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Filing date: **10/13/2006**

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

Proceeding	91163999
Party	Plaintiff Sybaritic, Inc.
Correspondence Address	Frank B. Janoski Lewis, Rice & Fingersh, L.C. 500 North Broadway, Suite 2000 St. Louis, MO 63102-2147 UNITED STATES fjanoski@lewisrice.com
Submission	Motion to Compel Discovery
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Date	10/13/2006
Attachments	Ex 1.pdf ( 11 pages )(797086 bytes ) Ex 2.pdf ( 8 pages )(547152 bytes ) Ex 3.pdf ( 15 pages )(1061953 bytes ) Ex 4.pdf ( 5 pages )(296076 bytes ) Ex 5.pdf ( 17 pages )(1337660 bytes ) Ex 6.pdf ( 1 page )(76940 bytes ) Ex 7.pdf ( 1 page )(61613 bytes ) Ex 8.pdf ( 1 page )(74687 bytes ) Ex 9.pdf ( 2 pages )(122528 bytes ) Ex 10.pdf ( 3 pages )(160672 bytes ) MemoinSupport.pdf ( 7 pages )(595009 bytes ) MotiontoCompel.pdf ( 6 pages )(473895 bytes )

UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

\_\_\_\_\_  
SYBARITIC, INC. )  
)  
)

Opposer, )

v. )

THOMAS P. MUCHISKY )

Applicant. )  
\_\_\_\_\_ )

Opposition No.: 91/163,999

Serial No.: 78/282,661

**SYBARITIC, INC.'S FIRST SET OF REQUESTS FOR ADMISSION  
TO THOMAS P. MUCHISKY (NOS. 1-28)**

In accordance with Rule 36 of the Federal Rules of Civil Procedure, Opposer, Sybaritic, Inc. ("Sybaritic") requests that Applicant Thomas P. Muchisky ("Muchisky") admit or deny the matters set forth below. Any objections or denials shall comport with the provisions of Rule 36 and shall specifically state the reason for any objection, and any failure to admit or deny the matter shall set forth with specificity the reason why Muchisky cannot admit or deny the matter.

The definitions of Opposer Sybaritic's First Set of Interrogatories are incorporated by  
~~reference as though set forth fully herein.~~

**REQUESTS FOR ADMISSION**

**REQUEST FOR ADMISSION NO. 1:**

Muchisky is not the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 2:

Muchisky represented to the United States Patent and Trademark Office that Muchisky was the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 3:

Muchisky took no steps to inform the United States Patent and Trademark Office that Muchisky was not the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 4:

Muchisky, as an individual, has made no sales of an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

**REQUEST FOR ADMISSION NO. 5:**

Muchisky, as an individual, has not incurred any advertising expenses promoting applicators having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 6:**

Other entities besides Muchisky and/or Muchisky's related entities have placed trademarks on applicators or associated packaging for the applicators having the same configuration or a similar configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 7:**

Muchisky is not the owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 8:**

Muchisky represented to the United States Patent and Trademark Office that Muchisky was the owner of the French Trademark Registration that was submitted as Exhibit B along with

Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 9:**

Muchisky took no steps to inform the United States Patent and Trademark Office that Muchisky was not the owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 10:**

Muchisky and/or an agent of Muchisky contacted Norris Enterprises which resulted in a letter being sent to Muchisky or an agent of Muchisky that was submitted as Exhibit C along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

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**REQUEST FOR ADMISSION NO. 11:**

The letter that was submitted as Exhibit C along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 does not state that the configuration of the

applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is an identifier of the source of the goods.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 12:**

Muchisky and/or an agent of Muchisky contacted Cynthia Edwards or an agent of Cynthia Edwards which resulted in a letter being sent to Muchisky or an agent of Muchisky that was submitted as Exhibit D along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 13:**

The letter that was submitted as Exhibit D along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 does not state that the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial

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No. 78/282,661 is an identifier of the source of the goods.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 14:**

In Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, Applicant

stated that there are "numerous applicators which provide virtually the identical functions" to the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 15:**

In Applicant's specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to reduce trigger points; for all varieties of pressure techniques, and; wherever the thumb would normally be used in muscle goading techniques.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 16:**

The rounded tip of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to simulate the surface of a thumb.

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**RESPONSE:**

**REQUEST FOR ADMISSION NO. 17:**

The rounded tip of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 is used to simulate the pressure applied to a body by a thumb.

RESPONSE:

REQUEST FOR ADMISSION NO. 18:

An applicator, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, would not perform the stated functions without a rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 19:

Applicant is aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 20:

Applicant is aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a cone shaped portion attached to the rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 21:

On or before June 16, 2004, Applicant was aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 22:

On or before June 16, 2004, Applicant was aware of an applicator used and/or sold in commerce by another besides Applicant, designed for the purposes stated in the specimen submitted with the application having U.S. Trademark Serial No. 78/282,661, that does not have a cone shaped portion attached to the rounded tip.

RESPONSE:

REQUEST FOR ADMISSION NO. 23:

In Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, Applicant ~~stated: "There are various hand-held massagers using different applicators, as shown by the attached~~ literature. None of these massagers are identical or even substantially similar to Applicant's particular configuration. These alternative designs are equally efficient and competitive." which were made in reference to third party's applicators that perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

**REQUEST FOR ADMISSION NO. 24:**

Applicant did not attach any literature in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 as referenced in Request for Admission No. 21.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 25:**

Applicant did not attach any literature in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661 illustrating third party alternative designs to an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 26:**

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On or before June 16, 2004, Muchisky was not aware of a third party's alternative configuration for an applicator that was designed to perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

REQUEST FOR ADMISSION NO. 27:

On or before June 16, 2004, Muchisky did not have in his possession, custody or control any literature of a third party's alternative configuration for an applicator that was designed to perform the same functions as an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST FOR ADMISSION NO. 28:

Muchisky, through a licensing agreement or other agreement, allowed at least one third party to place the third party's trademark on an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

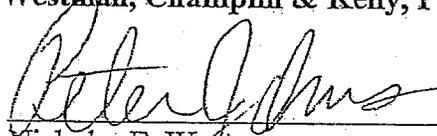
RESPONSE:

Respectfully submitted,

Westman, Champlin & Kelly, P.A.

Dated: October 24, 2005

By:

  
\_\_\_\_\_  
Nickolas E. Westman

Peter J. Ims

Westman, Champlin & Kelly, P.A.

Suite 1400 – International Centre

900 Second Avenue South

Minneapolis, MN 55402

(612) 334-2222

ATTORNEYS FOR OPPOSER  
SYBARITIC, INC.

CERTIFICATE OF SERVICE

I certify that:

I am over the age of 18 and am not a party to this action. My business address is Westman, Champlin & Kelly, P.A., Suite 1400 - International Centre, 900 Second Avenue South, Minneapolis, MN 55402-3319.

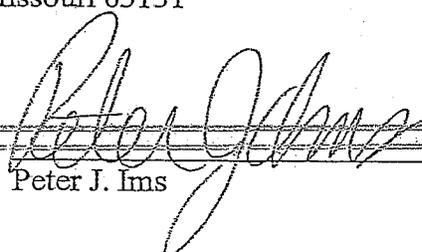
On October 24, 2005, copies of the following documents:

- I. SYBARITIC, INC.'S FIRST SET OF INTERROGATORIES TO THOMAS P. MUCHISKY (NOS. 1 - 30);
- II. SYBARITIC, INC.'S FIRST SET OF REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS TO THOMAS P. MUCHISKY (NOS. 1-19); and
- III. SYBARITIC, INC.'S FIRST SET OF REQUESTS FOR ADMISSION TO THOMAS P. MUCHISKY (NOS. 1-28)

were delivered via first class, U.S. Mail to:

Lionel L. Lucchesi, Esq.  
Polster, Lieder, Woodruff & Lucchesi, L.C.  
12412 Powerscourt Drive, Suite 200  
St. Louis, Missouri 63131

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Peter J. Ims

UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

SYBARITIC, INC.

Opposer,

v.

THOMAS P. MUCHISKY

Applicant.

Opposition No.: 91/163,999

Serial No.: 78/282,661

**SYBARITIC, INC.'S FIRST SET OF REQUEST FOR PRODUCTION  
OF DOCUMENTS AND THINGS TO THOMAS P. MUCHISKY (NOS. 1 -19)**

In accordance with Rule 34 of the Federal Rules of Civil Procedure and Rules 2.116 and 2.120 of the Trademark Rules of Practice, Opposer, Sybaritic, Inc. ("Sybaritic"), requests that Applicant, Thomas P. Muchisky ("Muchisky"), produce the documents requested herein for inspection and copying at the offices of Westman, Champlin & Kelly, P.A., Suite 1400 – International Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402. These Document Requests are intended to be continuing in nature. Any information that is discovered after timely service of the answers should be brought to the attention of Sybaritic's counsel through supplemental answers within a reasonable time after discovery.

These Requests for Production of Documents and Things are subject to the following instructions and definitions:

**INSTRUCTIONS AND DEFINITIONS**

A. The Instructions and Definitions of Opposer's First Set of Interrogatories are incorporated by reference as though set forth fully herein.

B. Photocopies of documents may be produced in lieu of originals when necessary, but all versions of non-identical copies must be produced.

C. If Applicant is aware of any document requested that Applicant is unable to produce, state this fact, give particular reasons for Applicant's inability to produce the document and identify every person Applicant knows or believes has possession, custody or control of the document or of a duplicate thereof.

D. Regarding each document Applicant contends as privileged or otherwise non-discoverable, state the basis for the privilege for exclusion from discovery, the subject matter of the document, the name and address of the author, the document's date, the name and address of the person to whom the document was addressed or for whom it was created, the name and address of any and all recipients of the document, the name and address of each person Applicant believes now has a copy or original of the document, and identify the files and the file location where the original and any copies are normally kept, including any computer files.

E. A request for production of a document is a request for production of the entire document, including any attachments, exhibits, appendices and the like.

**DOCUMENTS REQUESTED**

**REQUEST NO. 1:**

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Specimens of each label, brochure, display, catalog, advertisement or any other publicly disseminated information ever used by Muchisky in connection with the use, sale, offer for sale, or distribution of goods or services in conjunction with the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST NO. 2:**

All documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST NO. 3:**

All documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of an alternative design identified in the responses to Interrogatory Nos.: 3 and 6 to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST NO. 4:**

All documents referring or relating to marketing studies, focus group studies, polls or surveys conducted by or caused to be conducted or obtained for Muchisky that relate to the selection, adoption and/or acquisition of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST NO. 5:**

All documents referring or relating to the marketing, distribution, sale, advertising, or promotion by Muchisky of an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST NO. 6:**

All documents referring or relating to any person, owner or any other entity having or having had any right to use the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 including, but not limited to licensing agreements, through or under which Muchisky claims any rights in such alleged mark.

**RESPONSE:**

**REQUEST NO. 7:**

All documents referring or relating to each complaint, objection, opposition, ~~administrative proceeding, legal opinion or civil action involving Muchisky's use of the~~ configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST NO. 8:**

All documents summarizing or memorializing Muchisky's sales of applicators having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 commencing with the date of first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST NO. 9:**

All documents referring or relating to Sybaritic's making, using and/or selling of an applicator having the exact configuration or a similar configuration to the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**REQUEST NO. 10:**

All documents that support Muckisky's statements set forth in Muchisky's Answer to Amended Notice of Opposition.

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**RESPONSE:**

**REQUEST NO. 11:**

All documents that discuss materials of construction of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 12:

All documents that discuss a cone shape as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 13:

All documents that discuss a rounded tip as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

RESPONSE:

REQUEST NO. 14:

All documents referring to or relating to a third party's use of an applicator having the same configuration or a similar configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 whether the use is controlled by a license agreement or is not controlled by a license agreement.

RESPONSE:

**REQUEST NO. 15:**

All documents referring to or relating to a third party's use of an applicator designed to perform the same functions as stated in response to Interrogatory No. 5 that does not have a configuration the same as or similar to the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 whether the use is controlled by a license agreement or is not controlled by a license agreement.

**RESPONSE:**

**REQUEST NO. 16:**

All documents that were or should have been identified in response to Sybaritic's Interrogatories in this Opposition Proceeding.

**RESPONSE:**

**REQUEST NO. 17:**

For each of Sybaritic's Interrogatories in this Opposition Proceeding, all documents, other than those documents already produced, used to prepare Muchisky's answers.

**RESPONSE:**

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**REQUEST NO. 18:**

For each of Sybaritic's Document Requests in this Opposition Proceeding, all documents, other than those documents already produced, used to prepare Muchisky's responses.

**RESPONSE:**

REQUEST NO. 19:

All document that were identified or referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

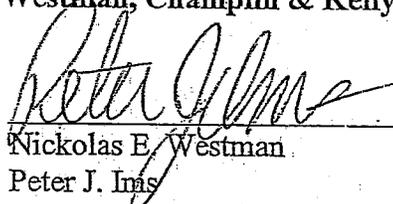
RESPONSE:

Respectfully submitted,

Westman, Champlin & Kelly, P.A.

Dated: October 24, 2005

By:



Nickolas E. Westman

Peter J. Ims

Westman, Champlin & Kelly, P.A.

Suite 1400 - International Centre

900 Second Avenue South

Minneapolis, MN 55402

(612) 334-2222

**ATTORNEYS FOR OPPOSER  
SYBARITIC, INC.**

UNITED STATES PATENT AND TRADEMARK OFFICE  
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THOMAS P. MUCHISKY

Applicant.

Opposition No.: 91/163,999

Serial No.: 78/282,661

SYBARITIC, INC.'S FIRST SET OF INTERROGATORIES  
TO THOMAS P. MUCHISKY (NOS. 1 - 30)

Opposer, Sybaritic, Inc. ("Sybaritic"), requests that Applicant, Thomas P. Muchisky ("Muchisky"), answer, pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rules 2.116 and 2.120 of the Trademark Rules of Practice, each of the following Interrogatories. These Interrogatories are intended to be continuing in nature. Any information updating an answer or answers to these Interrogatories that Muchisky discovers after timely service of the answers should be brought to the attention of the counsel for Sybaritic, through supplemental answers within a reasonable time after discovery of such information.

~~These Interrogatories are subject to the following instructions and definitions:~~

INSTRUCTIONS AND DEFINITIONS

A. Opposer.

As used herein, the term "Opposer" includes Sybaritic, Inc., its predecessors in interest, and all of its parent, subsidiary and affiliated companies and officers, directors, employees, agents and representatives thereof.

B. Applicant.

As used herein, the term "Applicant" includes Thomas P. Muchisky, an individual.

C. Document.

As used herein, the term "document" is used in its customary broad sense as described in Rule 34 of the Federal Rules of Civil Procedure and includes, but is not limited to, all notes, notations, correspondence, invoices, contracts, purchase orders, pamphlets, publications, writings, studies, reports, labels, packaging, books, memoranda, displays, photographs, drawings, art work, tear sheets, proofs, sketches, illustrative materials, videotapes, models, films, magnetic recording tapes, microfilms, and other storage means by which information is retained in retrievable form and all other materials, whether printed, typewritten, handwritten, recorded or reproduced by any mechanical, electronic or magnetic process.

D. Manner of Identifying Documents.

Whenever an Interrogatory inquires about documents, please furnish the following information as to each:

1. The date of the document;
2. A general description of the document;
3. A general description of the subject matter to which it pertains;
4. ~~The names and addresses of the addressor, addressee, and all persons~~  
receiving or shown the document or copies thereof;
5. The names and addresses of person in whose custody, possession or control the document is presently maintained; and

6. If a privilege or work product exception is claimed as to a document, identify each such document and state the nature of the privilege or exception claimed.

E. Person.

As used herein, the term "person" includes any individual, corporation, company, division, partnership, agency or other organization or entity.

F. Manner of Identifying Individuals.

Whenever an Interrogatory inquires about a person, and the person is an individual, the information furnished should include:

1. The person's full name;
2. The person's employer;
3. The person's present position or title;
4. The person's past employers and positions or titles at all times relevant to the Interrogatory, if other than the person's present employer, position or title; and
5. The person's last known address and telephone number.

G. Manner of Identifying Persons - Not Individuals.

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Whenever an Interrogatory inquires about the name or identity of a person or business, not an individual, the information furnished should include:

1. The full name and current address of such business entity or organization;
2. The name of its executive officer or equivalent authority;
3. The principal place of business; and

4. The nature of the business or function and its relationship to Applicant's operations or products.

H. Manner of Identifying Trademarks, Service Marks and Related Filings.

Whenever an Interrogatory inquires about a service mark, a trademark, or an application or registration for a service mark or trademark, please include:

1. Its country or state;
2. The application or registration number, date of filing and current status;
3. Its date of first use in that country or state and a full description of the goods on which it was first used;
4. The identity of the trademark owner and any and all prior owners or claimants; and
5. The class and description of the goods or services for which it is registered and the class and description of the goods or services for which it is used, if different.

I. Manner of Identifying Goods and Services.

Whenever an Interrogatory inquires as to a service, product or good, please indicate:

1. The catalog, stock or like number;
2. The name, type and grade;
3. Sizes or quantity customarily sold;
4. Whether primarily intended for personal retail consumption, commercial retail consumption or wholesale use; and
5. Any other designation customarily used by Applicant or by the trade to designate such product or good.

J. Construction of 'And' as Well as 'Or' Terms.

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

K. Construction of Verb Tenses and Singular as Well as Plural Terms.

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

L. Manner of Identifying Publications.

As used herein, the term "identify" as used in referring to a publication shall include:

1. The title of the publication;
2. The author of the publication;
3. The date; and
4. The relevant page(s).

M. Objections.

If Muchisky objects to any Interrogatory, state the specific grounds for the objection and provide all information, responsive to the Interrogatory, outside the scope of the objection.

O. Assertions of Privilege.

If Muchisky alleges privilege as the basis for withholding information or materials, specifically identify the privilege asserted and identify all information or material for which Muchisky alleges the privilege and provide all information responsive to the Interrogatory which is not subject to the asserted privilege including, but not

limited to, the author of the information, the recipient(s) of the information, the type of information or document, the date of the information and the number of pages.

### INTERROGATORIES

#### INTERROGATORY NO. 1:

(A) Provide the date and describe the circumstances of Muchisky's consideration, selection, adoption and first use of the design mark in U.S. Trademark Serial No. 78/282,661.

(B) Identify each person having knowledge or information relating to Muchisky's consideration, selection, adoption, and/or first use of the design mark in U.S. Trademark Serial No. 78/282,661.

#### RESPONSE:

#### INTERROGATORY NO. 2:

If the date of first use provided in response to Interrogatory No. 1(A) is later than January 1, 1966, provide the name of the individual or entity that had used the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 prior to Muchisky.

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#### RESPONSE:

#### INTERROGATORY NO. 3:

If the date of first use provided in response to Interrogatory No. 1(A) is later than January 1, 1966, state whether the individual or entity had considered other designs as alternatives to the configuration of the applicator for a hand-held massager as illustrated

as the design mark in U.S. Trademark Serial No. 78/282,661, the number of designs that were considered as alternatives to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and the reasons why the design of applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 was selected over the previously mentioned designs.

**RESPONSE:**

**INTERROGATORY NO. 4:**

If the date of first use provided in response to Interrogatory No. 1(A) is later than January 1, 1966, describe in detail how Muchisky acquired the rights to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 prior to the date provided in response to Interrogatory No. 1(A).

**RESPONSE:**

**INTERROGATORY NO. 5:**

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Identify Muchisky's intended use of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**INTERROGATORY NO. 6:**

Identify other designs that Muchisky considered as alternatives to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**INTERROGATORY NO. 7:**

With respect to each design identified in the answer to interrogatory 6, describe in detail the facts considered in selecting the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 over the designs identified in the response to interrogatory 6.

**RESPONSE:**

**INTERROGATORY NO. 8:**

Identify any licenses, whether written or oral, that Applicant has given to use the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 in commerce.

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**RESPONSE:**

**INTERROGATORY NO. 9:**

Identify each of Applicant's competitors referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**INTERROGATORY NO. 10:**

With respect to each of Applicant's competitors referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, identify by tradename, model number or any other identifier, the applicators that perform the same intended function of the a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and disclosed in response to Interrogatory No. 5 and disclosed in the specimen submitted with the application for U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**INTERROGATORY NO. 11:**

Identify all trademarks that have been or are being placed on applicators or associated packaging having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 that were used or sold in commerce and the owner of the trademark.

**RESPONSE:**

**INTERROGATORY NO. 12:**

Identify the source of Exhibit A that was submitted along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**INTERROGATORY NO. 13:**

If the source of Exhibit A identified in response to Interrogatory No. 12 is not the Applicant, identify the steps taken to inform the United States Patent and Trademark Office that the source of the specimen was an entity other than Applicant.

**RESPONSE:**

**INTERROGATORY NO. 14:**

If the source of Exhibit A identified in response to Interrogatory No. 12 is not the Applicant, provide the facts as to why Applicant represented to the United States Patent and Trademark Office that Applicant was the source of Exhibit A.

**RESPONSE:**

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**INTERROGATORY NO. 15:**

Identify the total annual sales by Applicant, an individual, of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 from 2000 to the present.

**RESPONSE:**

**INTERROGATORY NO. 16:**

If the response to Interrogatory No. 15 for any year from 2000 to the present is less than the amount disclosed in the in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, provide the factual basis for making the representation regarding annual sales of the applicator at issue to the United States Patent and Trademark Office.

**RESPONSE:**

**INTERROGATORY NO. 17:**

Identify the total annual advertising expenditures by Applicant, an individual, promoting the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 from 2000 to the present.

**RESPONSE:**

**INTERROGATORY NO. 18:**

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If the response to Interrogatory No. 17 identifies an amount for any year requested, that is less than the amount disclosed in the in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661, provide all bases for making the representation regarding annual advertising expenditures promoting the applicator at issue to the United States Patent and Trademark Office.

**RESPONSE:**

**INTERROGATORY NO. 19:**

Identify the listed owner of the French Trademark Registration that was submitted as Exhibit B along with Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**INTERROGATORY NO. 20:**

If the owner of the French Trademark Registration identified in response to Interrogatory No. 19 is not the Applicant, identify the steps taken to inform the United States Patent and Trademark Office that the owner of the French Trademark Registration was an entity other than Applicant.

**RESPONSE:**

**INTERROGATORY NO. 21:**

If the owner of the French Trademark Registration identified in response to Interrogatory No. 19 is not the Applicant, provide the facts as to why Applicant represented to the United States Patent and Trademark Office that Applicant was the owner of the French Trademark Registration.

**RESPONSE:**

**INTERROGATORY NO. 22:**

Please identify each person Muchisky has retained or specially employed to provide expert testimony in the case. In doing so, please state all opinions to be expressed

and the basis and reasons therefor, set forth the data or other information considered by the witness in forming the opinions, and identify any exhibits to be used as a summary of or support for the opinions.

**RESPONSE:**

**INTERROGATORY NO. 23:**

Identify other configurations for an applicator that perform the function as described in both response to Interrogatory No. 5 and in the description of the applicator submitted with the specimen submitted with the application for U.S. Trademark Serial No. 78/282,661.

**RESPONSE:**

**INTERROGATORY NO. 24:**

Describe in detail why the tip of the applicator is specified as being firm rubber in the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 and how a firm rubber tip is an identifier of a source of goods.

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**RESPONSE:**

**INTERROGATORY NO. 25:**

Please identify all documents upon which Muchisky relied upon in answering these Interrogatories, and identify the custodian(s) of such documents.

**RESPONSE:**

**INTERROGATORY NO. 26:**

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 24 of Muchisky's Answer to Amended Notice of Opposition, and for each person identified, describe in detail the substance of his or her knowledge.

**RESPONSE:**

**INTERROGATORY NO. 27:**

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 25 of Muchisky's Answer to Amended Notice of Opposition, and for each person identified, describe in detail the substance of his or her knowledge.

**RESPONSE:**

**INTERROGATORY NO. 28:**

Please identify each person known to or believed by Muchisky to have knowledge of facts relating to Muchisky's Affirmative Defense as stated in paragraph 26 of

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~~Muchisky's Answer to Amended Notice of Opposition, and for each person identified,~~

describe in detail the substance of his or her knowledge.

**RESPONSE:**

INTERROGATORY NO. 29:

Identify the persons who participated in compiling the information used to prepare Muchisky's answers and the persons most knowledgeable on behalf of Muchisky regarding the subject matter of the Interrogatory answers.

RESPONSE:

INTERROGATORY NO. 30:

Identify the persons who participated in identifying and compiling the documents produced by Muchisky and the persons most knowledgeable on behalf of Muchisky regarding the subject matter of the documents produced.

RESPONSE:

Respectfully submitted,

WESTMAN, CHAMPLIN & KELLY, P.A.

Dated: October 24, 2005

By:   
Nickolas E. Westman

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Peter J. Ims  
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ATTORNEYS FOR OPPOSER  
SYBARITIC, INC.

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Mailed: August 16, 2006

Opposition No. 91163999

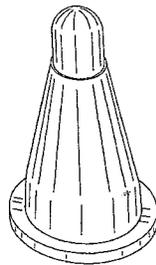
Sybaritic, Inc.

v.

Thomas P. Muchisky

**Thomas W. Wellington,  
Interlocutory Attorney:**

On August 4, 2003, Thomas P. Muchisky filed an application (Serial No. 78282661) to register the following configuration mark:<sup>1</sup>



The application contains the following description:

The mark consists of the configuration of an applicator for a hand-held massager. The applicator consists of a cone-shaped attachment having a firm rubber tip.

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<sup>1</sup> The application is based on alleged dates of first use anywhere on December 31, 1965 and first use in commerce on December 31, 1970.

Opposer filed its notice of opposition and, as amended, the complaint sets forth allegations that applicant's mark is *de jure* functional, has not acquired secondary meaning, and fails to function as a trademark.<sup>2</sup>

On December 16, 2005, applicant filed a motion for summary judgment under Fed. R. Civ. P. 56. By way of the motion, applicant moves the Board to "determine whether applicant's mark is not functional, has acquired distinctiveness and secondary meaning, and functions as a trademark."

On January 20, 2006, applicant filed a motion for leave to take limited discovery under Fed. R. Civ. P. 56(f), supported by an affidavit of Frank B. Janoski, Esq. in accordance with 37 CFR § 2.20 and required by Fed. R. Civ. P. 56(f).

The Board presumes familiarity with the issues presented via applicant's Rule 56(f) motion and does not provide a complete recitation of the allegations and contentions of each party.

Generally, a motion for discovery under Rule 56(f), unless dilatory or lacking in merit, will be treated liberally by the Board. See James W. Moore, Moore's Federal Procedure, § 56.24 (1985). If a party has demonstrated a

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<sup>2</sup> On June 29, 2005, opposer filed its amended notice of opposition. On July 27, 2005, applicant filed his answer to the amended notice of opposition. The amended pleadings were noted by the Board on August 18, 2005 and entered.

Opposition No. 91163999

need for discovery which is reasonably directed to facts essential to its opposition to the motion, discovery will be permitted. See *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). This is especially true if the information sought is largely within the control of the party moving for summary judgment. See *Orion Group Inc. v. Orion Insurance Co. P.L.C.*, 12 USPQ2d 1923 (TTAB 1989).

However, when a request for discovery under FRCP 56(f) is granted by the Board, the discovery allowed is limited to that which the nonmoving party must have in order to oppose the motion for summary judgment; this is so even if the nonmoving party had, at the time when the summary judgment motion was filed, requests for discovery outstanding, and those requests remain unanswered. See T. Jeffrey Quinn, TIPS FROM THE TTAB: Discovery Safeguards in Motions for Summary Judgment: No Fishing Allowed, 80 Trademark Rep. 413 (1990). Cf. *Fleming Companies v. Thriftway Inc.*, 21 USPQ2d 1451 (TTAB 1991), *aff'd*, 26 USPQ2d 1551 (S.D. Ohio 1992).

Again, applicant's summary judgment motion involves the grounds and issues of functionality, failure to function, and acquired distinctiveness and secondary meaning. While pursuant to Rule 56(f) the only discovery which may now be permitted is that specifically directed to the issues raised by the motion for summary judgment, we find that opposer's discovery requests (identified in the declaration of Frank Janoski,

Opposition No. 91163999

Esq. and previously served on opposer) seek information that is essential to opposer's opposition to the summary judgment motion. However, opposer has not demonstrated the need to "conduct further discovery." We note that discovery closed on October 25, 2005 and opposer served its discovery requests one day prior thereto. Thus, absent a reopening of the discovery period, there was no possibility for any "follow-up" discovery requests.

Accordingly, opposer's motion for Rule 56(f) discovery is granted only to the extent that applicant is hereby ordered to serve supplemental responses to opposer's first set of interrogatories, opposer's first set of document requests, and opposer's requests for admissions within **THIRTY (30) DAYS** from the mailing date of this order.<sup>3</sup> To the extent that opposer also seeks leave to "conduct further discovery", the Rule 56(f) motion is denied.

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<sup>3</sup> It is acknowledged that applicant raised several objections in his previously served responses to these discovery requests. To alleviate any concerns and potentially obviate some of these objections, **the Board is hereby imposing its standard protective order.** The protective order is now in force and applicant's supplemental responses shall be served in compliance therewith. The standard protective order may be found in the Appendix of Forms of the TBMP (2d ed. rev. 2004) and on the USPTO website at: [www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm](http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm) Should the parties not be able to resolve their discovery disputes, in spite of protective agreement, the Board will entertain a motion to compel so long as it is (1) filed prior to the deadline (set forth in this order) for opposer's response to the summary judgment motion, and (2) filed after the parties have met and conferred in a good faith effort to resolve the outstanding discovery disputes.

Opposition No. 91163999

Opposer is allowed until **SIXTY (60) DAYS** from the mailing date on this order to file a response to applicant's motion for summary judgment.

Except to the extent indicated above, proceedings remain **SUSPENDED**. See Trademark Rule 2.127.

\* \* \*

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

SYBARITIC, INC.,	)	
	)	
Opposer,	)	Opposition No.: 91163999
	)	Serial No. 78/282,661
v.	)	
	)	
THOMAS P. MUCHISKY,	)	
	)	
Applicant.	)	

**THOMAS P. MUCHISKY'S SUPPLEMENTAL RESPONSES TO  
SYBARITIC, INC.'S FIRST SET OF REQUEST FOR PRODUCTION  
OF DOCUMENTS AND THINGS (NOS. 1 -19)**

COMES NOW THOMAS P. MUCHISKY (hereinafter "Muchisky"), by and through his undersigned attorneys, and for his Supplemental Responses to Sybaritic, Inc.'s First Set of Request for Production of Documents and Things (Nos. 1 – 19) states as follows:

**GENERAL OBJECTIONS**

1. Muchisky objects to each Request to the extent that it could be construed as encompassing communications or documents protected by any privilege, including but not limited to: (i) the attorney-client privilege; (ii) the attorney work product doctrine/privilege; or (iii) any other privilege or protection afforded by law. Muchisky and his counsel hereby assert such privileges and immunities.
2. Muchisky objects to each Request to the extent it seeks to impose on Muchisky obligations beyond those imposed by the Federal Rules of Civil Procedure.
3. Muchisky objects to each Request to the extent that the information or documents requested therein are not within Muchisky's possession, custody or control.

4. Muchisky objects to each Request to the extent it is argumentative and/or calls upon Muchisky to interpret legal theories or to draw legal conclusions. If Opposer subsequently asserts or prevails on an interpretation of any Request that differs from that of Muchisky, Muchisky reserves the right to supplement and/or modify his objections.

5. Muchisky objects to these Requests to the extent that they seek information that is neither relevant to the subject matter of this Opposition nor reasonably calculated to lead to the discovery of admissible evidence.

6. Muchisky objects to each Request on the ground that Opposer's definitions are overly broad, unduly burdensome, vague, and seek information beyond the scope of this Opposition and/or require Muchisky to provide documents and things outside the scope of Rule 26(b) of the Federal Rules of Civil Procedure.

7. Muchisky expressly reserves the right to object to further discovery and to the subject matter of such Request and to the introduction into evidence of any document, thing, information or portion thereof.

## **RESPONSES TO DOCUMENTS REQUESTED**

### **REQUEST NO. 1:**

Specimens of each label, brochure, display, catalog, advertisement or any other publicly disseminated information ever used by Muchisky in connection with the use, sale, offer for sale, or distribution of goods or services in conjunction with the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection: unduly burdensome and oppressive, and not reasonably calculated to lead to the discovery of admissible evidence. Objection, unlimited as to

time. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant directs Opposer's attention to [www.g5.com](http://www.g5.com), a web cite, on information and belief well known to Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 2:**

All documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, calls for a legal conclusion. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 3:**

All documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of an alternative design identified in the responses to Interrogatory Nos.: 3 and 6 to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, calls for a legal conclusion. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 4:**

All documents referring or relating to marketing studies, focus group studies, polls or surveys conducted by or caused to be conducted or obtained for Muchisky that relate to the selection, adoption and/or acquisition of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, calls for a legal conclusion. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 5:**

All documents referring or relating to the marketing, distribution, sale, advertising, or promotion by Muchisky of an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise

Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 6:**

All documents referring or relating to any person, owner or any other entity having or having had any right to use the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 including, but not limited to licensing agreements, through or under which Muchisky claims any rights in such alleged mark.

**RESPONSE:** Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 7:**

All documents referring or relating to administrative proceeding, legal opinion or civil each complaint, objection, opposition, action involving Muchisky's use of the

configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 8:**

All documents summarizing or memorializing Muchisky's sales of applicators having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 commencing with the date of first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control

responsive to this Request not already in the possession, custody or control of Opposer

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 9:**

All documents referring or relating to Sybaritic's making, using and/or selling of an applicator having the exact configuration or a similar configuration to the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 10:**

All documents that support Muckisky's statements set forth in Muchisky's Answer to Amended Notice of Opposition.

**RESPONSE:** Objection, calls for a legal conclusion. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 11:**

All documents that discuss materials of construction of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection, Applicant restates and incorporates the general objections. Objection, requests confidential business information that will only be provided, if available, under a suitable protective order entered by the Board. Without waiving any

objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 12:**

All documents that discuss a cone shape as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, vague and indefinite. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, requests confidential business information that will only be provided, if available, under a suitable protective order entered by the Board. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff &

Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 13:**

All documents that discuss a rounded tip as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 14:**

All documents referring to or relating to a third party's use of an applicator having

the same configuration or a similar configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 whether the use is controlled by a license agreement or is not controlled by a license agreement.

**RESPONSE:** Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 15:**

All documents referring to or relating to a third party's use of an applicator designed to perform the same functions as stated in response to Interrogatory No. 5 that does not have a configuration the same as or similar to the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 whether the use is controlled by a license agreement or is not controlled by a license

agreement.

**RESPONSE:** Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer. To the extent not already in the possession of Opposer or available to Opposer from other sources, and without waving any objections, Applicant will produce relevant, non – privileged documents responsive to this Request.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 16:**

All documents that were or should have been identified in response to Sybaritic's Interrogatories in this Opposition Proceeding.

**RESPONSE:** Objection, vague, indefinite and incapable of answer. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection:

request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 17:**

For each of Sybaritic's Interrogatories in this Opposition Proceeding, all documents, other than those documents already produced, used to prepare Muchisky's answers.

**RESPONSE:** Objection, vague, indefinite and incapable of answer. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 18:**

For each of Sybaritic's Document Requests in this Opposition Proceeding, all documents, other than those documents already produced, used to prepare Muchisky's responses.

**RESPONSE:** Objection, vague, indefinite and incapable of answer. Objection, overly broad and unduly burdensome and unrestricted as to time and/or place. Objection, seeks information that is not relevant to the subject matter of this Opposition. Objection: request seeks documents and things protected by attorney-client privilege and attorney work product. Applicant restates and incorporates the general objections. Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

**REQUEST NO. 19:**

All document that were identified or referenced in Applicant's Amendment dated June 16, 2004 that was filed with the United States Patent and Trademark Office for the application having U.S. Trademark Serial No. 78/282,661.

**RESPONSE:** Without waiving any objections, Applicant states as follows: Applicant has no non-privileged documents in his possession, custody or control responsive to this Request not already in the possession, custody or control of Opposer. To the extent not already in the possession of Opposer or available to Opposer from other sources, and without waving any objections, Applicant will produce relevant, non – privileged documents responsive to this Request.

**SUPPLEMENTAL RESPONSE:** There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise Applicant's counsel of available dates to view these documents subject to the protective order in this matter.

Respectfully submitted,

By: s/Lionel L. Lucchesi  
Lionel L. Lucchesi, 25,891  
Polster, Lieder, Woodruff & Lucchesi, L.C.  
12412 Powerscourt Drive, Suite 200  
St. Louis, Missouri 63131  
(314) 238-2400 Phone  
(314) 238-2401 Fax

Attorneys for Applicant  
Thomas P. Muchisky

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via facsimile and first class U.S. Mail, postage prepaid, this 15th day of September, 2006, upon the following:

Frank B. Janoski, Esq.  
Bridget Hoy, Esq.  
Lewis, Rice & Fingersh, L.C.  
500 North Broadway, Suite 2000  
St. Louis, MO 63102-2147  
Telephone: (314) 444-7600  
Facsimile: (314) 241-6056

Attorneys for Opposer  
Sybaritic, Inc.

Now Schomay

# LEWIS, RICE & FINGERSH, L.C.

ATTORNEYS AT LAW

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BHOY@LEWISRICE.COM

BRIDGET HOY  
DIRECT (314) 444-7837

TEL (314) 444-7600  
FAX (314) 612-7837

October 10, 2006

## VIA FACSIMILE AND U.S. MAIL

Mr. Lionel L. Lucchesi  
Polster, Lieder, Woodruff & Lucchesi, L.C.  
12412 Powerscourt Drive, Suite 200  
St. Louis, MO 63131-3615

**Re: Sybaritic, Inc. v. Thomas P. Muchisky  
U.S. Patent & Trademark Office, Trademark Trial and Appeal Board  
Opposition No. 91/163,999**

Dear Lou:

I write with regard to Applicant Thomas P. Muchisky's discovery responses in the above-referenced matter. We did not receive supplemental responses to the First Requests for Admission or First Set of Interrogatories directed to your client. Please let me know if supplemental responses are forthcoming and if so, when they are expected to be served.

We also need to schedule a time to inspect and arrange for copying of the documents referenced in Applicant's supplemental responses to the First Requests for Production of Documents and Things. We additionally need to meet and confer with you regarding Applicant's objections. We are available this afternoon, in the afternoon on Wednesday or anytime on Thursday of this week. Please advise as to your availability.

I will call you later today to set up a time for our telephone conference and for inspection of the documents.

Kindest regards,



Bridget Hoy

cc: Frank B. Janoski

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BRIDGET HOY  
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October 11, 2006

## VIA FACSIMILE AND U.S. MAIL

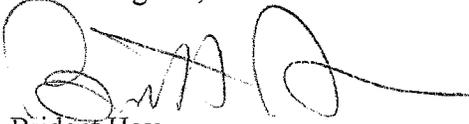
Mr. Lionel L. Lucchesi  
Polster, Lieder, Woodruff & Lucchesi, L.C.  
12412 Powerscourt Drive, Suite 200  
St. Louis, MO 63131-3615

**Re: Sybaritic, Inc. v. Thomas P. Muchisky  
U.S. Patent & Trademark Office, Trademark Trial and Appeal Board  
Opposition No. 91/163,999**

Dear Lou:

Per our conversation yesterday afternoon, I write to confirm that documents responsive to the First Set of Requests for Production of Documents and Things directed to your client will be available for inspection and copying at your offices on Thursday, October 12, 2006, at 2:30 p.m. I also understand from our conversation that no supplemental responses to the First Set of Interrogatories or First Requests for Admission are forthcoming. Please contact me immediately if that is not the case.

Kindest regards,



Bridget Hoy

cc: Frank B. Janoski



**Polster, Lieder, Woodruff & Lucchesi, L.C.**

Patent ■ Trademark ■ Copyright ■ Trade Secret ■ Unfair Competition

12412 Powerscourt Drive, Suite 200  
St. Louis, Missouri 63131-3615  
TELEPHONE: 314.238.2400  
FACSIMILE: 314.238.2401  
E-MAIL: plwl@patpro.com

Lionel L. Lucchesi  
LLUCCHESI@PATPRO.COM

October 11, 2006  
Via Facsimile 314-612-7837

Bridget Hoy, Esq.  
Lewis, Rice & Fingersh, L.C.  
500 North Broadway, Suite 2000  
St. Louis, MO 63102-2147

Re: Sybaritic, Inc. v. Thomas P. Muchisky  
United States Patent and Trademark Office Trial and Appeal Board  
Opposition No.: 91/163992  
Our file: PHYS I689

Dear Bridget:

I have checked the TTAB order and believe that the reference to the entrance of the protective order had dealt only with document production; consequently, our responses with respect to the admissions and interrogatory requests do not require additional supplementation. If you can point to a particular request for admission or interrogatory request where you feel differently, please let me know immediately.

Very truly yours,

Lionel L. Lucchesi

LLL/dml

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Glen E. Books, Of Counsel  
Managing Attorney of New Jersey Office  
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Basking Ridge, New Jersey 07920  
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BRIDGET HOY  
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October 11, 2006

*Via Facsimile and First Class Mail*

Mr. Lionel L. Lucchesi  
Polster, Lieder, Woodruff & Lucchesi, L.C.  
12412 Powerscourt Drive, Suite 200  
St. Louis, MO 63131-3615

**Re: Sybaritic, Inc. v. Thomas P. Muchisky**  
**U.S. Patent & Trademark Office, Trademark Trial and Appeal Board**  
**Opposition No. 91/163,999**

Dear Lou:

Thank you for your October 11, 2006 letter.

Our reading of the TTAB Order indicates that your client was under an obligation to supplement the responses to the requests for admission and interrogatories on September 15, 2006. It appears that we have interpreted the Order differently and we will therefore proceed accordingly. We will plan to inspect documents at your office tomorrow afternoon.

Kindest regards,

  
Bridget Hoy

cc: Frank B. Janoski  
1329322 1

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TO: Lionel L. Lucchesi  
FROM: Bridget Hoy  
NO. OF PAGES W/ COVER: 02  
TELECOPY NUMBER: 238-2401  
REGULAR NUMBER:  
DATE: Wednesday, October 11, 2006 2:12:28 PM  
CHARGE NUMBER: 099998.02513

PLEASE CALL (314) 444-7837 IF A PROBLEM OCCURS IN THE TRANSMISSION OF THIS DOCUMENT.

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Internal Revenue Service regulations provide that, for the purpose of avoiding certain penalties under the Internal Revenue Code, taxpayers may rely only on formal opinions of counsel which meet specific requirements set forth in such regulations. Any tax advice that may be contained in this writing does not constitute a formal opinion that meets the requirements of the regulations. Accordingly, the Internal Revenue Service requires that we advise you that (1) any tax advice contained in this communication was not intended or written to be used, and may not be used, for the purpose of avoiding penalties that the IRS might attempt to impose on a taxpayer, (2) no one, without express prior written permission, may use any part of this communication in promoting, marketing or recommending an arrangement relating to any Federal tax matter to any person or entity, (3) there is no limitation by this Firm on the disclosure of the tax treatment or tax structure of the transaction(s) or matter(s) discussed herein by the intended recipient of this communication.

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

SYBARITIC, INC.,	)	
	)	
Opposer,	)	Opposition No.: 91163999
	)	Serial No. 78/282,661
vs.	)	
	)	
THOMAS P. MUCHISKY,	)	
	)	
Applicant.	)	

**AFFIDAVIT OF BRANDY B. BARTH**

Brandy B. Barth, being first duly sworn on oath and being competent to testify as to the facts set forth herein, does hereby state the following:

1. My name is Brandy B. Barth. I am over the age of 21 and have personal knowledge of the facts stated herein.
2. I am an associate attorney at Lewis, Rice & Fingersh, L.C.
3. Our firm represents the Opposer, Sybaritic, Inc.
4. Our firm also represents Sybaritic, Inc. in Civil Action No. 4:03CV01058 HEA, currently pending in United States District Court for the Eastern District of Missouri, Eastern Division, styled General Physiotherapy, Inc., Plaintiff, v. Sybaritic, Inc., Symbdex, LLC, and Steven J. Daffer, Defendants/Counterclaim-Plaintiffs, v. General Physiotherapy, Inc. and Thomas P. Muchisky, Counterclaim-Defendants. I have worked on Civil Action No. 4:03CV01058 HEA for nearly two years and am familiar with the documents produced in that case.
5. On October 12, 2006, I traveled to the law offices of Polster, Lieder, Woodruff & Lucchesi, L.C., counsel for the Applicant Thomas P. Muchisky, to inspect 5,000 documents

referenced in their Supplemental Responses to Sybaritic, Inc.'s First Set of Requests for Documents and Things (No.s 1-19) served in the instant action..

6. Upon my arrival, I was met by Mr. Lionel Lucchesi, counsel for Muchisky.

7. Mr. Lucchesi escorted me to a conference room and provided me with seven legal files, or "red ropes."

8. Based upon my work in Civil Action No. 4:03CV01058 HEA, I believe that all of the documents produced were the same produced in Civil Action No. 4:03CV01058 HEA.

9. I carefully went through each of the seven files, and all of the documents were Bates labeled with the same numbers as the documents produced in Civil Action No. 4:03CV01058 HEA.

10. Substantially all of the documents made available for inspection related to products other than the "cone-shaped" attachment at issue in this proceeding.

FURTHER THE AFFIANT SAYETH NOT.



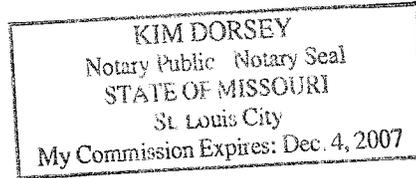
Brandy B. Barth  
Attorney at Law  
Lewis, Rice & Fingersh, L.C.

STATE OF MISSOURI    )  
                                  )    SS.  
CITY OF ST. LOUIS    )

Subscribed and sworn to before me this 13th day of October, 2006.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: 12-4-07



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

SYBARITIC, INC.,	)	
	)	
Opposer,	)	Opposition No.: 91163999
	)	Serial No. 78/282,661
vs.	)	
	)	
THOMAS P. MUCHISKY,	)	
	)	
Applicant.	)	

**MEMORANDUM IN SUPPORT OF OPPOSER’S  
MOTION TO COMPEL**

**I. INTRODUCTION**

Applicant, Thomas P. Muchisky (Muchisky”), has failed to comply with the August 16, 2006 Order of this Board to supplement (i.e., to provide substantive responses) to Opposer Sybaritic, Inc.’s (“Sybaritic”) discovery requests by September 15, 2006. Such failure is in blatant disregard of this Board’s Order granting Sybaritic’s Rule 56(f) Motion and unequivocally requiring Muchisky to provide supplemental responses to Sybaritic’s discovery requests. Therefore, Sybaritic requests that the Board impose its full range of sanctions for Muchisky’s refusal to comply, including denial of the registration of Muchisky’s Application, Serial No. 78/282,661.

On October 24, 2005, Sybaritic served written discovery on Muchisky, including Requests for Admissions, Interrogatories, and Requests for Production of Documents and Things. True and accurate copies are attached to Opposer’s Motion to Compel at Exs. 1-3. On November 28, 2005, Muchisky served his objections and responses to Sybaritic’s written discovery, but did not produce any documents in response to Sybaritic’s proffered discovery. On

December 16, 2005, Muchisky filed a Motion for Summary Judgment. In response, Sybaritic filed Opposer's Motion and Memorandum Seeking Additional Time Pursuant to Federal Rule 56(f) to Conduct Discovery and to Respond to Applicant's Motion for Summary Judgment. On or about August 16, 2006, the Board granted Sybaritic's Motion as to the discovery already propounded by Sybaritic and ordered Muchisky to "serve supplemental responses to opposer's first set of interrogatories, opposer's first set of documents requests and opposer's requests for admissions within THIRTY (30) DAYS from the mailing date of this order." The Board also imposed its standard protective order in light of Muchisky's previously filed objections.

Muchisky has failed to comply with the Board's Order and has not provided any supplemental responses to Sybaritic's interrogatories and requests for admissions. Further, the documents that have been made available to Sybaritic in response to its requests for documents are not responsive to Sybaritic's specific requests, in fact, nearly all pertain to matters other than the claimed mark at issue in this Opposition.

## **II. MUCHISKY'S FAILURE TO PRODUCE DOCUMENTS**

The Requests for Production of Documents that were the subject of Opposer's Rule 56(f) Motion to Conduct Discovery, that Muchisky was ordered to supplement, and that are now the subject of this Motion are as follows:

1. Documents referring or relating to Muchisky's or another's creation, consideration, selection, adoption, and/or first use of an alternative design identified in responses to Interrogatory Nos.: 3 and 6 to the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 (Req. No. 3);
2. Documents referring or relating to marketing studies, focus group studies, polls or survey conducted by or caused to be conducted or obtained for Muchisky that relate the selection, adoption, and/or acquisition of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 (Req. No. 4);

3. Documents referring or relating to the marketing, distribution, sale, advertising, or promotion by Muchisky of an applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 (Req. No. 5);
4. Documents referring or relating to any person, owner or any other entity having or having had any right to use the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661, including by not limited to licensing agreements, thought or under which Muchisky claims any rights in such alleged mark (Req. No. 6);
5. Documents summarizing or memorializing Muchisky's sale of applicators having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282, commencing with the date of first use of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 (Req. No. 8);
6. Documents that support Muchisky's statements set forth in Muchisky's Answer to Amended Notice of Opposition (Req. No. 10);
7. Documents that discuss materials of construction of the applicator having the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 (Req. No. 11) ;
8. Documents that discuss a cone shape as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 (Req. No. 12);
9. Documents that discuss a rounded tip as a portion of the configuration of the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661 (Req. No. 13);
10. Documents referring to or relating to a third party's use of an applicator designed to perform the same functions as stated in response to Interrogatory No. 5 that does not have a configuration the same as or similar to the applicator for a hand-held massager as illustrated as the design mark in U.S. Trademark Serial No. 78/282,661, whether the use of controlled by a license agreement or is not controlled by a license agreement (Req. No. 15).

These document requests are specifically related to the "cone-shaped" applicator for a hand-held massager (the subject of this Opposition), and the production of documents responsive to these requests is necessary for Opposer to respond to the Motion for Summary Judgment filed by Applicant.

In response to Sybaritic's document requests and the Board's Order requiring Muchisky to provide supplemental responses, Muchisky merely made available for inspection the same documents that were previously produced to Sybaritic in a separate federal case, Civil Action No. 4:03CV01058 HEA, currently pending in the United States District Court for the Eastern District of Missouri, Eastern Division, styled General Physiotherapy, Inc., Plaintiff, v. Sybaritic, Inc., Symbex, LLC, and Steven J. Daffer, Defendants/Counterclaim-Plaintiffs, v. General Physiotherapy, Inc. and Thomas P. Muchisky, Counterclaim-Defendants. See Affidavit of Brandy Barth ("Barth Aff."), ¶¶ 8-10. The "cone-shaped" applicator at issue in this Opposition is not the subject of that separate federal lawsuit. As a result, only a few, at most, of the documents made available for inspection pertain to the subject matter of the instant Opposition. Instead, Muchisky blatantly disregarded this Board's Order by producing irrelevant documents previously disclosed in the above-referenced federal lawsuit. Barth Aff. ¶ 10.

Therefore, Sybaritic requests that the Board order Muchisky to comply immediately and/or impose the full range of sanctions available to the Board under TBMP Rule 411.04 as a sanction for Muchisky's misconduct.

### **III. MUCHISKY'S FAILURE TO PROVIDE SUPPLEMENTAL RESPONSES TO SYBARITIC'S REQUEST FOR ADMISSIONS AND FIRST SET OF INTERROGATORIES**

In Sybaritic's Rule 56(f) Motion, which was granted by this Board, Sybaritic sought to compel responses to Requests for Admission Nos. 6 - 9 and Interrogatory Nos. 1 - 4, 10, 15 - 18 and 23, in order to respond to the pending summary judgment motion. On August 16, 2006, the Board granted Sybaritic's Rule 56(f) Motion. In that Order, the Board required Muchisky to "serve supplemental responses to opposer's first set of interrogatories, opposer's first set of document requests, and opposer's requests for admissions within THIRTY (30) DAYS from the mailing date of this order."

To date, Muchisky has failed or refused to comply with the Board's Order by failing to serve **any** supplemental responses to Sybaritic's First Set of Interrogatories and First Requests for Admissions. Counsel for Sybaritic has conferred with Muchisky's counsel regarding the failure to provide any supplemental response to Sybaritic's First Set of Interrogatories and First Requests for Admissions by letters dated October 10, 2006 and October 11, 2006, and by telephone conference on October 10, 2006. Even though the Board's Order clearly imposed its standard protective order over all of the discovery requests and ordered supplemental responses to all the discovery requests, Muchisky's counsel claims the protective order only covers document requests, and thus refuses to provide supplemental responses to the interrogatories or requests for admissions. It is an incredulous position to take that the Board's Order did not cover all of Sybaritic's discovery requests. The footnote providing for the protective order directly followed the Board's statement that Muchisky was to serve supplemental responses to Sybaritic's first set of interrogatories, first set of requests for production and requests for admissions. The Board did not make any distinction between the three types of discovery requests. There simply is no plausible argument that the protective order only applied to Sybaritic's requests for production of documents.

Therefore, due to Muchisky's failure to comply with the Board's August 16, 2006 Order, Sybaritic requests the Board compel Muchisky to provide answers and responses, including, but not limited to, Interrogatory Nos. 1, 2, 3, 4, 10, 15, 16, 17, 18, 23 and Requests for Admissions Nos. 6, 7, 8, and 9. True and accurate copies of Sybaritic's First Set of Interrogatories and Requests for Admissions are attached to Opposer's Motion to Compel at Exs. 1 and 3.

Furthermore, based upon Muchisky's complete failure to provide supplemental answers in spite of the Board's clear Order, Sybaritic also requests the Board deem all requests not

answered as admitted and/or deny the Muchisky's Application, Serial No. 78/282,661 pursuant to TBMP 411.04.

#### **IV. CONCLUSION**

The discovery requests that are the subject of this Motion were due on September 15, 2006. Muchisky has yet to produce any relevant documents in response to Sybaritic's requests for documents and instead made available for inspection irrelevant documents already in Sybaritic's possession that are unrelated to the subject matter at issue in this opposition. Further, Muchisky failed completely to supplement his answers to Sybaritic's First Set of Interrogatories and Requests for Admissions in spite of the Board's Order compelling such responses. Defendants therefore request that this Court order immediate production of all responsive documents and answers to interrogatories and requests for admissions, award attorneys' fees and costs, and grant such other relief as this Court deems just and proper.

Respectfully submitted,

**LEWIS, RICE & FINGERSH, L.C.**

By: 

Frank B. Janoski

Bridget Hoy

500 North Broadway, Suite 2000

St. Louis, Missouri 63102-2147

Telephone: (314) 444-7600

Facsimile: (314) 241-6056

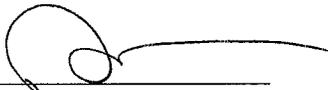
E-mail: [bhoy@lewisrice.com](mailto:bhoy@lewisrice.com)

Attorneys for Opposer Sybaritic, Inc.,

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **OPPOSER'S MOTION TO COMPEL AND MEMORANDUM IN SUPPORT** was served, via U.S. Postal Service, first class postage prepaid, this 13th day of October, 2006, upon the following:

Lionel L. Lucchesi  
Polster, Lieder, Woodruff & Lucchesi, L.C.  
12412 Powerscourt Drive, Suite 200  
St. Louis, Missouri 63131



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

SYBARITIC, INC.,	)	
	)	
Opposer,	)	Opposition No.: 91163999
	)	Serial No. 78/282,661
vs.	)	
	)	
THOMAS P. MUCHISKY,	)	
	)	
Applicant.	)	

**OPPOSER’S MOTION TO COMPEL**

COMES NOW Opposer Sybaritic, Inc. (“Sybaritic”), by and through its undersigned attorneys, and hereby files this Motion to Compel production of documents and answers to interrogatories and admissions from Applicant Thomas P. Muchisky (“Muchisky”). In support of its Motion, Sybaritic states as follows:

1. On October 24, 2005, Sybaritic served written discovery on Muchisky, including Requests for Admissions, Requests for Production of Documents and Things and its First Set of Interrogatories. True and accurate copies of the written discovery propounded on Muchisky are attached hereto at Exs. 1-3.
2. On November 28, 2005, Muchisky served his objections and responses to Sybaritic’s written discovery, but did not produce any documents in response to Sybaritic’s proffered discovery.
3. On December 16, 2005, Muchisky filed a Motion for Summary Judgment.
4. On or about January 20, 2006, Sybaritic filed Opposer’s Motion and Memorandum Seeking Additional Time Pursuant to Federal Rule 56(f) to Conduct Discovery

and to Respond to Applicant's Motion for Summary Judgment ("Sybaritic's Rule 56(f) Motion").

5. In Sybaritic's Rule 56(f) Motion, Sybaritic requested additional time to compel responses to its outstanding discovery requests from Muchisky in order to file a proper response to Muchisky's Motion for Summary Judgment. Specifically, Sybaritic identified the following discovery requests as relevant to the issues raised in Muchisky's summary judgment motion: Request for Production Nos. 3 – 6, 8, 10 – 13, and 15; Request for Admission Nos. 6 – 9, and Interrogatory Nos. 1 – 4, 10, 15 – 18, and 23.

6. On or about August 16, 2006, the Board granted Sybaritic's Rule 56(f) Motion and ordered Muchisky to "serve supplemental responses to opposer's first set of interrogatories, opposer's first set of document requests, and opposer's requests for admissions within **THIRTY (30) DAYS** from the mailing date of this order." (Hereinafter, the "Board's Order," a true and accurate copy of which is attached hereto as Ex. 4.).

7. In a footnote attached to the above quoted section of the Board's Order, the Board further provided that "**the Board is hereby imposing its standard protective order.** The protective order is now in force and applicant's supplemental responses shall be served in compliance therewith."

8. The Board's Order made no distinction among or between the three sets of discovery requests, and instead imposed the order of protection as to "these discovery requests."

9. To date, Muchisky has failed or refused to provide Sybaritic with any supplemental responses to Sybaritic's interrogatories and requests for admissions, even though the Board's Order clearly ordered Muchisky to do so.

10. On or about September 15, 2006, Muchisky served his Supplemental Responses to Sybaritic, Inc.'s First Set of Request for Production of Document and Things (Nos. 1-19) ("Supplemental Responses"). A true and accurate copy of the Supplemental Response is attached hereto at Ex. 5.

11. Muchisky's Supplemental Responses to each and every request made by Sybaritic read: "There are over 5,000 pages of documents that are available for inspection and copying at the law firm of Polster, Lieder, Woodruff & Lucchesi, 12412 Powerscourt Drive, Suite 200, St. Louis, Missouri 63131. Please advise counsel of available dates to view these documents subject to the protective order in this matter."

12. By letter dated October 10, 2006, counsel for Sybaritic arranged to meet and confer with counsel for Muchisky regarding Muchisky's failure to serve supplemental responses in accordance with the Board's order of August 16, 2006, and to arrange for inspection of the 5,000 documents referenced in Muchisky's Supplemental Responses. A true and accurate copy of the letter dated October 10, 2006 is attached hereto as Ex. 6.

13. During a telephone conference between counsel on October 10, 2006, counsel for Muchisky agreed to make documents available for inspection and stated that no supplemental responses to Sybaritic's First Set of Interrogatories and First Requests for Admissions were forthcoming.

14. By letter dated October 11, 2006, counsel for Sybaritic confirmed that the documents referenced in Muchisky's Supplemental Responses would be made available for inspection Thursday, October 12, 2006. Based upon the earlier conversation, the letter also confirmed that no supplemental responses to Sybaritic's First Set of Interrogatories and First

Requests for Admissions were forthcoming. A true and accurate copy of the letter dated October 11, 2006 is attached hereto as Ex. 7.

15. By letter dated October 11, 2006, counsel for Muchisky stated that the Board's Order and reference to the protective order had dealt only with document production and did not require supplemental "responses with respect to the admissions and interrogatory requests." A true and accurate copy of the letter dated October 11, 2006 is attached hereto as Ex. 8.

16. In response, and in light of the Board's Order imposing its standard protective order covering all of the discovery requests and unequivocally requiring supplemental responses to Sybaritic's First Set of Interrogatories and First Requests for Admissions, counsel for Sybaritic sent a letter dated October 11, 2006 stating Sybaritic would proceed accordingly if no supplemental responses were forthcoming. A true and accurate copy of Sybaritic's letter dated October 11, 2006 is attached hereto as Ex. 9.

17. Counsel for Sybaritic appeared at Polster, Lieder, Woodruff & Lucchesi on October 12, 2006 to inspect the documents referenced by Muchisky in his Supplemental Responses. However, the only documents made available for inspection were the same documents previously disclosed to Sybaritic during discovery over the past two years in a federal lawsuit pending in the United States District Court for the Eastern District of Missouri, Eastern Division, Civil Action No. 4:03CV01058 HEA, styled General Physiotherapy, Inc., Plaintiff, v. Sybaritic, Inc., Symbex, LLC, and Steven J. Daffer, Defendants/Counterclaim-Plaintiffs, v. General Physiotherapy, Inc. and Thomas P. Muchisky, Counterclaim-Defendants. See Affidavit of Brandy B. Barth attached hereto as Ex. 10 ("Barth Aff."), ¶¶ 8-10. The large majority of the documents made available for inspection relate to products other than the "cone-shaped" attachment at issue in Muchisky's Application and are not responsive to the requests for

production. Barth Aff. ¶ 10. Because the documents had all been produced in unrelated litigation and were Bates stamped accordingly, counsel for Muchisky knew that nearly all of the documents were unresponsive and that such inspection would not fulfill Muchisky's obligations under this Board's Order. All of the document requests remain unfulfilled through this knowing production of unresponsive documents.

18. This disingenuous disclosure of documents by Muchisky was in contravention to this Board's Order and has left Sybaritic at a distinct disadvantage in preparing a response to Muchisky's Motion for Summary Judgment.

19. Further, Muchisky has served no supplemental responses to Sybaritic's First Set of Interrogatories and First Requests for Admissions even though the Board clearly ordered Muchisky to do so.

20. Pursuant to the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") Rule 411.02, this Board may deem any request for admission that Muchisky has failed to answer as admitted.

21. Pursuant to TBMP Rule 411.04, this Board may impose a variety of sanctions for Muchisky's manifest refusal to properly supplement his discovery responses as required by this Board's Order of August 16, 2006, including: striking all or part of Muchisky's pleadings; refusing to allow Muchisky to support or oppose designated claims or defenses; drawing adverse inferences against Muchisky; prohibiting Muchisky from introducing designated matters into evidence; and including **entering judgment against** Muchisky.

WHEREFORE Opposer Sybaritic, Inc. requests that this Board order all admissions Muchisky has failed to supplement as admitted, and impose the full range of sanctions available

to this Board, including denying Muchisky's Application, Serial No. 78/282,661, and grant such other relief as this Court deems just and proper.

Respectfully submitted,

**LEWIS, RICE & FINGERSH, L.C.**

By: 

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Attorneys for Opposer Sybaritic, Inc.

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