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

Proceeding	92044624
Party	Plaintiff J. Christopher Carnovale
Correspondence Address	Michael A. Grow Arent Fox Pllc 1050 Connecticut Avenue N.W. Washington, DC 20036-5339 UNITED STATES henrye@arentfox.com, TMDocket@arentfox.com
Submission	Motion to Compel Discovery
Filer's Name	Michael A. Grow
Filer's e-mail	henrye@arentfox.com, rosenberg.alec@arentfox.com
Signature	/Michael A. Grow/
Date	07/08/2010
Attachments	Carnovale.pdf (17 pages)(657237 bytes)

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

J. CHRISTOPHER CARNOVALE	:	
Petitioner	:	
v.	:	**Cancellation No. 92044624**
THE BRAND EXPERIENCE LLC	:	
Registrant	:	

PETITIONER'S AMENDED MOTION TO COMPEL DISCOVERY

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, 37 CFR 2.120(e), and TBMP §§ 411.01 and 523 and § TMEP 120.2(e), Petitioner J. Christopher Carnovale hereby moves for an order compelling Registrant The Brand Experience LLC to answer Petitioner's second set of interrogatories and first request for production. As noted below, Petitioner has made a good faith effort to resolve this matter. However, Registrant has failed to respond and has not complied with its discovery obligations.

On May 7, 2010, Petitioner served its second set of interrogatories and requests for production. Registrant's responses were due on June 11, 2010. Copies of the discovery requests are attached as Exhibit A. Registrant has served no responses to the discovery requests, nor has it sought an extension of time to respond from Petitioner.

By letter of June 23, 2010, Petitioner's counsel requested that Registrant immediately provide its answers to the discovery requests. In response to this demand, Registrant's counsel sent an email that same day stating that the discovery responses would be provided no later than June 28, 2010. Copies of the letter and an excerpt from the email are attached as Exhibit B.

Nothing was received on June 28. On June 29, 2010, Registrant's counsel advised that data relating to information requested by Petitioner was unavailable pending a repair to a

computer system. Even if this were the case, Registrant should have responded to the discovery requests providing as much information as possible. As of today's date, Petitioner has received no further information. Petitioner has been unable to prepare for its testimony period due to Registrant's failure to respond to the discovery requests. Petitioner has requested an extension of the opening of its testimony period, and Registrant has consented. However, it appears unlikely that Registrant will respond to the interrogatories or requests for production unless compelled to do so.

Registrant has failed to meet its obligations in that it has not responded to the discovery requests and, thus, should be compelled to respond without objection.

J. CHRISTOPHER CARNOVALE

By: _____

Michael A. Grow
Alec P. Rosenberg
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Telephone: (202) 857-6000

July 8, 2010

Attorneys for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing is being served upon Registrant's counsel Wayne Harper of Greenberg Traurig PA at Suite 650, 450 S. Orange Avenue, Orlando, Florida 32801 by first class mail, postage prepaid, on July 8, 2010.

_____

EXHIBIT A

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

J. CHRISTOPHER CARNOVALE	:	
Petitioner	:	
v.	:	Canc. No. 92044624
THE BRAND EXPERIENCE LLC	:	
Registrant	:	

PETITIONER'S SECOND SET OF INTERROGATORIES

Petitioner, J. Christopher Carnovale ("Petitioner") propounds the following interrogatories to be answered by Registrant, The Brand Experience LLC ("Registrant"), in writing under oath, within thirty (30) days pursuant to Rule 33 of the Federal Rule of Civil Procedure.

DEFINITIONS

The following definitions apply to these interrogatories and other discovery requests.

1. "Document" shall have the full meaning ascribed to it in Rule 34 of the Federal Rules of Civil Procedure, and shall include all tangible sources of information, including but not limited to: (a) the original and any non-identical copy (whether different from the original because of handwritten notes or underlining made thereon, attachments affixed thereto, or otherwise) or drafts thereof, of any handwritten, typewritten, printed, recorded, electronically stored or graphic matter, however produced or reproduced, including but not limited to charts, plans, drawings, art work, transparencies, sketches, blueprints, files, electronic mail, computer data and/or tapes, reports, travel reports, expense reports, memoranda, notes, minutes, letters and other correspondence, testimony, summaries, abstracts, studies, surveys, graphs, statistics, tables, forms, work papers, logs, indexes, drafts, advertisements, and scripts; and (b) any mechanical,

magnetic or electronic or other recordings of any voice, sound, image or data including but not limited to photographs, microfilms, video and audio tapes, film, sound recordings, CDs, record albums, and any other data compilation in Registrant's possession, custody or control wherever located.

2. "Tangible things" shall mean any physical object not included within the definition of "document" above including, but not limited to, models, mock-ups, prototypes and samples.

3. The pronouns "you" and "your" and/or the term "Registrant" shall mean the Registrant The Brand Experience LLC, and all of its parents, predecessors, subsidiaries, affiliates, divisions and groups, and each of their directors, officers, employees, shareholders, agents, representatives and consultants.

4. The term "Petitioner" shall mean the Petitioner J. Christopher Carnovale in the above-captioned action, and all of his predecessors in business, employees, agents, representatives, attorneys and consultants.

5. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

6. "And" and "or" shall be construed conjunctively or disjunctively as necessary to make these document requests inclusive rather than exclusive.

7. "Each", "any" and "all" mean each and every.

8. "Person" means any individual or entity, including but not limited to partnerships, corporations or any other form of business or any legal, governmental, or business entity.

9. "Entity" means any legal or business entity of any kind and includes, without limitation, corporations, partnerships, trusts, associations and organizations.

10. The term "communication" means any exchange or transmission of words or ideas to another person or an entity, including without limitation conversations, discussions, e-mails, facsimiles, letters, memoranda, meetings, notes, speeches, or other transfer of information, whether written, oral, or by any other means, whether direct or indirect, formal or informal, and includes any document which abstracts, digests, transcribes or records any such communication.

11. The term "Petitioner's Mark" refers to the mark THE SUNSCREEN THAT NEVER WEARS OFF, and any other marks owned by Petitioner containing the phrase SUNSCREEN THAT NEVER WEARS OFF, described in the petition to cancel.

12. The term "Registrant's Marks" refers to the alleged marks identified in Registration Nos. 2384600, THE 50+ SUNSCREEN THAT WON'T RUB OFF; 2477694, THE SUNSCREEN THAT WON'T RUB OFF; and 2593603, SUNSCREEN KIDS WANT TO WEAR, and the phrase SUNSCREEN THAT WON'T RUB OFF, alone or in combination with other words.

13. The term "mark" includes trademarks, service marks, collective marks, certification marks, and trade names as defined in 15 U.S.C. § 1127, regardless of whether any such mark is federally registered.

14. The term "referring or relating to" means comprising, relating to, or in any way relevant within the meaning of Rule 26(b) (1) of the Federal Rules of Civil Procedure.

15. As used herein, the term "identify" means:

(1) In the case of a person, to state:

a. name;

b. last known residence;

c. employer or business affiliation; and

d. occupation and title or position held.

(2) In the case of a company, to state:

a. the name;

b. if incorporated, the place of incorporation;

c. the principal place of business; and

d. the name and address of the person or persons having knowledge of the matter with respect to which the company is named.

(3) In the case of a document, to state:

a. the identity of the person or persons who prepared it, the sender and recipient, if any;

b. the title or a description of the general nature of its subject matter;

c. the date of preparation;

d. the date and manner of distribution and publication, if any;

e. the location of each copy and the identity of the present custodian;

f. the identity of the person or persons who can identify it;

g. the contents of the document verbatim; and

h. if privilege is claimed, the specific basis for the claim.

In lieu of the foregoing, a copy may be supplied.

(4) In the case of an act or event, to state:

a. a description of the act or event;

b. when it occurred;

c. where it occurred;

d. the names and addresses of the person or persons involved in or who performed said act (or, in the case of an omission, the person or persons failing to perform);

e. the identity of all persons who have knowledge, information or belief about the act;

f. when the act, event or omission first became known; and

g. the circumstances and manner in which such knowledge was first obtained.

16. The terms "state," "describe," or "explain" mean, when used with respect to a fact, event, action, defense, or allegation, to provide a complete description of all details concerning such fact, event, action, defense, or allegation, including the date, place, factual basis, pertinent facts, and names and addresses of all persons with knowledge relating to each such fact, event, action, defense, or allegation.

INSTRUCTIONS

The following instructions apply in answering these interrogatories and other discovery requests:

1. The interrogatories and document requests are continuing in nature and, pursuant to Rule 26 of the Federal Rules of Civil Procedure, Registrant has a duty to supplement its answers promptly upon obtaining or learning of further responsive information.

2. The answer to each interrogatory or document request shall include such knowledge or information as is within Registrant's possession, custody, or control including, but not limited to, knowledge, information and documents in the possession, custody, or control of

Registrant's officers, directors, accountants, consultants, attorneys, or other agents or representatives.

3. The answers to interrogatories must be furnished separately and fully in writing under oath or verification by Registrant declaring, under penalty of perjury, that the answers are true and accurate to the best of its current knowledge, information, and belief. If an answer depends upon the knowledge of a person other than the person signing the answers, each such person should be identified in the answer.

4. The answers shall include the knowledge of Registrant's representatives and agents including, but not limited to, it consultants, accountants and your attorneys.

5. If an objection is raised to all or any part of an interrogatory or document request, state the grounds of the objection with sufficient specificity to permit determination of the basis for and propriety of such objection, including citations where legal authority is relied upon, and answer to the extent the interrogatory or document request is not objectionable. All objections shall be signed by the attorney making them.

6. All answers and objections to interrogatories or document requests shall be made within thirty (30) days of the service of these interrogatories in writing.

7. Registrant shall not refer to documents generally in lieu of answering; if the burden upon you of deriving an answer from documents is the same as it is upon Petitioner, you may elect to refer to documents which are specifically identified from which the response may be readily obtained. Such a response constitutes a representation under oath by you and your counsel that, after reasonable investigation, those conditions have been met.

8. The full text of the interrogatory (or part thereof) to which any answer is intended to respond is to be restated immediately preceding such answer.

9. If at any time you obtain knowledge that the answer given in response to any interrogatory or document request was not correct when given or is no longer correct, a statement in writing under penalty of perjury consisting of the correct answer to such interrogatory shall be promptly provided.

10. If you contend that any item of information requested by the interrogatories or document requests is privileged, in whole or in part, as a ground for its non-production or non-disclosure, for each alleged privileged item or document, provide all information required by Rule 26 of the Federal Rules of Civil Procedure, the Local Rules and relevant case law.

INTERROGATORIES

34. Identify and describe all facts on which Registrant bases the allegation that it has continuously used the marks THE SUNSCREEN THAT WON'T WEAR OFF and the THE SUNSCREEN THAT KIDS WANT TO WEAR.

35. Supplement all of Registrant's responses to Petitioner's First Set of Interrogatories with information that is current and complete as of the date of this Second Set of Interrogatories.

If the response to any interrogatory is believed by Registrant to contain confidential information or trade secrets, it should be so designated in accordance with the protective order in effect in this proceeding..

J. CHRISTOPHER CARNOVALE

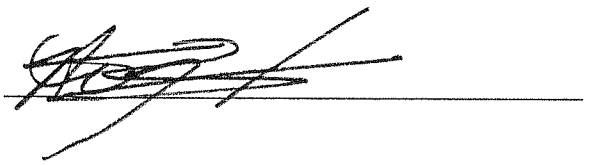
By _____

Michael A. Grow
Alec Rosenberg
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
202-857-6389

Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petitioner's second set of interrogatories is being served upon Registrant's counsel Wayne Harper of Greenberg Traurig, PA at Suite 650, 450 South Orange Avenue, Orlando, Florida 32801 by first class mail, postage prepaid, on May 7, 2010.



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

J. CHRISTOPHER CARNOVALE	:	
Petitioner	:	
v.	:	Canc. No. 92044624
THE BRAND EXPERIENCE LLC	:	
Registrant	:	

PETITIONER'S SECOND REQUEST FOR PRODUCTION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, and the Trademark Rules of Practice., Petitioner, J. Christopher Carnovale ("Petitioner"), hereby requests that Registrant, The Brand Experience LLC ("Registrant"), produce for inspection and copying the documents listed below, at the offices of Arent Fox LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036, within thirty (30) days of the date of service of this request or at such other time and place as may be mutually agreed upon by the parties.

This request seeks the production of documents as of the date on which Registrant responds and, as to those requests falling within Rules 26(e)(1) and (2) of the Federal Rules of Civil Procedure, shall be deemed continuing, requiring Registrant to serve upon Petitioner such further responses promptly after Registrant has acquired additional knowledge or information.

If Registrant is aware with respect to any request that any responsive document once existed but has been destroyed, identify the document, the person who destroyed it, why it was destroyed, and the manner in which it was destroyed.

DEFINITIONS AND INSTRUCTIONS

The definitions and instructions set forth in Petitioner's first set of interrogatories are incorporated herein by reference and made a part hereof.

CLAIM OF PRIVILEGE

If you contend that documents responsive to any request are privileged, in whole or in part, as a ground for their non-production and/or production in redacted form, for each allegedly privileged document provide all information required by Rule 26(b)(5) of the Federal Rules of Civil Procedure, including but not limited to: (1) state expressly the factual and legal grounds for exclusion, and (2) for each document provide the: (a) author, (b) title, (c) date, (d) addressee(s), recipient(s) and/or distributee(s), (e) type of document, and (f) subject matter.

DOCUMENT REQUESTS

38. The CD referenced in the email from Wayne Harper dated December 10, 2008.

39. All labels and other things bearing Registrant's Marks, all purchase orders or other requests for the purchase or acquisition of labels and other things bearing Registrant's Marks, all documents evidencing payment by Registrant or others for labels and other things bearing Registrant's Marks.

40. All documents showing the sale of clothing products on which labels and other things bearing Registrant's Marks have been used.

41. All documents referring or relating to the information Registrant was required to provide in response to Petitioner's Second Set of Interrogatories.

42. All written communications between Registrant and any third party relating to the testing of products sold or intended for sale under Registrant's Marks.

43. All documents that are responsive to any of Petitioner's discovery requests previously served in this proceeding that have not yet been produced.

If the response to any request is believed by Registrant to contain confidential information, it should be so designated and access thereto will be confined to Petitioner's counsel unless further dissemination is authorized by mutual agreement of the parties or by order of the Board.

J. CHRISTOPHER CARNOVALE

By _____

Michael A. Grow
Alec P. Rosenberg
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
202-857-6000

Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petitioner's second request for production is being served upon Registrant's counsel Wayne Harper of Greenberg Traurig, PA at Suite 650, 450 South Orange Avenue, Orlando, Florida 32801 by first class mail, postage prepaid, on May 7, 2010.

_____

EXHIBIT B

Arent Fox

June 23, 2010

Michael A. Grow
Attorney
202.857.6389 DIRECT
grow.michael@arentfox.com

BY TELEFAX: 407 420 5909
CONFIRMATION BY FIRST CLASS MAIL

Wayne Harper, Esq.
Greenberg Traurig, PA
Suite 650
450 South Orange Avenue
Orlando, Florida 32801

Re: Carnovale v. Brand Experience
Cancellation No. 92044624
Our File: 19543-006

Dear Wayne:

On May 7, 2010, we served interrogatories and requests for production on Brand Experience in the above referenced proceeding. Brand Experience's answers were due on June 13. As yet, we have not received Brand Experience's responses.

Because we have not received a response to our settlement proposal of July 2009 we must insist that Brand Experience immediately provide answers to the discovery requests. If we do not hear from you we will have no alternative but to file a motion to compel with the Board.

Sincerely,

Michael A. Grow

cc: Alec P. Rosenberg, Esq.

1050 Connecticut Avenue, NW
Washington, DC 20036-5339
T 202.857.6000 F 202.857.6395

1675 Broadway
New York, NY 10019-5820
T 212.484.3900 F 212.484.3990

555 West Fifth Street, 48th Floor
Los Angeles, CA 90013-1065
T 213.629.7400 F 213.629.7401

From: Harper, Wayne (Assoc-Orl-IP/Tech)
Sent: Wednesday, June 23, 2010 5:09 PM
To: 'Rosenberg, Alec'
Cc: Grow, Michael A.; Henry, Eileen; Ziring, Julie
Subject: RE: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

Regarding your fax:

We will provide responses to your discovery requests no later than June 28, 2010. I apologize for the delay.

In any event, I will honor the above date as to discovery and will work with you to resolve any further issues.