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

Proceeding	92057941
Party	Defendant Barnaby Heating & Air
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Submission	Opposition/Response to Motion
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Signature	//JULIE CELUM//
Date	06/15/2015
Attachments	RESPONDENT OPPOSITION TO SANCTIONS.pdf(620815 bytes)

**IN THE UNITED STATES PATENT & 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

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

**RESPONDENT’S OPPOSITION TO PETITIONER’S MOTION FOR DISCOVERY
SANCTIONS AND (REQUESTED) ENTRY OF JUDGMENT AND,
ALTERNATIVELY, RESPONDENT’S MOTION TO REOPEN
TIME TO SERVE RESPONSES TO PETITIONER’S DISCOVERY REQUESTS**

Respondent, Barnaby Heating & Air, LLC hereby opposes the motion for sanctions and (requested) entry of judgment of Petitioner Clockwork, IP, LLC. Respondent provided the discovery requested by Petitioner even prior to the issuance of the Board’s March 11, 2015 order, and Respondent has provided supplements thereto. If responsive documents do not exist, Respondent is not required to create documents. Any failure to provide any discovery ordered

by the Board was inadvertent, and had Petitioner adequately conferred with Respondent before filing this surprise motion against Respondent, Respondent would have supplemented. One can only conclude that this motion for sanctions was brought for the purpose of delaying the proceedings and multiplying the cost of litigation. Accordingly, the motion should be DENIED. Alternatively, Respondent moves to reopen the time to serve supplemental responses to Petitioner's discovery requests.

BACKGROUND

Respondent is the rightful owner of the COMFORTCLUB Mark and Respondent has fully responded to Petitioner's discovery requests – even though Petitioner served its discovery requests outside of the applicable discovery period in this case. (*See* Dkt. # 13, Ex. K to Patel Decl.; *see also* # 20, Ex. G to Newberg Decl.; *see also* Ex. A to Celum Decl.) Discovery in this case opened on December 6, 2013 and closed on June 4, 2014. (*See* Dkt. # 2.) Petitioner waited until the very last day of the close of the discovery period in this case to serve discovery requests. (*See* Dkt. # 13, Ex. A-C, Patel Decl.) Though counsel's offices are only miles apart, Respondent did not receive Petitioner's discovery requests until June 30, 2014, at which time Respondent emailed Petitioner and advised she had just received a copy of Petitioner's discovery requests. (*See* Celum Decl.) Respondent does not believe Petitioner's requests were timely served, but nonetheless, on July 15, 2014, Respondent served objections and responses to Petitioner's requests, and on September 25, 2014, Respondent served first amended objections and responses to Petitioner's requests. (*See* Celum Decl.) On October 17, 2014, Respondent filed its motion to join its Assignee/Licensors, McAfee Heating & Air Conditioning, Inc., as co-Respondent, motion to reopen discovery and motion to extend the trial deadlines. (*See* Dkt. # 11). On November 6, 2014, Petitioner filed a Motion to Compel. (*See* Dkt. # 13.)

Because this is the very first TTAB proceeding in which Respondent's counsel has participated, Respondent's counsel flat-out miscalculated the deadline to file a response to Petitioner's motion. (*See Celum Decl.*) Following counsel's discovery of her mistake, counsel for Respondent reviewed the *excusable neglect* standard for filing a motion to reopen the time in which to file a late response to Petitioner's motion to compel. (*See Celum Decl.*) From a review of TBMP § 590.01(B)(1) and the relevant case law, counsel did not believe she could honestly or rightfully argue that her miscalculation of the deadline to respond to Petitioner's outstanding motion to compel was the result of excusable neglect under the *Pioneer* and *Pumpkin* decisions (e.g., decisions holding that a failure to act due to counsel's docketing errors is, per se, not the result of excusable neglect). *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seeds Corp.* 43 USPQ2d 1582 (TTAB 1997). (*See id.*) The Board granted Petitioner's motion to compel as **conceded** because Respondent's counsel did not file a response and ordered Respondent to serve amended responses, sans objections, within 30 days of the Board's March 11, 2015 order. (*See Dkt. # 16.*)¹

On March 13, 2015, Petitioner's current counsel filed an appearance in this case (*See Dkt. # 17.*) On March 18, 2015, counsel for Petitioner, Respondent and Co-Respondent held a telephone conference to discuss the possibility of settling the case and Petitioner requested that Respondent and Co-Respondent agree to a 60-day stipulation of the current deadlines, to which Respondents consented, and that same afternoon, Petitioner filed a stipulation to extend the

¹ The Board's March 11, 2015 order also granted Respondent's motion to join McAfee Heating & Air Conditioning, Inc. as Co-Respondent in this case and denied Respondent's motion to reopen discovery. (*See Dkt. # 16.*)

remaining deadlines. (*See* Dkt. # 18.) Petitioner's consented stipulation was granted by the Board on March 24, 2015. (*See* Dkt. # 19).

Immediately following the March 18, 2015 telephone conference between the parties, counsel for Respondent calendared Respondent's April 10, 2015 deadline to amend its discovery responses and calendared an April 3, 2015 "7-day alert." (*See* Celum Decl.) What counsel for Respondent did not realize, was that when she calendared the April 3, 2015 alert and the April 10, 2015 deadlines on March 18, 2015, she made the entries in a personal Google calendar, created on March 16, 2015, instead of her office calendar. (*See* Celum Decl.)

On March 16, 2015, in an ongoing and concerted effort to keep counsel's family's schedules aligned, counsel's husband, Guillaume Garrigue, created a Google calendar entitled "Maison Garrigue" and in doing so, unbeknownst to counsel for Respondent, mistakenly changed counsel's calendar settings. (*See id.*) Unbeknownst to counsel for Respondent, the April 3, 2015 and the April 10, 2015 calendar entries were entered on the "Maison Garrigue" Google calendar, which was not visible to counsel on her office Apple iCal calendar, and thus, counsel for Respondent did not receive the calendar notifications relating to these deadlines. (*See id.*) This was not a docketing error on counsel's part. (*See id.*) This was certainly not a mistake on Respondent's part for which discovery sanctions in the form of an entry of judgment should be imposed. This was a technical error caused by a newly added software application, Google Calendar, with which counsel for Respondent had no knowledge was being utilized, or that it would interfere with her office Apple iCal. (*See id.*) Through no fault of counsel's and, most importantly, through no fault of Respondent, Respondent's second amended responses were not served on Petitioner on April 10, 2015, as ordered, but instead were served on April 16, 2015. (*See* Dkt. # 20, Ex. G Newberg Decl.)

On April 13, 2015, when counsel for Petitioner emailed counsel for Respondent about Respondent's amended responses, counsel for Respondent alerted counsel for Petitioner to the calendaring issue and asked for additional time to provide the amended responses. (*See Ex. C to Newberg Decl.*) At no time did counsel for Respondent indicate that it would not supplement its responses, or that it was refusing to cooperate with discovery in this case. Imperatively, Respondent had already responded to Petitioner's discovery requests, but because Respondent did not file a response to Petitioner's motion to compel, the Board issued its March 11, 2015 order that amended responses be served without objections.

Respondent has fully responded to and provided responses to the discovery at issue in this case. Concurrently with the filing of this opposition, Respondent files its motion to reopen the time in which to respond to Petitioner's discovery requests and serves its third amended responses, amending Interrogatory Nos. 25 – 27, because of a typographical error appearing in Interrogatory No. 25, about which Petitioner complains in its motion for sanctions. (*See Ex. A, Celum Decl.*)

ARGUMENT

The purpose of sanctions is to secure compliance with the discovery rules, to deter violation of the discovery rules by others, and to punish parties for discovery violations. *See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). When considering sanctions, the courts and this Board should ensure that any discovery sanction comports with due process. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982). Discovery orders, for which the Board fashions relief, are based on the nature and circumstances of the discovery devices at issue. *See In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1012 (1st Cir. 1988) (discussing the court's powers with respect to discovery under Fed. R. Civ. P. 26). The Board's authority to enter sanctions for conduct or

misconduct related to discovery is rooted in Fed. R. Civ. P. 37, most portions of which are made applicable to Board proceedings by 37 CFR § 2.116. The Board should deny Petitioner's motion for sanctions because although technically Respondent did not timely comply with the Board's order, Respondent has served amended responses and produced all documents in its possession and sanctions, as requested by Petitioner, would be unjust in this case. (*See Celum Decl.*; *see also Ex. L, Newberg Decl.*) *See Fed. R. Civ. P. 37(b); Ins. Corp. of Ir., Ltd.*, 456 U.S. at 707-08.

Petitioner complains that 30 of Respondent's responses to Petitioner's discovery are deficient. The Board should deny the motion for sanctions because Respondent did not provide evasive or misleading responses to Petitioner's discovery requests; rather, Respondent provided adequate and responses. *See Fed. R. Civ. P. 37(d)(1)(A)(ii); Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 277 n.2 (4th Cir. 2005). For example, Request for Production No. 10 specifically asks for documents relating to the types of customers to whom Respondent has provided products or services. In response to this request, Respondent produced a complete list of each and every customer to whom it has sold COMFORTCLUB memberships, beginning in January 1998. (*See Celum Decl. at Ex. A at Request for Production No. 10.*) Respondent stands by its responses to all of Petitioner's requests. (*See Ex. L, Newberg Decl.*)

Counsel for Respondent advised Petitioner's counsel that it had produced all documents in Respondent's possession. (*See id.*) The Board should deny Petitioner's motion because the previous motion to compel did not specifically address these discovery responses. 37 CFR § 2.120(G)(1); *Miscellaneous Changes To Trademark Trial And Appeal Board Rules*, 72 Fed. Reg. 42242, 42256 (August 1, 2007) ("A motion for sanctions is only appropriate if a motion to compel these respective disclosures has already been granted."); *Amazon Technologies v. Wax*, 93 USPQ2d 1702, 1706 (TTAB 2009) (motion for sanctions under 37 CFR § 2.120(g)(1) denied

as premature where no Board order in place compelling discovery). If Petitioner believes Respondent has failed to comply with the rules of discovery, or that Respondent's discovery responses are inappropriate, Petitioner should have brought a motion to compel Respondent's second amended responses. On April 16, 2015, Respondent scanned and uploaded approximately 400 additional documents for production. (*See Celum Decl.*) Respondent continued to organize and scan additional materials and on April 20, 2015, notified counsel for Petitioner that all materials had been scanned and were available for download by providing a URL for counsel to access. (*See Newberg Decl. at Ex. J.*) To date, Respondent has produced in excess of 900 pages of materials and has fully complied with Petitioner's discovery requests and sanctions are not justified. (*See Celum Decl.*)

The discovery rules in *inter partes* proceedings adopted by the Board are not without limitations. If responsive documents do not exist, applicant is not obligated to create such documents solely to satisfy Petitioner's document requests. See *Washington v. Garrett*, 10 F.3d 1421, 1437-38 (9th Cir. 1993). Respondent is aware it has a duty to make a good faith effort to satisfy Petitioner's discovery requests and has done so. See TBMP Section 408.01. Petitioner also has the ability to object to the materials at the time of trial, or by other appropriate motion to limit the sufficiency of the evidence or materials. Because Petitioner has failed to elaborate on why it believes these 30 discovery responses are incomplete, Respondent is left to speculate that Petitioner may not be conducting a through review of the materials produced by Respondent. A party has no obligation under the rules to respond to discovery requests that are not made or explain the significance of evidence that is produced or prepare the case of the other party.

The Board should deny the motion for sanctions because Respondent did not intentionally disobey the Board's March 11, 2015 order. The Board should not sanction Respondent under its inherent power to sanction because Petitioner has not shown Respondent has engaged in wrongful conduct. In fact, Respondent's counsel has complied with the Board's March 11, 2015 order. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991). The standard institution order for every *inter partes* proceeding instructs, "The parties must note that the Board allows them to utilize telephone conferences to discuss or resolve a wide range of interlocutory matters that may arise during this case." In fact, the Board encourages parties to request a phone conference whenever, despite good faith efforts to resolve a dispute, they reach an impasse in regard to their conferencing obligation, disclosure requirements or discovery. *Promgirl, Inc. v. JPC CO., LTD.*, 94 USPQ2d 1759 (TTAB 2009) ("it is always preferable to involve the Board"). If counsel for Petitioner believed that receipt of Respondent's amended responses on April 16, 2015, rather than April 10, 2015, "impaired [its] ability to fully prepare its trial submissions" Petitioner's counsel could have and should have asked Respondent to stipulate to an extension of time of the trial submissions deadlines, which Respondent would have freely granted. (*See Celum Decl.*) Instead, Petitioner chose to file this motion for sanctions without conferring with counsel for Respondent. (*See Celum Decl.*) *See* 37 CFR § 2.120(g)(1) and 37 CFR § 2.127(f).

If the Board determines that Respondent should be sanctioned, it should not grant the requested entry of judgment because they are more severe than necessary to promote full compliance with the rules. *See Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir. 1990). The range of sanctions listed in Fed. R. Civ. P. 37(b)(2), and which may be entered by the Board include, inter alia, striking all or part of the pleadings of the disobedient party; refusing

to allow the disobedient party to support or oppose designated claims or defenses; drawing adverse inferences against uncooperative party; prohibiting the disobedient party from introducing designated matters in evidence; and entering judgment against the disobedient party. Sanctions are not warranted in this case, because it is clear that Respondent has complied with Petitioner's discovery requests.

Petitioner seeks entry of judgment sanctions for Respondent's six (6) day delay in amending its responses to comply with the Board's March 11, 2015 order. The Board should deny the request for the following reasons:

(A) Respondent's delay was not willful or done in bad faith. *See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). Respondent did not disregard the Board's order relating amending its to discovery responses and there is no misconduct on the part of Respondent. Thus, sanctions are neither necessary nor warranted.

(B) An entry of judgment does not serve the public interest in the expeditious resolution of litigation; rather, an entry of judgment will violate the public policy favoring disposition of cases on the merits. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007).

(C) Petitioner has not been substantially prejudiced by Respondent's unintentional six (6) day delay in serving amended answers to Petitioner's discovery requests to comport with the Board's March 11, 2015 order. As set forth above, the delay and amending Respondent's discovery responses to comply with the March 11, 2015 order, was not intentional, and Petitioner has failed to show it was prejudiced or harmed in any way by the delay. *See Sheetz of Delaware, Inc. v. Doctor's Associates Inc.*, 108 USPQ2d 1341, 1346 (TTAB 2013) (applying "Great Seats factors," opposer's failure to supplement its discovery responses or initial disclosures with

respect to third-party use found harmless). Had Petitioner honestly felt it was prejudiced or harmed, it could have sought a request for a continuance from Respondent, which request would have been agreed to and granted. *See Guthy-Renker Corp. v. Boyd*, 88 USPQ2d 1701, 1704 (TTAB 2008) (motion for sanctions denied; moving party could have made additional efforts with adverse party to schedule conference, including requesting Board participation in the discovery conference, but failed to do so).

(D) Sanctions other than dismissal are available. An entry of judgment is a harsh sanction, justified where no less drastic remedy would be effective and there is a strong showing of willful evasion. *Unicut Corporation v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984). Petitioner has not strongly shown Respondent willfully evaded its obligations in responding to discovery in this case. As set forth more fully above, this is Respondent's counsel's first TTAB proceeding and order granting Petitioner's motion to compel was entered following counsel's belief that she would be unpersuasive in arguing "excusable neglect" in a late-filed response to Petitioner's motion to compel. (*See Celum Decl.*) The motion to compel was not granted based upon a strong showing that Respondent had engaged in evading its discovery obligations or deplorable conduct. The motion to compel was granted because it was conceded following Respondent's failure to file a response. There has not been a showing of a willful disregard of Respondent's discovery obligations.

It is clear that Respondent has complied with the Board's order granting Petitioner's motion to compel, as **conceded**, albeit six (6) days late. Respondent has never withheld responses to Petitioner's discovery, and Respondent has served original, first amended, second amended and third amended responses to Petitioner's discovery, and Respondent has produced

900 documents to Petitioner in this case, more than 600 of which documents were served following the Board's March 11, 2015 order.

**MOTION TO REOPEN TIME FOR SERVING AMENDED
RESPONSES TO PETITIONER'S DISCOVERY REQUESTS**

Where the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. The movant must show that its failure to act during the time previously allotted therefore was the result of excusable neglect. See Fed. R. Civ. P. 6(b); TBMP §509.01(b)(1). The analysis to be used in determining whether a party has shown excusable neglect was set forth by the Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). These cases hold that the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. The "prejudice to the nonmovant" contemplated under the first *Pioneer* factor must be more than the mere inconvenience and delay caused by the movant's previous failure to take timely action, and more than the nonmovant's loss of any tactical advantage which it otherwise would enjoy as a result of the movant's delay or omission. Rather, "prejudice to the nonmovant" is prejudice to the nonmovant's ability to litigate the case, e.g., where the movant's delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant.

Petitioner has made no showing that it has been harmed by any delay in receiving Respondent's amended responses. To the contrary, Petitioner served its pretrial disclosures two (2) days before the pretrial disclosure deadline. (*See Celum Decl.*) As set forth more fully above, Respondent is amenable to provide Petitioner any additional extension of time it believes it needs to prepare Petitioner's case for trial.

It has been held that the third *Pioneer* factor, i.e., "the reason for the delay, including whether it was within the reasonable control of the movant," may be deemed to be the most important of the *Pioneer* factors in a particular case. As set forth more fully above, counsel for Respondent did not engage in intentional misconduct, or willful violation of this Board's order. (*See Celum Decl.*) Accordingly, Respondent's asks the Board grant its motion to reopen to amend its Interrogatory Responses.

CONCLUSION

For the reasons stated above, Respondent Barnaby Heating & Air, LLC respectfully requests that the Board deny Petitioner's motion for sanctions because Respondent's amended responses are in sufficient compliance with the Board's March 11, 2015 order. Respondent prays that the Board grant Respondent's motion to reopen to serve Respondent's third amended responses to discovery. Respondent prays for any further relief, at law or in equity to which Respondent may be entitled.

Respectfully,

Barnaby Heating & Air, LLC

// Julie Celum Garrigue //

JULIE CELUM GARRIGUE

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Attorney for Respondent
Barnaby Heating & Air, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR DISCOVERY SANCTIONS AND (REQUESTED) ENTRY OF JUDGMENT AND, ALTERNATIVELY, RESPONDENT'S MOTION TO REOPEN TIME TO SERVE RESPONSES TO PETITIONER'S DISCOVERY REQUESTS** was filed on June 15, 2015 and forwarded to counsel for Petitioner and counsel for Co-Respondent, this 15th day of June 2015, by email and by sending the same via FederalExpress overnight delivery:

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// Julie Celum Garrigue//
JULIE CELUM GARRIGUE

**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

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

DECLARATION OF JULIE L. CELUM

Julie L. Celum declares:

1. I am counsel for Respondent, Barnaby Heating & Air, LLC ("Barnaby") in the above-identified Cancellation proceeding.
2. Respondent has fully responded to Petitioner's discovery requests, except to the newly alleged deficiencies relating to Requests for Admissions Nos. 36 -45, which Respondent will address via a separate motion and declaration.
3. Petitioner served its requests for discovery outside of the applicable discovery period in this case.
4. I received Petitioner's discovery requests on June 30, 2014, at which time I emailed

counsel for Petitioner, Purvi Patel, and advised I had just received a copy of Petitioner's discovery requests.

5. Ms. Patel would not agree to an extension any longer than 15 days.

6. On July 15, 2014, I served objections and responses to Petitioner's discovery requests, and on September 25, 2014, I served first amended objections and responses to Petitioner's requests.

7. This is the very first TTAB proceeding in which I have participated.

8. I miscalculated the deadline to file a response to Petitioner's November 6, 2014 motion to compel.

9. Following the discovery of my mistake, and a review of the TTAB's *excusable neglect* standards for filing a motion to reopen the time in which to file a late response to Petitioner's motion to compel, I determined I did not have a good faith basis in arguing excusable neglect.

10. On March 16, 2015, my husband created the Maison Garrigue Google calendar and sent me an invitation to join the calendar. I accepted, and unbeknownst to me, when I did, the software application changed my view of the calendars available for me to see.

11. Immediately following the March 18, 2015 telephone conference between the counsel for the parties, I calendared Respondent's April 10, 2015 deadline to amend its discovery responses and calendared an April 3, 2015 "7-day alert."

12. The deadlines were entered on my Maison Garrigue personal Google calendar, created on March 16, 2015, instead of my office calendar.

13. I was frantic when I received the April 13, 2015 email from counsel for Petitioner, because I was 100% certain these calendar entries had been made by me.

14. It was not an intentional disregard of the Board's March 11, 2015 order, and was certainly no fault of my client's, Barnaby Heating & Air, LLC.

15. I served Petitioner Respondent's second amended responses on April 16, 2015.

16. At no time did I indicate that I would not supplement Respondent's discovery responses, or that I was refusing to cooperate with discovery in this case.

17. Respondent has fully responded to and provided responses to the discovery at issue in this case.

18. Counsel for Petitioner did not confer with me prior to filing the Motion for Discovery Sanctions and Entry of Judgment.

19. At no time did I indicate I was unwilling to discuss Petitioner's issues or perceived deficiencies relating to Respondent's amended discovery responses.

20. Counsel for Petitioner contacted me on more than one occasion to introduce himself and to ask for a stipulation of an extension of the deadlines. That same effort was not made with respect to any conference on the motion for sanctions.

21. Attached hereto as Exhibit A is a true and correct copy of Respondent's third amended discovery responses. Respondent's motion to reopen the time in which to respond to Petitioner's discovery requests is filed so that Respondent may amend Interrogatory Nos. 25 – 27, because of a typographical error appearing in Interrogatory No. 25, about which Petitioner complains in its motion for sanctions.

I declare that the above statements are true and correct to the best of my knowledge, under penalty of perjury of the laws of the United States of America.

DATED: JUNE 15, 2015



JULIE L. CELUM

EXHIBIT A

**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

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

**RESPONDENT’S THIRD 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 THIRD 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 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, 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.
- d. Documents pertaining to the subscription, development and history of the website www.barnabyheatingandair.com.
- e. Documents pertaining to the subscription, development and history of the website 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. 24 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 Nos. 24-25 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 and all documents produced in response to Requests for Production. 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, tradename, 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

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Attorney for Respondent
Barnaby Heating & Air, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **RESPONDENT'S THIRD 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 15TH day of JUNE 2015, by email and by sending the same via First Class Mail:

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