

ESTTA Tracking number: **ESTTA758992**

Filing date: **07/18/2016**

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

| | |
|------------------------|---|
| Proceeding | 91214086 |
| Party | Plaintiff Starbuzz Tobacco, Inc. |
| Correspondence Address | NATU J PATEL THE PATEL LAW FIRM PC 22952 MILL CREEK DRIVE LAGUNA HILLS, CA 92653 UNITED STATES NPatel@thePatelLawFirm.com, MUy@thePatelLawFirm.com, JChuan@thePatelLawFirm.com, dngai@thepatellawfirm.com, kjain@thepatellawfirm.com |
| Submission | Motion to Compel Discovery |
| Filer's Name | Natu J. Patel |
| Filer's e-mail | NPatel@ThePatelLawFirm.com, KJain@ThePatelLawFirm.com, DN- gai@ThePatelLawFirm.com, MUy@ThePatelLawFirm.com, JCriss- man@ThePatelLawFirm.com |
| Signature | /natupatel/ |
| Date | 07/18/2016 |
| Attachments | SB - MTC SI 071816.pdf(441924 bytes) SB - Decl of K. Jain ISO MTC SI 071816.pdf(1626672 bytes) |

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

In the Matter of Application Serial No. 85/774,314

Mark: MYST
Filed: November 8, 2012
Published: November 19, 2013

| | | |
|-------------------------|---|-------------------------------------|
| STARBUZZ TOBACCO, INC., |) | OPPOSITION NO: 91214086 |
| Opposer, |) | |
| vs. |) | NOTICE OF MOTION AND MOTION |
| PHILLIP MELNICK, |) | TO COMPEL APPLICANT PHILIP |
| Applicant. |) | MELNICK'S RESPONSES TO |
| |) | STARBUZZ TOBACCO, INC.'S |
| |) | INTERROGATORIES (SET ONE); |
| |) | DECLARATION OF KUNAL JAIN IN |
| |) | SUPPORT THEREOF |
| |) | |
| |) | |
| |) | |
| |) | |

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Registrant, Starbuzz Tobacco, Inc. ("Starbuzz"), will move to compel Applicant, Philip Melnick's ("Applicant") responses to Opposer Starbuzz Tobacco, Inc.'s Interrogatories (Set One). This motion is made pursuant to Federal Rule of Civil Procedure 33(b)(2), the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 405.04(a), and on the ground that Petitioner failed to serve any responses.

This motion is based upon this Notice, the attached Memorandum of Points and Authorities, the Declaration of Kunal Jain, the pleadings, records and files in this action, and upon such other documentary evidence as requested by the Trademark Trial and Appeal Board.

Dated: July 18, 2016

Respectfully Submitted,
THE PATEL LAW FIRM, P.C.



Kunal Jain
Natu J. Patel
Daniel H. Ngai
Attorneys for Starbuzz
Starbuzz Tobacco, Inc.

POINTS AND AUTHORITIES

BRIEF STATEMENT OF SALIENT FACTS

On November 19, 2013, Applicant, Philip Melnick's ("Applicant") § 1(b) application for the "MYST" mark was published for opposition by the United States Patent and Trademark Office ("USPTO"). On December 18, 2013, Starbuzz Tobacco, Inc., ("Starbuzz") filed an Opposition to the "MYST" application based on Starbuzz's "MIST" related registrations in the same international class. Starbuzz now brings this motion to compel responses to its Interrogatories (Set One) propounded in this proceeding.

DISCOVERY DISPUTE

Starbuzz served Petitioner with Interrogatories (Set One) ("Interrogatories") on June 6, 2016. See the Declaration of Kunal Jain ("Jain Decl.") ¶ 1, **Exhibit A**, concurrently filed herewith. Pursuant to the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 403.03, Applicant's responses to Starbuzz's Interrogatories were due within 30 days (allowing 5 extra days for mail service), by July 11, 2016.

On July 13, 2016, after not receiving any responses or objections to the Interrogatories, Starbuzz sent an email to Applicant demanding, among other things, that Applicant serve responses without objections by July 15, 2016. Jain Decl. ¶ 2, **Exhibit B**. As of today, Starbuzz has not received responses or objections to the Interrogatories nor any response to Starbuzz's July 13, 2016 email. Jain Decl. ¶ 3.

Since Applicant Has Failed to Respond to the Interrogatories, Starbuzz Respectfully Requests the Board to Compel Applicant's Responses.

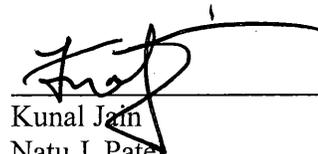
Federal Rule of Civil Procedure 33(b)(2) and TBMP § 403.03(a) provide that responses to Interrogatories must be served within 30 days after the date of service of the requests. Additionally, a party which fails to respond to interrogatories during the time allowed therefor,

and which is unable to show that its failure was the result of excusable neglect, may be found, on motion to compel filed by the propounding party, to have forfeited its right to object to the requests on their merits. *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1555 (TTAB 2000).

Applicant failed to respond to Starbuzz's June 6, 2016 Interrogatories by the July 11, 2016 statutory deadline. Moreover, Applicant completely ignored Starbuzz's subsequent July 13, 2016 meet and confer email, and provided absolutely no excuse for failing to respond or otherwise object to Starbuzz's Interrogatories. Jain Decl. ¶¶ 2-3. Consequently, pursuant to Rule 33 of the Federal Rules of Civil Procedure and TBMP § 405.04(a), Starbuzz respectfully moves the Board for an order to compel Applicant's responses to Starbuzz's Interrogatories without objection.

Dated: July 18, 2016

Respectfully Submitted,
The Patel Law Firm, P.C.



Kunal Jain
Natu J. Patel
Daniel H. Ngai
Attorneys for Starbuzz
Starbuzz Tobacco, Inc.

The Patel Law Firm, P.C.
22952 Mill Creek Drive
Laguna Hills, CA 92653
Telephone: (949) 955-1077
Facsimile: (949) 955-1877
NPatel@thePatelLawFirm.com
NJP/kj

CERTIFICATE OF SERVICE

I certify that a copy of this **NOTICE OF MOTION AND MOTION TO COMPEL APPLICANT'S RESPONSES TO OPPOSER'S INTERROGATORIES (SET ONE)** is being served via U.S. mail, postage prepaid, on this the 18th day of July, 2016, to the following:

Applicant's Attorney/Representative:

PHILIP MELNICK
PO BOX 131822
STATEN ISLAND, NY 10313
UNITED STATES
philipmelnick@aol.com



Korey Dufek

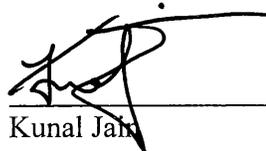
true and correct copy of the e-mail sent to Applicant demanding responses is attached hereto as

Exhibit B.

3. As of the date of this declaration, July 18, 2016, Starbuzz has not received Applicant's responses to its Interrogatories, nor any response to the July 13, 2016 e-mail.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 18th day of July 2016 at Laguna Hills, California.


Kunal Jain

CERTIFICATE OF SERVICE

I certify that a copy of this **DECLARATION OF KUNAL JAIN IN SUPPORT OF MOTION TO COMPEL APPLICANT'S RESPONSES TO OPPOSER STARBUZZ TOBACCO, INC.'S INTERROGATORIES (SET ONE)** is being served via U.S. mail, postage prepaid, on this the 18th day of July, 2016, to the following:

Applicant's Attorney/Representative:

PHILIP MELNICK
PO BOX 131822
STATEN ISLAND, NY 10313
UNITED STATES
philipmelnick@aol.com



Korey Dufek

Exhibit A

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

In the Matter of Application Serial No. 85/774,314

Mark: MYST

Filed: November 8, 2012

Published: November 19, 2013

| | | |
|-------------------------|---|--------------------------------------|
| STARBUZZ TOBACCO, INC., |) | |
| |) | |
| Opposer, |) | OPPOSITION NO: 91214086 |
| |) | |
| vs. |) | OPPOSER STARBUZZ TOBACCO, |
| |) | INC.'S INTERROGATORIES TO |
| PHILLIP MELNICK, |) | APPLICANT PHILIP MELNICK (SET |
| |) | ONE) |
| Applicant. |) | |
| |) | |
| |) | |
| |) | |

PROPOUNDING PARTY: STARBUZZ TOBACCO, INC.

RESPONDING PARTY: PHILIP MELNICK

SET NUMBER: ONE

TO APPLICANT PHILIP MELNICK AND HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that pursuant to Federal Rule of Civil Procedure 33 and C.F.R. § 2.120(d), Opposer Starbuzz Tobacco, Inc. (“Starbuzz”) submits the following Interrogatories to Applicant, Philip Melnick, to be responded to fully within thirty (30) days of service thereto.

DEFINITIONS

Unless the context clearly requires otherwise, the following definitions and instructions shall apply to these requests and all other discovery requests in this action unless otherwise provided:

1. As used herein, the term “and” includes “or,” and the term “or” includes “and.”
2. “You” or “Your,” “Applicant,” “Melnick” (or any derivative thereof) shall refer to Applicant Philip Melnick, including any companies, subsidiaries, affiliates, employees, agents, officers, directors, attorneys, contractors, accountants, consultants, investigators, predecessors, and successors-in-interests and all persons acting or purporting to act on Applicant’s behalf.
3. “Opposer” or “Starbuzz” shall refer to Starbuzz Tobacco, Inc., a California corporation, and Opposer in the above-captioned matter.
4. “Applicant’s Mark” shall refer to the words “MYST”, which You are currently using or intend to use in connection with Your electronic cigarette products.
5. “BLUE MIST” shall refer to Opposer’s registered trademark “BLUE MIST” (Registration No. 3,619,407).
6. “CITRUS MIST” shall refer to Opposer’s registered trademark “CITRUS MIST” (Registration No. 3,695,500).
7. “PEACH MIST” shall refer to Opposer’s registered trademark “PEACH MIST” (Registration No. 4,287,968).
8. “TROPICAL MIST” shall refer to Opposer’s registered trademark “TROPICAL MIST” (Registration No. 4,196,957).
9. “Opposer’s Marks” shall individually and collectively refer to Opposer’s

registered trademarks “BLUE MIST” (Registration No. 3,619,407), “CITRUS MIST” (Registration No. 3,695,500), “PEACH MIST” (Registration No. 4,287,968), “TROPICAL MIST” (Registration No. 4,196,957).

10. “USPTO” shall refer the United States Patent and Trademark Office.

11. “Application” shall refer to Your USPTO application for the registration of Applicant’s Mark “MYST” (Serial No. 85/774,314).

12. “Opposition” shall refer to the Notice of Opposition filed by Opposer with respect to Your Application (Opposition No. 91214086).

13. “Answer” shall refer to the Answer to the Opposition, which was filed on or about July 30, 2014.

14. “Products” shall refer to the electronic products, which You are currently selling or intend to sell bearing Applicant’s Mark.

15. “Channels of Trade” shall refer to the methods by which You sell products, including, but not limited to, via mail order, internet, facsimile and telephone sales, use of agents to sell directly to customers on Your behalf, and distribution of products to retailers.

16. “Media Channels” shall refer to any and all means or methods by which You advertise, market or offer products to the public for sale, including, without limitation, use of direct mail, the telephone, journals, magazines, television, the internet, retail locations, and stores.

17. “Document(s)” means any writing or recording as defined in Rule 1001 of the Federal Rules of Evidence, including but not limited to, any written, printed, typed, recorded, or other graphic matter of any kind or nature and shall include, without limitation, all writings, drawings, graphs, charts, books, technical materials, photographs, microfilm, magnetic media,

computer records, electronically stored information, and other media from which information can be obtained. This will include, without limitation, all drafts of such documents, by whatever means made, specifically including, without limitation, initials, stamped indicia, comments, or notations not a part of the original text or photographic reproduction thereof, as a separate document. “Document” shall also include any data compilation from which information can be obtained or translated if necessary by You through detection devices into reasonably usable form.

18. When referring to a person, to “Identify” means to give, to the extent known, the person’s full name, present or last known address, and, when referring to a natural person, the present or last known place of employment and e-mail address. When referring to a company, to “Identify” means to give, to the extent known, the company’s full corporate name, a brief description of the general nature of the business, its state of incorporation, the address and principal place of business; and the identity of the officers or other persons having knowledge of the matter with respect to which the company has been identified. Once a person or company has been identified in accordance with this subparagraph, only the name of that person or company need be listed in response to subsequent discovery requesting the identification of that person or company.

19. When referring to documents, “to “Identify” means to give, to the extent known, the (a) type of document; (b) general subject matter; (c) date of the document; and (d) author(s), addressee(s), and recipient(s).

20. "Person" includes, without limitation, any natural person, proprietorship, corporation, partnership, trust, joint venture, association, organization, business entity or governmental agency.

21. "Describe," "Refer," "Relate," "Relating To" and "Relates To" mean, without limitation, relating to, regarding, constituting, concerning, mentioning, referring to, describing, summarizing, evidencing, listing, relevant to, demonstrating, or tending to prove, disprove, or explain.

22. "Communication" means any transfer of information of any kind, orally, in writing, or by any other manner, at any time or place, and under any circumstances whatsoever and shall include, but is not limited to, the following: contracts or agreements; drawings or sketches; invoices, orders, or acknowledgements; diaries or reports; forecasts or appraisals; memoranda of telephonic or in person communications by or with any person; other memoranda, letters, telegrams, telexes, or cables prepared, drafted, received or sent; tapes transcripts, or recordings; photographs, pictures, or films; computer programs, computer data, or computer printouts; or graphic, symbolic, recorded, or written materials of any nature whatsoever.

23. **PRIVILEGE ASSERTED.** Where a request calls for the production of a document as to which a claim of privilege is asserted, please set forth the following with respect to each document:

(a) The type of document;

(b) The date of the document;

(c) The name, business address and present position of the author(s) or originator(s) of the document;

(d) The position of the author(s) or originator(s) of the document at the time the document was prepared;

(e) The names and address of all persons or entities who have received a copy of the document;

(f) The position of each recipient of the document at the time the document was prepared and at the time the document was received;

(g) A general description of the subject matter of the document;

(h) All information contained in the document to which the claimed privilege is not asserted;

(i) All information contained in the document to which the claimed privilege is not asserted;

(j) If the protection of the work product doctrine is asserted, the proceeding in anticipation of which the document was prepared.

24. The use of the singular includes the plural, and vice versa.

25. The use of one gender includes all others, appropriate in context.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify the date You first sold or distributed Your Products in the United States.

INTERROGATORY NO. 2:

Identify the date You first sold or distributed Your Products through the Internet.

INTERROGATORY NO. 3:

Identify the names of any and all business entities under which You sold, distributed, marketed, or manufactured Your Products.

INTERROGATORY NO. 4:

For each of Your Products, state, the total number of units sold in each quarter from October 1, 2012 to present.

INTERROGATORY NO. 5:

For each of Your Products, provide the total quarterly sales from October 1, 2012 to present.

INTERROGATORY NO. 6:

Identify each state within the United States where You have sold Your Products from October 1, 2012 to present.

INTERROGATORY NO. 7:

Identify the location where Your Products are produced or manufactured.

INTERROGATORY NO. 8:

Identify the Person(s) most knowledgeable about the marketing, promotion, distribution, advertising, and/or sales of Your Products.

INTERROGATORY NO. 9:

State, with specificity, all facts regarding how and why You decided to adopt Applicant's Mark in connection with Your Products.

INTERROGATORY NO. 10:

Identify the date You first became aware of Opposer and Opposer's Marks.

INTERROGATORY NO. 11:

Identify all Documents relating to the steps You took to determine whether Applicant's Mark would conflict with any prior used or registered mark.

INTERROGATORY NO. 12:

State, with specificity, all Channels of Trade that You use to promote or sell Your Products, and the date You first sold or distributed your products through each Channel of Trade.

INTERROGATORY NO. 13:

Identify all countries worldwide where You have applied for Applicant's Mark and the date of priority in each of those countries.

INTERROGATORY NO. 14:

Describe in detail all efforts to advertise, market, and promote Your Products in the United States and the costs and expenses associated with such efforts.

INTERROGATORY NO. 15:

State, with specificity, all facts supporting Your first affirmative defense in the Answer that Opposer's claims are barred because Opposer is misusing its trademarks and the trademark registration process to prevent the legitimate use and registration of other trademarks.

INTERROGATORY NO. 16:

State, with specificity, all facts supporting Your second affirmative defense in the Answer that Opposer’s claims are barred by the doctrine of unclean hands.

INTERROGATORY NO. 17:

State, with specificity, all facts supporting Your third affirmative defense in the Answer that Opposer’s claims are barred since Opposer fraudulently obtained its federal trademark registrations.

INTERROGATORY NO. 18:

State, with specificity, all facts supporting Your fourth affirmative defense in the Answer that Opposer’s claims are barred since Opposer is not likely to suffer injury, nor is there a likelihood of injury.

INTERROGATORY NO. 19:

State, with specificity, all facts supporting Your fifth affirmative defense in the Answer that Opposer’s claims are barred since consumers are not likely to be confused as to the source of Opposer’s and Applicant’s products.

INTERROGATORY NO. 20:

State, with specificity, all facts supporting Your sixth affirmative defense in the Answer that Opposer’s claims are barred since third parties have used the term “mist” for tobacco products prior to Opposer’s first use of the mark.

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INTERROGATORY NO. 21:

Identify Applicant, including, but not limited to, Applicant's name, home address, work address, and physical address for personal delivery of documents.

DATED: June 6, 2016

Respectfully Submitted,
THE PATEL LAW FIRM, P.C.


Daniel H. Ngai
Attorney for Opposer
Starbuzz Tobacco, Inc.

The Patel Law Firm, P.C.
22952 Mill Creek Drive
Laguna Hills, CA 92653
Telephone: (949) 955-1077
Facsimile: (949) 955-1877
DNgai@thePatelLawFirm.com

CERTIFICATE OF SERVICE

I certify that a copy of this **OPPOSER STARBUZZ TOBACCO, INC.'S INTERROGATORIES TO APPLICANT PHILIP MELNICK (SET ONE)** is being served via U.S. mail, postage prepaid, and electronic mail on this the 6th day of June, 2016, to the following:

Applicant's Attorney/Representative:

PHILIP MELNICK
PO BOX 131822
STATEN ISLAND, NY 10313
UNITED STATES
philipmelnick@aol.com



Mark Uy

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| June 29, 2016 , 11:49 am | Delivered, Front Desk/Reception | PORT ORANGE, FL 32128 |
| Your item was delivered to the front desk or reception area at 11:49 am on June 29, 2016 in PORT ORANGE, FL 32128. | | |
| June 29, 2016 , 7:43 am | Arrived at Unit | PORT ORANGE, FL 32127 |
| June 29, 2016 , 4:18 am | Departed USPS Facility | ORLANDO, FL 32824 |
| June 28, 2016 , 9:59 pm | Arrived at USPS Facility | ORLANDO, FL 32824 |
| June 27, 2016 , 10:36 am | Departed USPS Destination Facility | METRO, NY |
| June 27, 2016 , 10:35 am | Arrived at USPS Destination Facility | METRO, NY |
| June 25, 2016 , 9:42 pm | Departed USPS Destination Facility | KEARNY, NJ 07032 |
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| June 9, 2016 , 9:44 am | Sorting Complete | STATEN ISLAND, NY 10313 |
| June 9, 2016 , 5:34 am | Available for Pickup | STATEN ISLAND, NY 10313 |
| June 9, 2016 , 1:58 am | Departed USPS Destination Facility | METRO, NY |
| June 9, 2016 , 1:50 am | Arrived at USPS Destination Facility | METRO, NY |
| June 7, 2016 , 8:51 pm | Departed USPS Origin Facility | ANAHEIM, CA 92899 |
| June 7, 2016 , 8:49 pm | Arrived at USPS Origin Facility | ANAHEIM, CA 92899 |
| June 7, 2016 , 7:34 pm | Accepted at USPS Origin Facility | LAGUNA HILLS, CA 92653 |

June 7, 2016

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NATU J PATEL
THE PATEL LAW FIRM, P.C.
22952 MILL CREEK DR STE A
LAGUNA HILLS, CA 92653-1214
muy@thepatel lawfirm.com

Delivery Address:

PHILLIP MELNICK
PO BOX 131822
STATEN ISLAND, NY 10313-1822

Package:

Ship Date: 06/06/16
Value: \$1.00
From: 92653

Service:

Priority Mail® 3-Day
Flat Rate Envelope
USPS Tracking®

Transaction Number: **376036965**

Transaction Type: Label

Payment Method: VISA-0901

Payment Status: Account Charged

Postage Cost \$6.45
USPS Tracking® Free

Label Total: \$6.45

Order Total: \$6.45

| Timestamp | Message |
|---------------------|-----------------|
| 06-06-2016 18:05:51 | LABEL PRINTED |
| 06-06-2016 18:05:47 | Getting Payment |
| 06-06-2016 18:05:36 | Setting Payment |

[Back](#)

Exhibit B

Kunal Jain

From: Daniel Ngai
Sent: Wednesday, July 13, 2016 4:52 PM
To: PhilipMelnick@aol.com
Cc: Natu Patel; Kunal Jain; Mark Uy
Subject: Re: Starbuzz v. Melnick - RFP, RFA and Interrogatories (TTAB Opposition No. 91214086)

Dear Mr. Melnick:

This e-mail is an attempt to meet and confer with you regarding Starbuzz Tobacco, Inc.'s ("Starbuzz") discovery requests served on you on or about June 6, 2016:

- 1) Requests for Admission, Set One ("RFA");
- 2) Requests for Production, Set One ("RFP"); and
- 3) Interrogatories, Set One ("ROG").

Starbuzz has not received any responses to those discovery requests, which were due on or before July 11, 2016.

Consequently, you have waived your right to raise objections to Starbuzz's RFPs and ROGs. *Barron Phillippe De Rothschild S.A. v. S. Rothschild & Co.* 16 USPQ2d 1466, 1467 n.5 (TTAB 1990). In addition, all responses to Starbuzz's RFAs are deemed admitted. Fed. R. Civ. P. 36(a)(3).

Please send us your responses to Starbuzz's RFPs and ROGs, without objection, by July 15, 2016. Otherwise, we will move forward with motions to compel.

Best Regards,

Daniel H. Ngai
The Patel Law Firm, P.C.
22952 Mill Creek Drive
Laguna Hills, California 92653
Business: (949) 955-1077
Facsimile: (949) 955-1877

www.thepatellawfirm.com
E-mail: DNgai@ThePatelLawFirm.com

This message may contain privileged and confidential information. If it has been sent to you in error, kindly advise me of the error and immediately delete the message.

From: Mark Uy
Sent: Monday, June 6, 2016 5:18 PM
To: philipmelnick@aol.com
Cc: Natu Patel <npatel@ThePatelLawFirm.com>; Mark Uy <muy@ThePatelLawFirm.com>; Daniel Ngai <dngai@ThePatelLawFirm.com>; Kunal Jain <kjain@ThePatelLawFirm.com>
Subject: Re: Starbuzz v. Melnick - RFP, RFA and Interrogatories

Dear Mr. Melnick:

Attached please find the following documents:

1. Starbuzz Tobacco's Requests for Production of Documents (Set One);
2. Starbuzz Tobacco's Interrogatories (Set One); and
3. Starbuzz Tobacco's Requests for Admission (Set One).

These documents were also served to you via mail today.

Should you have any questions, please do not hesitate to contact us.

Best Regards,

Mark Uy
Legal Assistant
The Patel Law Firm, P.C.
22952 Mill Creek Drive
Laguna Hills, California 92653
Business: (949) 955-1077
Facsimile: (949) 955-1877

www.thepatellawfirm.com
E-mail: MUy@thePatelLawFirm.com

This message may contain privileged and confidential information. If it has been sent to you in error, kindly advise me of the error and immediately delete the message.