if the first express
2 authorization didn't grant the right, these would have.

3 And the third is, that there's also a
4 doctrine in copyright law called implied license, that
5 says that, where, as here, you have a party that has
6 stood by and has accepted royalty payments for years.
7 The songs that are at issue here have been disseminated
8 over the I-Tunes service, which is very well known, for
9 years, going back to 2003, that if a party acts in
10 accordance with the belief that there is in fact a
11 license and accepts money for it, that there is a license
12 implied as a matter of law. So there are multiple
13 grounds on which we've moved for summary judgment and
14 that is pending.

15 With respect to Interrogatory Number Six,
16 the first thing that I would say in response to Mr. Busch
17 is, he said that what his question was was, "Why is it
18 that you, Apple, believe you don't need to have a license
19 from us?"

20 That is not the interrogatory that Mr.
21 Busch actually drafted. The interrogatory that he
22 actually drafted and served, and that we objected to, had
23 to do with the basis for your belief that Apple has the
24 right to synchronize with images the Eminem compositions.
25 Synchronizing with images is a particular right under the

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1 copyright act and that is not at issue in the complaint.

2 Transmit, which is not a defined term, but
3 appears to be the same thing as publically perform or
4 broadcast, also is not at issue in the complaint, because
5 that's not what Apple does, or we produce lyrics of the
6 Eminem compositions. It's undisputed that I-Tunes
7 doesn't reproduce lyrics, and so that particular right
8 isn't at issue.

9 And what we had said to Mr. Busch during
10 the meet and confer was, "That's not the interrogatory
11 that you drafted. The interrogatory that you drafted
12 doesn't have anything to do with the allegations that are
13 in the complaint."

14 And if he'd wanted to draft a new
15 interrogatory, it was his burden to go and draft -- to go
16 and draft one that was more clear.

17 The other thing is, he did say that we've
18 pointed to -- in terms of what the answer is here, there
19 is another interrogatory, it was number four in our
20 response, which deal with -- which are set forth at tab A
21 of the motion, which gets at exactly the thing that I
22 think he says he's trying to get to with respect to this
23 interrogatory,

24 "Explain the basis for your belief
25 that Universal had the authority to

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1 license, authorize or otherwise grant
2 Apple the right to reproduce,
3 distribute and sell downloads of the
4 sound recordings."

5 And what's stated is, by Apple, is that "Our agreements
6 provide that we are a reseller. Our agreements provide
7 that we are a reseller and we rely on the label, in this
8 case, Universal, to be responsible for obtaining what are
9 called the mechanical rights to the composition."

10 There is no great mystery here as to what
11 the nature of the arrangement is or why it is that we
12 contend that Apple has the right to resell the sound
13 recordings with the compositions.

14 MR. BUSCH: Your Honor, if I may just
15 respond briefly?

16 THE COURT: You may.

17 MR. BUSCH: First of all, our
18 Interrogatory Number Six was drafted very broadly to
19 cover every possible item that Apple might be doing,
20 and transmit was a broad way of saying, to make
21 available for digital download. That's why we have the
22 right to "synchronize images, transmit, publically
23 perform, or reproduce lyrics of the Eminem
24 compositions." It was drafted broadly to encompass
25 every possible thing that Apple did.

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1 In connection with our meet and confer,
2 that is where I told -- because Mr. Klaus had some
3 objections to things that he said were not part of this
4 case. I pointed to the transmit language and I said,
5 "Look, if you will just answer the question about --
6 explain the basis for Apple's belief that Apple has the
7 right to make these songs available for permanent
8 download, the compositions, I will be satisfied with that
9 and I would not require answers on the other items that
10 you say are not part of this case."

11 So I've agreed to do that. I've agreed to
12 take that. And Aftermath's answer is not Apple's answer.
13 And I would like Apple to answer the question
14 specifically on what basis. If they want to say that
15 they are simply a reseller and they don't need a license,
16 let them say that. If they believe they have a
17 sublicense from Universal or Aftermath, they can say that
18 too. It's a very simple, straightforward interrogatory
19 and we'd ask that it be answered.

20 THE COURT: So you have employed in your
21 rebuttal the formulation, "make available for permanent
22 download." Is that construction included in the
23 language employed in Interrogatory Number Four, as Mr.
24 Klaus suggests?

25 MR. BUSCH: Interrogatory Number Four to

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1 Aftermath -- Interrogatory Number Four to Aftermath
2 says,

3 "Please explain the basis for your
4 believe that Universal,"
5 which is defined as part of Aftermath,
6 "has the authority to license,
7 authorize or otherwise grant to Apple
8 the right to reproduce, distribute
9 and sell downloads of sound
10 recordings."

11 So it relates to sound recordings as opposed to
12 compositions. This gets to the compositions that are at
13 issue.

14 So again, we would be more than satisfied
15 with an answer to the question, "On what basis Apple
16 claims to have the right to make available for download
17 or sell downloads that contain the Eminem compositions?"

18 MR. KLAUS: The only thing that I would
19 point out is that Interrogatory Number Four, Mr. Busch
20 suggested that this was limited to the authorization
21 for sound recordings. What it actually says is, "Sound
22 recordings of the Eminem composition." It's the
23 composition -- there are two separate -- and the reason
24 for the confusion, Your Honor, is -- in case either one
25 of us is not clear, every song, every popular song has

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1 two separate copyrights bound up within it. One in the
2 actual recording, one in the composition. And this
3 case deals with the composition rights.

4 THE COURT: But Interrogatory Four, as I
5 read it, deals with sound recordings.

6 MR. KLAUS: It says it's sound
7 recordings of the compositions, which is --

8 THE COURT: Which is sound recordings as
9 far as I'm concerned. So the question that the
10 plaintiff now wants answered is not asked.

11 MR. BUSCH: Oh, it is, in Interrogatory
12 Number Six. That's the one that we're talking about,
13 is Interrogatory Number Six. They pointed to
14 Interrogatory Number Four and are saying, "Well, we
15 answered it through Interrogatory Number Four."

16 THE COURT: Which word or phrase in
17 Interrogatory Number Six is the functional equivalent
18 of your formulation, quote, make available for
19 permanent download?

20 MR. BUSCH: "Transmit," Your Honor.

21 THE COURT: And what is the basis for
22 your equivalence?

23 MR. BUSCH: Because they are -- what is
24 happening is that Apple is transmitting to the public
25 the compositions for purposes of permanent downloads.

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1 That's the transmission that is occurring. And that's
2 why we drafted it as broadly as possible, to encompass
3 every potential act that Apple did, inclusive of the
4 transmission.

5 THE COURT: It's going to be a long
6 afternoon.

7 MR. KLAUS: The only thing I would say
8 on the transmission issue, we've been meeting and
9 conferring on the -- we first met and conferred on
10 these several months ago, Your Honor. It was the first
11 time that I -- the first time that I heard Mr. Busch
12 say that "transmit" in the sentence was the same as
13 "make available for download," was this afternoon, a
14 few hours before this hearing. It was never said to me
15 during the meet and confer process, that "transmit"
16 covered "make available for download." It just wasn't.

17 MR. BUSCH: Your Honor, we did say, and
18 Mr. Hertz was on the phone call with us, when we first
19 had a meet and confer, and we absolutely did say that.

20 MR. KLAUS: And I would just say, Your
21 Honor, in response, that the best -- the indication
22 that it wasn't is if you look through the Motion to
23 Compel paper and the -- and even the statement of
24 unresolved issues, that argument isn't made anywhere.

25 THE COURT: I'm going to grant the

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1 motion and direct that an answer be provided,
2 responding to Interrogatory Number Six as it relates to
3 the right to make available for permanent download of
4 the composition.

5 MR. BUSCH: Thank you, Your Honor.

6 We have resolved point number 16, and as
7 to Interrogatory Number 18, Apple has agreed to provide
8 information to us for purposes of a deposition that we
9 will be taking of Mr. Eddie Q (sic). So as to Apple, it
10 has been resolved.

11 As to Aftermath, we have -- in our meet
12 and confer process, we have narrowed the issue -- we have
13 narrowed the issue to -- we have narrowed the issue in
14 the meet and confer process to obtaining from Aftermath
15 an answer as to whether they have a license from some
16 other third party, a co-publisher of Eight Mile Style,
17 that would allow them to make the compositions available
18 to Apple through that agreement. They have agreed to
19 provide us with that information.

20 THE COURT: Is that correct?

21 MR. KLAUS: With respect to Apple, there
22 is a separate agreement for purposes of resolving this
23 that Mr. Busch and I have laid forth. With respect to
24 this Interrogatory Number 18 and Request For Production
25 Number Six, which we'll get to momentarily, yes. With

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1 respect to Aftermath it said that we have produced one
2 agreement with a -- with the clause that I referred to
3 earlier with respect to Eminem. If there are any other
4 co-authors that we're going to rely on, we're going to
5 provide that information and produce the agreements to
6 Mr. Busch.

7 THE COURT: That satisfies the
8 plaintiff?

9 MR. BUSCH: Co-authors or book
10 publishers, just to make it clear.

11 THE COURT: Thank you. Eighteen is
12 resolved.

13 MR. BUSCH: Interrogatory Number 19, I
14 believe Mr. Klaus said his client would provide a
15 supplemental response.

16 MR. KLAUS: Correct. This is directed
17 solely to Apple, as Number 19. And what I said was
18 that Apple would respond supplemental responses.

19 THE COURT: Nineteen is resolved.

20 MR. BUSCH: We're up to the document
21 requests now, Your Honor. And as to the Document
22 Request, Number Six, I believe we have the same
23 agreement as to Document Request Number Six, as we did
24 to Interrogatory Number 18.

25 MR. KLAUS: That's correct.

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1 THE COURT: Six is resolved.

2 MR. BUSCH: Number seven has been
3 resolved?

4 MR. KLAUS: Yes, Number Seven has been
5 resolved. I believe plaintiffs have said they're not
6 -- they're not continuing with Number Seven.

7 THE COURT: Seven is resolved.

8 MR. BUSCH: Number 13 has been resolved
9 as well?

10 MR. KLAUS: Yes. Number 13 was resolved
11 at the same time as Number Seven.

12 THE COURT: Thirteen is resolved.

13 MR. BUSCH: That brings us to discovery
14 related to damages, Your Honor. The defendants -- as
15 to Number 26, I'm sorry, Apple has indicated they have
16 no such documents, and with that representation, it has
17 been resolved, so we would just ask that they make that
18 representation on the record.

19 MR. KLAUS: I think actually with
20 respect to -- with respect to Number 26, this I think
21 is the -- this was the flip side of our resolution with
22 respect to Interrogatory Number 18, as to Apple. There
23 is -- I think the response that we have provided, which
24 is that Apple doesn't have any direct agreements for
25 the compositions, remains our answer. There is an

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1 outstanding issue with respect to Apple having
2 agreements with music companies that are owned by some
3 recording artists that will be covered at a
4 30(b)(6) deposition that we had discussed, because I
5 think that's the resolution with respect to both that
6 Interrogatory and Request for Production 26.

7 MR. BUSCH: Just stated my way to make
8 sure that Mr. Klaus and I are speaking the same
9 language, what Apple has said to us is they have no
10 specific mechanical licenses with third parties.
11 However, they may have -- or they do have agreements
12 with artists, and to the extent that would encompass a
13 mechanical license, they will provide us with samples
14 of those and we will be able to question a witness,
15 simply Mr. Q about it at his deposition. And with that
16 representation, it's resolved.

17 MR. KLAUS: Resolved.

18 THE COURT: Resolved, Number 26.

19 That brings us up to discovery related to
20 damages.

21 MR. BUSCH: And the defendants had a
22 motion to bifurcate that we have opposed. And we have
23 agreed to short-circuit this to hold off on the
24 disputes we have on this pending the resolution of the
25 motion to bifurcate, and we have agreed that once the

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1 motion to bifurcate is resolved, if the Court approves
2 this structure, that we would be able to meet and
3 confer on these discovery requests relating to damages
4 and either reach a resolution or come to the Court.
5 And whatever the Court decides as far as the
6 breadth of the discovery, we would be allowed to take
7 depositions or discovery related to damages at the
8 appropriate time following the bifurcation decision.

9 THE COURT: Sounds like a deal.

10 MR. KLAUS: That's what we have decided
11 to do.

12 THE COURT: That takes us up to
13 deposition disputes.

14 MR. BUSCH: Yes, sir. And the first
15 deposition dispute we have relates to -- it's the same
16 thing, it's Leo Ferrante and Tim Hernandez. The issues
17 are relatively similar here, and that is this. Mr.
18 Ferrante -- let's do a -- let's start with -- let's
19 start with the deposition of Eddie Q actually. As to
20 the deposition of Eddie Q, that matter has been
21 resolved on the following terms. They will make Eddie
22 Q available for a deposition on June the 20th. The
23 deposition will take place at Apple. It will last the
24 afternoon, one to five, for four hours of deposition
25 time. Mr. Q will answer the questions relating to

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1 these other agreements that we have -- among other
2 topics, the item on the agreements with the artists.

3 We will agree that as far as the financial
4 issues relating to Apple and a witness that relates to
5 the financial issues, that we will also put that off
6 pending the motion for bifurcation resolution and
7 hopefully be able to resolve the -- a deposition of Apple
8 on financial matters at the same time that we meet and
9 confer on a witness for Aftermath on financial matters.
10 And we will not require any other witness from Apple
11 besides Mr. Q and the financial person.

12 MR. KLAUS: And I think that fairly
13 summarizes the agreement that we have. The one -- the
14 caveat being a financial -- somebody to speak about the
15 financial information at issue, if and when we get to
16 damages discovery.

17 MR. BUSCH: Yes.

18 THE COURT: Eddie Q is resolved.

19 MR. BUSCH: Now, that brings us to Leo
20 Ferrante and Tim Hernandez. That's last.

21 As far as Mr. Ferrante and Mr. Hernandez
22 are concerned, they were members of Universal's copyright
23 department at relevant times in this process. They were
24 both identified in discovery, either through
25 correspondence that was produced or through interrogatory

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1 responses as people with information or knowledge.

2 Mr. Ferrante, some of his correspondence
3 was produced. I believe Mr. Hernandez, his name was
4 identified specifically, although in response to the
5 question -- let me back up one second if I can, Your
6 Honor.

7 One of the issues in this case is, did
8 Eight Mile Style object to the making available of its
9 compositions on I-Tunes? Did it advise Universal that it
10 objected and would not sign licenses. That is a key
11 issue in this case.

12 In response to an interrogatory that was
13 served on us by Aftermath, which asked us to identify who
14 we made objections to, we answered that interrogatory by
15 saying that we made objections to various people in the
16 copyright department, including, but not limited to --
17 and we identified five or six people.

18 During discovery in this case, we've taken
19 the deposition of several people from the copyright
20 department of Universal, Pat Blair, who was the head of
21 the department and Chad Gary, who was in the department
22 at the relevant time, as well as Todd Douglas.

23 Mr. Ferrante and Mr. Hernandez no longer
24 work for Universal. They are not within the control of
25 Universal. Mr. Ferrante resides in New York and Mr.

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1 Hernandez, I believe resides in Nashville, Tennessee.

2 During the course -- discovery was
3 original scheduled to end in this case on June the 2nd.
4 Before the deposition of Pat Blair, which was occurring
5 -- which occurred in the last week and-a-half or so, we
6 spoke on the record about depositions that needed to be
7 completed. And we agreed to extend the taking of
8 discovery through the end of June for purposes of
9 completing depositions.

10 During the conversation that occurred, I
11 neglected to mention Ferrante and Hernandez. And we then
12 went back after the deposition and we were talking about
13 it. And almost within the -- it was like a Thursday or
14 Friday. The following week, at the beginning of the
15 week, I e-mailed Mr. Pomerantz, Mr. Klaus' partner, and I
16 said, "We forgot to mention Ferrante and Hernandez. We
17 still need to depose those two people as well."

18 And Mr. Pomerantz, who is Mr. Klaus'
19 partner, said, "Well, you didn't mention it at the
20 deposition, so my view of it is that it's -- you don't
21 get to do it."

22 Mr. Ferrante and Mr. Hernandez are
23 essential to the case because they have knowledge about
24 Eight Mile's objections. Mr. Ferrante does have
25 knowledge about the practice in the copyright department

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1 at Universal concerning sending out separate digital
2 licenses, and we want the chance to depose them.

3 Mr. Ferrante, I will say -- and this will
4 -- some of this will be illuminated further when we talk
5 about Aftermath's -- the 30(b)(6) Notice of Deposition of
6 Aftermath. But Mr. Ferrante is in New York and we are
7 actually going to New York next week for the deposition
8 of Mark Levinson, who is Eight Mile's lawyer. We have
9 subpoenaed Mr. Ferrante for a deposition that morning,
10 the same morning. Mr. Levinson is going to be deposed at
11 noon. We subpoenaed Mr. Ferrante for a deposition at
12 9:00 on that morning, the same day, at the same location,
13 so there's no prejudice. We're going to be there anyways
14 and we would ask that we be allowed to take that
15 deposition. There will be no extra cost, nothing.

16 And then as far as Mr. Hernandez is
17 concerned, he's in Nashville, and we would ask that we be
18 allowed to take his deposition as well.

19 MR. KLAUS: A couple of points to make
20 in response. One is, the plaintiff in this case has
21 already taken ten depositions -- has already reached
22 the limit of the number of depositions that it's
23 entitled to take, exclusive of the 30(b)(6) depositions
24 that we haven't gotten to. We've said we're not
25 objecting on the ten -- we're not objecting on the ten

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1 depo, with respect to the 30(b)(6), but the plaintiff
2 had the opportunity to take ten depositions.

3 As was stated by Mr. Busch, three of those
4 depositions were of people from the Universal copyright
5 department covering exactly the same issues that he says
6 he wants to now depose Mr. Ferrante and Mr. Hernandez on.

7 Ms. Blair, who he mentioned as being the
8 head of the department, there was a suggestion that the
9 testimony of these individuals might be somewhat more
10 favorable because they no longer work for Universal. Ms.
11 Blair no longer works for Universal. And Mr. Busch
12 subpoenaed her and was able to take her deposition.

13 There was also a suggestion that the
14 omission of Mr. Ferrante and Mr. Hernandez was somehow
15 inadvertent, because it was not mentioned at the start of
16 Pat Blair's deposition. And I have excerpts from -- I
17 don't think there's any dispute. They weren't mentioned
18 as somebody that the plaintiff was reserving its right to
19 depose at the deposition, but there wasn't just a -- it
20 wasn't just a five-minute discussion there, where the
21 parties set forth their understanding of what the limited
22 extension of the discovery cut-off in the case would be.

23 The parties also filed a stipulation
24 regarding the extension of the discovery. And the
25 stipulation, which has not been entered, but which was --

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1 or I'm sorry. There was nothing -- Judge Taylor has not
2 signed the order yet. But the stipulation refers to the
3 agreement, and it says,

4 "It is stipulated and agreed the
5 discovery deadline shall be extended
6 to June 27th from June 2nd to allow
7 the parties to conduct the
8 depositions identified on the record
9 at the deposition of Patricia Blair
10 in this case taken on May 29, 2008."

11 And therefore, if there was -- there was another chance
12 for reflection before the stipulation to say, "Oh, yeah,
13 I forgot."

14 Our position is there had been more than
15 enough depositions in this case. There had been
16 depositions of -- the depositions that Mr. Busch wants to
17 take here is to go over ground that he's already gone
18 over with three witnesses from the same department.
19 There's been no proffer as to what these individuals
20 would say which would establish any sort of good cause
21 for relief from Rule 30's ten deposition limit, which
22 there hasn't been a motion filed to, or for relief from
23 the stipulation that Mr. Busch himself entered into. And
24 so we would -- and so we oppose the request to take these
25 two additional depositions.

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1 THE COURT: Rebuttal?

2 MR. BUSCH: Your Honor, very briefly.

3 On the record we talked about the fact that neither
4 side -- or I made clear that the other side would not
5 be raising the ten deposition limit. We agreed that
6 the depositions would go forward and that we would
7 extend the deadline.

8 And now, in addition to that, Your Honor,
9 we'll get to this in a second, but on Aftermath, which is
10 the defendant in this case, we served a 30(b)(6) notice a
11 long time ago for various -- very important topics that
12 I'll get to in a moment that relate to some of these
13 issues, and they still have not designated a witness.
14 And now they want additional time to designate witnesses
15 and have agreed or have suggested or we discussed, I
16 should say, postponing our response to summary judgment
17 until mid-July, so that they can figure out who their
18 witnesses are going to be in connection with our 30(b)(6)
19 notice.

20 So I guess my point is that there's --
21 since there is absolutely no prejudice to taking these
22 depositions, and since by their own request they want to
23 postpone identifying who their witnesses will be on very
24 important topics that we'll get to in a moment, there's
25 absolutely no prejudice to not allowing these depositions

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1 to go forward. And they are essential to the case,
2 because as third parties who are no longer associated
3 with Universal, we feel like they will be more likely to
4 tell the truth, I would say.

5 MR. KLAUS: First of all, the agreement
6 with respect to the ten deposition limit, carved out
7 the 30(b)(6)s, but it was reached with respect to other
8 individuals in the case.

9 The second is, is obviously there's
10 expense and inconvenience, certainly of traveling to
11 Nashville for a deposition of Mr. Hernandez, and there's
12 additional expense in terms of preparing for a deposition
13 of another witness.

14 And what we still haven't seen in the
15 statement of undisputed issues or any other statement, is
16 any indication of why it is that there's a belief that
17 Mr. Ferrante will have information that other individuals
18 in the case have not.

19 Mr. Busch just said, "He's a former
20 employee, and we therefore think that he will be more
21 forthcoming." Patricia Blair is a former employee. He
22 took her deposition and now wants to take another one
23 from somebody who reported to her. And we don't see the
24 need to do it, and particularly not where the parties had
25 already entered into not just a stipulation at a

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1 deposition, but a subsequent stipulation saying that
2 identified the universe of potential opponents.

3 MR. BUSCH: Since Mr. Klaus has baited
4 me on saying he wanted a proffer on Mr. Ferrante and
5 Mr. Hernandez, if Your Honor would like one, I would be
6 happy to give it.

7 THE COURT: No, in light of the rule --
8 in light of the fact that the ten deposition limit is
9 reached and no motion to exceed the limit was filed,
10 I'm disinclined to just grant carte blanche.

11 On the other hand, you're going to be in
12 New York. You've already deposed three members of
13 copyright department. I can't imagine that the
14 preparation for Ferrante is going to -- going to be that
15 unduly burdensome. I'm going to grant the motion in
16 part, and allow the deposition of Ferrante on the New
17 York date that's already been set, a three-hour
18 deposition.

19 And the deposition for Hernandez is not
20 granted, short of a motion to exceed the time and a
21 showing of cause why it wasn't taken care of earlier in
22 the case.

23 MR. BUSCH: Yes, sir. Thank you, Your
24 Honor.

25 MR. KLAUS: I want to add -- I can talk

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1 about this with Mr. Busch afterwards, but at the risk
2 of pushing this, we had also -- there were some
3 documents that were produced by the plaintiffs in the
4 case after the deadline and Mr. Busch had agreed to
5 make Mr. Martin available for deposition the same day
6 in New York. If it would be possible for the Ferrate
7 deposition and the Martin depositions to be two hours
8 each in the morning, then the Levinson four hours in
9 the afternoon?

10 MR. BUSCH: That's fine with me, Your
11 Honor.

12 THE COURT: Two hours.

13 MR. KLAUS: Thank you, Your Honor.

14 MR. BUSCH: That brings us to the
15 30(b)(6) notice of Aftermath. And it also brings us to
16 the other summary judgment, the summary judgment
17 schedule. Right now, Your Honor, we have stipulated,
18 although the Court has not entered it yet, changing
19 the response date for our motion for summary judgment
20 -- or for their motion for summary judgment to the 24th
21 of June.

22 And speaking to Mr. Klaus today, there is
23 a concern that Mr. Klaus has identified, that he can not
24 get witnesses that would be responsive to some of these
25 topics in sufficient time that we can take their

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1 deposition and be able to incorporate any testimony into
2 our response for summary judgment.

3 And one topic in particular is very
4 important. Your Honor, with respect to Subject Matter
5 Number Two, Subject Matter Number Two is,

6 "Whether the mechanical license
7 signed by Joel Martin for the song
8 "Lose Yourself" was ever
9 countersigned by UMG or otherwise
10 approved and whether it is now in
11 effect."

12 A bit of background on that is very important, Your
13 Honor. Remember, it is the position of Universal in this
14 case that the controlled composition clause in a
15 recording agreement that FBT, which is also owned by Mr.
16 Martin and Eminem, gives them the right to exploit these
17 compositions through digital download. That's their
18 position in this case.

19 Shortly after the original FBT agreement
20 with Aftermath was entered into in 1998, there were no
21 permanent downloads in 1998. There was no I-Tunes, there
22 was no commercially viable, lawful, permanent download
23 service where these downloads were a means of
24 distribution or licensing of the compositions for sale.

25 In 2002, when permanent downloads began to

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1 be a means to license and sell compositions and sound
2 recordings, Universal had the controlled composition
3 clause that they thought that it applied to digital
4 downloads. However, they contacted Mr. Martin, and they
5 asked him to sign a digital download license specifically
6 for "Lose Yourself," the song "Lose Yourself."

7 There was a negotiation that took place
8 after Mr. Martin received that license request. It was
9 ultimately agreed that Mr. Martin would sign the
10 requested license based upon a two-year term, a right to
11 terminate and other conditions. It drafted a license, a
12 negotiated license, not the license that Universal sent,
13 but a negotiated license that had a two-year term, and a
14 right to terminate and several other conditions within
15 it.

16 Our position is that if the controlled
17 composition clause at issue in this case actually granted
18 digital distribution rights, the right to license these
19 songs for digital downloads, there would be no need for
20 them to have entered into this license with a two-year
21 term.

22 The testimony of both Ms. Blair and Mr.
23 Martin was -- and Ms. Blair was the head of the copyright
24 department who negotiated this, was that the parties
25 agreed this would be a trial process for digital

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1 downloads that would only be for this one particular
2 song.

3 UMG never -- or we don't have a returned,
4 signed copy of that mechanical license. UMG then sent us
5 over the course of the next several years, requests for
6 permanent download licenses that Mr. Martin never signed,
7 never executed. This is -- if Universal did in fact sign
8 this "Lose Yourself" license and if Universal believes
9 it's now in effect, that would, in our view, be strong
10 evidence that they understood that the controlled
11 composition clause did not implicate digital rights.

12 So we need a witness in responding to
13 summary judgment to testify about (a), whether the song,
14 "Lose Yourself" was -- the mechanical license signed by
15 Mr. Martin was ever signed by UMG. No one who we've
16 deposed so far knows whether it was otherwise approved by
17 Universal. No one who we've testified knows -- who's
18 testified so far knows, and whether Universal believes
19 it's now in effect. Again, no one who has testified on
20 behalf of Universal has said they have any knowledge on
21 that whatsoever.

22 Mr. Klaus offered to search to see whether
23 they could locate a countersigned "Lose Yourself"
24 mechanical license. Of course, our position would be
25 this litigation has been going on for months now, if not

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1 longer, and they should have produced it originally and
2 they should have looked for it originally. But the point
3 is, is that we need a witness on this, and it is
4 absolutely essential to have that in order for us to
5 respond to summary judgment.

6 So what I would ask, Your Honor, is that
7 either Mr. Klaus be compelled to produce a witness to us
8 almost immediately on these topics and the other topics
9 that we have been discussing here today, some of them
10 we've agreed not to require a witness, some they've
11 agreed to produce a witness. We're still taking about
12 it. Or we would ask that our -- the time for our
13 response to the Motion For Summary Judgment be extended.

14 And Mr. Klaus has said he would agree to
15 that, so that we can get a witness on this topic, which
16 is essential, and any other topic that the parties agree
17 or the Court orders a witness be produced.

18 MR. KLAUS: Your Honor, first of all, I
19 disagree with a great deal of the information that Mr.
20 Busch just said about the import of the "Lose Yourself"
21 license, about the plausibility of there being a test
22 case when Eminem compositions have been obviously
23 available on I-Tunes for many years, or his
24 representations about Ms. Blair saying that there was
25 an express agreement that there was a test case.

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1 The problem with what Mr. Busch has done
2 with respect to topic number two, and with respect to the
3 entire Aftermath 30(b)(6), is that he has plucked
4 something out of something that we are in the middle of
5 meeting and conferring on. There are ten separate
6 requests for topics in the Aftermath 30(b)(6). And what
7 I proposed to Mr. Busch today -- I heard what he has said
8 about his summary judgment, he -- the reason that the
9 summary judgment date was continued to June 24th was on
10 Mr. Busch's motion for an extension of time to have it
11 moved to the 24th.

12 What I said to him is that with respect to
13 topic number two and with respect to a-half dozen other
14 topics as to which he thinks we still have a dispute and
15 which he and I started our meet and confer and actually
16 discussing the scope of the issues this afternoon after
17 the deposition that we took this morning, is that we
18 agreed to an expedited time frame for -- including the
19 meet and confer, staking out our positions, and to the
20 extent there is an issue that we need to submit to Your
21 Honor for resolution, that we identify it in a statement
22 of unresolved issues. It is a short document that
23 doesn't have to be a full-blown motion, that we can do it
24 in a format that we hope we could get a resolution on if
25 it's convenient to the Court, either without the need for

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1 us to come here for hearing in person or without the need
2 for a hearing, and that we would then be agreeable to an
3 acceptable extension of his time to respond to the
4 summary judgment motion.

5 THE COURT: This is the date set for the
6 hearing on the motion and you've had chances to meet
7 and confer. Why is it that -- if you haven't reached
8 an agreement, why should I believe you're going to
9 reach an agreement?

10 MR. KLAUS: The reason for it is, Your
11 Honor, is that the Aftermath 30(b)(6), there's nothing
12 about it in the motion to compel papers. Our
13 objections to this were served on May the 30th. We did
14 not -- we did not start discussing the meet and confer
15 in terms of putting together the list of unresolved
16 issues, until Monday night. We continued to work
17 through the interrogatories and the request for
18 production, almost all of which we've actually reached
19 an agreement and we've come to a resolution on.

20 Mr. Busch and I started talking about the
21 Aftermath 30(b)(6) depositions this afternoon. I think
22 that there's reason to believe that we would reach
23 resolution on it, Your Honor. And if we didn't, there
24 would at least be the opportunity for each party to put
25 in some form of a written statement which says, "Here's

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1 our position as to this request," instead of going through
2 them point by point, where there may be no need for the
3 Court's resolution.

4 MR. BUSCH: Your Honor, I think there's
5 one or two things I have to clear up here, but I don't
6 want to leave the Court with the idea that I waited
7 until this afternoon -- or the parties waited until
8 this afternoon to discuss this. We served this
9 30(b)(6) notice on the defendants in the middle of May.
10 They served their objections on May the 30th.

11 I have been out in California with Mr.
12 Pomerantz, which is Mr. Klaus' partner, for depositions
13 throughout the second half of the month of May, and then
14 the first week of June. There were several occasions
15 when I asked Mr. Pomerantz, we were planning on
16 discussing this and the other topics that ultimately
17 became the Motion to Compel, following our depositions,
18 and each time -- and I don't want to put this entirely on
19 Mr. Pomerantz, but each time, after his witness was
20 deposed, it was late in the day, and he decided, "Let's
21 not have the conversation. Let's do it some other time."

22 Then when we -- at the day of Pat Blair's
23 deposition, we identified this 30(b)(6) matter as
24 something that needed resolution and would be resolved
25 today, would be resolved today if the parties could not

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1 reach a resolution on it.

2 My problem with this is, unlike some of
3 the documents or interrogatories, they can't -- they
4 should have been looking for a witness for these topics
5 for the last month. And if you hear Mr. Klaus, he's just
6 going to start thinking about who the witness might be
7 and has not offered up who the witness is. They've got
8 to know who their witness is, who's going to know whether
9 UMG ever countersigned "Lose Yourself."

10 "Lose Yourself" is a huge song. It was
11 the biggest song from the "Eight Mile" movie. It is a
12 huge song. It is one of the most important documents in
13 this litigation, whether Universal approved it. They're
14 just starting to look for witnesses now.

15 THE COURT: Was there a document request
16 for that license?

17 MR. BUSCH: We produced it. We produced
18 the -- yes, we --

19 THE COURT: You're looking for a signed
20 one?

21 MR. BUSCH: Yes, for all licenses they
22 had, any licenses, everything. And nothing has been
23 produced.

24 And Mr. Klaus said to me today, "Well,
25 we'll do a double secret look later."

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1 But the point is, our point is, "Why
2 haven't you looked for it now? Why can't you identify
3 who the witness is going to be now? Why are we just
4 starting this process?" I would like them to advise us
5 when these witnesses will be available. And we need this
6 information in order to properly respond to the summary
7 judgment.

8 And we would ask that if they can't get a
9 witness to us on these topics that we've agreed to, and I
10 think we will reach resolution on most of these topics
11 that are here, that we be allowed some additional time to
12 respond to summary judgment, which he's agreed to, which
13 he's okay with if the Court is okay with it.

14 THE COURT: Well, I'm not going to touch
15 this. It's not in the motion that's referred to me. I
16 appreciate that you've discussed it and decided that it
17 would be submitted to me, but that's just not how it
18 works.

19 The Magistrate Judge system is subordinate
20 to the District Judge bench. I decide what Judge Taylor
21 tells me to decide, and the parties can't agree to submit
22 things to me in the absence of a motion and expect me to
23 respond to it.

24 MR. BUSCH: Your Honor, just to make it
25 very clear, in our stipulation that we filed setting

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1 this hearing for today and what we've submitted to the
2 Court, this was one of the issues that we actually did
3 submit to the Court. The resolution of 30(b)(6) was
4 one of the items listed.

5 THE COURT: Well, you meet and confer
6 and see what you can work out. By way of guidance, I
7 will say that I have long been and remain a proponent
8 of broad discovery. Absent some good cause why I
9 should not require you to produce a witness on these
10 subject matters, I'm likely to tell you to do it.

11 So with that in mind, you better get
12 together and talk this thing through. You can submit a
13 list if you want. If you can't agree on something, I'll
14 review it, not likely to call you back for a hearing. So
15 make it good and make it short, because this is not the
16 way these matters are to be addressed.

17 MR. BUSCH: Thank you, Your Honor. The
18 only thing is, is that on the summary judgment issue,
19 on a response, I'm getting a little bit nervous about
20 that, because right now our request was based upon
21 where we stood a couple of weeks ago, that we be
22 allowed to have until the 24th to respond to their
23 summary judgment motion. That -- and that was part of
24 our stipulation. That has not been signed yet.

25 THE COURT: I consider it part of the

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1 agreement.

2 MR. BUSCH: Okay. So could we -- can we
3 stipulate, can we submit something to Your Honor if we
4 agree on the dates for these depositions we're talking
5 about and that we needed to respond, a new schedule for
6 our response and their reply?

7 THE COURT: Any objection to that?

8 MR. KLAUS: As I indicated to Your
9 Honor, we will meet and confer.

10 And just so there is no misunderstanding
11 about this, it's not just a question of -- the question
12 here is not meeting and conferring to figure out the
13 dates for deponents and we haven't had peoples' calendars
14 open. It's that there are issues with respect to the
15 scope of these -- I take to heart what Your Honor has
16 said about your view of discovery. We'll work often with
17 Mr. Busch to try to get this issue resolved without the
18 need to have to come back.

19 THE COURT: Very well.

20 MR. BUSCH: And I'm not sure he answered
21 Your Honor's question directly. I just want to make
22 sure he doesn't object to extending the --

23 THE COURT: He doesn't. He's already
24 said he doesn't, and he won't.

25 MR. BUSCH: Okay.

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THE COURT: There will be an extension.
If it's not stipulated, I'll take care of it. But I'll
be very disappointed if that's necessary.

MR. BUSCH: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Busch, I'll direct that you prepare an
order effectuating my rulings and your stipulations.
Exchange it Messrs. Klaus and Quick for any objections as
to form. Submit it within five working days.

MR. BUSCH: Thank you, Your Honor.

MR. KLAUS: Thank you, Your Honor.

THE COURT: Thank you.

(At 3:57 p.m., court in recess)

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C E R T I F I C A T I O N

I, Marie J. Metcalf, Official Court Reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

\s\Marie J. Metcalf _____
Marie J. Metcalf, CSMR-3274, CVR, CM (Date)