

ESTTA Tracking number: **ESTTA674156**

Filing date: **05/26/2015**

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

Proceeding	92057941
Party	Plaintiff Clockwork IP, LLC
Correspondence Address	BRAD R NEWBERG MCGUIRE WOODS LLP 1750 TYSONS BOULEVARD, SUITE 1800 TYSONS CORNER, VA 22102-4215 UNITED STATES bnewberg@mcguirewoods.com, wfederspiel@mcguirewoods.com, ade- ford@mcguirewoods.com, trademarks@mcguirewoods.com
Submission	Motion for Sanctions
Filer's Name	Brad R. Newberg
Filer's e-mail	trademarks@mcguirewoods.com, bnewberg@mcguirewoods.com, ade- ford@mcguirewoods.com
Signature	/Brad R. Newberg/
Date	05/26/2015
Attachments	Clockwork - Motion for Discovery Sanctions and Entry of Judgment.pdf(47022 bytes ) Active_67344990_1_Newberg Decl. - Executed.PDF(302486 bytes ) Active_67346027_1_Ex. A.PDF(15336 bytes ) Active_67346028_1_Ex. B.PDF(47375 bytes ) Active_67346029_1_Ex. C.PDF(16363 bytes ) Active_67346030_1_Ex. D.PDF(24328 bytes ) Active_67346031_1_Ex. E.PDF(18052 bytes ) Active_67346032_1_Ex. F.PDF(45708 bytes ) Active_67346034_1_Ex. G.PDF(369559 bytes ) Active_67346035_1_Ex. H.PDF(405077 bytes ) Active_67346036_1_Ex. I.PDF(23423 bytes ) Active_67346037_1_Ex. J.PDF(21098 bytes ) Active_67346039_1_Ex. K.PDF(3116580 bytes ) Active_67346040_1_Ex. L.PDF(49953 bytes ) Active_67346042_1_Ex. M.PDF(1113555 bytes )

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

<b>CLOCKWORK IP, LLC</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
v.	)	<b>Cancellation No. 92057941</b>
	)	<b>Reg. No. 3,618,331</b>
<b>BARNABY HEATING &amp; AIR, and</b>	)	
<b>McAFEE HEATING AND AIR</b>	)	
<b>CONDITIONING CO., INC.</b>	)	
	)	
<b>Respondents.</b>	)	

**PETITIONER’S MOTION FOR DISCOVERY SANCTIONS AND ENTRY OF**  
**JUDGMENT**

Petitioner Clockwork IP, LLC, by counsel, pursuant to section 2.120(g) of title 37 of the Code of Federal Regulations and Federal Rule of Civil Procedure 37(b)(2), moves for the entry of discovery sanctions against Respondent Barnaby Heating & Air, including the entry of a judgment against Respondent, and states the following in support of its motion:

**INTRODUCTION AND BACKGROUND**

On November 6, 2014, after Respondent almost completely failed to substantively respond to Petitioner’s discovery requests and to produce relevant documents, Petitioner was forced to file a Motion to Compel. (*See* Dkt. # 13.) The Board granted that Motion on March 11, 2015, and it ordered Respondent to serve on Petitioner its responses to all of Petitioner’s interrogatories and requests for production (collectively, the “discovery requests”), *without any objections on the merits*, by no later than April 10, 2015, (thirty days after March 11, 2015). (*See* Dkt. # 16.) The Board then sternly warned Respondent of the dire, potential consequences for noncompliance with its Order:

In the event Respondent fails to respond to Petitioner's discovery requests as ordered herein, Respondent may be subject to sanctions, *potentially including entry of judgment against Respondent*. See Trademark Rule 2.120(g); Fed. R. Civ. P. 37(b)(2). Respondent should also note that any further indication of attempts to extort capitulation from Petitioner by withholding discovery will be looked upon with extreme disfavor.

(*Id.* (emphasis added).)

Respondent did not heed that warning. April 10, 2015, came and went, and Respondent failed to serve a single discovery response or document on Petitioner. Nor did Respondent contact Petitioner to request more time to serve its responses and documents. Giving Respondent the benefit of the doubt, counsel for Petitioner waited until April 12, 2015, to contact counsel for Respondent via email about Respondent's failure to comply with the Board's Order. (See Apr. 12, 2015 Email from Newberg to Garrigue, Ex. A to Decl. of Brad R. Newberg ("Newberg Decl.")). Respondent's counsel did not respond to that email. Counsel for Petitioner sent another email to Respondent's counsel on April 13, 2015, inquiring again whether Respondent's discovery responses and documents would be served that day. (See Apr. 13, 2015 Email from Newberg to Garrigue, Ex. B to Newberg Decl.) Respondent's counsel replied that evening, stating: "I know this was on my calendar, but I have searched and searched and do not see the entry. I will get you our revised responses, sans objections, first thing tomorrow morning." (Apr. 13, 2015 Email from Garrigue to Newberg, Ex. C to Newberg Decl.)

But Respondent did not honor that statement and once again failed serve a single discovery response or document on April 14, 2015. As a result, on April 15, 2015, Petitioner's counsel emailed Respondent's counsel for the third time about the missing discovery responses and documents. (See Apr. 15, 2015 Email from Newberg to Garrigue, Ex. D to Newberg Decl.) Instead of producing the responses and documents, Respondent's counsel replied, asking for extra time (until April 16, 2015 at 5:00 p.m.). (See Apr. 15, 2015 Email from Garrigue to

Newberg, Ex. E to Newberg Decl.) Petitioner agreed to the additional time on the condition that Respondent serve all responsive documents by the end of the requested extra time. (*See* Apr. 15, 2015 PM Email from Newberg to Garrigue, Ex. F to Newberg Decl.)

On April 16, 2015 – almost a week after the Board-ordered deadline passed – Respondent’s counsel finally served discovery responses, albeit deficient ones, on Petitioner’s counsel, but Respondent’s counsel did not produce any documents, indicating instead that she would “send the URL for the documents responsive to this discovery under a separate email.” (*See* Apr. 16, 2015 Discovery Responses (“Pet’r Disco. Resp.”), Ex. G to Newberg Decl.; Apr. 16, 2015 Email from Garrigue to Newberg, Ex. H to Newberg Decl.) Although Respondent’s counsel provided a URL link to its purported document production the next day, Respondent’s counsel acknowledged the production was incomplete, explaining that “[t]he files are not completely uploaded, but they are being added as the upload completes.” (*See* Apr. 17, 2015 Email from Garrigue to Newberg, Ex. I to Newberg Decl.) It was not until April 20, 2015 – ten days after the Board ordered deadline – that Respondent’s counsel indicated that “[a]ll of the documents responsive to outstanding discovery have been uploaded.” (*See* Apr. 20, 2015 Email from Garrigue to Newberg, Ex. J to Newberg Decl.)

But a review of Respondent’s discovery responses and document production quickly revealed that Respondent had not satisfied its obligation or complied with the Board’s Order. In an effort to address the gaps and deficiencies in Respondent’s discovery responses, Petitioner’s counsel sent a letter to Respondent’s counsel on April 28, 2015. (*See* Apr. 28, 2015 Discovery Deficiency Letter to Garrigue, Ex. K to Newberg Decl.) In an effort to narrow the issues with the trial testimony periods fast approaching, the letter addressed only the most egregious deficiencies, including among others:

- Respondent’s failure to produce any documents responsive to Request for Production (“RFP” or “Request”) Nos. 3, 6, 9, 10, 15, 16, 19, 30, 35, 59, 60, 63, 66, 67, 68, 73, 74, and 79, despite a discovery response stating “[s]ee documents produced herewith;”
- Respondent’s inaccurate statement of facts, which arguably can be construed as objections on the merits, in lieu of producing documents in response to RFP Nos. 20, 33, 80, and 82;
- Respondent’s wholly deficient responses to Interrogatory Nos. 6, 14, 25, 26, and 27; and
- Respondent’s failure to respond fully to Interrogatory Nos. 2, 7, and 8, each of which requested information essential to this case, such as information relating to Respondent’s alleged conceptualization and development of Respondent’s Mark and Respondent’s relationship with Petitioner and Petitioner’s affiliated entities.

*(Id.)*

Instead of supplementing Respondent’s production, amending its discovery responses to address these deficiencies, and bringing Respondent into compliance with the Board’s Order, Respondent’s counsel replied to the letter by email a week later, stating “I have not had the opportunity to go over each of the points in your letter with Mr. Barnaby. However, he has assured me there are no other responsive documents and that everything has been produced.” (*See* May 4, 2015 Email from Garrigue to DeFord, Ex. L to Newberg Decl.) Respondent’s counsel also attempted to supplement Respondent’s incomplete response to only one of the identified Interrogatories by providing the same deficient explanation (regarding Respondent’s relationship to Petitioner, SGI, and AirTime 500). (*See* Ex. L to Newberg Decl.; *see also* Pet’r Disco. Resp., Ex. G to Newberg Decl.) In other words, Respondent made no attempt to remedy the identified deficiencies, electing instead to ignore the majority of the concerns Petitioner raised in its April 28, 2015 letter and to flatly contradict the prior representation that “documents

[were] produced herewith” by now claiming that no such documents exist. (*See* Ex. L to Newberg Decl.; Pet’r Disco. Resp., Ex. G to Newberg Decl.)<sup>1</sup>

Petitioner has been reasonable and allowed Respondent ample opportunity to comply with the Board’s Order and to satisfy its obligation to provide Petitioner with complete responses to its discovery requests. (*See* Exs. A–L to Newberg Decl.) Yet, over and over Respondent has indicated either an unwillingness, or an inability, to hold up its end of the deal, all but forcing Petitioner to file this motion for sanctions. (*See id.*)

## **ARGUMENT**

### **I. Sanctions are warranted in this case.**

Section 2.120(g)(1) of title 37 of the Code of Federal Regulations – which permits the Board to enter any sanction, including those listed in Federal Rule of Civil Procedure 37(b)(2), against a party that “fails to comply with an order of the Trademark Trial and Appeal Board relating to . . . discovery” – was designed to address situations precisely like the one here. (*See* 37 C.F.R. § 2.120(g)(1).) The exhibits attached to this motion confirm that Respondent failed to comply with the Board’s March 11, 2015 Order, which required Respondent to fully respond to all of Petitioner’s discovery requests without any objection on the merits, and the exhibits further demonstrate that Respondent has taken advantage of Petitioner’s goodwill and efforts to remain reasonable in the face of Respondent’s continued stonewalling. (*See* Exs. A–L to Newberg Decl.)

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<sup>1</sup> Because of, among other reasons, the lack of documents that could possibly support Respondent’s ownership of the Mark, Respondent’s numerous admissions and effective admissions in response to Petitioner’s Requests for Admission, and the documents that were produced showing that Respondent knew that the COMFORTCLUB Mark belonged to Petitioner when it applied to register the Mark, Petitioner is simultaneously filing a motion for summary judgment along with this motion for sanctions.

Of equal importance, the history of this case – which is marred by delay and wasted time and resources to address Respondent’s discovery deficiencies – as well as Respondent’s failure to meaningfully address the deficiencies in its discovery responses identified in Petitioner’s letter indicate that Respondent’s behavior will not change. As a result, Petitioner respectfully requests that the Board enter sanctions against Respondent pursuant to section 2.120(g)(1), including an entry of judgment.

## **II. The appropriate sanction is the entry of judgment against Respondent.**

Although it remains entirely within the Board’s discretion what sanctions, if any, shall be imposed, Petitioner respectfully suggests that the most relevant, meaningful, and therefore appropriate sanction is the one the Board specifically warned Respondent about in its March 11, 2015 Order: the “entry of judgment against Respondent.” (Dkt. # 16; *see also* Fed. R. Civ. P. 37(b)(2)(A)(vi).)

By failing to comply fully with the Board’s Order, Respondent has denied Petitioner valuable discovery in this case and impaired Petitioner’s ability to fully prepare its trial submissions. For example, Respondent has failed to respond to Requests and Interrogatories related to Respondent’s alleged conceptualization and development of the COMFORTCLUB Mark and its first use of that mark in commerce, denying Petitioner information highly relevant to its claim that Respondent did not own the COMFORTCLUB Mark, knew that the Mark belonged to Petitioner, and therefore committed fraud on the United States Patent and Trademark Office when it claimed ownership in its application to register the Mark. (*See* Pet’r Disco. Resp., Ex. G to Newberg Decl.; Exs. K–L to Newberg Decl.) Similarly, Respondent continues to refuse to explain or provide documents explaining its relationship with SGI, stating that no relationship has ever existed. (*See* Pet’r Disco. Resp., Ex. G to Newberg Decl.; Ex. L to Newberg Decl.)

Yet, Respondent's own production demonstrates the falsity of that statement: among other things, it contains a signed agreement between Respondent and AirTime500, an SGI affiliate, and emails between Robin Faust, an SGI employee, and Respondent relating to the COMFORTCLUB Mark just weeks before Respondent filed his application to register it (and seemingly trying to get SGI's approval for clearance on an advertisement using the Mark). (*See* Ex. M to Newberg Decl. (containing documents produced by Respondent).) Rewarding Respondent's willful violation of the Board's Order and continued efforts to deny Petitioner discovery in this case is unfair and unjust. Entry of judgment as a sanction is therefore appropriate here. *See, e.g., Corporacion Habanos, S.A. & Empresa Cubana del Tabaco, DBA Cubatabaco v. Cigar King, Ltd.*, No. 92053245, 2013 WL 6056505 (T.T.A.B. June 12, 2013) (entering judgment against a respondent that failed to comply with the Board's discovery order and engaged in tactics designed to thwart the petitioner's ability to obtain discovery); *Super Bakery, Inc. v. Benedict*, 96 U.S. P.Q.2d (BNA) 1134 (T.T.A.B. 2010) (same).

Moreover, an entry of judgment is the most appropriate sanction because the only other arguably applicable sanction under Rule 37(b)(2) would be to prohibit Respondent from supporting its defenses or opposing Petitioner's claims, or from introducing matters covered by the discovery requests into evidence. (*See* Fed. R. Civ. P. 37(b)(2)(A)(ii).) But this alternative sanction would essentially amount to an entry of judgment against Respondent because Respondent failed to respond to the discovery requests that cover the most pertinent issues in this case. As a result, an exclusion sanction would almost completely preclude Respondent from

offering any evidence in support of its defense.<sup>2</sup> Thus, the only difference between the two sanctions available is that allowing the case to proceed instead of entering judgment against Respondent would unnecessarily impose on witnesses the time and burden of testifying during the trial testimony period and on Petitioner the burden of expending additional time and cost to prosecute this matter until it achieves what is essentially a predetermined result. The alternative sanction is therefore ineffective when applied to this case, making entry of judgment the appropriate sanction. *See, e.g., Cigar King*, at \*3 (“Although entry of judgment as a sanction for failure to comply with an order compelling discovery is a hard remedy, it is justified when no less drastic remedy would be effective, and there is a strong showing of willful evasion.”).

Finally, this case presents similar facts to those that the Board recently found warranted entry of judgment as a discovery sanction in the *Cigar King* case referenced above. Like Respondent here, the respondent in *Cigar King* “was under a Board order to take certain specific actions to supplement its discovery,” it “was warned of the possible result of noncompliance with the order,” and it had “been represented by counsel since the filing of its answer in this proceeding.” *Id.* Based on those facts, the *Cigar King* Board held that “respondent’s willful noncompliance with the July 2, 2012 order and deliberate action to impair petitioner’s ability to present its case after having been advised of the possible consequences warrants entry of the sanction requested by petitioner,” which was the entry of judgment. *Id.* The same result is equally warranted in this case.

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<sup>2</sup> The conclusion that the exclusion sanction would amount to an entry of judgment against Respondent is further supported by the fact that the documents Respondent’s did produce and its discovery responses, including the May 4, 2015 statement that no additional documents exist, demonstrate that Petitioner is entitled to judgment as a matter of law. This point is discussed more fully in Petitioner’s motion for summary judgment that Petitioner filed simultaneously with this motion.

## CONCLUSION

For the reasons stated above, Petitioner Clockwork IP, LLC respectfully requests that the Board grant its Motion for Discovery Sanctions and Entry of Judgment, and enter judgment against Respondent in this proceeding. Alternatively, Petitioner requests that the Board enter any other sanction(s) it deems appropriate.

Moreover, due to the fast-approaching pretrial disclosure deadline and start of Petitioner's trial testimony period, Petitioner respectfully requests that the Board stay proceedings pending resolution of this motion, or alternatively that the Board conduct an expedited review of this motion.

Respectfully submitted,

CLOCKWORK IP, LLC

Filed via ESTTA: May 26, 2015

By: /Brad R. Newberg/  
Brad R. Newberg  
bnewberg@mcguirewoods.com  
McGuireWoods LLP  
1750 Tysons Boulevard  
Suite 1800  
Tysons Corner, VA 22102-4215  
(703) 712-5061  
(703) 712-5187 (fax)

Amanda L. DeFord  
adeford@mcguirewoods.com  
McGuireWoods LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-7787  
(804) 698-2248 (fax)  
*Attorneys for Petitioner Clockwork IP, LLC*

**CERTIFICATE OF SERVICE**

On May 26, 2015, this document was sent by first class mail to the following counsel of record:

Julie Celum Garrigue  
Celum Law Firm PLLC  
11700 Preston Rd  
Suite 660 Pmb 560  
Dallas, TX 75230

*Counsel for Respondent Barnaby  
Heating & Air*

Melissa Replogle  
Replogle Law Office LLC  
2661 Commons Blvd.  
Suite 142  
Beavercreek, OH 45431

*Counsel for Assignee McAfee Heating  
& Air Conditioning Co., Inc.*

/Amanda L. DeFord/  
Amanda L. DeFord



6. Attached hereto as **Exhibit E** is a true and accurate copy of the email I received from Ms. Garrigue on April 15, 2015.

7. Attached hereto as **Exhibit F** is a true and accurate copy of the email I sent to Ms. Garrigue in the early evening on April 15, 2015.

8. Attached hereto as **Exhibit G** is a true and accurate copy of the discovery responses served on Petitioner by Respondent on April 16, 2015.

9. Attached hereto as **Exhibit H** is a true and accurate copy of the email I received from Ms. Garrigue on April 16, 2015.

10. Attached hereto as **Exhibit I** is a true and accurate copy of the email I received from Ms. Garrigue on April 17, 2015.

11. Attached hereto as **Exhibit J** is a true and accurate copy of the email I received from Ms. Garrigue on April 20, 2015.

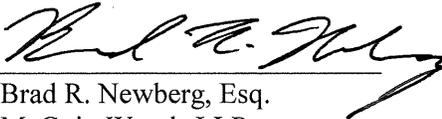
12. Attached hereto as **Exhibit K** is a true and accurate copy of the cover email and the deficiency letter Amanda L. DeFord, Esquire, an associate at McGuireWoods LLP, sent to Ms. Garrigue on April 28, 2015..

13. Attached hereto as **Exhibit L** is a true and accurate copy of the email Ms. Garrigue sent to me and Ms. DeFord on May 4, 2015, in response to the April 28, 2015 letter.

14. Attached hereto as **Exhibit M** are true and accurate excerpts taken from the documents Respondent produced in response to Petitioner's discovery requests in the above-captioned case.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Executed this 19th day of May 2015 at Tysons Corner, Virginia.

  
Brad R. Newberg, Esq.  
McGuireWoods LLP

# **EXHIBIT A**

**From:** [Newberg, Brad R.](#)  
**To:** [Julie Celum Garrigue](#)  
**Cc:** [Melissa Replogle](#)  
**Subject:** Failure to deliver discovery  
**Date:** Sunday, April 12, 2015 1:21:21 PM

---

Julie, I believe that all of Barnaby's discovery responses, including its production of documents, pursuant to the TTAB's Order was due this past Friday, but we did not receive anything. Please advise. Thank you.

# **EXHIBIT B**

**From:** [Newberg, Brad R.](#)  
**To:** [Julie Celum Garrigue](#)  
**Cc:** [Melissa Replogle](#)  
**Subject:** RE: Failure to deliver discovery  
**Date:** Monday, April 13, 2015 5:37:14 PM

---

Hi Julie. Could you please let us know whether we can anticipate the responses and documents today? Thank you.

Brad R. Newberg  
McGuireWoods LLP  
1750 Tysons Boulevard  
Suite 1800  
Tysons Corner, VA 22102-4215  
703.712.5061 (Direct Line)  
703.712.5187 (Fax)  
[bnewberg@mcguirewoods.com](mailto:bnewberg@mcguirewoods.com)  
<http://www.mcguirewoods.com>  
[Brad R. Newberg Profile](#)

---

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---

**From:** Newberg, Brad R.  
**Sent:** Sunday, April 12, 2015 1:21 PM  
**To:** Julie Celum Garrigue  
**Cc:** Melissa Replogle  
**Subject:** Failure to deliver discovery

Julie, I believe that all of Barnaby's discovery responses, including its production of documents, pursuant to the TTAB's Order was due this past Friday, but we did not receive anything. Please advise. Thank you.

# **EXHIBIT C**

**From:** [Julie Celum Garrigue](#)  
**To:** [Newberg, Brad R.](#)  
**Cc:** [Melissa Replogle](#)  
**Subject:** Re: Failure to deliver discovery  
**Date:** Monday, April 13, 2015 6:21:10 PM

---

Hi Brad.

I know this was on my calendar, but I have searched and searched and do not see the entry. I will get you our revised responses, sans objections, first thing tomorrow morning.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065  
F: 214-504-2289  
E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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On Apr 12, 2015, at 12:21 PM, Newberg, Brad R. <[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, I believe that all of Barnaby's discovery responses, including its production of documents, pursuant to the TTAB's Order was due this past Friday, but we did not receive anything. Please advise. Thank you.

# **EXHIBIT D**

**From:** [Newberg, Brad R.](#)  
**To:** [Julie Celum Garrigue](#)  
**Cc:** [Melissa Replogle](#); [DeFord, Amanda L.](#)  
**Subject:** Re: Failure to deliver discovery  
**Date:** Wednesday, April 15, 2015 12:38:50 PM

---

Julie, we still haven't received any responses or documents.

Sent from my iPhone

On Apr 13, 2015, at 6:21 PM, Julie Celum Garrigue <[jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)> wrote:

Hi Brad.

I know this was on my calendar, but I have searched and searched and do not see the entry. I will get you our revised responses, sans objections, first thing tomorrow morning.

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On Apr 12, 2015, at 12:21 PM, Newberg, Brad R.  
<[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, I believe that all of Barnaby's discovery responses, including its production of documents, pursuant to the TTAB's Order was due this past Friday, but we did not receive anything. Please advise. Thank you.

# **EXHIBIT E**

**From:** [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)  
**To:** [Newberg, Brad R.](#)  
**Cc:** [Melissa Replogle](#); [DeFord, Amanda L.](#)  
**Subject:** Re: Failure to deliver discovery  
**Date:** Wednesday, April 15, 2015 2:50:02 PM

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Brad,

I have been working to get all of the updated responses to interrogatories completed and verified by Mr. Barnaby. It is his busiest time of the year and his business depends on him to be there working each day. I am working on it, but I cannot send you anything until he is able to complete the responses.

Given our agreement to extend the prettiest deadlines in this case, will you allow us until this Thursday at 5:00 to get you the materials?

Julie Celum Garrigue  
214-334-6065

On Apr 15, 2015, at 11:38 AM, Newberg, Brad R. <[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

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# **EXHIBIT F**

**From:** [Newberg, Brad R.](#)  
**To:** [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)  
**Cc:** [Melissa Replogle](#); [DeFord, Amanda L.](#)  
**Subject:** RE: Failure to deliver discovery  
**Date:** Wednesday, April 15, 2015 3:06:15 PM

---

We will allow you until this Thursday at 5:00 per your request to get us the “materials” as you put it, but we consider materials—especially given that responses were due last week—to include responsive documents.

Brad R. Newberg  
McGuireWoods LLP  
1750 Tysons Boulevard  
Suite 1800  
Tysons Corner, VA 22102-4215  
703.712.5061 (Direct Line)  
703.712.5187 (Fax)  
[bnewberg@mcguirewoods.com](mailto:bnewberg@mcguirewoods.com)  
<http://www.mcguirewoods.com>  
[Brad R. Newberg Profile](#)

---

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---

**From:** [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com) [mailto:[jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)]  
**Sent:** Wednesday, April 15, 2015 2:50 PM  
**To:** Newberg, Brad R.  
**Cc:** [Melissa Replogle](#); [DeFord, Amanda L.](#)  
**Subject:** Re: Failure to deliver discovery

Brad,

I have been working to get all of the updated responses to interrogatories completed and verified by Mr. Barnaby. It is his busiest time of the year and his business depends on him to be there working each day. I am working on it, but I cannot send you anything until he is able to complete the responses.

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Julie Celum Garrigue  
214-334-6065

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Julie, we still haven't received any responses or documents.

Sent from my iPhone

On Apr 13, 2015, at 6:21 PM, Julie Celum Garrigue <[jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)>

wrote:

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Julie Celum Garrigue

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Dallas, TX 75230

P: 214-334-6065

F: 214-504-2289

E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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On Apr 12, 2015, at 12:21 PM, Newberg, Brad R.

<[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, I believe that all of Barnaby's discovery responses, including its production of documents, pursuant to the TTAB's Order was due this past Friday, but we did not receive anything. Please advise. Thank you.

# **EXHIBIT G**

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

In the Matter of Trademark Registration No. 3,618,331

Registration Date: May 12, 2009

Mark: COMFORTCLUB

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Clockwork IP, LLC	)	
	)	
Petitioner	)	
	)	
v.	)	Cancellation No. 92057941
	)	
BARNABY HEATING & AIR, LLC	)	
	)	
Respondent.	)	

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**RESPONDENT’S SECOND AMENDED OBJECTIONS AND RESPONSES  
TO PETITIONER’S FIRST SET OF INTERROGATORIES,  
FIRST REQUESTS FOR PRODUCTION, AND FIRST REQUESTS FOR ADMISSION**

**TO: PETITIONER CLOCKWORK IP, LLC AND ITS COUNSEL OF RECORD:**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and TBMP § 403, et seq., Respondent Barnaby Heating & Air, LLC (“Barnaby”) serves its SECOND Amended Objections and Answers to Petitioner’s First Set of Interrogatories, Petitioner’s First Requests for Production of Documents and Petitioner’s First Requests for Admission.

Respondent, in answering these interrogatories, requests for production, and requests for admission will afford the words contained therein their common, ordinary meaning, except as the Federal Rules of Civil Procedure may specifically define them. Respondent answers these interrogatories, requests for production, and requests for admission in accordance with the Federal Rules of Civil Procedure, the TBMP and the Trademark Trial and Appeal Board applicable rules.

The pleadings in this matter do not indicate how the following entities are related to this litigation: “Clockwork “SGI””, “AirTime”, “AirTime 500”, “Success Day”, “Success Academy”, “CONGRESS”, “SGI EXPO”, “BRAND DOMINANCE”, and “Senior Tech.” These entities are not parties to this cancellation proceeding and without more information about each of these entities, or how they are related to Petitioner, Clockwork IP, LLC. Until Petitioner amends its pleadings in this case, or better provides an explanation of how any of the above entities relate to Petitioner, Respondent is unable to provide accurate responses to Petitioner’s discovery requests about these various entities.

## **INTERROGATORIES**

### **INTERROGATORY NO. 1:**

Describe in detail how Respondent's Mark was first conceived of by Respondent.

### **ANSWER:**

Mr. Charlie Barnaby is the President of Barnaby Heating & Air, LLC located in Rowlett, Texas. Mr. Charlie Barnaby and his nephew, Shelby Cuellar, relying on their combined years of experience in the air conditioning and heating trade, and their ingenuity, conceived of, created, and developed the COMFORTCLUB mark as a means of marketing club membership sales to its existing customers and to new customers throughout Rowlett, Texas and the Dallas-Fort Worth area. Mr. Barnaby and Mr. Cuellar conceived of and developed the COMFORTCLUB while working at Barnaby Heating & Air in Rowlett, Texas beginning sometime in the Fall and Winter of 2007. Following the conception and development of the COMFORTCLUB mark, and in an effort to market COMFORTCLUB club membership sales to its existing customers and to new customers throughout Rowlett, Texas and the Dallas-Fort Worth area, on January 28, 2008, Barnaby Heating & Air ordered five thousand (5,000) 3.5 X 8.5 double sided Rip Hangers from 48HourPrint.com of Quincy, Massachusetts that incorporated and displayed Respondent’s COMFORTCLUB mark.

Neither Mr. Charlie Barnaby, nor Mr. Cuellar, relied upon any documents or materials of Petitioner’s while creating and developing Respondent’s COMFORTCLUB mark.

### **INTERROGATORY NO. 2:**

State in detail the reasons for Respondent's selection of COMFORTCLUB and the filing of U.S. Registration No. 3,618,331 therefore, the date that Respondent's Mark was selected and cleared, and identify all persons involved in the selection and clearance of Respondent's Mark.

**ANSWER:**

Given the amount of time that has lapsed between Respondent's selection of COMFORTCLUB and the filing of U.S. Registration No. 3,618,331, Respondent relies on the written materials and the United States federal trademark application databases and records that exist on the website, [www.uspto.gov](http://www.uspto.gov) in answering this interrogatory. Respondent is unable to know, without guessing, which individuals at the United States Patent and Trademark Office were involved in the "clearance of the [COMFORTCLUB] mark." Respondent, Barnaby Heating & Air, LLC, developed the COMFORTCLUB trademark in the Fall and Winter of 2007 and Respondent has been using the COMFORTCLUB mark in commerce continuously since at least as early as January 2008.

Respondent incorporates its response to Interrogatory No. 1 above, as if fully set forth herein. Respondent's President Mr. Charlie Barnaby along with Shelby Cuellar selected the COMFORTCLUB mark and following a search online and a search of the United States and Patent and Trademark Office archives filed for federal trademark protection. Respondent selected and conducted multiple online searches to confirm that no other companies offering air conditioning and heating services were using the COMFORTCLUB mark in commerce. Respondent filed the United States federal trademark application on without the aid of anyone outside of Respondent's company, or an attorney, or agent at the U.S. Trademark Office.

**INTERROGATORY NO. 3:**

State Respondent's annual expenditures in developing and marketing COMFORTCLUB.

**ANSWER:**

Respondent would have to speculate or guess about the amount of money spent developing and marketing COMFORTCLUB on an annual basis. Respondent has produced receipts for the Rip Hangers purchased in January 28, 2008 after months of development of the COMFORTCLUB mark that began in the Fall or Winter of 2007. Respondent has also produced an invoice for carbonless COMFORTCLUB business forms. Respondent relies upon those documents in response to this Interrogatory.

Respondent maintains the website, [www.barnabyheatandair.com](http://www.barnabyheatandair.com), on which Respondent markets COMFORTCLUB mark and COMFORTCLUB memberships. Respondent expends approximately \$3,700 annually as a member of the Better Business Bureau through which Respondent advertises the

COMFORTCLUB mark. Respondent expended money employing Mr. Shelby Cuellar during the Fall and Winter of 2007 and in the Winter and Spring of 2008 paying Mr. Cuellar an income while Mr. Cuellar and Mr. Barnaby developed the COMFORTCLUB mark. Respondent employed Mr. Cuellar and paid Mr. Cuellar an income when Respondent began its initial marketing campaign and use of the COMFORTCLUB mark in commerce in 2008.

Respondent has used the COMFORTCLUB Mark continuously since at least as early as January 2008, and Respondent did not independently account for or apportion those amounts it spent developing and marketing the COMFORTCLUB Mark on an annual basis from late 2007 through today.

Respondent incurred filing and registration fees for securing the federal trademark for Respondent's COMFORTCLUB mark. Respondent estimates that it spent approximately \$10,000 on January 18, 2008 – January 25, 2008 for its initial COMFORTCLUB marketing campaign, including the purchase of 5,000 Rip Hangers, forms, strategic marketing campaigns, and for the purchase of additional printed marketing materials. Respondent also incorporated the COMFORTCLUB mark onto its existing website. Respondent estimates that it has spent approximately \$200,000 in developing and marketing the COMFORTCLUB Mark from the Fall or Winter of 2007 through today's date.

**INTERROGATORY NO. 4:** Describe all documents supporting or negating Respondent's priority and ownership of COMFORTCLUB.

**ANSWER:** Respondent "describes" the following documents: (1) All documents produced herewith, including but not limited to Respondent's business records, the August 21, 2007, NIGHTHAWK AIRTIME MEMBER AGREEMENT, entered into between AirTime, LLC and Respondent, an undated Confidentiality Agreement entered into by Respondent and Clockwork Home Services, Inc. formerly known as Venvest, Inc., invoices and forms indicating the dates that Respondent began marketing and advertising its COMFORTCLUB mark, emails to and from individuals at Success Academy beginning in February 2008, Respondent's credit card statements indicating the dates and amounts Respondent paid to AirTime, LLC as a member of AirTime 500 and for developing, registering, and marketing the COMFORTCLUB mark, registration materials for an AirTime 500 March 11-15, 2008 AirTime 500 EXPO, course materials from a "SGI" "The Senior Sales Technician" course attended by Respondent's Charlie Barnaby in March 17-19, 2008, and any and all documents relating to the formation of Petitioner as a limited liability company formed in the State of Delaware, any and all documents Respondent received from Success Academy as a

member of AirTime 500, any and all documents that contain images from Respondent's website, any and all documents showing the corporate formation and/or dissolution and/or merger of AirTime, LLC and any and all companies that may have merged with AirTime, LLC, any and all documents indicating the dates Clockwork Home Services, Inc. was formed and the date of the forfeiture of its incorporation, any and all corporate formation records, fictitious names certificates, annual reports, change in registered agents, and any other corporate or company filings made by Success Group International, New Millennium Academy, LLC, AirTime, LLC, Clockwork Home Services, Inc., Clockwork IP, LLC, The New Masters Alliance, LLC, DirectEnergy, Inc., Aquila Investments, CW 2012, LLC, Plumbers Success, LLC, Roofers Success, LLC, Clockwork, Inc., and Barnaby Heating & Air, LLC. Respondent will also rely on all assignments on filed by or on behalf of Petitioner with the USPTO. Respondent will rely on all assignments to and from Aquila Investments, Inc.

Respondent will also generally rely on any and all documents that relate in any way to Petitioner's alleged claims and Respondent's defenses, including the sworn pleadings and the sworn answer of the parties, those documents that Petitioner and Respondent will include on their exhibit lists, any and all documents identified by Petitioner or Respondent in Rule 26(A)(1) Disclosures, any and all documents on file with the U.S. Patent & Trademark Office, and the Trademark Trial and Appeal Board. Respondent will rely on documents acquired from Petitioner's former or current counsel and or agents, documents located in Respondent's business materials and documents Petitioner served upon other parties – not yet a party to this action. Respondent will rely on Petitioner's application to the U.S. Trademark Office, Application No. 85/880911, filed March 20, 2013 based upon "intent to use".

Respondent has no firsthand knowledge about the document, Bates Numbered OHAC-OTT-001, produced by Petitioner in this cancellation proceeding, which purports to show a nearly identical mark, "COMFORT CLUB", being used in the "*Dynamic Training*" "SUCCESS ACADEMY" "THE ON-TIME TECHNICIAN" "ONE HOUR HEATING & AIR CONDITIONING™" "Always on Time...Or You Don't Pay a Dime! ®" Organization. Respondent had never seen the document, Bates Numbered OHAC-OTT-001, entitled "*Dynamic Training*" "SUCCESS ACADEMY" "THE ON-TIME TECHNICIAN" "ONE HOUR HEATING & AIR CONDITIONING™" "Always on Time...Or You Don't Pay a Dime! ®" until this document was produced by Petitioner just prior to the initiation of this cancellation proceeding. Petitioner does not own franchises. Respondent was never a franchisee of Petitioner's. Respondent was never a member of any organization belonging to Petitioner. Because Respondent was never a member of any organization related to "*Dynamic Training*" "SUCCESS ACADEMY" "THE ON-TIME TECHNICIAN" "ONE HOUR HEATING

& AIR CONDITIONING™” “Always on Time...Or You Don’t Pay a Dime! ®”, Respondent never attended a “*Dynamic Training*” “SUCCESS ACADEMY” “THE ON-TIME TECHNICIAN” “ONE HOUR HEATING & AIR CONDITIONING™” “Always on Time...Or You Don’t Pay a Dime! ®” course.

Respondent never entered into a contract with Petitioner. Respondent, Barnaby Heating & Air, LLC, is a Texas Limited Liability Company. On August 21, 2007, Respondent entered into a contract titled NIGHTHAWK AIRTIME MEMBER AGREEMENT with AirTime, LLC, a Missouri Limited Liability Company and Respondent became a “member” of an organization known as “AirTime 500”. Respondent has no personal knowledge about the relationship between Petitioner and AirTime, LLC or Petitioner and the AirTime 500 organization.

From a review of documents produced by Petitioner just prior to the initiation of this cancellation proceeding, Respondent believes that an entity known as “SGI” and/or “Success Academy” may provide training and educational programs for multiple organizations, including the “AirTime 500” organization to which Respondent belonged beginning in August 2007. Respondent was never a member of any other organization owned by, managed by, or in any way related to Petitioner. Clockwork Home Services, Inc. owned “ONE HOUR HEATING & AIR CONDITIONING™” franchises. Respondent does not nor has it ever owned a “ONE HOUR HEATING & AIR CONDITIONING™” franchise. As a result of never having owned a “ONE HOUR HEATING & AIR CONDITIONING™” franchise, Respondent never saw, nor was Respondent ever provided, a copy of the document, Bates Numbered OHAC-OTT-001, entitled, “*Dynamic Training*”, “SUCCESS ACADEMY”, “THE ON-TIME TECHNICIAN”, “ONE HOUR HEATING & AIR CONDITIONING™” “Always on Time...Or You Don’t Pay a Dime! ®”. Respondent was never provided a copy of the document, Bates Numbered OHAC-OTT-001, entitled, “*Dynamic Training*”, “SUCCESS ACADEMY”, “THE ON-TIME TECHNICIAN”, “ONE HOUR HEATING & AIR CONDITIONING™” “Always on Time...Or You Don’t Pay a Dime! ®” until Petitioner disclosed this document to Respondent in this litigation.

Pursuant to Rule 26(a)(1)(B) of the Federal Rules of Civil Procedure, Barnaby provides the following description of categories of documents, electronically stored information, and tangible things that Barnaby has in its possession, custody, or control and may use to support its claims or defenses. Unless otherwise noted, the documents described above and the following documents, electronically stored information, and tangible things have been produced herewith:

- a. Documents pertaining to the historical use, sales and advertising of Barnaby's services and Barnaby's COMFORTCLUB mark.
- b. Advertisements and other documents pertaining to the continuous use of the "COMFORTCLUB" mark by Barnaby, from a date prior to the date of first use alleged by Clockwork in documents produced in this case and in documents filed with the U. S. Patent and Trademark Office, Application No. 85/880911 – COMFORTCLUB – by Petitioner.
- c. Internet printouts from Barnaby's website at [www.barnabyheatingandair.com](http://www.barnabyheatingandair.com).
- d. Documents pertaining to the subscription, development and history of the website [www.barnabyheatingandair.com](http://www.barnabyheatingandair.com).
- e. Documents pertaining to the subscription, development and history of the website [www.onehourheatandair.com](http://www.onehourheatandair.com).
- f. Documents and franchise materials from the One Hour Heating & Air.
- g. Internet printouts from DirectEnergy. Internet printouts from One Hour Heating & Air.

Barnaby expressly reserves the right to supplement this response.

**INTERROGATORY NO. 5:**

List and describe all Petitioner, SGI, or AirTime events, including without limitation, Success Day and Success Academy sessions, CONGRESS franchise events, SGI EXPO events, BRAND DOMINANCE events, Senior Tech events, and any similar events attended by Respondent since 2006.

**ANSWER:**

Respondent has not attended any events held by Petitioner. Respondent is unaware of any "SGI" events. Respondent has never attended a "CONGRESS franchise event." Respondent has never attended a "BRAND DOMINANCE" event. Respondent is a former member of "AirTime 500" and only attended AirTime 500 events. Respondent attended a "SGI AirTime 500 EXPO" in September 2007. Respondent believes that while he was present at the September 2007 "SGI AirTime 500 Expo" he may have attended a "Success Day" sales and marketing meeting. Respondent attended a "SGI AirTime 500 EXPO" in approximately March 10-15, 2008 and attended a "Success Academy" "The Senior Sales Technician" meeting from March 2008. The March 2008 "Success Academy" "The Senior Sales Technician" was the only training event Respondent ever attended. Respondent attended other AirTime 500 Expos periodically from 2009 through 2012. Respondent is no longer an AirTime 500 member.

**INTERROGATORY NO. 6:**

Describe Respondent's relationship with Petitioner, SGI, and AirTime 500.

**ANSWER:** Respondent has no relationship with Petitioner. Respondent has no relationship with SGI. Respondent has no relationship with AirTime 500.

**INTERROGATORY NO. 7:**

Describe and list all agreements between Respondent and Petitioner, Respondent and SGI, Respondent and AirTime 500, including without limitation all Acknowledgements of Non-Solicitation Policy or Confidentiality Agreements executed by Respondent.

**ANSWER:** Respondent has no agreements with Petitioner. Respondent has no agreements with SGI. Respondent has no agreements with AirTime 500. Respondent is a former member of AirTime 500 and on August 21, 2007 entered into a contract with AirTime, LLC. Respondent refers Petitioner to the August 21, 2007 contract between Respondent and AirTime, LLC produced herewith. Respondent has never signed any agreements with Petitioner. Respondent is not a licensee of Petitioner.

**INTERROGATORY NO. 8:**

Describe all goods and services with which Respondent's Mark has been, is intended to be, or is currently used and, for each good or service identified:

- (a) state the date of first use anywhere and the date of first use in commerce and the nature of that first use in commerce;
- (b) describe any periods of non-use;
- (c) describe the distribution system for each such good or service including the channels of trade in which such good or service is or will be distributed;
- (d) describe the methods by which Respondent has advertised or promoted the sale of each good or service, including, without limitation, the types of media in which such advertising and promotion has been conducted;
- (e) identify and describe the geographic scope of any advertising and sales for each good or service provided;
- (f) identify all instances of use of Respondent's Mark by Respondent or Respondent's licensees, including use in marketing materials, internal materials, and Respondent's websites.

**ANSWER:**

Respondent has used the COMFORTCLUB mark continuously since, at least as early as January 22, 2008 in its promotional materials and its marketing materials. Respondent relies on the materials produced herewith describing Respondent's goods and services for which Respondent's Mark has been and is currently used. Respondent incorporates its response to Interrogatories Nos. 1, 2, 3, and 4, and the documents produced herewith.

**INTERROGATORY NO. 9:**

Describe all facts and identify all documents and things relating to and showing Respondent's use of Respondent's Mark in commerce before and after Mr. Charles Barnaby's execution of the Success Academy "Acknowledgement of Non-Solicitation Policy" dated March 17, 2008.

**ANSWER:**

See Respondent's answer to Interrogatory Nos. 1-4 and No. 8, which answer is fully incorporated herein.

**INTERROGATORY NO. 10:**

Identify and describe the types of customers to whom Respondent has provided or is providing COMFORT CLUB services and, for each type of customer:

- (a) indicate the approximate fractional or percentage dollar volume of sales to each type of customer; and
- (b) state the method by which Respondent has provided or is providing services identified with Respondent's Mark, including without limitation, channels of trade utilized or being utilized by Respondent.

**ANSWER:**

Respondent incorporates its response to Interrogatories Nos. 1, 2, 3, and 4 and to Interrogatory No. 8, and the documents produced herewith.

**INTERROGATORY NO. 11:**

State the annual revenues generated in connection with Respondent's services offered under Respondent's Mark from the date of first use to present.

**ANSWER:**

Respondent incorporates its response to Interrogatories Nos. 1, 2, 3, and 4 and to Interrogatory No. 8, and Respondent relies on the COMFORTCLUB club membership sales materials produced herewith. Respondent reserves the right to supplement this response.

**INTERROGATORY NO. 12:**

State whether any search, inquiry, investigation, or marketing survey has been or is being conducted relating to the availability, registrability, or enforceability of Respondent's Mark and, if so, for each identify all documents relating to the search or investigation including, but not limited to, each report referring to or reflecting the search or investigation.

**ANSWER:**

Respondent performed a thorough search, inquiry, investigation, and marketing survey prior to expending advertising dollars and securing a federal trademark registration for the COMFORTCLUB mark. Respondent does not have a printed report of each effort it made prior to filing its federal trademark application. Respondent refers Petitioner to the documents produced herewith relating to the registration of Respondent's COMFORTCLUB mark.

**INTERROGATORY NO. 13:**

Describe in detail all instances in which Respondent has received objections or misdirected inquiries regarding its use and/or application for Respondent's Mark.

**ANSWER:**

Respondent does not understand the request as drafted. Respondent is unsure what Petitioner means by "instances in which Respondent has received objections or misdirected inquiries regarding its use and/or application for Respondent's Mark." Subject to the foregoing and without waiving same, Respondent is only aware of the objections made by Clockwork Home Services, Inc. and now Clockwork IP, LLC regarding Respondent's use of Respondent's COMFORTCLUB Mark. Respondent also received an "objection" to the use of Respondent's use of the COMFORTCLUB mark from McAfee Heating & Air Conditioning, Inc. at some time in 2013. Respondent refers Petitioner to the documents produced herewith.

**INTERROGATORY NO. 14:**

Describe in detail all facts and identify all documents and things relating to any alleged association between Petitioner and Respondent.

**ANSWER:**

There is no relationship between Respondent and Petitioner.

**INTERROGATORY NO. 15:**

Identify any members of the public known to Respondent to have been or who may have been confused with respect to Respondent's Mark as a result of, or with respect to, the use by Petitioner of the mark COMFORT CLUB; and:

- (a) Describe each such instance of confusion; and
- (b) Identify any persons who can testify regarding each such instance.

**ANSWER:**

Respondent does not understand the request as drafted. Respondent is unclear what Petitioner means by “any members of the public known to Respondent to have been or who may have been confused with respect to Respondent's Mark as a result of, or with respect to, the use by Petitioner of the mark COMFORT CLUB.” Subject to the foregoing, Respondent is not aware of any members of the public to have been or who may have been confused with respect to Respondent’s Mark.

**INTERROGATORY NO. 16:**

Identify each person that was a potential customer of Respondent who would have received any advertising or marketing material displaying Respondent's Mark.

**ANSWER:**

Respondent would identify those 5,000 plus customers to whom Respondent distributed flyers beginning in January 2008. Respondent identifies the individuals as J. Does 1-5,000. Respondent also identifies every single individual who has ever accessed its website, the Better Business Bureau’s website on which they may have viewed Respondent’s advertisements of its COMFORTCLUB mark. Respondent also advertises on the radio and Respondent would identify each and every listener during the time Respondent’s COMFORTCLUB was being advertised.

**INTERROGATORY NO. 17:**

Describe Respondent's present or future plans to market goods and/or services offered under Respondent's Mark beyond the scope of that which Respondent currently offers.

**ANSWER:**

Respondent expects to continue to use its COMFORTCLUB mark as it has been using it since 2008.

**INTERROGATORY NO. 18:**

State the date of, and describe in detail the circumstances of, when you first became aware of Petitioner's Mark.

**ANSWER:**

Respondent first became aware of Petitioner's infringement of Respondent's trademark while conducting an online search some time in 2011.

**INTERROGATORY NO. 19:**

State all facts on which Respondent relies in support of the allegation in its application for U.S. Registration No. 3,618,331 that "to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive...."

**ANSWER:**

In Responding to this Interrogatory, Respondent incorporates its answers to Interrogatories Nos. 1, 2, 3, 4, 8 and Interrogatory No. 18.

**INTERROGATORY NO. 20:**

State all facts on which Respondent relies in support of the allegation in its application for U.S. Registration No. 3,618,331 for COMFORTCLUB that Respondent was the rightful "owner of the trademark/service mark sought to be registered."

**ANSWER:**

In Responding to this Interrogatory, Respondent incorporates its answers to Interrogatories Nos. 1, 2, 3, 4, 8 and Interrogatory No. 18.

**INTERROGATORY NO. 21:**

Identify all interactions Respondent had with Petitioner or Petitioner's legal representatives prior to the filing of its application for U.S. Registration No. 3,618,331.

**ANSWER:**

None.

**INTERROGATORY NO. 22:**

Describe all facts and identify all documents and things upon which Respondent bases its denials in Respondent's Answer to the Petition to Cancel in this proceeding.

**ANSWER:**

Respondent is unable to provide a narrative answer to this interrogatory and instead relies on information that is available from its business records and electronically stored records in accordance with Federal Rule of Civil Procedure 33(d). Respondent also incorporates its answers to Interrogatories Nos. 1-4, 8, and 18. In drafting Respondent's Answer, Respondent denied the facts and claims in the numbered paragraphs corresponding to Petitioner's petition for cancellation that were untrue and with which Respondent could not agree.

By way of example, in Paragraph's 1-3, from Petitioner's Petition to Cancel, Petitioner alleges that it owns the trademark "COMFORT CLUB", Application No. Application No. 85/880911, filed March 20, 2013. In fact, Petitioner does not own the "COMFORT CLUB" mark and has since abandoned its U.S. Trademark application.

Petitioner also claims it owns the COMFORT CLUB mark and has been using it since 2006. Respondent denied this paragraph because it is untrue. It is untrue, because Petitioner has failed to produce any evidence that it has used the Mark since 2006. Petitioner filed an application with the U.S. Trademark Office on March 20, 2013 alleging as its filing basis an intent to use the COMFORT CLUB mark in commerce rather than actual use.

Petitioner's U.S. Trademark Application No. 85/880911 was abandoned by Petitioner.

Petitioner willfully made false statements knowing they were punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001. Despite such knowledge, Petitioner willfully filed a federal trademark application, filed under 15 U.S.C. Section 1051(b), asserting that it believed it was entitled to use the Mark in commerce and that no other entity, including Respondent, had the right to use the Mark in commerce. This was a willfully false statement made by Petitioner in March 2013, just shortly before filing its Petition to Cancel.

Petitioner's Petition to Cancel contradicts basic representations made by Petitioner's attorneys' and/or agent's in the written documents and verbal discussions prior to the initiation of this cancellation proceeding.

Petitioner signed a sworn declaration before the U.S. Trademark Office, and was warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001. Petitioner also declared under oath that under 15 U.S.C. Section 1051(b), (1) it believed it was entitled to use such mark in commerce; (2) that to the best of its knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and (3) that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true. Not only did Petitioner abandon its federal trademark application, but it has failed to provide any evidence it used the COMFORTCLUB Mark in commerce since 2006, and there are zero documents attached as exhibits to Petitioner's Petition to Cancel indicating any use by Clockwork IP, LLC. of the COMFORTCLUB mark as early as 2003, or from 2003 to 2008.

Additionally, according to documents produced by Petitioner in this proceeding appear to assert that DirectEnergy, Inc. or Clockwork Home Services, Inc. may have used a substantially similar mark, COMFORT CLUB.

Respondent also bases its affirmative defenses on the timing of Petitioner's Petition for Cancellation, which was filed well over five (5) years after Respondent began using the COMFORTCLUB mark in commerce.

Respondent was never owned a "One Hour Heating and Air" franchisee and never attended any meeting

where “One Hour Heating and Air” marketing materials were distributed.

Respondent’s date of first use of its COMFORTCLUB mark precedes the date of any applicable membership agreement entered into between Respondent and Clockwork Home Services, Inc. Respondent has never done business with Petitioner. Respondent has never entered into a contract with Petitioner. Respondent is not a licensee of Petitioner’s

Respondent declines to provide a further narrative answer to this interrogatory because the interrogatory asks for information that is available from documents produced in this case, on which Respondent relies in answering this Interrogatory, and the pleadings filed in this case including the Petition to Cancel and Answer and Affirmative Defenses, and this interrogatory is best addressed via a deposition. Fed. R. Civ. P. 33(d).

**INTERROGATORY NO. 23:**

Describe all facts and identify all documents and things upon which Respondent bases its Affirmative Defenses in Respondent 's Answer to the Petition to Cancel in this proceeding.

**ANSWER:**

In reliance upon Federal Rule of Civil Procedure 33(d), Respondent declines to provide a narrative answer to this interrogatory and relies on its business and electronically stored records that were produced in this case. Fed. R. Civ. P. 33(d). Respondent relies on any and all documents produced herewith, including (1) its business records, (2) documents produced by Petitioner in this case, (3) conversations Respondent has had with Petitioner’s agents or employees, (4) representations made by Petitioner and its employees, (5) representations made by Petitioner’s attorneys during the pendency of this matter and prior to the initiation of this matter, (6) Respondent’s federal trademark application and registration materials, and (7) Respondent’s memory, (8) Petitioner’s federal trademark application and the corresponding file materials, (9) Petitioner’s abandonment of its federal trademark registration, (10) any and all documents that Petitioner may produce in this case, or identify in its Disclosures, discovery documents, pretrial disclosures, or other materials filed in this proceeding, (11) all corporate registration and formation documents and dissolution documents, (12) all assignments on file with the U.S. Patent and Trademark Office. To the extent this interrogatory calls for a narrative from Respondent and to the extent Respondent has inadvertently failed to recall each and every single document, fact, or circumstance upon which it relies in defending against Petitioner’s baseless claims, Respondent specifically reserves the right to supplement and amend this

response.

**INTERROGATORY NO. 24:**

Identify all persons having knowledge of the denials asserted in Respondent's Answer to the Petition to Cancel, and describe the substance of those persons' knowledge.

**ANSWER:**

Respondent declines to provide a narrative answer to this interrogatory because the interrogatory asks for information that is available from its business and electronically stored records. Fed. R. Civ. P. 33(d). Respondent would refer Petitioner to documents produced by Respondent in this case and Respondent's Rule 26(a)(1) disclosures for a list of those individuals Respondent believes have the most knowledge about the facts of this case. Subject to the foregoing,

John Paccuca, Blue Stream Services, Inc., 850 Vandalia Street, Suite 120, Collinsville, IL 62234. It is believed that Mr. Paccuca has information and knowledge regarding Respondent's priority of use over that of Petitioner.

Travis Barnaby, 4620 Industrial Street, Suite C, Rowlett, TX 75088, an employee of Barnaby Heating & Air and has worked in Respondent's office and it is believed that Mr. Barnaby has information and knowledge regarding Respondent's priority of use over that of Petitioner.

Shelby Cuellar, 4800 Northway Drive, Apartment 2N, Dallas, TX 75206, the nephew of Respondent's Mr. Charlie Barnaby, an employee of Barnaby Heating & Air and has worked in Respondent's office and it is believed that Mr. Barnaby has information and knowledge regarding Respondent's priority of use over that of Petitioner.

Thomas Dougherty, 6305 Carrizo Drive, Granbury, TX 76049. It is believed that Mr. Dougherty has information and knowledge regarding Respondent's priority of use over that of Petitioner.

Paul Riddle, Vice President of Operations for Clockwork Home Services. Mr. Riddle has information regarding the history and use of the COMFORTCLUB mark by Barnaby, prior to use of the Mark by Petitioner.

Randy Kelley, 1510 Stevens St., The On Time Experts, Dallas, Texas 75218. Mr. Kelley is a former franchisee of Petitioner and it is believed that Mr. Kelley has information pertaining to Petitioner's use of the "Comfort Club" mark. Mr. Kelly is a former franchisee of Petitioner's and has knowledge of Respondent's priority of use of the COMFORTCLUB mark over that of Petitioner.

Mr. Jay Rol, Rol Air, Plumbing and Heating, 7510 Lannon Avenue NE, Albertville, MN 55301. Mr. Rol is a current user of the COMFORTCLUB mark under license from McAfee Heating & Air Conditioning, Inc. and has information pertaining to McAfee Heating & Air's use of the COMFORTCLUB mark in commerce.

Juli Cordray Barnaby Heating & Air LLC, 4620 Industrial Street, Suite C, Rowlett, TX 75088. Ms. Cordray is an employee of Barnaby Heating & Air and was in the office during Mr. Barnaby's telephone conversations with Petitioner's employee, Mr. Paul Riddle.

Greg McAfee, McAfee Heating & Air Conditioning, Inc., 4770 Hempstead Station Dr., Kettering, Ohio 45429. Mr. McAfee is the owner of McAfee Heating & Air Conditioning, Inc., the current assignee of the COMFORTCLUB mark from Respondent. It is believed that Mr. McAfee has knowledge of McAfee's priority over that of Petitioner, given McAfee's use of the COMFORTCLUB mark in commerce since 1999. See the documents produced in response to various Requests for Production, submitted herewith.

Charlie Barnaby owns and operates Barnaby Heating & Air and has intimate knowledge of the conception, development, marketing, and continuous use of the COMFORTCLUB mark by Respondent since the Fall or Winter of 2007 and first use in commerce beginning at least as early as January 2008.

Deborah Barnaby, R.N. co-owner of Barnaby Heating & Air, LLC, who has knowledge of the conception, development, marketing, and continuous use of the COMFORTCLUB mark by Respondent since the Fall or Winter of 2007 and first use in commerce beginning at least as early as January 2008.

Scott Boose, former President of Clockwork Home Services, Inc. who has knowledge of the dates Respondent sent cease and desist correspondence to a One Hour Heating and Air franchisee regarding the use of Respondent's COMFORTCLUB mark.

Steven Thrasher, former counsel of Respondent, who drafted a cease and desist correspondence to Clockwork Home Services, Inc.

John Pare, former Secretary of Clockwork, Inc. and counsel for Petitioner, who has knowledge of the sell and dissolution of Clockwork Home Services, Inc., the merger of various entities, including Electricians Success International, LLC, Plumbers Success International, LLC, and Roofers Success International, LLC with AirTime, LLC, the sale of AirTime, LLC to Aquila Investments, LLC, the parties to any contract between Respondent and AirTime, LLC or Respondent and Success Academy, LLC or New Millennium Academy, LLC., the assignment of Clockwork Home Services, Inc.'s or Clockwork, Inc.'s or Clockwork IP, LLC's trademarks to Aquila Investments, LLC in 2013.

Rebecca Cassel, President of Aquila Investments, LLC who has knowledge of the dissolution and/or merger of AirTime, LLC, and the assignment of intellectual property to Aquila Investments, LLC.

Robert R. Beckmann, former Secretary of VenVest Ventures, Inc. who has knowledge of the merger of VenVest Ventures, Inc. with Clockwork Home Services, Inc.

Robin Faust, formerly with Success Academy, who received and sent emails from and to Respondent's Charles Barnaby regarding the January 2008 advertisement showing Respondent's use of the COMFORTCLUB mark prior to attending any Success Academy Senior Technician Training.

Any and all employees of Success Academy.

Any and all employees of AirTime, LLC. These individuals have knowledge of the materials that are shared with independent contractors who are members of AirTime 500, versus the proprietary materials that are shared with Clockwork Home Services, Inc. franchisees.

Sean Collin, of Pitts & Eckel, P.C., who has knowledge of the transfer and assignment of intellectual property to Aquila Investment, LLC and the dissolution of Clockwork Home Services, Inc. and Clockwork, Inc.

Any and all employees of Respondent.

**INTERROGATORY NO. 25:**

Identify all persons having knowledge of allegations and facts which you asserted in these interrogatory responses and describe the substance of those persons' knowledge.

**ANSWER:**

Respondent incorporates its response to Interrogatory No. 25 herein.

**INTERROGATORY NO. 26:**

Identify each person whom Respondent may call to testify on his behalf in this Cancellation.

**ANSWER:**

Respondent incorporates its response to Interrogatory No. 25 herein

**INTERROGATORY NO. 27:**

Describe all facts and identify all documents and things relating to and supporting Respondent's Affirmative Defenses in its Answer to Petitioner's Petition to Cancel.

Identify all documents and things on which Respondent intends to rely in this Cancellation.

**ANSWER:**

Respondent will rely on any and all documents that tend to support its defenses in this case, including, but not limited to any and all documents identified in Interrogatories Nos. 1 – 26, above. Respondent specifically reserves the right to supplement this response.

**RESPONDENT'S OBJECTIONS AND RESPONSES TO PETITIONER'S FIRST REQUESTS  
FOR THE PRODUCTION OF DOCUMENTS AND THINGS**

**REQUEST FOR PRODUCTION NO. 1:**

All documents and things identified in Respondent's responses to Petitioner's First Set of Interrogatories to

Respondent served in connection with this Cancellation.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 2:**

All documents and things not identified in Respondent's responses to Petitioner's First Set of Interrogatories to Respondent which nonetheless were reviewed or relied upon by Respondent in preparing answers to said Interrogatories, or which support Respondent's responses thereto.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 3:**

All documents and things relating to the following:

- (a) Respondent's creation, selection, development, clearance, approval, and adoption of Respondent's Mark, including all documents relating to any trademark searches which were conducted by or for Respondent in connection with Respondent's Mark, the results thereof, and samples of any marks or names considered and rejected.
- (b) The content or result of any meeting or discussion at which Respondent's consideration, acquisition, selection, approval, or adoption of Respondent's Mark were discussed;
- (c) Further investigations conducted by or on behalf of Respondent into the current status of any marks uncovered by trademark searches which were conducted by or for Respondent in connection with Respondent's Mark;
- (d) Information, notice, or opinion(s) concerning conflict or potential conflict associated with your adoption, use, or registration of Respondent's Mark;
- (e) All communications in which a person has recommended or cautioned against

Respondent's acquisition, selection, development, adoption , or use of Respondent' s Mark; and

(f) All information, notices, or opinions concerning the availability of Respondent' s Mark for use or registration.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 4:**

All documents and things relating to communications issued or received by Respondent relating to Respondent's Mark.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 5:**

All documents and things relating to communications issued or received by Respondent relating to Petitioner's Marks.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 6:**

All documents and things relating to the first use anywhere and the first use in commerce of Respondent's Mark by or on behalf of Respondent.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 7:**

All documents and things relating to or identifying the nature of Respondent's business, including all

products and services ever offered by Respondent.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 8:**

Representative examples - such as products, labels, packaging, tags, brochures, advertisements, promotional items, point of sale displays, websites, informational literature, stationery, invoices, or business cards - showing each and every variation in the form of Respondent's Mark which Respondent (or other parties with Respondent's consent) has used, uses, or plans to use depicting Respondent's Mark.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 9:**

All documents and things relating to any plans which Respondent has to expand the types of goods or services currently offered under Respondent's Mark.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 10:**

All documents and things relating to the types of customers to whom Respondent has provided or is providing products or services identified by Respondent's Mark.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 11:**

All documents supporting or negating Respondent's priority and ownership of COMFORTCLUB, including all documents and things relating to the first use anywhere and the first use in commerce of Petitioner's Mark.

**ANSWER:**

See documents produced herewith.

**REQUEST FOR PRODUCTION NO. 12:**

All agreements and policies between Petitioner and Respondent, Respondent and SGI, and Respondent and AirTime 500.

**ANSWER:**

There are no agreements or policies between Respondent and Petitioner. There are no agreements or policies between Respondent and SGI. There are no agreements or policies between Respondent and AirTime 500. Subject to the foregoing, see documents produced herewith.

**REQUEST FOR PRODUCTION NO. 13:**

All written communications between Petitioner and Respondent, Respondent and SGI, and Respondent and AirTime 500.

**ANSWER:**

There are no written communications between Respondent and Petitioner. For any correspondence between SGI or AirTime 500 and Respondent, see responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 14:**

All documents and things relating to Respondent's attendance of any Success Day or Success Academy events, CONGRESS franchise events, SGI EXPO events, BRAND DOMINANCE events, and Senior Tech events, including without limitation all 2008 events and sessions.

**ANSWER:**

Respondent did not attend CONGRESS franchise events, SGI EXPO events, and BRAND DOMINANCE events. For documents responsive to the remainder of this request, see documents produced herewith.

**REQUEST FOR PRODUCTION NO. 15:**

All documents and things relating to Respondent's past, present, and future marketing plans and methods for products or services identified by Respondent's Mark.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 16:**

All documents and things relating to your distribution of and trade channels for the services identified by Respondent's Mark.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 17:**

All documents and things relating to communications between Respondent and third parties concerning the advertisement or promotion of Respondent's Mark.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 18:**

All documents and things relating to communications between Respondent and any third party, including consumers, concerning Respondent's Mark or Petitioner's Mark.

**ANSWER:**

Respondent does not possess documents relating to communications between Respondent and any third party, including consumers, concerning Petitioner's Mark. The documents responsive to the remainder of this request are produced herewith.

**REQUEST FOR PRODUCTION NO. 19:**

All documents and things relating to expenses for advertisement or promotion of Respondent's Mark, including all documents that summarize or tabulate existing or projected advertising expenditures and expenses associated with Respondent's use of Respondent's Mark.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 20:**

All documents and things relating to communications between Respondent and any third party, including consumers and Petitioner franchisees, concerning products and services on which Respondent uses, or has used, the term COMFORTCLUB in commerce.

**ANSWER:**

Petitioner does not have franchisees. None.

**REQUEST FOR PRODUCTION NO. 21:**

All documents and things relating to Petitioner 's Marks, including all documents and things relating to any search, inquiry, investigation, or marketing survey that has been, is being, or will be conducted relating to Petitioner's Mark.

**ANSWER:**

Respondent intends on relying on every single assignment or transfer made by Clockwork Home Services, Inc. and Aquila Investments, Inc. which may be obtained by any party to this proceeding by accessing the U.S. Patent and Trademark Office records, Assignments and Recording Division.

**REQUEST FOR PRODUCTION NO. 22:**

All documents and things relating to any possibility of confusion, mistake, or deception as to the source of original or sponsorship of any product or service arising out of use of Respondent's Mark.

**ANSWER:**

None.

**REQUEST FOR PRODUCTION NO. 23:**

All documents and things relating to any likelihood of confusion, deception or mistake between Respondent's Mark and Petitioner's Marks, including Petitioner's Mark as used by licensee.

**ANSWER:**

None.

**REQUEST FOR PRODUCTION NO. 24:**

All documents and things relating to any instances of actual confusion between Respondent's Mark and Petitioner's Marks, including but not limited to documents and things relating to misdirected mail, e-mail, or telephone calls.

**ANSWER:**

None.

**REQUEST FOR PRODUCTION NO. 25:**

All documents and things relating to any instances of actual confusion regarding a connection between Petitioner or Petitioner's services and Respondent.

**ANSWER:**

None.

**REQUEST FOR PRODUCTION NO. 26:**

All documents and things relating to Respondent's communications with third parties regarding this proceeding.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 27:**

All documents and things relating to any communications between Respondent and Petitioner concerning Respondent's Mark.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 28:**

All documents and things relating to any communications between Respondent and any other party who has used or owns any rights in any names or marks, including design marks, which are comprised of or include the words COMFORT or CLUB.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 29:**

All documents and things relating to the strength or distinctiveness of Respondent's Mark or Petitioner 's Mark.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 30:**

All documents and things relating to any application(s) submitted by Respondent to register, maintain, or modify Respondent's Mark on any trademark register worldwide, and any registration(s) issued as a result thereof.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 31:**

All documents and things identified in Respondent's Initial Disclosures.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 32:**

All documents and things not identified in Respondent's Initial Disclosures which nonetheless were reviewed or relied upon in preparing Respondent's Initial Disclosures.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 33:**

All documents showing or relating to Respondent's awareness of, and first dates of awareness of Petitioner's Mark.

**ANSWER:**

Respondent is not aware that Petitioner owns any mark.

**REQUEST FOR PRODUCTION NO. 34:**

All documents and things showing use of the term COMFORTCLUB in commerce by Respondent in connection with the sale, offer for sale, and/or distribution of any product or service at any time.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 35:**

All documents relating to or detailing Respondent's selection of Respondent's Mark and the decision to file

a U.S. Trademark application for COMFORTCLUB.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 36:**

All documents relating to the goods and services with which Respondent's Mark has been, is intended to be, or is currently used.

**ANSWER:**

See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 37:**

All documents and things upon which Respondent bases its denial of Petitioner's allegation in paragraph 8 of Petitioner's Petition to Cancel in this proceeding that "Respondent, Barnaby Heating and Air, has been an AirTime member and licensee of Petitioner since August 21, 2007."

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 38:**

All documents and things upon which Respondent bases its denial of Petitioner's allegation in paragraph 22 of Petitioner's Petition to Cancel in this proceeding that "Petitioner introduced its COMFORTCLUB mark at CONGRESS in 2006 ... and has come to be associated with the maintenance plans offered by franchisees and member affiliates for the performance and delivery of home heating, air conditioning and ventilation services."

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 39:**

All documents and things upon which Respondent bases its denial of Petitioner' s allegation in paragraph

23 of Petitioner's Petition to Cancel in this proceeding that "Petitioner has priority based upon its prior use and contractual ownership of Petitioner's 'COMFORTCLUB' Mark."

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 40:**

All documents and things upon which Respondent bases its denial of Petitioner's allegation in paragraph 23 of Petitioner's Petition to Cancel in this proceeding that Respondent's COMFORTCLUB mark is virtually identical to Petitioner's COMFORTCLUB in sound, appearance, connotation, and form.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 41:**

All documents and things upon which Respondent bases its denial of Petitioner's allegation in paragraphs 36 and 37 of Petitioner's Petition to Cancel in this proceeding.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 42:**

All documents and things upon which Respondent bases its other denials and admissions in Respondent's Answer to the Petition to Cancel in this proceeding.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 43:**

All documents and things upon which Respondent bases its First Affirmative Defense in paragraph 41 - Failure to State a Claim.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 44:**

All documents and things upon which Respondent bases its Second Affirmative Defense in paragraph 42 - Priority.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 45:**

All documents and things upon which Respondent bases its Third Affirmative Defense in paragraph 43 - Fair Use.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 46:**

All documents and things upon which Respondent bases its Fourth Affirmative Defense in paragraph 44 - Statute of Limitations.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 47:**

All documents and things upon which Respondent bases its Fifth Affirmative Defense in paragraph 45 - Estoppel.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 48:**

All documents and things upon which Respondent bases its Sixth Affirmative Defense in paragraph 46 - Laches.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 49:**

All documents and things upon which Respondent bases its Seventh Affirmative Defense in paragraph 47 - Acquiescence.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 50:**

All documents and things upon which Respondent bases its Eighth Affirmative Defense in paragraph 48 - No Liability.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 51:**

All documents and things upon which Respondent bases its Ninth Affirmative Defense in paragraph 49 - No Standing.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 52:**

All documents and things upon which Respondent bases its Tenth Affirmative Defense in paragraph 50 - Non-Use and Abandonment.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 53:**

All documents and things upon which Respondent bases its Eleventh Affirmative Defense in paragraph 51.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 54:**

All documents and things identified in Respondent's Answer to the Petition to Cancel in this proceeding.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 55:**

All documents referring or relating to Respondent' s uses of any term comprised of or containing "COMFORT " and/or "CLUB" including but not limited to use as the common commercial name for a type of product or service, to describe a feature or characteristic of any product or service, as a verb, or in lowercase letters.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 56:**

All documents and things sufficient to identify the particular market or market segment in which Respondent's services compete, and all competitors.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 57:**

Representative examples of advertising and promotional materials in each media used (e.g., print, television, radio, internet, direct mail, billboards) featuring, displaying, or containing Respondent's Mark

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 58:**

Representative samples of all websites, advertisements, catalogs, brochures, posters, flyers, and any other

printed or online promotional materials that have ever been used by Respondent in connection with Respondent's Mark.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 59:**

Documents sufficient to show all media (e.g., print, television, radio, internet, direct mail, billboards) in which Respondent has advertised or promoted Respondent's Mark, including but not limited to media schedules and advertising plans.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 60:**

Documents sufficient to show the type, identity, and geographic distribution of all media in which Respondent has advertised or intends to advertise goods and services using Respondent's Mark.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 61:**

All press releases, articles, and clippings relating to or commenting upon Respondent's Mark or Respondent's services.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 62:**

Documents sufficient to show all forms in which Respondent has depicted, displayed, or used Respondent's Mark, including but not limited to all designs, stylizations, and/or logos.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 63:**

To the extent not covered by other requests, all documents referring or relating to investigations, searches, research focus groups, reports, surveys, polls, studies, searches, and opinions conducted by or for Respondent relating or referring to Respondent's Mark.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 64:**

All documents referring or relating to any objections Respondent has received concerning his use and/or registration of Respondent's Mark.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 65:**

Documents sufficient to identify the annual sales revenues in units from sales of goods and services by Respondent under Respondent's Mark.

**ANSWER:**

To the extent these materials exist, see responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 66:**

Documents sufficient to identify any advertising expenses incurred by Respondent in connection with use of Respondent's Mark.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 67:**

Documents sufficient to identify the annual advertising and promotional expenditures for Respondent's Goods from the first use of Respondent's Mark to the present.

**ANSWER:**

To the extent these materials exist, see responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 68:**

All documents referring or relating to Respondent's annual expenditures for developing and marketing Respondent's Mark.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 69:**

All documents referring or relating to judicial or administrative proceedings in any forum referring or relating to Respondent's Mark and/or Respondent's Goods, other than this proceeding.

**ANSWER:**

None.

**REQUEST FOR PRODUCTION NO. 70:**

All documents referring or relating to all adversarial proceedings to which Respondent has been a party , including domain name disputes, inter-party proceedings before the U.S. Trademark Trial & Appeal Board or other nation 's trademark offices, or lawsuits filed in a court anywhere in the world.

**ANSWER:**

None.

**REQUEST FOR PRODUCTION NO. 71:**

All documents referring or relating to agreements Respondent has entered into (oral or written) relating to Respondent's Mark, including but not limited to development agreements, license agreements, co-branding agreements, consent agreements, coexistence agreements, assignments, settlement agreements, and advertising agreements.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 72:**

All documents and things sufficient to identify all uses of Respondent's Mark by Respondent or Respondent's licensees, including use in marketing materials, internal materials, and Respondent's websites.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 73:**

All documents and things sufficient to identify the meaning of Respondent's Mark and the messages that Respondent intends to convey to consumers with respect to Respondent's Mark.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 74:**

All documents and things sufficient to identify the ways in which the type of consumer to whom Respondent has been marketing or will market its goods and services under Respondent's Mark is different from the type of consumer to whom Respondent believes Petitioner is marketing its goods and services.

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 75:**

All documents referring or relating to all known third-party uses of terms comprised of or containing "Comfort" and "Club" in connection with HVAC or any other goods or services offered by Respondent, or use of "comfortclub" as the common commercial name for a type of product or service, to describe a feature or characteristic of any product or service, as a verb, or in lowercase letters.

**ANSWER:**

To the extent these materials are in Respondent's possession, see responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 76:**

All documents relied upon by Respondent to support the allegation in its application for U.S. Registration No. 3,618,331 that "to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive."

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 77:**

All documents relied upon by Respondent to support the allegation in its application for U.S. Registration No. 3,618,331 that Respondent was the rightful "owner of the trademark/service mark sought to be registered."

**ANSWER:**

See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 78:**

All documents referring or relating to any and all interactions Respondent had with Petitioner or Petitioner's legal representatives prior to the filing of its application for U.S. Registration No. 3,618,331.

**ANSWER:** None.

**REQUEST FOR PRODUCTION NO. 79:**

All documents referring or relating to Respondent's reasons for selecting the mark "COMFORTCLUB" as a compounded or unitary mark.

**ANSWER:** See responsive documents served herewith.

**REQUEST FOR PRODUCTION NO. 80:**

All documents referring or relating to the similarity of Respondent's COMFORTCLUB mark and Petitioner's COMFORTCLUB mark.

**ANSWER:** Petitioner does not own a COMFORTCLUB mark, so none.

**REQUEST FOR PRODUCTION NO. 81:**

All documents referring or relating to the priority and seniority of Petitioner's COMFORTCLUB mark.

**ANSWER:** None.

**REQUEST FOR PRODUCTION NO. 82:**

All documents referring or relating to the similarity in the services listed in the Respondent's Mark and the services marketed or sold by Petitioner under Petitioner's Mark.

**ANSWER:** Not applicable, as Petitioner and Respondent are not similar entities. Petitioner is not a provider of air conditioning and heating services.

**REQUEST FOR PRODUCTION NO. 83:**

All documents and things relating to Respondent's document retention and destruction policies or

guidelines, if any, which may relate to documents covered by any request herein.

**ANSWER:** None.

**REQUEST FOR PRODUCTION NO. 84:**

All documents Respondent intends to introduce into evidence in this proceeding.

**ANSWER:** Respondent has not made a determination as to which documents Respondent intends to introduce into evidence in this proceeding. When the time comes for the introduction of evidence, Respondent may, or may not, introduce each and every document produced herewith, including any and all documents on which Petitioner may or may not introduce.

**REQUEST FOR PRODUCTION NO. 85:**

All documents on which Respondent intends to rely during the testimony period in support of Respondent's case and all other documents relating to such documents.

**ANSWER:** Respondent has not made a determination as to which documents Respondent intends to rely upon during the testimony period. When the testimony period opens, Respondent may, or may not, rely on each and every document produced herewith, including any and all documents on which Petitioner may rely or may not rely.

**REQUEST FOR PRODUCTION NO. 86:**

For each fact witness whom Respondent intends to call in this proceeding, please produce the following:

- (a) A resume or employment history;
- (b) A written report containing a complete statement of all of his or her opinions and conclusions relevant to this case and the grounds therefor; and
- (c) Other information considered by the witness in forming his or her

opinions.

**ANSWER:** None.

**REQUEST FOR PRODUCTION NO. 87:**

All documents and things supporting cancellation of Respondent's Mark because Respondent perpetrated fraud on the USPTO.

**ANSWER:** None.

**REQUEST FOR PRODUCTION NO. 88:**

All documents and things supporting Respondent's position that it did not perpetrate fraud on the USPTO with respect to Respondent's Mark.

**ANSWER:** See responsive documents attached hereto.

**REQUEST FOR PRODUCTION NO. 89:**

All documents and things relating to each expert witness Respondent has engaged in connection with this proceeding, including but not limited to, resumes, curriculum vitae, references, promotions, matters, opinions, reports, exhibits, and communications concerning any issue presented or considered herein.

**ANSWER:** None.

**REQUEST FOR PRODUCTION NO. 90:**

Any written report, memorandum, opinion, or other written documents and things regarding either Respondent's Mark or Petitioner's Marks that was prepared by any expert witness, regardless of whether Respondent presently intends to call such expert witness in this proceeding.

**ANSWER:** None.

**RESPONDENT'S OBJECTIONS AND RESPONSES  
TO PETITIONER'S FIRST REQUESTS FOR ADMISSION**

**REQUEST FOR ADMISSION NO. 1:**

Respondent has no valid rights in the mark COMFORTCLUB or any variation thereof. At no time was Respondent the owner of COMFORTCLUB.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 2:**

Petitioner is the rightful owner of the COMFORTCLUB Mark as used for Petitioner's services and Respondent's services in the U.S.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 3:**

At no time was Respondent the owner of COMFORTCLUB.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 4:**

Petitioner's Mark has been in use in interstate commerce by Petitioner and/or licensees of Petitioner since at least as early as 2006.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 5:**

Respondent has been an AirTime 500 member and licensee of Petitioner since August 21, 2007, by signing the AirTime Member Agreement, Respondent agreed that "AirTime wholly owns and/or has protectable legal rights in and to the AirTime Resources whether ...(b) the AirTime Resources are subject to copyright, trademark ,tradenname, and/or patent rights of AirTime ..." In the Member Agreement, Respondent agreed

"[n]ot to use any or all of the AirTime Resources for any purpose other than your valid participation in the AirTime Program . . .[and N]othing in this Agreement shall be construed as conveying to you . . .(ii) any license to use, sell, exploit, .copy or further develop any such AirTime Resources." Petitioner's Mark falls under the umbrella of the term "AirTime Resources" as described in said Member Agreement.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 6:**

Respondent attended an SGI "Senior Tech" course in March, 2008. Petitioner's COMFORTCLUB Mark and Petitioner's services were discussed and promoted to Airtime members and licensees at the SGI "Senior Tech" course in March, 2008.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 7:**

Respondent, without the authorization of Petitioner, filed Application No. 77/420,784 for COMFORTCLUB after attending an SGI course covering Petitioner's services rendered under Petitioner's Mark.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 8:**

At all relevant times, Respondent's use of COMFORTCLUB was only as a licensee of Petitioner pursuant to Respondent's AirTime Member Agreement. Respondent was never an owner of the COMFORTCLUB mark.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 9:**

Respondent' s Application No. 77/420,784 for Respondent's Mark was filed fraudulently. Respondent' s

Mark is thus void.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 10:**

Petitioner used the mark COMFORTCLUB in U.S. commerce before any use of the mark COMFORTCLUB in U.S. commerce by Respondent commenced.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 11:**

Prior to March 13, 2008, the filing of Application No. 77/420,784, Respondent was aware of Petitioner's senior and prior right in Petitioner's Mark for both Petitioner's services and Respondent's services.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 12:**

Respondent's Mark is identical to Petitioner's Mark.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 13:**

Respondent's Mark is confusingly similar to Petitioner's Mark.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 14:**

Respondent's services are the same as Petitioner's services.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 15:**

Respondent's services are sold through the same channels of trade as Petitioner's services and directed to the same consumers.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 16:**

Respondent is no longer an AirTime Member and is using the COMFORTCLUB mark without authorization from Petitioner.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 17:**

Respondent's Mark so closely resembles Petitioner's Mark such as to cause confusion, mistake, or deception, and/or to cause the consuming public to believe that Respondent's services marketed or sold in connection with Respondent's Mark originate with or are sponsored, endorsed, licensed, authorized and/or affiliated or connected with Petitioner and/or Petitioner's services in violation of Section 2(d) of the Lanham Act.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 18:**

Petitioner is and will be damaged by registration of Respondent's Mark.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 19:**

Petitioner's rights in Petitioner's Mark predate any use by Respondent of Respondent's Mark in U.S. commerce.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 20:**

All use of the COMFORTCLUB mark by Respondent inured to the benefit of Petitioner, the rightful owner of the COMFORTCLUB mark in the U.S.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 21:**

On March 13, 2008, Respondent's Owner and Principle Partner, Mr. Charles Barnaby, was aware of Petitioner's senior rights in COMFORTCLUB but signed a fraudulent declaration in support of Respondent's Application No. 77/420,784, with an intent to deceive the U.S. Trademark Office into granting registration of Respondent's Mark.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 22:**

On March 13, 2008, Respondent's Owner and Principle Partner, Mr. Charles Barnaby, was aware of that it was not the rightful owner of the COMFORTCLUB Mark and Application No. 77/420,784, but signed a fraudulent declaration in support of Respondent's application for registration of Respondent's Mark, with an intent to deceive the U.S. Trademark Office into granting registration of Respondent's Mark.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 23:**

Respondent's Declaration in Application No. 77/420,784 stating that "to the best of his/her knowledge and

belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive...." is false.

**Answer:**

Denied.

**REQUEST FOR ADMISSION NO. 24:**

Petitioner established rights in the United States in its COMFORTCLUB Mark prior to 2008.

**Answer:** Denied.

**REQUEST FOR ADMISSION No. 25:**

Since as early as 2006, Petitioner has established extensive, common-law rights in COMFORTCLUB Mark.

**Answer:** Denied.

**REQUEST FOR ADMISSION NO. 26:**

Petitioner's rights in COMFORTCLUB date from prior to the filing date of Respondent's Mark or Respondent's alleged use in United States commerce of Respondent's Mark.

**Answer:** Denied.

**REQUEST FOR ADMISSION NO. 27:**

Respondent's Mark is not entitled to continued registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1125(d) because it is likely to cause confusion with the Petitioner's Mark.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 28:**

Applicant committed fraud on the U.S. Patent and Trademark Office.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 29:**

Respondent's First Affirmative Defense in paragraph 41 of its Answer: to Petitioner's Petition to Cancel is without merit and unsupported by evidence.

**ANSWER:** Denied.

**REQUEST FOR ADMISSION NO. 30:**

Respondent' s Second Affirmative Defense in paragraph 42 of its Answer: to Petitioner's Petition to Cancel is without merit and unsupported by evidence.

**Answer:** Denied.

**REQUEST FOR ADMISSION NO. 31:**

Respondent' s Third Affirmative Defense in paragraph 43 of its Answer: to Petitioner's Petition to Cancel is without merit and unsupported by evidence.

**Answer:** Denied.

**REQUEST FOR ADMISSION NO. 32:**

Respondent' s Fourth Affirmative Defense in paragraph 44 of its Answer to Petitioner's Petition to Cancel is without merit and unsupported by evidence.

**Answer:** Denied.

**REQUEST FOR ADMISSION NO. 33:**

Respondent' s Fifth Affirmative Defense in paragraph 45 of its Answer to Petitioner' s Petition to Cancel is without merit and unsupported by evidence.

**Answer:** Denied.

**REQUEST FOR ADMISSION NO. 34:**

Respondent's Sixth Affirmative Defense in paragraph 46 of its Answer to Petitioner's Petition to Cancel is without merit and unsupported by evidence.

**Answer:** Denied.

**REQUEST FOR ADMISSION NO. 35:**

Respondent' s Seventh Affirmative Defense in paragraph 47 of its Answer to Petitioner's Petition to Cancel is without merit and unsupported by evidence.

**Answer:** Denied.

Dated: April 16, 2015

Respectfully,

Barnaby Heating & Air, LLC

/s/ Julie Celum Garrigue

JULIE CELUM GARRIGUE

Celum Law Firm, PLLC  
11700 Preston Rd.  
Suite 660, PMB 560  
Dallas, Texas 75230  
P: 214.334.6065  
F: 214.504.2289  
E: Jcelum@celumlaw.com

Attorney for Respondent  
Barnaby Heating & Air, LLC

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **RESPONDENT'S SECOND AMENDED RESPONSE TO PETITIONER'S FIRST SET OF INTERROGATORIES, FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS, AND FIRST REQUEST FOR ADMISSION** was served on counsel for Petitioner and counsel for Co-Respondent, this 16th day of April 2015, by email and by sending the same via First Class Mail:

Brad R. Newberg  
McGuireWoods, LLP  
1750 Tysons Boulevard  
Suite 1800  
Tysons Corner, VA 22102-4215  
T: 703.712.5061 (Direct Line)  
F: 703.712.5187  
Email: [bnewberg@mcguirewoods.com](mailto:bnewberg@mcguirewoods.com)

Counsel for Petitioner, Clockwork IP, LLC

Melissa Replogle, Esq.  
Replogle Law Office, LLC  
2312 Far Hills Ave., #145  
Dayton, OH 45419  
T: 937.369.0177  
F: 937.999.3924  
Email: [melissa@reploglelawoffice.com](mailto:melissa@reploglelawoffice.com)

Counsel for Co-Respondent  
McAfee Heating & Air Conditioning, Inc.

/s/ Julie Celum Garrigue

JULIE CELUM GARRIGUE

# **EXHIBIT H**

**From:** [Julie Celum Garrigue](#)  
**To:** [Newberg, Brad R.](#)  
**Cc:** [Melissa Replogle](#); [DeFord, Amanda L.](#)  
**Subject:** Re: Failure to deliver discovery  
**Date:** Thursday, April 16, 2015 6:24:23 PM  
**Attachments:** [4.16.2015-Response to Clockwork ROGS, RFPS and RFAS.pdf](#)

---

Attached are Respondent's discovery responses.

I will send the URL for the documents responsive to this discovery under separate email.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065  
F: 214-504-2289  
E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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On Apr 15, 2015, at 2:06 PM, Newberg, Brad R. <[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

We will allow you until this Thursday at 5:00 per your request to get us the "materials" as you put it, but we consider materials—especially given that responses were due last week—to include responsive documents.

Brad R. Newberg  
McGuireWoods LLP  
1750 Tysons Boulevard  
Suite 1800  
Tysons Corner, VA 22102-4215  
703.712.5061 (Direct Line)  
703.712.5187 (Fax)  
[bnewberg@mcguirewoods.com](mailto:bnewberg@mcguirewoods.com)  
<http://www.mcguirewoods.com>  
[Brad R. Newberg Profile](#)

---

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---

**From:** [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com) [<mailto:jcelum@celumlaw.com>]  
**Sent:** Wednesday, April 15, 2015 2:50 PM

**To:** Newberg, Brad R.  
**Cc:** Melissa Replogle; DeFord, Amanda L.  
**Subject:** Re: Failure to deliver discovery

Brad,

I have been working to get all of the updated responses to interrogatories completed and verified by Mr. Barnaby. It is his busiest time of the year and his business depends on him to be there working each day. I am working on it, but I cannot send you anything until he is able to complete the responses.

Given our agreement to extend the prettiest deadlines in this case, will you allow us until this Thursday at 5:00 to get you the materials?

Julie Celum Garrigue  
214-334-6065

On Apr 15, 2015, at 11:38 AM, Newberg, Brad R. <[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, we still haven't received any responses or documents.

Sent from my iPhone

On Apr 13, 2015, at 6:21 PM, Julie Celum Garrigue <[jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)> wrote:

Hi Brad.

I know this was on my calendar, but I have searched and searched and do not see the entry. I will get you our revised responses, sans objections, first thing tomorrow morning.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065  
F: 214-504-2289  
E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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this message in error, please notify the sender immediately.

On Apr 12, 2015, at 12:21 PM, Newberg, Brad R.  
<[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, I believe that all of Barnaby's discovery responses, including its production of documents, pursuant to the TTAB's Order was due this past Friday, but we did not receive anything. Please advise. Thank you.

# **EXHIBIT I**

**From:** [Julie Celum Garrigue](#)  
**To:** [Newberg, Brad R.](#)  
**Cc:** [Melissa Replogle](#)  
**Subject:** URL for Retrieving Barnaby Production  
**Date:** Friday, April 17, 2015 4:57:02 PM

---

Here is the URL, login and password for retrieving Barnaby documents.

<http://64.183.210.86:8000/>

Login: Clockworkip

Password: Newberg

The files are not completely uploaded, but they are being added as the upload completes.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065

F: 214-504-2289

E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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# **EXHIBIT J**

**From:** [Julie Celum Garrigue](#)  
**To:** [Newberg, Brad R.](#)  
**Cc:** [Melissa Replogle](#)  
**Subject:** Re: URL for Retrieving Barnaby Production  
**Date:** Monday, April 20, 2015 4:30:33 PM

---

Brad & Melissa:

All of the documents responsive to outstanding discovery have been uploaded. The files are saved using the corresponding Bates Numbering, e.g., BARNABY - 000238 - BARNABY - 000323, BARNABY - 000901 - BARNABY - 001010, etc.

Please let me know if you experience any technical difficulties or have any trouble retrieving the documents.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065  
F: 214-504-2289  
E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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On Apr 17, 2015, at 3:56 PM, Julie Celum Garrigue <[jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)> wrote:

Here is the URL, login and password for retrieving Barnaby documents.

<http://64.183.210.86:8000/>

Login: Clockworkip

Password: Newberg

The files are not completely uploaded, but they are being added as the upload completes.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065

F: 214-504-2289

E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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# **EXHIBIT K**

**From:** [DeFord, Amanda L.](#)  
**To:** [Julie Celum Garrigue](#)  
**Cc:** [Newberg, Brad R.](#)  
**Subject:** Clockwork IP, LLC v. Barnaby Heating & Air, Cancellation No. 92057941 - Discovery Responses and Production  
**Date:** Tuesday, April 28, 2015 8:57:39 AM  
**Attachments:** [Active 66643690\\_1\\_4-28-2015 - Ltr to Garrigue re Discovery Deficiencies.PDF](#)  
**Importance:** High

---

Ms. Garrigue,

Please see the attached correspondence.

Thank you,

Amanda

Amanda L. DeFord  
McGuireWoods LLP  
One James Center  
901 East Cary Street  
Richmond, VA 23219-4030  
804.775.7877 (Direct Line)  
804.698.2248 (Fax)  
adeford@mcguirewoods.com  
<http://www.mcguirewoods.com>

---

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---

**From:** Julie Celum Garrigue [mailto:jcelum@celumlaw.com]  
**Sent:** Thursday, April 16, 2015 6:24 PM  
**To:** Newberg, Brad R.  
**Cc:** Melissa Replogle; DeFord, Amanda L.  
**Subject:** Re: Failure to deliver discovery

Attached are Respondent's discovery responses.

I will send the URL for the documents responsive to this discovery under separate email.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065  
F: 214-504-2289  
E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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Brad R. Newberg  
McGuireWoods LLP  
1750 Tysons Boulevard  
Suite 1800  
Tysons Corner, VA 22102-4215  
703.712.5061 (Direct Line)  
703.712.5187 (Fax)  
[bnewberg@mcguirewoods.com](mailto:bnewberg@mcguirewoods.com)  
<http://www.mcguirewoods.com>  
[Brad R. Newberg Profile](#)

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**From:** [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com) [<mailto:jcelum@celumlaw.com>]  
**Sent:** Wednesday, April 15, 2015 2:50 PM  
**To:** Newberg, Brad R.  
**Cc:** Melissa Replogle; DeFord, Amanda L.  
**Subject:** Re: Failure to deliver discovery

Brad,

I have been working to get all of the updated responses to interrogatories completed and verified by Mr. Barnaby. It is his busiest time of the year and his business depends on him to be there working each day. I am working on it, but I cannot send you anything until he is able to complete the responses.

Given our agreement to extend the prettiest deadlines in this case, will you allow us until this Thursday at 5:00 to get you the materials?

Julie Celum Garrigue  
214-334-6065

On Apr 15, 2015, at 11:38 AM, Newberg, Brad R. <[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, we still haven't received any responses or documents.

Sent from my iPhone

On Apr 13, 2015, at 6:21 PM, Julie Celum Garrigue <[jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)>

wrote:

Hi Brad.

I know this was on my calendar, but I have searched and searched and do not see the entry. I will get you our revised responses, sans objections, first thing tomorrow morning.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065

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On Apr 12, 2015, at 12:21 PM, Newberg, Brad R.

<[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, I believe that all of Barnaby's discovery responses, including its production of documents, pursuant to the TTAB's Order was due this past Friday, but we did not receive anything. Please advise. Thank you.

April 28, 2015

**By Email and U.S. Mail**

(jcelum@celumlaw.com)

Julie Celum Garrigue, Esq.  
Celum Law Firm PLLC  
11700 Preston Rd  
Suite 660 Pmb 560  
Dallas, TX 75230

Re: Clockwork IP, LLC v. Barnaby Heating & Air, Cancellation No. 92057941  
Deficiencies in Barnaby Heating & Air's Discovery Responses and Document  
Production

Dear Julie:

We write to raise concerns about Barnaby Heating & Air's ("Barnaby") discovery responses dated April 16, 2015, and Barnaby's document production, which you stated was completed as of April 20, 2015 (collectively, "Barnaby's Discovery Responses"). As detailed below, Barnaby's Discovery Responses are deficient in several ways. Barnaby's failure to produce certain documents and to provide information responsive to Clockwork IP, LLC's ("Clockwork") First Set of Interrogatories, First Requests for Production, and First Requests for Admission (collectively, the "Discovery Requests") is unjustifiable and violates the Board's March 11, 2015 order, requiring Barnaby to fully respond to the Discovery Requests without objection on the merits. Please immediately correct all deficiencies, including but not limited to those identified below.

**Email Identified in BARNABY-001260**

In Barnaby's most recent production, it produced an email chain in which Charlie Barnaby requested Robin Faust's input on a proposed ad design. *See, e.g.*, BARNABY-001260. Ms. Faust responded to Mr. Barnaby as follows: "Peter was reviewing your ad and going to respond [sic] directly to you....." *Id.* Barnaby's production did not include the email from Peter to Mr. Barnaby regarding the proposed ad in 2008. If an e-mail was ever sent from "Peter" to Barnaby, that email is responsive to at least Request for Production ("RFP" or "Request") No. 3. Please immediately produce it, and any other emails between Peter and Mr. Barnaby regarding Barnaby's proposed ad.

### **Deficient Production of Documents**

Barnaby's production of documents is deficient in several ways. First, in response to Request for Production ("RFP") Nos. 3, 6, 9, 10, 15, 16, 19, 30, 35, 59, 60, 63, 66, 67, 68, 73, 74, and 79 Barnaby stated "[s]ee documents produced herewith," indicating that it is in possession of documents responsive to those Requests. The existence of responsive documents is further confirmed by the fact that, where Barnaby believes no responsive documents exist, Barnaby responded to the Request with the response "[n]one." See Response to RFP No. 22. But Barnaby did not, and has not to date, produced any documents responsive to RFP Nos. 3, 6, 9, 10, 15, 16, 19, 30, 35, 59, 60, 63, 66, 67, 68, 73, 74, and 79 despite its representation that such documents were produced. Please immediately produce all documents responsive to RFP Nos. 3, 6, 9, 10, 15, 16, 19, 30, 35, 59, 60, 63, 66, 67, 68, 73, 74, and 79. If you believe that documents have been produced in response to these Requests, please provide us with a list stating which documents, by Bates Number, have been produced in response to which of the above-referenced Requests.

Second, in lieu of producing documents, Barnaby provided the following inaccurate and incomplete responses to four of Clockwork's Requests:

- In response to RFP No. 20, which requests "[a]ll documents and things relating to communications between Respondent and any third party, including consumers and Petitioner franchisees, concerning products and services on which Respondent uses, or has used, the term COMFORTCLUB in commerce," Barnaby stated "[p]etitioner does not have franchisees. None." This response is inaccurate as to Petitioner, but it also is incomplete because, regardless of the status of Petitioner and any franchisees, the Request asks for all communications with "any third party" regardless of that party's status. As a result, please immediately produce any documents and things relating to communications between Barnaby and any third party concerning products and services on which Respondent uses, or has used, the term COMFORTCLUB in commerce. In the alternative, let us know immediately that no documents exist between Respondent and any third party, including consumers and Petitioner's franchisees, concerning products and services on which Respondent uses, or has used, the term COMFORTCLUB in commerce.
- In response to RFP No. 33, which requests "[a]ll documents showing or relating to Respondent's awareness of, and first dates of awareness of Petitioner's Mark," Barnaby stated "[r]espondent is not aware that Petitioner owns any mark." Similarly, in response to RFP No. 80, which requests "[a]ll documents referring or relating to the similarity of Respondent's COMFORTCLUB mark and Petitioner's COMFORTCLUB Mark," Barnaby stated "[p]etitioner does not own a COMFORTCLUB mark, so none." Both of these responses are improper because Respondent's belief concerning Petitioner's ownership of Petitioner's Mark bears no relation to Respondent's awareness of Petitioner's Mark, including the first date that Respondent learned of Petitioner's Mark, or the similarity between Respondent's Mark and Petitioner's Mark. Accordingly, please

immediately amend Barnaby's discovery responses and produce all documents responsive to RFP Nos. 33 and 80.

- In response to RFP No. 82, which requests "[a]ll documents referring or relating to the similarity in the services listed in the Respondent's Mark and the services marketed or sold by Petitioner under Petitioner's Mark," Barnaby stated "[n]ot applicable, as Petitioner and Respondent are not similar entities. Petitioner is not a provider of air conditioning and heating services." This response is inaccurate and insufficient. Petitioner's business is directly related to air conditioning and heating services, and its licensees and franchisees use Petitioner's Mark for those services. Barnaby must amend its discovery response and produce all documents responsive to this Request immediately.

Third, our review of Barnaby's document production to date indicates that, although Barnaby produced some documents responsive to RFP Nos. 11, 13, 18, 26, 34, 56, 57, and 62, its production in response to those Requests is nevertheless clearly deficient given the Board's Order. For example, in response to RFP No. 18, Barnaby produced some documents relating to communications with third parties, such as McAfee, regarding Barnaby's Mark, *see, e.g.*, BARNABY-000005; BARNABY-000206, but it did not produce any documents or things relating to communications with consumers. Similarly, in response to RFP No. 57, Barnaby produced some examples of its print advertisements that contain Barnaby's Mark, *see* BARNABY-000002, but it did not produce examples of its advertising and promotional materials in any other media types, even though its answer to Interrogatory No. 16 indicates that Barnaby advertises via the radio. Please either immediately produce all documents responsive to RFP Nos. 11, 13, 18, 19, 26, 34, 56, 57, and 62 and note which documents are responsive to which Requests, or confirm that all responsive documents have been produced with respect to each Request.

### **Deficient Interrogatory Responses**

Five of Barnaby's April 16, 2015 Interrogatory responses are wholly deficient:

- Interrogatory No. 6 requests that Barnaby "[d]escribe [its] relationship with Petitioner, SGI, and AirTime500." Barnaby did not comply with that request; instead, it responded that "Respondent has no relationship with Petitioner. Respondent has no relationship with SGI. Respondent has no relationship with AirTime500." But Barnaby's own documents and its other discovery responses indicate that, at least to the extent Barnaby claims to have no relationship with Clockwork or AirTime500, those statements are false. *See, e.g.*, BARNABY-000197-20; Barnaby's Interrogatory Response No. 4. Please immediately supplement your response to explain Barnaby's relationship, prior and/or current, with Petitioner, including Petitioner's predecessor Clockwork Home Services, as well as with SGI and AirTime500.
- Interrogatory No. 14 requires Barnaby to "[d]escribe in detail all facts and identify all documents relating to any alleged *association* between Petitioner and Respondent." It

does not, as Barnaby's response suggests, request that Barnaby describe the *relationship* between Respondent and Petitioner. Please immediately supplement your response accordingly.

- Barnaby's responses to Interrogatory Nos. 25 and 26 are deficient in that they do not provide a separate narrative and instead incorporate Barnaby's response to Interrogatory No. 25. Barnaby cannot incorporate the response to Interrogatory No. 25 as no response is given. Please immediately clarify whether Barnaby intended to incorporate its response to a different Interrogatory, and if so which one, or supplement the answers to both Interrogatories to remedy these deficiencies. If Interrogatory No. 25 and No. 26 are intended to incorporate the answer to Interrogatory 24, then Interrogatory 25 is still deficient because it is asking for information regarding who had knowledge of the facts specifically given in the Interrogatory responses.
- Interrogatory No. 27 asks Barnaby to "[d]escribe all facts and identify all documents and things relating to and supporting Respondent's Affirmative Defenses in its Answer to Petitioner's Petition to Cancel. Identify all documents and things on which Respondent intends to rely in this Cancellation." Barnaby's response fails to answer the first part of the Interrogatory entirely, and its response is deficient as to the second half. Barnaby cannot answer that Barnaby "will rely on any and all documents that tend to support its defenses in this case." That is a circular statement that does not answer the question at all. Discovery in this action is over. Barnaby should be able to answer the question entirely. Furthermore, given various Requests for Production asking for all documents identified in Respondent's Interrogatory responses or upon which Barnaby will rely, Barnaby is prohibited from relying on any documents not already produced.

In addition to the deficient Interrogatory responses described above, Barnaby did not respond fully to at least three of Clockwork's Interrogatories in Barnaby's Discovery Responses. Specifically, Barnaby failed to provide a complete response to the following Interrogatories:

- In response to Interrogatory No. 2, Barnaby did not state in detail the reasons for its selection of the COMFORTCLUB mark or the date on which Barnaby selected and determined that it was available for use (as opposed to when the USPTO cleared the trademark for registration).
- In response to Interrogatory No. 7, Barnaby failed to describe and list agreements with Petitioner, including, at a minimum, the Confidentiality Agreement between Clockwork Home Services and Barnaby. *See, e.g.*, BARNABY-000197-205.
- In response to Interrogatory No. 8, Barnaby did not provide specific answers to the subparagraphs and nowhere within the response does Barnaby appear to provide any information that would approach an answer to subparagraphs (a), (e), or (f).

Please immediately supplement Barnaby's answers to Interrogatory Nos. 2, 7, and 8 to remedy these deficiencies.

Julie Celum Garrigue  
April 28, 2015  
Page 5

\* \* \*

Given the imminent trial testimony period in this case, we must demand that Barnaby resolve the concerns raised in this letter by no later than Tuesday, May 5, 2015. Clockwork reserves its rights as to all other deficiencies in Barnaby's Discovery Responses, and Clockwork will rely on (a) Barnaby's failure to produce documents as an admission that such documents do not exist and (b) Barnaby's failure to respond to any discovery served by Clockwork as a similar admission of fact regarding that discovery.

Sincerely,



Amanda L. DeFord

cc: Brad R. Newberg, Esq. (*by email*)

# **EXHIBIT L**

**From:** [icelum@celumlaw.com](mailto:icelum@celumlaw.com)  
**To:** [DeFord, Amanda L.](#)  
**Cc:** [Newberg, Brad R.](#)  
**Subject:** Re: Clockwork IP, LLC v. Barnaby Heating & Air, Cancellation No. 92057941 - Discovery Responses and Production  
**Date:** Monday, May 04, 2015 3:39:30 PM

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Amanda & Brad,

I have not had the opportunity to go over each of the points in your letter with Mr. Barnaby. However, he has assured me there are no other responsive documents and that everything has been produced.

As for the responses relating to your client, Clockwork IP, LLC, my client is certain that he has not done business with Clockwork IP, LLC, or its predecessor. He was a member of Airtime 500. The contract he signed was between Airtime 500 and Barnaby Heating & Air, LLC. We produced financial records indicating that each and every payment Barnaby Heating & Air made as a member of Airtime 500 was made to Airtime 500. I am not certain how you expect my client to respond to your outstanding requests given the nature of Barnaby Heating & Air, LLC's relationship to Airtime 500, a Missouri Company.

I am happy to discuss any of that set forth in your letter, but without more information from your client or you, we are unable to respond in any other way to your outstanding discovery requests.

Julie Celum Garrigue  
214-334-6065

On Apr 28, 2015, at 7:57 AM, DeFord, Amanda L. <[ADeFord@mcguirewoods.com](mailto:ADeFord@mcguirewoods.com)> wrote:

Ms. Garrigue,

Please see the attached correspondence.

Thank you,

Amanda

Amanda L. DeFord  
McGuireWoods LLP  
One James Center  
901 East Cary Street  
Richmond, VA 23219-4030  
804.775.7877 (Direct Line)  
804.698.2248 (Fax)  
[adeford@mcguirewoods.com](mailto:adeford@mcguirewoods.com)  
<http://www.mcguirewoods.com>

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**From:** Julie Celum Garrigue [<mailto:jcelum@celumlaw.com>]  
**Sent:** Thursday, April 16, 2015 6:24 PM  
**To:** Newberg, Brad R.  
**Cc:** Melissa Replogle; DeFord, Amanda L.  
**Subject:** Re: Failure to deliver discovery

Attached are Respondent's discovery responses.

I will send the URL for the documents responsive to this discovery under separate email.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065  
F: 214-504-2289  
E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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On Apr 15, 2015, at 2:06 PM, Newberg, Brad R.  
<[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

We will allow you until this Thursday at 5:00 per your request to get us the "materials" as you put it, but we consider materials—especially given that responses were due last week—to include responsive documents.

Brad R. Newberg  
McGuireWoods LLP  
1750 Tysons Boulevard  
Suite 1800  
Tysons Corner, VA 22102-4215  
703.712.5061 (Direct Line)  
703.712.5187 (Fax)  
[bnewberg@mcguirewoods.com](mailto:bnewberg@mcguirewoods.com)  
<http://www.mcguirewoods.com>  
[Brad R. Newberg Profile](#)

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**From:** [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com) [<mailto:jcelum@celumlaw.com>]

**Sent:** Wednesday, April 15, 2015 2:50 PM

**To:** Newberg, Brad R.

**Cc:** Melissa Replogle; DeFord, Amanda L.

**Subject:** Re: Failure to deliver discovery

Brad,

I have been working to get all of the updated responses to interrogatories completed and verified by Mr. Barnaby. It is his busiest time of the year and his business depends on him to be there working each day. I am working on it, but I cannot send you anything until he is able to complete the responses.

Given our agreement to extend the prettiest deadlines in this case, will you allow us until this Thursday at 5:00 to get you the materials?

Julie Celum Garrigue  
214-334-6065

On Apr 15, 2015, at 11:38 AM, Newberg, Brad R.  
<[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, we still haven't received any responses or documents.

Sent from my iPhone

On Apr 13, 2015, at 6:21 PM, Julie Celum Garrigue  
<[jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)> wrote:

Hi Brad.

I know this was on my calendar, but I have searched and searched and do not see the entry. I will get you our revised responses, sans objections, first thing tomorrow morning.

Julie Celum Garrigue

Celum Law Firm, PLLC  
11700 Preston Rd., Suite 660, PMB 560  
Dallas, TX 75230

P: 214-334-6065  
F: 214-504-2289

E: [jcelum@celumlaw.com](mailto:jcelum@celumlaw.com)

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On Apr 12, 2015, at 12:21 PM, Newberg, Brad R.  
<[BNewberg@mcguirewoods.com](mailto:BNewberg@mcguirewoods.com)> wrote:

Julie, I believe that all of Barnaby's discovery responses, including its production of documents, pursuant to the TTAB's Order was due this past Friday, but we did not receive anything. Please advise. Thank you.

<Active\_66643690\_1\_4-28-2015 - Ltr to Garrigue re Discovery Deficiencies.PDF>

# **EXHIBIT M**

**NIGHTHAWK**  
**AIRTIME MEMBER AGREEMENT** 7247

This AirTime Member Agreement ("Agreement") is entered into as of the date indicated below, by and between AirTime, LLC, a Missouri limited liability company, also known as AirTime 500 ("AirTime," "we," "our," or "us"), and the undersigned business entity and/or individual(s) (jointly and severally referred to as the "member," "your," or "you").

We are in the business of helping heating, ventilation and air conditioning contractors to learn and utilize appropriate methods and techniques of the heating, ventilation and air conditioning contracting business by providing the right to participate as a member in our proprietary program (the "AirTime Program"), which includes but is not limited to having the right to access and use certain information and materials relating to training, advertising, marketing, contracts and forms, operational techniques and methods, and other subjects ("AirTime Resources"). You desire to participate as a member of the AirTime Program and we desire that you participate as a member of the AirTime Program, in accordance with the terms of this Agreement.

**AirTime Program.** Subject to all of the terms of this Agreement, AirTime grants to you the non-exclusive right and license to participate as a member of the AirTime Program during the term provided for in this Agreement (the "Participation Term"). You agree that you will not use any AirTime Resources outside of your designated geographic service area in addition to abiding by all other terms and conditions regarding use and disclosure of AirTime Resources. A service area is defined as your licensed zip codes listed on attached Schedule C. *Top be determined by both parties*

**Guarantee.** See attached Schedule A

**Fees.** The attached Schedule B sets forth the membership fees applicable to your participation as a member of the AirTime Program as well as the terms of payment.

**Participation Term.** The Participation Term commences on the date of this Agreement and will continue until terminated upon thirty (30) days written notice by either party to the other party, or until otherwise terminated as provided in this Agreement.

YOUR SIGNATURE ON BEHALF OF MEMBER INDICATES THAT ALL TERMS OF THIS AGREEMENT, INCLUDING THE ADDITIONAL TERMS ON THE REVERSE SIDE AND ALL SCHEDULES ATTACHED, WHICH ARE HEREBY INCORPORATED BY REFERENCE, HAVE BEEN READ AND ARE AGREED TO BY THE MEMBER.

*Dallas, TX*

<p><b>"MEMBER"</b> <u>Barnaby Heating &amp; Air</u> <small>Print Full Name of Corporation or Limited Liability Company, if applicable</small></p> <hr/> <p><small>Signature Of Authorized Officer of Corporation or Limited Liability Company</small> <u>[Signature]</u></p> <hr/> <p><small>Authorized Signature Of Owner Of Business</small> <u>[Signature]</u></p> <hr/> <p><small>Authorized Signature Of Co-Owner Of Business</small> _____</p> <hr/> <p><small>Address - P.O. Box for mailing</small> <u>7510 Pennwood Circle Rowlett, TX 75088</u></p> <p><small>Address - Physical street for shipping (Please check one of the boxes below)</small> <input type="checkbox"/> Residential or <input type="checkbox"/> Commercial</p> <hr/> <p><small>Phone (Vendor Line):</small> _____ <small>Phone (Service Line):</small> <u>972-412-0150</u> <small>Facsimile:</small> <u>972-412-8813</u> <small>Email:</small> <u>BarnabyHeatingandAir.com</u> <small>Mobile:</small> <u>972-816-2109</u> <small>Website:</small> _____</p>	<p><b>DATE OF AGREEMENT:</b> <u>8-21-07.</u></p> <hr/> <p><b>"AirTime"</b> AirTime, LLC <u>[Signature]</u> By _____ Authorized Signature</p> <p><b>Address:</b> 7777 Bonhomme, Suite 1800 St. Louis, Missouri 63105 Attn: Patty Myers Phone: 877-862-8181 Facsimile: 314-862-2314</p> <p style="text-align: center;">(Leave this area blank)</p>
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①

## ADDITIONAL TERMS AND CONDITIONS OF THIS AGREEMENT

**Termination.** In addition to other methods of termination noted in this Agreement, either party may terminate this Agreement and terminate the Participation Term upon five business days' notice following any event of default by the other party. An event of default includes (1) the failure of the member to timely pay any amounts due to AirTime or any of AirTime's affiliates under this Agreement or pursuant to any other agreement or contract between the member and AirTime or any of AirTime's affiliates, (2) the failure by a party to cure the breach of any other obligation of such party under this Agreement or any other agreement between the parties within fifteen days following notice from the other party specifying such breach, or (3) a voluntary or involuntary filing of a bankruptcy petition by or with respect to a party. Following termination of the Participation Term (for any reason and/or by either party), certain terms, conditions and obligations of this Agreement including, without limitation, the confidentiality obligations, indemnification obligations, limitations, payment obligations incurred by you during the Participation Term or by your use of any Yellow Pages Materials, any obligations to be performed upon or following any termination of the Participation Term pursuant to any express provision of this Agreement, and any miscellaneous provisions that are relevant to any such obligations, as set forth in this Agreement, will nevertheless survive and continue in full force and effect.

### **Money Back Guarantee For New Members**

If you, as a new member, wish to cancel your AirTime membership and receive a full refund of the monies that you have already paid to AirTime you must: (a) deliver to the President of AirTime or his designated agent no later than 9:00 PM CST of the third day of the AirTime EXPO all AirTime Resources that had been given to you (whether by mail or in person) and any notes you had taken during the EXPO or based on the AirTime Resources; (b) tell the President or his agent that you wish to cancel your membership; and (c) upon request, sign a termination of membership form. If you timely complete these steps, your AirTime membership will be cancelled, the Down Payment portion of your Initial Membership Fee will be refunded by the same method of payment used for making the Down Payment and you will no longer be obligated to pay the remaining balance of the Initial Membership Fee or to pay the Continuing Membership Fee. The Money Back Guarantee is a one-time offer for new AirTime members only.

### **Confidentiality & Use Of AirTime Resources.**

1. By entering into this Agreement, you agree that you have continuing obligations to AirTime and/or AirTime's affiliates (for purposes of this section only, collectively referred to as "AirTime") in regard to the use and/or disclosure of the AirTime Resources whether the AirTime Resources are in oral, electronic or tangible form. You further agree that AirTime wholly owns and/or has protectable legal rights in and to the AirTime Resources whether (a) the legal protection derives from being confidential, proprietary, or trade secret information of AirTime, (b) the AirTime Resources are subject to copyright, trademark, tradename, and/or patent rights of AirTime, and/or (c) the AirTime Resources are otherwise protected by law or by the terms of this Agreement. You agree that your obligations regarding the AirTime Resources are a continuing one and include any and all AirTime Resources that you currently have access to and/or will or may have access to in the future.

2. You further agree: not to disclose and to keep strictly confidential all AirTime Resources; not to use any or all of the AirTime Resources for any purpose other than your valid participation in the AirTime Program; not to sell, market or disclose any AirTime Resources to any third person, firm, corporation, or association for any purpose; not to make any copies of the AirTime Resources without AirTime's prior written authorization; not to use any AirTime Resources to directly or indirectly compete with AirTime; not to create derivative works from any AirTime Resources (but if you do so with or without first receiving AirTime's permission, you agree that you shall have no rights in any such derivative works and they shall be considered to be solely and exclusively owned by AirTime); and, upon receipt of an oral or written request from AirTime, you shall immediately return all originals and copies (in whatever manner or technology stored, developed or copied) of any and all AirTime Resources.

3. In the event that you have previously entered into an agreement (written or otherwise) requiring you to protect and preserve any or all of the AirTime Resources, such agreement shall continue in full force and effect except to the extent that the terms and conditions of such agreement are contrary to the terms and conditions of this Agreement, in which event the terms and conditions of this Agreement shall govern and the previous agreement shall be deemed to be so amended.

4. If you use any Yellow Pages advertising materials that are included in the AirTime Resources ("Yellow Pages Materials"), you also agree to pay to AirTime the following fees (as noted in Schedule B) regardless of when the Participation Term terminates: (1) any remaining balance of your Initial Membership Fee, and (2) your Continuing Membership Fees for the entire period of time of your Yellow Pages advertising contract(s) that use any Yellow Page Materials. At the

expiration of your Yellow Pages advertising contract(s), you agree not to further use for your benefit, or the benefit of any other person or entity, any Yellow Pages Materials.

5. You specifically agree that the remedy at law for any breach of your obligations relating to confidentiality and/or use of the AirTime Resources as indicated in this Agreement may be inadequate and that AirTime, in addition to any other legal or equitable relief available, will be entitled to temporary and permanent injunctive relief without the necessity of proving any actual damages.

**Indemnification.** We agree to indemnify, hold harmless and defend you, and your directors, officers, employees and agents, from and against any claims, damages, liabilities and reasonable costs (including reasonable attorneys' fees) arising out of any failure by us to fulfill our obligations under this Agreement. You agree to indemnify, hold harmless and defend us, and our members, managers, directors, officers, employees, agents and other representatives, from and against any claims, damages, liabilities and reasonable costs (including reasonable attorneys' fees and other legal costs) arising out of any failure by you to fulfill your obligations under this Agreement or otherwise arising out of the conduct of your business. Neither party will in any event be liable to the other party for any consequential, incidental, indirect or special damages, including, without limitation, damages from loss of profits or business goodwill. If either party to this Agreement breaches any of the terms hereof, that party shall pay to the non-defaulting party upon written demand or as part of a judgment all of the non-defaulting party's costs and expenses, including reasonable attorneys' fees, incurred by that party in enforcing the terms of this Agreement, whether or not litigation is commenced.

**AirTime Program and Resources.** The precise nature, scope, and format of the AirTime Program and AirTime Resources are subject to change from time to time by AirTime in AirTime's reasonable discretion upon notice to you. While a member in the AirTime Program, you agree to abide by any and all terms and conditions, policies and procedures, and rules and regulations that may be published by AirTime from time to time (whether or not specifically contained in this Agreement or published elsewhere) subject to change by AirTime in AirTime's reasonable discretion upon notice to you.

### **Other Understandings**

1. You reserve the right to conduct your business using your own means, methods, policies and procedures. AirTime is an independent contractor and no partnership, limited liability company, joint venture, or franchise relationship is created between you and AirTime pursuant to this Agreement or otherwise.

2. Without limiting any and all express obligations of each party in this Agreement, you acknowledge and agree that AirTime makes no representations, warranties, or guarantees as to any revenues or other benefits to be derived by you from participation as a member of the AirTime Program or by use of the AirTime Resources.

3. Your license to be a member of the AirTime Program does not entitle you to any interest in or ownership rights to AirTime and you do not have any right or license to use any present or future AirTime Resources in the promotion or conduct of your business except as authorized in this Agreement. Nothing in this Agreement shall be construed as conveying to you (i) any right, title or interests or copyright in or to any AirTime Resources or (ii) any license to use, sell, exploit, copy or further develop any such AirTime Resources.

4. You agree not to issue any press release, or otherwise publicly or privately disclose any information concerning this Agreement, your participation in the AirTime Program and/or the AirTime Resources without our prior written consent.

5. During the Participation Term and for a period of six months thereafter, you (and/or you on behalf of any other person or company) will not, directly or indirectly, solicit for employment or for any other working relationship any employee or employees of AirTime or any of its affiliated companies.

6. During the Participation Term, you must have in force such insurance policies with such coverages and minimum policy limits as may be required by AirTime from time to time upon reasonable notice. In any such policy or policies, AirTime and its affiliates shall be added as additional named insureds and you shall provide, as and when requested, a certificate of insurance confirming the existence of such insurance coverage.

### **Miscellaneous Provisions.**

1. Unless otherwise provided herein, any notice, request, consent or other communication under this Agreement will be effective only if it is in writing and sent by a nationally-recognized overnight delivery service to the address indicated in this Agreement or as otherwise indicated by a party in a notice given by such party to the other party, and will be deemed given or made the next business day after delivery to an overnight delivery service properly addressed.

2. This Agreement embodies the entire agreement of the parties with respect to the subject matters hereof and supersedes all other prior agreements, written or oral, with respect to the subject matters hereof.

3. Except as otherwise permitted in this Agreement, this Agreement may not be amended or supplemented, unless set forth in a writing signed by each party, and the terms of this Agreement may not be waived unless set forth in a writing signed by the party entitled to the benefits thereof, and no such waiver will be deemed or will constitute a waiver of such provision at any time in the future or of any other provision hereof. The rights and remedies of the parties are cumulative and not alternative. Except as otherwise provided in this Agreement, neither the failure nor any delay by any party in fully exercising any right, power or privilege under this Agreement will operate as a waiver thereof.

4. Neither this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned or transferred, in whole or in part, by you without the prior written consent of us. We may assign or transfer this Agreement or any rights hereunder to any third party without notice to or the consent of you.

5. The Membership Fees are payable in accordance with Schedule (B) attached hereto. The amount of the Continuing Membership Fee (i) is calculated on an annual or yearly basis but is payable weekly as indicated in Schedule (B) and (i) is subject to increase after the first year at AirTime's option but in no event will the rate of increase exceed 5% per annual year. Your annual year begins with the date of the first payment of the Membership Fee noted in Schedule (B). Written notice of any increase in the Continuing Membership Fee will be provided 30 days in advance.

6. If any term of this Agreement or application thereof is, in any jurisdiction and to any extent, finally held invalid or unenforceable, such term will only be ineffective as to such jurisdiction, and only to the extent of such invalidity or unenforceability, without invalidating or rendering unenforceable any other terms of this Agreement. This Agreement may be executed in one or more counterparts.

7. This Agreement will be governed by and construed in accordance with the laws of the State of Missouri, without regard to conflict of laws principles. Any action arising out of or relating to this Agreement will be brought by the parties only in a Missouri state court or a federal court sitting within Missouri, which will be the exclusive venue of any such action. Each party waives any objection to the laying of venue of any such action, and irrevocably consents and submits to the jurisdiction of any such designated court (and the appropriate appellate courts) in any such action. Service of process and any other notice in any such action will be effective against such party when transmitted in accordance with the notice requirements set forth above. Nothing contained herein will be deemed to affect the right of a party to serve process in any manner permitted by law.

8. WAIVER OF JURY TRIAL - EACH OF THE PARTIES HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT THAT THEY MAY HAVE TO A TRIAL BY JURY IN ANY ACTION INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER (WHETHER SOUNDING IN TORT, CONTRACT OR OTHERWISE) IN ANY WAY ARISING OUT OF, RELATED TO, OR CONNECTED WITH THIS AGREEMENT.

**SCHEDULE A**  
**Guarantee**

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**AirTime, LLC**  
**New Member's**  
**IRON CLAD MONEY BACK GUARANTEE**

The concepts, strategies and techniques you are about to discover are powerful and amazing. So powerful that we are sure you'll see the exact step-by-step methods you must use to skyrocket profits and really get your business going.

All we need is three days of your time to reveal it. That's all – THREE DAYS.

Here's our Iron Clad Money Back Guarantee for new members: In the unlikely event, after attending the first three days of the AirTime, LLC (AirTime) EXPO you don't feel that our program is going to change your life, and you are not completely convinced that AirTime is everything we told you it was, then by the end of the third day of the EXPO, return all of the AirTime Resources and notes have taken and you may cancel your AirTime membership and get your money back. For additional details about our Iron Clad Money Back Guarantee for new members, see the Additional Terms & Conditions section of your Member Agreement.

No questions asked. No strings attached. And no expectations on our part. It's that simple. Give us three days to plant the beginning skills and knowledge into your heart and soul. We're so sure you'll love the entire program that we offer our Iron Clad Money Back Guarantee to new members to prove it to yourself.

Rev 09/06

**SCHEDULE B MEMBERSHIP FEES**

Member Name

Barnaby Heating & Air  
(Print Member Name)

**(A) Initial Membership Fee**

Member agrees to pay to AirTime, LLC ("AirTime") an Initial Membership Fee of \$20,950.00. Not less than \$2,550.00 of such Initial Membership Fee ("Down Payment") is due and payable to AirTime upon the signing and/or authorization of this Agreement.

Member authorizes payment of the \$2,550 Down Payment on the following credit card (VISA/MC/AMEX):

4339-9300-0205-8743

Card Number

02/08

Exp. Date

Charles Barnaby

Name On Card

*[Signature]*  
Authorized Signature Of Card Holder

*\$2550 cc 8/21*

Member authorizes payment of the remaining balance of the Initial Membership Fee by selecting one of the indicated Options below:

Option 1  \$18,400.00 due at conclusion of EXPO

Check One

- Please place the remaining balance of the Initial Membership Fee of \$18,400 on the above credit card on October 1, 2007; or
- The Member wishes to have the Initial Membership Fee balance automatically debited ACH on October 1, 2007. (please complete the attached ACH Debit Authorization)

OR

Option 2

Delivery of Member's promissory note ("Note"), in a form supplied by AirTime, for purposes of financing \$18,400 of the Initial Membership Fee on the following terms: (Note payments will begin on October 1, 2007).

Check One

- Equal consecutive monthly investment of \$3,174.89 over a period not to exceed six (6) months, with interest at the rate of one percent (1%) per month; or
- Equal consecutive monthly investment of \$1,147.88 over a period not to exceed eighteen (18) months, with interest at the rate of one percent (1.25%) per month; or
- Equal consecutive monthly investment of \$865.70 over a period not to exceed thirty-six (36) months, with interest at the rate of one and one-half percent (1.5%) per month

**(B) Continuing Membership Fee**

Member also agrees to pay to AirTime, during the Participation Term, a Continuing Membership Fee of \$228 per week. Such Continuing Membership Fee is payable weekly in advance by means of automatic debit or withdrawal from Member's bank account, or by an automatic charge to a credit card acceptable to AirTime (VISA/MC/AMEX). Payment of such Continuing Membership Fee is to begin September 24, 2007. The option chosen below will apply to your weekly membership and note payment (if applicable).

Option One:  Member authorizes the credit card noted in Section A above to be charged automatically

Option Two: \_\_\_\_\_ Member authorizes its business account to be debited automatically (Please complete the attached ACH Debit Authorization)

Option Three: \_\_\_\_\_ Member authorizes the credit card listed below to be charged automatically

Card Number

Exp. Date

Name On Card

*[Signature]*  
Authorized Signature Of Card Holder

Rev 09/06

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**OF REMAINING BALANCE OF INITIAL MEMBERSHIP FEE  
AND/OR WEEKLY CONTINUING MEMBERSHIP FEE  
(ACH DEBIT AUTHORIZATION)**

MEMBER/COMPANY NAME

MEMBER/COMPANY ID NUMBER

(AirTime office use)

ADDRESS

PHONE

CONTACT

Member (through its authorized representative) hereby authorizes AirTime, LLC ("AirTime") to initiate debit entries and/or correction entries to our: Checking Savings account (select one) indicated below at the depository named below, hereinafter called DEPOSITORY, to debit the same to such account.

DEPOSITORY NAME

BRANCH

CITY

STATE

DEPOSITORY TRANSIT/ABA NUMBER

ACCOUNT NUMBER

This ACH Debit Authorization is to remain in full force until AirTime has received written notification from Member of its termination in such time and in such manner as to afford AirTime and DEPOSITORY reasonable opportunity to act upon it.

MEMBER'S NAME(S)

MEMBER'S TAX ID NUMBER

SIGNATURE OF AUTHORIZED  
REPRESENTATIVE OF MEMBER

DATE

**AirTime, LLC**  
7777 Bonhomme Avenue #1800  
St. Louis, MO 63105  
(877) 862-8181  
Fax (314) 862-2314

Rev 09/06

**SCHEDULE C**  
**GEOGRAPHIC AREA**

There will be no more than two Airtime 500 members per 500,000 in population.

Your service area for the purpose of using the AirTime Resources is limited to the non-exclusive zip codes noted below or on the attached zip code selection form. If using the zip code selection form, please list zip codes in contiguous order up to a total of 250,000 in population but not to exceed a 40 mile radius of your office location.

Rev 09/06

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**From:** Charles Barnaby [<mailto:rowlettdrifter@verizon.net>]  
**Sent:** Thursday, February 28, 2008 2:38 PM  
**To:** Robin Faust  
**Subject:** Ad

Hello Robin,

Please look over the attached ad and let me know what you think

Thanks  
Charlie



## ***Consumer Alert!***

### **Is Your Home Comfort System Eating You Out of House and Home?**

**Government mandate for new technology leads to new Home Comfort System with a 99-Year Warranty!\***...  
**This could be the last air conditioner you'll ever buy!**

Who would have thought you'd be throwing a retirement party for yourself long before your next Home Comfort System quits?

Well that's exactly what's likely to happen when you have Ramahv Heating & Air

throughout the system and keeping the entire system running smoothly. In the unlikely event that the compressor ever fails in this unit, you'll get a new Condensing Unit for... **FREE!**\*

**BARNABY-000003**

... install a new, energy-efficient Amana® Home Comfort System. Chances are it will even outlast you!

The government recently mandated that air conditioning manufacturers make only high-efficiency air conditioners. What it means to you is that this new, environmentally-friendly, advanced technology saves you hundreds of dollars in energy costs and may even last so long that it could be the last air conditioner you ever buy!

**Your old, obsolete air conditioner is costing you money!**

These new air conditioners are mandated by law because Uncle Sam has realized that older systems can cost homeowners hundreds of dollars per year in extra, unnecessary energy costs which causes excessive green house gases to be released into the atmosphere. So they have required that manufacturers stop making the **inefficient energy hog units** and produce newer, more energy-efficient systems.

This law may mean that your air conditioning system is obsolete. In fact, your old air unit may be so inefficient that you could possibly pay for replacing your old unit with a new energy efficient Home Comfort System with the savings realized on your future utility bills.

Many manufacturers have had trouble keeping up with the demand for these new air conditioning units. They also cost more to make and as their costs have increased, so have the prices and that's not likely to change anytime soon. The cost of new air conditioners has skyrocketed, in some instances, as much as 300%!

**What's your best option?**

Faced with this reality, Barnaby Heating & Air has decided to make sure that our customers receive the absolute best value for their money. Please call us and schedule a Comfort Technician to perform a **FREE** Comfort for Life Air Conditioner Analysis, determining whether or not you could benefit now from making the next air conditioner you buy the last air conditioner you'll ever have to buy.

This unique program includes a high-efficiency air conditioner with a 99-Year Warranty on the compressor. The compressor is as important to your air conditioning system as your heart is to your body, pumping vital fluids

And on top of that rock solid guarantee, you will receive a **FREE** Talking Thermostat™. The Talking Thermostat™ is a "smart" stat that automatically adjusts the temperature in your home whether you are there or not, minimizing your energy use, day and night, saving you money. Who doesn't want to maximize their energy savings with energy rates going through the roof?

We've created the "Comfort for Life" Program that guarantees you exactly that... comfort for life.

The "Comfort for Life" Program offers you:

- 1. The last air conditioner you'll ever need!** Get a replacement high-efficiency Home Comfort System with a 99-Year Limited Warranty on the compressor.
- 2. Big Savings on energy bills!** Get a **FREE** Talking Thermostat™ when you have us replace your old, worn-out air conditioner with a new, high-efficiency unit (as described above). This new air conditioning technology obsoletes your old cooling system and drastically reduces energy bills, even more so when working with the Talking Thermostat™.
- 3. Special financing of as little as \$13 per week!** As an exclusive company that offers the Royal Privilege Program™, Barnaby Heating & Air has secured a special financing rate for its customers. This special financing plan might even cost less than what you're currently overpaying the utility company due to the inefficiencies of your old, outdated air conditioner!

Make the next air conditioner you buy the last you'll ever have to buy! Call 972.412.0150 today for a Comfort for Life Air Conditioner Analysis! Remember, some manufacturers are having trouble keeping up with demand on these new, technologically-advanced, energy-efficient air conditioners. Get yours now!



4620 Industrial St, Ste C - Rowlett, TX 75088



**Call 972.412.0150 now and be cool... for life!**

**From:** Robin Faust [mailto:rfaust@yoursgi.com]  
**Sent:** Monday, March 03, 2008 8:26 AM  
**To:** 'Charles Barnaby'  
**Subject:** RE: Ad

Charlie

Peter was reviewing your ad and going to respond directly to you.....in my opinion it is a great looking ad!.

robin

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