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

Proceeding	91176744
Party	Plaintiff DC Comics and Marvel Characters, Inc.
Correspondence Address	Jonathan D. Reichman Kenyon & Kenyon, LLP One Broadway New York, NY 10004 UNITED STATES
Submission	Motion to Compel Discovery
Filer's Name	Michelle C. Morris
Filer's e-mail	mmorris@kenyon.com
Signature	/Michelle C. Morris/
Date	07/03/2008
Attachments	Opposer's Motion to Compel_Opp_91176744.pdf ( 64 pages )(1155681 bytes )

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

DC COMICS and  
MARVEL CHARACTERS, INC.,

Opposers,

v.

MICHAEL CRAIG SILVER,

Applicant.

Opposition No. 91/176,744  
Application No. 78/823,155  
Mark: SUPER HERO

**OPPOSER'S MOTION TO COMPEL DISCOVERY**

Pursuant to TBMP §523 and 37 C.F.R. §2.120(e), Opposers DC Comics and Marvel Characters, Inc. (collectively, "Opposer") seek an order from the Trademark Trial and Appeal Board ("the Board") compelling Applicant Michael Craig Silver ("Applicant") to provide discovery as herein specified, pursuant to Rule 37 of the Federal Rules of Civil Procedure and as required by TBMP §523.02 and 37 CFR §2.120(e).

**BACKGROUND**

On May 5, 2008, Opposer served upon Applicant written discovery requests, including Opposer's First Request for Production of Documents to Applicant and Opposer's First Set of Interrogatories to Applicant (attached hereto as **Exhibits A** and **B**, respectively).

On June 6, 2008, Applicant served his written responses to Opposer's document requests and interrogatories (attached hereto as **Exhibits C** and **D**, respectively).

Applicant's responses are wholly deficient in that Applicant has failed to provide even a single document or shred of information. Instead, Applicant improperly objects to *each and every document request and interrogatory* on the ground of "Work Product Privilege," using the identical mantra in each objection.

On June 19, 2008, Opposer's counsel notified Applicant of his unsatisfactory responses in a detailed letter, outlining the categories of discoverable information and the inappropriate nature of Applicant's repeated "Work Product Privilege" objection. A copy of Opposer's letter (sent by Federal Express) is attached hereto as **Exhibit E**.

In this letter, Opposer's counsel requested that Applicant withdraw the improper objections, and provide responsive documents and information by no later than June 26, 2008. Opposer's counsel further stated that Opposer wished to cooperatively resolve the issue, proposing that the parties meet and confer by phone on June 23, 2008 in accordance with 37 CFR § 2.120(e), to discuss the outstanding discovery matters. Opposer's letter additionally stated that absent Applicant's compliance with its requests, Opposer would be forced to file a motion to compel responses.

Opposer's counsel also sent an email to Applicant on June 19, 2008, enclosing the June 19 letter and requesting that Applicant contact Opposer's counsel "to discuss the outstanding discovery issues as soon as possible." A copy of this email is attached hereto as **Exhibit F**.

Applicant failed to respond to either Opposer's letter or email. Therefore, on July 1, 2008, Opposer's counsel placed a phone call to Applicant, in a final effort to seek Applicant's cooperation. Opposer's counsel left a voice message for Applicant after being forwarded to a voice message greeting for "Michael Silver." In the message, Opposer's counsel referenced Opposition No. 91/176,744 and Opposer's June 19, 2008 letter; stated that Opposer's testimony

period was rapidly approaching; and requested Applicant's immediate response regarding the outstanding discovery issues.

In the voice message, Opposer's counsel also reminded Applicant that Opposer would be forced to file a motion to compel, absent contact and cooperation from Applicant. Opposer's counsel again provided its contact information. However, Opposer's counsel has received no response from Applicant to this voice message.

Hence, despite Opposer's multiple attempts at resolution, and its open invitations for Applicant to discuss the matter, Applicant has completely failed to cooperate, and neglected to contact or respond to Opposer in any manner.

Applicant thus apparently has no interest in resolving this discovery dispute, leaving Opposer with no option but to seek Board intervention.

## **ARGUMENT**

### **Applicant Has Failed to Provide Any Documents or Information in Response to Opposer's Discovery Requests**

Pursuant to Rules 33(b)(2) and 34(b)(2)(A) of the Federal Rules of Civil Procedure and 37 CFR §2.120(a), the party upon whom interrogatories and document requests have been served shall furnish its responses within 30 days. Failure to comply with these rules is actionable, and compliance may be ordered by the Board. *See* TBMP §523.01 and 37 CFR §2.120(e).

Nearly two months have passed since Opposer served its interrogatories and document requests upon Applicant. Opposer's requests were very standard in nature, and sought information highly relevant to the likelihood of confusion and dilution analyses which are central to this proceeding. The requests sought, *inter alia*, the following categories of discoverable information:

- Identification of the products sold or intended to be sold under the subject mark
- Samples of the products or prototypes
- Marketing/promotional materials
- Identification of persons involved with marketing/promotion
- Information related to knowledge of Opposer's mark
- Documents related to the selection and adoption of the subject mark
- Documents related to the classes of customers/intended classes of customers
- Documents related to trade channels
- Information related to controversies/contractual agreements/licensing agreements concerning the subject mark
- Annual sales/advertising figures
- Attendance at trade shows

Applicant improperly objected to nearly all of Opposer's standard document requests, based on "Work Product Privilege." Applicant repeated the following nonsensical mantra in response to Document Request Nos. 1-30 and 35:

- "a. The nature of the privilege: Work Product
- b. The place, approximate date, and manner of recordation or preparation of the document: San Francisco, CA., 2/24/06, Hand written notes
- c. The name and title of sender and the name and title of each recipient of the document: Michael Silver, Applicant and Michael Silver, Applicant.
- d. The name of each person or persons (other than stenographic or clerical assistants) who participated in the preparation of the document: Michael Silver
- f. The number of the request herein to which the document is responsive: 0
- g. A brief general description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying the information requested in subsections (2) through (7).: SUPERHERO Trademark Application."

Curiously, in response to Opposer's Document Request Nos. 31-34, Applicant, without lodging any objections, expressly stated that "no documents exist," or otherwise clearly indicted that Applicant did not possess any responsive documents. It therefore follows that Applicant must possess documents responsive to Document Request Nos. 1-30 and 35, which are being improperly withheld from Opposer.

Moreover, in response to *each* of Opposer's interrogatory requests, Applicant again improperly asserted a similar objection based on "Work Product Privilege," repeating a similar nonsensical mantra, which reads as follows:

“Excludable or Privileged Information  
Basis or Grounds: Fed R. Civ. P. 26(b)(5) and Work Product Privilege  
Name and Address of Author: Michael Silver  
Subject Matter: SUPERHERO Trademark Application  
Recipient of original or copy of information: Michael Silver  
Name and Address of person who now has the original or copy of files: Michael Silver, 3229  
Steiner Street, San Francisco, CA 94123  
Identification and location of files: 3229 Steiner Street, San Francisco, CA 94123”

Despite Opposer’s June 19, 2008 letter— in which Opposer carefully detailed the categories of responsive material which it sought, and which have been previously held discoverable— Applicant has still failed to provide any information or documents. Moreover, Applicant has neglected to even so much as contact Opposer to discuss the matter.

**Opposer Has Made a Good Faith Effort to Resolve the Discovery Dispute Herein**

Opposer has made a good faith effort to attempt to resolve this discovery dispute without Board involvement, as required by TBMP §523.02 and 37 CFR §2.120(e). As stated above, and discussed in the Declaration of Michelle C. Morris attached hereto as **Exhibit G**, Opposer sent a detailed letter to Applicant on June 19, 2008, outlining Applicant’s discovery deficiencies; suggesting a date and time at which the parties could meet and confer to discuss the issues; and providing a new deadline for Applicant’s production of responses (*this new deadline, June 26, 2008, has since passed*).

Moreover, on July 1, 2008, Opposer’s counsel left a voice message for Applicant, again requesting that he contact Opposer’s counsel immediately to discuss the outstanding discovery issues. Despite sending this letter (via Federal Express) and a confirmatory email enclosing the letter as an attachment, and despite Opposer’s follow-up voice message, Applicant has failed to respond to or communicate with Opposer in any manner. Applicant has therefore left Opposer with no alternative but to seek relief from the Board.

**Absent Board Order Compelling Responses, Opposer will be Severely Prejudiced**

As a result of Applicant's refusal to respond to Opposer's discovery requests in any meaningful way, Opposer has been deprived of important and relevant information necessary to properly prepare its case. Applicant has prevented this proceeding from moving forward, and Opposer will be prejudiced by Applicant's non-disclosure, unless the Board compels Applicant to remove his improper objections and serve full and complete responses.

Accordingly, Opposer asks the Board to order Applicant to withdraw his objections and respond fully to each of Opposer's document requests and interrogatories, which are attached hereto as **Exhibits A and B**, respectively.

**CONCLUSION**

For the reasons hereinabove set forth, Opposer respectfully requests that the Board grant Opposer's Motion to Compel Discovery, and require Applicant to produce, without objection, the requested documents and things as well as proper written responses to Opposer's interrogatories and document requests. Opposer further requests that judgment be entered against Applicant denying registration of Application Serial No. 78/823,155, in the event that Applicant fails to fully comply with the Board's Order herein.

Dated: July 3, 2008

KENYON & KENYON LLP  
By: Michelle C. Morris  
Jonathan D. Reichman  
Michelle C. Morris  
One Broadway  
New York, New York 10004  
(212) 425-7200  
*Attorneys for Opposer*

**PROOF OF SERVICE**

I hereby certify that true and complete copies of OPPOSER'S MOTION TO COMPEL DISCOVERY and its exhibits have been served by mailing said copy on July 3, 2008, via first class mail, to:

Michael Craig Silver  
3229 Steiner Street  
San Francisco, California 94123

  
Michelle C. Morris  
Michelle C. Morris

# **EXHIBIT A**

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

Applicant: Michael Craig Silver  
Application Ser. No.: 78/823,155  
Filing Date: 2/24/06  
Mark: SUPER HERO  
Date of Publication in OG: 1/16/07  
Opposer: DC Comics and Marvel Characters, Inc.

DC COMICS and  
MARVEL CHARACTERS, INC.,

Opposer,

vs.

MICHAEL CRAIG SILVER,

Applicant.

Opposition No. 91/176,744

**OPPOSER'S FIRST REQUEST FOR  
PRODUCTION OF DOCUMENTS TO APPLICANT**

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rule 34 of the Federal Rules of Civil Procedure, Opposers DC Comics and Marvel Characters, Inc. (collectively, "Opposer") request that Applicant Michael Craig Silver ("Applicant") produce for inspection and copying at the Offices of Kenyon & Kenyon LLP, One Broadway, New York, New York

10004, or such other location as shall be mutually agreed upon by counsel for the parties, within thirty (30) days of service hereof, the documents and things identified below.

### **DEFINITIONS**

For the purposes of these requests, the definitions set forth in Opposer's concurrently served "Opposer's First Set of Interrogatories to Applicant" are hereby incorporated by reference as if fully set forth herein, except as changed herein. Reference to a particular interrogatory herein refers to the corresponding interrogatory from "Opposer's First Set of Interrogatories to Applicant."

### **INSTRUCTIONS**

All documents shall be segregated and identified by the number of the request to which they are primarily responsive.

For each document requested herein which is sought to be withheld by Applicant under a claim of privilege or other objection, provide the following information:

1. the nature of the privilege, e.g., work product, which is being claimed;
2. the place, approximate date, and manner of recordation or preparation of the document;
3. the name and title of the sender and the name and title of each recipient of the document;
4. the name of each person or persons (other than stenographic or clerical assistants) who participated in the preparation of the document;
5. the name and corporate position, if any, of each person to whom the contents of the document have heretofore been disclosed or communicated by copy, exhibition, reading, or substantial summarization;
6. the number of the request herein to which the document is responsive;

7. a brief general description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying the information requested in subsections (2) through (7).

### **DOCUMENTS REQUESTED**

1. All documents identified by Applicant in response to "Opposer's First Set of Interrogatories to Applicant" which are not otherwise covered by these requests.
2. All documents concerning any topic of inquiry contained in "Opposer's First Set of Interrogatories to Applicant."
3. All documents concerning Applicant's conception of, adoption of, or decision to use SUPER HERO.
4. Documents sufficient to show Applicant's use or intended use of SUPER HERO in connection with any Products or Services sold or offered for sale or distributed by Applicant, or intended to be sold or offered for sale or distributed by Applicant.
5. Representative samples of each Product or Service ever sold or offered for sale, or distributed by Applicant, or intended to be sold or offered for sale or distributed by Applicant, in connection with SUPER HERO, as well as any and all accompanying product packaging, labels, tags, product literature and/or instruction manuals.
6. Representative samples of purchase orders, invoices, communications, and/or any other documents or materials related to any of Applicant's Products or Services sold, offered for sale, rendered, or distributed in connection with SUPER HERO for each year since the date of first use.

7. Representative samples sufficient to illustrate Applicant's present, past and/or intended use of SUPER HERO on letterhead, signs, websites, invoices, labels, tags, and product packaging.
8. All documents concerning Applicant's licensing policy with regard to SUPER HERO.
9. All documents concerning any assignment of SUPER HERO.
10. All documents concerning any license or other agreement regarding SUPER HERO.
11. All documents concerning any negotiations for licenses or other agreements regarding SUPER HERO.
12. All documents concerning any effort to exploit or commercialize any Product or Service under SUPER HERO.
13. All documents concerning any application for registration, registration, or attempted registration by Applicant for SUPER HERO for any Product or Service:
  - (a) in the United States Patent and Trademark Office (other than the subject application); and
  - (b) in any state or states of the United States.
14. Documents sufficient to show total sales, by year, in terms of revenue, gross profits, and net profits, regardless of whether such sales were made directly by Applicant, a licensee of Applicant, or other third party, by volume and dollar amount, for each Product or Service sold, or offered for sale, under SUPER HERO.
15. All documents concerning any civil action, or proceeding in the United States Patent and Trademark Office (other than this Opposition), filed by or against Applicant, concerning SUPER HERO, including without limitation:
  - (a) Copies of all pleadings and documents submitted in support or in defense

of any such action or proceeding; and

- (b) Copies of any settlement agreement, coexistence agreement, final judgment, or consent decree.

16. Representative samples of advertisements, promotional items, marketing materials, letters, posters, brochures, leaflets, or flyers printed, disseminated, or commissioned by Applicant in which SUPER HERO has appeared.

17. Copies of each television commercial, video presentation, or radio script prepared or commissioned by Applicant, regardless of whether the television commercial, video presentation, or radio script was actually released, aired or used, in which SUPER HERO has ever appeared, currently appears, or will appear.

18. Documents sufficient to show Applicant's actual or planned annual expenditures on efforts to advertise, market, or otherwise promote, through any form of media, including but not limited to print, television, radio, trade shows and the Internet, any of its Products or Services sold or offered for sale under SUPER HERO.

19. All documents concerning the channels of trade utilized, or planned to be utilized, by Applicant, including but not limited to the Internet, retail establishments, buying agents, individuals, or corporations, in selling or offering for sale Applicant's Products and Services under SUPER HERO.

20. All documents concerning any actual or planned participation or appearance by Applicant, or any licensee of Applicant, at trade shows, conventions, seminars, or any event open to the public, where Products and Services sold or offered for sale under SUPER HERO were or are planned to be displayed, including but not limited to photographs of each exhibit, booth, table, and the like, and samples of all flyers, advertisements, mailers, and any other

promotional materials, whether distributed or not, created by or for Applicant for use at said trade shows, conventions, seminars, or events open to the public.

21. All documents concerning any investigation, market study, survey, including pre-tests, or poll conducted by Applicant, or by any person or persons acting for or on behalf of Applicant, concerning any matter relating to the instant proceeding.

22. All documents concerning any investigation of the marketplace conducted by or for Applicant with respect to SUPER HERO or Opposer's Marks.

23. All documents concerning any surveys, consumer research, marketing studies, consumer recognition studies and/or consumer opinion polls conducted by or on behalf of Applicant in connection with SUPER HERO or Opposer's Marks.

24. All reports, memoranda, notes, correspondence, communications, or other documents relating to, bearing upon, commenting on, concerning, or discussing the retention or possible retention of expert witnesses for use by Applicant in connection with this Opposition.

25. All reports, memoranda, notes, correspondence, communications, or other documents concerning the opinion of any experts consulted or retained by Applicant, or by any person or persons acting for or on Applicant's behalf, in connection with this Opposition.

26. All documents concerning Applicant's knowledge of Opposer and/or Opposer's use of Opposer's Marks.

27. All documents concerning the first time Applicant obtained knowledge or information concerning Opposer's Marks.

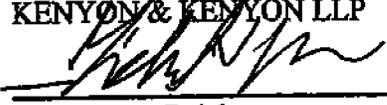
28. All documents, communications, or inquiries received by Applicant from any third party regarding questions or confusion as to the existence of an affiliation or connection of any kind between Applicant and Opposer.

29. All documents concerning any inquiry or unsolicited comments by any member of the media or the public, whether by publication, letter, telephone, email, or any other form, regarding SUPER HERO.
30. All documents concerning any inquiry or unsolicited comments by any member of the media or the public, whether by publication, letter, telephone, email, or any other form, regarding Opposer's Marks.
31. All documents concerning any instances of actual confusion as to the existence of an affiliation, connection, partnership or relationship between Applicant and Opposer.
32. All documents concerning any warning, complaint, or objection by Applicant, or by any person acting for or on behalf of Applicant, to any use, application for registration, or registration, by any third party, of any mark claimed by Applicant to be confusingly similar to SUPER HERO.
33. Copies of any and all statements or opinions of any person, other than an attorney rendering legal advice to Applicant, regarding this Opposition.
34. All search reports, including without limitation trademark clearance search reports, or other investigation materials regarding any search or investigation conducted by or on behalf of Applicant concerning SUPER HERO, Opposer's Marks, or any marks or names similar thereto.
35. All documents embodying, explaining, or discussing Applicant's document retention policy associated with SUPER HERO.

Dated: May 5, 2008

KENYON & KENYON LLP

By:

  
Jonathan D. Reichman

Michael J. Freno

One Broadway

New York, New York 10004

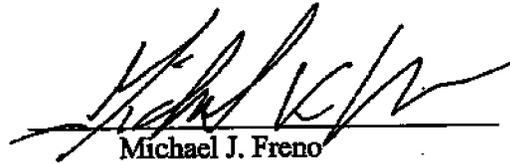
(212) 425-7200

*Attorneys for Opposer*

**PROOF OF SERVICE**

I hereby certify that a true and complete copy of OPPOSER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO APPLICANT has been served on May 5, 2008 by mailing said copy via first-class mail and by overnight delivery by commercial courier to:

Michael Craig Silver  
3229 Steiner Street  
San Francisco, California 94123  
530.320.6488



Michael J. Freno

# **EXHIBIT B**

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

Applicant: Michael Craig Silver  
Application Ser. No.: 78/823,155  
Filing Date: 2/24/06  
Mark: SUPER HERO  
Date of Publication in OG: 1/16/07  
Opposer: DC Comics and Marvel Characters, Inc.

DC COMICS and  
MARVEL CHARACTERS, INC.,

Opposer,

vs.

MICHAEL CRAIG SILVER,

Applicant.

Opposition No. 91/176,744

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

Pursuant to Rule 2.120(d)(1) of the Trademark Rules of Practice and Rule 33 of the Federal Rules of Civil Procedure, Opposers DC Comics and Marvel Characters, Inc. (collectively "Opposer") request that Applicant Michael Craig Silver ("Applicant") answer the following interrogatories fully and separately in writing and under oath within thirty (30) days of service hereof.

## **DEFINITIONS**

As used herein:

1. The term "Applicant" collectively refers to Michael Craig Silver, his licensees or licensors, and any other person or entity in privity with him, including, but not limited to, that entity's affiliates, partnerships, predecessor, parent, subsidiary, licensor, licensee, officer, director, partner, or attorney. In any instance where an interrogatory answer differs as between Applicant and any entity's predecessors, parents, subsidiaries, licensors, licensees, officers, directors, partners, attorneys, or other person or entity in privity with Applicant, or is applicable only to one of them, the answer shall so state, setting forth such difference and stating separately all information applicable to Applicant and all information applicable to any other party.
2. The term "Opposer" refers collectively to DC Comics and Marvel Characters, Inc.
3. The term SUPER HERO refers to Applicant's mark as embodied in Application Serial No. 78/823,155, which is the subject of Opposition No. 91/176,744 filed by Opposer, unless otherwise stated or unless obvious from the context of the interrogatory.
4. The term "Opposer's Marks" collectively refers to Opposer's trademarks as embodied in each of the registrations, applications and common law rights cited by Opposer in its Notice of Opposition filed against SUPER HERO on April 13, 2007, including without limitation U.S. Reg. No. 825,835 (SUPER HERO), Reg. No. 1,140,452 (SUPER HEROES), and Reg. No. 1,179,067 (SUPER HEROES), Appl. No. 78/946,654 (MY FIRST SUPER HERO).
5. The term "Notice of Opposition" refers to the Notice of Opposition filed by Opposer in connection with Opposition No. 91/176,744.

6. The term "Applicant's Products and Services," "Products," "Product," "Services," or "Service" means each or all products or services ever sold or offered for sale, rendered, or distributed, or intended to be sold or offered for sale, rendered, or distributed by or with the authorization of Applicant, in connection with SUPER HERO, as well as any written or printed materials, including advertisements and marketing materials, related thereto.

7. The term "sold," as used in these definitions and interrogatories, means products or services paid for, transferred, rendered, or provided free of charge.

8. The terms "communication," "writing," and "document" are used in their customary broad sense as described in Federal Rule of Civil Procedure 34 and include, but are not limited to, copies of orders, acknowledgements thereof, contracts, invoices, bills, receipts, checks, books, records, reports, financial statements, letters, telegrams, notes, memoranda, calculations, diaries, worksheets, drafts, advertisements, and other tangible things, including without limitation originals and copies, whether typed, handwritten, or on tape, computer disc, some other recording or in electronic format, from whatever source, and any material underlying, supporting, or used in the preparation of any of such document or documents.

9. The term "identify," when used in reference to a natural person, means to:

- (a) state his or her full name;
- (b) state his or her present or last-known address;
- (c) state his or her present or last-known employer or business affiliation; and
- (d) state his or her occupation and business position held and the length of time in such position.

10. The term "identify," when used in reference to a corporation, partnership, or other business entity, means to:

- (a) state its full name;
- (b) state its present or last-known principal place of business;
- (c) state the nature of its business;
- (d) in the case of a corporation, set forth its State of incorporation;
- (e) state the identities of persons having knowledge of the matter with respect to which the company is named; and
- (f) state the identity(ies) of the executive officer or officers of the company.

11. The term "identify," when used in reference to a document, means to:

- (a) state the date, author, recipient, and type of document (e.g., invoice, delivery receipt, etc.) or some other means of distinguishing the document;
- (b) state the identity of each person who prepared the document;
- (c) state the identity of each person who received the document;
- (d) state the present location of the document;
- (e) state the manner and dates of distribution and publication of the document, if any; and
- (f) state the identity of each person having possession, custody, or control of the document.

12. The phrase "describe in detail" means that Applicant is requested to state with specificity each and every fact, ultimate fact, particular circumstance, incident, act, omission, detail, event,

and date, and to identify each and every document, as herein defined, relating thereto or in any way whatsoever concerning the matters inquired of.

13. The singular form of a word shall be understood to include the plural, and vice versa.

14. The conjunctive shall be understood to include the disjunctive, and vice versa.

### **INSTRUCTIONS**

In answering each Interrogatory:

1. Identify each document or tangible thing and each oral communication which forms the basis, in whole or in part, for the answer given or which corroborates or negates the answer given or the substance of which is given, and either annex true copies of each such document or offer to make the same available for inspection and copying. The unexplained failure to annex a true copy of such document or to offer to make the same available for inspection and copying shall constitute a representation that such document does not exist.
2. In lieu of identifying a document or tangible thing, Applicant's production of a copy or photograph thereof or production of the document or thing for inspection and copying by Opposer's counsel (pursuant to the request for production) shall be deemed sufficient unless such further identification of each such document or thing is requested. The particular interrogatory to which the document is responsive must be designated for each document produced.
3. If a document which corroborates or negates an answer given, or the substance of which is given, is not in the possession of or available to Applicant, then supply a copy thereof, identified as required by Definition No. 11 above, within ten (10) days after such document comes into the possession of or becomes available to Applicant, or offer to make same available for inspection and copying.
4. If a document has been destroyed or is alleged to have been destroyed, then

state the date of and the reason for its destruction, and identify each person having knowledge of the document's destruction and each person responsible for the document's destruction.

5. State whether the information furnished is within the personal knowledge of the individual signing the interrogatory answers, and, if not, identify each person to whom the information is a matter of personal knowledge, if known.

6. With respect to each answer or document which Applicant contends is privileged or otherwise excludable from discovery, provide the information required by Fed. R. Civ. P. 26(b)(5) and, in addition, state the basis for the privilege or other grounds for exclusion, as well as the name and address of the author, the date of the privileged information, the general subject matter, the name and address of every recipient of the original or any copy of the document, the name and address of each person who now has the original or any copy, and the identification and location of the files where the original and each such copy are normally kept.

7. When producing any document or thing in partial or full response to any of the Interrogatories, reference the Interrogatory or Interrogatories to which the document or thing is responsive.

8. These interrogatories are continuing in character and with respect to any information hereinafter becoming known or any document hereinafter coming to the attention of Applicant, Applicant is requested to supply the same pursuant to the provisions of Federal Rule of Civil Procedure 26(e).

### **INTERROGATORIES**

1. Identify and describe each Product or Service.
2. For each Product or Service identified in response to Interrogatory No. 1, state:

- (a) the date SUPER HERO was first used anywhere and the date SUPER HERO was first used in interstate commerce;
- (b) the manner in which Applicant uses, or intends to use, SUPER HERO;
- (c) the period or periods (specifying dates) during which each such Product or Service was rendered, offered, sold, promoted, marketed or distributed by or under the authority of Applicant;
- (d) total sales, by year, in terms of units, revenue and profits, regardless of whether such sales were made directly by Applicant or under the authority of Applicant.

3. Identify the person most knowledgeable about Applicant's advertising and promotion of Products or Services for each year since SUPER HERO was first used, or about Applicant's intended advertising or promotion.

4. Identify the person most knowledgeable about Applicant's sales of Products or Services for each year since SUPER HERO was first used, or about Applicant's intended sales.

5. Identify the person most knowledgeable about the actual or intended manufacture, construction, formulation, design, development, or creation of each of Applicant's Products or Services.

6. Describe all channels of trade through which Applicant's Products or Services are, or are intended to be, distributed from Applicant on through to the ultimate purchasers or users of such Products or Services.

7. Describe the average consumer whom Applicant believes is most likely to be interested in purchasing his Products or Services, including the average income, age, and profession of such average consumer.

8. Identify each publication or type of publication in which any advertisement or promotion for Applicant's Products or Services has appeared or is planned to appear, including, but not limited to, newspapers, magazines, or Internet websites.
9. Identify each television station, radio station, or Internet website on which any advertisement for Applicant's Products or Services has been, is currently being, will be, or is planned to be, broadcast or exhibited.
10. Identify any use of SUPER HERO, or any marks similar thereto, by any third party.
11. State, by year, the total cost of advertising, marketing, or promoting Applicant's Products or Services through any and all forms of media, including, but not limited to, print, television, radio, trade shows, and the Internet.
12. State the retail and wholesale prices at which Applicant has sold, or plans to sell, each of its Products or Services.
13. Identify the retail stores, or types of retail stores, in which Applicant has sold, or plans to sell, each of its Products or Services.
14. Identify and describe the consumers (identified by gender, age group(s), education level(s), and socioeconomic status) to whom Applicant has sold, or plans to sell, each of its Products or Services.
15. Identify the person most knowledgeable about Applicant's conception and creation of SUPER HERO.
16. State when Applicant first became aware of any of Opposer's Marks.
17. Identify and describe the circumstances and resolution of any inquiry, question, comment, concern or belief expressed by any third party to Applicant, including but not limited to individuals, media, corporations or any governmental body or office, as to the origin

of any of Applicant's Products or Services, or any third party products or services including those of Opposer, which bear SUPER HERO or Opposer's Marks.

18. Identify and describe the circumstances and resolution of any complaint, protest, objection, or comment directed to Applicant by any third party relating to Applicant's Products or Services, or to Applicant's use of SUPER HERO.
19. State whether Applicant, or anyone acting on Applicant's behalf, has ever conducted any market study, survey, or opinion poll concerning SUPER HERO or Opposer's Marks.
20. Identify any disputes, including, but not limited to, lawsuits, oppositions, written objections, or threatened litigations, concerning the use, application, or registration of (a) SUPER HERO, or (b) any mark or name which Applicant claimed might violate his purported rights in SUPER HERO.
21. State whether Applicant, or anyone acting on Applicant's behalf, ever conducted an investigation, including but not limited to a trademark search, regarding the availability of SUPER HERO, and, if so, provide the particulars of same.
22. State whether Applicant has ever sought or received the opinion of an attorney regarding the trademark availability of SUPER HERO.
23. State whether Applicant, or anyone acting on Applicant's behalf, has ever entered into a license, assignment or other agreement regarding SUPER HERO and, if so, provide the particulars of same.
24. State whether Applicant, or anyone acting on Applicant's behalf, has ever entered into negotiations with a potential licensee or other third party regarding the exploitation of any Product or Service under SUPER HERO and, if so, provide the particulars of same.

25. State whether Applicant, or anyone acting on Applicant's behalf, has made any effort to exploit or commercialize any Product or Service under SUPER HERO and, if so, provide the particulars of same.

26. Describe why Applicant selected SUPER HERO as a trademark for his Products or Services.

27. Has Applicant taken any steps towards manufacturing, distributing, selling, and/or promoting any Products or Services under the SUPER HERO trademark? If so, please describe all such steps.

Dated: May 5, 2008

KENYON & KENYON LLP  
By:   
Jonathan D. Reichman  
Michael J. Freno  
One Broadway  
New York, New York 10004  
(212) 425-7200  
  
*Attorneys for Opposer*

**PROOF OF SERVICE**

I hereby certify that a true and complete copy of OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT has been served on May 5, 2008 by mailing said copy via first-class mail and by overnight delivery by commercial courier to:

Michael Craig Silver  
3229 Steiner Street  
San Francisco, California 94123  
530.320.6488

  
\_\_\_\_\_  
Michael J. Freno

# **EXHIBIT C**

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

In re Application of : Michael Craig Silver  
Serial No. : 78/823,155  
Filed : February 24, 2006  
For : SUPER HERO  
Published Official Gazette : 1/16/07  
Opposer : DC Comics and Marvel Characters, Inc.

-----X  
DC COMICS and :  
MARVEL CHARACTERS, INC. :  
 :  
Opposers, :  
 :  
vs. :  
 :  
MICHAEL CRAIG SILVER :  
 :  
Applicant, :  
-----X

Opposition # 91/176744

**APPLICANT'S RESPONSE TO OPPOSER'S FIRST REQUEST FOR  
PRODUCTION OF DOCUMENTS**

1.
  - a. The nature of the privilege: Work product
  - b. The place, approximate date, and manner of recordation or preparation of the document: San Francisco, CA., 2/24/06, Hand written notes
  - c. The name and title of sender and the name and title of each recipient of the document: Michael Silver, Applicant and Michael Silver, Applicant.
  - d. The name of each person or persons (other than stenographic or clerical assistants) who participated in the preparation of the document: Michael Silver
  - e. The name and corporate position, if any, of each person to whom the contents of the document have heretofore been disclosed or communicated by copy, exhibition, reading, or substantial summarization: Michael Silver
  - f. The number of the request herein to which the document is responsive: 0
  - g. A brief general description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying the information requested in subsections (2) through (7): SUPERHERO Trademark Application.

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- g. A brief general description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying the information requested in subsections (2) through (7): SUPERHERO Trademark Application.

15.

- a. The nature of the privilege or objection: Not applicable because no other civil action or proceeding exists.

16.

- a. The nature of the privilege: Work product
- b. The place, approximate date, and manner of recordation or preparation of the document: San Francisco, CA., 2/24/08
- c. The name and title of sender and the name and title of each recipient of the document: Michael Silver, Applicant and Michael Silver, Applicant.
- d. The name of each person or persons (other than stenographic or clerical assistants) who participated in the preparation of the document: Michael Silver
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- f. The number of the request herein to which the document is responsive: 0
- g. A brief general description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying

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21.

- a. The nature of the privilege: Work product
- h. The place, approximate date, and manner of recordation or preparation of the document: San Francisco, CA., 1/31/07, Hand written notes
- i. The name and title of sender and the name and title of each recipient of the document: Michael Silver, Applicant and Michael Silver, Applicant.
- j. The name of each person or persons (other than stenographic or clerical assistants) who participated in the preparation of the document: Michael Silver
- k. The name and corporate position, if any, of each person to whom the contents of the document have heretofore been disclosed or communicated by copy, exhibition, reading, or substantial summarization: Michael Silver
- l. The number of the request herein to which the document is responsive: 0
- m. A brief general description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying the information requested in subsections (2) through (7): SUPERHERO Trademark Application.

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- e. The name and corporate position, if any, of each person to whom the contents of the document have heretofore been disclosed or communicated by copy, exhibition, reading, or substantial summarization: Michael Silver
  - f. The number of the request herein to which the document is responsive: 0
  - g. A brief general description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying the information requested in subsections (2) through (7): SUPERHERO Trademark Application.
31. No documents exist as no instance of any actual confusion has occurred as to the existence of an affiliation, connection, partnership or relationship between Applicant and Opposer.
32. No documents exist as no instance has occurred of any warning, complaint, or objection by Applicant, or by any person acting for or on behalf of Applicant, to any use, application for registration, or registration, by any third party, of any mark claimed by applicant to be confusingly similar to SUPER HERO.
33. No copies of any statements or opinions of any person exist regarding this Opposition as no such statements or opinions have occurred.
34. No search reports on behalf of Applicant concerning SUPER HERO, Opposer's Marks, or any other marks or names similar thereto exist, as no such reports were done.
- 35.
- a. The nature of the privilege: Work product
  - b. The place, approximate date, and manner of recordation or preparation of the document: San Francisco, CA., 2/24/06, Hand written notes
  - c. The name and title of sender and the name and title of each recipient of the document: Michael Silver, Applicant and Michael Silver, Applicant.
  - d. The name of each person or persons (other than stenographic or clerical assistants) who participated in the preparation of the document: Michael Silver
  - e. The name and corporate position, if any, of each person to whom the contents of the document have heretofore been disclosed or communicated by copy, exhibition, reading, or substantial summarization: Michael Silver
  - f. The number of the request herein to which the document is responsive: 0
  - g. A brief general description of the subject matter of the contents of the document; and the identity and corporate position, if any, of the person or persons supplying the information requested in subsections (2) through (7): SUPERHERO Trademark Application.

Dated: June 6, 2008

By:   
Michael Silver  
3229 Steiner Street  
San Francisco, CA 94123  
(530) 320-6488

Applicant

**PROOF OF SERVICE**

I hereby certify that a true and complete copy of APPLICANT'S RESPONSE TO OPPOSER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS has been served by mailing said copy on June 6, 2008 via first class mail, to:

Kenyon & Kenyon LLP  
Jonathan D. Reichman  
One Broadway  
New York, New York 10004

  
Michael C. Silver

# **EXHIBIT D**



3. **Excludable or Privileged Information**  
Basis or Grounds: Fed. R. Civ. P. 26(b)(5) and Work Product Privilege  
Name and Address of Author: Michael Silver  
Date of Privileged Information: 2/24/06  
Subject Matter: SUPERHERO Trademark Application  
Recipient of original or copy of information: Michael Silver  
Name and Address of person who now has the original or copy of files: Michael Silver, 3229 Steiner Street, San Francisco, CA 94123  
Identification and location of files: 3229 Steiner Street, San Francisco, CA 94123
  
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Subject Matter: SUPERHERO Trademark Application  
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Identification and location of files: 3229 Steiner Street, San Francisco, CA 94123

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  - Name and Address of Author: Michael Silver
  - Date of Privileged Information: 2/24/06
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**Name and Address of Author:** Michael Silver  
**Date of Privileged Information:** 2/24/06  
**Subject Matter:** SUPERHERO Trademark Application  
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**Name and Address of person who now has the original or copy of files:** Michael Silver, 3229 Steiner Street, San Francisco, CA 94123  
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**16. Excludable or Privileged Information**

**Basis or Grounds:** Fed. R. Civ. P. 26(b)(5) and Work Product Privilege  
**Name and Address of Author:** Michael Silver  
**Date of Privileged Information:** 1/31/07  
**Subject Matter:** SUPERHERO Trademark Application  
**Recipient of original or copy of information:** Michael Silver  
**Name and Address of person who now has the original or copy of files:** Michael Silver, 3229 Steiner Street, San Francisco, CA 94123  
**Identification and location of files:** 3229 Steiner Street, San Francisco, CA 94123

**17. Excludable or Privileged Information**

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**Name and Address of Author:** Michael Silver  
**Date of Privileged Information:** 2/24/06  
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**Name and Address of person who now has the original or copy of files:** Michael Silver, 3229 Steiner Street, San Francisco, CA 94123  
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**Name and Address of Author:** Michael Silver  
**Date of Privileged Information:** 2/24/06  
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Date of Privileged Information: 2/24/06  
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Identification and location of files: 3229 Steiner Street, San Francisco, CA 94123

27. Excludable or Privileged Information

Basis or Grounds: Fed. R. Civ. P. 26(b)(5) and Work Product Privilege

Name and Address of Author: Michael Silver

Date of Privileged Information: 2/24/06

Subject Matter: SUPERHERO Trademark Application

Recipient of original or copy of information: Michael Silver

Name and Address of person who now has the original or copy of files: Michael Silver, 3229 Steiner Street, San Francisco, CA 94123

Identification and location of files: 3229 Steiner Street, San Francisco, CA 94123

Dated: June 6, 2008

By:

  
Michael Silver

3229 Steiner Street

San Francisco, CA 94123

(530) 320-6488

Applicant

**PROOF OF SERVICE**

I hereby certify that a true and complete copy of APPLICANT'S RESPONSE TO OPPOSER'S FIRST SET OF INTERROGATORIES has been served by mailing said copy on June 6, 2008, via first class mail, to:

Kenyon & Kenyon LLP  
Jonathan D. Reichman  
One Broadway  
New York, New York 10004

  
Michael C. Silver

# **EXHIBIT E**



Michelle Morris  
Direct 212.908.6141  
MMorris@kenyon.com

One Broadway  
New York, NY 10004-1007  
212.425.7200  
Fax 212.425.5288

June 19, 2008

**VIA EMAIL**

[silver\\_michael@sbcglobal.net](mailto:silver_michael@sbcglobal.net)

**AND FEDERAL EXPRESS**

Michael Craig Silver  
3229 Steiner Street  
San Francisco, California 94123

Re: DC Comics and Marvel Characters, Inc. v. Michael Craig Silver  
Applicant's Mark: SUPER HERO  
Trademark Opposition No.: 91/176,744  
Our Ref.: 45555/94601

---

Dear Mr. Silver:

We are in receipt of your responses to Opposer's written discovery requests, and have serious concerns about the adequacy and asserted objections therein.

To date, we have not received a single document from you, or a single legitimate response to the standard discovery requests which were served over a month and a half ago. You instead repeat the *identical* objection to each Interrogatory and Document Request, and improperly assert, "*Attorney Work Product Privilege*," as your ground for withholding the information. Opposer is entitled to the responsive information, and your repeated objections based on "*Attorney Work Product Privilege*," are without merit.

In addition, we have not received a privilege log as required by Federal Rule of Civil Procedure 26(b)(5) for those responses (if any) which contain a legitimate objection based on privilege. We therefore expect that a privilege log will be immediately provided, should you maintain any of your objections and withhold any documents or information based upon such privilege.

As you may be aware, Opposer's testimony period is set to begin in less than two weeks, on July 3, 2008. Therefore, your cooperation in expeditiously providing adequate responses to our properly and timely served discovery requests is imperative, and required under Rule 26 Federal Rules of Civil Procedure and the Trademark Rules of Practice § 2.120.



Case law clearly holds that the documents and information requested by Opposer is discoverable, and Section 414 of the TBMP outlines the categories of discoverable information, which include, without limitation, information related to:

- The selection and adoption of the subject mark
- Classes of customers/intended classes of customers
- Intended channels of trade
- Use and or intended use of the subject mark, including physical samples of the product
- Search reports on the subject mark
- Litigation, controversies and contractual agreements relating to the subject mark
- The manufacturing of the goods sold/intended to be sold
- Annual sales/advertising figures
- Marketing and promotion/intended marketing and promotion

We therefore expect that you will withdraw your improper objections and provide us with the responsive documents and information, or provide us with a privilege log detailing the documents and information being withheld, by no later than Thursday, June 26, 2008.

If you would like to further discuss any of the above, we would be happy to set up a time to meet and confer under rule 37 CFR § 2.120(e), and suggest Monday, June 23 at 3:00 P.M.

We look forward to working with you to resolve the outstanding discovery issues, but please be advised, if you do not provide adequate responses by the above deadline, we will be forced to seek Board intervention to compel such responses.

Very truly yours,

KENYON & KENYON LLP

By: Michelle C. Morris

cc: Jonathan D. Reichman, Esq.

# **EXHIBIT F**

**Morris, Michelle**

---

**From:** Morris, Michelle  
**Sent:** Thursday, June 19, 2008 1:20 PM  
**To:** silver\_michael@sbcglobal.net  
**Cc:** Reichman, Jonathan  
**Subject:** SUPER HERO Opposition 91176744, Ref 455555/94601, Outstanding Discovery  
**Attachments:** Discovery Letter-Silver\_Super Hero Opp.pdf

Dear Mr. Silver,

In regard to the above referenced Opposition proceeding, attached please find a letter sent via Federal Express to your attention today. Please review it and contact me to discuss the outstanding discovery issues as soon as possible.

Very truly yours,

Michelle C. Morris | Associate  
Kenyon & Kenyon LLP  
One Broadway | New York, NY 10004-1007  
212.908.6141 Phone | 212.425.5288 Fax  
mmorris@kenyon.com | [www.kenyon.com](http://www.kenyon.com)

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This message, including any attachments, may contain confidential, attorney-client privileged, attorney work product, or business confidential information, and is only for the use of the intended recipient(s). Any review, use or distribution by others is prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

6/30/2008

# **EXHIBIT G**

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

DC COMICS and  
MARVEL CHARACTERS, INC.,

Opposers,

v.

MICHAEL CRAIG SILVER,

Applicant.

Opposition No. 91/176,744  
Application No. 78/823,155  
Mark: SUPER HERO

**DECLARATION OF MICHELLE C. MORRIS IN SUPPORT OF OPPOSER'S  
MOTION TO COMPEL DISCOVERY**

I, Michelle C. Morris, hereby declare:

1. I am an associate at the law firm of Kenyon & Kenyon LLP, counsel for Opposers DC Comics and Marvel Characters, Inc. (collectively, "Opposer") in the above-referenced matter.
2. I make this statement in support of Opposer's Motion to Compel Discovery ("the Motion to Compel") as required by TBMP 523.02 and 37 CFR §2.120(e), to demonstrate to the Board that Opposer has attempted in good faith but without success to resolve with Applicant the issues presented in this motion.
3. On May 5, 2008, Opposer served upon Applicant written discovery requests, including Opposer's First Request for Production of Documents to Applicant and Opposers' First Set of Interrogatories to Applicant (attached to the Motion to Compel as **Exhibits A and B**, respectively).

4. On June 6, 2008, Applicant served his written responses upon Opposer. Applicant's responses are attached to the Motion to Compel as **Exhibits C and D**.
5. In his responses, Applicant improperly objected to *each and every* document request and interrogatory on the ground of "Work Product Privilege."
6. On June 19, 2008, I sent a letter (plus a confirmation email attaching the letter) to Applicant, outlining the unsatisfactory and inappropriate nature of his responses and objections.
7. My June 19 letter also addressed the categories of discoverable information to which Opposer was entitled. A copy of my letter is attached to the Motion to Compel as **Exhibit E**, and the corresponding email is attached as **Exhibit F**.
8. In my June 19 letter, I also stated that Opposer wished to cooperatively resolve the matter, and I suggested that the parties meet and confer by phone on June 23 at 3:00 p.m., in accordance with 37 CFR § 2.120(e), to further discuss the outstanding discovery issues. I further gave Applicant a new deadline for his responses of no later than June 26, 2008.
9. Applicant failed to respond to my letter or email. Therefore on July 1, 2008, I placed a phone call to Applicant, in a final effort to seek Applicant's cooperation.
10. I left a voice message for Applicant after being forwarded to a voice message greeting for "Michael Silver."
11. In my July 1 voice message, I referenced Opposition No. 91/176,744 and my June 19, 2008 letter; stated that Opposer's testimony period was rapidly approaching; and requested Applicant's immediate response regarding the outstanding discovery issues.

12. I also reminded Applicant that Opposer would be forced to file a motion to compel, absent contact and cooperation from him.

13. I again provided my contact information.

14. I have not received any communications or documents from Applicant in response to my June 19, 2008 letter or July 1, 2008 voice message.

15. Opposer has made a good faith effort to resolve this discovery dispute with Applicant. However, absent Board intervention, it appears that Applicant will not furnish the discovery responses to which Opposer is entitled.

I declare that the foregoing is true and accurate to the best of my knowledge under penalty of perjury of the laws of the United States.

Dated: July 3, 2008

  
Michelle C. Morris  
Michelle C. Morris