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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	Opposition/Response to Motion
Filer's Name	Stephen L. Anderson
Filer's e-mail	attorneys@brandxperts.com
Signature	/StephenLAnderson/
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Attachments	App's Oppn to Motion to compel answers to Rogs 1.pdf ( 16 pages ) Exhibits ABCD.pdf ( 44 pages )

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

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

APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO COMPEL  
APPLICANT'S ANSWERS TO FIRST SET OF INTERROGATORIES

Comes now, Applicant, Keith Cangiarella, through counsel, in opposition to Opposer Gold Shells Inc.'s Motion to compel responses to Opposer's First Set of Interrogatories. As a preliminary note, although the Applicant's responses to Opposer's First Request for Documents were served on Opposer's counsel back on August 12, 2005, and although the period for discovery to close elapsed on September 30, 2005; Opposer's counsel delayed in filing the instant motion until December 06, 2005, notably, well after the first testimony period in this matter had opened. As such, and as described below, Opposer has failed to file the motion to compel within a reasonable time including

within the time provided for in 37 C.F.R. §2.120(3) (1). Therefore, the motion should be summarily denied as untimely.

#### STATEMENT OF FACTS

On or about June 29, 2005, Opposer served Applicant's counsel, by mail, with its First Set of Interrogatories. Within the time required, on August 12, 2005, Applicant responded to Opposer's First Set of Interrogatories, by serving Opposer's counsel with "Applicant's General Objections To Opposer's Excessive Interrogatories Set One" which included several objections, including, *inter alia*, that the total number of interrogatories, contained in the Opposer's First Set, counting subparts, greatly exceeded the permissible limit of interrogatories (namely seventy-five) as allowed under 37 CFR § 2.120(d)(1). A true copy of such general objections was attached as Exhibit "B" to the Opposer's motion to compel Applicant's Answers To the First Set of Interrogatories.

For the Board's convenience, "Applicant's General Objections To Opposer's Excessive Interrogatories Set One" is likewise attached hereto as "Exhibit B."

As may be noted at the top of page 2 of Exhibit "B," Applicant elected to serve his general objections "instead of serving answers and specific objections to the interrogatories and are required by Chapter 400 of the Trademark Trial And Appeal Board Manual of Procedure (TBMP) and specifically by 37 C.F.R. § 2.120(d)(1). At the first numbered paragraph, Applicant further objected "to the Interrogatories generally to the extent that they exceed the requirements and permissible scope of discovery under the Federal Rules of Civil Procedure or the Trademark Rules of Practice."

As may be noted at the top of the following page 3, numbered paragraph 2, Applicant reiterated such objection and provided further authority therefor, namely:

“37 C.F.R. § 2.120(d)(1); Helen R. Wendel, TIPS FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE TTAB: The Burden Shifts: Revised Discovery Practice Under Trademark Rule 2.120(d)(1), 82 Trademark Rep. 89 (1992); *Brawn of California Inc. v. Bonnie Sportswear Ltd.*, 15 USPQ2d 1572, 1574 (TTAB 1990).”

Finally, on “Exhibit B” at page 5, paragraph 9, Applicant generally objected to the lengthy “‘Definitions’ and ‘Instructions’ contained in Opposer’s interrogatories to the extent that they seek to impose obligations on Applicant beyond those set forth in the Federal Rules of Civil Procedure and the Trademark Rules of Practice, and that they further compound and convolute the already excessive number of interrogatories propounded by Opposer, and the matters requested therein.”

On or about September 17, 2005, Opposer’s Counsel, Peter Smith, sent the undersigned a letter attached as Exhibit “C” which (albeit erroneously) asserted that “the total number of interrogatories is 68” and that Applicant’s “blanket objection to these interrogatories – which are a typical set in an opposition proceeding involving issues of likelihood of confusion and priority – cannot in any light be viewed as a good faith participation in the discovery process.” Mr. Smith’s September 17 letter further (albeit erroneously), contended that the “rational procedure in the case of excessive interrogatories is to answer the first 75 and object to answering any beyond that, not to simply stonewall the entire set of interrogatories.” Mr. Smith further refused to modify or otherwise serve a revised set, and instead chose to re-serve another identical copy of the first set of excessive interrogatories.

On September 29, 2005, in a good faith attempt to resolve the dispute, the undersigned served Mr. Smith with a letter copied hereto as Exhibit “D,” concurrently with a second copy of “Applicant’s General Objections To Opposer’s Excessive Interrogatories Set One” as well as a worksheet showing the method of computation in

which the undersigned counsel had originally determined that the total number of Opposer's Interrogatories was not "68," but rather was well over 154 counting the individual subparts and according to the specific rules and guidelines contained in Section 405.03 of the TBMP.

In my September 29 letter, I particularly indicated that Applicant would "stand by said objections as related to [Opposer's] excessive interrogatories for the following reasons:" (In order to abbreviate the "legal argument" Section II below, I incorporate such letter in relevant part herein):

"As you are no doubt aware, 37 CFR § 2.120(d)(1) states that '(t)he total number of written interrogatories which a party may serve upon another party pursuant to Rule 33 of the Federal Rules of Civil Procedure, in a proceeding, shall not exceed seventy-five, counting subparts, except that the Trademark Trial and Appeal Board, in its discretion, may allow additional interrogatories upon motion therefore showing good cause, or upon stipulation of the parties.'

Your assertion that the "rational procedure in a case of excessive interrogatories is to answer the first 75 and object to answering any beyond that" is simply incorrect and unfounded. To the contrary, as called for by Section 405.03 of the TTAB Manual of Procedure, Second Edition published 11 June 2003, at page 400-42:

"If a party on which interrogatories have been served, in a proceeding before the Board, believes that the number of interrogatories served exceeds the limit specified in 37 CFR § 2.120(d)(1), and wishes to object to the interrogatories on this basis, the party must, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number."<sup>1</sup>

Further, according to such section, "[a] party should not answer what it considers to be the first seventy-five interrogatories and object to the rest as excessive."<sup>2</sup>

Therefore, contrary to your assertions, I have indeed followed the applicable rules of discovery in good faith herein. Please note for your information that we have utilized the Board's prescribed method of determining whether the number of interrogatories are excessive and as shown by the attached worksheet, we have determined that in fact the actual number of interrogatories propounded by your client is not 68, but is actually at least 154, more than twice the permissible limit.

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<sup>1</sup> See 37 CFR § 2.120(d)(1) and Helen R. Wendel, TIPS FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE TTAB: The Burden Shifts: Revised Discovery Practice Under Trademark Rule 2.120(d)(1), 82 Trademark Rep. 89 (1992).

<sup>2</sup> *Brawn of California Inc. v. Bonnie Sportswear Ltd.*, 15 USPQ2d 1572, 1574 (TTAB 1990).

Again as you should be aware and as stated in the TTAB Manual of Procedure, Second Edition, published 11 June 2003 at section 405.03(d) at page 400-40:

“In determining whether the number of interrogatories served by one party on another exceeds the limit of 37 CFR § 2.120(d)(1), the Board will count each subpart within an interrogatory as a separate interrogatory, regardless of whether the subpart is separately designated (i.e., separately numbered or lettered) . If an interrogatory includes questions set forth as numbered or lettered subparts, each separately designated subpart will be counted by the Board as a separate interrogatory. The propounding party will, to that extent, be bound by its own numbering system, and will not be heard to complain that an interrogatory, although propounded with separately designated subparts, should nevertheless be counted as a single interrogatory because the interrogatory concerns a single transaction, state of facts, etc., or because the division was made for clarification or convenience.<sup>3</sup>

Moreover, as specifically stated at page 400-41 of the TTAB Manual, “[i]f an interrogatory requests information concerning more than one issue, such as information concerning both "sales and advertising figures," or both "adoption and use," the Board will count each issue on which information is sought as a separate interrogatory.”

As shown by the attached worksheet, we have in good faith adopted such an approach, which has led us to believe that your interrogatories are grossly excessive, unreasonable and were propounded in bad faith.

For example, your client’s Interrogatory No. 1 requests that the Applicant “Identify each product and service produced or marketed by you to date under the trademark.”

Inasmuch as the Applicant may have produced both products and services under the mark, and may also have marketed certain products and services that he did not “produce” such interrogatory actually counts as 3 distinct subparts. Being conservative however, we only counted 2 while arriving at our calculation of 154 interrogatories as shown by the attached worksheet.

Further, your client’s Interrogatory No. 2 similarly requests that the Applicant “Identify each product and service produced or marketed by you to date under the trademarks other than the Trademark.” As such, said interrogatory similarly contains at least 2 (more appropriately 3) distinct issues.

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<sup>3</sup> See *Jan Bell Marketing, Inc. v. Centennial Jewelers, Inc.*, 19 USPQ2d 1636, 1637 (TTAB 1990); *Pyttronic Industries, Inc. v. Terk Technologies Corp.*, 16 USPQ2d 2055, 2056 (TTAB 1990); *Kellogg Co. v. Nugget Distributors' Cooperative of America, Inc.*, 16 USPQ2d 1468, 1469 (TTAB 1990); *Brawn of California Inc. v. Bonnie Sportswear Ltd.*, 15 USPQ2d 1572, 1574 (TTAB 1990); and *Carla Calcagno, TIPS FROM THE TTAB: Discovery Practice Under Trademark Rule 2.120(d)(1)*.

Your client's third interrogatory requests that the Applicant "[i]dentify any and all trademarks used to date, or intended to be used, by Applicant on any of its products or services. Again such interrogatory involves at least four separate inquiries, namely:

- (1) That the Applicant identify any and all trademarks used to date . . . on any products;
- (2) That the Applicant identify any and all trademarks used to date . . . on any services;
- (3) That the Applicant identify any and all trademarks intended to be used on any of his products;
- (4) That the Applicant identify any and all trademarks intended to be used on any of his services.

Again, in good faith and being conservative rather than aggressive, we counted such third interrogatory only twice as shown on the attached worksheet.

As a final example, your client's seventh interrogatory requests that the Applicant "Identify what change is intended as to each product and service produced or marketed by you to date for which you intend to change the trademark."

As shown by the worksheet, such interrogatory involves four distinct issues, namely:

- (1) That the Applicant identify what change is intended as to each product produced... for which [he] intends to change the trademark;
- (2) That the Applicant identify what change is intended as to each service produced ... for which [he] intends to change the trademark;
- (3) That the Applicant identify what change is intended as to each product marketed... for which [he] intends to change the trademark;
- (4) That the Applicant identify what change is intended as to each service marketed ... for which [he] intends to change the trademark."

\* \* \*

Due to time constraints, what I neglected to mention in my letter of September 29, (Exhibit "D") and would bring to the Board's attention in response to Opposer's motion to compel is that within the "68" interrogatories that Opposer's counsel has conceded to at page 5 of Opposer's Motion; and *assuming arguendo* that "[i]n the present proceeding, the goods and services of both parties are integrally intertwined" -- (and therefore presumably, according to Opposer, the Board should now opine that the term "products and services" as contained (e.g., in Opposer's interrogatory Nos. 1, 2, 4, 5, 6, 7, 8, 9, etc.) should only count as one interrogatory), notwithstanding the clear prescription contained in Section 405.03 of the TBMP (p. 400-41) which states:

"If an interrogatory requests information concerning more than one issue, such as information concerning both "sales and advertising figures," or both "adoption

and use," the Board will count each issue on which information is sought as a separate interrogatory."

No matter which counting method is used, the total number of interrogatories contained in the Opposer's First Set still well exceeds the permissible number, counting subparts. Plainly, in addition to numbers 11, 13, and 16, Opposer has propounded several additional interrogatories which indisputably each themselves contain several subparts including, for example:

15. *State whether you have ever received an opinion by correspondence or communication concerning possible trademark conflict arising out of the intended use of the trademark by Opposer, and, if so, for each such correspondence or communication, identify the date upon which each such correspondence or communication was transmitted, the person transmitting each such correspondence or communication, and the person receiving each such correspondence or communication.*

(4 subparts: 1) Y or N; 2) if yes, date; 3) who sent; 4) who received);

20. *Identify each advertising agency or public relations firm which you have retained in connection with your sale or intended sale of products or services bearing the trademark, starting with 1998 and continuing to the present time, and identify the date retained, the services provided by the firm, and the amounts you paid for such services.*

(Between 6 and 14 subparts: Each agency or firm; products or services; each year 1998 to present; each date retained; what services provided; amount paid for services.);

22. *State the dollar amount spent annually on advertising and promoting goods and services under the Trademark annually during each of the last five years, including the portion of the present year to date, for each category of goods and services sold by Applicant under the Trademark;*

(Between 2 and 4 subparts)

57. *State whether you have or had a policy for the retention or the destruction of records, documents or files, and if so, identify the terms of such policies and the categories of documents covered; if there have been any changes in such policy and if so, the dates and nature of each such change; the types of files maintained; and the locations of such files; the name and address of the custodian or custodians of such files; and identify any documents relating thereto.*

(10 subparts: and four semi-colons: 1) Y/N 2) if yes, terms; 3) categories; 4) changes Y/N; 5) dates of each change; 6) nature of each change; 7) types of files maintained; 8) locations of each such files; 9) names and addresses of each custodian; 10) what documents as to which custodians);

59. *Identify each person Applicant expects to offer as a fact witness, and state the substance of the facts to which each such witness is expected to testify.*

As stated at page 400-41, Section 405.03(d) of the TBMP:

“If an interrogatory contains both an initial question, and follow-up questions to be answered if the first is answered in the affirmative, the initial question and each follow-up question will be counted as separate interrogatories.<sup>126</sup> Similarly, if an interrogatory begins with a broad introductory clause (“Describe fully the facts and circumstances surrounding applicant's first use of the mark XYZ, including:”) followed by several subparts (“Applicant's date of first use of the mark on the goods listed in the application,” “Applicant's date of first use of the mark on such goods in commerce,” etc.), the Board will count the broad introductory clause and each subpart as a separate interrogatory, whether or not the subparts are separately designated.<sup>127</sup>

Cf. Kellogg Co. v. Nugget Distributors' Cooperative of America, Inc., supra; and Carla Calcagno, TIPS FROM THE TTAB: Discovery Practice Under Trademark Rule 2.120(d)(1), supra.

\* \* \*

After preparing and sending to Mr. Smith my letter dated September 29, 2005 (Exh. “D”), which cordially concluded with the invitation: “[s]hould you have a different view after reviewing the applicable rules cited herein, we would look forward to hearing from you” I did not hear or otherwise receive any correspondence from Mr. Smith with respect to the Applicant’s interrogatories, until receiving the Motion to Compel on or about December 06, 2005. I am not aware of any further attempt by him during such time to address any issue related to the instant Motion.

In response to Applicant’s clear and repeated objections, rather than explaining his own “counting method;” supporting his position with any legal authority; or otherwise merely serving on Applicant a set of interrogatories in compliance with 37 CFR §2.120(d)(1) and TBMP Section 403.05, Opposer’s counsel has since elected only to engage in unreasonable and sanctionable conduct which has unreasonably increased the costs and resulted in further delays associated with this action.

Such bad faith unprofessional conduct includes: twice serving Applicant with the identical and excessive set of discovery as noted above; the unwarranted and bombastic

personal attacks on the undersigned counsel, as reflected in Opposer's instant Motion to Compel (e.g, "*spurious*" (p. 5, 7); "*distortion*" (p.5); "*stonewalling*" (p. 6, 7); "*flies in the face*" (p.6) "*extraordinarily negative attitude*" (p.7) "*flagrant disregard*" (p.7)); failing to meet and confer with respect to the motion to compel production of documents served concurrently with the instant Motion; and further, after being forced to acknowledge Applicant's clear and "elaborate argument" and his clearly reserved objections to Opposer's excessive set of interrogatories, Opposer's counsel unreasonably waited until long after the discovery period herein had closed on September 30, 2005, and until after the testimony period had opened in this matter, namely on December 06, 2005, to file the instant and untimely Motion to Compel.

#### LEGAL ARGUMENT

I. Opposer's Motion to Compel is Untimely and must be denied on such basis.

Pursuant to 37 C.F.R. § 2.120(e) 37 CFR § 2.120(e)(1) "... The motion must be filed prior to the commencement of the first testimony period as originally set or as reset."

In this case, the Applicant's general objections to Opposer's First Set of Interrogatories were served on Opposer on August 12, 2005. Further, according the TTAB's Order resetting trial dates dated July 12, 2005, the Period for Discovery to Close was set on September 30, 2005 and the testimony period for plaintiff in the opposition is to close on December 29, 2005.

According to the records of the TTAB, Opposer's instant motion to compel which was served by mail on Thanksgiving eve, 2005, and which arrived at the undersigned's

office and were and filed with the TTAB on or about December 06, 2005 is untimely and therefore must be denied.

According to the Trademark Trial And Appeal Board Manual of Procedure (TBMP) section 523.03, “the motion (to compel) should be filed within a reasonable time after the failure to respond to a request for discovery or after service of the response believed to be inadequate and must, in any event, be filed before the first testimony period opens. (See 37 CFR § 2.120(e); and, *for example*, *Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spoletoducale SCRL*, 59 USPQ2d 1383, 1383 (TTAB 2001)).

As is conceded by Opposer in its moving papers, (page 7), the discovery period closed on September 30, 2005. Opposer's counsel apparently filed this motion on December 06, 2005. Thus, this motion was made more than 60 days after the discovery period elapsed and well over 105 days after the Applicant's responses were served on Opposer. There has not been any evidence of an extension of time of the discovery period by the Board, nor has Opposer's counsel submitted a request to do so. Because of the unreasonable delay in filing the motion until after the discovery period had already elapsed, and after the testimony period had opened, Opposer's motion to compel must be denied as untimely filed.

## II. Applicant Has In Good Faith Complied With The FRCP and the TBMP With Respect to Its General Objections

37 CFR § 2.120 (d) (1), reads as follows:

The total number of written interrogatories which a party may serve upon another party pursuant to Rule 33 of the Federal Rules of Civil Procedure, in a proceeding, shall not exceed seventy-five, counting subparts, except that the Trademark Trial and Appeal Board, in its discretion, may allow additional interrogatories upon motion therefor showing good cause, or upon stipulation of the parties. A motion for leave to serve additional interrogatories must be

filed and granted prior to the service of the proposed additional interrogatories; and must be accompanied by a copy of the interrogatories, if any, which have already been served by the moving party, and a copy of the interrogatories proposed to be served. If a party upon which interrogatories have been served believes that the number of interrogatories served exceeds the limitation specified in this paragraph, and is not willing to waive this basis for objection, the party shall, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number. If the inquiring party, in turn, files a motion to compel discovery, the motion must be accompanied by a copy of the set(s) of interrogatories which together are said to exceed the limitation, and must otherwise comply with the requirements of paragraph (e) of this section.

According to Section 405.03(e) of the TBMP:

"If a party on which interrogatories have been served, in a proceeding before the Board, believes that the number of interrogatories served exceeds the limit specified in 37 CFR § 2.120(d) (1), and wishes to object to the interrogatories on this basis, the party must (emphasis), within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number."

In this case, Opposer's counsel has served on Applicant sixty numbered interrogatories, nearly each of which contained numerous subparts and clauses.

According to Opposer, counting the subparts included in Number 11 (3); Number 13 (6); and Number 16 (2); according to Opposer, there are 68 interrogatories in total.

When one considers interrogatories numbered 15 and 57, alone, and without counting several others noted above (e.g, Nos. 20, 22, 59 etc.), those two alone serve to exceed the permissible number of interrogatories reasonably allowed in these matters.

More particularly, upon Applicant's fairly conservative estimate based on the TBMP guidelines, including Section 405.03<sup>5</sup>; Helen R. Wendel, TIPS FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE TTAB: The Burden Shifts:

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<sup>5</sup> Section 405.03 (d) of the TBMP states, "[in] determining whether the number of interrogatories serve by one party on another exceeds the limit of 37 CFR § 2.120(d)(1), the Board will count each subpart within an interrogatory as a separate interrogatory, regardless of whether the subpart is separately designated. If an interrogatory includes questions set forth as numbered or lettered subparts, each separately designated subpart will be counted by the Board as a separate interrogatory.

Revised Discovery Practice Under Trademark Rule 2.120(d)(1), 82 Trademark Rep. 89 (1992), and several of the case authorities therein cited, as is shown on the worksheet originally attached to Exhibit "D", Applicant determined that Opposer had actually served well over double the legal limit (154 Interrogatories or easily arguably more) within Opposer's first set.

TBMP Section 405.03 (e) states:

"If an interrogatory requests information concerning more than one issue, such as information concerning both "sales and advertising figures," and both "adoption and use," the Board will count each issue on which information is sought as a separate interrogatory."

Adopting and specifically detailing the counting approach as is stated in the TBMP, the undersigned counsel maintains herein that at all times, he has not engaged in any "stonewalling" "distorting" or "flagrantly disregarding" of the TTAB Rules, but as shown above, was timely advising Mr. Smith of the applicable discovery Rules and Regulations as contained in the FRCP, the TBMP and the CFR. Again, in light of the excessive number and nature of the interrogatories Applicant's counsel was bound (emphasis) not to respond under 37 CFR § 2.120(d)(1), but instead was compelled to serve Applicant's general objections thereto.

In return, rather than engaging in a further effort to meet and confer or otherwise limit the interrogatories, Mr. Smith chose to wait months after the last communication in this regard, until the eleventh hour and then some, and now requests the Board to grant a Motion to Compel and to further extend the waning hours of his client's testimony period.

### III. Applicant's Various General Objections Remain Valid and Posed In Good Faith

Among Applicant's General Objections to the Excessive Set as shown in Exhibit

“B” were additional objections which can be generally classified as those raised:

-to the extent that the interrogatories generally requested material or information that violated the attorney work product doctrine, the attorney-client privilege and/or Applicant’s proprietary rights and/or his rights of privacy and confidentiality;

-to the extent that the First Set as a whole and the interrogatories contained therein were unduly burdensome, annoying, and/or called for information not relevant to this proceeding, nor reasonably calculated to lead to the discovery of admissible evidence herein; and

-e.g., that the “Definitions and Instructions” contained in Opposer’s Interrogatories were compound, inconsistent with, and or when considered with respect the interrogatories may confuse or otherwise convolute the possible responses to each of the interrogatories themselves.

Should Opposer had then chose to revise or limit the set, Applicant further reserved the right to require an appropriate protective order to cover any confidential or proprietary information from public disclosure.

Rather than to rationally discuss or even correspond in any fashion, Opposer’s Counsel has now by way of a belated motion, not only dismissed Applicant’s objections as being “boiler plate objections of every variety;” but without proffer of any factual or legal support, he has also suggested that the Board should consider such valid objections to be representative of “the most flagrant disregard of Opposer’s Interrogatories.”

Applicant respectfully disputes such contention, and further responds that under TBMP Section 402.02 (page 400-6):

“The right to discovery is not unlimited. Even if the discovery sought by a party is relevant, it will be limited, or not permitted, where, inter alia, it is unreasonably

cumulative or duplicative; or is unduly burdensome or obtainable from some other source that is more convenient, less burdensome, or less expensive; or "where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information." Fn 13 *Katz v. Batavia Marine & Sporting Supplies Inc.*, 984 F.2d 422, 25 USPQ2d 1547, 1549 (Fed. Cir. 1993) (in response to nonparty's prima facie showing that discovery was burdensome, party did not meet burden of showing need for information sought), and *FMR Corp. v. Alliant Partners*, 51 USPQ2d 1759, 1763 (TTAB 1999) (motion for protective order to prohibit deposition of "very high-level official of a large corporation" granted) (citation omitted).

...

"The Board may refuse to permit the discovery of confidential commercial information, or may allow discovery thereof only under an appropriate protective agreement or order."

As such, with a factual basis and as supported by specific legal authority, the undersigned counsel certifies that there was a good faith basis for raising such various general objections and that they were neither "boiler plate" nor posed in bad faith.

To the contrary, and in light of Opposer's Counsel's own bad faith in propounding and twice serving excessive interrogatories, in light of the untimeliness of this motion and the contemporaneously filed motion to compel production of Requests Nos. 19 and 22, and in light of Opposer's counsel own blatant "distortions," "mischaracterizations" and "flagrant disregard" as well as a complete failure to carry its burden as related to the instant motion, Opposer's motion to compel should be denied and the Board should further consider the imposition of sanctions as against Opposer and its counsel herein.

#### IV. Sanctions Should Be Imposed By the Board Against Opposer and Its Counsel.

According to the TBMP Section 408.01

"The Board expects parties (and their attorneys or other authorized representatives) to cooperate with one another in the discovery process, and looks with extreme disfavor on those who do not. Each party and its attorney or other authorized representative has a duty not only to make a good faith effort to satisfy the discovery needs of its adversary, but also to make a good faith effort to seek only such discovery as is proper and relevant to the issues in the case.<sup>187</sup>

(See, for example, Fed. R. Civ. P. 26(g); Johnston Pump/General Valve Inc. v. Chromalloy American Corp., 13 USPQ2d 1719, 1721 n.4 (TTAB 1989); Johnston Pump/General Valve Inc. v. Chromalloy American Corp., 10 USPQ2d 1671, 1675 (TTAB 1988) (in view of parties' impasse, Board was burdened with resolving numerous requests for discovery); Sentrol, Inc. v. Sentex Systems, Inc., 231 USPQ 666, 667 (TTAB 1986) (parties must narrow amount of disputed requests to reasonable number); Unicut Corp. v. Unicut, Inc., 222 USPQ 341, 344 (TTAB 1984) (failure to cooperate in discovery resulted in entry of sanctions); See also C. H. Stuart Inc. v. Carolina Closet, Inc., 213 USPQ 506 (TTAB 1980); C. H. Stuart Inc. v. S. S. Sarna, Inc., 212 USPQ 386 (TTAB 1980); Varian Associates v. Fairfield-Noble Corp., 188 USPQ 581 (TTAB 1975); Tektronix, Inc. v. Tek Associates, Inc., 183 USPQ 623 (TTAB 1974); and Gastown Inc. of Delaware v. Gas City, Ltd., 180 USPQ 477 (TTAB 1974). Cf. Micro Motion Inc. v. Kane Steel Co., 894 F.2d 1318, 13 USPQ2d 1696 (Fed. Cir. 1990).)

Despite his protestations to the contrary, Mr. Smith made no effort to reasonably “tailor” Opposer’s proper discovery herein, nor did he make any effort to limit or properly cooperate in the process in good faith. His filing of untimely motion(s), with no proper basis in fact or law therefor, and his other repeated errors, and acts of dilatory conduct described above (and as previously brought to the attention of the Board including Opposer’s earlier default and resetting of trial dates as was necessitated thereby and mentioned in the Board’s July 12, Order) has already harmed the Applicant, caused unnecessary delay and significantly increased the costs and expeditious handling of this matter.

Therefore, under F.R.C.P. Rule 11 and under the provisions of Fed. R. Civ. P. 26(g)(2), the Board should consider an appropriate sanction be imposed. (See 37 CFR § 2.116(a); *ITC Entertainment Group Ltd. v. Nintendo of America Inc.*, supra at 2023 (sanctions included requirement that law firm include express provision in all subsequent filings acknowledging Rule 11(b) and Trademark Rule 10.18(a) and stating that motion was read, has a sound legal basis and is not interposed for delay, harassment or other improper purpose); *Fort Howard Paper Co. v. C.V. Gambina Inc.*, 4 USPQ2d 1552, 1554 (TTAB 1987) (filing of discovery motions without reasonable basis in law or in fact resulted in Rule 11 sanctions precluding applicant from filing further discovery motions

and from filing any motion without prior leave of Board); *Giant Food, Inc. v. Standard Terry Mills, Inc.*, supra (applicant's frivolous request for reconsideration of order imposing Rule 11 sanctions resulted in entry of judgment); and *Giant Food, Inc. v. Standard Terry Mills, Inc.*, 229 USPQ 955 (TTAB 1986) (applicant warned that any other filing deemed frivolous would result in judgment).

#### CONCLUSION

Based on the foregoing, Applicant respectfully prays that the Board enter an Order:

- 1) denying Opposer's Motion To Compel;
- 2) deeming such Motion to be frivolous and filed in bad faith;
- 3) imposing an appropriate sanctions on Opposer's counsel, (e.g. that the Board precluding Mr. Smith from filing further discovery motions and from filing any motion without prior leave of Board and further warning him that any other filing deemed frivolous would result in judgment; and
- 4) that all prior dates set forth by the Board remain.

ANDERSON & ASSOCIATES

Dated: December 14, 2005

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

#### *Certificate of Service*

I hereby certify that a copy of the foregoing APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO COMPEL APPLICANT'S ANSWERS TO FIRST SET OF INTERROGATORIES was mailed, this date, 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,

December 14, 2005

/EyadKarkoutly/  
Eyad Karkoutly

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 and  
Counterclaim for Cancellation

-----  
In the Matter of Trademark Registration  
No. 2,243,269  
Mark: MESSAGE IN A BOTTLE

KEITH CANGIARELLA,  
Petitioner,

v.

ROGER ROJAS,  
Respondent.

**OPPOSER'S FIRST SET OF  
INTERROGATORIES TO APPLICANT**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, Opposer Gold Shells, Inc., and Counterclaim Respondent Roger Rojas hereby propound and serve upon Applicant Keith Cangiarella the following written interrogatories to be fully and separately answered in writing, under oath, and within the time provided by law.

///

**I.**  
**DEFINITIONS**

A. Each interrogatory seeks information available to Applicant and his attorneys, agents, representatives, and all persons acting on his behalf. Accordingly, as used herein, "Applicant", "you" or "your" refer, without limitation, to Applicant Keith Cangiarella and any person or company affiliated with or related to Applicant, and all officers, directors, employees, agents, representatives, attorneys and all other persons acting or purporting to act on behalf of Applicant and/or his business, DreamWeaver Studios. Similarly, "Opposer" refers, without limitation, to Gold Shells, Inc., and any employees, attorneys, agents, representatives and all other persons acting on its behalf, including Roger Rojas, Counterclaim Respondent herein.

B. "Person" means any individual, partnership, firm, association, corporation, proprietorship or other business or government or other private or public legal entity.

C. "Correspondence" means, in addition to its ordinary meaning, any recording, memorandum or note (handwritten or otherwise) of conversations or telephone calls.

D. "Communication" means any contact among or between two or more persons and includes, without limitation, written and electronic contact by such means as letters, memoranda, telegrams, fax, telex, e-mail, or documents, and/or oral contact by such means as face-to-face meetings or telephone conversations.

E. "Document" is used herein in its broadest customary sense, and is defined to include every means of recording upon any tangible thing, and any form of communication

or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and whether by means of handwriting, typewriting, printing, photostating, photographing, sound or video recording, or other means, and includes originals, copies, reproductions, facsimiles, drafts, versions, revisions, and both sides thereof; and "document" shall include all the tangible things within the definition of "writings" or "recordings" set forth in Rule 1001 of the Federal Rules of Evidence.

The term "document" shall include all such materials, whether sent or received or not, and shall include but not be limited to writings, pages, books, pamphlets, letters, correspondence, reports, summaries, studies, evaluations, appraisals, forecasts, opinions, lists, notes, notations, memoranda, circulars, bulletins, diaries, calendars, calendar books, appointment books, telephone logs, notebooks, telegrams, cables, telex messages, e-mail messages, accounts, schedules, financial statements, ledgers, journals, indices, contracts, notices, minutes, applications, statements, invoices, bills, receipts, checks, vouchers, promissory notes, questionnaires, answers to questionnaires, statistical records, advertisements, brochures, court pleadings, computer printouts, Internet websites and materials, photographs, charts, drawings, models, recordings, microfilms, or other objects, regardless of their author or origin, and however denominated by the custodian or creator thereof.

F. "Identify" shall have the following meanings:

(i) When used in reference to a natural person, it means to state the person's

(a) full name, (b) present or last-known address and telephone number (business and residential), and (c) occupation, job title, business affiliation and/or nature of business.

(ii) When used in reference to a corporation, it means to state the corporation's (a) full name, (b) state of incorporation, and (c) address of its principal place of business, and if different, the address of the principal place of business at the time to which the discovery has reference.

(iii) When used in reference to a document, it means to state the type of document or other means of identifying it, its author or originator, its date or dates, all addresses and recipients, and its present location or custodian; and if any such document was but is no longer in Applicant's possession or subject to Applicant's control, state what disposition was made of it.

(iv) When used in reference to an oral communication, it means to state the speaker, each person spoken to or who otherwise heard the communication, the date and place of the communication, and the substance of the communication.

(v) When used with respect to an instance or occurrence, it means (a) to state the date and place thereof; (b) to identify all persons involved and the nature of their involvement; (c) to identify all agreements relating thereof; and (d) to state the result or disposition of such instance or occurrence.

G. "Relate" or "refer" means reflecting, containing, pertaining, referring, indicating, showing, describing, evidencing, discussing, mentioning, or concerning.

H. Whenever the singular is used, it shall also be taken to include the plural and vice versa.

I. "The Trademark" is defined as the mark MESSAGE IN A BOTTLE, regardless of (a) the style of lettering in which the mark appears, (b) the spacing or capitalization of the letters, and (c) whether or not the mark is used in connection with any design.

J. Whenever the conjunctive is used, it shall also be taken in the disjunctive and vice versa.

K. "Date" means the exact day, month and year, if ascertainable, or if not ascertainable, the best available approximation (including relationship to other events).

L. "Trademark" shall include "service mark".

## II. INSTRUCTIONS

The following instructions apply to each of the interrogatories set forth herein:

1. Where an interrogatory can be answered in whole or in part by reference to a preceding or subsequent interrogatory, it is sufficient to indicate such by specifying the response to the preceding or subsequent interrogatory by number, and by specifying whether it is claimed that the response to the preceding or subsequent interrogatory is a full or partial response. If the latter, the response to the balance of the interrogatory shall be completed.

2. As to those interrogatories consisting of a number of separate divisions, or related parts or portions, a complete response is required to each such part or portion with

the same effect as if it were propounded as a separate interrogatory. Should an objection to an interrogatory be interposed, it should clearly indicate to which part or portion of the interrogatory it is directed.

3. These interrogatories shall be deemed continuing and Applicant shall provide, in the form of supplementary answers, any information requested herein which is available to Applicant at the time it submits its response hereto, but which becomes available to Applicant or to any of its attorneys, agents or representatives up to the time of trial.

4. If any document or identification of any document or oral communication is withheld under a claim of privilege, in order that the Board and the parties may determine the validity of the claim of privilege, provide sufficient information to determine the identity of the document or oral communication, and state the basis of any asserted claim of privilege.

5. If any of the following interrogatories cannot be answered in full after exercising due diligence to secure the information, please so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information you have concerning the unanswered portions. If your answer is qualified in any particular, set forth the details of such qualification.

6. If, in answering any of these interrogatories, you claim any ambiguity in interpreting either the interrogatory or definition or instruction to the Applicant thereto, such claim shall not be utilized by you as a basis for refusing to respond, but there shall be set

forth as part of the response the language deemed to be ambiguous and the interpretation chosen for use in the interrogatory.

### **III. INTERROGATORIES**

1. Identify each product and service produced or marketed by you to date under the Trademark.
2. Identify each product and service produced or marketed by you to date under trademarks other than the Trademark.
3. Identify any and all trademarks used to date, or intended to be used, by Applicant on any of its products or services.
4. Identify which trademark is used on each product and service produced or marketed by you to date.
5. Identify which trademark is intended to be used by you on each product and service intended to be produced or marketed by you in the future.
6. Identify each product and service produced or marketed by you to date for which you intend to change the trademark.
7. Identify what change is intended as to each product and service produced or marketed by you to date for which you intend to change the Trademark.
8. Identify all discontinued goods and services that Applicant previously identified with the Trademark.

9. As to all discontinued goods and services that Applicant previously identified with the Trademark, identify when the use began and ended for each such category of goods and services.

10. As to all discontinued goods and services that Applicant previously identified with the Trademark, state why the goods or services were discontinued.

11. With respect to each of the products and services identified in Applicant's response to interrogatory number 1, indicate Applicant's total sales of such products and services for each year from 1998 to the present date by giving for each:

- (a) the dollar value of such sales;
- (b) the unit volume of such sales; and
- (c) identify all documents related thereto.

12. If Applicant distributes goods and services identified with the Trademark through a third party or parties, including licensees and distributors, identify each third-party licensee or distributor and the geographical area in which such party or parties operate.

13. For each product and service which you have sold or intend to sell under the Trademark, identify:

- (a) the geographic area in which the products and services have been sold;
- (b) the channels of trade for the sale of the products and services;
- (c) each retail or other sales establishment;
- (d) the actual or intended class of consumers;

(e) the channels or media in which you have promoted or advertised the product or service or intend to promote or advertise the product or service; and

(f) all documents related thereto.

14. Identify, by mark and registration number or serial number, each trademark application filed by you in, or trademark registration issued to you by, the United States Patent and Trademark Office.

15. State whether you have ever received an opinion by correspondence or communication concerning possible trademark conflict arising out of the use or intended use of the Trademark by Opposer, and, if so, for each such correspondence or communication identify the date upon which each such correspondence or communication was transmitted, the person transmitting each such correspondence or communication, and the person receiving each such correspondence or communication.

16. Identify (a) any and all instances where you have received a telephone call, invoice, letter or other communication intended for Opposer, which referred or related to the products or services of Opposer, or which was an inquiry concerning a possible relationship or affiliation between you and Opposer, and (b) any documents related thereto.

17. Identify all documents in your possession, custody, or control that relate to or mention the Trademark as used by Opposer.

18. Identify when and the circumstances under which you first learned or became aware of Roger Rojas and his use of the Trademark.

19. Identify when and the circumstances under which you first learned or became aware of Gold Shells, Inc., and its use of the Trademark.

20. Identify each advertising agency or public relations firm which you have retained in connection with your sale or intended sale of products or services bearing the Trademark, starting with 1998 and continuing to the present time, and identify the date retained, the services provided by the firm, and the amounts you paid for such services.

21. List all media in which Applicant has promoted or advertised its goods or services associated with the Trademark from 1998 to the present.

22. State the dollar amount spent annually on advertising and promoting goods and services under the Trademark annually during each of the last five years, including the portion of the present year to date, for each category of goods and services sold by Applicant under the Trademark.

23. Identify all persons other than Opposer and Roger Rojas with whom you have or have had a dispute regarding use of the Trademark or a mark allegedly similar thereto.

24. Did you view the Internet website [www.messageinabottle.com](http://www.messageinabottle.com) prior to March 25, 2003?

25. Did you apply for the Internet website address [www.messageinabottle.com](http://www.messageinabottle.com)?

26. If your answer to interrogatory no. 25 is "yes", when did you apply?

27. If your answer to interrogatory no. 25 is "yes", what was the result of your application?

28. What is the basis for your denying that Opposer is the owner of service mark registration no. 2,243,269 for the mark MESSAGE IN A BOTTLE in Class 38 for receiving communications from others, recording such communications in written or printed form, and transmitting such communication to others?

29. What is the basis for your denying that registration no. 2,243,269 is valid and subsisting and is conclusive evidence of Opposer's exclusive rights to use the Trademark in commerce on the services specified in Opposer's registration?

30. What is the basis for your denying that the Trademark as used by Applicant so resembles the Trademark as registered by Opposer as to be likely to cause confusion, or to cause mistake, or to deceive?

31. What is the basis for your denying that since January 16, 1999, Opposer or its predecessor have been, and Opposer is now, actually using the Trademark in connection with the sale of services as described in Opposer's registration and as a trademark in connection with the sale of goods consisting of novelty, favor, and souvenir bottles containing messages and greetings, identical to some of the goods set forth in Applicant's application?

32. What is the basis for your denying that under Section 7(c) of the Lanham Act, Opposer has a priority right to the Trademark through constructive use based on the filing date of its predecessor's original intent-to-use service mark application?

33. What is the basis for your denying that use of the Trademark by Opposer and

its predecessor has been valid and continuous since the date of first use and has not been abandoned?

34. What is the basis for your denying that the services for which Opposer's mark was registered and the goods for which Applicant's application has been published for opposition are related?

35. What is the basis for your denying that you use the Trademark on services which are identical to those for which Opposer has registered the Trademark?

36. What is the basis for your denying that the nature of the goods and services of Applicant and Opposer are substantially similar?

37. What is the basis for your denying that the Trademark is symbolic of Opposer's extensive good will and customer recognition built up by Opposer and its predecessor through a substantial amount of time and effort in advertising and promotion?

38. What is the basis for your denying that the mark as used by Applicant so resembles the Trademark as used by Opposer as to be likely to cause confusion, or to cause mistake or to deceive?

39. What evidence do you have to support your affirmative defense that Opposer lacks any standing to bring this opposition?

40. What evidence do you have to support your affirmative defense that Opposer is barred by laches, acquiescence, and estoppel from bringing this opposition?

41. What evidence do you have to support your affirmative defense that Opposer's

claims are barred due to its own fraud and fraudulent conduct and that of its alleged predecessor?

42. What evidence do you have to support your affirmative defense that Opposer's claims are barred as unconscionable and due to the unclean hands of Opposer and its alleged predecessor, Roger Rojas?

43. What evidence do you have that Opposer and its alleged predecessor, Roger Rojas, have not used the Trademark on goods or services as an identification of origin of those goods or services identified in the Notice of Allowance for Opposer's registration no. 2,243,269?

44. What evidence do you have to support your affirmative defense that Opposer and its alleged predecessor have not used the Trademark on any services that may be properly characterized as within International Class 38?

45. What evidence do you have to support your affirmative defense that any use of the Trademark other than for the specific services identified in the Notice of Allowance for Opposer's registration no. 2,243,269 would not lead to a likelihood of confusion?

46. What evidence do you have to support your affirmative defense that Opposer's Notice of Opposition fails to state a claim upon which relief can be granted, and in particular, fails to state legally sufficient grounds for sustaining the opposition?

47. What evidence do you have to support your allegation that Opposer fraudulently obtained its registration for the Trademark?

48. What evidence do you have to support your allegation that Opposer or its predecessor provided a false and misleading description of the goods and/or services covered by its application for registration of the Trademark?

49. What evidence do you have to support your allegation that Roger Rojas mischaracterized his goods as "telecommunication services" in his application for registration of the Trademark?

50. What evidence do you have to support your allegation that the representations of Opposer or its predecessor to the U.S. Patent & Trademark Office concerning the date of first use and the manner and mode of use were intentionally false and misleading?

51. What evidence do you have to support your allegation that Roger Rojas knew or should have known that you had used the Trademark at least as early as March 10, 1998?

52. What evidence do you have to support your allegation that the representations made in Roger Rojas' statement of use as submitted to the U.S. Patent & Trademark Office on or about January 28, 1999, were made by Roger Rojas with the knowledge and belief that said statement was false?

53. What evidence do you have to support your allegation that the first use of the Trademark as alleged in the application of Roger Rojas with the U.S. Patent & Trademark Office was not rendered in interstate commerce as alleged but was rendered wholly within the State of California?

54. What evidence do you have to support your allegation that the registrant of

registration no. 2,243,269 for the Trademark abandoned the Trademark by failing to use it in connection with the products and services for at least two years with no intention to resume such use?

55. What evidence do you have to support your allegation that Roger Rojas knowingly required or consented to a third party, Gold Shells, Inc., to describe itself as an owner of the Trademark since at least 2003 without proper licensing or any assignment?

56. What evidence do you have to support your allegation that Opposer failed to disclose to the U.S. Patent & Trademark Office known uses of the Trademark, or allegedly confusingly similar mark by others, including Applicant?

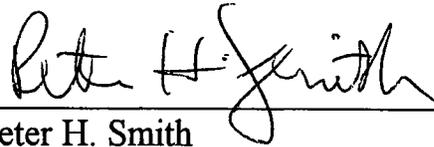
57. State whether you have or had a policy for the retention or the destruction of records, documents or files, and if so, identify the terms of such policies and the categories of documents covered; if there have been any changes in such policy and if so, the dates and nature of each such change; the types of files maintained and the location of such files; the name and address of the custodian or custodians of such files; and identify any documents relating thereto.

58. Identify any and all experts Applicant has or plans to employ to testify as an expert in this matter and set forth the subject matter of his or her testimony and the qualifications of said expert.

59. Identify each person Applicant expects to offer as a fact witness, and state the substance of the facts to which each such witness is expected to testify.

60. Identify all persons who provided information or otherwise assisted in the preparation of answers to the foregoing interrogatories.

Dated: June 29, 2005



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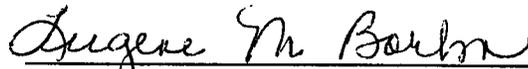
Peter H. Smith  
Attorney for Opposer  
Gold Shells, Inc., and  
Counterclaim Respondent Roger Rojas

1535 J Street, Suite A  
P.O. Box 1867  
Modesto, CA 95353  
Telephone: (209) 579-9524

**PROOF OF SERVICE**

The person whose signature appears below confirms that the **OPPOSER'S FIRST SET OF INTERROGATORIES** was served upon the Applicant herein as follows:

- By delivering a copy of the paper to the person served.
- By leaving a copy at the usual place of business of the person served, with someone in his employment.
- By leaving a copy at the residence of the person served, with a member of his family over the age of 14 years and of discretion, since the person served is not believed to have the usual place of business.
- By transmitting a copy of the document by overnight courier California Overnight prepaid, to the Attorney for the Applicant, Stephen L. Anderson, Esq., Anderson & Associates, 27349 Jefferson Avenue, Suite 211, Temecula, California 92590, which transmittal was made on June 29, 2005, at Modesto, California.

  
\_\_\_\_\_  
Lugene M. Borba



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 GENERAL OBJECTIONS  
TO OPPOSER'S EXCESSIVE  
INTERROGATORIES—SET ONE

In the Matter of Trademark  
Registration No.: 2,243,269  
Mark: MESSAGE IN A BOTTLE

KEITH CANGIARELLA,  
Petitioner,  
v.

Gold Shells, Inc,  
Assignee

**APPLICANT'S GENERAL OBJECTIONS TO OPPOSER'S FIRST SET OF  
INTERROGATORIES**

Applicant, Keith Cangiarella ("Applicant"), hereby objects to Opposer's First Set of Interrogatories pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, and Rules 2.116 and 2.120 of the Trademark Rules of Practice.

**PREFATORY STATEMENT**

The following objections are given without prejudice to Applicant's right to later provide a substantive response to the interrogatories and/or to produce evidence of any subsequently discovered fact or facts which may later be developed. These objections are required in lieu of a response to the excessive number of interrogatories and should in no way be considered prejudicial in relation to further discovery, research, analysis or production of evidence.

These general objections are submitted instead of serving answers and specific objections to the interrogatories and are required by Chapter 400 of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) and specifically by 37 C.F.R. § 2.120(d)(1).

Applicant does not waive, nor intend to waive any particular objection to any specific interrogatory, nor does the Applicant waive, in whole or in part the attorney-client privilege, work product protection, or any right of privacy or confidentiality provided for by law with respect to any matter whatsoever. In raising these general objections, responding party will not undertake to provide any information protected by the attorney-client privilege or work product doctrine.

Applicant party does not concede the admissibility, relevance or materiality of the discovery or the subject matter referred to therein. Except for facts specifically admitted herein, no admission of any nature, whatsoever, it to be implied or inferred, the fact that any interrogatory has been answered should not be taken as an admission, or concession of the existence of any fact set forth or assumed by the interrogatory, or that the answer constitutes evidence of any facts thus set forth or assumed.

Each response is subject to all objections as to competency, relevancy, materiality, propriety, and admissibility, and any and all other objections and grounds that would require the exclusion of any document herein at trial. All such objections and ground are reserved.

#### GENERAL OBJECTIONS

1. Applicant objects to the Interrogatories generally to the extent that they exceed the requirements and permissible scope of discovery under the Federal Rules of Civil Procedure or the Trademark Rules of Practice.

2. Applicant generally objects to the entire first set of interrogatories on the basis that the number of interrogatories served exceeds the limit specified in 37 C.F.R. § 2.120(d)(1). See: 37 CFR § 2.120(d)(1) and Helen R. Wendel, *TIPS FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE TTAB: The Burden Shifts: Revised Discovery Practice Under Trademark Rule 2.120(d)(1)*, 82 Trademark Rep. 89 (1992); *Brawn of California Inc. v. Bonnie Sportswear Ltd.*, 15 USPQ2d 1572, 1574 (TTAB 1990).

3. Applicant objects to the Interrogatories generally to the extent that any interrogatories herein seek to require Applicant to identify documents or search for information about documents no longer in existence or not currently in Applicants' possession, custody or control, or to identify or describe persons, entities, or events not known on the grounds that such instructions, definitions or interrogatories are overbroad and seek to require more of Applicant than any obligation imposed by the Federal Rules of Civil Procedure or the Trademark Rules of Practice, subject Applicant to unreasonable and undue annoyance, oppression, burden and expense, and seek to impose upon Applicant an obligation to investigate or discover information or materials from third parties or sources which are equally accessible to Opposer. Applicant further objects to this entire set inasmuch as the discovery sought is unreasonably cumulative or duplicative, and that such information is already in the possession of the requesting party or is otherwise obtainable from some other source that is more convenient, less burdensome, or less expensive.

4. Applicant objects to the Interrogatories generally to the extent that they are overly broad in seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

5. Applicant objects to each interrogatory generally to the extent that such interrogatory is so broad, vague, uncertain, and/or ambiguous that Applicant cannot determine the precise nature of the information and/or documents sought and, therefore, is made to respond with an unreasonable risk of inadvertently providing a misleading, confusing, inaccurate and/or incomplete response. Additionally, responses to such interrogatories will subject Applicant to an unreasonable, oppressive and undue burden, especially, to the extent that the overbreadth, vagueness and ambiguity will require Applicant to provide responses on issues that are irrelevant to these cases. The burden of responding to such interrogatories outweighs the likelihood that the information and/or documents sought may lead to the discovery of admissible evidence.

6. Applicant objects to each interrogatory generally to the extent it calls for speculation and conjecture, opinion, or a legal conclusion.

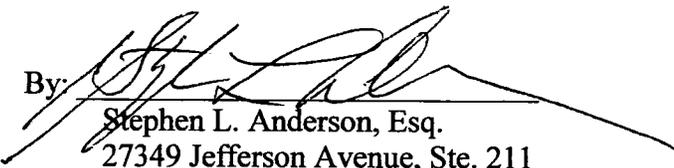
7. Applicant objects to each interrogatory generally to the extent that it seeks confidential, proprietary or trade secret information and/or documents. Applicant further objects to Opposer's interrogatories to the extent that they seek confidential information in the absence of an appropriate protective order or other information subject to the attorney-client privilege or constituting attorney work product. The interrogatories are overbroad as to time frame, and overbroad in scope and concern matters violative of the Applicant's Constitutional, and statutory privacy rights. Where it is obvious that such information and/or documents is sought, Applicant has so indicated in its response. Beyond the information and documents provided herewith, Applicant will not produce any further information about its business, and will not produce any further confidential, proprietary and/or trade secret information and/or documents absent a showing of relevance, and need by Opposer and the entry of an appropriate protective order.

8. Applicant objects to the Interrogatories generally to the extent that they require Applicant to warrant that the information provided is exhaustive regardless of whether the requested information is within Applicant's control. Applicant will endeavor to provide discovery in good faith and consistent with the Federal Rules of Civil Procedure and Trademark Rules of Practice.

9. Applicant generally objects to the "Definitions" and "Instructions" contained in Opposer's interrogatories to the extent that they seek to impose obligations on Applicant beyond those set forth in the Federal Rules of Civil Procedure and the Trademark Rules of Practice, and that they further compound and convolute the already excessive number of interrogatories propounded by Opposer, and matters requested therein.

ANDERSON & ASSOCIATES

Dated: August 12, 2005

By: 

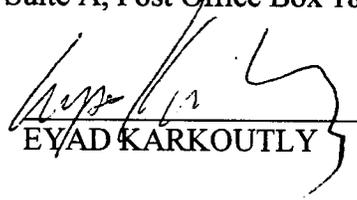
Stephen L. Anderson, Esq.  
27349 Jefferson Avenue, Ste. 211  
Temecula, CA 92590  
(951) 719-1371

Attorneys for Applicant/Petitioner  
KEITH CANGIARELLA

*Certificate of Service*

I hereby certify that a copy of the foregoing APPLICANT'S GENERAL OBJECTIONS TO OPPOSER'S 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,

August 12, 2005

  
EYAD KARKOUTLY



PETER H. SMITH

ATTORNEY AT LAW

1535 J STREET, SUITE A

POST OFFICE BOX 1867

MODESTO, CALIFORNIA 95353

TELEPHONE (209) 579-9524

FACSIMILE (209) 579-9940

MEMBER OF CALIFORNIA  
& OREGON STATE BARS

September 17, 2005

Stephen Lee Anderson, Esq.  
Anderson & Associates  
32605 Highway 79 South, Suite 208  
Temecula, CA 92592

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

Dear Mr. Anderson:

This will address your general objections dated August 12, 2005, to the first set of interrogatories of Gold Shells, Inc., in the above-referenced matter. This letter is an attempt to "meet and confer" in regard to a discovery dispute with the goal of avoiding a motion to compel answers with the Trademark Trial & Appeal Board.

You have failed to answer any of the interrogatories on the ground ". . . that they exceed the requirements and permissible scope of discovery under the Federal Rules of Civil Procedure or the Trademark Rules of Practice." You say, ". . . the number of interrogatories served exceeds the limit specified in 37 CFR §2.120(d)(1)."

This is not true. You were served with 60 interrogatories. Three of those interrogatories have subparts: number 11 has 3, number 13 has 6, and number 16 has 2. Counting these subparts, the total number of interrogatories is 68. This is well below the limit of 75 interrogatories (counting subparts) specified in Trademark Rule Section 2.120(d)(1).

In any event, the rational procedure in a case of excessive interrogatories is to answer the first 75 and object to answering any beyond that, not to simply stonewall the entire set of interrogatories. Your blanket objection to these interrogatories – which are a typical set in an opposition proceeding involving issues of likelihood of confusion and priority – cannot in any light be viewed as a good faith participation in the discovery process.

I also submit that your other objections are not well taken. Of course the interrogatories do not require the applicant to identify documents no longer in existence or not currently in his possession, custody, or control, or to identify things not known, so this is not a valid ground for objection.

EXHIBIT C

Stephen Lee Anderson, Esq.  
September 17, 2005  
Page 2

I concede that nothing is required by these interrogatories beyond the obligations imposed by the Federal Rules of Civil Procedure and the Trademark Rules of Practice, so it is not a valid ground of objection to say that these interrogatories seek more than that.

It is not a valid ground of objection to say that the interrogatories subject the applicant to unreasonable and undue annoyance, oppression, burden, and expense, or that they seek to impose upon him an obligation to investigate or discover information or materials from third parties or sources which are equally accessible to the opposer. Again, the opposer's discovery simply seeks information in the applicant's possession, custody, or control, and makes no pretense to require discovery from third parties.

Furthermore, it is not a valid ground of objection that the discovery sought is unreasonably cumulative or duplicative, or in the possession of the opposer, or otherwise obtainable from some other source. ". . . It is generally not a valid objection to discovery that information sought is within the knowledge of the discovering party, and no distinction should be drawn between facts within or not within the knowledge of that party." 10 Federal Procedure Lawyer's Edition, Section 26:66, page 383.

Furthermore, your simply reciting an objection to the extent that the interrogatories are "overly broad and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence" does not make it so. "The scope of discovery in the federal courts is broad and requires nearly total mutual disclosure of each parties' evidence prior to trial. . . . The discovery rules are to be accorded broad and liberal treatment, particularly where proof of interest in required. The information sought need not be admissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence. The purpose of discovery is to allow a broad search for the facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of its case. It is intended that each party obtain in advance of trial knowledge of all relevant facts in the position of the other party. . . . FRCP 26(b) envisions generally unrestricted access to sources of information, even where compliance with discovery creates considerable burdens for the parties." (Supra, §26:64, page 380).

You have also objected to the interrogatories "to the extent" that they are too broad, vague, uncertain, or ambiguous, but none of these interrogatories fit that description. "The placement of the burden of proof is not a limitation upon the boundaries of discoverable material, and a party who has the burden of establishing the issue is to which the discovery relates is nonetheless entitled to discovery." (Supra, §26:64, page 381).

Stephen Lee Anderson, Esq.

September 17, 2005

Page 3

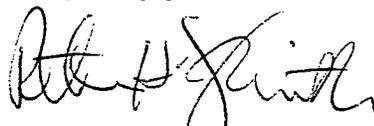
You also object "to the extent" that the interrogatories call for speculation, conjecture, opinion, or legal conclusion, but they do not do so.

In regard to your objections that particular interrogatories seek confidential, proprietary, or trade secret information and/or documents, I have expressed the same objection to some of your document requests. You had mentioned to me that you had planned to send me a proposed protective order or agreement which would allow us to exchange relevant information which would be commercially sensitive to our clients, and I encourage you to do so. It is not appropriate to simply say that you will not produce any information about your client's business. Some business information should not be deemed confidential, and any confidential information should be discoverable with an appropriate protective order or confidentiality agreement.

In your objections, you say that you will "endeavor to provide discovery in good faith and consistent with the Federal Rules of Civil Procedure and Trademark Rules of Practice". I simply ask that you do so. "Unless the scope of discovery is otherwise limited by order of a court in accordance with the Federal Rules of Civil Procedure, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." (Supra, § 26:64, page 380). "FRCP 26(b)(1) sets forth the general rule that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The requirement of relevancy must be construed liberally with common sense rather than measured by precise issues refined by the pleadings or limited by other concepts of narrow legalisms; thus, discovery should ordinarily be allowed unless it is clear that the information sought can have no possible bearing upon the subject matter of the action. Generally, if information sought is relevant to the subject matter of the litigation, it is discoverable unless privileged." (Supra, §26:67, page 384).

Please answer the interrogatories without further delay. I will reserve any comments on your objections to my admission requests and document requests pending receipt of your documents, noting that the deadline for a motion to compel is not yet near.

Very truly yours,



Peter H. Smith

PHS/lmb

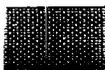
cc: Gold Shells, Inc.

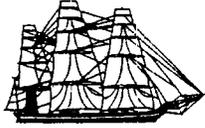
Stephen Lee Anderson, Esq.

September 17, 2005

Page 4

P.S. I acknowledge receipt of your interrogatories on September 16, 2005, but am unable to compile responses with my client until after my return from vacation; so I am on September 19 serving you only with responses to your admission requests and document requests.





## ANDERSON & ASSOCIATES

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32605 Highway 79 South, Suite 208 • Temecula, CA 92592  
(951) 694-1877 • (951) 694-1876 fax  
attorneys@brandXperts.com

Peter H. Smith, Esq.  
1535 J Street, Suite A  
P.O. Box 1867  
Modesto, CA 95353

September 29, 2005

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

Dear Mr. Smith:

This letter responds to yours dated September 17, 2005 which concerns Applicant's objections to Opposer's First Set of Interrogatories.

You have specifically asserted that the total number of interrogatories in your client's first set is 68 and that that my client's blanket objection to the entire set on the ground that they exceed the limit specified in 37 C.F.R. §2.120(d)(1), "cannot in any light be viewed as a good faith participation in the discovery process."

You have further contended that the "rational procedure in the case of excessive interrogatories is to answer the first 75 and object to answering any beyond that, not to simply stonewall the entire set of interrogatories."

Finally, you have contended that my client's "blanket objection to these interrogatories – which are a typical set in an opposition proceeding involving issues of likelihood of confusion and priority – cannot in any light be viewed as a good faith participation in the discovery process."

To the contrary of your baseless assertions, I am simply compelled to stand by said objections as related to your excessive interrogatories for the following reasons:

As you are no doubt aware, 37 CFR § 2.120(d)(1) states that "(t)he total number of written interrogatories which a party may serve upon another party pursuant to Rule 33 of the Federal Rules of Civil Procedure, in a proceeding, shall not exceed seventy-five, counting subparts, except that the Trademark Trial and Appeal Board, in its discretion, may allow additional interrogatories upon motion therefore showing good cause, or upon stipulation of the parties."

Your assertion that the "rational procedure in a case of excessive interrogatories is to answer the first 75 and object to answering any beyond that" is simply incorrect and unfounded. To the contrary, as called for by Section 405.03 of the TTAB Manual of Procedure, Second Edition published 11 June 2003, at page 400-42:

“If a party on which interrogatories have been served, in a proceeding before the Board, believes that the number of interrogatories served exceeds the limit specified in 37 CFR § 2.120(d)(1), and wishes to object to the interrogatories on this basis, the party must, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number.”<sup>1</sup>

Further, according to such section, “[a] party should not answer what it considers to be the first seventy-five interrogatories and object to the rest as excessive.”<sup>2</sup>

Therefore, contrary to your assertions, I have indeed followed the applicable rules of discovery in good faith herein. Please note for your information that we have utilized the Board’s prescribed method of determining whether the number of interrogatories are excessive and as shown by the attached worksheet, we have determined that in fact the actual number of interrogatories propounded by your client is not 68, but is actually at least 154, more than twice the permissible limit.

Again as you should be aware and as stated in the TTAB Manual of Procedure, Second Edition, published 11 June 2003 at section 405.03(d) at page 400-40:

“In determining whether the number of interrogatories served by one party on another exceeds the limit of 37 CFR § 2.120(d)(1), the Board will count each subpart within an interrogatory as a separate interrogatory, regardless of whether the subpart is separately designated (i.e., separately numbered or lettered) <sup>4</sup>. If an interrogatory includes questions set forth as numbered or lettered subparts, each separately designated subpart will be counted by the Board as a separate interrogatory. The propounding party will, to that extent, be bound by its own numbering system, and will not be heard to complain that an interrogatory, although propounded with separately designated subparts, should nevertheless be counted as a single interrogatory because the interrogatory concerns a single transaction, state of facts, etc., or because the division was made for clarification or convenience.”<sup>3</sup>

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<sup>1</sup> See 37 CFR § 2.120(d)(1) and Helen R. Wendel, TIPS FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE TTAB: The Burden Shifts: Revised Discovery Practice Under Trademark Rule 2.120(d)(1), 82 Trademark Rep. 89 (1992).

<sup>2</sup> *Brawn of California Inc. v. Bonnie Sportswear Ltd.*, 15 USPQ2d 1572, 1574 (TTAB 1990).

<sup>3</sup> See *Jan Bell Marketing, Inc. v. Centennial Jewelers, Inc.*, 19 USPQ2d 1636, 1637 (TTAB 1990); *Pyttronic Industries, Inc. v. Terk Technologies Corp.*, 16 USPQ2d 2055, 2056 (TTAB 1990); *Kellogg Co. v. Nugget Distributors' Cooperative of America, Inc.*, 16 USPQ2d 1468, 1469 (TTAB 1990); *Brawn of California Inc. v. Bonnie Sportswear Ltd.*, 15 USPQ2d 1572, 1574 (TTAB 1990); and Carla Calcagno, TIPS FROM THE TTAB: Discovery Practice Under Trademark Rule 2.120(d)(1).

Moreover, as specifically stated at page 400-41 of the TTAB Manual, “[i]f an interrogatory requests information concerning more than one issue, such as information concerning both “sales and advertising figures,” or both “adoption and use,” the Board will count each issue on which information is sought as a separate interrogatory.

As shown by the attached worksheet, we have in good faith adopted such an approach, which has led us to believe that your interrogatories are grossly excessive, unreasonable and were propounded in bad faith.

For example, your client’s Interrogatory No. 1 requests that the Applicant “Identify each product and service produced or marketed by you to date under the trademark.

Inasmuch as the Applicant may have produced both products and services under the mark, and may also have marketed certain products and services that he did not “produce” such interrogatory actually counts as 3 distinct subparts. Being conservative however, we only counted 2 while arriving at our calculation of 154 interrogatories as shown by the attached worksheet.

Further, your client’s Interrogatory No. 2 similarly requests that the Applicant “Identify each product and service produced or marketed by you to date under the trademarks other than the Trademark.” As such, said interrogatory similarly contains at least 2 (more appropriately 3) distinct issues.

Your client’s third interrogatory requests that the Applicant “[i]dentify any and all trademarks used to date, or intended to be used, by Applicant on any of its products or services. Again such interrogatory involves at least four separate inquiries, namely:

- (1) That the Applicant identify any and all trademarks used to date . . . on any products;
- (2) That the Applicant identify any and all trademarks used to date . . . on any services;
- (3) That the Applicant identify any and all trademarks intended to be used on any of his products;
- (4) That the Applicant identify any and all trademarks intended to be used on any of his services.

Again, in good faith and being conservative rather than aggressive, we counted such third interrogatory only twice as shown on the attached worksheet.

As a final example, your client’s seventh interrogatory requests that the Applicant “Identify what change is intended as to each product and service produced or marketed by you to date for which you intend to change the trademark.”

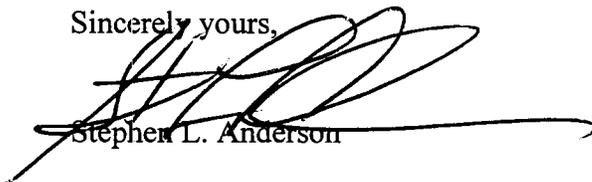
As shown by the worksheet, such interrogatory involves four distinct issues, namely:

- (1) That the Applicant identify what change is intended as to each product produced... for which [he] intends to change the trademark;
- (2) That the Applicant identify what change is intended as to each service produced ... for which [he] intends to change the trademark;
- (3) That the Applicant identify what change is intended as to each product marketed... for which [he] intends to change the trademark;
- (4) That the Applicant identify what change is intended as to each service marketed ... for which [he] intends to change the trademark.

Based on the foregoing, and in light of the fact that you curiously re-served an identical set of Opposer's First Set of Interrogatories to Applicant along with your September 17, 2005 correspondence, we again serve herewith our client's objections to same. Further redundant sets of discovery which we have already responded to, which you may again serve in bad faith may not receive such courtesy. Again, based on the foregoing and attached worksheet we hereby stand by our prior objections as stated.

Should you have a different view after reviewing the applicable rules cited herein, we would look forward to hearing from you.

Sincerely yours,



Stephen L. Anderson

Enclosures: - Applicant's General Objections to Opposer's Excessive Interrogatories – Set One (second service);  
- Interrogatory Counting Worksheet showing at least 154

**ANDERSON & ASSOCIATES**

forth as part of the response the language deemed to be ambiguous and the interpretation chosen for use in the interrogatory.

III. INTERROGATORIES

1. Identify each <sup>①</sup> product and <sup>②</sup> service produced <sup>③</sup> or marketed by you to date under the Trademark.

2. Identify each <sup>③</sup> product and <sup>④</sup> service produced <sup>⑤</sup> or marketed by you to date under trademarks other than the Trademark.

3. Identify any and all trademarks <sup>⑥</sup> used to date, <sup>⑦</sup> or intended to be used, by Applicant on any of its products or services.

4. Identify which trademark is used on each product and service produced or marketed by you to date.

5. Identify which trademark is intended to be used by you on each product and service intended to be produced or marketed by you in the future.

6. Identify each product and service produced or marketed by you to date for which you intend to change the trademark.

7. Identify what change is intended as to each product and service produced or marketed by you to date for which you intend to change the Trademark.

8. Identify all discontinued goods and services that Applicant previously identified with the Trademark.

9. As to all discontinued goods and services that Applicant previously identified with the Trademark, identify when the use began and ended for each such category of goods and services.

10. As to all discontinued goods and services that Applicant previously identified with the Trademark, state why the goods or services were discontinued.

11. With respect to each of the products and services identified in Applicant's response to interrogatory number 1, indicate Applicant's total sales of such products and services for each year from 1998 to the present date by giving for each:

- (a) the dollar value of such sales; ~~27~~ 25/26
- (b) the unit volume of such sales; and ~~28~~ 27/28
- (c) identify all documents related thereto. ~~29~~ /20

12. If Applicant distributes goods and services identified with the Trademark through a third party or parties, including licensees and distributors, identify each third-party licensee or distributor and the geographical area in which such party or parties operate.

13. For each product and service which you have sold or intend to sell under the Trademark, identify:

- (a) the geographic area in which the products and services have been sold; ~~33~~ 33/34
- (b) the channels of trade for the sale of the products and services; ~~34~~ 33/34
- (c) each retail or other sales establishment; ~~36~~ 37 38
- (d) the actual or intended class of consumers;

(e) the channels or media in which you have promoted or advertised the product or service or intend to promote or advertise the product or service; and

(f) all documents related thereto.

14. Identify, by mark and registration number or serial number, each trademark application filed by you in, or trademark registration issued to you by, the United States Patent and Trademark Office.

15. State whether you have ever received an opinion by correspondence or communication concerning possible trademark conflict arising out of the use or intended use of the Trademark by Opposer, and, if so, for each such correspondence or communication identify the date upon which each such correspondence or communication was transmitted, the person transmitting each such correspondence or communication, and the person receiving each such correspondence or communication.

16. Identify (a) any and all instances where you have received a telephone call, invoice, letter or other communication intended for Opposer, which referred or related to the products or services of Opposer, or which was an inquiry concerning a possible relationship or affiliation between you and Opposer, and (b) any documents related thereto.

17. Identify all documents in your possession, custody, or control that relate to or mention the Trademark as used by Opposer.

18. Identify when and the circumstances under which you first learned or became aware of Roger Rojas and his use of the Trademark.

19. Identify when and the circumstances under which you first learned or became aware of Gold Shells, Inc., and its use of the Trademark. (61) (62) (63) (64)

20. Identify each advertising agency or public relations firm which you have retained in connection with your sale or intended sale of products or services bearing the Trademark, starting with 1998 and continuing to the present time, and identify the date retained, the services provided by the firm, and the amounts you paid for such services. (65) (66) (67) (68) (69)

21. List all media in which Applicant has promoted or advertised its goods or services associated with the Trademark from 1998 to the present. (70)

22. State the dollar amount spent annually on advertising and promoting goods and services under the Trademark annually during each of the last five years, including the portion of the present year to date, for each category of goods and services sold by Applicant under the Trademark. (71) (72)

23. Identify all persons other than Opposer and Roger Rojas with whom you have or have had a dispute regarding use of the Trademark or a mark allegedly similar thereto. (73) (74)

24. Did you view the Internet website www.messageinabottle.com prior to March 25, 2003? (75)

25. Did you apply for the Internet website address www.messageinabottle.com? (76)

26. If your answer to interrogatory no. 25 is "yes", when did you apply? (77)

27. If your answer to interrogatory no. 25 is "yes", what was the result of your application? (78)

28. What is the basis for your denying that Opposer is the owner of service mark registration no. 2,243,269 for the mark MESSAGE IN A BOTTLE in Class 38 for receiving communications from others, recording such communications in written or printed form, and transmitting such communication to others? (79)

29. What is the basis for your denying that registration no. 2,243,269 is valid and subsisting and is conclusive evidence of Opposer's exclusive rights to use the Trademark in commerce on the services specified in Opposer's registration? (80)

30. What is the basis for your denying that the Trademark as used by Applicant so resembles the Trademark as registered by Opposer as to be likely to cause confusion, or to cause mistake, or to deceive? (81) (82) (83)

(84) 31. What is the basis for your denying that since January 16, 1999, Opposer or its predecessor have been, and Opposer is now, actually using the Trademark in connection with the sale of services as described in Opposer's registration and as a trademark in connection with the sale of goods consisting of novelty, favor, and souvenir bottles containing messages and greetings, identical to some of the goods set forth in Applicant's application? (85) (86) (87) (88)

32. What is the basis for your denying that under Section 7(c) of the Lanham Act, Opposer has a priority right to the Trademark through constructive use based on the filing date of its predecessor's original intent-to-use service mark application? (89)

33. What is the basis for your denying that use of the Trademark by Opposer and (90)

(91) its predecessor has been valid and continuous since the date of first use and has not been abandoned? (92)

(93) 34. What is the basis for your denying that the services for which Opposer's mark was registered and the goods for which Applicant's application has been published for opposition are related? (94)

35. What is the basis for your denying that you use the Trademark on services which are identical to those for which Opposer has registered the Trademark?

36. What is the basis for your denying that the nature of the goods and services of Applicant and Opposer are substantially similar? (95) (96)

37. What is the basis for your denying that the Trademark is symbolic of Opposer's extensive good will and customer recognition built up by Opposer and its predecessor through a substantial amount of time and effort in advertising and promotion? (97) (98)

38. What is the basis for your denying that the mark as used by Applicant so resembles the Trademark as used by Opposer as to be likely to cause confusion, or to cause mistake or to deceive? (99)

39. What evidence do you have to support your affirmative defense that Opposer lacks any standing to bring this opposition? (100)

40. What evidence do you have to support your affirmative defense that Opposer is barred by laches, acquiescence, and estoppel from bringing this opposition? (101) (102) (103)

41. What evidence do you have to support your affirmative defense that Opposer's

claims are barred due to its own fraud and fraudulent conduct and that of its alleged predecessor?

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42. What evidence do you have to support your affirmative defense that Opposer's claims are barred as unconscionable and due to the unclean hands of Opposer and its alleged predecessor, Roger Rojas?

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43. What evidence do you have that Opposer and its alleged predecessor, Roger Rojas, have not used the Trademark on goods or services as an identification of origin of those goods or services identified in the Notice of Allowance for Opposer's registration no. 2,243,269?

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44. What evidence do you have to support your affirmative defense that Opposer and its alleged predecessor have not used the Trademark on any services that may be properly characterized as within International Class 38?

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45. What evidence do you have to support your affirmative defense that any use of the Trademark other than for the specific services identified in the Notice of Allowance for Opposer's registration no. 2,243,269 would not lead to a likelihood of confusion?

46. What evidence do you have to support your affirmative defense that Opposer's Notice of Opposition fails to state a claim upon which relief can be granted, and in particular, fails to state legally sufficient grounds for sustaining the opposition?

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47. What evidence do you have to support your allegation that Opposer fraudulently obtained its registration for the Trademark?

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48. What evidence do you have to support your allegation that Opposer or its predecessor provided a false and misleading description of the goods and/or services covered by its application for registration of the Trademark? (122) (123)

49. What evidence do you have to support your allegation that Roger Rojas mischaracterized his goods as "telecommunication services" in his application for registration of the Trademark? (124) (125)

50. What evidence do you have to support your allegation that the representations of Opposer or its predecessor to the U.S. Patent & Trademark Office concerning the date of first use and the manner and mode of use were intentionally false and misleading? (127) (128) (129)

51. What evidence do you have to support your allegation that Roger Rojas knew or should have known that you had used the Trademark at least as early as March 10, 1998? (130) (131)

52. What evidence do you have to support your allegation that the representations made in Roger Rojas' statement of use as submitted to the U.S. Patent & Trademark Office on or about January 28, 1999, were made by Roger Rojas with the knowledge and belief that said statement was false? (132)

53. What evidence do you have to support your allegation that the first use of the Trademark as alleged in the application of Roger Rojas with the U.S. Patent & Trademark Office was not rendered in interstate commerce as alleged but was rendered wholly within the State of California? (133) (134)

54. What evidence do you have to support your allegation that the registrant of

registration no. 2,243,269 for the Trademark abandoned the Trademark by failing to use it in connection with the products and services for at least two years with no intention to resume such use? 135

55. What evidence do you have to support your allegation that Roger Rojas knowingly required or consented to a third party, Gold Shells, Inc., to describe itself as an owner of the Trademark since at least 2003 without proper licensing or any assignment? 136

56. What evidence do you have to support your allegation that Opposer failed to disclose to the U.S. Patent & Trademark Office known uses of the Trademark, or allegedly confusingly similar mark by others, including Applicant? 137

57. State whether you have or had a policy for the retention or the destruction of records, documents or files, and if so, identify the terms of such policies and the categories of documents covered; if there have been any changes in such policy and if so, the dates and nature of each such change; the types of files maintained and the location of such files; the name and address of the custodian or custodians of such files; and identify any documents relating thereto. 138  
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140 141 142  
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58. Identify any and all experts Applicant has or plans to employ to testify as an expert in this matter and set forth the subject matter of his or her testimony and the qualifications of said expert. 148 149 150

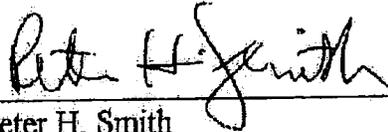
59. Identify each person Applicant expects to offer as a fact witness, and state the substance of the facts to which each such witness is expected to testify. 151 152

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60. Identify all persons who provided information or otherwise assisted in the preparation of answers to the foregoing interrogatories.

Dated: June 29, 2005



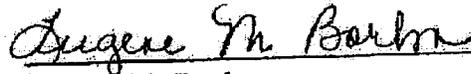
Peter H. Smith  
Attorney for Opposer  
Gold Shells, Inc., and  
Counterclaim Respondent Roger Rojas

1535 J Street, Suite A  
P.O. Box 1867  
Modesto, CA 95353  
Telephone: (209) 579-9524

**PROOF OF SERVICE**

The person whose signature appears below confirms that the **OPPOSER'S FIRST SET OF INTERROGATORIES** was served upon the Applicant herein as follows:

- \_\_\_\_\_ By delivering a copy of the paper to the person served.
- \_\_\_\_\_ By leaving a copy at the usual place of business of the person served, with someone in his employment.
- \_\_\_\_\_ By leaving a copy at the residence of the person served, with a member of his family over the age of 14 years and of discretion, since the person served is not believed to have the usual place of business.
- X   By transmitting a copy of the document by overnight courier California Overnight prepaid, to the Attorney for the Applicant, Stephen L. Anderson, Esq., Anderson & Associates, 27349 Jefferson Avenue, Suite 211, Temecula, California 92590, which transmittal was made on June 29, 2005, at Modesto, California.

  
\_\_\_\_\_  
Lugene M. Borba