THE DECKARD LAW FIRM
Diane C. Deckard, Esq. (SBN 99632)
96 North Third St., Ste. 350
San Jose, CA 95112
Telephone: (408) 971-4359
Facsimile: (408) 971-4357

Attorney for Plaintiff Ecast, Inc.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

ECAST, INC. Plaintiff, vs. MORRISON & FOERSTER, LLP; GERALD P. DODSON, ESQ., ERICA D. WILSON, ESQ., and DOES 1 through 100, inclusive, Defendants.	CASE NO.: **COMPLAINT FOR LEGAL MALPRACTICE**

Plaintiff, ECAST INC. alleges:

1. Plaintiff E CAST, INC., (hereinafter "Ecast") is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the City and County of San Francisco, California. At all times herein mentioned, Plaintiff Ecast was a corporation in the business of using broadband to bring media entertainment to retail venues.

2. On information and belief Defendant, MORRISON & FOERSTER, LLP (hereinafter "Morrison & Foerster") is, and at all times herein mentioned was, a limited liability company duly organized and existing under the laws of the State of California with its principal place of business in the City and County of San Francisco, California.

3. Defendant, GERALD P. DODSON, (hereinafter "Dodson") is an individual and an attorney licenced to practice law in California with an office in San Francisco, California.

4. Defendant, ERICA D. WILSON, (hereinafter "Wilson") is an individual and an attorney licenced to practice law in California with an office in San Francisco, California

5. At all times herein mentioned, Defendant Dodson was a partner and agent of the Defendant Morrison & Foerster, and in doing the things herein alleged was acting within the scope of such employment and agency.

6. At all times herein mentioned, Defendant Wilson was a partner and agent of the Defendant Morrison & Foerster, and in doing the things herein alleged was acting within the scope of such employment and agency.

7. At all times herein mentioned, Defendants Morrison & Foerster, Dodson, Wilson, and Does 1 through 100, and each of them, were, and now are, attorneys at law, duly admitted and licenced to practice law in the State of California, and doing business in San Francisco County, California.

\\\

\\\

8. Plaintiff is ignorant of the true names and capacities of the Defendants sued herein as DOES 1 through 100, inclusive, and therefore sue these Defendants by such fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities of Does 1 through 100, inclusive, when Plaintiff ascertains the identity of such Defendants. Plaintiff is informed and believes, and thereon allege, that each of these Defendants is responsible in some manner for the acts and omissions which damaged Plaintiff, and that Plaintiff's damages as alleged herein were proximately caused by their actions or omissions.

9. Plaintiff is informed and believes and thereon alleges, that at all times herein mentioned, each of the Defendants, and Does 1 through 100, and each of them, were the agents and/or employees of each of the remaining Defendants, and in doing the things herein alleged, were acting within the course and scope of said agency and/or employment, in that the actions of each of the Defendants as herein alleged were authorized, approved, and/or ratified by each of the other Defendants as principals and/or employers.

FIRST CAUSE OF ACTION

(Legal Malpractice against Defendants Morrison & Foerster,
Dodson, Wilson, and Does 1 through 100

10. Plaintiff refers to and incorporates herein the General Allegations stated in Paragraphs 1 through 9 alleged herein above, and make them a part hereof as though set forth at length.

11. Plaintiff Ecast was named as a defendant in the case of *Rowe International Corp., and Arachnid, Inc. v. Ecast, Inc., Rockola Mfg.Corp., and View Interactive Entertainment Corp*.

("Rowe case") which had been filed in the U.S. District Court For The Northern District of Illinois on May 15, 2006. Rowe and Arachnid alleged Ecast's infringement of several U.S. patents which all relate to computer jukebox technology. The Patent Numbers were 5,355,302, 5,781,889, 5,848,398 , 6,397,189, 6,381,575, 6,970,834, and 6,598,230, collectively, the patents-in-suit.

12. Because Defendants Morrison & Foerster, Dodson, and Wilson had previously represented Ecast in a litigation matter and had also represented Ecast in drafting, filing, and prosecuting patent application cases, Ecast's CEO, John Taylor, contacted Defendant Dodson to discuss Ecast retaining Defendants to represent Ecast in the Rowe case.

13. Before retaining Defendants as their counsel, Ecast CEO, John Taylor, had a discussion with Defendant Dodson, then one of Morrison & Foerster's senior patent litigators regarding the fact that John Taylor and the Ecast board of directors wanted assurances that Dodson would personally handle the Rowe case. John Taylor specifically requested that Defendant Wilson would not handle any in-court presentation in the Rowe Case. Taylor made this request because he had previously observed Wilson's court performance in the prior litigation when she argued a matter on behalf of Ecast. Taylor had been extremely disappointed in Wilson's performance and felt that Wilson's style and presentation before the judge had a negative impact on the case. Because of this, Taylor specifically requested that Defendant Dodson personally represent Ecast in court in the Rowe case. Defendant Dodson did make these express assurances. Based upon the above representations by Dodson, Ecast retained Defendants, and each of them, to represent Ecast in that case.

14. Defendants, and each of them, had a duty to use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise, in providing legal services to Plaintiff herein.

15. In October 2007 Dodson and Wilson left Defendant Morrison & Foerster to join another firm. As a result of that move and the fact that an agreement regarding financial arrangements could not be reached between Plaintiff and Defendants, Plaintiff retained new counsel. Defendants, and each of them, continued to represent Ecast in the Rowe Case until November 9, 2007 when new counsel substituted in as Ecast's attorneys of record.

16. Defendants filed Ecast's answer to the Rowe complaint on July 21, 2006 and counterclaimed for, inter alia, a declaratory judgment that the patents-in-suit were invalid, unenforceable, and not infringed.

17. During the course of Defendants' representation of Ecast, there were several instances wherein the conduct of the Defendants fell below the applicable standard of care, as set forth herein.

18. Although Defendants submitted Ecast's technical expert, Sigurd Meldal's opening report in a timely manner, Defendants failed to timely submit Meldal's complete body of opinions, or to assure that his report laid a sufficient foundation to support Ecast's defenses to the claims asserted against it. Defendants failed to assure that the supporting analysis this expert would be offering at trial regarding the relevant technology related to the patents-in-suit was fully disclosed. Defendants did not submit a reply expert report by Meldal, to respond to respond to Rowe's expert report; the deadline for doing so was November 2, 2007.

19. After new counsel substituted into the case they submitted a declaration signed by Meldal in opposition to Rowe's summary judgment motion. In order to bolster Ecast's defense, they expanded and modified theories and analysis which had not previously been disclosed by Meldal in the opening expert report, in order to counter Rowe's claims.

20. Rowe's counsel objected to those modified portions of Meldal's declaration, arguing that those arguments were untimely and in violation of the discovery rules which require parties to disclose every expert opinion and submission to be offered at trial by the court's deadline. Thereafter on August 25, 2008, the court agreed with Rowe's assessment and struck the majority of Meldal's declaration finding the opinions therein departed substantially from the ones he submitted , through Defendants, within the court's timeframe for expert discovery.

21. On November 18, 2008**,** the court ruled on Rowe's pre-trial motion in limine and struck additional portions of Meldal's declaration and further ruled that Ecast could not even challenge or cross-examine at trial Rowe's expert on his opinions regarding those very same matters because Rowe's expert had sufficiently disclosed the subject matter in his original report. The court specifically laid the blame for the failure to disclose at Defendants' feet:

> The Court:
>
> All right. So here's my ruling on the anticipation, obviousness, and non-infringement issues. You know, it's a situation that really is outside of Mr. Beck's and his colleagues' control that the expert discovery got done before they were brought into the case, and so I can't be critical of them on this. And to the extent that this is a criticism, it's a criticism of the prior lead counsel, who are no longer in the case.

22. Defendants failed to take appropriate measures to assure that Ecast's expert was prepared to make a full disclosure of all expert opinions in his original report, and also failed to address any shortcomings of Meldal's original report by filing a timely reply report. Critical evidence was therefore ruled inadmissable at trial, thereby prohibiting Ecast from presenting a stronger and more cogent defense to Rowe's infringement allegations. Ecast's defense was so severely compromised, that Ecast had no reasonable chance of prevailing at trial. Ecast was therefore forced to avoid trial by settling with Rowe in a confidential settlement.

23. The Defendants conduct in not sufficiently preparing their key technical expert for his role in this litigation and in failing to correctly recognize the issues and define the scope or

extent to which the expert needed to prepare for completing his expert report before the September 2007 deadline fell below the standard of care. Furthermore, Defendants failure to anticipate the expert opinions and analysis of Plaintiff's expert, and failure to thereafter take necessary measures to sufficiently respond, rebut, or challenge that expert with credible expert testimony fell below the standard of care. In addition to all of the above, there were other errors and omissions committed by Defendants, and each of them, in failing to properly prepare, preserve and present the expert testimony Ecast would need in order to present their best case at trial.

24. The conduct of the Defendants, and each of them, in doing the acts and omissions herein alleged directly resulted in damages and harm to Ecast as set out herein.

25. Once Defendants undertook to represent Ecast in the Rowe case, Defendants failed to sufficiently explain and advise Ecast of the benefits Ecast could have derived by filing a request for reexamination of the patents-in-suit. Proper pursuit of a patent reexamination could have resulted in a stay of the Rowe litigation for a substantial period of time. Although technically a stay, the reexamination process often serves to effectively end the patent litigation in many cases and could have terminated the Rowe case.

26. Although Defendants did mention the reexamination process to Ecast early in their representation and explained the estimated cost of a reexamination to be approximately $100,000.00 per patent, Defendants failed to advise Ecast of the possible strategic advantages Ecast stood to gain if they pursued reexamination. Defendants failed to stress the opportunity Ecast had to possibly cease the Rowe case and eliminate all of the litigation risks and hefty legal fees and costs inherent in a full blown patent litigation. Defendant explained only that the reexamination process was a costly option which was not guaranteed to be successful.

27. Based upon the limited information provided to them by Defendants, Ecast believed the reexamination process would be too expensive and therefore did not choose to pursue that

option. Defendants thereafter simply accepted Ecast's decision not to pursue reexamination and took no additional steps to convince or attempt to persuade Ecast that reexamination was too valuable an option to forego.

28. Had Ecast been properly advised of the benefits to be gained by the reexamination process, mainly a significant stay of the Rowe case possibly leading to avoidance of all further litigation risks, legal fees and expenses, then Ecast would have chosen to pursue reexamination. Ecast would have pursued reexamination and it would likely have been successful because approximately one month after new counsel substituted in as counsel of record for Ecast in the Rowe case, a reexamination of the Arachnid patents was sought by Ecast and granted by the Patent and Trademark Office. The reexamination resulted in a finding that there was a substantial question as to the patentability on all the Arachnid patents. Under these circumstances, the claims are often modified or cancelled.

29. Because the reexamination was pursued at such a late date and in such close proximity to the commencement of trial, no stay of the Rowe case was imposed because Ecast's request came too late.

30. Defendants' failure to adequately and fully advise Ecast to pursue the extremely beneficial reexamination process fell below the standard of care. Defendants should have pursued this process in a timely manner rather than engage in a full blown patent litigation with Defendants attorney's fees exceeding a staggering $4.8 million. The cost of reexamination would have amounted to a fraction of these fees and failure of the Defendants to attempt to stay that litigation was negligent.

31. In doing the things herein alleged, Defendants intentionally put their own financial interests and the gain realized by a full blown litigation of the Rowe case, ahead of the interests of their client in avoiding litigation and the attendant legal fees by obtaining an immediate stay of the

action for a significant period thereby potentially avoiding litigation. As a direct and proximate result of Defendants actions, as alleged herein, Ecast incurred substantial unnecessary fees and costs, in an amount subject to proof.

32. Rowe's total damage claim as a result of Ecast's alleged infringement totaled $57 million. Approximately eighty-three (83%) percent of that damage claim, or $47 million, was damage Rowe attributed to profits lost by a subsidiary, AMI Entertainment, Inc. Despite the magnitude of the lost profit claim, Defendants failed to conduct appropriate discovery to determine the relationship between Rowe and the subsidiary, which was essential to establish the lost profits claim.

______33. The relationship between Rowe and its subsidiary was therefore a critical issue which should have been the subject of thorough discovery and investigation given the magnitude of the lost profit claim. Defendants however failed to adequately do either.

34. Ecast, through its new counsel, moved to exclude the lost profits claim in limine; and the court ruled that Rowe had sufficient facts to support the $47 million claim; Ecast's attempt to preclude the damages was therefore denied. If Ecast had sufficient evidence to challenge the transfer of profits from AMI to Rowe, then Rowe's claim for lost profits of $47 million may have been summarily eliminated. Defendants' failure to pursue appropriate discovery or investigation on the relationship or the flow of profits between Rowe and AMI left new counsel for Ecast unable to defend against the claim, because when they made that discovery , the discovery deadline had elapsed and it was too late.

35. If Defendants had conducted appropriate discovery on the issue then perhaps Ecast would have discovered admissible evidence sufficient to defeat, or at the very least challenge, the $47 million lost profit claim. Without sufficient controverting evidence, Ecast was powerless to controvert the claim in any meaningful way.

36. Defendants failure to include the argument that Rowe did not lose profits in their expert reports and failure to conduct appropriate discovery into the issue of the relationship between AMI and Rowe for purposes of defeating, refuting, or even challenging the lost profit claim, deprived Defendants of a possible game changer defense, and these failures fell below the applicable standard of care. As a direct and proximate result, Ecast was forced to settle with Rowe as it could not risk a trial where it had no ability to challenge the $47 million damage claim, and Ecast was damaged thereby in an amount subject to proof.

37. Defendants' handling of the Rowe case fell below the applicable standard of care in many respects. From December 5, 2005 through November 20, 2007, Defendants billed over $4.8 million dollars in attorneys fees to Ecast, and on October 21, 2007, Defendants estimated that an additional $3.7 million in fees would be needed to get through trial. This was double the amount initially quoted to John Taylor by Defendant Dodson at the outset of the case. Ecast alleges that this staggering amount of legal fees is an example of unconscionable, abusive, and unfettered expenditure of attorneys fees.

38. The case was mishandled from the start of Defendants' representation and the mishandling by Defendants began almost immediately after Defendants were retained when Dodson failed to personally handle the case as he assured John Taylor that he would as alleged hereinabove. Dodson did no work on this file until July 2006, which was 7 months after Defendants were retained. Not only did Dodson fail to handle the matter, Dodson allowed Defendant Wilson to take over handling the case, including appearing at the crucial claims construction hearing on April 6, 2007, without notifying Ecast and after John Taylor had been specifically assured by Dodson that Wilson would not handle court appearances on the Ecast matter.

39. What began almost immediately upon hiring Defendants was a seemingly endless transfer of this case file from one attorney to another in Defendants' firm. For the 23 month period

from December 2005 through November 9, 2007 in which Defendants billed and represented Ecast, over 48 attorneys, paralegals, and staff billed for work on this file.

40. Even a cursory review of the Defendants' billing records evidence the fact that this was a revolving-door assignment which led to grossly excessive, wasteful, unnecessary, and often repetitive work on the case by so many different personnel that even Defendant could not identify several of the 48 persons at Defendants' firm who billed on this case.

41. Without a consistent team or a core set of attorneys handling this litigation, there was a failure by the Defendants to develop a clear case plan or strategic defense and representation of Ecast. This failure to develop a case strategy became evident as Defendants began spending inordinate amounts of time and money attempting to develop weak and easily defeatable claims and defenses while seeming to completely ignore other much more substantive and potent claims and defenses. Defendants ignored and failed to pursue courses of action and strategies which would have offered Ecast a valid defense and bolstered Ecast's claims to many, if not all, of Rowe's claims.

42. Defendants also conducted very costly depositions of several patent prosecutors who worked on the patents- in-suit in an attempt to support Ecast's inequitable conduct claims. The depositions were extremely costly, were not helpful to the case, and the equitable conduct claims were summarily dismissed before trial.

43. Defendants also to failed to take the deposition of the sole surviving inventor of the patents- in-suit who was scheduled to be a trial witness. Rather than take the deposition of this crucial witness, on information and belief, Defendants instead chose to rely on 9 year old deposition transcript.

44. Defendants failed to build a strong case and defense for Ecast by failing to create a focused plan, but rather engaged in generalized scorched earth tactics during the approximately two year period they represented Ecast. The Defendants' conduct amounted to a failure to provide competent legal representation and it was undoubtedly fueled by the constant revolving door of attorneys and staff who were working this file at a stunning financial cost to Ecast.

45. Failure to build a cogent case for Ecast over that 2 year period was negligent and Defendants conduct fell below the standard of care. The $4.8 million fee on this case by Defendants should have included an extensive and comprehensive litigation plan, but it did not. Rather, a review of Defendants' billing records reveals a pattern of unconscionable overbilling and an uncontrolled and undisciplined approach to the case, all of which proximately resulted in damage and loss to Ecast.

46. In doing all of the above described acts and omissions, Defendants, and each of them, repeatedly and intentionally put their own financial interests ahead of the interests of their client in avoiding a costly full blown patent litigation case.

47. Defendants, and each of them, failed to exercise reasonable care and skill in their representation of Ecast by negligently and carelessly doing all of the acts and omissions as herein alleged. Among other things, Defendants failed to exercise reasonable care and skill and were negligent in failing to properly prepare for, present, and preserve Ecast's ability to introduce necessary expert testimony at trial; in failing to properly counsel and advise Ecast as to its ability to seek reexamination of the patents in suit; in failing to properly address the claim of lost profits alleged by Rowe, and by generally mishandling, mismanaging, and overbilling in this case to such an extent that Ecast incurred excessive and unconscionable legal fees and expenses and was ultimately forced to settle the case because Ecast's position had become so compromised by the negligence of the Defendants, and each of them.

48. As a direct and proximate result of the aforesaid negligence and/or intentional failures of the Defendants, Ecast was required to retain new counsel to assume their representation at a cost of over $2.65 million dollars.

49. As a further direct and proximate result of the negligence of Defendants, and each of them, Ecast sustained damages, including, but not limited to, legal fees paid to Defendants in the amount of $4.8 million, payment of a settlement to Rowe which is confidential, and payment of legal fees to new counsel who substituted in to assume representation of Ecast at a cost of $2.65 million. Ecast has sustained, and will continue to sustain, further and additional damages as a direct result of the Defendants' negligence, all in an amount according to proof.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

(Breach of Fiduciary Duty against Defendants Morrison & Foerster, Dodson, Wilson, and Does 1 through 100

50. Plaintiff refers to and incorporates herein the General Allegations and the allegations of the First Cause of Action in paragraphs 1 through 49 alleged herein above, and make them a part hereof as though set forth at length.

51. Defendants, and each of them, owed Ecast a fiduciary duty to act at all times in good faith and in Ecast's best interests, and had a duty, among other things, to perform the services for which they were retained with reasonable care and skill, to act in Ecast's highest and best interests at all times, and to not expose Ecast to any unnecessary risk or peril. This fiduciary and confidential relationship was never repudiated by Defendants at any time herein mentioned.

52. Defendants, and each of them, breached their fiduciary duties and obligations to Plaintiff by doing all of the acts and omissions as herein alleged. Among other things, Defendants breached their duty by failing to properly counsel and advise Ecast as to its ability to seek reexamination of the patents-in-suit in order to limit the litigation, by placing their interest in charging unconscionable fees above Ecast's interests, and by generally mishandling, mismanaging, and overbilling in this case to such an extent that Ecast was forced to incur excessive and unconscionable legal fees and expenses and ultimately forced to settle the case because Ecast's position had become so compromised by the failure of the Defendants, and each of them, to manage the litigation in a prudent manner.

53. Furthermore, in doing all of the above described acts and omissions constituting Defendants' breach of their fiduciary duties owed to Ecast, Ecast sustained damages, including but not limited to, legal fees incurred to Defendants in the amount of $4.8 million, payment of a settlement to Rowe which is confidential and payment of legal fees to new counsel which substituted in to assume representation of Ecast at a cost of $2.65 million. Ecast sustained further and additional economic and out of pocket losses and damages to be presented at trial, all according to proof.

54. The acts and omissions constituting breach of Defendants' fiduciary duties were committed with oppression, fraud and/or malice within the meaning of Civil Code Section 3294. As a result, Plaintiff, in addition to actual damages, may recover exemplary damages for the sake of example and by way of punishing Defendants.

///

///

///

///

///

///

WHEREFORE, Plaintiff Ecast prays for judgment against Defendants, and each of them, as set forth below:

As to the First Cause of Action

1. For actual damages in a sum in excess of the jurisdiction of this Court according to proof;
2. For interest as allowed by law;
3. For costs of suit incurred herein;
4. For such other and further relief as the Court deems just and proper.

As to the Second Cause of Action

1. For actual damages in a sum in excess of the jurisdiction of this Court according to proof;
2. For exemplary damages according to proof;
3. For interest as allowed by law;
4. For costs of suit incurred herein;
5. For such other and further relief as the Court deems just and proper.

Dated: April 8, 2009

THE DECKARD LAW FIRM

DIANE C. DECKARD
Attorney For Plaintiff, Ecast, Inc.