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Filing date: **10/19/2005**

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

Proceeding	91162780
Party	Defendant Cangiarella, Keith Cangiarella, Keith 331 N. Harrington Drive Fullerton, CA 92831
Correspondence Address	Stephen L. Anderson Anderson & Associates 32605 Highway 79 South Suite 208 Temecula, CA 92592 UNITED STATES attorneys@brandxperts.com
Submission	Motion to Compel Discovery
Filer's Name	Stephen L. Anderson, Esq
Filer's e-mail	attorneys@brandxperts.com
Signature	/StephenLAnderson/
Date	10/19/2005
Attachments	motion to compel.pdf (2 pages) Exhibit A - interrogatories.pdf (5 pages) Exhibit B.pdf (4 pages) Exhibit C.pdf (3 pages)

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

In the Matter of Trademark Application Serial No.: 78/229,875 Mark: MESSAGE IN A BOTTLE		Opposition No. 91162780
GOLD SHELLS, INC., a California corporation, Opposer,		APPLICANT KEITH CANGIARELLA'S MOTION TO COMPEL RESPONSES TO FIRST SET OF INTERROGATORIES AND REQUEST FOR STAY OF PROCEEDINGS
KEITH CANGIARELLA, Applicant.		

In the Matter of Trademark Registration No.: 2,243,269 Mark: MESSAGE IN A BOTTLE		
KEITH CANGIARELLA, Applicant, v.		
ROGER ROJAS, Opposer.		

APPLICANT'S MOTION TO COMPEL DISCOVERY RESPONSES

Applicant, Keith Cangiarella hereby moves for an order requiring Opposer Gold Shells Inc. to answer specified interrogatories and simultaneously moves to stay all discovery and testimony periods pending a resolution of this discovery motion.

Applicant's Memorandum

On August 17, 2005, Applicant's counsel served his first set of interrogatories on Opposer regarding litigation in front of the Trademark Trial and Appeal Board, opposition # 91162780.

Attached hereto as Exhibit "A" is a true copy of Applicant's First Set of Interrogatories and the certificate of service thereof demonstrating that such interrogatories were indeed served on Opposer by first class mail on August 17, 2005. All interrogatories herein made to Opposer were relevant and germane to the issues at bar.¹

¹ For Example, Interrogatory # 2 asks "Describe each service offered by Opposer under the designation MESSAGE IN A BOTTLE. Interrogatory # 8 asks "Identify the date of first use in commerce for each service that Opposer has used the MESSAGE IN A BOTTLE mark. Interrogatory #16 asks "Identify all facts which relate to Opposer's claim that it is the owner of the rights to the trademark Registration No. 2,243,269.."

No response to such interrogatories was received within the requisite time.

On September 29, 2005, in an attempt to informally resolve this dispute prior to filing, Applicant sent a "meet and confer" letter regarding Opposer's failure to respond. Applicant also sent another copy of these interrogatories by both fax and mail. Attached hereto as Exhibit "B" is a copy of this fax, including the date, time and fax number it was sent, with a cover sheet stating that this office had yet to receive a response.

By October 11, 2005, this office still did not receive any reply to the September 29 correspondence, nor any responses to the interrogatories. Hereinafter, Applicant's counsel again sent the above "meet and confer letter." Applicant then received correspondence from Peter H. Smith, Esq. claiming that he never received the original interrogatories by mail and that he would finish his response in a "timely manner." Attached hereto is Exhibit "C", a copy of Mr. Smith's correspondence letter dated October 11, 2005.

As of October 18, 2005, this office has yet to receive a response to the interrogatories. Applicant's counsel has made a good faith effort by correspondence to resolve this with Opposer's counsel and we have been unable to reach an agreement as stated under TBMP § 523.02.

Because Opposer has failed to respond to interrogatories, it has waived its right to object to any interrogatories submitted under F.R.C.P. 33 (b) (4). See *Davis v. Fendler* (9th Cir. 1981) 650 F.2d 1154, 1160. See also *Straight Int'l Inc. v. Herlihy* (D. KS 1998) 181 FRD 494, 498. Applicant now moves to compel a response. Applicant further moves to stay all testimony periods pending a resolution of this discovery motion under 37 C.F.R. § 2.120 (e) (2).

Respectfully Submitted,

Anderson & Associates

Dated: October 18, 2005

By: /StephenLAnderson/
Stephen L. Anderson
Attorney for Applicant
32605 Highway 79 South, Suite 208
Temecula, CA 92592
(951) 694-1877

Certificate of Service

I hereby certify that a copy of the foregoing APPLICANT'S MOTION TO COMPEL RESPONSES TO FIRST SET OF INTERROGATORIES was mailed first-class mail, postage prepaid, to Peter H. Smith, Attorney at law, 1535 J Street, Suite A, Post Office Box 1867, Modesto, California, 95353, attorney for Opposer,

October 19, 2005

/StevenJohnson/
Steven Johnson

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

In the Matter of Trademark Application Serial No.: 78/229,875 Mark: MESSAGE IN A BOTTLE GOLD SHELLS, INC., a California corporation, Opposer, v. KEITH CANGIARELLA, Applicant.	Opposition No. 91162780 APPLICANT'S FIRST SET OF INTERROGATORIES TO OPPOSER
In the Matter of Trademark Registration No.: 2,243,269 Mark: MESSAGE IN A BOTTLE KEITH CANGIARELLA, Petitioner, v. ROGER ROJAS, Registrant	

In accordance with Rule 33 of the Federal Rules of Civil Procedure, and Rules 2.116 and 2.120 of the Trademark Rules of Practice, Petitioner Keith Cangiarella requests that Opposer, Gold Shells, Inc., within thirty (30) days, answer each of the interrogatories set forth below, subject to the following definitions and instructions:

DEFINITIONS AND INSTRUCTIONS

- A. As used herein, the term "Petitioner" refers to Keith Cangiarella, an individual, residing California and doing business under the fictitious name of "DreamWeaver Studios.", and the employees, agents and representatives thereof.
- B. The term "Opposer" refers to Gold Shells, Inc., a California Corporation, its employees, agents and all other representatives.
- C. The term "Registrant" refers to Roger Rojas, an individual, residing in California.
- D. If a privilege is relied upon in declining to provide any information or document in response to an interrogatory or a part thereof, identify the nature of the privilege and

EXHIBIT A

1. For documents, provide the following: (a) the type of document; (b) the general subject matter of the document; (c) the date of the document; and (d) such other information as is sufficient to identify each document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and where not apparent, the relationship to the author and addressee to each other; and
2. For oral communications, provide the following; (a) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (b) the date and place of the communication; and (c) the general subject matter of the communication.

D. As used herein, the term "person" includes any corporation, division, agency, or other entity, as well as an individual.

E. Whenever an interrogatory inquires about the name or identity of a person and that person is an individual, the information requested includes:

1. The person's full name;
2. The person's employer;
3. The person's position or title; and
4. The person's last known address and telephone number.

F. Whenever an interrogatory inquires about the name or identity of a person and the person is a corporation, division, agency or other entity, the information requested includes the full name and current address of said corporation, division agency or other entity.

G. As used herein, "and" as well as "or" shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of the interrogatory all responses which might otherwise be construed to be outside its scope.

H. As used herein, the singular shall always include the plural and the present tense shall always include the past tense, and vice versa.

INTERROGATORIES

EXHIBIT A

1. Describe each product sold by Opposer under the designation MESSAGE IN A BOTTLE.
2. Describe each service offered by Opposer under the designation MESSAGE IN A BOTTLE.
3. Describe each product produced or marketed by Registrant under the designation MESSAGE IN A BOTTLE.
4. Identify each product and service produced or marketed by Registrant under the designation MESSAGE IN A BOTTLE.
5. Describe the manner of Opposer's first use of the term MESSAGE IN A BOTTLE as a successor in interest of Registrant in the trademark (Registration No.: 2,243,269).
6. Identify the marketing plans or marketing studies created or implemented by Opposer concerning the use of the term MESSAGE IN A BOTTLE.
7. Identify the date of first use in commerce for each product on which Opposer has used the term MESSAGE IN A BOTTLE.
8. Identify the date of first use in commerce for each service that Opposer has used the MESSAGE IN A BOTTLE mark.
9. Identify each person participating in the preparation or approval of advertisements or promotions of products and services bearing the mark MESSAGE IN A BOTTLE.
10. State the amount of money that Opposer has spent for each type of advertising or promotion Opponent has used in connection with each of its MESSAGE IN A BOTTLE products, goods and services before October 04, 2004, if any and since October 04, 2004.
11. Identify each third party use, former use, or claim of use of any term consisting of MESSAGE IN A BOTTLE known to Opposer and each person with knowledge of such use, former use or claim of use.
12. Identify each investigation which has been conducted relating to any term consisting of MESSAGE IN A BOTTLE and each person having knowledge relating thereto.

13. Identify any rights in the term MESSAGE IN A BOTTLE which Opposer has granted to any third party or acquired from any third party, and the persons most knowledgeable concerning each grant or acquisition.

14. Describe separately the nature of all objections made by or directed to Opposer that relate to use of or rights in, any term consisting in whole or part of MESSAGE IN A BOTTLE, and identify the persons most knowledgeable about each objection.

15. If Opposer intends to rely upon the opinion of an expert in connection with his defense of the cancellation proceeding, provide the information set forth in Rule 26(a)(2)(A) and (B), Fed.R.Civ.P., for each expert.

16. Identify all facts which relate to Opposer's claim that it is the owner of the rights to the trademark Registration No. 2,243,269.

17. Identify all documents that refer to, relate to or reflect the decision to file the application for the trademark (Registration No. 2,243,269) including any opinion from or to counsel for Registration.

18. Identify all documents in your possession, custody or control that relate to or mention the MESSAGE IN A BOTTLE trademark as used by the Applicant.

19. Identify all documents that support YOUR contention stated in your tenth affirmative defense in the Respondent's Answer to Applicant's Counterclaim for Cancellation that "Respondent has continuously used the registered mark MESSAGE IN A BOTTLE in commerce, for the services in connection with which it was registered, for over five consecutive years subsequent to the date of such registration."

Dated: August 17, 2005

By:


Stephen L. Anderson, Esq.
ANDERSON & ASSOCIATES
32605 Highway 79 South, Suite # 208

EXHIBIT A

Temecula, CA 92592
Attorneys for Applicant/Petitioner
KEITH CANGIARELI.A

Certificate of Service

I hereby certify that on August 17, 2005, a copy of the foregoing PETITIONER'S FIRST SET OF INTERROGATORIES TO REGISTRANT was mailed first-class mail, postage prepaid, to Peter H. Smith, Attorney at law, 1535 J Street, Suite A, Post Office Box 1867, Modesto, California, 95353, attorney for Registrant.

Dated: August 17, 2005

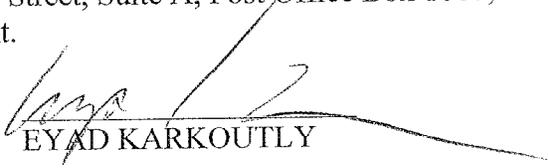

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EXHIBIT A

ANDERSON & ASSOCIATES

32605 HIGHWAY 79 SUITE 208
TEMECULA, CALIFORNIA 92592
PHONE: 951-694-1877 FAX: 951-694-1876

FACSIMILE TRANSMITTAL SHEET

TO:	Peter H. Smith, Esq.	FROM:	Stephen L. Anderson, Esq.
COMPANY:	Law Offices of Peter H. Smith	DATE:	OCTOBER 11, 2005
FAX NUMBER:	209-579-9940	TOTAL NO. OF PAGES INCLUDING COVER:	3
PHONE NUMBER:	209-579-9524	SENDER'S REFERENCE NUMBER:	B-560.001
RE:	Message In a Bottle TTAB Opposition No. 91162780	YOUR REFERENCE NUMBER:	

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

Dear Mr. Smith:

As you are no doubt aware, this office has yet to receive any response by your client to Applicant's first set of Interrogatories, which were served by mail on your office along with the other discovery requests on August 17, 2005.

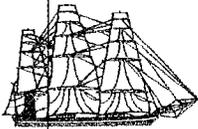
Attached hereto for your further reference is a copy of a meet and confer letter sent to your office on September 29, 2005. To date, you have not favored us with any reply whatsoever.

Therefore please be advised that we will promptly prepare and file a motion to compel your client's responses to such interrogatories at this time.

Sincerely yours,

Stephen L. Anderson, Esq.

EXHIBIT B



ANDERSON & ASSOCIATES

27349 Jefferson Avenue, Suite 211 • Temecula, CA 92590
(951) 719-1371 • (951) 719-1372 fax
attorneys@brandXperts.com

Peter H. Smith
1535 J. Street, Suite A
Post Office Box 1867
Modesto, CA 95353

September 29, 2005

Re: Gold Shells v. Cangiarella
Trademark Trial and Appeal Board Opposition NO. 91,162,780

Dear Mr. Smith:

I am writing in an effort to “meet and confer” concerning Applicant’s First Set of Interrogatories to Opposer, which were served on you on August 17, 2005. As you are aware, Applicant’s First Set of Interrogatories were served on you on August 17, 2005, in the same envelope as contained the Applicant’s first set of requests for admission and document requests. Please find a copy of the original certificate of service attached hereto.

I. Due to its Failure to Timely Respond, Opposer Has Waived its Objections to Petitioner’s Special Interrogatories

Under F.R.C.P., Rule 33, a response to special interrogatories is due within 30 days after the interrogatories were served. As we have never, to date, received any timely response, you have failed to comply with such rule and your failure constitutes a *waiver* of any and all objections thereto, absent extension or good cause. (See F.R.C.P. Rule 33(b)(4), *Davis v. Fendler* (9th, Cir. 1981) 650 F.2d 1154, 1160. See also *Straight Int’l, Inc v. Herlihy* (D KS 1998) 181 FRD 494, 497).

Furthermore, during our conversation which occurred on or about August 27, 2005, you had conceded that you received such interrogatories, and that you expected the “objections to be the same as those” raised by the Applicant in response to Opposer’s first set of interrogatories, to which I responded, “not a chance.” Finally, in light of your prior dilatory conduct in failing to promptly file and serve an answer to the counterclaim raised in this matter, your further dilatory conduct herein is particularly offensive.

As such, please promptly provide us with complete responses to our client’s interrogatories, without objections, within the next ten days. If such responses are not promptly received, we will have no choice but to make a motion to compel same. I thank you in advance for your attention and anticipated cooperation herein.

Sincerely yours,

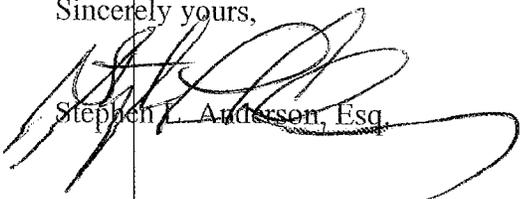

Stephen L. Anderson, Esq.

EXHIBIT B

Temecula, CA 92592
Attorneys for Applicant/Petitioner
KEITH CANGIARELLA

Certificate of Service

I hereby certify that on August 17, 2005, a copy of the foregoing PETITIONER'S FIRST SET OF INTERROGATORIES TO REGISTRANT was mailed first-class mail, postage prepaid, to Peter H. Smith, Attorney at law, 1535 J Street, Suite A, Post Office Box 1867, Modesto, California, 95353, attorney for Registrant.

Dated: August 17, 2005


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Certified

HP LaserJet 3200



ANDERSON & ASSOC
9517191372
OCT-11-2005 3:42PM

Fax Call Report

Job	Date	Time	Type	Identification	Duration	Pages	Result
880	10/11/2005	3:39:49PM	Send	12095799940	2:37	3	OK

ANDERSON & ASSOCIATES
32605 HIGHWAY 79 SUITE 208
TEMECULA, CALIFORNIA 92592
PHONE: 951-694-1877 FAX: 951-694-1876

FACSIMILE TRANSMITTAL SHEET

TO: Peter H. Smith, Esq.	FROM: Stephen L. Anderson, Esq.
COMPANY: Law Offices of Peter H. Smith	DATE: OCTOBER 11, 2005
FAX NUMBER: 209-579-9940	TOTAL NO. OF PAGES INCLUDING COVER: 3
PHONE NUMBER: 209-579-9524	SENDER'S REFERENCE NUMBER: B-560.001
RE: Message In a Bottle TTAB Opposition No. 91162780	YOUR REFERENCE NUMBER:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

Dear Mr. Smith:

As you are no doubt aware, this office has yet to receive any response by your client to Applicant's first set of Interrogatories, which were served by mail on your office along with the other discovery requests on August 17, 2005.

Attached hereto for your further reference is a copy of a meet and confer letter sent to your office on September 29, 2005. To date, you have not favored us with any reply whatsoever.

Therefore please be advised that we will promptly prepare and file a motion to compel your client's responses to such interrogatories at this time.

Sincerely yours,

Stephen L. Anderson, Esq.

EXHIBIT B

Telephone: (209) 579-9524

Fax: (209) 579-9940

TELECOPIER TRANSMITTAL MEMO

DATE: October 11, 2005

✓ TO: Stephen Lee Anderson, Esq.

FAX NUMBER: (951) 694-1876

FROM: Peter H. Smith

ENCLOSED PLEASE FIND: Copy of letter being mailed to you today.

- () For your information/files; no reply necessary.
- () In accordance with your request.
- () Per our discussion.
- (x) For your review and comments.
- (x) Comments: I am faxing this in response to your fax today. There is no need to file a motion to compel. I am working on the interrogatory answers today and will finalize and serve them in a timely manner as I said before.

TOTAL PAGES, INCLUDING THIS TRANSMITTAL: 3

cc: Gold Shells, Inc.

IF YOU DO NOT RECEIVE ALL THE PAGES,
PLEASE CALL : LUGENE BORBA (209) 579-9524.

WARNING:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return this original message to us at the above address via the U.S. Postal Service.

Thank you.

EXHIBIT C

PETER H. SMITH

ATTORNEY AT LAW
1535 J STREET, SUITE A
POST OFFICE BOX 1867
MODESTO, CALIFORNIA 95353

TELEPHONE (209) 579-9324
FACSIMILE (209) 579-9940

MEMBER OF CALIFORNIA
& OREGON STATE BARS

October 11, 2005

Stephen Lee Anderson, Esq.
Anderson & Associates
27349 Jefferson Avenue, #211
Temecula, CA 92590

Re: Gold Shells, Inc. v. Cangiarella
Trademark Trial & Appeal Board Opposition No. 91162780
Your Interrogatories

Dear Mr. Anderson:

As I expected, and as I advised you, I returned to the office from vacation on October 6, 2005, and I first saw your September 29 letter regarding your interrogatories on October 7, 2005. I am now responding as follows:

1. Contrary to your statement, I am not aware that Applicant's First Set of Interrogatories was served on me on August 17, 2005. Indeed, it was not served on me on that date, regardless of what is stated in your certificate of service. I advised you in our telephone conversation of September 16, 2005, that I had not received your interrogatories, and I documented that to you in my letter of the same date. You then faxed the interrogatories to me on September 16, and I acknowledged receipt of that faxed copy in my letter to you dated September 17, 2005.

2. Since I never received your interrogatories until September 16, I have not failed to timely respond and I have not waived any objections. As I told you in my September 16 letter, I will get interrogatory responses out to you not later than 30 days from the date you served them on me, which was September 16.

3. Contrary to your statement, I did not concede in a conversation on or about August 27, 2005, that I had received the interrogatories. My comments in that conversation were directed only to the discovery documents I had actually received (though I may have assumed at that point that you had served interrogatories, as I recall being surprised later to find that you had not when I examined what you had sent).

EXHIBIT C

Stephen Lee Anderson, Esq.

October 11, 2005

Page 2

4. I am offended by your reference to my so-called "prior dilatory conduct in failing to promptly file and serve an answer to the counterclaim". As you well know, I did indeed timely file and serve an answer to the counterclaim, and you have a copy of the answer I timely served with the proof of service. The only confusion was from the fact that the TTAB did not acknowledge having a record of the filing so I had to send it a second copy.

5. I also take offense to your reference in the same paragraph to "your further dilatory conduct" when there has been none.

Very truly yours,



Peter H. Smith

PHS/lmb

cc: Gold Shells, Inc.

EXHIBIT C