

ESTTA Tracking number: **ESTTA308499**

Filing date: **09/28/2009**

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

Proceeding	91189418
Party	Plaintiff Speed Channel, Inc.
Correspondence Address	Daniel E. Bruso Cantor Colburn LLP 20 Church Street, 22nd Floor Hartford, CT 06103-3207 UNITED STATES DBruso@cantorcolburn.com, DMayhew@cantorcolburn.com
Submission	Motion to Compel Discovery
Filer's Name	Daniel E. Bruso
Filer's e-mail	DBruso@cantorcolburn.com, DMayhew@cantorcolburn.com
Signature	/Daniel E. Bruso/
Date	09/28/2009
Attachments	2DZ8714.pdf (15 pages)(962954 bytes)

EXHIBIT D

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

Application Serial Nos.:	77476098 77497086 77476107 77478035
Filed:	May 15, 2008 June 12, 2008 May 15, 2008 May 19, 2008
Marks:	SPEEDVISION SPEEDVISION SPEEDVISION HD SPEEDVISION (and Design)
Publication Date:	November 25, 2008 (for all opposed applications)

Speed Channel, Inc.

Opposer,

v.

Phoenix 2008 LLC,

Applicant.

Opposition No. 91189418

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

Applicant Phoenix 2008 LLC ("Applicant") hereby responds to Opposer Speed Channel, Inc.'s ("Opposer") First Set of Interrogatories ("Interrogatories") served on June 4, 2009.

GENERAL OBJECTIONS

Applicant objects to Opposer's Interrogatories to the extent that such Interrogatories are not relevant to the claims asserted in this proceeding, or not calculated to lead to the discovery of admissible evidence.

Applicant objects to Opposer's Interrogatories to the extent that such Interrogatories relate to matters that are protected by the attorney-client privilege, the attorney work product privilege, or any other applicable privilege.

Applicant objects to Opposer's Interrogatories to the extent that such Interrogatories, including their definitions and instructions, seek to impose any obligation on Applicant beyond that required by the Federal Rules of Civil Procedure or the United States Patent and Trademark Office.

In responding to these Interrogatories, Applicant does not waive any of the foregoing objections, or the specific objections set forth in the responses to particular Interrogatories. By making these responses, Applicant does not concede that its responses are relevant to this action or calculated to lead to the discovery of admissible evidence. Applicant expressly reserves the right to object to further discovery into the subject matter of these Interrogatories, to the introduction into evidence of any response or portion thereof, and to supplement its response should further investigation disclose responsive information.

Applicant incorporates by reference the foregoing general objections into each of the responses below.

SPECIFIC OBJECTIONS AND RESPONSES

INTERROGATORY NO. 1:

Set forth all reasons why Applicant selected Applicant's Marks.

Applicant selected Applicant's Marks because all of the trademark or service mark registrations for "SPEEDVISION" formerly owned by Opposer were cancelled by the PTO for nonuse under Section 8 of the Trademark Act. These cancellations occurred

over a span of more than four years without any attempt by Opposer to maintain these registrations, constituting an express abandonment of any rights associated with these marks. Applicant, upon discovering that these cancelled marks were available for public use, applied for registration of Applicant's Marks. Applicant specifically selected the term SPEEDVISION due to its ability to uniquely symbolize motorsports and related goods and services.

INTERROGATORY NO. 2:

Describe with specificity the derivation of Applicant's Marks.

Applicant objects to Interrogatory No. 2 to the extent that it seeks information that is not relevant to the issues in this proceeding or reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects on the ground that the request is ambiguous as to the meaning and scope of "derivation" with respect to Applicant's Marks. Subject to, and without waiver of, this objection, there are no alternate forms of Applicant's Marks that Applicant considered for the Opposed Applications.

INTERROGATORY NO. 3:

Set forth with specificity the reason for selecting the term "SPEEDVISION" as a term used in Applicant's Marks.

Applicant objects to Interrogatory No. 3 to the extent that it seeks information that is not relevant to the issues in this proceeding or reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiver of, this objection, see response to Interrogatory Nos. 1 and 2.

INTERROGATORY NO. 4:

State whether Applicant, or any entity acting for Applicant, is currently selling goods or providing services described in the Opposed Applications under the marks that are the subject of the Opposed Applications in the United States and, if so, fully describe the first sale of such goods or services.

Applicant is not currently selling any goods or providing any services described in the Opposed Applications under the marks that are the subject of the Opposed Applications in the United States, nor has Applicant ever sold such goods or provided such services.

INTERROGATORY NO. 5:

Set forth all facts to support the claim that at the time Applicant filed the Opposed Applications, Applicant had a *bona fide* intent to use the marks identified in each of the Opposed Applications on each of the goods and services identified therein.

Applicant objects to Interrogatory No. 5 to the extent that it seeks information that is not relevant to the issues in this proceeding or reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiver of, this objection, the Opposed Applications were filed on an intent-to-use basis pursuant to 15 U.S.C. §1051(b), which includes a sworn statement of a *bona fide* intention to use the mark in commerce, which represents evidence of a good faith intention to use Applicant's Marks. Accordingly, at the time of filing the Opposed Applications, Applicant had a *bona fide* intent to use the marks identified in each of the Opposed Applications on each of the goods and services identified therein, and still has a *bona fide* intent to use such marks on such goods and services. In addition, since approximately January 2008, Applicant or Applicant's sole member explored the possibility of producing and distributing television programming related to automobiles, and motorsports in general, with the potential of utilizing Applicant's Marks on such goods or services subject to Applicant's permissible use of such marks.

INTERROGATORY NO. 6:

Identify all third party marks (whether registered or not) of which You are aware that include the word element SPEED for goods or services in International Classes 38, 41, or either of them, within the United States.

Applicant objects to Interrogatory No. 6 to the extent that the request seeks information that is publicly available from the PTO. Applicant further objects to the extent that the request seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine.

INTERROGATORY NO. 7:

Describe in detail all uses that You made or make of the term SPEEDVISION or any marks that include the word element SPEEDVISION in connection with any goods in International Classes 38, 41, or either of them, within the United States.

Applicant is not currently using, nor has it ever used, the term SPEEDVISION or any marks that include the word element SPEEDVISION in connection with any goods in International Classes 38, 41, or either of them, within the United States.

INTERROGATORY NO. 8:

Identify (a) the persons who created and selected Applicant's Marks, and (b) the current employee of Applicant with the greatest knowledge concerning the selection of Applicant's Marks.

For subparts (a) and (b):

Roger Williams
Phoenix 2008 LLC

114 Ferris Hill Rd.
New Canaan, CT 06840
(203) 972-6447

INTERROGATORY NO. 9:

Fully describe each good offered or to be offered and each service provided or to be provided under Applicant's Marks within the United States.

Applicant does not currently offer any good or provide any service under Applicant's Marks within the United States. Accordingly, Applicant has not yet identified a specific good or specific service to be provided under Applicant's Marks within the United States. In general, it is Applicant's intention to offer the following goods and provide the following services under Applicant's Marks within the United States:

For Application Serial No. 77497086,

Publications, namely, newsletters, magazines, and journals in the fields of automobiles, airplanes, motorcycles, boats, and other modes of transportation

For Application Serial No. 77478035

Shirts; Pants; Jackets; Footwear; Hats; Headwear; Sweat shirts; Coats; Gloves

Cable television broadcasting; Radio and television broadcasting services; Audio and video broadcasting services over the Internet

Entertainment services, namely, an on-going series featuring automobiles, airplanes, motorcycles, boats, and other modes of transportation provided through television broadcasts, cable and satellite television, radio broadcasts, mobile communications devices, wireless networks, and global computer networks; Entertainment services, namely, production of CDs, DVDs, videotapes, and pre-recorded digital media featuring an on-going series featuring automobiles, airplanes, motorcycles, boats, and other modes of transportation; Production of cable television programs

For Application Serial No. 77476107

Cable television broadcasting; Radio and television broadcasting services; Audio and video broadcasting services over the Internet

Entertainment services, namely, an on-going series featuring automobiles, airplanes, motorcycles, boats, and other modes of transportation provided through television broadcasts, cable and satellite television, radio broadcasts, mobile communications devices, wireless networks, and global computer networks; Entertainment services, namely, production of CDs, DVDs, videotapes, and pre-

recorded digital media featuring an on-going series featuring automobiles, airplanes, motorcycles, boats, and other modes of transportation; Production of cable television programs

For Application Serial No. 77476098

Cable television broadcasting; Audio and video broadcasting services over the Internet; Radio and television broadcasting services

Entertainment services, namely, an on-going series featuring automobiles, airplanes, motorcycles, boats, and other modes of transportation provided through television broadcasts, cable and satellite television, radio broadcasts, mobile communications devices, wireless networks, and global computer networks; Entertainment services, namely, production of CDs, DVDs, videotapes, and pre-recorded digital media featuring an on-going series featuring automobiles, airplanes, motorcycles, boats, and other modes of transportation; Production of cable television programs

INTERROGATORY NO. 10:

Fully describe the trade channels for each good offered or to be offered and service provided or to be provided under Applicant's Mark within the United States.

Applicant does not currently offer any good or provide any service under Applicant's Marks within the United States, and has not yet identified a specific good or specific service to be provided under Applicant's Marks within the United States. Accordingly, Applicant has not yet determined specific trade channels for each good or service that it may offer under Applicant's Marks in the United States. In general, it is Applicant's intention to offer its goods and/or provide its services in the following trade channels:

For entertainment and cable television services: television, radio, internet, CDs, DVDs, videotapes, and other pre-recorded digital media.

For publications: internet, retail outlets that sell publications; mail subscriptions.

For clothing: internet, retail outlets that sell clothing.

INTERROGATORY NO. 11:

Fully describe the intended consumer for each good offered or to be offered and service provided or to be provided under Applicant's Mark within the United States.

Applicant does not currently offer any good or provide any service under Applicant's Marks within the United States, and has not yet identified a specific good or specific service to be provided under Applicant's Marks within the United States. Accordingly, Applicant has not yet determined specific consumers for each good or service it may

offer under Applicant's Marks in the United States. In general, it is Applicant's intention to offer its goods and/or provide its services to consumers with interests in automobiles, and motorsports in general.

INTERROGATORY NO. 12:

Fully describe the source of all revenues that Applicant expects to receive from each good offered or to be offered and service provided or to be provided under Applicant's Marks within the United States.

Applicant does not currently offer any good or provide any service under Applicant's Marks within the United States, and has not yet identified a specific good or specific service to be provided under Applicant's Marks within the United States. Accordingly, Applicant cannot identify any specific source of revenue that Applicant expects to receive from each good offered or to be offered or service provided or to be provided under Applicant's Marks within the United States. In general, it is Applicant's expectation that it will derive revenue for Applicant's goods or services from:

For entertainment and cable television services: television, radio and internet advertisements; sale of CDs, DVDs, videotapes, and other pre-recorded digital media.

For publications: sale of publications at retail outlets, mail subscriptions and Internet sales.

For clothing: sale of clothing at retail outlets and Internet sales.

INTERROGATORY NO. 13:

Identify any good offered or to be offered and service provided or to be provided under Applicant's Marks that are not identified in the Opposed Applications.

Applicant objects to Interrogatory No. 13 to the extent that it seeks information that is not relevant to the issues in this proceeding or reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiver of, this objection, Applicant is not currently offering any good or providing any service, and presently does not intend to offer any good, or provide any service, under Applicant's Marks that is not identified in the Opposed Applications.

INTERROGATORY NO. 14:

Identify all third-parties (including advertising agencies, public relations agencies or market research agencies) that Applicant has communicated with concerning the advertising, marketing, promoting or publicizing of goods or services to be sold or provided within the United States under Applicant's Marks, whether or not such third-parties are located within the United States.

Applicant has not communicated with any third-party concerning the advertising, marketing, promoting or publicizing of goods or services to be sold or provided within the United States under Applicant's Marks.

INTERROGATORY NO. 15:

Describe any information requested, conducted or received by or on behalf of Applicant concerning Applicant's Marks or the Speed Marks, or goods or services offered under any such marks, including but not limited to market research relating to any likelihood of or actual confusion between the parties' respective marks.

Applicant objects to Interrogatory No. 15 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine, and to the extent that the request for "information ... conducted" is incomprehensible. Subject to, and without waiver of, this objection, Applicant or Applicant's sole member has inquired and/or received information indicating that Speedvision Network changed to Speed Channel on or about February 2002, and that the previously registered SPEEDVISION marks became available upon cancellation by the PTO. Applicant also learned that several employees of Opposer, or one of its affiliates (including Fox), including David Hill, the current Chairman and CEO of Fox Sports, were involved with researching, investigating and instituting the discontinued use of SPEEDVISION and the use of SPEED to describe Opposer's goods and services following Opposer's acquisition of Speedvision Network.

INTERROGATORY NO. 16:

Identify all channels in which Applicant advertises or intends to advertise goods and services under Applicant's Marks within the United States.

Applicant does not currently offer any good or provide any service under Applicant's Marks within the United States, and has not yet identified a specific good or specific service to be provided under Applicant's Marks within the United States. Accordingly, Applicant cannot state specific channels in which Applicant advertises or intends to advertise its goods or services under Applicant's Marks within the United States. In general, it is Applicant's intention to advertise its goods and services through common advertising media, including but not limited to television, radio, print publications, and the Internet.

INTERROGATORY NO. 17:

Describe in detail all facts and evidence to support Applicant's denial of any allegation in Speed's Notice of Opposition, with reference to the specific allegation(s) to which the facts and evidence relate.

Applicant objects to Interrogatory No. 17 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine. Subject to, and without waiver of, this objection, Applicant states that there is no likelihood of confusion between Applicant's Marks and Opposer's SPEED marks, and that Opposer has no rights in SPEEDVISION due to its non-use of such marks, its abandonment of such marks, and the cancellation of such marks by the PTO. Applicant is also aware that, in as early as 1999, Opposer, or one of its affiliates (including Fox), had planned to abandon the SPEEDVISION mark. See also Applicant's response to Interrogatory No. 15.

INTERROGATORY NO. 18:

Describe in detail all facts and evidence to support Applicant's Affirmative Defenses to Speed's Notice of Opposition, with reference to the specific Affirmative Defense(s) to which the facts and evidence relate.

Applicant objects to Interrogatory No. 18 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine. Subject to, and without waiver of, this objection, Applicant states as follows:

Affirmative Defense	Basis for Defense
Failure to State a Claim	Opposer has failed to state a valid claim because Opposer has abandoned all rights to SPEEDVISION and there is no likelihood of confusion between Applicant's Marks and Opposer's SPEED marks.
Abandonment	Opposer has no rights to SPEEDVISION due to Opposer's non-use of such marks, its abandonment of such marks and the cancellation of such marks by the PTO.
Doctrine of Unclean Hands	Applicant asserts the doctrine of unclean hands based on Opposer's attempt to claim rights to SPEEDVISION after Opposer's non-use of such marks, its abandonment of such marks and the cancellation of such marks by the PTO, in addition to Opposer's attempt to assert rights in its Opposition that Opposer no longer has.
Doctrine of Estoppel	Applicant is estopped from claiming any right to SPEEDVISION due to its non-use of such marks, its abandonment of such marks and the cancellation of such marks by the PTO, and from making any claim in its Opposition to rights that Opposer no longer has.
Doctrine of Bad Faith	Applicant asserts the doctrine of bad faith based on Opposer's attempt to claim rights to SPEEDVISION due to Opposer's non-use of such marks, its abandonment of such marks and the cancellation of such marks by the PTO, as well as Opposer's attempt to assert rights in its Opposition that Opposer no longer has.

Applicant is also aware that, in as early as 1999, Opposer, or one of its affiliates (including Fox), had planned to abandon the SPEEDVISION mark. See also Applicant's

response to Interrogatory No. 15. See also Applicant's response to Interrogatory No. 15. Applicant reserves the right to supplement or amend its response to this Request subject to Applicant's further investigation of this matter.

INTERROGATORY NO. 19:

To the extent You are relying upon third party marks in support of Applicant's denial of any of the allegations in Speed's Notice of Opposition, identify each third party mark and for each identify the owner, the goods, the annual sales of goods under the mark, and evidence of consumer recognition of the mark.

Applicant objects to Interrogatory No. 19 to the extent that it seeks information that is publicly available from the USPTO. Applicant further objects to the extent that it seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine. Applicant further objects to the extent that the request is overly broad and unduly burdensome. Subject to, and without waiver of, this objection, the following Speedvision marks (all previously owned by Speed Channel, Inc.) were abandoned by Opposer and cancelled by the PTO for nonuse under Section 8 of the Trademark Act:

Speedvision (Registration No. 2049276) (cancelled)
Speedvision Network (Registration No. 2067548) (cancelled)
Speedvision (and design) (Registration No. 2140153) (cancelled)
Speedvision News Raceweek (and design) (Registration No. 2433636) (cancelled)
Speedvision GT Championship (Registration No. 2451685) (cancelled)
Speedvision World Challenge (Registration No. 2453681) (cancelled)
Speedvision Touring Car Championship (Registration No. 2453772) (cancelled)
Speedvision.com (Registration No. 2464221) (cancelled)

INTERROGATORY NO. 20:

Identify each of Applicant's officers, managers and members.

Roger Williams
Phoenix 2008 LLC
114 Ferris Hill Rd.
New Canaan, CT 06840
(203) 972-6447

INTERROGATORY NO. 21:

If You contend that there is no likelihood of confusion between the Speed Marks and Applicant's Marks, describe in detail the basis for Your contention.

Applicant objects to Interrogatory No. 21 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine. Applicant further objects on the ground that the interrogatory seeks a conclusion of law regarding

"likelihood of confusion." Subject to, and without waiver of, this objection, the word "speed" is highly suggestive or descriptive of Opposer's goods and services, thus warranting a very narrow scope of protection under U.S. trademark law. In fact, the U.S. Trademark Office database reveals many registrations and applications incorporating the word "speed" for numerous goods and services. Opposer's attempt to claim exclusive rights to a word that is commonly associated with and describes a feature of automobiles, and motorsports in general, contravenes trademark law and policy. Even if it were true that Opposer's Speed Marks have acquired some degree of fame, this does not afford Opposer absolute rights to that word, especially when used as one syllable of a non-confusingly similar multi-syllabic term. SPEEDVISION is sufficiently different from SPEED in terms of sight, sound and connotation to avoid confusion, particularly since the word "speed" is in common usage as a trademark and descriptive term, and when it is used in a highly suggestive or descriptive manner.

INTERROGATORY NO. 22:

Identify all documents that support or contravene Your answer to Interrogatory No. 21.

Applicant objects to Interrogatory No. 22 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine. Subject to, and without waiver of, this objection, Opposer is already in possession of Applicant's April 3, 2009 letter to Daniel E. Bruso, Esq., counsel for Opposer, in response to Opposer's March 25, 2009 letter to Brian J. Hurh, Esq., counsel for Applicant.

INTERROGATORY NO. 23:

Describe in detail any instances of which you are aware in which any person has referred to Opposer, or Opposer's goods and services, using the term "SPEEDVISION," from December 4, 2004, through and including the date that Applicant responds to these Interrogatories.

Applicant is not aware of any instance in which any person has referred to Opposer, or Opposer's goods and services, using the term "SPEEDVISION," from December 4, 2004, through and including the date of Applicant's response to these Interrogatories.

INTERROGATORY NO. 24:

Describe how Applicant complied with its obligations to preserve all Documents, including but not limited to electronically stored information, relevant to the issues in this case, including by identifying all steps taken and the dates such steps were taken.

Upon receiving notice of Opposer's request for an extension of time to file a Notice of Opposition against the Opposed Applications, Applicant has made all reasonable efforts to preserve any potentially relevant documents.

INTERROGATORY NO. 25:

Identify the persons with the most knowledge about the substance of the Answers to Opposer's First Set of Interrogatories.

Roger Williams
Phoenix 2008 LLC
114 Ferris Hill Rd.
New Canaan, CT 06840
(203) 972-6447

INTERROGATORY NO. 26

Identify all persons who provided information or documents relating to Applicant's Answers to Opposer's First Set of Interrogatories.

Roger Williams
Phoenix 2008 LLC
114 Ferris Hill Rd.
New Canaan, CT 06840
(203) 972-6447

INTERROGATORY NO. 27:

Identify the specific person(s) who participated in the decision to file the Opposed Applications and their role.

Roger Williams
Phoenix 2008 LLC
114 Ferris Hill Rd.
New Canaan, CT 06840
(203) 972-6447

Respectfully Submitted,

PHOENIX 2008 LLC

By:



Brian J. Hurh

DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave. NW
Suite 200
Washington, DC 20006
(202) 973-4200

Its Attorneys

July 13, 2009

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing "Applicant's Response to Opposer's First Set of Interrogatories" was sent via first class mail, postage prepaid, this 13th day of July, 2009 to the following:

Daniel E. Bruso, Esq.
Cantor Colburn LLP
20 Church Street, 22nd Floor
Hartford, CT 06103-3207

A handwritten signature in cursive script, appearing to read "Daniel E. Bruso", written over a horizontal line.