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

Proceeding	91218363
Party	Defendant Mr. Foamer, Inc.
Correspondence Address	ISABELLE JUNG CAREY RODRIGUEZ GREENBERG & O'KEEFE LLP 7900 GLADES RD STE 520 BOCA RATON, FL 33434-4105 UNITED STATES pto@crgolaw.com, ijung@crgolaw.com
Submission	Other Motions/Papers
Filer's Name	Isabelle Jung
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Signature	/Isabelle Jung/
Date	04/07/2016
Attachments	Motion_Accept_Papers.pdf(67831 bytes) Exhibit_1_Interrogs.pdf(3937299 bytes) Exhibit_2_HearingTr.pdf(95915 bytes)

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

Opposition No. 91218363

NEW WAVE INNOVATIONS INC.
Opposer

vs.

MR. FOAMER, INC.
Applicant

**MR. FOAMER’S MOTION FOR LEAVE TO USE PAPERS AND TESTIMONY FROM
ANOTHER PROCEEDING**

MR. FOAMER, INC. (“MR. FOAMER” or “Applicant”) hereby files its Motion for Leave to Use Papers and Testimony from Another Proceeding (the “Motion for Leave”) in Opposition No. 91218363 filed by NEW WAVE INNOVATIONS, INC. (“New Wave” or “Opposer”) before the Trademark Trial and Appeal Board (the “Board”). The Motion for Leave is filed concurrently with Applicant’s Motion for Summary Judgment.

Pursuant to 37 C.F.R. 2.122(f), a party may seek by motion to use testimony from another proceeding between the same parties.

In the present case, Applicant and Opposer were parties to the litigation captioned *New Wave Innovations, Inc. v. McClimond et al.*, Case No. 1:13-cv-22541, before the District Court for the Southern District of Florida (the “Federal Case”). During the course of the Federal Case, Applicant and Opposer participated in extensive discovery and several hearings were held before the District Court for the Southern District of Florida. Of import, for the purposes of this Motion for Leave, Opposer offered responses to interrogatories served by Applicant on Opposer (see attached as **Exhibit “1”**). Also, Opposer and Applicant offered testimony during a hearing on Opposer’s motion for a preliminary injunction held of October 29, 2013 before the District Court

for the Southern District of Florida (excerpted pages from the hearing transcript are attached as **Exhibit “2”**)¹.

The parties had previously entered into a joint stipulation regarding the admission of evidence seeking to admit the entire record in the Federal Case. The joint stipulation was rejected by the Board for being too vague.

In support of Applicant’s motion for summary judgment submitted concurrently with this Motion for Leave, Applicant wishes to rely upon the following documents from the Federal Case: a) the admissions made by Opposer in the responses to interrogatories (Exhibit 1); and b) the admissions made by Opposer and Applicant during the hearing on the motion for a preliminary injunction (Exhibit 2). The admissions made by Opposer in Opposer’s responses to interrogatories (Exhibit 1) establish the absence of likelihood of confusion between Opposer’s use of the MR. FOAMER Mark and Applicant’s use of the MR. FOAMER Mark. The admissions made by Opposer during the hearing on the motion for a preliminary injunction establish the lack of priority of use of the MR. FOAMER Mark by Opposer (Exhibit 2).

WHEREFORE, Applicant respectfully moves the Board for leave to use Opposer’s responses to the interrogatories in Exhibit 1 and excerpted pages from the hearing transcript of October 29, 2013 in Exhibit 2 to support its motion for summary judgment concurrently filed herewith.

Dated: April 7, 2016

Respectfully submitted,
/s/ Isabelle Jung
Isabelle Jung
ijung@crgolaw.com
CRGO Law
7900 Glades Road, Suite 520
Boca Raton, FL 33434
Tel. 561-922-3845
Fax. 561-244-1062

¹ Applicant would like to bring to the Board’s attention the fact that the numbering of the exhibits in the present Motion for Leave differs from the numbering of the same exhibits in Applicant’s Motion for Summary Judgment where Opposer’s Responses to Interrogatories are listed as Exhibit 13, and the excerpted pages of the hearing transcript are listed as Composite Exhibit 3.

CERTIFICATE OF SERVICE

I hereby certify that this Motion for Leave is being electronically transmitted in PDF format to the Trademark Trial and Appeal Board through the Electronic System for Trademark Trials and Appeals (ESTTA) on the date indicated below. I hereby further certify that on the date indicated below true and complete copy of this Motion for Leave has been served on opposing counsel listed below by first-class mail to the attorney of record for Opposer at the address listed below:

John H. Faro
Faro & Associates
1395 Brickell Avenue, Suite 800
Miami, FL 33131

/s/ Isabelle Jung
Isabelle Jung
April 7, 2016

EXHIBIT 1

**OPPOSER'S RESPONSES TO INTERROGATORIES FROM APPLICANT IN THE
FEDERAL CASE**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Miami Division)**

Case No. 13-cv-22541-Civ-COOKE/TURNOFF

NEW WAVE INNOVATIONS, INC.

Plaintiff,

vs.

JAMES (JIM) MCCLIMOND, MR. FOAMER,
INC., and CAR WASH EXPERTS INC.

Defendants.

DEFENDANTS' FIRST SET OF INTERROGATORIES DIRECTED TO PLAINTIFF

Defendants, James McClimond (“McClimond”), Mr. Foamer Inc. (“Mr. Foamer”) and Car Wash Experts Inc. (“Car Wash Experts”) (altogether “Defendants”), by and through undersigned counsel, and pursuant to Florida Rule of Civil Procedure 1.340 (a) and (c), propounds the attached Interrogatories to Plaintiff, New Wave Innovations, Inc. (“Plaintiff”) to be answered in writing, under oath within thirty (30) days from the date of service, in accordance with Florida Rule of Civil Procedure 1.340 (a) and (c).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail to: **John H. Faro, Esquire**, Faro & Associates, 1395 Brickell Avenue Suite 800, Miami, FL 33131 (JohnF75712@aol.com) and to **Adam D. Palmer, Esq.**, Schoeppl & Burke, PA, 4651 N. Federal Hwy., Boca Raton, FL 33431 (apalmer@schoepplburke.com; asmith@schoepplburke.com) on this 26th day of February 2013.

By: /s/ Steven M. Greenberg
Steven M. Greenberg
CRGO Law
sgreenberg@crgolaw.com
Florida Bar Number 173924

CRGO Law
7900 Glades Road, Suite 520
Boca Raton, FL 33434
Telephone: (561) 922-3845
Facsimile: (561) 244-1062
Attorney for Defendants

DEFINITIONS

1. **"Person"** shall mean the plural as well as the singular and shall include any natural person, corporation, partnership, joint venture, association, government agency and every other form of entity cognizable at law.
2. **"You"** and **"your"** refer to the party to whom these Interrogatories is directed, each and every name by which the party is known or has been known, and each and every employee, attorney, and agent for such party.
3. **"Document"** shall include all records, books of account, work sheets, checks, instructions, specifications, manuals, reports, books, periodicals, publications, raw and refined data, memoranda, graphs, drawings, photographs, notes, advertisements, lists, studies, meeting minutes, working papers, transcripts, magnetic tapes or discs, punch cards, computer printouts, letters, telegrams, e-mails, drafts, proposals, recommendations, and any other data recorded in readable and/or retrievable form, whether typed, handwritten, reproduced, magnetically recorded, coded, or in any other way made readable or retrievable.
4. **"And"** shall mean and/or.
5. **"Or"** shall mean and/or.
6. **"New Wave," "Plaintiff," "you," "yours" and/or "yourself"** shall mean the Plaintiff to this litigation, New Wave Innovations, Inc., and/or any directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on behalf of New Wave.
7. **"Mr. Foamer"** and/or **"Defendant"** shall mean the Defendant to this litigation, Mr. Foamer, Inc., and/or any directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on behalf of Mr. Foamer.
8. **"Car Wash Experts"** and/or **"Defendant"** shall mean the Defendant to this litigation, Car Wash Experts, Inc., and/or any directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on behalf of Car Wash Experts.
9. **"McClimond"** and/or **"Defendant"** shall mean the Defendant to this litigation, James McClimond, and/or any representative, heir, successor, affiliate, assign, employee, officer, principal or agent of McClimond.
10. **"Agent"** shall mean: any agent, employee, officer, director, attorney, independent contractor or any other person acting at the direction of or on behalf of another.
11. **"Third party"** or **"third parties"** refers to individuals or entities that are not a party to this action.

12. The singular shall include the plural and vice versa; the terms "**and**" or "**or**" shall be both conjunctive and disjunctive; and the term "**including**" mean "including without limitation."

13. "**Related to,**" "**discussing**" or "**evidencing**" shall mean: relates to, refers to, contains, concerns, describes, embodies, mentions, constitutes, constituting, supports, corroborates, demonstrates, proves or tends to prove, evidences, shows, refutes, disputes, rebuts, controverts or contradicts.

14. "**Complaint**" shall mean the complaint filed in the law suit captioned *New Wave Innovations, Inc. v. James McClimond et al.*, Case No. 1:13-CV-22541, pending in the United States District Court for the Southern District of Florida, Miami Division.

15. "**Communication**" shall mean any disclosure, transfer, or exchange of information or opinion, however made, written, oral or by electronic means.

16. "**New Wave Products**" shall mean any products sold by New Wave including but not limited to the Turbo Foam Generator and the Elephant Ears Foam Applicator.

17. "**New Wave Marks**" shall mean any trademark used by New Wave in commerce in connection with the sale of the New Wave Products.

18. "**New Wave Trade Dresses**" shall mean any trade dress used by New Wave in commerce in connection with the sale of the New Wave Products.

19. "**Mr. Foamer Products**" shall mean any products sold by Mr. Foamer including but not limited to the Twist N' Kleen Generator.

20. "**Mr. Foamer Trade Dresses**" shall mean any trade dress used by Mr. Foamer in commerce in connection with the sale of the Mr. Foamer Products.

21. "**Mr. Foamer Marks**" shall mean any trademark used by Mr. Foamer in commerce in connection with the sale of the Mr. Foamer Products.

22. "**Car Wash Experts Products**" shall mean any products sold by Car Wash Experts.

23. "**Car Wash Experts Trade Dresses**" shall mean any trade dress used by Car Wash Experts in commerce in connection with the sale of the Car Wash Experts Products.

24. "**Car Wash Experts Marks**" shall mean any trademark used by Car Wash Experts in commerce in connection with the sale of the Car Wash Experts Products.

25. All other words not defined in this section shall include the word's plain meaning which shall also include but not be limited to the definition imputed to them by Merriam-Webster's Collegiate Dictionary, 11th Edition (2008).

INSTRUCTIONS

1. You are to produce the original of each document unless the same is not within your possession, custody or under your control, in which event you are to produce all copies in your possession, custody or control.

2. To the extent precise and complete documents cannot be furnished, such documents as are available shall be supplied.

3. If any privilege is asserted with respect to any documents described in these Interrogatories, please specifically identify the documents and state, as to each document, the precise nature of and the basis for the privilege relied on.

FIRST SET OF INTERROGATORIES

1. Please provide the name, address and position held in Plaintiff's corporation of the person answering these interrogatories.

2. Please describe with specificity the confidential documents allegedly provided by Plaintiff to one or more of the Defendants sometime in October-November 2011, and specify which Defendant the confidential documents were provided to.

3. Please identify the documents that support Plaintiff's contention that one or more of the Defendants received confidential information from Plaintiff sometime in October-November 2011.

4. Please identify the documents that support Plaintiff's contention that one or more of the Defendants qualified or served as a distributor of the New Wave Products.

5. Please identify the documents, including but not limited to any survey evidence, that support Plaintiff's contention that the New Wave Marks are well-known, famous, have acquired secondary meaning and/or that the public associates the New Wave Marks with Plaintiff, and specify the New Wave Mark to which the documents pertain to.

6. Please identify the documents, including but not limited to any survey evidence, that support Plaintiff's contention that the New Wave Trade Dresses are well-

known, famous, have acquired secondary meaning and/or that the public associates the New Wave Trade Dresses with Plaintiff, and specify the New Wave Trade Dress to which the documents pertain to.

7. Please describe with specificity the type of expenditures made by Plaintiff in advertising and promoting the New Wave Products, the New Wave Marks and the New Wave Trade Dresses, and specify the New Wave Product, Mark or Trade Dress to which the documents pertain to.
8. Please identify the documents that support Plaintiff's contention that Plaintiff made substantial expenditures in advertising and promoting the New Wave Products, the New Wave Marks and the New Wave Trade Dresses, and specify the New Wave Product, Mark or Trade Dress to which the documents pertain to.
9. Please describe with specificity instances of actual confusion from consumers regarding the source of any Car Wash Experts Products, including but not limited to confusion where consumers believed that the Car Wash Experts Products originated from New Wave.
10. Please describe with specificity instances of actual confusion from consumers as to the source of the Mr. Foamer Products, including but not limited to confusion where consumers believed that the Mr. Foamer Products originated from New Wave.

11. Please describe with specificity instances of actual confusion from consumers between the New Wave Marks and the Car Wash Experts Marks, and provide the name of the Car Wash Experts Mark and the name of the New Wave Mark which allegedly created confusion.

12. Please identify the documents that support Plaintiff's contention that there exists actual confusion from consumers between the New Wave Marks and the Car Wash Experts Marks.

13. Please describe with specificity instances of actual confusion from consumers between the New Wave Marks and the Mr. Foamer Marks, and provide the name of the Mr. Foamer Mark and the name of the New Wave Mark which allegedly created confusion.

14. Please describe with specificity instances of actual confusion from consumers between the New Wave Trade Dresses and the Car Wash Experts Trade Dresses, and provide the name of the Car Wash Experts Product and the name of the New Wave Product which allegedly created confusion.

15. Please identify the documents that support Plaintiff's contention that there exists actual confusion from consumers between the New Wave Trade Dresses and the Car Wash Experts Trade Dresses.

16. Please describe with specificity instances of actual confusion from consumers between the New Wave Trade Dresses and the Mr. Foamer Trade Dresses, and provide the name of the Mr. Foamer Product and the name of the New Wave Product which allegedly created confusion.

17. Please identify the documents that support Plaintiff's contention that there exists actual confusion from consumers between the New Wave Trade Dresses and the Mr. Foamer Trade Dresses.

18. Please identify the documents that support Plaintiff's contention that McClimond, Car Wash Experts and/or Mr. Foamer made any claims to third parties that New Wave's Turbo Foam Generator was his/its invention.

19. Please identify the documents that support Plaintiff's contention that one or more of the Mr. Foamer Products incorporates the New Wave Trade Dresses including but not limited to the trade dress of New Wave's Turbo Foam Generator and/or Elephant Ears Foam Applicator.

20. Please identify the documents that support Plaintiff's contention that one or more of the Car Wash Experts Products incorporates the New Wave Trade Dresses including but not limited to the trade dress of New Wave's Turbo Foam Generator and/or Elephant Ears Foam Applicator.

21. Please identify the documents that support Plaintiff's contention that products manufactured or distributed by McClimond, Mr. Foamer and/or Car Wash Experts have a brand name including the term "turbo."

22. Please identify the documents that support Plaintiff's contention that products manufactured or distributed by McClimond, Mr. Foamer and/or Car Wash Experts have a brand name including the term "elephant."

23. Please identify the documents that support Plaintiff's contention that products manufactured or distributed by McClimond, Mr. Foamer and/or Car Wash Experts have a brand name including the terms "ear" or "ears."

24. Please identify the documents that support Plaintiff's contention that Plaintiff owned one or more pending patent applications at the time of filing of the Complaint.

25. Please identify the documents that support Plaintiff's contention that Plaintiff was the exclusive licensee to one or more pending patent applications at the time of filing of the Complaint.

26. Please identify by application serial number all patent applications assigned to or licensed by New Wave at any time during the year 2013.

27. Please state the filing dates for each patent application identified as having been assigned to or licensed by New Wave at any time during the year 2013.

28. Please identify the documents that support Plaintiff's contention that Mr. Foamer, Car Wash Experts and/or McClimond made statements that New Wave does not own any pending patent applications or issued patents.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No. 13-CV-225421-COOKE/TORRES

NEW WAVE INNOVATIONS, INC.)
)
Plaintiff)
vs.)
)
JAMES (JIM) MCCLIMOND (AN INDIVIDUAL),)
MR. FOAMER, INC.) (A FLORIDA CORPORATION) &)
CAR WASH EXPERTS, INC. (A FLORIDA)
CORPORATION))
)
Defendants)
	/

PLAINTIFF NEW WAVE INNOVATIONS INC. HEREIN FILES ITS NOTICE OF COMPLIANCE WITH COURT ORDER [DE 145] REQUIRING SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES

The Plaintiff, New Wave Innovations, Inc. ("NEW WAVE" or "NWI") herein files its *Notice Of Compliance With Court Order [De 145] Requiring Supplemental Response To Defendants' First Set Of Interrogatories*

The NWI Supplemental Response are annexed hereto

Respectfully,

/s/ John H. Faro
John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No. 13-CV-225421-COOKE/TORRES

NEW WAVE INNOVATIONS, INC.)
)
Plaintiff)
vs.)
)
JAMES (JIM) MCCLIMOND (AN INDIVIDUAL),)
MR. FOAMER, INC.) (A FLORIDA CORPORATION) &)
CAR WASH EXPERTS, INC. (A FLORIDA)
CORPORATION))
)
Defendants)
	/

**PLAINTIFF NEW WAVE INNOVATIONS SUPPLEMENTAL REPOSE
TO DEFENDANT FIRST SET OF INTERROGATORIES**

The Plaintiff, New Wave Innovations, Inc. (“NEW WAVE” or “NWI”) herein responds to the Defendant, First Set of Interrogatories Directed to Plaintiff in numbered paragraphs corresponding to the numbered paragraphs of the Request.

1. Michael J. Ross, CEO NEW WAVE INNOVATIONS, INC. c/o Plaintiff’s Counsel
2. All confidential information was conveyed to the Defendant, Jim McClimond, in the course of several telephone conferences occurring from about May 2011 through about December 2011, (some of which lasted more than 1 hour), incident to his expression of his interest as an “investor” and/or as a “partner” with the NWI in the distribution of the NWI Turbo Foam generator. These telephone conference were conducted on a speaker phone located at the NEW WAVE office in Lodi, California. At least one (1) additional person was present in the NWI offices and overheard many of these phone calls Mr. Ross’ telephone number at the time was 209-298-7667.

These discussions included Confidential Business and Technical Information, as follows:

- a. Business Information, as related to the NEW WAVE Turbo Foam Generator and related accessories, financial information as to cost and profit margins, potential sources for product components, identification of potential and existing customers on the East coast and marketing projections;
- b. Technical Information, as related to the NEW WAVE Turbo Foam Generator and related accessories, discussion of operational parameters of the individual components of the Turbo Foam Generator, and the interaction of these components within the Generator, the various component parts which were evaluated by NEW WAVE in the development of Turbo Foam Generator, (both components that worked and components that did not work), and the performance characteristics of each of these components, identification of components that did not work (in response to suggestions by Defendant, Jim McClimond, specific inquiries relative to different materials traditionally used in such foam generators), the sources of components which were ultimately selected for the commercial configuration of the Turbo Foam Generator.
- c. The T-Mobile records of the conversations between Michael Ross and Jim McClimond are reflected upon the bills for Mr. Ross's cell phone (209, 298-7667), have been requested from T-Mobile and, are as yet unavailable from T-Mobile. These telephone shall confirm the date and frequency of these teleconferences. I believe the date and substance of these teleconference are reflected in my March 27, 2014, deposition taken by Defendants in the matter,

See March 27, 2014, Ross Deposition Tx @ page 162, line 3 to page 164, line 17. .

3. McClimond testimony at his March 25, 2014, Deposition (Tx, @ page 115), identified/acknowledged the dimensions, arrangement and composition of the components of the insert for his Twist 'N Kleen foam generator
4. There are no written distributor agreements between Defendants and NWI.
5. There are no survey documents. Evidence of recognition of NWI marks is largely anecdotal. Widespread dissemination of marketing pamphlets over internet, NWI web page and trade show attendance depicts such trademarks as originating with NWI . The extent of internet and/or email dissemination of the NWI catalogs, promotional materials and the like are reflected in Trade Show announcements which were disseminated to the current and potential customers, and holiday/seasonal cards, e.g. Halloween, Christmas, etc., NWI production Bates Nos 000209-277. The extent of the extent of dissemination of the NWI trademarks is reflected in the Confidential Customer List provide in response to the Defendants Request for Documents, NWI production Bates Nos.000040-000208
6. There are no survey documents. Evidence of recognition of NWI distinctive trade dress is largely anecdotal. Widespread dissemination of marketing pamphlets over internet, web page and trade show attendance depicts such trade dress as originating with NWI. Recognition of the NWI Turbo Foam Generator as the industry leader of foam generator products, and the willingness to pay a premium for its products. The extent of internet and/or email dissemination of the NWI catalogs, promotional materials and the like are reflected in Trade Show announcements which were

disseminated to the current and potential customers, and holiday/seasonal cards, e.g. Halloween, Christmas, etc., NWI production Bates Nos 000209-277. The extent of the extent of dissemination of the NWI trademarks is reflected in the Confidential Customer List provide in response to the Defendants Request for Documents, NWI production Bates Nos.000040-000208

7. The NWI advertising and promotional expenses are approximately \$50,000 to \$75,000, and included magazine adds, trade show promotions, coupon discounts/incentives and in-house contacts with potential customers. The NWI advertising and promotional activities, and expenses, are reflected in my March 27, 2014, deposition taken by Defendants in the matter, March 27, 2014, Ross Deposition Tx @ 27, lines 1-20
8. The advertising and promotional expenses are reflected in the printed reports generated by the accounting system, which is maintained by NWI at its company headquarters in Lodi, California.
9. There are no instances of actual confusion with CWE products
10. The instances of actual confusion with Mr. Foamer are reflected and occur primarily at the trade shows where both the NEW WAVE products and FOAMER products are being concurrently promoted for sale to the same customers. A typical example of such actual confusion is February 17, 2014, email from Chad White to NWI, NWI production to FOAMER Bates Nos 000428
11. There are no NWI marks which conflict with CWE marks
12. See response to Interrogatory No. 11

13. The instances of actual confusion with Mr. Foamer are largely anecdotal. The occurrence and frequency of actual confusion of consumers is at the trade shows for the car wash industry. The confusion is based upon the similarities in the product designs (trade dress) for the Turbo Foam Generator and the Elephant Ears foam applicator. See also response to Interrogatory No. 10
14. There is no instances of actual confusion with any trade dress of CWE
15. See response to Interrogatory No. 14
16. See response to Interrogatory Nos. 10 & 13
17. See response to Interrogatory Nos. 10 & 13
18. NEW WAVE has for some time been queried as to the inventorship of its Turbo Foam Generator, including the McClimond contention that he was the inventor. These queries came from a variety of sources and was calculate to inject uncertainty and confusion among the distributors as to the ownership of the proprietary Turbo Foam Generator design and technology. This questioning of the inventorship of the patent rights prompted the dissemination of a Cease & Desist letter from NEW WAVE counsel (Statutory Notice under 35 USC 154), in which counsel identified a number of pending patent applications, filed and owned by Michael Ross relating to the Turbo Foam Generator. As noted in an earlier response to this Interrogatory, an email reporting McClimond's claim of inventorship was sent to NEW WAVE in about January/February 2012, in which McClimond was reported to have stated to a potential customers that McClimond not Michael Ross, was the inventor. That email has been misfiled and could not be located at the time of this response.

19. Foamer product literature of the parties depicts confusingly similar product designs/configurations. These confusingly similar designs/configurations are evident upon comparison, for example, NEW WAVE product literature Bates Nos. 000278-000302 and FOAMER product literature Bates Nos. 000432-000433 – all such documents are in the Defendants’ possession
20. There are no CWE documents
21. Most, if not all of the NWI promotional materials, which depict the NWI Turbo Foam Generator include the work “Turbo” in reference to its Turbo Foam Generator. The NWI marketing materials for the Turbo Foam Generator have been previously provided to Defendants, Bates Nos. 000278-000302.
22. Most, if not all of the NWI promotional materials, which depict the NWI Elephant Ears foam applicator include the work “Elephant “in reference to its Elephant Ears foam applicator. The NWI marketing materials and product literature for the NWI Elephant Ears foam applicator have been previously provided to Defendants, Bates Nos. 000278-000302
23. See response to Interrogatory No. 22.
24. All Patent Office filing receipts for patent applications relating to the NWI Turbo Foam Generator reflect ownership by Michael Ross – all such receipt have been previously produced to Defendants. The authorization of NWI by Ross to use his inventions and proprietary product designs for the manufacture and sale of products incorporating his proprietary designs and inventions, is reflected in the NWI minutes of a Board of Director’s meeting, dated August 12, 2012. These minutes acknowledged Ross’ authorization of NEW WAVE to manufacture and sell 100,000

units of the Turbo Foam Generator. Insofar as the inventor, Michael Ross, is also the CEO of NEW WAVE, he is duty bound/constrained by his office from authorizing others to do the same (denigrate from the rights conveyed to NEW WAVE), and accordingly, this Ross authorization comprises, in effect, an exclusive, field of use restricted (car wash products) license, under the Ross proprietary designs and patent application as related to the NWI products. This authorization is to be confirmed and ratified in a formal license agreement, which is presently in preparation.

25. See response to Interrogatory No. 24 – NWI is authorized to manufacture and sell products covered by the Ross pending patent applications and proprietary designs in accordance NWI corporate minutes dated August 12, 2012
26. The filing receipt for the currently pending US national patent application has been provided to Defendants' counsel under the Protective Order entered in this case – **“Confidential – Attorney Eyes Only”** – and that designation remains in effect. Recently, Ross has filed a PCT (International) patent application, based upon his prior filed non-provisional utility application, and that filing receipt has yet to be received – which receipt is also to be provided when received as **“Confidential – Attorney Eyes Only - Both the US national application and the PCT application (filed on April 25, 2014) are currently pending; and, the PCT application claims priority to both provisional and non-provisional US patent application, to which it corresponds.**
27. The US national, non-provisional utility patent application was filed on or about April 15, 2013.
28. See response to Interrogatory No, 18.

Pursuant to 28 USC 1726, I Michael J. Ross, hereby declare under penalties of perjury, that the Answers to the foregoing interrogatories, where stating factual information, are truthful, and where based upon informtoin and belief, such statements are believed to be truthful.



Michael J. Ross May 8, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document, filed through the ECF system, will be sent electronically to the registered participants, as identified in the Notice of Electronic Filing (NEF), and that paper copies will be sent to the individuals indicated as non-registered participants, (if any), as per the attached Distribution List, on this 8th day of May, 2014.

Respectfully,

/s/ John H. Faro
John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiff

EXHIBIT 2

**EXCERPTED PAGES FROM THE HEARING TRANSCRIPT ON OPPOSER'S MOTION
FOR A PRELIMINARY INJUNCTION IN THE FEDERAL CASE**

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 MIAMI DIVISION
4 CASE NO. 13-22541-CIVIL-COOKE

4 NEW WAVE INNOVATIONS, INC., Miami, Florida
5 Plaintiff, October 29, 2013
6 vs. 10:18 a.m. to 4:43 p.m.
7 JAMES McCLIMOND,
8 MR. FOAMER, INC., and
9 CAR WASH EXPERTS, INC.,
Defendants. Pages 1 to 286

10
11 MOTION FOR PRELIMINARY INJUNCTION
12 FOR TRADEMARK AND TRADE DRESS INFRINGEMENT
13 BEFORE THE HONORABLE WILLIAM C. TURNOFF,
14 UNITED STATES MAGISTRATE JUDGE

14 APPEARANCES:

15 FOR THE PLAINTIFF: JOHN H. FARO, ESQ.
16 FARO & ASSOCIATES
17 Post Office Box 490014
18 Key Biscayne, Florida 33149

19 FOR THE DEFENDANTS: ADAM PALMER, ESQ.
20 SCHOEPPPL & BURKE
21 4651 North Federal Highway
22 Boca Raton, Florida 33431
23 -and-
24 STEVEN GREENBERG, ESQ., and
25 ISABELLE JUNG, ESQ.
CAREY, RODRIGUEZ, GREENBERG,
O'KEEFE, LLP
7900 Glades Road
Suite 520
Boca Raton, Florida 33434

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I N D E X

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<u>WITNESSES FOR THE PLAINTIFF</u>			
Michael James Ross	38	76	
Timothy Sean Reilly	121	134	
Courtney Chenoweth	141	143	155
<u>WITNESSES FOR THE DEFENDANTS</u>			
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1 abandonment of the mark. In this case --

2 THE COURT: Cause the what of the mark?

3 MR. FARO: I'm sorry? Mr. Foamer.

4 THE COURT: To cause the what of the mark?

5 MR. FARO: Abandonment of the mark.

6 THE COURT: Abandonment.

7 MR. FARO: That's correct.

8 There's no evidence and there's no -- nothing that can
9 be pointed to to show abandonment of the mark. In fact, there
10 was an effort made by my client to informally resolve the use
11 of the Mr. Foamer mark and the confusingly similar trade dress,
12 which was ineffective, thus lawsuit.

13 Mr. Ross will testify as to his concerns and why he did
14 that.

15 He's going to resume the use of the Mr. Foamer mark for
16 this holiday season and continue using it in some fashion as to
17 hopefully avoid any overlap or infringement -- confusion,
18 rather, with respect to Mr. Foamer, Inc.

19 Presumably, if we can get an injunction, then that
20 won't be a problem.

21 THE COURT: Let me ask you a question. Nobody's to
22 read anything into my questions, comments or poor attempts at
23 humor.

24 Has your client at any time through today used the
25 title Mr. Foamer?

1 MR. FARO: Not other than in the Christmas card, sir.

2 THE COURT: Only the Christmas card.

3 MR. FARO: That's correct.

4 THE COURT: But what he intends to do is start using
5 the name Mr. Foamer. Right?

6 MR. FARO: That's correct.

7 He's going to start -- he's going to resume his use
8 particularly in the holiday season as --

9 THE COURT: Resume his use on products that he
10 presently manufactures and/or distributes?

11 MR. FARO: It's a service mark. It's not a trademark.
12 So it is as to identify his company as Mr. Foamer, an
13 authoritative source of car wash products.

14 THE COURT: Right now the company is known as what?

15 MR. FARO: New Wave Innovations, Inc.

16 THE COURT: New Wave Innovations, Inc.

17 And that's how he markets his products. Right?

18 MR. FARO: That's correct.

19 THE COURT: Okay. And so he wants to start using
20 Mr. Foamer now?

21 MR. FARO: He wants to resume it. That's correct.

22 THE COURT: Resume what he used in a Christmas card?

23 MR. FARO: That's correct.

24 THE COURT: Okay. Go ahead.

25 MR. FARO: The extent of use has been challenged. The

1 Defendants, did you have any concerns and express those
2 concerns to anybody else regarding your continued use of the
3 Mr. Foamer service mark as depicted in your Christmas card?

4 A. Can you elaborate?

5 Q. Let me restate that.

6 A. Yes.

7 Q. Once you became aware that there were -- there was another
8 company using Mr. Foamer and you had some experience with
9 customers calling you and complaining about Mr. Foamer
10 products, did you have any concerns regarding your continued
11 use of the Mr. Foamer service mark?

12 A. Yes.

13 Q. Could you explain those, please.

14 A. With the confusion that was starting to present itself, I
15 suspended the use of the Mr. Foamer Christmas card or any other
16 form of our generator holiday special until the matter could be
17 resolved.

18 THE COURT: Well, you sent out the Christmas card,
19 Mr. Foamer. Right? This one. Right?

20 THE WITNESS: Yes.

21 THE COURT: What else -- how else did you use the name?

22 THE WITNESS: We didn't. We were planning on using it
23 again the following Christmas.

24 THE COURT: So there was no other use, right -- as we
25 speak --

1 THE WITNESS: Correct.

2 THE COURT: -- of Mr. Foamer, right, other than this
3 card? Right?

4 THE WITNESS: Correct.

5 THE COURT: Did you get any calls from anybody saying,
6 "I got your Christmas card. I got this defective product," you
7 know? Any calls like -- directly or indirectly with reference
8 to the Christmas card?

9 THE WITNESS: If they had reference to it, they did not
10 tell me. But that doesn't mean that they did not.

11 THE COURT: Did anybody tell you any other sources,
12 other than YouTube, that they were connecting you with the
13 defective product or unsatisfactory product?

14 THE WITNESS: I think that would be best answered by
15 Courtney, who works in the field.

16 THE COURT: By who?

17 THE WITNESS: By --

18 MR. FARO: We have another declarant here.

19 THE WITNESS: -- another witness.

20 THE COURT: What's your position with the company?

21 THE WITNESS: CEO.

22 MR. FARO: He's -- he distributes the products through
23 distributors. I think you asked him a question regarding the
24 perception of the --

25 THE COURT: You're the capo de capo. Right? You're

1 Q. Now, Mr. Foamer, if I may -- Exhibit No. 1 is the ad for
2 Mr. Foamer? That's ad where -- I'm sorry.

3 This is the Christmas card that you used. Correct?

4 A. Yes.

5 Q. And there's no offer to sell anything in this, is there?

6 A. Yeah. On the inside, actually, there was. We actually did
7 a coupon.

8 Q. There's no offer to sell in this exhibit, is there, sir?

9 A. No.

10 Q. There's no price in this exhibit, is there?

11 A. Anybody who got that had already purchased from us. So
12 they were aware of who it's coming from and our products and
13 what we sell.

14 Q. Okay. So they were -- they would be aware, for instance,
15 that you used the name New Wave Innovations --

16 A. Yes.

17 Q. -- on the Christmas card?

18 A. Yes.

19 Q. And the Mr. Foamer is not the product, is it, sir? It's
20 the cartoon character that's around the product. Correct?

21 A. The Mr. Foamer would be the actual name -- the fictional
22 name of that character being represented.

23 Q. Thank you.

24 So the fictional character is not a product, is it?

25 A. It is a representation of our product.

1 Q. I see.

2 The fictional character was not anything that you ever sold
3 in commerce, is it?

4 A. What is Santa Claus?

5 Q. You don't have any --

6 THE COURT: Well, that's not before me and I do not
7 have jurisdiction over that.

8 MR. PALMER: Pardon me, your Honor?

9 THE COURT: You know, I was thinking, looking at this
10 cartoon, that would be -- and I'm the first user here -- that
11 would certainly get people's attention and be good advertising
12 for car washes, would it not, if you put this cartoon face on
13 these devices?

14 THE WITNESS: It could be. We have actually had the
15 notion of getting an inflatable outfit to wear at trade shows.

16 THE COURT: I'm not talking about trade shows. I don't
17 go to a trade show to get my car washed.

18 THE WITNESS: You mean like out on the street corner
19 dancing?

20 THE COURT: No. I mean, in the car wash, instead of
21 having a piece of pipe and a hose, you'd have one of these
22 things with a funny face on it.

23 THE WITNESS: I will look into that.

24 THE COURT: Or have something like -- have like a hose
25 and a face that says -- and a flashing sign that says "This

1 does nothing."

2 I'm just throwing that out there on a public record so
3 I have first usage of this.

4 MR. FARO: If you want to copyright that, sir, you
5 could receive a royalty.

6 THE COURT: I could not afford you, Mr. Faro. But I'm
7 putting it on the record here at the public expense. Because,
8 actually, if you think about it, all car washes look the same.

9 But if you had something like this that lit up on one
10 of these tubes there and maybe actually sprayed something out
11 of it, that would be interesting, would it not? That would get
12 somebody's attention.

13 THE WITNESS: Yes.

14 THE COURT: But the point that you're making, sir, is
15 that this is not what the product looked like. Do you follow
16 me? This is just a cartoon, but with a nozzle that's coming
17 out of the eyes -- or the side of the eyes. Right?

18 MR. PALMER: Well, the cartoon, your Honor, is a
19 fictional character that's been placed, in essence, on top of
20 the foamer.

21 THE COURT: Okay.

22 THE WITNESS: Would that not be like the Michelin Man
23 that's made of tires -- Michelin tires with eyes added to it?

24 BY MR. PALMER:

25 Q. Sir, you never registered a trademark. Correct?

1 A. No.

2 Q. And my point was -- and I just wanted a quick answer -- you
3 never sold anything called -- you never had a product that was
4 called Mr. Foamer?

5 A. Neither did Mr. Foamer.

6 Q. Is that a "no"?

7 A. That is a "no." But it's to my understanding that I have
8 two years to register the trademark from my use of it.

9 Q. And Mr. Foamer doesn't have a product called a Mr. Foamer.
10 Correct?

11 A. No.

12 Q. Mr. Foamer simply is the name of a company, not a product.
13 Correct?

14 A. Correct.

15 THE COURT: Does Mr. Foamer sell Twist 'n Kleen?

16 MR. PALMER: Yes, your Honor.

17 THE COURT: And that's what -- his product is Twist 'n
18 Kleen?

19 MR. PALMER: Yes.

20 THE COURT: But the company is Mr. Foamer?

21 MR. PALMER: Yes, sir.

22 THE COURT: Got you.

23 I'm allowed to think out loud and nobody's to read
24 anything into my thoughts or questions or anything else.

25 MR. PALMER: Thank you, your Honor.

1 THE COURT: Annoying.

2 THE WITNESS: -- annoying at the same time. But I like
3 it. It fits us. It fits what we're about.

4 THE COURT: Did you get their Christmas card?

5 THE WITNESS: I did not.

6 THE COURT: Are you familiar with their Christmas card?

7 THE WITNESS: The first time I saw the card was when my
8 attorney gave me the affidavit and the filing.

9 THE COURT: So you're swearing under penalty of perjury
10 that you did not get the name Mr. Foamer from a Christmas card
11 or from any other source, directly or indirectly, to your
12 knowledge, related to the Plaintiff?

13 THE WITNESS: Yes, your Honor. Absolutely.

14 BY MR. PALMER:

15 Q. Do you have an understanding of roughly how many commercial
16 car washes there are in this country?

17 A. As far as I understand, your probably around 50,000,
18 somewhere in that ballpark, when you combine touch-free --

19 THE COURT: That's just in Dade County. He's talking
20 about the country.

21 THE WITNESS: I believe it's around 50,000. But that
22 number could be even higher. You know, there's self-serves.
23 There's full-serves. There's rollovers.

24 BY MR. PALMER:

25 Q. So how much of that market do you control?