

ESTTA Tracking number: **ESTTA298275**

Filing date: **07/30/2009**

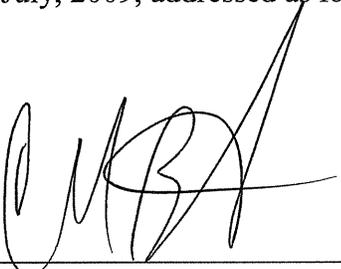
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91179090
Party	Defendant SIMPLYWELL, LLC
Correspondence Address	Christopher M. Bikus Husch Blackwell Sanders, LLP 1601 Dodge Street, Suite 2100 Omaha, NE 68102-1637 UNITED STATES chris.bikus@huschblackwell.com,pto-om@huschblackwell.com
Submission	Defendant's Notice of Reliance
Filer's Name	Christopher M. Bikus
Filer's e-mail	pto-om@huschblackwell.com,chris.bikus@huschblackwell.com
Signature	/Christopher M. Bikus/
Date	07/30/2009
Attachments	SIMPLYWELL FIRST NOTICE OF RELIANCE.7.30.09.pdf (25 pages) (1764586 bytes)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing APPLICANT'S FIRST NOTICE OF RELIANCE was served on Cynthia R. Moore, the attorney for Elgo, Inc., by first class mail postage prepaid this 30th day of July, 2009, addressed as follows:

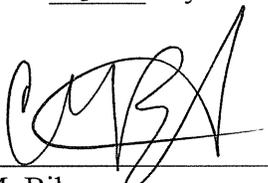
Cynthia R. Moore
794 Los Robles Avenue
Palo Alto, CA 94306



Christopher M. Bikus

CERTIFICATION UNDER 37 C.F.R. § 1.8

I hereby certify that this NOTICE OF FILING OF AND RELIANCE ON TESTIMONY DEPOSITION is being filed electronically with the United States Patent and Trademark Office utilizing the *Electronic System for Trademark Trials and Appeals* this 30th day of July, 2009.



Christopher M. Bikus

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

COPY

In the Matter of Application Serial No. 77/090694
Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,

OPPOSITION NO.: 91179090

OPPOSER

vs.

SIMPLYWELL, LLC,

APPLICANT

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

TO: SimplyWell, LLC by and through their attorney Christopher M. Bikus, McGRATH
NORTH MULLIN & KRATZ, PC LLO, Suite 3700, First National Tower, 1601 Dodge Street
Omaha, Nebraska 68102

COMES NOW Elgo, Inc. ("Elgo"), and pursuant to the provisions of Rule 33 of the Federal
Rules of Civil Procedure and Trademark Rule 2.120, responds to SimplyWell, LLC's
("SimplyWell") First Set of Interrogatories as follows.

GENERAL OBJECTIONS

1. Elgo has not yet completed its investigation of the facts in this matter, has not completed discovery, and has not completed trial preparation. Accordingly, Elgo is providing its present responses in a good faith effort to comply with SimplyWell's Interrogatories. Further investigation, discovery and trial preparation may lead to the discovery of additional information and facts. The following responses are made upon the basis of information available to Elgo at this time. It is anticipated that future discovery and independent investigation could supply additional facts or information, add meaning to known facts, may establish entirely new factual conclusions and contentions, all of which may lead to substantial additions to, changes in, and variations from the response set forth herein. Accordingly, the answers made herein are without prejudice to the right of Elgo to provide evidence at time of trial.

2. Elgo objects to each Interrogatory to the extent that it purports to require the disclosure of information which is protected by the attorney-client privilege, work product doctrine, proprietary or trade secret privileges, or any other privilege, immunity or exemption. No documents for which such privileges are asserted will be produced.

3. Elgo objects to the extent that these Interrogatories seek to require to produce documents within the possession, custody or control of third parties.

4. Elgo objects to the Interrogatories which seek confidential, proprietary, commercial or financial information without the entry by the Court of an appropriate Protective Order.

5. Elgo objects to the Definitions and Instructions contained within the Interrogatories to the extent that they purport to impose obligations and duties on Elgo beyond those under the Federal Rules of Civil Procedure.

6. Elgo objects under 37 C.F.R. § 2.120(d)(1) to the excessive number of interrogatories, which including subparts, exceed 75 in number. Nevertheless, Opposer has attempted to provide good faith answers where it was not excessively burdensome to do so.

7. Elgo specifically incorporates each of the foregoing General Objections into each of the answers to SimplyWell's Interrogatories and when appropriate, will state additional specific objections to each such discovery request. The answers of Elgo to SimplyWell's discovery are made subject to and without waiving these general and specific objections of Elgo.

OPPOSER'S ANSWERS TO INTERROGATORIES

Interrogatory No. 1: Identify all persons who you believe have knowledge of facts pertaining to the subject matter of this opposition, including within your answer a brief description of the facts for which each person has knowledge.

Answer:

Sam Gold (all relevant facts)
Ely Gold (inventor on patented simulated cigarette, trademark applicant)

Interrogatory No. 2: Please identify each person whom Opposer expects to call as an expert witness in this proceeding, and state all of the following: (a) The subject matter on which the expert is expected to testify; (b) The substance of the facts and opinions to which the expert is expected to testify; and (c) A summary of the grounds for each opinion.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 3: For each expert identified in Opposer's answer to No. 2 above: (a) Please provide a complete statement of all opinions to be expressed and the basis and reasons therefore; (b) Please list all of the data or other information considered by the expert witness in forming the opinion; (c) Please list all exhibits to be used as a summary of or in support for the opinion; (d) Please describe the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten (10) years; (e) Please describe the compensation arrangement with the expert; and (f) Please describe all court cases or administrative proceedings in which the witness has testified as an expert at trial or by deposition within the preceding ten (10) years, providing for each case or proceeding all of the following: (i) the names of the parties involved in the proceeding; (ii) the proceeding number; (iii) Opposer's status therein; (iv) any trademark or service marks involved; (v) the type of proceeding involved; (vi) the name of the Court or agency in which the proceeding was filed; (vii) the date of the filing and file number; (viii) the ultimate disposition of the proceedings; and (ix) each document relating to such proceeding.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, attorney-client privileged information and/or attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 4: Identify each non-expert witness that Opposer expects to testify in this proceeding, the subject matter on which such witness is expected to testify, and the substance of the facts to which such witness is expected to testify.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, attorney-client privileged information and attorney work product, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 5: With respect to Opposer's Mark, identify the person or persons most knowledgeable about Opposer's sales, advertising, and sales promotion, adoption and use, licensing, and/or assignment or other transfer of rights to Opposer's Mark.

Answer:

Sam Gold

Interrogatory No. 6: Identify all state and federal registrations, applications for registration, and uses by Opposer of Opposer's Mark and for each such registration, application, and use, identify all documents relating thereto.

Answer:

U.S. Trademark Application No. 78/085,086 for the mark SIMPLYQUIT™. Opposer's SIMPLYQUIT mark is used to sell products related to smoking cessation. Opposer refers Applicant to Opposer's U.S. Trademark Application and application file and to Opposer's website <http://www.simplyquit.com>.

Interrogatory No. 7: Describe in detail the nature of Opposer's business or businesses, including the date on which Opposer first engaged in such business.

Answer:

Opposer's business sells SIMPLYQUIT simulated cigarettes nationwide (and internationally) as an aid to smoking cessation and provides the SIMPLYQUIT Step by Step Stop Smoking Guide. The business was incorporated August 25, 2000, received a seller's permit on January 1, 2001, and completed the first sale on September 21, 2001.

Interrogatory No. 8: Identify and describe each of the goods and/or services on which Opposer intends to use, currently uses, or has used Opposer's Mark or any variation thereof.

Answer:

Opposer sells SIMPLYQUIT simulated cigarettes nationwide (and internationally) as an aid to smoking cessation, and provides the SIMPLYQUIT Step by Step Stop Smoking Guide.

Interrogatory No. 9: For each of the goods or services identified in answer to Interrogatory No. 8, identify all of the following: The number of units and dollar amount of the annual sales of such goods and services; The dollar amount of annual advertising expenditure on such goods or services; The individual medium in which such advertising took place; The dollar amount of advertising through each such medium; and (e) Documents sufficient to support your answer to this Interrogatory.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential business information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 10: Identify all documents and set forth with specificity all facts regarding the selection by Opposer of Opposer's Mark including, without limitation, the circumstances and method by which Opposer adopted Opposer's Mark.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 11: Identify all persons who were involved in, or participated in any way with, the decision to adopt, register and/or use Opposer's Mark, and for each such person, state his/her title and the role he/she played to adopt, register and/or use Opposer's Mark.

Answer:

Ely Gold, inventor of product, chose the mark and filed the trademark application. Sam Gold, owner of Elgo, Inc., manages Elgo, Inc. which manufactures and sells products under the SIMPLYQUIT trademark.

Interrogatory No. 12: State whether any searches or investigations were conducted by Opposer, its attorneys, or any persons on its behalf to determine whether Opposer's Mark was available for use and/or registration, and if so, identify each such search or investigation including the date such search or investigation was performed and the trademarks located in such search or investigation.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 13: Identify all manufacturers or intended manufacturers of goods, and all promoters or intended promoters of any goods or services bearing Opposer's Mark.

Answer:

Opposer objects to this Interrogatory on the grounds that it seeks confidential company information, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 14: For each of the goods and/or services identified in Opposer's application, Application Serial No. 78/085,086, identify all documents supporting the date in which Opposer's Mark was first used.

Answer:

Opposer refers Applicant to the Opposer's Trademark Application filed as "in use" under Section 1(a).

Interrogatory No. 15: Identify all documents and set forth with specificity all facts with respect to any instance where a person or entity has been confused, mistaken, and/or deceived as to whether any goods or services advertised or sold under Opposer's Mark are those of Applicant, or are connected or associated with Applicant, and for each such incident provide the date of such incident, the identity of the person or entity, and a detailed description of the circumstances of such confusion, mistake and/or deception.

Answer:

Documents associated with this Opposition.

Interrogatory No. 16: Identify a representative sample of each different sign, display, point-of-sale display, label, hand tag, wrapper, container, package, advertisement, brochure, promotional material, and the like, known to Opposer which contains or bears Opposer's Mark or any variation thereof and which is intended to be used, is currently in use, or has been used or disseminated by Opposer within the last (5) years.

Answer:

Opposer objects to this Interrogatory as unduly burdensome. Without waiving said objection, Opposer refers Applicant to sample internet, television, and radio advertising material posted at Opposer's website <http://www.simplyquit.com> as well as the record in his Trademark Application file at the USPTO.

Interrogatory No. 17: Identify each person employed by Opposer, or each outside agency or agent retained by Opposer, who has been or is responsible for the following activity with respect to any goods sold and/or services offered by and/or intended to be sold, offered, or promoted by under Opposer's Mark:

- (a) Marketing;
- (b) Advertising and promotion; and
- (c) Bookkeeping and accounting.

Answer:

Opposer objects to this Interrogatory to the extent that it requests confidential company information. Without waiving said objection, Opposer states that Sam Gold has overall responsibility and supervises other employees and outside contractors.

Interrogatory No. 18: State whether Opposer ever licensed or permitted or had negotiations to license or permit, or otherwise granted rights to third parties to use Opposer's Mark. If so, identify the following: (a) The party or parties who have received or sought such license or permission or other right; and (b) The nature and extent of any such license or permit of use or right, given or negotiated, and identify and describe all documents compromising [*sic*] or containing any such license, permission, or other right, or any agreement in respect to Opposer's Mark.

Answer:

Opposer has never licensed or permitted rights to third parties to use Opposer's Mark.

Interrogatory No. 19: State in detail the channels of trade in which Opposer's Mark is used, including all of the following: (a) The geographic area by state, territory, or possession to which each such channel reaches or extends; (b) The manner in which the goods or services reach the ultimate consumer in each such channel; (c) The approximate percentage of sales of goods and/or services sold in each such channel out of the total sales of goods and/or services sold under Opposer's Mark; and (d) Documents sufficient to support your answer to this Interrogatory.

Answer:

Opposer objects to this Interrogatory as seeking confidential business information. Without waiving said objection, Opposer states that Opposer's products are sold nationwide and internationally via internet, mail, and telephone orders. Products are shipped by various common carriers.

Interrogatory No. 20: Identify with specificity the marketing methods used in the advertising and/or sale of the goods and/or services by or for Opposer under Opposer's Mark, but not limited to, the names of television stations, radio stations, Internet Web sites, newspapers, magazines, trade journals, or periodicals, and/or retail establishments in which Opposer has advertised and intends to advertise its goods and/or services under Opposer's Mark, and identify documents sufficient to support your answer to this Interrogatory.

Answer:

Opposer objects to this Interrogatory as seeking confidential business information. Without waiving said objection, Opposer states that marketing has included the website <http://www.simplyquit.com>, various national media companies, including Stardust Media LLC, Central Point Media, TV Sales Pros LLC, PSST; print media including *Globe*, *National Enquirer*, *Star*, *Outdoor Life*, *Prevention*, *Inventor's Digest*, *Golf*, *Entertainment Today*, *Times Mirror*, *Mystery*, *Autoworld News*, *PennySaver*, *Acorn*, *Alaska Bush Shopper*; radio stations, including KQQU (Omaha Nebraska), KNIK, Talk Radio; and TV channels including Comedy Central, Family Net, Great American Country, WBIH TV, WYBE-LP, WCTV, KBTB, UATV, KFWD, WKAG, WYB33, KETK, CNTV, KMIR TV, TVHH.

Interrogatory No. 21: Identify the ordinary purchaser of the goods or services sold and intended to be sold under Opposer's Mark, including, but not limited to, the level of care exercised by such an ordinary purchaser in purchasing the goods and/or services sold under Opposer's Mark.

Answer:

Individuals seeking assistance with efforts to quit smoking, as well as health care personnel, including physicians, pharmacists, nurses and smoking cessation counselors.

Interrogatory No. 22: Identify all documents relating to and set forth with specificity all facts regarding each and every instance where Opposer has notified any third party that any trademark or service mark used by that person or entity infringe Opposer's Mark, and for each such instance

provide a detailed description of any action taken thereafter.

Answer:

Documents related to the instant Trademark Opposition.

Interrogatory No. 23: State whether Opposer has been a party to any litigation or administrative proceeding, other than the present opposition, involving Opposer's Mark. For all such litigation or administrative proceedings, provide all of the following: (a) The names of the parties involved in the proceeding; (b) The proceeding number; (c) Opposer's status therein; (d) The mark or marks involved; (e) The type of proceeding involved; (f) The name of the Court or agency in which the proceeding was filed; (g) The date of the filing and file number; (h) The ultimate disposition of the proceedings; and (i) Each document relating to such proceeding.

Answer:

There are none.

Interrogatory No. 24: For purposes of establishing priority of use, identify the earliest date upon which Opposer intends to rely in this proceeding with respect to its use of Opposer's Mark and identify all documents supporting that date of use.

Answer:

September 21, 2001. See Opposer's Trademark Application filed under Section 1(a).

Interrogatory No. 25: Identify any period of non-use of Opposer's Mark.

Answer:

There is none.

Interrogatory No. 26: Describe in detail the length of any period of non-use of Opposer's Mark identified in response to Interrogatory No. 25, and the circumstances and facts that led to such period of non-use.

Answer:

There is none.

Interrogatory No. 27: Describe in detail all facts and circumstances that led to the abandonment of U.S. Trademark Application Serial No. 78/085,06 [*sic*].

Answer:

Opposer refers Applicant to the file for U.S. Trademark Application Serial No. 78/085,086, wherein all circumstances are described and documented in detail. See especially, Opposer's Petition to Revive (response to Notice of Abandonment) dated August 26, 2002.

Interrogatory No. 28: Identify each person who participated in or supplied information used in answering any of the above Interrogatories. For each such person, state the number of the Interrogatory answer(s) with respect to which that person participated in or supplied information.

Answer:

Sam Gold (all Interrogatories) together with counsel.

Interrogatory No. 29: Identify all state and federal registrations, applications for registration, and uses by Opposer of any of Opposer's Marks, and for each such registration, application, and use, identify all documents relating thereto.

Answer:

Opposer object to this Interrogatory to the extent that it purports to require the disclosure of information that is protected by the attorney-client privilege, work product doctrine, and confidential business documents, and is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 30: Identify all third-party state and federal registrations, applications for registration, and uses known to Opposer of any mark which incorporates the terms SIMPLYWELL.

Answer:

Opposer is not aware of any third party use of the Mark SIMPLYWELL.

Dated this 14th day of April, 2008

Respectfully submitted,

ELGO, INC., Opposer

By 
Cynthia R. Moore
794 Los Robles Ave.
Palo Alto, CA 94306
(650) 565-8185
(650) 493-1993

ATTORNEY FOR OPPOSER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing "Answers to Interrogatories" was served on Christopher Bikus, the attorney for Applicant SimplyWell, LLC, by first class mail postage prepaid and via email this 14^h day of April 2008, addressed as follows:

McGRATH NORTH MULLIN & KRATZ, PC LLO
Suite 3700, First National Tower
1601 Dodge Street
Omaha, Nebraska 68102
Attention: Christopher M. Bikus, Esq.


Cynthia R. Moore
Attorney for Opposer

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

In The Matter of Application Serial No. 77/090,694
Published in the *Official Gazette* on August 7, 2007

COPY

_____)	
ELGO, INC.,)	Opposition No. 91179090
)	
Opposer,)	
)	
v.)	
)	
SIMPLYWELL, LLC,)	
)	
Applicant.)	
_____)	

APPLICANT'S FIRST SET OF INTERROGATORIES TO OPPOSER

TO: Elgo, Inc. by and through their attorney Cynthia R. Moore, Moore Patents, 794 Los Robles Avenue, Palo Alto, CA 94306.

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Rules of Practice, the following Interrogatories are to be fully and separately answered under oath by an officer or duly authorized agent of Opposer, Elgo, Inc., ("Elgo") and such answers are to be served upon the undersigned counsel for Simplywell, LLC ("Simplywell") within thirty (30) days after service of these Interrogatories.

DEFINITIONS AND INSTRUCTIONS

When used in these Interrogatories, the following terms or abbreviations are explained or defined below:

- A. Applicant. The term "Applicant" shall mean Simplywell, and where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates.

- B. Applicant's Mark. The term "Applicant's Mark" shall mean Applicant's SIMPLYQUIT mark in U.S. Trademark Application Serial No. 77/090,694.
- C. Document. The term "Document" shall mean any drawing, graph, chart, photograph, transcription, audio and/or video recording, correspondence, contract, agreement, memorandum, telegram, date compilation, invoice, check, draft, test result, statistical abstract, or other writing of any description.
- D. Identify. The term "Identify" in reference to a person shall mean to state the person's full name; the employer or other business affiliation of the person; the residence and business address of the person; and the residence and business telephone number of the person.
- E. Identify. The term "Identify" in reference to a company shall mean to state the full legal name of the company; and all trade or assumed names under which the company does business or otherwise operates; the address and telephone number of the principal place of business of the company; and to identify each person at the company with whom you dealt and their position in the company.
- F. Identify. The term "Identify" in reference to any document shall mean to describe the type of document; state the date of the document and/or the date the document was prepared; identify the author or preparer of the document; identify the person to whom or for whom the document was addressed, directed or prepared; state the current location of the original and any copy of the document; and identify the persons having possession of the original or any copy of the document.
- G. Identify. The term "Identify" when referring to an oral communication, means to set forth by whom and to whom each such communication was made, the names of all persons present, and the date and place at which it was made.

- H. Opposer. The term “Opposer” shall mean Elgo, Inc., and where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates.
- I. Opposer’s Mark. The term “Opposer’s Mark” shall mean Opposer’s SIMPLYQUIT mark in U.S. Trademark Application Serial No. 78/085,086.
- J. Oral Communication. The term “Oral Communication” shall mean any utterance heard by any person, whether in person, by telephone, or otherwise, as well as all mechanical or electronic sound records or transcripts thereof.
- K. You/Your. The terms “you” and “your” shall mean Elgo, Inc., and where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates.
- L. The terms “and” and “or” shall be construed conjunctively or disjunctively as necessary to make the response to these Interrogatories inclusive rather than exclusive.
- M. Each Interrogatory calls for the knowledge of Opposer and also for all knowledge available to Opposer by reasonable inquiry.
- N. Unless otherwise indicated, these Interrogatories refer to the time, place and circumstances of the matters mentioned or complained of in the pleadings.
- O. Where knowledge or information in possession of a party is requested, such request includes knowledge of the party’s agents, next friend, guardian, representative, and, unless privileged, his or its attorneys.

INTERROGATORIES

INTERROGATORY NO. 1: Identify all persons who you believe have knowledge of facts pertaining to the subject matter of this opposition, including within your answer a brief description of the facts for which each person has knowledge.

ANSWER:

INTERROGATORY NO. 2: Please identify each person whom Opposer expects to call as an expert witness in this proceeding, and state all of the following:

- (a) The subject matter on which the expert is expected to testify;
- (b) The substance of the facts and opinions to which the expert is expected to testify;
and
- (c) A summary of the grounds for each opinion.

ANSWER:

INTERROGATORY NO. 3: For each expert identified in Opposer's answer to Interrogatory No. 2 above:

- (a) Please provide a complete statement of all opinions to be expressed and the basis and reasons therefore;
- (b) Please list all of the data or other information considered by the expert witness in forming the opinion;
- (c) Please list all exhibits to be used as a summary of or in support for the opinion;
- (d) Please describe the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten (10) years;
- (e) Please describe the compensation arrangement with the expert; and
- (f) Please describe all court cases or administrative proceedings in which the witness has testified as an expert at trial or by deposition within the preceding ten (10) years, providing for each case or proceeding all of the following: (i) the names of

the parties involved in the proceeding; (ii) the proceeding number; (iii) Opposer's status therein; (iv) any trademark or service marks involved; (v) the type of proceeding involved; (vi) the name of the Court or agency in which the proceeding was filed; (vii) the date of the filing and file number; (viii) the ultimate disposition of the proceedings; and (ix) each document relating to such proceeding.

ANSWER:

INTERROGATORY NO. 4: Identify each non-expert witness that Opposer expects to testify in this proceeding, the subject matter on which such witness is expected to testify, and the substance of the facts to which such witness is expected to testify.

ANSWER:

INTERROGATORY NO. 5: With respect to Opposer's Mark, identify the person or persons most knowledgeable about Opposer's sales, advertising, and sales promotion, adoption and use, licensing, and/or assignment or other transfer of rights to Opposer's Mark.

ANSWER:

INTERROGATORY NO. 6: Identify all state and federal registrations, applications for registration, and uses by Opposer of Opposer's Mark, and for each such registration, application and use, identify all documents relating thereto.

ANSWER:

INTERROGATORY NO. 7: Describe in detail the nature of Opposer's business or businesses, including the date on which Opposer first engaged in such business.

ANSWER:

INTERROGATORY NO. 8: Identify and describe each of the goods and/or services on which Opposer intends to use, currently uses, or has used Opposer's Mark or any variation thereof.

ANSWER:

INTERROGATORY NO. 9: For each of the goods or services identified in answer to Interrogatory No. 8, identify all of the following:

- (a) The number of units and dollar amount of the annual sales of such goods and services;
- (b) The dollar amount of annual advertising expenditure on such goods or services;
- (c) The individual medium in which such advertising took place;
- (d) The dollar amount of advertising through each such medium; and
- (e) Documents sufficient to support your answer to this Interrogatory.

ANSWER:

INTERROGATORY NO. 10: Identify all documents and set forth with specificity all facts regarding the selection by Opposer of Opposer's Mark including, without limitation, the circumstances and method by which Opposer adopted Opposer's Mark.

ANSWER:

INTERROGATORY NO. 11: Identify all persons who were involved in, or participated in any way with, the decision to adopt, register and/or use Opposer's Mark, and for each such person, state his/her title and the role he/she played to adopt, register and/or use Opposer's Mark.

ANSWER:

INTERROGATORY NO. 12: State whether any searches or investigations were conducted by Opposer, its attorneys, or any persons on its behalf to determine whether Opposer's Mark was available for use and/or registration, and if so, identify each such search or investigation including the date such search or investigation was performed and the trademarks located in such search or investigation.

ANSWER:

INTERROGATORY NO. 13: Identify all manufacturers or intended manufacturers of goods, and all promoters or intended promoters of any goods or services bearing Opposer's Mark.

ANSWER:

INTERROGATORY NO. 14: For each of the goods and/or services identified in Opposer's application, Application Serial No. 78/085,086, identify all documents supporting the date in which Opposer's Mark was first used.

ANSWER:

INTERROGATORY NO. 15: Identify all documents and set forth with specificity all facts with respect to any instance where a person or entity has been confused, mistaken, and/or deceived as to whether any goods or services advertised or sold under Opposer's Mark are those of Applicant, or are connected or associated with Applicant, and for each such incident provide the date of such incident, the identity of the person or entity, and a detailed description of the circumstances of such confusion, mistake and/or deception.

ANSWER:

INTERROGATORY NO. 16: Identify a representative sample of each different sign, display, point-of-sale display, label, hand tag, wrapper, container, package, advertisement, brochure, promotional material, and the like, known to Opposer which contains or bears Opposer's Mark or any variation thereof and which is intended to be used, is currently in use, or has been used or disseminated by Opposer within the last (5) years.

ANSWER:

INTERROGATORY NO. 17: Identify each person employed by Opposer, or each outside agency or agent retained by Opposer, who has been or is responsible for the following activity with respect to any goods sold and/or services offered by and/or intended to be sold, offered, or promoted by under Opposer's Mark:

- (a) Marketing;
- (b) Advertising and promotion; and
- (c) Bookkeeping and accounting.

ANSWER:

INTERROGATORY NO. 18: State whether Opposer ever licensed or permitted or had negotiations to license or permit, or otherwise granted rights to third parties to use Opposer's Mark. If so, identify the following:

- (a) The party or parties who have received or sought such license or permission or other right; and
- (b) The nature and extent of any such license or permit of use or right, given or negotiated, and identify and describe all documents compromising or containing any such license, permission, or other right, or any agreement in respect to Opposer's Mark.

ANSWER:

INTERROGATORY NO. 19: State in detail the channels of trade in which Opposer's Mark is used, including all of the following:

- (a) The geographic area by state, territory, or possession to which each such channel reaches or extends;
- (b) The manner in which the goods or services reach the ultimate consumer in each such channel;
- (c) The approximate percentage of sales of goods and/or services sold in each such channel out of the total sales of goods and/or services sold under Opposer's Mark; and
- (d) Documents sufficient to support your answer to this Interrogatory.

ANSWER:

INTERROGATORY NO. 20: Identify with specificity the marketing methods used in the advertising and/or sale of the goods and/or services by or for Opposer under Opposer's Mark, but not limited to, the names of television stations, radio stations, Internet Web sites, newspapers, magazines, trade journals, or periodicals, and/or retail establishments in which Opposer has advertised and intends to advertise its goods and/or services under Opposer's Mark, and identify documents sufficient to support your answer to this Interrogatory.

ANSWER:

INTERROGATORY NO. 21: Identify the ordinary purchaser of the goods or services sold and intended to be sold under Opposer's Mark, including, but not limited to, the level of care exercised by such an ordinary purchaser in purchasing the goods and/or services sold under Opposer's Mark.

ANSWER:

INTERROGATORY NO. 22: Identify all documents relating to and set forth with specificity all facts regarding each and every instance where Opposer has notified any third party that any trademark or service mark used by that person or entity infringe Opposer's Mark, and for each such instance provide a detailed description of any action taken thereafter.

ANSWER:

INTERROGATORY NO. 23: State whether Opposer has been a party to any litigation or administrative proceeding, other than the present opposition, involving Opposer's Mark. For all such litigation or administrative proceedings, provide all of the following:

- (a) The names of the parties involved in the proceeding;
- (b) The proceeding number;
- (c) Opposer's status therein;
- (d) The mark or marks involved;
- (e) The type of proceeding involved;
- (f) The name of the Court or agency in which the proceeding was filed;
- (g) The date of the filing and file number;
- (h) The ultimate disposition of the proceedings; and
- (i) Each document relating to such proceeding.

ANSWER:

INTERROGATORY NO. 24: For purposes of establishing priority of use, identify the earliest date upon which Opposer intends to rely in this proceeding with respect to its use of Opposer's Mark and identify all documents supporting that date of use.

ANSWER:

INTERROGATORY NO. 25: Identify any period of non-use of Opposer's Mark.

ANSWER:

INTERROGATORY NO. 26: Describe in detail the length of any period of non-use of Opposer's Mark identified in response to Interrogatory No. 25, and the circumstances and facts that led to such period of non-use.

ANSWER:

INTERROGATORY NO. 27: Describe in detail all facts and circumstances that led to the abandonment of U.S. Trademark Application Serial No. 78/085,06.

ANSWER:

INTERROGATORY NO. 28: Identify each person who participated in or supplied information used in answering any of the above Interrogatories. For each such person, state the number of the Interrogatory answer(s) with respect to which that person participated in or supplied information.

ANSWER:

INTERROGATORY NO. 29: Identify all state and federal registrations, applications for registration, and uses by Opposer of any of Opposer's Marks, and for each such registration, application, and use, identify all documents relating thereto.

RESPONSE:

INTERROGATORY NO. 30: Identify all third-party state and federal registrations, applications for registration, and uses known to Opposer of any mark which incorporates the terms SIMPLYWELL.

RESPONSE:

DATED this 10th day of March, 2008.

Respectfully submitted,

SIMPLYWELL, LLC, Applicant

By: _____

Christopher M. Bikus
McGRATH, NORTH, MULLIN & KRATZ, PC LLO
Suite 3700 First National Tower
1601 Dodge Street
Omaha, NE 68102
(402)341-3070
(402)341-0216 (fax)

ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPLICANT'S FIRST SET OF INTERROGATORIES TO OPPOSER** was served on this 10th day of March, 2008, by sending the same, via first class mail, postage prepaid to:

Cynthia R. Moore
Moore Patents
794 Los Robles Avenue
Palo Alto, CA 94306
Tel: (650) 565-8185

Christopher M. Bikus