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

Proceeding	92061236
Party	Defendant BR Consulting, Inc.
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Date	03/07/2016
Attachments	Reply In Support of Motion for Summary Judgment.pdf(37209 bytes) Exhibits A & B.pdf(643201 bytes)

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

FWHG IP HOLDINGS LLC,

Petitioner

v.

BR CONSULTING, INC.

Registrant-Respondent

Cancellation No. 92061236

Mark: MAGO CAFÉ

Registration No. 3,810,357

Date of Issue: June 29, 2010

**RESPONDENT’S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT**

Respondent BR Consulting, Inc. (“Respondent”) replies in support of Respondent’s Motion for Summary Judgment.¹

Petitioner FWHG IP Holdings LLC (“Petitioner”) has raised no genuine issues of material fact that would prevent summary adjudication. Petitioner has introduced no evidence whatsoever that use of the MAGO CAFÉ trademark (U.S. Reg. No. 3,810,357) (the “Mark”) was discontinued for three consecutive years or was discontinued with intent not to resume use. It is Petitioner’s affirmative burden to do so. Accordingly, Respondent’s Motion for Summary Judgment should be granted.

¹ Respondent inadvertently failed to mail to Petitioner a copy of its Opposition to Motion to Extend Discovery, filed on December 31, 2015. Respondent offered Petitioner additional time to file a Reply. *See* Exhibit A to Petitioner’s Response in Opposition to Respondent’s Motion for Summary Judgment. Petitioner has not responded to this offer.

I. Undisputed Facts

It is undisputed that:

(1) Respondent obtained trademark Registration No. 3,810,357 for the mark MAGO CAFÉ;²

(2) Respondent used the mark in connection with the MAGO CAFÉ restaurant until it closed on August 31, 2012;³ and

(3) Respondent reopened the MAGO CAFÉ, on August 1, 2015 and continues to use the Mark in connection with the restaurant.⁴

This cancellation action may be dismissed on these facts alone. The hiatus in use of the Mark was less than three consecutive years, the period necessary to trigger a statutory presumption of abandonment under 15 U.S.C. § 1127. Consequently, Respondent benefits from a presumption of trademark validity and the burden falls on Petitioner to prove an intent to abandon.⁵

Petitioner has not introduced any evidence whatsoever that would indicate an intent to abandon the Mark. Petitioner has not met its burden of proof. Indeed, the facts Respondent cites in its Motion for Summary Judgment establish there was no intent to abandon the mark and remain undisputed. The restaurant was in fact reopened, the restaurant equipment was kept for future use and a written business plan and a written lease preceded the reopening of the restaurant.

Petitioner has not raised a genuine issue of material fact that warrants further proceedings in this cancellation action.

² See Respondent's Motion for Summary Judgment, Exhibit A (Petitioner's Response to Requests for Admission Nos. 1 and 2).

³ See Respondent's Motion for Summary Judgment, Exhibit E (Respondent's Answer to Interrogatory No. 1).

⁴ *Id.* See also August 2015 monthly sales summaries (BRC000437) and daily sales records (BRC003706-3709) and September 2015 monthly sales summaries (BRC000438) and daily sales records (BRC003710-3722), which were produced on November 6, 2015 as a supplemental Response to Petitioner's Request for Production No. 1. The Request and Response are attached to this Reply as Exhibit A.

⁵ *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 1023-24 (Fed. Cir. 1989).

II. Legal Standard: Genuine Issues of Material Fact

“On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. When the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (citations omitted).

Petitioner must show a genuine issue of material fact.

When the moving party has carried its burden under [Fed. R. Civ. P.] 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts... In the language of the Rule, the nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986) (citations omitted) (emphasis in original).

Petitioner admits that to cancel Respondent’s Mark Petitioner must allege and prove by a preponderance of the evidence that Respondent’s use of the Mark was discontinued for at least three consecutive years, or that Respondent discontinued use of the Mark without an intent to resume use.⁶ The burden is on Petitioner to produce evidence indicating there is a genuine issue of material fact for trial.⁷ Petitioner has not done so.

Petitioner must supply evidence affirmatively indicating the Mark was abandoned—discontinued with no intent to resume use. Petitioner has presented no facts or evidence of any kind that could lead a rational trier of fact to find for Petitioner.

Respondent has carried its burden under Fed. R. Civ. P. 56(c) to produce evidence supporting its assertion that the Mark was not abandoned. Summary judgment for Respondent is warranted.

⁶ See Petitioner’s Response in Opposition to Respondent’s Motion for Summary Judgment, pg. 10, ¶ 1; pg. 15, ¶ 2.

⁷ “[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, the nonmoving party bears the burden of production under Rule 56 to designate specific facts showing that there is a genuine issue for trial (internal quotation marks omitted).” *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (quoting *Celotex Corp. v. Catrett*, 477 U. S. 317, 324 (1986)).

III. Argument

1. Respondent has met its burden under Fed. R. Civ. P. 56(c).

Fed. R. Civ. P. 56(c)(1) defines the materials a party may rely upon to assert a fact genuinely cannot be disputed.⁸ Respondent is not required to rely exclusively on a declaration to meet this standard. Respondent has properly relied on documents, Interrogatory answers, admissions and disclosures introduced into the record to establish the undisputed facts.

Beginning in May of 2015 (before the restaurant reopened), Respondent has produced over 3,000 pages of evidence indicating the use of the Mark was neither discontinued for at least three consecutive years, nor discontinued without intent to resume.⁹

In its Response in Opposition to Respondent's Motion for Summary Judgment, Petitioner asserts evidentiary objections to a handful of the documents Respondent has produced.¹⁰ Petitioner now asserts "additional discovery [is] necessary and sought,"¹¹ yet Petitioner requested no depositions or additional discovery to acquire such information during the discovery period.¹² Even if the disputed evidence is excluded from the analysis,¹³ extensive evidence remains to

⁸ Fed. R. Civ. P. 56(c)(1) states the following:

Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

⁹ This evidence is summarized in Respondent's Motion for Summary Judgment, pgs. 2-3, and includes but is not limited to a license agreement, lease agreement, photographs of kitchen machinery that was maintained in storage, café menus, Facebook screenshots, a January 2015 business plan, a July 2015 business license, lease payment schedules, sales figures and monthly sales summaries for the August 2010-August 2012 and August-September 2015 time periods, and photographs of MAGO CAFÉ signage.

¹⁰ Specifically, Petitioner objects to evidence of Respondent's other trademark registrations, the 2010 License Agreement (BRC000385-395), the 2012 Menu (BRC000380-384), the 2012 MAGO CAFÉ sign photograph (BRC000402), and photographs of the kitchen machinery Respondent placed into storage (BRC000001-3). *See* Petitioner's Response in Opposition to Respondent's Motion for Summary Judgment, pgs. 4-5.

¹¹ Petitioner's Response in Opposition to Respondent's Motion for Summary Judgment, pg. 6, ¶ 1.

¹² The discovery period had only 28 days remaining when Petitioner filed a motion to extend discovery.

¹³ Respondent disputes the objections to the un rebutted documentary evidence, which includes business records, lease agreements, sign photographs, café menus, and signed agreements, but this motion does not require resolution of the objections raised.

support the presumption of no abandonment, which still applies. Respondent closed the MAGO CAFÉ on August 31, 2012 and reopened the MAGO CAFÉ on August 1, 2015, before the three year period had run.

The record before the Board establishes Respondent did not discontinue use of the Mark for three or more consecutive years. Petitioner and Respondent acknowledge that use of the Mark ceased on August 31, 2012,¹⁴ and Respondent has provided ample admissible evidence that use of the Mark resumed on August 1, 2015, before the three year period of consecutive nonuse had run.¹⁵ Petitioner did not request the exclusion of this evidence in its Response in Opposition.¹⁶

Petitioner must do more than suggest a “metaphysical doubt” regarding some of the facts and evidence Respondent has supplied—Petitioner must come forward with specific facts that establish a genuine issue regarding nonuse with an intent to abandon.¹⁷

2. Petitioner, as the party bearing the burden of proof at trial of the dispositive issue of trademark abandonment, has not met its burden of production under Fed. R. Civ. P. 56 to introduce specific facts showing there is a genuine issue for trial.

Petitioner admits it must allege and prove by a preponderance of the evidence that Respondent’s use of the Mark was discontinued for at least three consecutive years, or discontinued without intent to resume, to prevail on the cancellation action at trial.¹⁸ Because Petitioner bears this burden of proof—and has acknowledged it does so—Fed. R. Civ. P. 56 places

¹⁴ See Petitioner’s Response in Opposition to Respondent’s Motion for Summary Judgment, pg. 1, ¶ 2.

¹⁵ See Exhibits E, H, and I of Respondent’s Motion for Summary Judgment. See also Exhibit A to this Reply, August 2015 monthly sales summaries (BRC000437) and daily sales records (BRC003706-3709) and September 2015 monthly sales summaries (BRC000438) and daily sales records (BRC003710-3722).

¹⁶ See Respondent’s Motion for Summary Judgment, ¶ 5 and its Exhibit E, Respondent’s Answer to Interrogatory No. 1. In its Response in Opposition, Petitioner specifically objected to the facts stated in ¶¶ 2, 3, and 7 of Respondent’s Motion for Summary Judgment and the corresponding Exhibits thereto, without objecting to the facts stated in ¶ 5. See Petitioner’s Response in Opposition to Respondent’s Motion for Summary Judgment, pg. 5, ¶ 2.

¹⁷ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

¹⁸ See Note 6 above.

the burden of production on Petitioner to designate specific facts showing there is a genuine issue for trial in order to prevent entry of summary judgment.¹⁹

Petitioner has introduced no such evidence at any point in the proceedings. When asked during discovery to state facts upon which Petitioner relied when it contended the Mark was abandoned, Petitioner responded merely that “it conducted Internet searches and investigations relative to MAGO CAFÉ,” which revealed the restaurant had closed on August 31, 2012 “and possibly even earlier,” allegedly without evidencing an intent to reopen.²⁰ No evidence supports a closing date earlier than August 31, 2012, a reopening date later than August 1, 2015, or lack of intent to reopen.

Instead, Petitioner alleges that 600 square feet is “hardly a sufficient size for a restaurant,”²¹ without offering any evidence as to why 600 square feet insufficient to run a food service business that makes use of the Mark. Petitioner also offers no evidence of any kind to suggest that Respondent’s current use of the MAGO CAFÉ Mark would not qualify under “restaurant and café services; catering services,” the services identified by the MAGO CAFÉ trademark Reg. No. 3,810,357, or that Respondent’s use of the Mark would not qualify as commerce which may lawfully be regulated by Congress and trademark law.²² Unsubstantiated allegations of this type do not create a genuine dispute of material fact.

Nor does Petitioner’s unsubstantiated questioning of whether Respondent’s August 2015 sales activity “[serves] as a *bona fide* use of a mark in the ordinary course of trade.”²³

¹⁹ See *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

²⁰ See Petitioner’s Response to Respondent’s Interrogatory No. 1, attached to this Reply as Exhibit B.

²¹ Petitioner’s Response in Opposition to Respondent’s Motion for Summary Judgment, pg. 8, numbered ¶ 6.

²² A single-location restaurant’s commerce is sufficiently significant as to be regulated by Congress and the Lanham Act when it affects interstate commerce in some capacity. See *Larry Harmon Pictures Corp. v. Williams Rest. Corp.*, 929 F.2d 662, 666 (Fed. Cir. 1991). Respondent’s use of the Mark in Sedona, Arizona, a city well known to attract visitors and tourists from across the nation, affects commerce to the necessary degree to be regulated by Congress. Petitioner offers no evidence of any kind otherwise.

²³ Petitioner’s Response in Opposition to Respondent’s Motion for Summary Judgment, pg. 16, ¶ 1.

Abandonment under 15 U.S.C. § 1127 “requires *complete* cessation or discontinuance of trademark use.”²⁴ Nominal or limited commercial sales, if made in good faith and in appropriate circumstances, are sufficient to avoid abandonment.²⁵ Respondent has previously produced and entered into the record full August and September 2015 monthly sales summaries and daily sales records that indicate the resumption of business under the MAGO CAFÉ mark occurred on August 1, 2015 and a subsequent increase in monthly sales followed in September.²⁶ Respondent can hardly be faulted for failing to achieve the level of monthly sales it enjoyed in 2012 in its first month of reopening in August 2015, and the circumstances indicate Respondent’s sales reflect the *bona fide* good faith sales of a café resuming business after a hiatus. Again, Petitioner introduces no evidence to suggest otherwise.

Finally, Petitioner also misstates the applicable legal standard. Petitioner alleges that “Respondent, as the party moving for summary judgment dismissing the claims of abandonment, must establish continuous use of its marks for all of the goods and services named in the registration, or specific activities undertaken during the period of non-use or special circumstances which excuse non-use,”²⁷ and cites generally *Cerveceria India Inc. v. Cerveceria Centroamericana, S.A.*, 10 U.S.P.Q.2d 1064 (TTAB 1989) to make this point. However, nowhere in its opinion does *Cerveceria* address motions for summary judgment or state that a cancellation proceeding respondent moving for summary judgment must affirmatively establish continuous use of its marks in order to prevail on the motion. This is not the standard. As stated above,

²⁴ *Electro Source, LLC v. Brandess-Kalt-Aetna Grp., Inc.*, 458 F.3d 931, 938 (9th Cir. 2006) (emphasis in original).

²⁵ *Id.* at 939. See also *Carter-Wallace, Inc. v. P&G Co.*, 434 F.2d 794, 804 (9th Cir. 1970) (“Even a single instance of use is sufficient against a claim of abandonment of a mark if such a use is made in good faith”).

²⁶ See Exhibit A to this Reply, August 2015 monthly sales summaries (BRC000437) and daily sales records (BRC003706-3709) and September 2015 monthly sales summaries (BRC000438) and daily sales records (BRC003710-3722).

²⁷ Petitioner’s Response in Opposition to Respondent’s Motion for Summary Judgment, pg. 10, ¶ 1.

Petitioner, who bears the burden of proof at trial, must designate specific facts showing a genuine issue for trial to survive summary judgment. Petitioner has not done so here.

Conclusion

No genuine issues of material fact currently exist. Accordingly, summary judgment should be granted, dismissing Petitioner's Petition for Cancellation.

Respectfully submitted this 7th day of March, 2016.

By: /Ray K Harris/
Ray K. Harris, Esq.
Stacie K. Smith, Esq.
Blake Atkinson, Esq.
FENNEMORE CRAIG
2394 East Camelback Road
Suite 600
Phoenix, AZ 85012
Tel: (602) 916-5000
Fax: (602) 619-5999
[email: ip@fclaw.com](mailto:ip@fclaw.com)

Attorneys for Respondent

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served via certified mail and email to:

Boris Umansky
Ladas & Parry LLP
224 S. Michigan Avenue, Suite 1600
Chicago, IL 60604
bumansky@ladas.net

Respectfully submitted this 7th day of March, 2016.

/s/Vicki Morgan
Vicki Morgan

EXHIBIT A

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

FWHG IP HOLDINGS LLC,)	
)	Cancellation No. 92061236
Petitioner,)	
)	Mark: MAGO CAFÉ
v.)	
)	Registration No. 3,810,357
BR CONSULTING, INC.)	
)	Date of Issue: June 29, 2010
Registrant-Respondent)	

PETITIONER’S FIRST SET OF REQUESTS FOR DOCUMENTS AND THINGS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120(a), Petitioner, FWHG IP Holdings LLC (“Petitioner” or “FWHG”), through its attorneys, hereby requests that Respondent, BR Consulting, Inc. (“Respondent” or “BR”), produce within thirty (30) days from the date of service hereof at the offices of Ladas & Parry, 224 South Michigan Avenue, Suite 1600, Chicago, IL 60604, or at another mutually agreeable location, and/or permit Petitioner, or someone acting on its behalf, to inspect and copy such of the following designated documents as are in Respondent’s possession, custody or control.

INSTRUCTIONS AND DEFINITIONS

Petitioner adopts the Instructions and Definitions provided in “Petitioner’s First Set Of Interrogatories” by reference, as if fully set forth herein.

REQUESTS FOR DOCUMENTS AND THINGS

Petitioner has been requested to produce the following documents and things:

1. All documents referring or relating to all sales of Respondent under the mark MAGO CAFÉ within the last five (3) years.

2. All documents and things relating to any period of discontinuance of use of the Respondent's mark MAGO CAFÉ on or in connection with any goods or services.

3. All documents and things that relate to any deliberation by Respondent as to whether Respondent's mark MAGO CAFÉ should be modified or whether the use of Respondent's mark should be discontinued, reduced or expanded.

4. Documents and things sufficient to determine the organization and corporate business structure of Respondent, at present and during the past five (5) years, including, but not limited to, organizational charts and job descriptions.

5. Documents and things sufficient to determine each of Respondent's principal places of business.

6. Documents and things sufficient to determine the principal places of business of each parent, subsidiary or affiliate of Respondent's business.

7. A sample of each different good or service provided in connection with Respondent's mark MAGO CAFÉ that is or has been advertised, offered for sale, sold or distributed by Respondent or mock-up packaging or advertising for any goods or services for which the Respondent has an intent to use the mark MAGO CAFÉ in connection with any such goods or services.

8. Representative specimens of each label, tag, placard, insert, stamp, packaging material, and the like, on which Respondent's mark MAGO CAFÉ is, or at any time has been, used or is intended for such use.

9. Representative specimens of catalogs, mailing pieces, brochures, handbills, flyers, franchise offerings, marketing materials, menus, and other pieces of descriptive or promotional literature, directed at potential (or actual) customers, and relating to or describing goods or services identified by, or associated with the Respondent's mark MAGO CAFÉ.

10. All documents and things that relate to any investigation, market survey or other research regarding the use or abandonment of Respondent's mark MAGO CAFÉ in connection with the sale of Respondent's goods or services.

11. All documents which refer to or relate to Petitioner.

12. All license agreements or other agreements relating to use of Respondent's mark MAGO CAFÉ, including, but not limited to, the license agreement between Respondent and STI Network Inc.

13. All documents that relate to the Lease Agreement and negotiation thereof between Healing Family Center of Sedona, LLC and STI Network, Inc. allegedly dated April 1, 2015 and attached to Respondent's Initial Disclosure Statement.

14. Specimens showing the current use of the Respondent's mark MAGO CAFÉ for each product or service identified in any application or registration.

15. Specimens showing the use in 2014 of the Respondent's mark MAGO CAFÉ for each product or service identified in any application or registration.

16. Specimens showing the use in 2013 of the Respondent's mark MAGO CAFÉ for each product or service identified in any application or registration.

17. Specimens showing the use in 2012 of the Respondent's mark MAGO CAFÉ for each product or service identified in any application or registration.

18. Specimens showing the use in 2011 of the Respondent's mark MAGO CAFÉ for each product or service identified in any application or registration.

19. Documents describing or illustrating the past and present trade and advertising channels for any goods or services sold or intended for sale by Respondent or by any person(s) acting or purporting to act for or on behalf of Respondent, bearing or intended to be bearing Respondent's mark MAGO CAFÉ.

20. For the last five (5) years, documents sufficient to show the volume of goods or services sold on a monthly basis (in both unit sales and dollar volume) for each product or service bearing the Respondent's mark MAGO CAFÉ.

21. All documents and things that relate to Respondent's first awareness of Petitioner.

22. For the last five (5) years, documents sufficient to show Respondent's advertising expenditures for goods or services in connection with Respondent's mark MAGO CAFÉ.

23. All documents and things upon which Respondent intends to rely or place in evidence during the testimony periods of this proceeding.

24. All documents and things which refer or relate to any licensing or prospective licensing of the trademark MAGO CAFÉ by the Respondent.

25. All documents which refer or relate to Respondent's basis for its denial of abandonment in Respondent's Response to Petition for Cancellation filed on June 4, 2015.

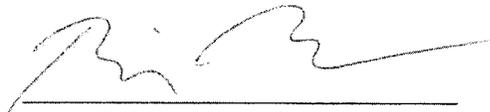
26. All documents which refer or relate to Respondent's use, if any, of the mark MAGO CAFÉ within three (3) years of the filing of the Petition for Cancellation.

27. Documents sufficient to show, by month and year, Respondent's use, if any, of the mark MAGO CAFÉ within three (3) years of the filing of the Petition for Cancellation.

28. All documents which Respondent may introduce into evidence within this proceeding referring or relating to the issue of non-abandonment of the mark MAGO CAFÉ.

29. All documents not previously produced, but identified in response to PETITIONER'S FIRST SET OF INTERROGATORIES TO RESPONDENT or referred to for purposes of preparing a response to those Interrogatories.

Respectfully submitted,

By: 
One of Petitioner's attorneys

Boris Umansky
Ladas & Parry LLP
224 S. Michigan Avenue
Suite 1600
Chicago, IL 60604
(312) 427-1300

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's First Set of Requests for Documents and Things was mailed by first-class mail, postage prepaid on this 5th day of August, 2015 to:

Ray K. Harris, Esq.
Fennemore Craig, P.C.
2394 East Camelback Rd., Ste. 600
Phoenix, AZ 85016-3429


Boris Umansky

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

FWHG IP HOLDINGS LLC,
Petitioner

v.

BR CONSULTING, INC.

Registrant-Respondent

Cancellation No. 92061236

Mark: MAGO CAFÉ

Registration No. 3,810,357

Date of Issue: June 29, 2010

NOTICE OF SERVICE OF SUPPLEMENTAL DISCOVERY RESPONSE

Notice is hereby given, by and through the undersigned counsel, that on November 6, 2015 Respondent BR Consulting, Inc. served via first class mail the attached Supplemental Discovery Responses to Petitioner's First Set of Request for Documents and Things. These Supplemental Responses, comprising (1) Mago Café monthly sales summaries from August 2010-August 2012 and August-September 2015, (2) licensing fees between BR Consulting and STI Network, and (3) Mago Café daily sales records from August 2010-August 2012 and August-September 2015, are in response to Requests for Documents Nos. 1 and 12, pertaining to sales made under the MAGO CAFÉ mark and licensing agreements between Respondent and STI Network.

Dated this 6th day of November, 2015.

By: /Ray K Harris/
Ray K. Harris, Esq.
Stacie K. Smith, Esq.
Blake W. Atkinson, Esq.
FENNEMORE CRAIG
2394 East Camelback Road
Suite 600
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Tel: (602) 916-5000
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email: ip@fclaw.com

Attorneys for Respondent

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served via first class mail to:

Boris Umansky
Ladas & Parry LLP
224 S. Michigan Avenue, Suite 1600
Chicago, IL 60604
bumansky@ladas.net

Respectfully submitted this 6th day of November, 2015.

/Melody Tolliver/
Melody Tolliver

STI Network, Inc. dba Mago Cafe
Profit & Loss
August 2015

	Aug 15
Ordinary Income/Expense	
Income	
0445000 · Business Income	
0448200 · Taxable	
0448212 · Snack Foods	143.04
0448290 · Yoga Brunch	168.35
Total 0448200 · Taxable	<u>311.39</u>
Total 0445000 · Business Income	311.39
Total Income	<u>311.39</u>
Gross Profit	311.39
Net Ordinary Income	<u>311.39</u>
Net Income	<u><u>311.39</u></u>

STI Network, Inc. dba Mago Cafe
Profit & Loss
September 2015

	Sep 15
Ordinary Income/Expense	
Income	
0445000 · Business Income	
0448200 · Taxable	
0448212 · Snack Foods	111.15
0448218 · Retail -Misc	473.16
0448290 · Yoga Brunch	432.23
0448409 · Tea Ceremony	50.05
0448410 · Snack Foods Discount	-1.50
Total 0448200 · Taxable	1,065.09
Total 0445000 · Business Income	1,065.09
Total Income	1,065.09
Gross Profit	1,065.09
Net Ordinary Income	1,065.09
Net Income	1,065.09

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09/24/15

Accrual Basis

STI Network, Inc. dba Mago Cafe
General Journal Transaction
August 31, 2015

Num	Name	Memo	Account	Class	Debit	Credit
4740		August 2015	0211524 · Cafe Unal...	Cafe	152.87	
		August 2015	0448212 · Snack Fo...	Cafe		143.04
	Square Inc	August 2015	0612002 · Merchant ...	Cafe	4.33	
	Arizona Department ...	August 2015	0210523 · Cafe Sale...	Cafe		14.16
					<u>157.20</u>	<u>157.20</u>
TOTAL					<u>157.20</u>	<u>157.20</u>

Invoice

Mago Cafe
 340 Jordan Rd.
 Sedona, AZ 86336

Date	Invoice #
8/1/2015	00030

PAID
 08/31/2015

Bill To
Body and Brain Foundation Sedona Meditation Center 2500 S. Power Rd. 126-3 Mesa, AZ 85209

P.O. No.	Terms	Project

Quantity	Description	Rate	Amount
12	Yoga Brunch on August 1st	4.55	54.60T
	Sales Tax	9.90%	5.41
Total			\$60.01

Invoice

Mago Cafe
 340 Jordan Rd.
 Sedona, AZ 86336

Date	Invoice #
8/15/2015	00032

PAID
 08/31/2015

Bill To
 Body and Brain Foundation
 Sedona Meditation Center
 2500 S. Power Rd. 126-3
 Mesa, AZ 85209

P.O. No.	Terms	Project

Quantity	Description	Rate	Amount
12	Yoga Brunch on August 15	4.55	54.60T
	Sales Tax	9.90%	5.41
		Total	\$60.01

Invoice

Mago Cafe
 340 Jordan Rd.
 Sedona, AZ 86336

Date	Invoice #
8/25/2015	00031

Bill To

Body and Brain Foundation
 Sedona Meditation Center
 2500 S. Power Rd. 126-3
 Mesa, AZ 85209

PAID
 08/31/2015

P.O. No.	Terms	Project

Quantity	Description	Rate	Amount
13	Yoga Brunch on August 8	4.55	59.15T
	Sales Tax	9.90%	5.86
Total			\$65.01

9:17 AM

10/09/15

Accrual Basis

STI Network, Inc. dba Mago Cafe
Custom Transaction Detail Report
 September 2015

Date	Num	Memo	Account	Class	Debit	Credit
Sep 15						
09/29/2015	4744	09/01-09/28 Cafe Sales	0448212 ?Snack Foods	Cafe		111.15
09/29/2015	4744	09/01-09/28 Cafe Sales - Hwanchil Tea...	0448218 ?Retail -Misc	Cafe		263.88
09/29/2015	4744	09/01-09/28 Cafe Sales	0448290 ?Yoga Brunch	Cafe		432.23
09/29/2015	4744	09/01-09/28 Cafe Sales	0448410 ?Snack Foods Discount	Cafe	1.50	
09/29/2015	4744	09/01-09/28 Cafe Sales	0448409 ?Tea Ceremony	Cafe		50.05
09/30/2015	609	Conference catering	0448218 ?Retail -Misc	Cafe		209.28
Sep 15					<u>1.50</u>	<u>1,066.59</u>

10/5/2015

Square Dashboard

Sales

Sep. 2015

NEW

Category	Items Sold	Gross Sales
Uncategorized	27	\$250.24
Bakery	38	\$89.31
Beverages	12	\$21.84
Other	14	\$523.21
Yoga Brunch	40	\$181.99
Total	131	\$1,066.59

09/01/2015

NEW

Item	SKU	Category	Items Sold	Gross Sales
Cookie		Bakery	4	\$7.28
Regular			4	\$7.28
Muffin or Scone		Bakery	9	\$24.57
Regular			9	\$24.57
Hwangchil Tea Cannister		Other	1	\$131.94
Regular			1	\$131.94
Total			14	\$163.79

09/02/2015

NEW

Item	SKU	Category	Items Sold	Gross Sales
Cookie		Bakery	3	\$5.46
Regular			3	\$5.46
Muffin or Scone		Bakery	6	\$16.38
Regular			6	\$16.38
Hwangchil Tea Cannister		Other	1	\$131.94
Regular			1	\$131.94
Total			10	\$153.78

BRC003713

09/05/2015

NEW

Item	SKU	Category	Items Sold	Gross Sales
Cookie		Bakery	8	\$14.56
Regular			8	\$14.56
Muffin or Scone		Bakery	5	\$13.65
Regular			5	\$13.65
Total			13	\$28.21

BRC003714

09/12/2015

NEW

Item	SKU	Category	Items Sold	Gross Sales
Cookie		Bakery	1	\$1.82
Regular			1	\$1.82
Muffin or Scone		Bakery	1	\$2.73
Regular			1	\$2.73
Yoga Brunch		Yoga Brunch	28	\$127.39
Regular			28	\$127.39
Total			30	\$131.94

BRC003715

09/16/2015

REG

Item	SKU	Category	Items Sold	Gross Sales
Black, Green, Korea Tea (...)		Beverages	4	\$7.28
Regular			4	\$7.28
Coffee		Beverages	4	\$7.28
Regular			4	\$7.28
Total			8	\$14.56

BRC003716

09/17/2015

NEW

Item	SKU	Category	Items Sold	Gross Sales
Custom Amount		Uncategorized	1	\$131.94
No description			1	\$131.94
Total			1	\$131.94

BRC003717

09/18/2015

NEW

Item	SKU	Category	Items Sold	Gross Sales
Custom Amount		Uncategorized	11	\$49.14
No description			11	\$49.14
Total			11	\$49.14

BRC003718

Sales

09/22/2015

NEW

Item	SKU	Category	Items Sold	Gross Sales
Muffin or Scone		Bakery	1	\$2.86
Regular			1	\$2.86
Coffee		Beverages	4	\$7.28
Regular			4	\$7.28
Tea Ceremony		Other	11	\$50.05
Regular			11	\$50.05
Yoga Brunch		Yoga Brunch	12	\$54.60
Regular			12	\$54.60
Total			28	\$114.79

Sales

09/26/2015

NEW

Item	SKU	Category	Items Sold	Gross Sales
Custom Amount		Uncategorized	15	\$69.16
No description			15	\$69.16
Total			15	\$69.16

Sales

09/30/2015

N.A.W

Item	SKU	Category	Items Sold	Gross Sales
Catering		Other	1	\$209.28
Regular			1	\$209.28
Total			1	\$209.28

Bill

STI Network, Inc.
PO Box 2155
Sedona, AZ 86339

Date	Ref. No.
09/30/2015	SEPT'15 Royalty Fee

Vendor
BR Consulting, Inc. PO Box 2155 Sedona, AZ 86339

Bill Due 10/10/2015
Terms
Memo

Expenses

Account	Memo	Amount	Customer Job	Class
Royalty Fee - BRC	10% of \$1065.09	106.51		Cafe

Expense Total : 106.51

Bill Total : \$106.51

BRC003722

EXHIBIT B

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

RECEIVED RKH

FWHG IP HOLDINGS LLC,)	Cancellation No. 92061236
)	
Petitioner,)	Mark: MAGO CAFÉ
)	
v.)	Registration No. 3,810,357
)	
BR CONSULTING, INC.)	Date of Issue: June 29, 2010
)	
Registrant-Respondent.)	

SEP 21 2015

ACTION _____

PETITIONER'S RESPONSES TO INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, the Petitioner, FWHG IP Holdings LLC, hereby responds and objects to the Registrant's INTERROGATORIES, Nos. 1 through 4 as follows:

GENERAL OBJECTIONS

1. Petitioner objects to Registrant's interrogatories, Definitions, and Instructions to the extent that they are inconsistent with, or purport to impose an obligation on Petitioner that exceeds the requirements of the Federal Rules of Civil Procedure.

2. Petitioner objects to the interrogatories to the extent that they seek information that is protected by the attorney-client privilege, the work product immunity and/or any other applicable privilege, or otherwise exceed the scope of permissible discovery. Nothing contained herein is intended to be or should be construed as a waiver of the attorney-client privilege, the attorney work product immunity or any other applicable privilege, protection or doctrine.

Unintentional or inadvertent production or disclosure of any such information shall not constitute a waiver of any applicable privilege, and shall not waive the right of Petitioner to object to the use of any information during this proceeding.

3. Petitioner objects to the interrogatories to the extent they seek information that is not reasonably calculated to lead to the discovery of admissible evidence. Petitioner reserves all objections to the competency, relevancy, materiality or admissibility at trial of any information provided. The identification of any witness or document or the supplying of any information in response to an interrogatory does not constitute an admission that such information is relevant to the pending opposition proceeding or that it is admissible at trial.

4. Petitioner objects to the interrogatories to the extent they are ambiguous, vague or otherwise incomprehensible.

5. Petitioner objects to the interrogatories as unduly burdensome to the extent that they seek publicly available information; seek discovery that is unreasonably cumulative or duplicative; seek information already within Registrant's knowledge, possession and/or control; and/or seek information that is obtainable with equal or greater facility by Registrant.

6. Petitioner objects to the interrogatories as overly broad and unduly burdensome to the extent that they would require Petitioner to undertake an unreasonable search of its files, documents and records. Petitioner further objects to the interrogatories to the extent that they seek information not in Petitioner's possession, custody or control or information that is protected from disclosure by court order or agreement.

7. Petitioner objects to the interrogatories as overly broad and unduly burdensome to the extent that they seek the premature production of information.

8. Petitioner objects to the interrogatories to the extent that they seek documents containing Petitioner's proprietary information, trade secrets or other confidential information not relevant to the issues in this case. Petitioner will provide relevant, non-privileged confidential information pursuant to the terms of the Standard Protective Order applicable in this case or a modified version thereof upon agreement of the parties.

9. Petitioner bases its responses upon its present knowledge (a) without conceding relevancy or materiality of any requests, (b) without prejudice to Petitioner's right to object to further discovery or proof of the subject matter, and (c) incorporates its general objections into each Response.

Petitioner is responding to these interrogatories to the extent it has knowledge or information as of the response date. Inasmuch as Petitioner's investigation and discovery in this proceeding is continuing and ongoing, Petitioner reserves the right to supplement, modify, alter or correct these responses, and to supplement its responses as information is discovered, comes to light or is made available to Petitioner.

INTERROGATORIES

INTERROGATORY NO. 1: State each fact upon which you rely when you contend U.S. Trademark Registration No. 3,810,357 for MAGO CAFÉ was abandoned.

Response to Interrogatory No. 1:

Petitioner objects to this interrogatory as being premature. Registrant seeks information supporting Petitioner's contentions in its Petition for Cancellation, and at this relatively early stage in the proceeding Petitioner has yet to compile information and documentation sufficient to allow for a comprehensive response to this interrogatory, as for instance Petitioner has as yet received no documents from Registrant in response to Petitioner's First Set of Requests for Documents and Things propounded on August 5, 2015. Petitioner further objects to this interrogatory as being overly broad and unduly burdensome in that it seeks information relative to "each fact." Additionally, Petitioner objects to divulging any information that is attorney client or work product privileged, such as the workings of the attorney-client relationship. Subject to and without waiving these objections and the General Objections, Petitioner states that

it conducted Internet searches and investigations relative to MAGO CAFÉ, which revealed that the sole restaurant location in Sedona, Arizona had closed on August 31, 2012, and possibly even earlier, and there was no indication that Registrant or Registrant's licensee had any intention of reopening that restaurant or opening another restaurant location using the name MAGO CAFÉ in the foreseeable future.

INTERROGATORY NO. 2: State each fact upon which you rely when you contend U.S. Trademark Registration No. 3,810,357 should not prevent the issuance to registration of U.S. Application 86/155,443 for the mark MAGO GRILL AND CANTINA.

Response to Interrogatory No. 2:

Petitioner objects to this interrogatory as being premature. Registrant seeks information supporting Petitioner's contentions in its Petition for Cancellation, and at this relatively early stage in the proceeding Petitioner has yet to compile information and documentation sufficient to allow for a comprehensive response to this interrogatory, as for instance Petitioner has as yet received no documents from Registrant in response to Petitioner's First Set of Requests for Documents and Things propounded on August 5, 2015. Petitioner further objects to this interrogatory as being overly broad and unduly burdensome in that it seeks information relative to "each fact." Additionally, Petitioner objects to divulging any information that is attorney client or work product privileged, such as the workings of the attorney-client relationship. Petitioner also objects on the grounds that this interrogatory seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence in this proceeding. Petitioner filed a Petition for Cancellation against Registrant's mark MAGO CAFÉ based on an allegation of non-use and abandonment, and this interrogatory seeks information not germane to this issue.

Subject to and without waiving these objections and the General Objections, and as discussed between counsel for the parties during their Rule 26(f) discovery conference, Petitioner states as follows: (1) the parties' geographic areas of interest appear to differ, with Petitioner's restaurants currently being located in the Greater Chicagoland area and Registrant's prior single-location restaurant having been located in Sedona, Arizona; (2) the parties' marks differ (including the addition of design elements to Petitioner's Application No. 86155419) and have different meanings and connotations as reflected by the parties' respective trademark filings of record with the USPTO, i.e. Petitioner has translated the Spanish word "Mago" as meaning "magician" and Registrant has translated "Mago," presumably from Korean, as meaning "mother earth"; (3) the restaurants using the parties' respective trademarks specialize in and serve different cuisines, with Petitioner's restaurants focusing on Mexican fare and Registrant's restaurant previously serving Korean food; and (4) Registrant's restaurant location was previously tied to or associated with the Sedona Mago Retreat, which, according to its website, is a nonprofit organization promoting the spirit of Tao and spirituality, whereas Petitioner's subject marks have no such association or connotation.

INTERROGATORY NO. 3: Identify each person which [sic] knowledge of the information set forth in your answers to interrogatories 1 and 2.

Response to Interrogatory No.3:

Petitioner objects to this interrogatory on the basis that it seeks attorney-client and work product privileged information relating to legal counsel and the working relationship with the client. The attorney-client and work product privileges protect divulging communications and interworkings between counsel and its client. For instance, information or advice or who

assisted counsel in working with the client are attorney-client and work product privileged. Subject to and without waiving these objections and the General Objections, and as indicated in Petitioner's Initial Disclosures, Mr. Eddie Nahlawi is the individual at Petitioner's company with the most knowledge concerning these matters.

INTERROGATORY NO. 4: Identify each document referring or relating to the facts set forth in your answers to interrogatories 1 and 2.

Response to Interrogatory No.4:

Petitioner objects to identifying those documents that are attorney client and/or work product privileged. Petitioner incorporates other objections to any other documents sought and will make available for inspection and/or copying any referenced documents for which there has been no objection.

Respectfully submitted,

By:



One of Petitioner's attorneys

Boris Umansky
Ladas & Parry LLP
224 S. Michigan Avenue
Suite 1600
Chicago, IL 60604
(312) 427-1300

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of **PETITIONER'S RESPONSES TO INTERROGATORIES** has been served via First Class Mail, postage pre-paid, to:

Ray K. Harris, Esq.
FENNEMORE CRAIG
2394 East Camelback Road
Suite 600
Phoenix, AZ 85012

Respectfully submitted this 17th day of September, 2015.

By 
Boris Umansky