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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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**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.)	

**REGISTRANT’S/RESPONDENT’S OBJECTION TO PETITIONER’S SUMMARY
JUDGMENT EVIDENCE AND MOTION TO STRIKE PETITIONER’S EVIDENCE,
AND RESPONDENT’S OPPOSITION TO PETITIONER’S MOTION FOR SUMMARY
JUDGMENT, AND RESPONDENT’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Registrant/Respondent, Barnaby Heating & Air, LLC (herein “Respondent” and “Barnaby”), by counsel, hereby objects to the Declarations of Rick Yohn, Robin Faust, and Chelsea Crew, submitted as evidence in support of Petitioner’s Motion for Summary Judgment because these individuals were not disclosed until after the close of discovery, and after Petitioner filed its Motion for Summary Judgment, and were not disclosed in Petitioner’s Initial Disclosures, or supplements thereto.

Respondent also, by counsel, hereby Opposes Petitioner's Motion for Summary Judgment, and files Respondent's Cross-Motion for Summary Judgment on its Pleaded Affirmative Defenses. Respondent respectfully requests that the Board deny Petitioner's Motion for Summary Judgment and not cancel Barnaby's U.S. Registration No. 3,618,331 for the COMFORTCLUB Mark, given Petitioner's failure to properly plead fraud in compliance with Fed. R. Civ. P. 9(b), and because Respondent has produced affirmative evidence establishing its priority in the COMFORTCLUB Mark and that did not commit fraud on the U.S. Patent and Trademark Office at any time in connection with the registration of its COMFORTCLUB Mark.

Additionally, given the contractual relationship between the parties, Petitioner's claims of likelihood of confusion and fraud are barred by law and Respondent moves for cross-summary judgment on Respondent's pleaded affirmative defenses that: (1) Petitioner has failed to state a claim upon which relief can be granted, (2) priority, (3) statute of limitations, (4) estoppel, (5) laches, (6) acquiescence, and (7) the absence of any liability by Respondent for fraud, or any other act, that would give rise to liability to Petitioner. The grounds for these motions are set forth in the accompanying memorandum, the opposition, cross-motion and supporting declarations.

Filed via ESTTA: July 9, 2015

Respectfully submitted,

Barnaby Heating & Air, LLC

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONDENT'S OBJECTIONS AND MOTION TO STRIKE PETITIONER'S SUMMARY JUDGMENT EVIDENCE, RESPONDENT'S OPPOSITION TO PETITIONER'S SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT** was filed on July 9, 2015 and forwarded to counsel for Petitioner and counsel for Co-Respondent, this 9th day of July 2015, by email and by sending the same via first class mail:

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**RESPONDENT’S MEMORANDUM IN SUPPORT OF ITS
OBJECTIONS TO THE DECLARATIONS OF UNDISCLOSED
WITNESSES SUBMITTED IN SUPPORT OF SUMMARY JUDGMENT**

Respondent, Barnaby Heating & Air, LLC, by counsel, objects and moves to strike the Declarations of Rick Yohn, Robin Faust and Chelsea Crew, which were submitted by Petitioner in support of its Motion for Summary Judgment and moves to strike this evidence submitted by Petitioner in support of its summary judgment motion. (See Dkt. # 22.) See *Spier Wines (PTY) Ltd. v. Shepherd*, 105 USPQ2d 1239, 1246 (TTAB 2012) (estoppel sanction imposed where witness first identified in pretrial disclosure); *Great Seats Inc. v. Great Seats Ltd.*, 100 USPQ2d 1323, 1326, 1328 (TTAB 2011) (estoppel sanction imposed with respect to the witnesses first disclosed in the amended and supplemental pretrial disclosures).

Petitioner’s Motion for Summary Judgment is predicated on misrepresentations made by Petitioner regarding, not only, the so-called “deemed admissions,” which Petitioner failed to serve on Respondent in this case, but also upon the declarations of individuals that Petitioner failed to disclose in its Initial Disclosures, or supplements thereto, and that were disclosed for the first time in declarations submitted in support of Petitioner’s summary judgment motion, and in amended disclosures served two (2) days after Petitioner served its Motion for Summary Judgment. (See Celum Decl. at ¶2.)

Initial Disclosures in this cancellation proceeding were due on January 5, 2014, and Discovery closed on June 4, 2014. (Dkt. # 2, and Exhibit 1 to Celum Decl. at ¶2.) Petitioner served Initial Disclosures, by agreement, on January 31, 2014, and Supplemental Disclosures on

June 4, 2014. (Exhibits 2 and 3 to Celum Decl. at ¶3.) Petitioner did not serve Expert Disclosures, which were due on May 5, 2014. (Celum Decl. at ¶4.) Petitioner failed to disclose Rick Yohn, Robin Faust, and Chelsea Crew in its Initial Disclosures or in its Supplemental Disclosures, which served on the very last day of the close of discovery. (*See Id.*) Then, on May 28, 2015, two (2) days after Petitioner served its Motion for Summary Judgment and submitted these individuals' testimony in support, Petitioner served a third supplement to its Initial Disclosures, adding a multitude of individuals likely to have discoverable information, including the three (3) individuals above. (Exhibit 3 to Celum Decl. at ¶3.)

Respondent objects to Petitioner's late disclosed witnesses, to their declarations submitted in support of its summary judgment and Respondent asks that the Board strike their testimony from the record. (Exhibits 1, 2 and 3 to Celum Decl. at ¶2.) *See Panda Travel, Inc. v. Resort Option Enterprises, Inc.*, 94 USPQ2d 1789 (TTAB 2009) (documents not produced until after the start of trial stricken). *See, e.g., Ingalls Shipbuilding, Inc. v. United States*, 857 F.2d 1448 (Fed. Cir. 1988); *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1896 n.5 (TTAB 1988) (trademark search report not produced under attorney-client privilege, albeit rightfully withheld, still cannot be relied upon to support motion for summary judgment).

**RESPONDENT'S OPPOSITION TO
PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

Petitioner's Motion for Summary Judgment is not only based upon the late-disclosed witnesses' testimony above, but is also based upon misrepresentations regarding Petitioner's relationship with Respondent. Additionally all of Petitioner's allegations of fraud are "based upon information and belief" and "mistake of fact" and fail to satisfy Fed. R. Civ. P. 9(b). Fed. R. Civ. P. 9(b). (Dkt. # 1 at ¶¶9, 31, 34, 35, and 36.)

In support of Respondent's Opposition to Petitioner's Motion ("Opposition"), Respondent submits the Declarations of Mr. Charles Barnaby, President of Barnaby Heating & Air, LLC ("Barnaby Decl.") and Julie Celum Garrigue, counsel for Respondent ("Celum Decl."), along with the attached Exhibits. Respondent also relies on certain Exhibits attached to Petitioner's Motion ("Pet.'s Mot.").

II. UNDISPUTED FACTS

1. On May 12, 2009, Respondent was granted U.S. Reg. No. 3,618,331 for the COMFORTCLUB Mark in International Class 36, for "[p]repaid preventative maintenance service plans for heating, ventilating and air conditioning systems" as embodied in COMFORTCLUB Mark. (Exhibit 3 to Barnaby Decl. at ¶ 8.)

2. As owner of the COMFORTCLUB Mark, in September 2014, Respondent assigned all interest and goodwill in its COMFORTCLUB Mark to its Co-Respondent, McAfee Heating & Air Conditioning Co., Inc. ("McAfee") and obtained an Exclusive License from McAfee for continued use of the COMFORTCLUB Mark, which license specifically provides Respondent with the right to prosecute and defend this cancellation proceeding. (Exhibit 4 to Barnaby Decl. and ¶ 9.)

3. Shortly prior to the grant of registration, on August 21, 2007, Respondent entered into Petitioner's Nighthawk AirTime Membership Agreement and Respondent became a member of AirTime 500. (Dkt. # 1 at ¶ 8, Exhibit 7 to Barnaby Decl. and ¶ 12.)

4. In its Petition to Cancel, Petitioner states, "that it is a home services business..." and "[o]ne of Petitioner's membership organizations is AirTime 500, LLC, ("AirTime"), nationally servicing HVAC home contractors." (Dkt. # 1 at ¶ 5, Exhibit 7 to Barnaby Decl. and ¶ 12.) Petitioner also alleges that through its "related One Hour Air Conditioning Franchising, LLC"

comprising “One Hour Air Conditioning & Heating”, and other related entities, such as “AirTime 500”, Petitioner has “established hundreds of Petitioner’s licensed contractors... associated with the COMFORTCLUB Mark.” (Dkt. # 1 at ¶6, Exhibit 7 to Barnaby Decl. and ¶12.)

5. Petitioner further alleges, “Respondent remains in good standing as an AirTime Member, except for the present issue, and in accordance with Petitioner’s original Member Agreement on August 21, 2007.” (Dkt. # 1 at ¶19.)

6. The Member Agreement, between Respondent and Petitioner, by Petitioner’s own judicial admission, as the owner of AirTime 500, describes its business as:

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

(Exhibit D of Dkt. # 1 at ¶11, Exhibit 7 to Barnaby Decl. and ¶12.)

7. The Member Agreement includes an exclusive and non-objectionable, Missouri choice of law provision and mandatory forum selection clause, as set forth below:

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

(Exhibit D at ¶7 of Dkt. # 1 at ¶11, Exhibit 7 to Barnaby Decl. and ¶12.)¹

8. On January 22, 2008, over five and one-half (5 ½) years prior to the initiation of this cancellation proceeding, Respondent began use of its COMFORTCLUB Mark in commerce, and Respondent has provided affirmative evidence of this use, including a January 28, 2008 invoice from 48HourPrint.com along with the images of the initial advertising layout of the COMFORTCLUB Mark. (Exhibit 1 to Barnaby Decl. at ¶4.)

9. On February 22, 2008, Respondent's, Mr. Charles Barnaby, received an email from Robin Faust, Client Advisor, AirTime 500, and sister company of Petitioner's, advising that Respondent had not completed registration for the upcoming AirTime 500 Expo being held from March 11 - 15, 2008 in St. Louis, Missouri. (Pet's Mot., Dkt # 22 at Exhibit 6 of DeFord Decl. at ¶7).

10. On February 22, 2008, Respondent's, Mr. Charles Barnaby, registered to attend an AirTime 500 Senior Sales Technician Training course, which was being held from March 17 - 19, 2008 in St. Louis, Missouri. (Pet.'s Mot. Dkt. # 22 at DeFord Decl. Exhibit 6 at ¶7.)

11. From a review of the Senior Sales Technician Course Registration Confirmation, AirTime 500 Member classes are held separately from One Hour Heating & Air Conditioning Franchisee classes, with AirTime 500 Member classes beginning at 8:00 a.m. daily and Franchisee classes beginning at 8:30 a.m. daily. (*Id.*, Barnaby Decl. at ¶16.)

12. On February 29, 2008, Respondent's, Charles Barnaby, emailed copies of images from Respondent's commercial advertisement of its COMFORTCLUB Mark to Petitioner's

¹ This contractual provision, alone, mandates the Board's denial of Petitioner's Motion for Summary Judgment on its fraud claim, and mandates the Board's dismissal of Petitioner's Petition to Cancel. Respondent has filed a cross-motion for summary judgment herewith on its pleaded affirmative defenses of failure to state a claim and contract estoppel, *et al.*

agent/employee, Robin Faust, via email correspondence. (Pet.'s Mot., Dkt. # 22 at Faust Decl. Exhibit B at ¶¶ 3, 4 and 5, Exhibit 9 to Barnaby Decl. at ¶ 13.)

13. On February 29, 2008, Respondent also sold its first COMFORTCLUB membership. (Dkt. # 22 at DeFord Decl. Exhibit 11 at ¶12.)

14. On March 3, 2008, Petitioner's, Robin Faust, an employee of Petitioner's sister company, confirmed receipt of Respondent's February 29, 2008 email and expressed admiration for Respondent's advertisement embodying the COMFORTCLUB Mark. (Dkt. # 22 at Exhibit B to Faust Decl., Exhibit 8 to Barnaby Decl. at ¶13.) In that same email, Ms. Faust ensured Respondent's, Mr. Charles Barnaby, that "Peter" would review Respondent's ad and provide a response. (Exhibit 9 to Barnaby Decl. at ¶14.)

15. On March 13, 2008, Respondent filed its application to register the COMFORTCLUB Mark, for "prepaid preventative maintenance service plans for heating, ventilating and air conditioning systems" in International Class 36, U.S. Application Serial No. 77/420,784, without the aid of anyone outside of Respondent's company, and without the aid of an attorney or other agent. (Exhibit 2 to Barnaby Decl. at ¶7.)

16. On March 17 – 19, 2008, Respondent's, Mr. Charles Barnaby, attended the AirTime 500 Senior Sales Technician Training course in St. Louis, Missouri, for which he registered on February 22, 2008. (Pet.'s Mot. Dkt. # 22 Exhibit 18 to Crew Decl.; Barnaby Decl. at ¶18-19.)

17. A copy of the March 17 – 19, 2008 AirTime 500 materials provided to Mr. Charles Barnaby in the Senior Sales Technician Training course confirm that there was no use of any "COMFORTCLUB" mark in Petitioner's training materials and there is no evidence that any additional materials were provided to Respondent's, Mr. Charles Barnaby, at that meeting. (Exhibit 11 to Barnaby Decl. at ¶19.)

III. LAW AND ARGUMENT

A party seeking cancellation of a trademark registration for fraudulent procurement bears a heavy burden of proof. *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1939, *citing W.D. Byron & Sons, Inc. v. Stein Bros. Mfg. Co.*, 377 F.2d 1001, 153 USPQ 749, 750 (CCPA 1967). “Indeed, ‘the very nature of the charge of fraud requires that it be proven ‘to the hilt’ with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against it. 1 USPQ2d at 1939, *citing, Smith Int’l, Inc. v. Olin Corp.*, 4 (TTAB 1981). Because fraud involves a willful intent to deceive, one cannot commit fraud unknowingly. *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009) ([A]llegations [based solely upon information and belief] fail to meet the Fed. R. Civ. P. 9(b) requirements as they are unsupported by any statement of facts providing the information upon which petitioner relies or the belief upon which the allegation is founded (i.e., known information giving rise to petitioner’s stated belief, or a statement regarding evidence that is likely to be discovered that would support a claim of fraud)).

In this proceeding, Petitioner plead the following:

- “Respondent’s application for the mark COMFORTCLUB was filed both by mistake of fact and fraudulently, in breach of their license agreement with Petitioner or as a Constructive Trustee of Petitioner.” (Dkt. # 1 at ¶9.)
- “Petitioner licensed Petitioner’s Mark to Respondent for use in the performance and delivery of home heating, air conditioning and ventilation contracting services.” (*Id.* at ¶18.)
- “Respondent remains in good standing as an AirTime member, except for the present issue, and in accordance with Petitioner’s original Member Agreement on

August 21, 2007.” (Id. at ¶19.)

- “Respondent’s authorization to use Petitioner’s Mark has continued in accordance with the terms of the Member Agreement.” (Id. at ¶20.)
- Petitioner also alleges that on March 13, 2008, in Respondent’s original application and again on August 27, 2008, in support of Respondent’s amended specimen, that “Respondent’s Owner and Principal, Mr. Charles Barnaby, signed a declaration in support of its application for the Registration that stated, *inter alia*, that he ‘believes the applicant to be the owner of the trademark/service mark sought to be registered,’ ... ‘believes applicant to be entitled to use such mark in commerce,’ and to the best of his knowledge, he believes that ‘no other person, firm, corporation, or association has the right to sue the mark in commerce, either in the identical form thereof or in such near resemblance thereto’ as to be likely to cause confusion. Upon information and belief, these statements, which were made under oath, were false. Upon information and belief, Mr. Barnaby made these statements with an intent to deceive the U.S. Patent and Trademark Office (“USPTO”) into granting registration ...” (Id. at ¶¶32 and 34.)
- “Upon information and belief, Respondent was not, at the time it filed an application for the Registration, the rightful owner of Respondent’s Mark.” (Id. at ¶36.)
- “Upon information and belief, Respondent is not currently the rightful owner of Respondent’s Mark.” (Id. at ¶37.)

Petitioner’s pleaded fraud claim is insufficient, as a matter of law, to support an award of summary judgment, because it is based upon allegations that Respondent’s application for the

COMFORTCLUB Mark was filed by “mistake,” was used “under the grant of a license from Petitioner”, and each of Petitioner’s specific allegations of any wrongdoing are “based upon information and belief.” (*See id.*; and see *Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285, 1287 (TTAB 2008) (finding the proposed amended pleading insufficient in part under Fed. R. Civ. P. 9(b) because the false statements that purportedly induced the Office to allow registration were not set forth with particularity); and 5A FED. PRAC. & PROC. CIV. 3D § 1298 (April 2013) (discussing particularity requirement of FED. R. CIV. P. 9(b)).

Because Petitioner’s fraud claim was not properly pleaded and is insufficient to state a claim Petitioner’s motion for summary judgment should be deemed moot. *Intermed Communications, Inc. v. Chaney*, 197 USPQ 501, 503 n. 2 (TTAB 1977) (“If a claim has not been properly pleaded, one cannot obtain summary judgment thereon”); see also *Consolidated Foods Corporation v. Berkshire Handkerchief Co., Inc.*, 229 USPQ 619, 621 (TTAB 1986) (The rule that only properly pleaded issues may be the subject of a grant of summary judgment “is especially important where the asserted ground for summary judgment is fraud since in pleading fraud, ‘the circumstances . . . shall be stated with particularity.’ Fed. R. Civ. P. 9(b)”). Pleadings of fraud made “on information and belief,” when there is no allegation of “specific facts upon which the belief is reasonably based” are insufficient. *Exergen Corp. v. Wal-Mart Stores Inc.*, 91 USPQ2d 1656, 1670 (Fed. Cir. 2009) and cases cited therein (discussing when pleading on information and belief under Fed. R. Civ. P. 9(b) is permitted); see also *In Re Bose Corp.*, 91 USPQ2d at 1938. Additionally, under USPTO Rule 11.18, the factual basis for a pleading requires either that the pleader know of facts that support the pleading or that evidence showing the factual basis is “likely” to be obtained after a reasonable opportunity for discovery or investigation. Allegations based solely on information and belief raise only the mere possibility

that such evidence may be uncovered and do not constitute pleading of fraud with particularity. Thus, to satisfy Rule 9(b), any allegations based on “information and belief” must be accompanied by a statement of facts upon which the belief is founded. *See Exergen Corp.*, 91 USPQ2d at 1670 n.7, *citing Kowal v. MCI Commc'n Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) (“[P]leadings on information and belief [under Rule 9(b)] require an allegation that the necessary information lies within the defendant's control, and ... such allegations must also be accompanied by a statement of the facts upon which the allegations are based’).”

Alternatively, to the extent the Board is inclined to find Petitioner’s fraud claim is well plead, and satisfies Fed. R. Civ. P. 9(b), based upon the undisputed facts and admissions, as set forth herein (**II. Undisputed Facts**, ¶¶ 1- 17, *infra.*), genuine issues remain with respect to Respondent’s intent to commit fraud on the USPTO. A party asserting a fraud claim bears a heavy burden because fraud must be “proven ‘to the hilt’ by clear and convincing evidence,” leaving nothing to speculation, conjecture, or surmise; any doubt must be resolved against the party making the claim. *Smith International, Inc. v. Olin Corp.*, 209 USPQ 1033, 1043-1044 (TTAB 1981). The factual question of intent is particularly unsuited to disposition on summary judgment. *Copelands' Enterprises Inc. v. CNV Inc.*, 945 F.2d 1563, 20 USPQ2d 1299 (Fed. Cir. 1991). Petitioner’s Motion and the scant evidence submitted in support, do not meet Petitioner’s clear and convincing burden. Respondent has set forth evidence to refute each of Petitioner’s allegations of wrongdoing, including fraud, at all times material to the use and registration of Respondent’s COMFORTCLUB Mark. (*See* Barnaby Decl.)

As set forth in **II. Undisputed Facts**, *infra.*, Respondent began using the COMFORTCLUB Mark in January 2008, prior to attending the March 2008 AirTime 500 meeting in St. Louis, Missouri, a fact on which Petitioner bases the bulk of its argument and

evidence that Respondent is guilty of fraud. (*See* Dkt. # 22 at pp. 3-7.) As Respondent has shown, not only had Respondent already begun using its COMFORTCLUB Mark in commerce, but Respondent had also filed its application for the registration of its Mark at the USPTO. (Dkt. # 22; *see also* Barnaby Decl.). Even if Respondent had not filed its application for its COMFORTCLUB Mark by the time Respondent's, Mr. Charles Barnaby attended the AirTime 500 Expo, Petitioner has failed to show that the COMFORTCLUB Mark was adopted by Petitioner, or that it was in use at the March 17-19, 2008 meeting, such that Respondent could have intentionally and willfully adopted the COMFORTCLUB Mark as its own, in complete abrogation, to Petitioner's ownership rights. (Barnaby Decl. at ¶¶17 – 21.)

What Petitioner has submitted in support of its Motion are undated internal exemplars or mock-ups, lacking any contact information, or with faux contact information for its faux Franchisees with fictitious addresses in fictitious towns. (Barnaby Decl. at ¶24; *see also* Yohn Decl. at Exhibits 1 and 2.) The materials submitted by Petitioner fail to establish that Petitioner ever used the COMFORTCLUB or "COMFORT CLUB" Mark in commerce, or that Petitioner has rights to the COMFORTCLUB Mark that are superior to that of Respondent's. (*See* Exhibits 1 and 2 of Yohn Decl.)

Given the timing of Respondent's first use in commerce, its application date, and given Petitioner's failure to produce even a scintilla of evidence that Respondent committed fraud in securing its Registration, Petitioner's motion for summary judgment should be denied. The record before the Board does not contain undisputed facts demonstrating that Respondent engaged in fraud. As such, Petitioner's Motion for Summary Judgment must be denied.

RESPONDENT'S CROSS MOTION FOR SUMMARY JUDGMENT

Respondent hereby moves via its cross-motion for summary judgment based upon its pleaded affirmative defenses of Petitioner's failure to state a claim upon which relief can be granted, contract estoppel, statute of limitations, laches, and acquiescence, by the very terms of the Member Agreement between the parties, given Petitioner's repeated admissions that it is the "owner" and "constructive trustee" of benefits to the parties' August 21, 2007 Member Agreement. (See Dkt. # 1 at ¶¶ 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 19, and 20; Exhibit 7 to Barnaby Decl. at ¶12.) The August 21, 2007 Member Agreement contains a non-objectionable choice of law provision that Missouri State law apply to any dispute arising out of the Member Agreement be brought in Missouri State or Federal court, and that jurisdiction is limited solely to the State of Missouri. (Exhibit 7 to Barnaby Decl. at 12.) Petitioner is required, as a party to the underlying Member Agreement, to abide by its terms, and as such, was required to bring this action in the State of Missouri. Because, Petitioner failed to do so, it has failed to state a claim for which relief can be provided and Respondent moves for judgment on its affirmative defense. (See Dkt. #3 at ¶ 41.)

A motion for summary judgment is a pretrial device intended to save the time and expense of a full trial when the moving party is able to demonstrate, prior to trial, that there is no genuine dispute of material fact, and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In reviewing a motion for summary judgment, the evidentiary record and all reasonable inferences to be drawn from the undisputed facts must be viewed in the light most favorable to the nonmoving party. *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). This Board may not resolve issues of material fact; it may only ascertain whether such issues exist. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027

(Fed. Cir. 1993). This Board may “consider the agreement, its construction or its validity if necessary to decide the issues properly before it ... including the issue of estoppel.” *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 217 USPQ 641, 647 (Fed. Cir. 1983). Nonetheless, in those cases where the material facts are clearly undisputed, as is the case in the present cancellation proceeding, and are truly compelling, or where the motion is based on some theory of res judicata, summary judgment is a good way to avoid a useless trial. *See, e.g., Orouba Agrifoods Processing Company v. United Food Import*, 97 USPQ2d 1310 (TTAB 2010) (Cancellation No. 92050739) (successful motion based on res judicata).

For these very same reasons, and based upon the same admissions that Petitioner is a party to the Member Agreement, Respondent moves for summary judgment based upon its pleaded affirmative defense of contract estoppel. (Exhibit 7 to Barnaby Decl. and Dkt. #3 at ¶ 45.) Because contract construction is a question of law, the Board may “consider the agreement, its construction or its validity if necessary to decide the issues properly before it ... including the issue of estoppel.” *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 217 USPQ 641, 647 (Fed. Cir. 1983). Section 7. of the Member Agreement explicitly states that “any action arising out of, or related to this agreement will be brought by the parties only in a Missouri state court or federal court sitting in Missouri.” (Exhibit 7 to Barnaby Decl. at ¶12.) Respondent moves to enforce this provision against Petitioner and moves for a dismissal of Petitioner’s claims on Respondent’s pleaded affirmative defense of estoppel.

Respondent also moves for summary judgment on its pleaded affirmative defenses of laches and acquiescence. Petitioner submitted the Declaration of Robin Faust in support of its Motion for Summary Judgment and Ms. Faust acknowledged under penalty of perjury that she received and praised Respondent’s ad incorporating and embodying Respondent’s

COMFORTCLUB Mark on February 28, 2008 and on March 3, 2008. (Exhibits B and C to Faust Decl. at ¶¶7 and 8.) Respondent has been using the COMFORTCLUB Mark in commerce since January 22, 2008, and Petitioner knew, or should have known, about such use as early as February 28, 2008. An estoppel can be created by a plaintiff's knowing acquiescence in defendant's activities, or by unreasonable delay coupled with prejudice, creating an estoppel by laches. *Richdel, Inc. v. Mathews Co.*, 190 USPQ 37, 1976 WL 20915 (TTAB 1976) (a consent to use necessarily includes a consent to register). Here, Respondent has invested over \$225,000 developing its COMFORTCLUB Mark, following its February 28, 2008 email to Petitioner's, Robin Faust. (Barnaby Decl. at ¶ 15.)

III. CONCLUSION

Construing Petitioner's allegations so as to do justice and in the light most favorable to Respondent, as the non-movant on the summary judgment motion, the Board should find that Petitioner has not alleged with sufficient particularity facts which, if proven at trial, would establish that Respondent knowingly made a false, material statement with the intent to deceive the United States Patent and Trademark Office, and Petitioner's Motion should be denied. Construing Respondent's allegations so as to do justice and in the light most favorable to Petitioner, as the non-movant on the summary judgment motion, the Board should find that Respondent has alleged with sufficient particularity facts which, if proven at trial, would establish that Petitioner's claims are barred based upon the contractual agreement between the parties, Petitioner's failure to state a claim upon which relief can be granted, contract estoppel, laches, acquiescence and the applicable Missouri statute of limitations.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONDENT'S OBJECTIONS AND MOTION TO STRIKE PETITIONER'S SUMMARY JUDGMENT EVIDENCE, AND MEMORANDUM IN SUPPORT, RESPONDENT'S OPPOSITION TO RESPONDENT'S SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT** was filed on July 9, 2015 and forwarded to counsel for Petitioner and counsel for Co-Respondent, this 9th day of July 2015, by email and by sending the same via first class mail:

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Counsel for Petitioner,
Clockwork IP, LLC

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

// 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 CELUM GARRIGUE

“I Julie Celum Garrigue declare under penalty of perjury that the foregoing is true and correct.

1. I am legal counsel for Respondent, Barnaby Heating & Air, LLC.
2. Petitioner filed its Motion for Summary Judgment on May 26, 2015. On May 28, 2015, I received a courtesy copy of Petitioner’s (third) Supplemented Initial Disclosures via email from Amanda L. DeFord. Initial disclosures in this case were due on January 31, 2014, Discovery closed on June 4, 2014, Expert Disclosures were due on May 5, 2014. A true and accurate copy of the original scheduling order in this case is attached hereto as Exhibit 1.

3. Petitioner's initial disclosures were served on January 31, 2014 and a true and accurate copy of Petitioner's initial disclosures is attached hereto as Exhibit 2. Petitioner's supplemental disclosures were served on June 4, 2014 and a true and accurate copy of Petitioner's supplemental disclosures is attached hereto as Exhibit 3. A true and accurate copy of Petitioner's May 28, 2015, supplemental disclosures are attached hereto as Exhibit 4.

4. Petitioner did not serve expert disclosures in this case by the May 5, 2014 deadline.

5. The three witnesses were not disclosed to Respondent until Petitioner filed its summary judgment motion. Respondent objects to these witnesses and their testimony and moves to strike their testimony from the record.

I declare under penalty of perjury the foregoing is true and correct.

EXECUTED on JULY 9, 2015.



JULIE CELUM GARRIGUE

EXHIBIT 1

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: September 27, 2013

Cancellation No. **92057941**
Registration No. 3618331

BARNABY HEATING & AIR
4620 INDUSTRIAL ST STE C,
ROWLETT, TX 75088 UNITED STATES

Clockwork IP, LLC

v.

Barnaby Heating & Air

JOHN PARE
CLOCKWORK INC
50 CENTRAL AVENUE SUITE 920,
SARASOTA, FL 34236 UNITED STATES

Karl Kochersperger, Paralegal Specialist:

A petition to cancel the above-identified registration has been filed. A service copy of the petition for cancellation was forwarded to registrant (defendant) by the petitioner (plaintiff). An electronic version of the petition for cancellation is viewable in the electronic file for this proceeding via the Board's TTABVUE system:
<http://ttabvue.uspto.gov/ttabvue/>.

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations ("Trademark Rules"). These rules may be viewed at the USPTO's trademarks page: <http://www.uspto.gov/trademarks/index.jsp>. The Board's main webpage (<http://www.uspto.gov/trademarks/process/appeal/index.jsp>) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).

Plaintiff must notify the Board when service has been ineffective, within 10 days of the date of receipt of a returned service copy or the date on which plaintiff learns that service has been ineffective. Plaintiff has no subsequent duty to investigate the defendant's whereabouts, but if plaintiff by its own voluntary investigation or through any other means discovers a newer correspondence address for the defendant, then such address must be provided to the Board. Likewise, if by voluntary investigation or other means the plaintiff discovers

information indicating that a different party may have an interest in defending the case, such information must be provided to the Board. The Board will then effect service, by publication in the Official Gazette if necessary. See Trademark Rule 2.118. In circumstances involving ineffective service or return of defendant's copy of the Board's institution order, the Board may issue an order noting the proper defendant and address to be used for serving that party.

Defendant's ANSWER IS DUE FORTY DAYS after the mailing date of this order. (See Patent and Trademark Rule 1.7 for expiration of this or any deadline falling on a Saturday, Sunday or federal holiday.) **Other deadlines the parties must docket or calendar are either set forth below (if you are reading a mailed paper copy of this order) or are included in the electronic copy of this institution order viewable in the Board's TTABVUE system at the following web address: <http://ttabvue.uspto.gov/ttabvue/>.**

Defendant's answer and any other filing made by any party must include proof of service. See Trademark Rule 2.119. **If they agree to, the parties may utilize electronic means, e.g., e-mail or fax, during the proceeding for forwarding of service copies.** See Trademark Rule 2.119(b)(6).

The parties also are referred in particular to Trademark Rule 2.126, which pertains to the form of submissions. **Paper submissions, including but not limited to exhibits and transcripts of depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.**

Time to Answer	11/6/2013
Deadline for Discovery Conference	12/6/2013
Discovery Opens	12/6/2013
Initial Disclosures Due	1/5/2014
Expert Disclosures Due	5/5/2014
Discovery Closes	6/4/2014
Plaintiff's Pretrial Disclosures	7/19/2014
Plaintiff's 30-day Trial Period Ends	9/2/2014
Defendant's Pretrial Disclosures	9/17/2014
Defendant's 30-day Trial Period Ends	11/1/2014
Plaintiff's Rebuttal Disclosures	11/16/2014
Plaintiff's 15-day Rebuttal Period Ends	12/16/2014

As noted in the schedule of dates for this case, the parties are required to have a conference to discuss: (1) the nature of and basis for their respective claims and defenses, (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and (3) arrangements relating to disclosures, discovery and introduction of evidence at trial, should the parties not agree to settle the case. See Trademark Rule 2.120(a)(2). Discussion of the first two of these three subjects should include a discussion of whether the parties wish to seek mediation, arbitration or some other means for resolving their dispute. Discussion of the third subject should include a discussion of whether the Board's Accelerated Case Resolution (ACR) process may be a

more efficient and economical means of trying the involved claims and defenses. Information on the ACR process is available at the Board's main webpage. Finally, if the parties choose to proceed with the disclosure, discovery and trial procedures that govern this case and which are set out in the Trademark Rules and Federal Rules of Civil Procedure, then they must discuss whether to alter or amend any such procedures, and whether to alter or amend the Standard Protective Order (further discussed below). Discussion of alterations or amendments of otherwise prescribed procedures can include discussion of limitations on disclosures or discovery, willingness to enter into stipulations of fact, and willingness to enter into stipulations regarding more efficient options for introducing at trial information or material obtained through disclosures or discovery.

The parties are required to conference in person, by telephone, or by any other means on which they may agree. A Board interlocutory attorney or administrative trademark judge will participate in the conference, upon request of any party, provided that such participation is requested no later than ten (10) days prior to the deadline for the conference. See Trademark Rule 2.120(a)(2). The request for Board participation must be made through the Electronic System for Trademark Trials and Appeals (ESTTA) or by telephone call to the interlocutory attorney assigned to the case, whose name can be found by referencing the TTABVue record for this case at <http://ttabvue.uspto.gov/ttabvue/>. The parties should contact the assigned interlocutory attorney or file a request for Board participation through ESTTA only after the parties have agreed on possible dates and times for their conference. Subsequent participation of a Board attorney or judge in the conference will be by telephone and the parties shall place the call at the agreed date and time, in the absence of other arrangements made with the assigned interlocutory attorney.

The Board's Standard Protective Order is applicable to this case, but the parties may agree to supplement that standard order or substitute a protective agreement of their choosing, subject to approval by the Board. The standard order is available for viewing at: <http://www.uspto.gov/trademarks/process/appeal/guidelines/stdagmnt.jsp>. Any party without access to the web may request a hard copy of the standard order from the Board. The standard order does not automatically protect a party's confidential information and its provisions must be utilized as needed by the parties. See Trademark Rule 2.116(g).

Information about the discovery phase of the Board proceeding is available in chapter 400 of the TBMP. By virtue of amendments to the Trademark Rules effective November 1, 2007, the initial disclosures and expert disclosures scheduled during the discovery phase are required only in cases commenced on or after that date. The TBMP has not yet been amended to include information on these disclosures and the parties are referred to the August 1, 2007 Notice of Final Rulemaking (72 Fed. Reg. 42242) posted on the Board's webpage. The deadlines for pretrial disclosures included in the trial phase of the schedule for this case also resulted from the referenced amendments to the Trademark Rules, and also are discussed in the Notice of Final Rulemaking.

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 addition, the assigned interlocutory attorney has discretion to require the parties to

participate in a telephone conference to resolve matters of concern to the Board. See TBMP § 502.06(a) (2d ed. rev. 2004).

The TBMP includes information on the introduction of evidence during the trial phase of the case, including by notice of reliance and by taking of testimony from witnesses. See TBMP §§ 703 and 704. Any notice of reliance must be filed during the filing party's assigned testimony period, with a copy served on all other parties. Any testimony of a witness must be both noticed and taken during the party's testimony period. A party that has taken testimony must serve on any adverse party a copy of the transcript of such testimony, together with copies of any exhibits introduced during the testimony, within thirty (30) days after the completion of the testimony deposition. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing after briefing is not required but will be scheduled upon request of any party, as provided by Trademark Rule 2.129.

If the parties to this proceeding are (or during the pendency of this proceeding become) parties in another Board proceeding or a civil action involving related marks or other issues of law or fact which overlap with this case, they shall notify the Board immediately, so that the Board can consider whether consolidation or suspension of proceedings is appropriate.

ESTTA NOTE: For faster handling of all papers the parties need to file with the Board, the Board strongly encourages use of electronic filing through the Electronic System for Trademark Trials and Appeals (ESTTA). Various electronic filing forms, some of which may be used as is, and others which may require attachments, are available at <http://estta.uspto.gov>.

EXHIBIT 2

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

Clockwork IP, LLC	§	Mark: COMFORT CLUB
	§	
<i>Petitioner,</i>	§	
	§	
v.	§	Cancellation No. 92057941
	§	In re Registration No. 3618331
Barnaby Heating & Air	§	
	§	
	§	
<i>Registrant.</i>	§	

PETITIONER'S RULE 26(A)(1) DISCLOSURES

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rule 26(a)(1) of the Federal Rules of Civil Procedure, Petitioner Clockwork IP, LLC, by counsel, hereby provides the following initial disclosures. Petitioner reserves the right to supplement and/or amend these disclosures as may be appropriate during the course of discovery and as allowed by the Trademark Rules of Practice and Federal Rules of Civil Procedure.

I. Included below are the names and, if known, the addresses and telephone numbers of individuals likely to have discoverable information that Petitioner may use to support its claims or defenses, based on information now available and reserving the right to supplement or amend:

- a. Paul Riddle, Vice President of Operations at SGI, 50 Central Ave., Suite 920, Sarasota, FL, 34236 c/o Purvi J. Patel, Haynes and Boone, LLP, 2323 Victory Ave., Suite 700, Dallas, TX 75219

Subject Matter: Mr. Riddle has knowledge relevant to Petitioner's claims of priority, as well as related claims set forth in the Petition to Cancel.

- b. Rebecca Cassel, Group President of Consumer Services, Clockwork Home Services, 50 Central Ave., Suite 920, Sarasota, FL, 34236 c/o Purvi J. Patel, Haynes and Boone, LLP, 2323 Victory Ave., Suite 700, Dallas, TX 75219

Subject Matter: Ms. Cassel has knowledge relevant to Petitioner's development, branding, and use of COMFORTCLUB and the COMFORTCLUB Maintenance Plan.

- c. Gatha Milhorn, Franchisee Paralegal, Clockwork Home Services, 50 Central Ave., Suite 920, Sarasota, FL, 34236 c/o Purvi J. Patel, Haynes and Boone, LLP, 2323 Victory Ave., Suite 700, Dallas, TX 75219

Subject Matter: Ms. Milhorn has knowledge relevant to Petitioner's Disclosures around use of COMFORTCLUB Mark and Maintenance Plan to Franchisees.

- d. Roger McCoy, Former Franchisee; Franchise Territory Manager, Clockwork Home Services, 50 Central Ave., Suite 920, Sarasota, FL, 34236 c/o Purvi J. Patel, Haynes and Boone, LLP, 2323 Victory Ave., Suite 700, Dallas, TX 75219

Subject Matter: Mr. McCoy has knowledge regarding field use and advice on the COMFORTCLUB Maintenance Plan

- e. John Hubai, Multi Media Designer, c/o Purvi J. Patel, Haynes and Boone, LLP, 2323 Victory Ave., Suite 700, Dallas, TX 75219

Subject Matter: Mr. Hubai has knowledge regarding promotion of the COMFORTCLUB mark in franchisee publications

- f. Charles Barnaby, President of Barnaby Heating & Air, 4620 Industrial Street, Rowlett, TX 75088

Subject Matter: Mr. Barnaby has knowledge relevant to Petitioner's claims of priority, as well as the likelihood of confusion, fraud, and false suggestion of a connection, and regarding Registration No. 3618331.

2. Based on information now available and reserving the right to supplement or amend, the following categories of documents are in Petitioner's possession at its offices, other locations owned or controlled by Petitioner, or the offices of its counsel and may be used to support Petitioner's claims and defenses:

- a. Documents regarding the application of Petitioner's "COMFORTCLUB" Mark as defined in the Petition to Cancel;
- b. Documents regarding the use and ownership of Petitioner's "COMFORTCLUB" Mark; and
- c. Correspondence between Petitioner and Applicant.

3. Petitioner has not yet determined the identity of any expert witnesses that it may use to support its claims and defenses.

Respectfully submitted,

CLOCKWORK IP, LLC



Purvi J. Patel, *Attorney for Petitioner*
Haynes and Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Phone: 214-651-5917
Facsimile: 214-200-0812
patelp@haynesboone.com

Date: January 31, 2014

File: 46889.81

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

Clockwork IP, LLC

Petitioner,

v.

Barnaby Heating & Air

Registrant.

§
§
§
§
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§
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§

Mark: COMFORT CLUB

Cancellation No. 92057941
In re Registration No. 3618331

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of January, 2014, a copy of the foregoing *Petitioner's Rule 26(a)(1) Disclosures* was served via first class mail, postage prepaid, on the following:

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


Purvi J. Patel

D-2238528_1

EXHIBIT 3

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

Clockwork IP, LLC	§	Mark: COMFORT CLUB
	§	
<i>Petitioner,</i>	§	
	§	
v.	§	Cancellation No. 92057941
	§	In re Registration No. 3618331
Barnaby Heating & Air	§	
	§	
	§	
<i>Registrant.</i>	§	

PETITIONER'S SUPPLEMENT TO ITS ORIGINAL RULE 26(A)(1) DISCLOSURES

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rule 26(a)(1) of the Federal Rules of Civil Procedure, Petitioner Clockwork IP, LLC, by counsel, hereby provides the following supplemental information to its initial disclosures provided on January 31, 2014. Petitioner reserves the right to supplement and/or amend these disclosures as allowed by the Trademark Rules of Practice and Federal Rules of Civil Procedure.

1. Included below are the names and, if known, the addresses and telephone numbers of additional individuals likely to have discoverable information that Petitioner may use to support its claims or defenses, based on information now available:

a. Charles, Debbie, and Travis Barnaby, Barnaby Heating & Air, 4620 Industrial Street, Rowlett, TX 75088.

Subject Matter: The Barnabys have knowledge relevant to Petitioner's and Respondent's claims of priority, Petitioner's and Respondent's use of the COMFORTCLUB mark, as well as the claims of likelihood of confusion, fraud, and false suggestion of a connection made in the Petition to Cancel Registration No. 3618331. They also have knowledge negating the Affirmative Defenses asserted in Respondent's Answer to the Petition to Cancel.

b. John Paccuca, Blue Stream Services, Inc., 850 Vandalia Street, Suite 120, Collinsville, IL 62234.

Subject Matter: Mr. Paccuca is a former Air Time 500 member and has information regarding the use of COMFORTCLUB by the parties, and Petitioner's use of the COMFORTCLUB mark at membership events and workshops.

c. Shelby Cuellar, 4800 Northway Drive, Apartment 2N, Dallas TX 75206.

Subject Matter: Mr. Cueller is a former employee of Respondent and has information pertaining to the development, adoption, and filing of the COMFORTCLUB mark and subjects related thereto.

- d. Thomas Dougherty, 6305 Carrizo Drive, Granbury, TX 76049.

Subject Matter: Mr. Dougherty is a former employee of Respondent and has information pertaining to the development, adoption, and filing of the COMFORTCLUB mark and subjects related thereto.

- e. Juli Cordray, Barnaby Heating & Air LLC, 4620 Industrial Street, Suite C, Rowlett, TX 75088.

Subject Matter: Ms. Cordray is a current employee of Respondent and has information pertaining to COMFORTCLUB, and subjects related thereto.

- f. Randy Kelley, 1510 Stevens St., The On Time Experts, Dallas, Texas 75218.

Subject Matter: Mr. Kelley is a former franchisee of Petitioner and has information pertaining to the use of "COMFORTCLUB" by the respective parties.

2. Based on information now available, the following categories of documents are in Petitioner's possession at its offices, other locations owned or controlled by Petitioner, or the offices of its counsel and may be used to support Petitioner's claims and defenses:

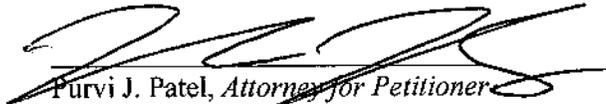
- a. Documents regarding the application of Petitioner's "COMFORTCLUB" Mark as defined in the Petition to Cancel;
- b. Documents regarding the use and ownership of Petitioner's "COMFORTCLUB" Mark;
- c. Documents regarding the seniority of Petitioner's use of "COMFORTCLUB";
- d. Documents regarding a likelihood of confusion and false association between the parties' use of "COMFORTCLUB";
- e. Documents regarding Respondent's fraud on the Trademark Office and intent to deceive the Trademark Office;
- f. Documents regarding Respondent's use of "COMFORTCLUB" as a licensee and constructive trustee of Petitioner;
- g. Correspondence between Petitioner and Respondent;
- h. Documents negating and countering the Affirmative Defenses set forth by Respondent in its Answer to the Petition to Cancel; and

- i. Agreements between Petitioner or Petitioner's Affiliates and Respondent with respect to the use of Petitioner Intellectual Property, including the Petitioner's Trademarks such as "COMFORTCLUB."
3. Petitioner has not yet determined the identity of any expert witnesses that it may use to support its claims and defenses.

Respectfully submitted,

CLOCKWORK IP, LLC

Date: June 4, 2014



Purvi J. Patel, *Attorney for Petitioner*
Haynes and Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Phone: 214-651-5917
Facsimile: 214-200-0812
patelp@haynesboone.com

File: 46889.81

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

Clockwork IP, LLC

Petitioner,

v.

Barnaby Heating & Air

Registrant.

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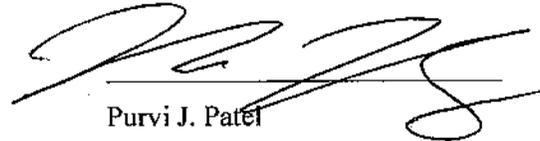
Mark: COMFORT CLUB

Cancellation No. 92057941
In re Registration No. 3618331

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of June, 2014, a copy of the foregoing *Petitioner's Supplement to its Original Rule 26(a)(1) Disclosures* was served via first class mail, postage prepaid, on the following:

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


Purvi J. Patel

D-2238528_1

EXHIBIT 4

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

CLOCKWORK IP, LLC

Petitioner,

v.

BARNABY HEATING & AIR, and
McAFEE HEATING AND AIR
CONDITIONING CO., INC.

Respondents.

Cancellation No. 92057941
Reg. No. 3,618,331

**PETITIONER CLOCKWORK IP, LLC'S SUPPLEMENTAL
RULE 26(a)(1) DISCLOSURES**

Pursuant to Rule 408.03 of the Trademark Trial and Appeal Board Manual of Procedure and Rule 26(e) of the Federal Rules of Civil Procedure, Petitioner Clockwork IP, LLC, by counsel, hereby provides the following updated initial disclosures. Petitioner reserves the right to supplement and/or amend these disclosures as allowed by the Trademark Rules of Practice and Federal Rules of Civil Procedure.

1. Included below are the names and, if known, the addresses and telephone numbers of individuals likely to have discoverable information that Petitioner may use to support its claim or defenses, based on information now available and reserving the right to supplement or amend:

- a. Paul Riddle, Vice President of Operations at SGI, 5901 N. Honore Ave., Suite 130, Sarasota, FL 34243 c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Mr. Riddle has knowledge relevant to Petitioner's claims of priority, as well as related claims set forth in the Petition to Cancel. Mr. Riddle also has knowledge about the types of resources an SGI/AirTime500 membership provides access to and any restrictions or limitations on use of those resources.

- b. Rebecca Cassel, former Group President of Consumer Services, Clockwork Home Services; Owner and President of Success Group International, 5901 N. Honore Ave., Suite 130, Sarasota, FL 34243 c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Ms. Cassel has knowledge relevant to Petitioner's development, branding, and use of COMFORTCLUB and the COMFORTCLUB Maintenance Plan. Ms. Cassel also has knowledge about the types of resources an SGI/AirTime500 membership provides access to and any restrictions or limitations on use of those resources.

- c. Gatha Milhorn, Franchisee paralegal, Clockwork Home Services, 50 Central Ave., Suite 920, Sarasota, FL 34236 c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Ms. Milhorn has knowledge relevant to Petitioner's Disclosures around use of the COMFORTCLUB Mark and Maintenance Plan by Franchisees.

- d. Roger McCoy, Former Franchisee; Franchise Territory Manager, Clockwork Home Services, 50 Central Ave., Suite 920, Sarasota, FL 34236 c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Mr. McCoy has knowledge regarding field use and advice on the COMFORTCLUB Maintenance Plan.

- e. John Hubai, Multi Media Designer, c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Mr. Hubai has knowledge regarding promotion of the COMFORTCLUB Mark in franchisee publications.

- f. Charles Barnaby, President of Barnaby Heating & Air, 4620 Industrial Street, Rowlett, TX 75088

Subject Matter: Mr. Barnaby has knowledge relevant to Petitioner's claims of priority, as well as the likelihood of confusion, fraud, and false suggestion of a connection, and regarding Registration No. 3618331.

- g. Rick Yohn, Vice President of Franchise Operations, Clockwork Home Services, 50 Central Ave., Suite 920, Sarasota, FL 34236 c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Mr. Yohn has knowledge relevant to Petitioner's claim of priority, Petitioner's use of COMFORTCLUB and the COMFORTCLUB

Maintenance Plan, and Petitioner's Application Serial No. 85/880,911 and other state and foreign filings related to the COMFORTCLUB Mark.

- h. Robin Faust, former Client Support Manager, Success Group International United States; Client Support Manager, Success Group International Canada, 15-160 Applewood Cres., Concord, ON L4K4H2 c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Ms. Faust has knowledge about Respondent's relationship to Petitioner and Petitioner's affiliated entities, SGI and AirTime500, as well as Respondent's access to Petitioner's intellectual property and the restrictions and/or limitations placed on that access and use.

- i. Chelsea Crew, Administrative Supervisor for Success Academy, Clockwork Home Services, 50 Central Ave., Suite 920, Sarasota, FL 34236 c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Ms. Crew has knowledge Respondent's relationship to Petitioner and Petitioner's affiliated entities, SGI and AirTime500, Mr. Charles Barnaby's attendance at SGI/AirTime500 Expo and Success Academy events, and Respondent's access to Petitioner's intellectual property and the restrictions and/or limitations placed on that access and use.

- j. John Young, former Head of Development, Clockwork Home Services, c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Mr. Young has knowledge relevant to Petitioner's development, branding, and use of COMFORTCLUB and the COMFORTCLUB Maintenance Plan, as well as Petitioner's reasons for developing and using the COMFORTCLUB Mark.

- k. Bill Powers, Franchise Brand Manager, Clockwork Home Services, 50 Central Ave., Suite 920, Sarasota, FL 34236 c/o Brad R. Newberg, McGuireWoods LLP, 1750 Tysons Blvd., Suite 1800, Tysons Corner, VA 22102, Tel: (703) 712-5061

Subject Matter: Mr. Powers has knowledge regarding the promotion, advertising, and sales of franchisee services authorized by Petitioner using the COMFORTCLUB Mark and the COMFORTCLUB Maintenance Plan.

2. Based on information now available and reserving the right to supplement or amend, the following categories of documents are in Petitioner's possession at its offices, other

locations owned or controlled by Petitioner, or the offices of its counsel and may be used to support Petitioner's claims and defenses:

- a. documents regarding the application of Petitioner's "COMFORTCLUB" Mark as defined in the Petition to Cancel;
 - b. documents regarding the use and ownership of Petitioner's "COMFORTCLUB" Mark; and
 - c. Correspondence between Petitioner and Respondent.
3. Petitioner has not yet determined the identity of any expert witnesses that it may use to support its claims and defenses.

Respectfully submitted,

CLOCKWORK IP, LLC

Dated: May 28, 2015

By: /Brad R. Newberg/
Brad R. Newberg
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One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-7787
(804) 698-2248 (fax)
Attorneys for Petitioner Clockwork IP, LLC

CERTIFICATE OF SERVICE

On May 28, 2015, in addition to being filed and served via ESTTA, this document was sent by first class mail to the following counsel of record:

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

*Counsel for Respondent Barnaby
Heating & Air*

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

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

/Amanda L. DeFord/
Amanda L. DeFord

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Tel 804.775.1000
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www.mcguirowoods.com

AMANDA L. DeFORD
Direct: 804.775.7877

McGUIREWOODS

adeford@mcguirowoods.com
Direct Fax: 804.698.2248

May 28, 2015

By First Class Mail and Email

(jcelum@celumlaw.com)

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

Re: Clockwork IP, LLC v. Barnaby Heating & Air
Cancellation No. 92057941
Clockwork IP, LLC's Updated Disclosures

Dear Julie,

Please find enclosed a copy of Petitioner Clockwork IP, LLC's updated disclosures.

Please do not hesitate to contact me with any questions.

Sincerely yours,



Amanda L. DeFord

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

**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 CHARLES BARNABY

“I Charles Barnaby declare under penalty of perjury that the foregoing is true and correct.

1. I am the President of Barnaby Heating & Air, LLC located in Rowlett, Texas.
2. I, along with my nephew, and former Barnaby Heating & Air, LLC employee, Shelby Cuellar, independently conceived of, independently created, and independently developed the COMFORTCLUB Mark as a means of marketing club membership sales to my new and existing customers throughout Rowlett, Texas and the Dallas-Fort Worth area.

3. We developed the COMFORTCLUB Mark while working for Barnaby Heating & Air, LLC beginning sometime in the Fall and Winter of 2007.
4. On January 28, 2008, following the conception and development of the COMFORTCLUB Mark, and in an effort to market COMFORTCLUB club membership sales to new and existing customers, I ordered five thousand (5,000) 3.5 X 8.5 double sided Rip Hangers from 48HourPrint.com of Quincy, Massachusetts that incorporated and displayed the COMFORTCLUB Mark. A true and accurate copy of the 48HourPrint.com invoice and the original Rip Hanger “proof”, dated January 25, 2008, Bates Nos. BARNABY-000001 – BARNABY 000002, are attached hereto as Exhibit 1.
5. Just prior to ordering the marketing materials in Exhibit 1, we selected the COMFORTCLUB Mark following multiple online searches to confirm that no other companies offering air conditioning and heating services were using the COMFORTCLUB Mark in commerce. We did not save any documents or digital files from the results of our online searches.
6. We also conducted an online search of the USPTO’s trademark database and/or archives and confirmed that no other companies offering air conditioning and heating services were using the COMFORTCLUB Mark in commerce. We did not save any documents or digital files from the results of our searches of the USPTO’s databases.
7. On March 13, 2008, we filed the application to register the COMFORTCLUB Mark, for “prepaid preventative maintenance service plans for heating, ventilating and air conditioning systems” in International Class 36, U.S. Application Serial No. 77/420,784, as available on the U.S. Patent and Trademark Office’s (“USPTO’s”) Trademark Status & Document Retrieval (“TSDR”) website, on behalf of Barnaby

Heating & Air, LLC, without the aid of anyone outside of my company, and without the aid of an attorney or other agent. A true and accurate copy of the application to register the COMFORTCLUB Mark, U.S. Application Serial No. 77/420,784, dated March 13, 2008, as available on the USPTO's TSDR website, is attached hereto as **Exhibit 2**.

8. On May 12, 2009, Barnaby Heating & Air, LLC was issued U.S. Registration No. 3,618,331 for the COMFORTCLUB Mark in International Class 36. A true and accurate copy of U.S. Registration No. 3,618,331 for the COMFORTCLUB Mark, as available on the USPTO's TSDR website, is attached hereto as **Exhibit 3**.
9. On September 30, 2014, I entered into a Trademark Assignment, on behalf of Barnaby Heating & Air, LLC, with McAfee Heating & Air Conditioning Co., Inc., assigning the entire interest and the goodwill in the COMFORTCLUB Mark to McAfee Heating & Air Conditioning Co, Inc. A true and accurate copy of the Assignment of Trademark Registration for the COMFORTCLUB Mark, dated September 30, 2014, is attached hereto as **Exhibit 4**.
10. On October 14, 2014, the Assignment was recorded at the USPTO, No. 900304052, at Reel: 005380, Frame: 0159, and the Trademark Assignment Cover Sheet for the COMFORTCLUB Mark, dated October 14, 2014, ETAS ID: TM319944, as available on the USPTO's TSDR website, is attached hereto as **Exhibit 5**.
11. On September 22, 2014, I entered into an Exclusive License, on behalf of Barnaby Heating & Air, LLC, with McAfee Heating & Air Conditioning Co., Inc. for use of the COMFORTCLUB Mark, which License includes the right to bring and defend this action. A true and accurate copy of the Licensing Agreement, dated September 22,

- 2014, is attached hereto as **Exhibit 6**.
12. I became a member of AirTime 500 on August 21, 2007 and discontinued my AirTime 500 membership in 2015, following the initiation of this proceeding by Petitioner. A true and accurate copy of the Nighthawk Airtime Member Agreement, dated August 21, 2007, is attached hereto as **Exhibit 7**.
 13. On February 28, 2008, I sent an email to Robin Faust, and attached a copy of one of the early versions of marketing materials advertising the COMFORTCLUB Mark. A true and accurate copy of email correspondence to Robin Faust from me, dated February 28, 2008, Bates Nos. BARNABY – 000003 – 000004, is attached hereto as **Exhibit 8**.
 14. On March 3, 2008, I received an email response from Robin Faust, acknowledging receipt of the marketing materials Barnaby’s advertisement of the COMFORTCLUB Mark, along with Robin Faust’s comments “that in her opinion it is a great looking ad.” A true and accurate copy of Robin Faust’s email correspondence to me, dated March 3, 2008, Bates Nos. BARNABY - 001260, is attached hereto as **Exhibit 9**.
 15. Since February 29, 2008, I estimate, based upon my personal knowledge and familiarity with the historical and everyday accounting of Barnaby Heating & Air Conditioning, LLC, and based upon my review of the invoices and advertisement expenses produced in this case, including all of the money paid to become an AirTime 500 member, that Barnaby Heating & Air, LLC has invested over \$225,000 in developing its COMFORTCLUB Mark. I have been prejudiced by Petitioner’s delay in bringing this cancellation proceeding over 5 ½ years after I initially developed the COMFORTCLUB Mark and began using the Mark in commerce.
 16. As a former member of “AirTime 500”, I have only attended AirTime 500 events. I

have never attended One Hour Heating & Air Conditioning classes, or been provided materials from their classes.

17. I attended a SGI AirTime 500 Expo in September 2007, but I never attended an AirTime 500 training seminar during 2007. While I was present at the September 2007 SGI AirTime 500 Expo, I attended a “Success Day” sales and marketing meeting. I have reviewed the materials I received from the September 2007 Success Day course, and a true and accurate copy of those materials, Bates Nos. BARNABY- 000041 through BARNABY – 000158, are attached hereto as **Exhibit 10**. From a review of **Exhibit 10**, it is clear that the COMFORTCLUB Mark, or any similar trademark or service mark, was used during the 2007 AirTime 500 meeting.
18. I attended my first AirTime 500 training seminar in March 2008, which was nearly two (2) months after I began using the COMFORTCLUB Mark in commerce and coincided with the first day of the AirTime 500 Expo, which was held from March 13 through March 15, 2008.
19. I attended a SGI AirTime 500 EXPO in, approximately, March 13-15, 2008 and attended a “Success Academy” “The Senior Sales Technician” meeting on approximately March 17-19, 2008. A true and accurate copy of the workbook from the March 2008 Senior Sales Technician, Bates Nos. BARNABY – 000238 through BARNABY- 000379, is attached hereto as **Exhibit 11**. I have reviewed **Exhibit 11** and there is no mention or use of the COMFORTCLUB Mark, or any similar derivation of the COMFORTCLUB Mark, within **Exhibit 11**.
20. The March 2008 “Success Academy” “The Senior Sales Technician” was the only training class for which I paid. I attended other AirTime 500 Expos, periodically from

2009 through 2012, but never attended any other paid for training events. The reason this distinction is important, is because AirTime 500 does not share proprietary training information with its members unless you are attending a paid course.

21. I have never attended a “CONGRESS franchise event.” I was never a Franchisee of Petitioner’s. I was never a member of the organizations 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! ®”. I have reviewed OHAC – OTT- 001, which I understand was produced by Petitioner in this case. I had not seen this document before becoming involved in this case. A true and accurate copy of the “*Dynamic Training*,” “SUCCESS ACADEMY,” “THE ON-TIME TECHNICIAN,” “ONE HOUR HEATING & AIR CONDITIONING,™” “Always on Time...Or You Don’t Pay a Dime! ®”, OHAC – OTT- 001, is attached hereto as Exhibit 12. Assuming page 12 and 13 of Exhibit 12 were published at the time of the date that appears at the top of page 12, this date does not precede my date of first use in commerce of the COMFORTCLUB Mark. Also, my COMFORTCLUB Mark included a TM symbol each and every time it appears in print, and then once my registration issued on May 12, 2009, a Registration symbol each and every time it appears in print. The use of “Comfort Club” in Exhibit 12, does not include a TM symbol.
22. I have reviewed the May 21, 2015 Declaration of Chelsea Crew and Exhibit 1 to her Declaration, the Acknowledgement of Non-Solicitation Policy, dated March 17, 2008. Exhibit 1 is an agreement, signed by me, that I would not solicit employees from other members. I signed the Acknowledgment of Non-Solicitation Policy as a member of AirTime 500. I was never a One Hour Air Conditioning & Heating Franchisee.

23. I have at all times material hereto been an independent HVAC contractor and would not have been privy to, or provided, the same materials and documents that would have been disclosed to One Hour Air Conditioning & Heating Franchisees. The materials I was provided during the March 17-19, 2008 course are attached to my declaration as **Exhibit 11**.

24. I have reviewed Rick Yohn's May 21, 2015 Declaration and Exhibits 1 and 2 attached his declaration. Exhibit 1 appears to be mock-ups, or layouts, of potential marketing materials and do not demonstrate use in commerce by Clockwork, or by any of its One Hour Air Conditioning & Heating Franchisees. For instance, there is no contact information provided on pages 1 or 2 of Exhibit 1. Also, Rebecca Cassel, whose name appears at the top of page 1, below the quoted text, "Every air conditioner and furnace needs annual service!" is the President of Success Group International. I base this sworn statement on my experience as a former AirTime 500 member and my familiarity with Ms. Rebecca Cassel, whose name appears at the very top of page 1 of Exhibit 1. As I understand it, as of 2014, Ms. Cassel is now the owner of Success Group International.

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

EXECUTED on JULY 9, 2015.



CHARLES BARNABY

EXHIBIT 1



Invoice

Order Number:	4128311
Order Date:	1/25/2008

MAKE CHECKS PAYABLE TO:
48HourPrint.com
159 Thomas East Burgin Parkway
Third Floor
Quincy, MA 02169

BILLED TO:
Charles Barnaby / Barnaby Heating &
Air
4620 Industrial St
Suite C
Rowlett, TX 75088

P.O. Number	Billing Method	Due Date
7182	Visa **5694	paid

Job #	Job Name and Details	Quantity	Price
50587455	3.5 x 8.5 Rip Hangers - 08-DH-0001 Single/Double Sided : 4/4 Double Sided Rip Hanger Coating : Gloss Both Sides Proof Type : Autoflight Operating System : Microsoft Windows File Type : PDF : Accepted by AutoFlight & 24 Hour Proof Ship to Charles Barnaby 4620 Industrial St Suite C Rowlett, TX, United States 75088 UPS Ground	5000	\$450.00
Subtotal			\$450.00
Shipping & Handling			\$41.32
TOTAL			\$491.32

Special Offer
On Back!!!

Ask About
Our **FREE**
Second
Opinions!

Is Your Home Comfort System
Eating You Out of House & Home?



Let Us Help Reduce
Your Utility Bills!

System Check-Up

Just **\$89.99**
per system

25% Off For
First 100 Callers

Call Today!

972.412.0150

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BARNABY
Heating & Air

TACLA 14319E

Residential / Commercial Sales and Service

4620 Industrial Street, Suite C
Rowlett, Texas 75088

info@barnabyheatingandair.com

972.412.0150

Fax. 972.475.6813

Introductory
Offer!!!

NEW!...

ComfortClub™ Memberships

Platinum Membership - \$29.95 per month*

Guaranteed same-day appointments

FREE service on system rejuvenation twice per year

FREE repairs up to Level 5

FREE diagnostic service, and...

100% of your unused balance may be applied to
a new home comfort system.

Gold Membership - \$19.95 per month*

Guaranteed appointments within 24 hours

20% off major services

FREE Level 1 repairs... no exclusions

FREE system rejuvenation twice per year,

FREE diagnostic service, and...

100% of your unused balance may be applied to
a new heating or cooling system.

Silver Membership - \$11.95 per month

Guaranteed appointments within 48 hours

10% off all repair services,

FREE system rejuvenation twice per year (filters extra)

\$29.95 diagnostic service.

**Make your best choice for: Savings, response,
reliability, care and safety.**

SERVICE, not selling. These plans offer the **BEST** and
most **AFFORDABLE** options to avoid costly repair,

replacement, loss of comfort, inconvenience or
loss of safety. These plans are like

SMOKE ALARMS, helping to prevent

major problems or putting the

fire out before it becomes

a catastrophe.

Call today
for more

information on
New! **ComfortClub™**
Memberships!

All Systems must pass an initial Diagnostics Check and
be deemed in proper working order. *Covers repairs listed in the
FixedRight Pricing™ guide. Free repairs up to Level 5 for Platinum
or Level 1 for Gold. ©2008 Barnaby Heating & Air, LLC. All Rights Reserved.

BARNABY
Heating & Air

TACLA 14319E

10% Off*
Any Service

Present this card and save
10% on your next service.

Call Today

972.412.0150

*One time offer not valid in conjunction with other offers.

EXHIBIT 2

Trademark/Service Mark Application, Principal Register

Serial Number: 77420784

Filing Date: 03/13/2008

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77420784
MARK INFORMATION	
*MARK	ComfortClub
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	ComfortClub
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	Barnaby Heating & Air
*STREET	4620 Industrial ST, STE C
*CITY	Rowlett
*STATE (Required for U.S. applicants)	Texas
*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	75088
PHONE	972-412-0150
FAX	972-475-6815
EMAIL ADDRESS	info@barnabyheatingandair.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
LEGAL ENTITY INFORMATION	
TYPE	limited liability company

STATE/COUNTRY WHERE LEGALLY ORGANIZED	Texas
GOODS AND/OR SERVICES AND BASIS INFORMATION	
INTERNATIONAL CLASS	036
FIRST USE ANYWHERE DATE	At least as early as 01/22/2008
FIRST USE IN COMMERCE DATE	At least as early as 01/22/2008
*IDENTIFICATION	Prepaid preventive maintenance service plans for heating, ventilating and air conditioning systems
FILING BASIS	SECTION 1(a)
FIRST USE ANYWHERE DATE	At least as early as 01/22/2008
FIRST USE IN COMMERCE DATE	At least as early as 01/22/2008
CORRESPONDENCE INFORMATION	
NAME	Barnaby Heating & Air
FIRM NAME	Barnaby Heating & Air
STREET	4620 Industrial ST, STE C
CITY	Rowlett
STATE	Texas
COUNTRY	United States
ZIP/POSTAL CODE	75088
PHONE	972-412-0150
FAX	972-475-6815
EMAIL ADDRESS	info@barnabyheatingandair.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	325
*TOTAL FEE DUE	325
*TOTAL FEE PAID	325
SIGNATURE INFORMATION	
SIGNATURE	/Charles Barnaby/

SIGNATORY'S NAME	Charles Barnaby
SIGNATORY'S POSITION	Principal Partner
DATE SIGNED	03/13/2008

Trademark/Service Mark Application, Principal Register

Serial Number: 77420784

Filing Date: 03/13/2008

To the Commissioner for Trademarks:

MARK: ComfortClub (Standard Characters, see [mark](#))

The literal element of the mark consists of ComfortClub.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Barnaby Heating & Air, a limited liability company legally organized under the laws of Texas, having an address of

4620 Industrial ST, STE C

Rowlett, Texas 75088

United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

For specific filing basis information for each item, you must view the display within the Input Table.

International Class 036: Prepaid preventive maintenance service plans for heating, ventilating and air conditioning systems

Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, or the applicant's predecessor in interest used the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended.

In International Class 036, the mark was first used at least as early as 01/22/2008, and first used in commerce at least as early as 01/22/2008, and is now in use in such commerce. The applicant is submitting one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) direct mail piece.

[Specimen File 1](#)

Correspondence Information: Barnaby Heating & Air

4620 Industrial ST, STE C

Rowlett, Texas 75088

972-412-0150(phone)

972-475-6815(fax)

info@barnabyheatingandair.com (authorized)

A fee payment in the amount of \$325 has been submitted with the application, representing payment for 1 class(es).

Declaration

The undersigned, being hereby 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, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; 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; and 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.

Signature: /Charles Barnaby/ Date Signed: 03/13/2008

Signatory's Name: Charles Barnaby

Signatory's Position: Principal Partner

RAM Sale Number: 9157

RAM Accounting Date: 03/13/2008

Serial Number: 77420784

Internet Transmission Date: Thu Mar 13 11:34:48 EDT 2008

TEAS Stamp: USPTO/BAS-71.96.1.66-2008031311344828293

3-77420784-40030574bb9cde1113f4fe217ddac

a3212f-CC-9157-20080313113219201855

ComfortClub

No Image Attached

EXHIBIT 3

Int. Cl.: 36

Prior U.S. Cls.: 100, 101 and 102

Reg. No. 3,618,331

United States Patent and Trademark Office

Registered May 12, 2009

**SERVICE MARK
PRINCIPAL REGISTER**

ComfortClub

BARNABY HEATING & AIR (TEXAS LIMITED
LIABILITY COMPANY)
4620 INDUSTRIAL ST, STE C
ROWLETT, TX 75088

THE MARK CONSISTS OF STANDARD CHAR-
ACTERS WITHOUT CLAIM TO ANY PARTICULAR
FONT, STYLE, SIZE, OR COLOR.

FOR: PREPAID PREVENTIVE MAINTENANCE
SERVICE PLANS FOR HEATING, VENTILATING
AND AIR CONDITIONING SYSTEMS, IN CLASS 36
(U.S. CLS. 100, 101 AND 102).

SER. NO. 77-420,784, FILED 3-13-2008.

FIRST USE 1-22-2008; IN COMMERCE 1-22-2008.

DANNEAN HETZEL, EXAMINING ATTORNEY

EXHIBIT 4

ASSIGNMENT OF TRADEMARK REGISTRATION

Mark: COMFORTCLUB
Registration No.: 3618331
Registration Date: May 12, 2009

Assignor: Barnaby Heating & Air LLC
Address: 4620 Industrial St., Ste. C, Rowlett, Texas 75088

Assignee: McAfee Heating and Air Conditioning Co., Inc.
Address: 4770 Hempstead Station Dr., Kettering, Ohio 45429

This Trademark Assignment is made and effective as of the 22nd date of September, 2014, by and between Barnaby Heating & Air LLC ("Assignor") and McAfee Heating and Air Conditioning Co., Inc. ("Assignee").

WHEREAS, Assignor obtained a federal trademark registration on May 12, 2009;

WHEREAS, Assignor and Assignee entered into a certain Trademark License Agreement effective the 2nd day of September, 2014 (the "License Agreement") which, among other provisions, grants certain licenses to Assignor to use the Mark;

WHEREAS Assignee desires to acquire all of Assignor's right, title and interest, in and to the Mark together with all the goodwill symbolized thereby, and Assignor desires to assign all such right, title and interest in and to the Mark to Assignee, upon the terms and conditions set forth herein.

NOW, THEREFORE, for good and valuable consideration the receipt and sufficiency of which is hereby acknowledged by Assignor, the parties agree as follows:

1. Assignor hereby conveys and assigns to Assignee, and Assignee hereby accepts from Assignor, all of Assignor's right, title and interest in and to the Mark, together with the goodwill of the business symbolized by the Mark.

2. Assignor represents and warrants that:

- (i) Assignor owns the entire right, title and interest in and to the Mark;
- (ii) the registration for the Mark is currently valid and subsisting and in full force and effect;
- (iii) Assignor has not licensed the Mark to any other person or entity or granted, either expressly or impliedly, any trademark right with respect to the Mark to any other person or entity;
- (iv) there are no liens or security interests against the Mark; and

(v) Assignor has all authority necessary to enter into this Agreement and the execution and delivery of this Agreement has been duly and validly authorized.

3. Assignor shall execute and deliver to Assignee on or before the Effective Date the Trademark Assignment in the form shown in Exhibit B. Assignor further agrees to assist Assignee and to provide such reasonable cooperation and assistance to Assignee, at Assignee's expense, as Assignee may reasonably deem necessary and desirable in exercising and enforcing Assignee's rights in the Mark.

4. After the Effective Date, Assignor agrees to use the Mark only as expressly authorized by Assignee in accordance with the License Agreement, and so long as it is in accordance with the License Agreement, Assignor agrees to not challenge Assignee's use or ownership, or the validity, of the Mark.

5. This Agreement shall be binding on and shall inure to the benefit of the parties to this Agreement and their successors and assigns, if any.

6. Miscellaneous.

(a) This Agreement, Exhibit A, and the Trademark Assignment whose form is shown in Exhibit B constitute the entire agreement of the parties with regard to the subject matter hereof. No modifications of or additions to this Agreement shall have effect unless in writing and properly executed by both parties, making specific reference to this Agreement by date, parties, and subject matter.

(b) This Agreement and the rights and obligations of the parties hereunder shall be governed by and construed in accordance with the laws of Texas or Ohio, without regard to its conflict of laws principles, and shall be enforceable against the parties in the courts of Texas or Ohio. For such purpose, each party hereby irrevocably submits to the jurisdiction of such courts, and agrees that all claims in respect of this Agreement may be heard and determined in any of such courts.

(c) This Agreement may be signed by each party separately, in which case attachment of all of the parties' signature pages to this Agreement shall constitute a fully-executed agreement.

(d) This Agreement may be amended only by a written agreement signed by both parties which explicitly adjoins itself to this agreement.

(e) Any provision of this Agreement that is invalid, illegal or unenforceable in any jurisdiction shall, as to that jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability, without affecting in any way the remaining provisions of this Agreement in such jurisdiction or rendering that or any other provision of this Agreement invalid, illegal or unenforceable in any other jurisdiction.

(f) Assignor and Assignee agree to perform any further acts and execute and deliver any documents that may be reasonably necessary to carry out the provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective duly authorized representatives as of the day and year above written.

ASSIGNOR:

ASSIGNEE:

Barnaby Heating & Air, LLC

McAfee Heating and Air Conditioning, Inc.

By: *Charlie Barnaby*

By: *Greg McAfee*

Name: Charlie Barnaby

Name: Greg McAfee

Title: President

Title: Pres.

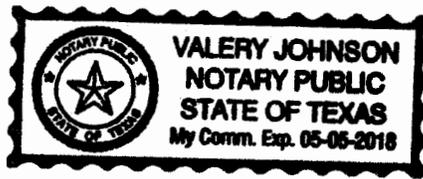
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Charlie Barnaby, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed this document and that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 30 day of September, 2014.

Valery Johnson
Notary Public, State of Texas

Barnaby Heating & Air, LLC
Charlie Barnaby



STATE OF OHIO

COUNTY OF Montgomery

§
§
§

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Greg McAfee, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed this document and that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 22 day of September, 2014.

Angela Petersimes
Angela Petersimes
Notary Public, State of Ohio

McAfee Heating and Air Conditioning, Inc.

Greg McAfee

ANGELA PETERSIMES
NOTARY PUBLIC • STATE OF OHIO
Recorded in Montgomery County
My commission expires Dec. 23, 2018

EXHIBIT 5

TRADEMARK ASSIGNMENT COVER SHEET

Electronic Version v1.1
Stylesheet Version v1.2

ETAS ID: TM319944

SUBMISSION TYPE:	NEW ASSIGNMENT		
NATURE OF CONVEYANCE:	ASSIGNMENT OF THE ENTIRE INTEREST AND THE GOODWILL		
CONVEYING PARTY DATA			
Name	Formerly	Execution Date	Entity Type
Barnaby Heating & Air LLC		09/30/2014	LIMITED LIABILITY COMPANY: TEXAS
RECEIVING PARTY DATA			
Name:	McAfee Heating and Air Conditioning Co., Inc.		
Street Address:	4770 Hempstead Station Dr.		
City:	Kettering		
State/Country:	OHIO		
Postal Code:	45429		
Entity Type:	CORPORATION: OHIO		
PROPERTY NUMBERS Total: 1			
Property Type	Number	Word Mark	
Registration Number:	3618331	COMFORTCLUB	
CORRESPONDENCE DATA			
Fax Number:	9379993924		
<i>Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.</i>			
Phone:	937-369-0177		
Email:	melissa@reploglelawoffice.com		
Correspondent Name:	Melissa Replogle		
Address Line 1:	2312 Far Hills Ave.		
Address Line 2:	PMB 145		
Address Line 4:	Dayton, OHIO 45419		
NAME OF SUBMITTER:	Melissa Replogle, Ohio Bar Member		
SIGNATURE:	/Melissa Replogle/		
DATE SIGNED:	10/14/2014		
Total Attachments: 4			
source=Executed Trademark Assignment#page1.tif			
source=Executed Trademark Assignment#page2.tif			
source=Executed Trademark Assignment#page3.tif			
source=Executed Trademark Assignment#page4.tif			

OP \$40.00 3618331

ASSIGNMENT OF TRADEMARK REGISTRATION

Mark: COMFORTCLUB
Registration No.: 3618331
Registration Date: May 12, 2009

Assignor: Barnaby Heating & Air LLC
Address: 4620 Industrial St., Ste. C, Rowlett, Texas 75088

Assignee: McAfee Heating and Air Conditioning Co., Inc.
Address: 4770 Hempstead Station Dr., Kettering, Ohio 45429

This Trademark Assignment is made and effective as of the 22nd date of September, 2014, by and between Barnaby Heating & Air LLC ("Assignor") and McAfee Heating and Air Conditioning Co., Inc. ("Assignee").

WHEREAS, Assignor obtained a federal trademark registration on May 12, 2009;

WHEREAS, Assignor and Assignee entered into a certain Trademark License Agreement effective the 22nd day of September, 2014 (the "License Agreement") which, among other provisions, grants certain licenses to Assignor to use the Mark;

WHEREAS Assignee desires to acquire all of Assignor's right, title and interest, in and to the Mark together with all the goodwill symbolized thereby, and Assignor desires to assign all such right, title and interest in and to the Mark to Assignee, upon the terms and conditions set forth herein.

NOW, THEREFORE, for good and valuable consideration the receipt and sufficiency of which is hereby acknowledged by Assignor, the parties agree as follows:

1. Assignor hereby conveys and assigns to Assignee, and Assignee hereby accepts from Assignor, all of Assignor's right, title and interest in and to the Mark, together with the goodwill of the business symbolized by the Mark.

2. Assignor represents and warrants that:

- (i) Assignor owns the entire right, title and interest in and to the Mark;
- (ii) the registration for the Mark is currently valid and subsisting and in full force and effect;
- (iii) Assignor has not licensed the Mark to any other person or entity or granted, either expressly or impliedly, any trademark right with respect to the Mark to any other person or entity;
- (iv) there are no liens or security interests against the Mark; and

(v) Assignor has all authority necessary to enter into this Agreement and the execution and delivery of this Agreement has been duly and validly authorized.

3. Assignor shall execute and deliver to Assignee on or before the Effective Date the Trademark Assignment in the form shown in Exhibit B. Assignor further agrees to assist Assignee and to provide such reasonable cooperation and assistance to Assignee, at Assignee's expense, as Assignee may reasonably deem necessary and desirable in exercising and enforcing Assignee's rights in the Mark.

4. After the Effective Date, Assignor agrees to use the Mark only as expressly authorized by Assignee in accordance with the License Agreement, and so long as it is in accordance with the License Agreement, Assignor agrees to not challenge Assignee's use or ownership, or the validity, of the Mark.

5. This Agreement shall be binding on and shall inure to the benefit of the parties to this Agreement and their successors and assigns, if any.

6. Miscellaneous.

(a) This Agreement, Exhibit A, and the Trademark Assignment whose form is shown in Exhibit B constitute the entire agreement of the parties with regard to the subject matter hereof. No modifications of or additions to this Agreement shall have effect unless in writing and properly executed by both parties, making specific reference to this Agreement by date, parties, and subject matter.

(b) This Agreement and the rights and obligations of the parties hereunder shall be governed by and construed in accordance with the laws of Texas or Ohio, without regard to its conflict of laws principles, and shall be enforceable against the parties in the courts of Texas or Ohio. For such purpose, each party hereby irrevocably submits to the jurisdiction of such courts, and agrees that all claims in respect of this Agreement may be heard and determined in any of such courts.

(c) This Agreement may be signed by each party separately, in which case attachment of all of the parties' signature pages to this Agreement shall constitute a fully-executed agreement.

(d) This Agreement may be amended only by a written agreement signed by both parties which explicitly adjoins itself to this agreement.

(e) Any provision of this Agreement that is invalid, illegal or unenforceable in any jurisdiction shall, as to that jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability, without affecting in any way the remaining provisions of this Agreement in such jurisdiction or rendering that or any other provision of this Agreement invalid, illegal or unenforceable in any other jurisdiction.

(f) Assignor and Assignee agree to perform any further acts and execute and deliver any documents that may be reasonably necessary to carry out the provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective duly authorized representatives as of the day and year above written.

ASSIGNOR:

ASSIGNEE:

Barnaby Heating & Air, LLC

McAfee Heating and Air Conditioning, Inc.

By: *Charlie Barnaby*

By: *Greg McAfee*

Name: Charlie Barnaby

Name: Greg McAfee

Title: President

Title: Pro.

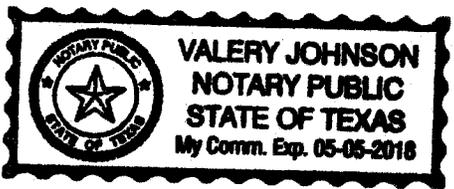
STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Charlie Barnaby, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed this document and that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 30 day of September, 2014.

Valery Johnson
Notary Public, State of Texas

Barnaby Heating & Air, LLC
Charlie Barnaby



STATE OF OHIO

§
§
§

COUNTY OF Montgomery

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Greg McAfee, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed this document and that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 22 day of September, 2014.

Angela Petersimes
Angela Petersimes
Notary Public, State of Ohio

McAfee Heating and Air Conditioning, Inc.

Greg McAfee

ANGELA PETERSIMES
NOTARY PUBLIC - STATE OF OHIO
Recorded in Montgomery County
My commission expires Dec. 23, 2018

EXHIBIT 6

TRADEMARK LICENSE AGREEMENT

THIS AGREEMENT is effective this 22nd day of September, 2014 by and between Barnaby Heating & Air LLC, a Texas Limited Liability Company, having its principal place of business at 4620 Industrial Street, Suite C, Rowlett, TX 75088 (hereinafter "Barnaby") and McAfee Heating & Air Conditioning Co., Inc., an Ohio corporation, having its principal place of business at 4770 Hempstead Station Drive, Kettering, OH 45429 (hereinafter "McAfee").

WHEREAS, Barnaby was the owner of the federal trademark COMFORTCLUB, U.S. Registration No. 3,618,331, (hereinafter referred to as COMFORTCLUB or the Mark) thereof for prepaid preventive maintenance service plans for heating, ventilating and air conditioning systems as set forth in Exhibit A);

WHEREAS, since at least as early as 1999, McAfee has used and is using COMFORT CLUB in connection with prepaid preventive maintenance service plans for heating, ventilating and air conditioning systems;

WHEREAS, Barnaby has assigned to McAfee the COMFORTCLUB trademark, including U.S. Registration No. 3,618,331, for good and valuable consideration, and McAfee is willing to grant to Barnaby a license to use the COMFORTCLUB trademark in connection with prepaid preventive maintenance service plans for heating, ventilating and air conditioning systems (the "Licensed Services"), on the following terms and conditions;

NOW THEREFORE, in consideration of the foregoing and the mutual covenants contained herein, the parties agree to follows:

1. Assignment.

By assignment, Barnaby hereby has transferred and assigned to McAfee all right, title and interest it possesses in the COMFORTCLUB trademark, including U.S. Registration No. 3,618,331, together with the goodwill in connection with which the mark has been used as set forth in Exhibit B. Barnaby further transfers and assigns to McAfee all causes of action, rights and remedies arising under the COMFORTCLUB trademark after the effective date of this Agreement, with the exception of the Clockwork action currently before the Trademark Trial and Appeal Board, such action McAfee intends to be joined with Barnaby upon the grant of an agreed

Motion to Join.

2. Grant.

McAfee hereby grants to Barnaby, subject to the following terms and conditions, an exclusive, royalty-free right to use the COMFORTCLUB trademark in connection with the Licensed Services within and limited to 90 miles from Dallas, Texas, including all of Collin, Dallas, Rockwall and Tarrant Counties, Texas. Barnaby shall have no right to license or sublicense the Mark.

Notwithstanding the exclusive character of the license granted in this Agreement, Barnaby shall take such license subject to the rights in one (1) third party, located in Waco, Texas, established by a licensing agreement entered into by McAfee prior to the date of this Agreement. In this connection, McAfee represents that no rights have been granted to others in the State of Texas to the Mark and the Licensed Services that are the subject matter of this Agreement and that no licenses have been granted affecting the subject matter of such Mark and Licensed Services that would in its judgment significantly diminish the value of the rights herein conveyed.

McAfee has noted and Barnaby recognizes and accepts the possible existence, in reference to the particular Mark and Licensed Services, of the prior licenses granted by McAfee to third parties that may be inconsistent in some respects with the commitments of this Agreement, but McAfee represents and warrants that it has accepted no commitments or restrictions that will materially affect the value of the license and rights granted by it in this Agreement.

3. Use of the Mark.

Barnaby shall continue to use the COMFORTCLUB trademark in the manner in which it is using the trademark as of the effective date of this Agreement.

Barnaby shall include in and/on all advertising and promotional material, and other printed material, and on its Web site or in other electronic media, the following legend or such other legend as McAfee may from time to time require:

COMFORTCLUB ® is a trademark of McAfee Heating & Air Conditioning Co., Inc., used under license.

Barnaby agrees that it shall use the COMFORTCLUB trademark only in such form and

manner as may be approved by McAfee. All advertising, promotion and other use of the COMFORTCLUB trademark will be in good taste and in such manner as will maintain and enhance the value of the COMFORTCLUB trademark and McAfee's reputation for high quality.

McAfee acknowledges that the manner in which Barnaby uses the COMFORTCLUB trademark in its advertising as of the date of this Agreement is acceptable to McAfee.

Before releasing any labeling, advertising, promotional or other material which departs materially from the manner in which Barnaby currently uses the COMFORTCLUB trademark, Barnaby shall submit to McAfee for its approval, a sample of each such new intended use of the COMFORTCLUB trademark, sufficiently far in advance to permit McAfee to review the form and manner in which the COMFORTCLUB trademark is displayed. However, McAfee shall not unreasonably withhold its approval, and any sample or example of art work submitted to McAfee hereunder which has not been disapproved within fifteen (15) days after receipt thereof shall be deemed to have been approved.

4. Quality Control.

McAfee has inspected the services that Barnaby is currently providing in connection with the COMFORTCLUB trademark and acknowledges that these services are of high quality and are appropriate for sale under the COMFORTCLUB trademark. Barnaby agrees to maintain the standard of quality of the services it provides in connection with the COMFORTCLUB trademark. If, in the future, Barnaby wishes to change or modify any of the Licensed Services it advertises, offers for sale, sells or distributes in connection with the COMFORTCLUB trademark, Barnaby, without charge and prior to any such advertisement, offer for sale, sale, or distribution, shall submit to McAfee for inspection such modified or changed services. McAfee shall have thirty (30) working days following its receipt of the submission within which to object in writing to Barnaby's proposed changes. If McAfee fails to object to the changed or modified service within thirty (30) working days, McAfee shall be deemed to have consented to Barnaby's modification. McAfee's consent to any changes or modifications to any of the Licensed Services shall not be unreasonably withheld. Barnaby may not offer for sale, sell or distribute any Licensed Services to which McAfee has objected in writing pursuant to this paragraph.

During the term of this Agreement, Barnaby shall, in all advertisements, marketing, and all other materials bearing the Mark, use the registered trademark symbol indicating that it is a

registered trademark.

During the term of this Agreement and thereafter Barnaby shall not use the Mark (i) as a portion of or in combination with any other trademarks, or (ii) as all or part of a corporate name, trade name or any other designation used by Barnaby to identify its products, services, or business. Both during and after the term of this Agreement, neither Barnaby nor any parent, subsidiary, affiliated, or related company, nor any person or entity owned or controlled by Barnaby or under common ownership or control as Barnaby, shall use any name, trademark, service mark, trade name, trade dress, or logo, which, in McAfee's sole opinion, is confusingly similar or identical to the Mark.

5. Ownership of the Mark.

Barnaby acknowledges that McAfee is the exclusive owner of the entire right, title and interest in and to the COMFORTCLUB trademark, U.S. Registration No. 3,618,331, in the United States together with the goodwill therein. Barnaby further acknowledges that its future use of the COMFORTCLUB trademark creates in Barnaby no rights in that Mark, and that all use of the COMFORTCLUB trademark by Barnaby shall inure to the benefit of McAfee. Barnaby shall not challenge or, directly or indirectly, assert any right, title or interest in or to the COMFORTCLUB trademark or any variation thereof, or any registration thereof or application for registration thereof.

At the request of McAfee and at McAfee's expense, Barnaby shall execute and deliver all documents which McAfee deems necessary or appropriate to transfer, obtain or maintain any federal trademark registration of the COMFORTCLUB trademark.

6. Infringement.

Barnaby shall promptly inform McAfee in writing of: (1) any infringement or instance of unfair competition involving the COMFORTCLUB trademark of which Barnaby becomes aware, (2) any challenge to Barnaby's use of the COMFORTCLUB trademark, and (3) any claim by any person of any rights in the COMFORTCLUB trademark (collectively, an Infringing Act).

McAfee shall have the right, but not the obligation, in its sole discretion, to take such action in response to an Infringing Act as it deems appropriate. Barnaby shall assist and cooperate with McAfee by furnishing documentary evidence and oral testimony relating to Barnaby's use of the COMFORTCLUB trademark, not only pursuant to this Agreement, but also

as a predecessor in title to the COMFORTCLUB trademark for the Licensed Services. At McAfee's request and expense, Barnaby agrees to be joined as a party in any action instituted by McAfee concerning the protection of the COMFORTCLUB trademark. Barnaby shall have no authority to enforce the rights of McAfee, nor shall Barnaby have any right to demand or control any action taken or proposed to be taken by McAfee to enforce such rights.

If third parties without a license to the Mark and the Licensed Services shall commit an Infringing Act and provide services under the Mark coming within the definition of Licensed Services, and if:

- (1) Barnaby shall give McAfee written notice of such infringement; and
- (2) Barnaby shall request in writing that suit be brought against such third party for the Mark so infringed; and
- (3) Barnaby supplies McAfee with an opinion from the Celum Law Firm, PLLC that such third party is infringing the Mark; and
- (4) McAfee fails to bring such suit or obtain discontinuance of such infringement within ninety (90) days after receipt of Barnaby's written notice of such infringement,

then, in such case, Barnaby, after obtaining McAfee's written authorization to do so, shall have the right to file suit against an infringer, in the name of McAfee and at Barnaby's expense and for Barnaby's benefit. McAfee consents to be a party and to cooperate with Barnaby in any such suit brought by Barnaby pursuant to this paragraph.

7. Indemnification.

(A) To the fullest extent permitted by applicable law, McAfee expressly agrees to defend (at McAfee's expense), indemnify, and save and hold harmless Barnaby and all of its officers, directors, shareholders, employees, agents, successors, and assigns, from and against any and all claims, suits, losses, causes of action, damages, liabilities, and expenses of any kind whatsoever, including without limitation, all expenses of litigation and arbitration, court costs and attorney's fees, arising during or on account of or in connection with alleged infringement of the COMFORTCLUB trademark or alleged wrongful use of the COMFORTCLUB trademark as contemplated by this Agreement.

(B) The obligations of McAfee as stated in paragraph (A), above, apply only if

Barnaby shall (1) notify McAfee in writing of such claims within 10 business days of learning of such claim, (2) McAfee is given exclusive control of the defense of such claims and all negotiations relating to any settlement, and (3) Barnaby assists McAfee in all necessary respects in conduct of the suit.

(C) McAfee shall not indemnify Barnaby for expenses incurred as part of the ongoing dispute with Clockwork IP, LLC. The parties expressly agree that they will assist one another in all necessary respects in conduct of the suit and will be responsible for their own attorney's fees.

(D) McAfee shall defend any and all future intellectual property suits, and indemnify Barnaby for any resulting loss and hold Barnaby harmless from any liability, including costs and expenses, and reasonable attorney's fees, for the infringement of any intellectual property arising on account of or in connection with this Agreement, including any claims for royalties or profits of Barnaby, whether or not said claims be asserted by the owner of the intellectual property, parties or third-parties.

(E) Barnaby shall indemnify and hold McAfee harmless from and against any claim, suit, loss, damage, or expense (including without limitation reasonable attorneys' fees) arising out of or relating to any breach of Barnaby's representations and warranties, or arising out of or relating to the manufacture, marketing, distribution, advertising, promotion or sale of any product or service bearing the Mark, including without limitation, products liability claims, or any other breach of this Agreement, or arising out of the gross negligence of Barnaby or its officers, directors, shareholders, employees, agents, successors, and assigns. In the event of Barnaby's misuse of the Mark, Barnaby shall be responsible for the fees and expenses associated with any legal action or challenge.

8. Termination.

McAfee may terminate this Agreement by providing Barnaby written notice of termination upon the occurrence of the following:

- (1) Barnaby's failure to cure any breach or default under this Agreement within thirty (30) days after receiving written notice thereof from McAfee;
- (2) Barnaby's assignment of its assets or business for the benefit of creditors, or the appointment of a trustee or receiver to administer Barnaby's business or affairs, or the filing of a voluntary or involuntary bankruptcy petition against Barnaby; or

- (3) Barnaby's failure to make regular commercial use of the COMFORTCLUB trademark in connection with the Licensed Services for a period of at least three (3) consecutive years.

Upon the termination of this Agreement, Barnaby shall discontinue all use of the COMFORTCLUB trademark in connection with the advertising, offering for sale, sale or distribution of the Licensed Services. Notwithstanding the foregoing, in the event that this Agreement is terminated pursuant to this paragraph 8(b), Barnaby may phase out the use of the COMFORTCLUB trademark in connection with the Licensed Services over a period not to exceed three (3) months following the date of termination.

9. Assignment.

Barnaby may not assign or transfer this Agreement except as part of the sale or transfer of its entire business. Barnaby shall provide McAfee with written notice of any such sale or transfer of the Agreement at least sixty (60) days prior to the effective date of the sale or transfer. Prior to the effective date of the sale or transfer, McAfee may object to any sale or transfer of the Agreement to a provider of heating, air conditioning, and ventilation equipment and services provider. If McAfee raises such an objection, Barnaby shall exclude this Agreement from the business assets being sold or transferred or, if Barnaby refuses or fails to do so, McAfee may immediately terminate this Agreement.

10. Relationship of the Parties.

The relationship created by this Agreement is that of licensor and licensee. This Agreement does not create an agency relationship between Barnaby and McAfee. Barnaby, its agents and employees shall, under no circumstances, be deemed employees, agents or representatives of McAfee. Neither Barnaby nor McAfee shall have any right to enter into any contract or commitment in the name of, or on behalf of the other, or to bind the other in any respect whatsoever.

11. No Waiver.

Any failure by McAfee or Barnaby to enforce any provision of this Agreement shall not constitute a waiver of McAfee's or Barnaby's rights herein.

12. Governing Law.

This Agreement and the rights and obligations of the parties hereunder shall be governed by

and construed in accordance with the laws of Texas or Ohio, without regard to its conflict of laws principles, and shall be enforceable against the parties in the courts of Texas or Ohio. For such purpose, each party hereby irrevocably submits to the jurisdiction of such courts, and agrees that all claims in respect of this Agreement may be heard and determined in any of such courts.

13. Notices.

Any notice, communication, approval or disapproval and request therefor required or permitted to be sent under this Agreement shall be duly made and shall be valid and effective only if in writing and sent by telefax, with a confirmation copy by First Class mail, or by Registered or Certified Mail, Return Receipt Requested, postage prepaid, to the addresses set forth above.

14. Arbitration.

Any dispute between McAfee and Barnaby arising out of or in connection with this Agreement shall be finally settled by mandatory binding arbitration in either Dallas, Texas or Dayton, Ohio, conducted in accordance with the rules and procedures of the American Arbitration Association. Such arbitration shall be conducted before a single arbitrator, except in matters involving a dispute greater than five hundred thousand dollars, which shall be conducted before a three arbitrator panel with each side selecting one arbitrator and the two arbitrators selected by the parties choosing the third arbitrator. The arbitrator(s) shall be knowledgeable in the subject matter of the dispute. Judgment on a binding arbitration award may be entered in any court of competent jurisdiction. Arbitration has the potential to provide a more timely, more economic and more confidential resolution of any dispute between the parties. There will likely be less discovery and a determination by an agreed upon arbitrator or arbitrators rather than a judge or jury. *The parties mutually acknowledge that, by this agreement to arbitrate, each party irrevocably waives its rights to court or jury trial.*

15. Injunctive Relief.

Barnaby acknowledges and admits that its failure to advertise, promote, and use the Mark in accordance with this Agreement or to otherwise fulfill its obligations under this Agreement or to cease its activities as required upon expiration or termination of this Agreement will result in immediate and irreparable damage to McAfee, and that McAfee will have no adequate remedy at law for the injuries described in this Section. Barnaby agrees that, in the event of such failure,

McAfee shall be entitled to equitable relief by way of temporary, preliminary, and permanent injunctions, and such other and further relief as any court with jurisdiction may deem just, in addition to and without prejudice to any other relief to which McAfee may be entitled.

16. Confidentiality.

Except as required by order of a court or government agency of competent jurisdiction, or by applicable laws, this Agreement and its provisions shall be kept confidential by and among the parties, unless otherwise agreed in writing.

17. Headings in this Agreement.

The headings in this Agreement are for convenience only, confirm no rights or obligations in either party, and do not alter any terms of this Agreement.

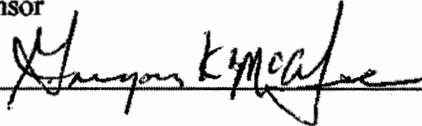
18. Severability.

If any term of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, then this Agreement, including all of the remaining terms, will remain in full force and effect as if such invalid or unenforceable term had never been included.

19. Binding Effect.

This Agreement shall be binding upon the parties and their respective successors and assigns. This Agreement may not be amended or modified except by a written instrument, signed by both parties.

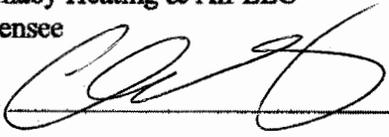
McAfee Heating & Air Conditioning Co., Inc.
Licensor

By: 

Name: Gregory K. McAfee

Title: Pres.

Barnaby Heating & Air LLC
Licensee

By: 

Name: Charles Barnaby

Title: President

EXHIBIT 7

NIGHTHAWK
AIRTIME MEMBER AGREEMENT 7247

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

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

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

Guarantee. See attached Schedule A

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

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

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

Dallas, TX

"MEMBER"
Barnaby Heating & Air
 Print Full Name of Corporation or Limited Liability Company, if applicable

Signature Of Authorized Officer of Corporation or Limited Liability Company
[Signature]
 Authorized Signature Of Owner Of Business

Authorized Signature Of Co-Owner Of Business

Address - P.O. Box for mailing
7510 Pennrose Circle Rowlett, TX 75088
 Address - Physical street for shipping (Please check one of the boxes below)
 Residential or Commercial

Phone (Vendor Line):
 Phone (Service Line): *972-412-0150*
 Facsimile: *972-412-6813*
 Email: *BarnabyHeatingandAir.com*
 Mobile#: *214-816-2109*
 Website:

DATE OF AGREEMENT: *8-21-07.*

"AirTime":
 AirTime, LLC *[Signature]*
 By _____
 Authorized Signature

Address:
 7777 Bonhomme, Suite 1800
 St. Louis, Missouri 63105
 Attn: Patty Myers
 Phone: 877-862-8181
 Facsimile: 314-862-2314

(Leave this area blank)

Rev. 08/06

①

ADDITIONAL TERMS AND CONDITIONS OF THIS AGREEMENT

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

Money Back Guarantee For New Members

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

Confidentiality & Use Of AirTime Resources.

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

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

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

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

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

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

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

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

Other Understandings

1. You reserve the right to conduct your business using your own means, methods, policies and procedures. AirTime is an independent contractor and no partnership, limited liability company, joint venture, or franchise relationship is created between you and AirTime pursuant to this Agreement or otherwise.
2. Without limiting any and all express obligations of each party in this Agreement, you acknowledge and agree that AirTime makes no representations, warranties, or guarantees as to any revenues or other benefits to be derived by you from participation as a member of the AirTime Program or by use of the AirTime Resources.
3. Your license to be a member of the AirTime Program does not entitle you to any interest in or ownership rights to AirTime and you do not have any right or license to use any present or future AirTime Resources in the promotion or conduct of your business except as authorized in this Agreement. Nothing in this Agreement shall be construed as conveying to you (i) any right, title or interests or copyright in or to any AirTime Resources or (ii) any license to use, sell, exploit, copy or further develop any such AirTime Resources.
4. You agree not to issue any press release, or otherwise publicly or privately disclose any information concerning this Agreement, your participation in the AirTime Program and/or the AirTime Resources without our prior written consent.
5. During the Participation Term and for a period of six months thereafter, you (and/or you on behalf of any other person or company) will not, directly or indirectly, solicit for employment or for any other working relationship any employee or employees of AirTime or any of its affiliated companies.
6. During the Participation Term, you must have in force such insurance policies with such coverages and minimum policy limits as may be required by AirTime from time to time upon reasonable notice. In any such policy or policies, AirTime and its affiliates shall be added as additional named insureds and you shall provide, as and when requested, a certificate of insurance confirming the existence of such insurance coverage.

Miscellaneous Provisions.

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

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

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

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

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

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

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

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

SCHEDULE A
Guarantee

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

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

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

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

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

SCHEDULE B MEMBERSHIP FEES

Member Name Barnaby Heating & Air
(Print Member Name)

(A) Initial Membership Fee

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

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

Card Number 4339-9300-0205-8743 Exp. Date 07/08
Name On Card Charles Barnaby * [Signature]
Authorized Signature Of Card Holder

\$2550 CC 8/31/08

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

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

Check One

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

OR
Option 2

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

Check One

- Equal consecutive monthly investment of \$3,174.89 over a period not to exceed six (6) months, with interest at the rate of one percent (1%) per month; or
- Equal consecutive monthly investment of \$1,147.88 over a period not to exceed eighteen (18) months, with interest at the rate of one percent (1.25%) per month; or
- * Equal consecutive monthly investment of \$865.20 over a period not to exceed thirty-six (36) months, with interest at the rate of one and one-half percent (1.5%) per month

(B) Continuing Membership Fee

Member also agrees to pay to AirTime, during the Participation Term, a Continuing Membership Fee of \$229 per week. Such Continuing Membership Fee is payable weekly in advance by means of automatic debit or withdrawal from Member's bank account, or by an automatic charge to a credit card acceptable to AirTime (VISA/MC/AMEX). Payment of such Continuing Membership Fee is to begin September 24, 2007. The option chosen below will apply to your weekly membership and note payment (if applicable).

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

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

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

Card Number _____ Exp. Date _____
Name On Card _____ * [Signature]
Authorized Signature Of Card Holder

Rev 09/06

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

MEMBER/COMPANY NAME

MEMBER/COMPANY ID NUMBER

(AirTime office use)

ADDRESS

PHONE

CONTACT

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

DEPOSITORY NAME

BRANCH

CITY

STATE

DEPOSITORY TRANSIT/ABA NUMBER

ACCOUNT NUMBER

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

MEMBER'S NAME(S)

MEMBER'S TAX ID NUMBER

SIGNATURE OF AUTHORIZED
REPRESENTATIVE OF MEMBER

DATE

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

SCHEDULE C
GEOGRAPHIC AREA

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

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

CONFIDENTIALITY AGREEMENT

This Confirmation is executed as of the date indicated by the undersigned business entity and/or individual(s) (jointly and severally referred to as "Member") for the benefit of Clockwork Home Services, Inc., formerly known as Venvest, Incorporated and its affiliated companies (collectively, "CHS"). Member acknowledges and confirms the following:

Member has previously entered into one or more agreements with CHS ("Agreements").

By entering into the Agreements, Member has continuing obligations to CHS in regard to the use and disclosure of certain materials or information (whether such materials or information are in oral, electronic or tangible form) owned by CHS that CHS and Member have agreed are legally protected materials or information of CHS ("Protected Information").

Member confirms that CHS owns and/or has legal rights to the Protected Information whether (a) the legal protection derives from being confidential, proprietary, or trade secret information of CHS, (b) the Protected Information is subject to copyright, trademark, tradename, and/or patent rights of CHS, and/or (c) the Protected Information is otherwise protected by law.

Member's obligations regarding the Protected Information is a continuing one and includes any and all Protected Information that Member already has access to and/or will validly have access to in the future.

All of the terms and conditions of the Agreements including those dealing with Member's obligations regarding Protected Information are and will continue to be in full force and effect.

This Confirmation is only a statement by Member confirming the existence and validity of the Agreements and Member's continuing obligations thereunder and does not constitute a modification of, an amendment to or a novation of the Agreements.

Barnaby Heating & Air allows Clockwork Home Services, Inc., THE SUCCESSFUL CONTRACTOR™, and any of Clockwork Home Services Inc.'s portfolio companies permission to use my name, picture/photograph, statements (oral, written, or recorded) and/or my likeness, for the purpose of using these photographs and statements in oral, written, and recorded communication created for Clockwork Home Services Inc. and any of its portfolio companies. By signing this form, I am allowing Clockwork Home Services Inc. and any of its portfolio company's permission to use my name, photographs, statements or likeness in any promotional or informational material. I will not and did not receive financial compensation for use of any photographs, oral, written, and recorded statements or my likeness.

"MEMBER"

Barnaby Heating & Air

Print Full Name of Corporation or Limited Liability Company, if applicable

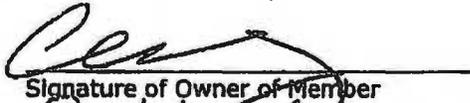
Rowlett, TX

City, State



Signature of Authorized Officer of Corporation or Limited Liability Company

DATE: _____


Signature of Owner of Member
Signature of Co-Owner of Member

Signature of Employee of Member

Signature of Employee of Member

Signature of Employee of Member

EXHIBIT 8

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

Hello Robin,

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

Thanks
Charlie



Consumer Alert! **Is Your Home Comfort System Eating You Out of House and Home?**

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

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

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

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

BARNABY-000003

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

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

Your old, obsolete air conditioner is costing you money!

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

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

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

What's your best option?

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

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

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

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

The "Comfort for Life" Program offers you:

- 1. The last air conditioner you'll ever need!** Get a replacement high-efficiency Home Comfort System with a 99-Year Limited Warranty on the compressor.
- 2. Big Savings on energy bills!** Get a *FREE* Talking Thermostat™ when you have us replace your old, worn-out air conditioner with a new, high-efficiency unit (as described above). This new air conditioning technology obsoletes your old cooling system and drastically reduces energy bills, even more so when working with the Talking Thermostat™.

3. Special financing of as little as \$13 per week! As an exclusive company that offers the Royal Privilege Program™, Barnaby Heating & Air has secured a special financing rate for its customers. This special financing plan might even cost less than what you're currently overpaying the utility company due to the inefficiencies of your old, outdated air conditioner!

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



4620 Industrial St, Ste C • Rowlett, TX 75088



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

EXHIBIT 9

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

Charlie

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

robin

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

Hello Robin,

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

Thanks
Charlie