

ESTTA Tracking number: **ESTTA181925**

Filing date: **12/19/2007**

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

| | |
|------------------------|--|
| Proceeding | 91179368 |
| Party | Defendant Nedboy, Robin L. |
| Correspondence Address | Erik M. Pelton Erik M. Pelton & Associates, PLLC PO Box 100637 Arlington, VA 22210 UNITED STATES emp@tm4smallbiz.com |
| Submission | Motion to Compel Discovery |
| Filer's Name | Erik M. Pelton |
| Filer's e-mail | emp@tm4smallbiz.com |
| Signature | /ErikMPelton/ |
| Date | 12/19/2007 |
| Attachments | Clean Living - Derner - Motion to Compel - FINAL.pdf (8 pages)(29773 bytes) CL-DernerMotCompel-EXHIBITS.pdf (24 pages)(1372120 bytes) |

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

| | | |
|------------------|---|----------------------------------|
| JAMES DERNER, |) | |
| Opposer, |) | Opposition No. 91179368 |
| v. |) | Application. Serial No. 77119422 |
| ROBIN L. NEDBOY, |) | Mark: CLEAN LIVING |
| Applicant. |) | |

MOTION TO COMPEL

COMES NOW, Applicant Robin L. Nedboy (“Applicant”), by counsel, and, pursuant to TMBP §§ 405.03 and 523 submits this Motion to Compel interrogatory responses. In support of this Motion, Applicant states as follows:

On October 12, 2007, Applicant served Opposer with Interrogatories (Exhibit A and Declaration of Erik M. Pelton) and Requests for Production.

On or about November 13, 2007, Opposer served responses to Applicant’s Interrogatories (Exhibit B and Declaration of Erik M. Pelton) and Requests for Production.

Opposer’s response to Applicant’s Interrogatories contained the following general objection:

1. Opposer objects to the first set of written interrogatories in its entirety in that the number of interrogatories including subparts exceeds 75.

See Exhibit B.

On November 26, 2007, counsel for Applicant faxed and mailed a letter to counsel for Opposer regarding the objection to the number of interrogatories (the “November 26th letter”).

See Exhibit C and Declaration of Erik M. Pelton. The November 26th letter contained the following from Applicant’s counsel:

In both form and spirit, the number of interrogatories including subparts does not exceed seventy-five. Pursuant to TBMP § 405.03(d), “[I]f an interrogatory requests ‘all relevant facts and

circumstances' concerning a single issue, event, or matter; or asks that a particular piece of information, such as, for example, annual sales figures under a mark, be given for multiple years, and/or for each of the responding party's involved marks, it will be counted as a single interrogatory." The large majority of Applicant's Interrogatories concern a single issue, event or matter.

See Exhibit C.

Applicant maintains that nearly all of the twenty-one (21) interrogatories served on Opposer, and contained in Exhibit A, relate to a single issue, event, or matter under any reasonable interpretation. An interrogatory that potentially applies to more than one mark or potentially relates to a subject in any time - the past, present and future – is not considered multiple interrogatories or subparts for the purposes of counting seventy-five. While some of Applicant's interrogatories contain subparts, the total number including subparts does not exceed seventy-five. Using the counting method apparently employed by Opposer¹, it would be nearly impossible to obtain any depth of information in seventy-five questions. TBMP § 405.03(d).

Opposer's claims regarding the number of interrogatories, and subsequent failure to explain them in writing in response to the November 26th letter from counsel for Applicant, is clearly an attempt to avoid discovery and delay this proceeding which was initiated by Opposer.

In the November 26th letter, Counsel for Applicant also noted that Opposer provided specific objections to individual interrogatories, which is prohibited by the TTAB rules when making a general objection regarding the number of interrogatories. TBMP § 405.03. See Exhibits B and C. As a result, Opposer has not followed the guidelines provided by the Board in TBMP § 405.03(e) and 37 CFR § 2.120(d)(1) which states:

If a party upon which interrogatories have been served believes that the number of interrogatories served exceed the limitation specified in this paragraph, and is not willing to waive this basis for objection, the party shall, within the time for

¹ Note that Opposer has not to date provided a detailed basis for its conclusion that the number of interrogatories served by Applicant is greater than seventy-five.

(and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number. (Emphasis added.)

Opposer has provided specific objections while also objecting generally to the number of interrogatories. Counsel for Applicant noted this contradiction in the November 26th letter and made a good faith attempt to resolve the apparent contradiction.

Kindly confirm by next Monday, December 3rd, if Opposer intends to maintain such a general objection. If it is Opposer's intention to do so, my client will consider filing a Motion to Compel based on (A) the apparent waiver of the right to make the general objection, and (B) the lack of support for any such general objection.

See Exhibit C.

Furthermore, Opposer's specific objections are not well taken. Opposer addressed some of the specific objections contained in Opposer's response to Applicant's first interrogatories (Exhibit B) in the November 26th letter:

I am prepared to address Opposer's specific objections if Opposer waives or fails in the general objection. Opposer's objections regarding multiple interrogatories which Opposer claims are "vague and ambiguous" because: the instructions do not "instruct how to identify a good and/or service;" "Opposer has no idea what the Applicant means by 'specificity,' and "the term 'all relevant facts and circumstances' is vague and ambiguous" hardly merit further explanation. Yet to make a good faith effort to resolve this matter, I shall attempt to provide some further clarification.

The identification of a good and/or service should not require further explanation in practice before the USPTO. For further reference you may consult TMEP § 1402 et seq.

"A written application must specify the particular goods or services on or in connection with which the applicant uses, or has a bona fide intention to use, the mark in commerce. 15 U.S.C. §§1051(a)(2) and 1051(b)(2); 37 C.F.R. §2.32(a)(6). To "specify" means to name in an explicit manner. The identification of goods or services should set forth common names, using terminology that is generally understood. For products or services that do not have common names, the applicant should use clear and succinct language to describe or explain the item. Technical or esoteric

language and lengthy descriptions of characteristics or uses are not appropriate.

The language used to describe goods or services should be understandable to the average person and should not require an in-depth knowledge of the relevant field. An identification may include terms of art in a particular field or industry, but, if these terms are not widely understood by the general population, the identification should include an explanation of the specialized terminology.” TMEP § 1402.01.

I note that you have been attorney of record for more than 2,000 records in the U.S. Patent and Trademark Office and dozens of proceedings before the Trademark Trial and Appeal Board (“TTAB”).

The meaning of the term “specificity” also should not require explanation in the context of TTAB practice. Should Opposer truly have doubt regarding the meaning of “specificity” or any other English word contained in the interrogatories, the meaning is plainly available in *The American Heritage® Dictionary of the English Language, Fourth Edition* or any comparable reference book.

See Exhibit C.

To date, Counsel for Applicant has received no substantive response from Opposer regarding the matters discussed in the November 26th letter. To date, Counsel for Applicant has received no further response from Opposer regarding its intention to maintain and/or explain (A) its objection to the number of interrogatories or (B) the apparent waiver of that objection by provided specific objections.

To date, Counsel for Opposer has provided no specifics to support its assertion that the number of interrogatories served by Applicant is greater than seventy-five.

The November 26th letter included an offer by counsel for Applicant to set up a telephone conference with the Interlocutory Attorney to discuss the interrogatory and request for production issues. See Exhibit C.

To date, Opposer has failed to answer substantively any interrogatories and failed to justify its objections.

Pursuant to TBMP § 403.05, a party is permitted to serve up to 75 interrogatories on another party in an Opposition proceeding.

Opposer has failed to sufficiently answer each of Applicant's interrogatories as requested pursuant to Rule 26 and Rule 37 of the Federal Rules of Civil Procedure and TBMP §§ 411 and 523.

Opposer has failed to sufficiently address Applicant's good faith efforts regarding the insufficiency and incompleteness of Opposer's discovery responses and objections.

Applicant has attached a statement from counsel regarding his good faith effort to resolve this discovery dispute without interference from the Board pursuant to 37 C.F.R. § 2.120(e) and TBMP § 523.02. See Declaration of Erik M. Pelton.

WHEREFORE, Applicant moves this Board for an Order compelling Opposer to fully and completely respond to all of Applicant's October 12, 2007 interrogatories numbered 1 through 21 within ten (10) days from the date of the Order; and

Applicant moves this Board for an Order including substantial sanctions and penalties for Opposer if Opposer continues to violate the rules and spirit of discovery; and

Applicant moves the Board to extend the period of discovery to allow Applicant a reasonable amount of time to serve follow discovery once Opposer provides interrogatory responses; and

Applicant moves this Board for an Order pursuant to TBMP § 411.04 preventing Opposer from introducing any new evidence or testimony in support of its claims; and

Applicant moves this Board to require Opposer to pay Applicant's costs, expenses and attorney fees incurred in connection with this Motion, pursuant to F.R.C.P. Rule 37(a)(4); and

Applicant further moves this Board to dismiss this Opposition with prejudice; and

Applicant further moves this Board for any other relief it deems appropriate; and
Applicant respectfully requests that the Trademark Trial and Appeal Board grant its
Motion to Compel and grant all other appropriate relief.

Applicant requests that if these proceedings are suspended pending the determination of
the Motion, any suspension order explicitly state that it shall not suspend any already pending
discovery obligations.

Applicant is willing to participate in an interlocutory telephone conference or an oral
hearing before the Board regarding these matters if so desired by the Board.

Dated this 19 day of December, 2007

Respectfully Submitted,
ROBIN L. NEDBOY

By: _____
/ErikMPelton/
Erik M. Pelton

Erik M. Pelton & Associates, PLLC
PO Box 100637
Arlington, Virginia 22210
TEL: (703) 525-8009
FAX: (703) 525-8089
EMAIL: emp@tm4smallbiz.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion to Compel was deposited as First Class
mail with the United States Postal Service on December 19, 2007, to Counsel for Opposer at the
following address:

Jay H. Geller
West Tower, Suite 4000
2425 West Olympic Blvd.
Santa Monica, CA 90404

By: _____
/ErikMPelton/
Erik M. Pelton, Esq.

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

JAMES DERNER,)
Opposer,) Opposition No. 91179368
v.) Application. Serial No. 77119422
ROBIN L. NEDBOY,) Mark: CLEAN LIVING
Applicant.)

DECLARATION OF ERIK M. PELTON, ESQ.

I, Erik M. Pelton, Esq., declare as follows:

1. I represent Applicant Robin L. Nedboy in this matter.
2. I have knowledge of the facts set forth herein and in Applicant's Motion to Compel.
3. Applicant's First Set of Interrogatories was served on Opposer on October 12, 2007.
4. On November 26, 2007, I faxed and mailed counsel for Opposer a letter seeking an explanation of Opposer's November 13, 2007, response to Interrogatories and the objections contained therein, and offering to participate in a phone conference with a TTAB interlocutory attorney regarding these issues.
5. As of December 19, 2007, Opposer has not completely responded to Opposer's First Set of Interrogatories or to the specific issues raised in my November 26, 2007, letter.
6. Pursuant to 37 C.F.R. § 2.120(e) and TBMP § 523.02, I have made a good faith effort to resolve the issues presented by Opposer's lack of responses to Applicant's First Set of Interrogatories.

7. Additional details regarding the nature and dates of these good faith efforts are contained in the Motion to Compel filed herewith and in the November 26, 2007, letter attached at Exhibit C.

I declare under penalty of Perjury that all of the foregoing is true and correct.

Dated: December 19, 2007

/ErikMPelton/
Erik M. Pelton, Esq.

Opposition No. 91179368

MOTION TO COMPEL – EXHIBIT A

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

JAMES DERNER:)
)
 Opposer,)
)
 vs.)
)
 ROBIN L. NEDBOY)
)
 Applicant.)

COPY

IN THE MATTER OF:
Opposition No. 91179368

APPLICANT'S FIRST SET OF INTERROGATORIES TO OPPOSER

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, 37 C.F.R. § 2.120, and the Trademark Rules of Practice, Applicant Robin L. Nedboy. ("Nedboy" or "Applicant"), by counsel, hereby requests that Opposer James Derner, ("Derner" or "Opposer") answer fully under oath the following interrogatories within thirty (30) days after service thereof. These answers are to be sent to Erik M. Pelton & Associates, PLLC, PO Box 100637, Arlington, Virginia 22210.

DEFINITIONS

The following definitions apply to and are deemed incorporated into each question in this first set of interrogatories:

1. "James Derner," "Derner," "you," "your," or "Opposer" means Opposer James Derner, his employees, counsel, agents, representatives, or other persons under his control, any predecessor or successor whether incorporated or not, any division, subsidiary or affiliate thereof, and those persons in active concert or participation with him or them.
2. "Document" shall refer to all items within the scope of Rule 34, Federal Rules of Civil Procedure.
3. "Person" or "persons" shall refer to any individual, corporation, proprietorship,

partnership, association, joint venture, business trust, receiver, estate syndicate government agency or other entity, including the parties to this suit and their officers, agents, employees and representatives.

4. "CLEAN LIVING" includes all marks incorporating the terms "CLEAN" and "LIVING", and all variations thereof including variations in which not all of its letters are capitalized, variations in which it is combined with a superscript such as "TM," "SM, "Tm," "Sm," "tm," "sm" or "®" or any other variation intended to convey that it, CLEAN LIVING, is a trademark.

5. The term "mark" includes any trademark, service mark, trade name, collective mark or certification mark, as defined by 15 U.S.C. § 1127, and any other phrase or symbol used as a source identifier for a particular good or service.

6. The words "and" and "or" are construed both conjunctively and disjunctively, and each includes the other wherever such dual construction will serve to bring within the scope of this request any documents which would otherwise not be brought within its scope. All such terms, as well as other conjunctions and prepositions, are interpreted in the manner that provides the most complete answer and information.

7. "Each" means each and every.

8. "Communication" means all discussions, conversations, interviews, negotiations, cable grams, mail grams, e-mails, telegrams, telexes, facsimile transmissions, cables, letters, confirmations, or other forms of written or verbal discourse, however transmitted, including reports, notes, electronic files and databases, memoranda, lists, agents and other documents and records.

9. The terms "date" means the exact day, month and year, if ascertainable, and if

not, the best approximation, including any relationship to any other events.

10. “Employee or agent” and “employees or agents” shall mean all persons currently or previously employed, including, without limitation, officers, directors, employees, agents, attorneys, accountants, representatives, or others acting for or on behalf of a person.

11. “challenge” – shall refer to any legal action or threat of legal action, including, but not limited to Federal Court actions, Trademark Trial and Appeal Board opposition or cancellation proceedings, proceedings before the Bureau of Customs or Federal Trademark Commission, warning letters, cease and desist letters, or other communications regarding or threatening legal action.

12. “adoption or use” – shall refer to any use in intrastate or interstate commerce in the United States, any use in commerce outside of the United States, any use not in commerce within or without the United States, any registration or application to register the **mark**, any adoption of the **mark** without use in commerce, and any acquisition of the **mark**.

13. “service provider” – shall refer to advertising agencies, public relations agencies, market research agencies, and other providers of promotional services.

14. “promote” – shall refer to advertising, marketing, or other means of making the public more aware of the mark, or good or service.

15. “trademark search” – shall refer to any search or investigation of the records of the U.S. Patent and Trademark Office, or of any other records or publications, whether conducted by Opposer, or by an agent or employee of Opposer.

16. “authorized use” – shall refer to any instance where Opposer has licensed franchised, or otherwise authorized another entity to use the mark, or any variation thereof.

17. “authorized user” – shall refer to any entity allowed the **authorized use** of the

mark as defined above.

INSTRUCTIONS

The following definitions apply to and are deemed incorporated into each question in this first set of interrogatories:

1. In construing each of these interrogatories, the singular form of a word shall be interpreted in the plural and vice versa, the words “and” and “or” shall be construed conjunctively or disjunctively, and verb tenses shall be interpreted to include past, present and future tenses, whichever meaning makes the interrogatory more inclusive.
2. Any pronoun shall be construed to refer to the masculine, feminine or neutral gender, in singular or plural, as in each case is most appropriate,
3. A request to “identify” or “state with particularity” requires the following information:
 - a. With respect to a natural person, provide:
 - i. Full name;
 - ii. Present or last known business address (including telephone number and email address), occupation and business position or title held; and
 - iii. Present or last known residence address (including telephone number and email address).
 - b. With respect to a firm, corporation, company, partnership, joint venture or other entity which is not a natural person provide:
 - i. Full name;
 - ii. Place of incorporation or organization (if any); and
 - iii. Principal place of business.
 - c. With respect to a document, provide;

- i. The date of the document;
- ii. The identity of each person who authorized, signed, created or prepared the document;
- iii. The identity of each addressee and recipient of the document;
- iv. The title and subject matter of the document;
- v. The number of pages in the document;
- vi. The identity of the persons having possession, custody or control of the original copies of the document; and
- vii. A present location of the document.

4. With respect to a communication, specify the form of the communication. If the communication was in written form, identify the communication in the manner that a document is to be identified under Paragraph 3 of these initial instructions. If the communication was not in written form, specify:

- a. The manner in which the communication was made (e.g., telephone, conversation, speech, etc.);
- b. The identity of each person who participated in or witnessed the communication;
- c. The subject matter and content of the communication; and
- d. The date of the communication.

5. The scope of these interrogatories shall be business conducted within the United States or between the United States and a foreign country, territory or jurisdiction, including Canada.

6. All relevant, non-privileged information which you or your employees possess or control is to be divulged. Should you claim privilege, immunity, confidentiality or protection of any kind with respect to any documents or communications concerning which information is requested by

any of the following interrogatories, you shall list such documents and communications and shall identify each document or communication in the manner prescribed by Paragraph 3 of these initial instructions, and additionally you shall state the specific type of privilege or protection claimed as a basis for withholding the document and/or communication and the grounds on which the claim of privilege rests,

7. If, after exercising due diligence to secure the information requested, you cannot respond to a request or any portion thereof in full, so state, answer to the extent possible, specify the reasons you were unable to provide a full and complete answer and state what information and knowledge you do have concerning the unanswered portion.

8. If, after answering, you acquire additional knowledge or information requested by the following interrogatories, Applicant requests that you serve upon Applicant amended or supplemental responses in accordance with Fed. R. Civ. P. 26(e), no more than thirty (30) days after you acquire such knowledge or information.

9. If information is withheld on grounds of privilege or work-product immunity,
- a. Identify the information with sufficient particularity to allow the matter to be brought before the Court, including a description of the information's type (e.g. event, conversation, occurrence), subject matter, date, and participants; and
 - b. State briefly the legal and factual basis for the claim of privilege or work-product protection.

INTERROGATORIES

Interrogatory No. 1

Identify, as described in Instruction No. 3, the Opposer, **James Derner**.

ANSWER:

Interrogatory No. 2

Identify and describe with specificity each good and service in connection with which the mark **CLEAN LIVING**, has been used or is currently being used by Opposer, or any authorized user of the marks.

ANSWER:

Interrogatory No. 3

With respect to each of the goods and services identified in response to Interrogatory No. 2, describe all relevant facts and circumstances regarding the first use of the **mark** in commerce in the United States.

ANSWER:

Interrogatory No. 4

With respect to each of the goods and services identified in response to Interrogatory No. 2, describe all relevant facts and circumstances regarding the first use of the **mark** in interstate commerce in the United States.

ANSWER:

Interrogatory No. 5

- (a) With respect to each of the goods and services identified in response to Interrogatory No. 2, state the annual sales in dollars for each year from 1997 to the present.

- (b) **Identify the persons** with the most complete knowledge of the information given in answer to subpart (a) herein.

ANSWER:

Interrogatory No. 6

- (a) With respect to each of the goods and services identified in response to Interrogatory No. 2, describe all relevant facts and circumstances regarding the manner in which the **mark CLEAN LIVING** is **promoted** in the United States.
- (b) For each instance of **promotion** of the **mark CLEAN LIVING** described in subpart (a) herein, specify the annual expenditure for **promotion** during each of the years 1997 to the present.
- (c) For each instance of **promotion** of the **mark CLEAN LIVING** described in subpart (a) herein, **identify the persons** with the most complete knowledge thereof.

ANSWER:

Interrogatory No. 7

With respect to each of the goods and services identified in response to Interrogatory No. 2, describe all relevant facts and circumstances regarding the channels of trade by which the goods or services of the Opposer reach the ultimate end customer.

ANSWER:

Interrogatory No. 8

- (a) Describe in detail any **trademark search** conducted in connection with the **mark CLEAN LIVING**.
- (b) Describe in detail any **trademark search** conducted in connection with any challenge a third party has made to the mark **CLEAN LIVING**.
- (c) **Identify all documents** related to any search described in subparts (a) or (b) herein.

ANSWER:

Interrogatory No. 9

- (a) **Identify any authorized user** of the **mark CLEAN LIVING**.
- (b) Describe all relevant facts and circumstances regarding instances where Opposer has **authorized use of the mark CLEAN LIVING to an authorized user**.

ANSWER:

Interrogatory No. 10

Identify all documents in Opposer's possession which refer or relate to Applicant or to use of the **CLEAN LIVING mark**, or any variations thereof, by Applicant.

ANSWER:

Interrogatory No. 11

- (a) Describe all relevant facts and circumstances relating to any **challenges** Opposer has made against any third party concerning a **mark** allegedly confusingly similar to Opposer's **CLEAN LIVING** mark.
- (b) Describe all relevant facts and circumstances relating to any **challenges a**

third party has made against Opposer concerning the alleged similarity between Opposer's **CLEAN LIVING mark** and the **mark** of a third party.

ANSWER:

Interrogatory No. 12

Identify the **persons** who, from the date of Opposer's first use of the **mark CLEAN LIVING** to the present, have been responsible for the **promotion** of goods and services under the **mark CLEAN LIVING**, indicating the period during which each person was so responsible.

ANSWER:

Interrogatory No. 13

Describe fully any survey conducted to determine whether there exists a likelihood of confusion between the **mark CLEAN LIVING**, and any other **marks**.

ANSWER:

Interrogatory No. 14

- (a) Identify all **service providers** which Opposer has used in **promoting** the goods and services identified in response to Interrogatory No. 2.
- (b) For each of the **service providers** named in part (a) herein, state the time periods during which the **promotional** activities were conducted.

ANSWER:

Interrogatory No. 15

Describe in detail any plans or steps to expand the number of products or services with which the **CLEAN LIVING mark**, or any related **mark** is used, to alter the channels of trade mentioned in the answer to Interrogatory No. 2, or to sell such goods and services to purchasers other than those mentioned in the answer to Interrogatory No. 2.

ANSWER:

Interrogatory No. 16

Describe with particularity the way in which Opposer's goods and services, which are sold under the **CLEAN LIVING mark**, compete with or are similar Applicant's goods and/or services.

ANSWER:

Interrogatory No. 17

- (a) **Identify** the date on which Opposer first became aware of Applicant's use of the **CLEAN LIVING mark**.
- (b) Describe with specificity the circumstances under which Opposer first became aware of Applicant's use of the **CLEAN LIVING mark**.

ANSWER:

Interrogatory No. 18

Describe with specificity the circumstances by which the name **CLEAN LIVING** was adopted by Opposer.

ANSWER:

Interrogatory No. 19

Describe with specificity the circumstances, including the date, by which the name **CLEAN LIVING** was first used in interstate commerce by Opposer.

ANSWER:

Interrogatory No. 20

For each of the preceding Interrogatories, **identify**: all **persons** who were consulted or participated in the preparation of the answer to each Interrogatory; all **persons** who are presently knowledgeable as to any of the facts recited in the answer to each Interrogatory; whether or not such **persons** were consulted or participated in the preparation of the answer; and all files and areas searched in attempting to locate any **documents** requested to be identified by each Interrogatory.

ANSWER:

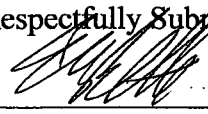
Interrogatory No. 21

Identify any person who may be used at Trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. For each such person, provide a separate written report satisfying the provisions of F.R.Civ.P. 26(a)(2)(B).

ANSWER:

Dated: October 12, 2007

Respectfully Submitted,



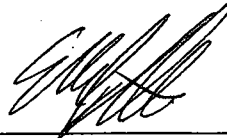
Erik M. Pelton, Esq.
Attorney for Applicant
PO Box 100637
Arlington, Virginia 22210
(703) 525-8009

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Applicant's First Set of Interrogatories to Opposer was deposited as First Class mail with the United States Postal Service on October 12, 2007, to counsel for Opposer at:

Jay H. Geller
West Tower, Ste 4000
2425 W Olympic Blvd.
Santa Monica, CA 90404

By:



Erik M. Pelton, Esq.

Opposition No. 91179368

MOTION TO COMPEL – EXHIBIT B

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

| | | |
|-----------------|---|--------------------------------|
| James Derner |) | |
| |) | <u>Opposition No. 91179368</u> |
| Opposer, |) | |
| |) | |
| v. |) | Serial Number 77119422 |
| Robin L. Nedboy |) | CLEAN LIVING |
| |) | Published OG: 8-28-07 |
| Applicant. |) | |
| <hr/> | | |

OBJECTION TO FIRST SET OF WRITTEN INTERROGATORIES

1. Opposer objects to the first set of written interrogatories in its entirety in that the number of interrogatories including subparts exceeds 75.

2. Assuming that at some point in time Applicant will comply with the TTAB discovery rules regarding interrogatories, Opposer as a courtesy provides the following additional specific objections to the following interrogatories to avoid having to object further on these grounds and to give notice to Applicant that if and when a set of interrogatories that complies with the TBMP are served on Opposer, these issues can be avoided:

Interrogatory No. 2. In your instructions, you instruct how to identify a person or a document but you don't instruct how to identify a good and/or service. Consequently, the interrogatory is vague and ambiguous. Further, Opposer objects on the ground that the term "describe with specificity" is vague and ambiguous in that Opposer has no idea what the Applicant means by "specificity."

Interrogatory No. 3. See objections to Interrogatory No. 2. Opposer further objects on the ground that the term "all relevant facts and circumstances" is vague and ambiguous and calls for

Opposer to guess what Applicant believes "relevant facts and circumstances" are.

Interrogatory No. 4. See objections to Interrogatory No. 2. Opposer further objects on the ground that the term "all relevant facts and circumstances" is vague and ambiguous and calls for Opposer to guess what Applicant believes "relevant facts and circumstances" are.

Interrogatory No. 5(a). See objections to Interrogatory No. 2.

Interrogatory No. 6. See objections to Interrogatory No. 2. Opposer further objects to Interrogatory No. 6(a) on the ground that the term "all relevant facts and circumstances" is vague and ambiguous and calls for Opposer to guess what Applicant believes "relevant facts and circumstances" are.

Interrogatory No. 7. See objections to Interrogatory No. 2. Opposer further objects on the ground that the term "all relevant facts and circumstances" is vague and ambiguous and calls for Opposer to guess what Applicant believes "relevant facts and circumstances" are.

Interrogatory No. 8(b). Opposer objects to this Interrogatory on the ground that it is vague, ambiguous and unintelligible.

Interrogatory No. 9(b). Opposer further objects on the ground that the term "all relevant facts and circumstances" is vague and ambiguous and calls for Opposer to guess what Applicant believes "relevant facts and circumstances" are.

Interrogatory No. 11. Opposer objects on the ground that the

term "all relevant facts and circumstances" is vague and ambiguous and calls for Opposer to guess what Applicant believes "relevant facts and circumstances" are.

Interrogatory No. 14. See objections to Interrogatory No. 2.

Interrogatory No. 15. See objections to Interrogatory No. 2. Opposer further objects on the ground that "any related mark" is vague and ambiguous.

Interrogatory No. 17(b). Opposer objects to this Interrogatory on the ground that the term "describe with specificity" is vague and ambiguous in that Opposer has no idea what the Applicant means by "specificity."

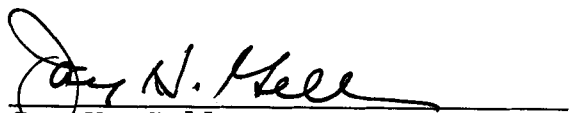
Interrogatory No. 18. Opposer objects to this Interrogatory on the ground that the term "describe with specificity" is vague and ambiguous in that Opposer has no idea what the Applicant means by "specificity."

Interrogatory No. 19. Opposer objects to this Interrogatory on the ground that the term "describe with specificity" is vague and ambiguous in that Opposer has no idea what the Applicant means by "specificity."

Interrogatory No. 20. In your instructions, you instruct how to identify a person or a document but you don't instruct how to identify files and areas searched. Consequently, the interrogatory

is vague and ambiguous.

Dated: November 13, 2007


Jay H. Geller
Jay H. Geller, A
Professional Corporation
West Tower, Suite 4000
2425 West Olympic Boulevard
Santa Monica, CA 90404

Telephone: 310-449-1399
Facsimile: 310-449-1394
Email: JHGELLER@aol.com

I certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Erik M. Pelton & Associates, PLLC, P.O. Box 100637, Arlington, VA 22210 on November 13, 2007.


Jay H. Geller

Opposition No. 91179368

MOTION TO COMPEL – EXHIBIT C

ERIK M. PELTON

ATTORNEY AT LAW

P. O. BOX 100637

ARLINGTON, VIRGINIA 22210

703.525.8009 PHONE

703.525.8089 FAX

BENJAMIN D. PELTON – OF COUNSEL

November 26, 2007

SENT VIA FACSIMILE TO 310-449-1394 & VIA FIRST CLASS MAIL

Jay H. Geller
West Tower, Suite 4000
2425 W. Olympic Boulevard
Santa Monica, CA 90404

Re: T.T.A.B. Opposition No. 91179368

Dear Mr. Geller,

I am in receipt of Opposer's "Objection to First Set of Written Interrogatories" served on November 13, 2007. I write in conformance with the requirements of Trademark Rule 2.120(e) and to make a good faith effort to resolve the issues presented by your objections and lack of answers.

It is unclear whether Opposer's response is meant to be a general objection to the number of Interrogatories. 37 C.F.R. §2.120(d) provides that when making such an objection no answers or specific objections shall be served. Opposer has provided both specific objections and a general objection.

If it is Opposer's intention, despite providing specific objections, to maintain a general objection to Applicant's Interrogatories Nos. 1 through 21 in their entirety "in that the number of interrogatories including subparts exceeds 75," I respectfully disagree. In both form and spirit, the number of interrogatories including subparts in Applicant's First Interrogatories to Opposer does not exceed seventy-five. Pursuant to TBMP § 405.03(d), "[I]f an interrogatory requests 'all relevant facts and circumstances' concerning a single issue, event, or matter; or asks that a particular piece of information, such as, for example, annual sales figures under a mark, be given for multiple years, and/or for each of the responding party's involved marks, it will be counted as a single interrogatory." The large majority of Applicant's Interrogatories concern a single issue, event or matter. I also note that while Opposer has included specific objections in its response of November 13, 2007, Opposer has not included any specific objections that a particular interrogatory contains multiple questions or sub-parts.

Kindly confirm by next Monday, December 3rd, if Opposer intends to maintain such a general objection. If it is Opposer's intention to do so, my client will consider filing a Motion to Compel based on (A) the apparent waiver of the right to make the general objection, and (B) the lack of support for any such general objection.

In the alternative, I am prepared to address Opposer's specific objections if Opposer waives or fails in the general objection. Opposer's objections regarding multiple interrogatories which Opposer claims are "vague and ambiguous" because: the instructions do not "instruct how to identify a good and/or service;" "Opposer has no idea what the Applicant means by 'specificity;' and "the term 'all relevant facts and circumstances' is vague and ambiguous" hardly merit further explanation. Yet to make a good faith effort to resolve this matter, I shall attempt to provide some further clarification.

The identification of a good and/or service should not require further explanation in practice before the USPTO. For further reference you may consult TMEP § 1402 et seq.

“A written application must specify the particular goods or services on or in connection with which the applicant uses, or has a bona fide intention to use, the mark in commerce. 15 U.S.C. §§1051(a)(2) and 1051(b)(2); 37 C.F.R. §2.32(a)(6). To “specify” means to name in an explicit manner. The identification of goods or services should set forth common names, using terminology that is generally understood. For products or services that do not have common names, the applicant should use clear and succinct language to describe or explain the item. Technical or esoteric language and lengthy descriptions of characteristics or uses are not appropriate.

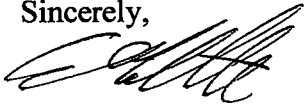
The language used to describe goods or services should be understandable to the average person and should not require an in-depth knowledge of the relevant field. An identification may include terms of art in a particular field or industry, but, if these terms are not widely understood by the general population, the identification should include an explanation of the specialized terminology.” TMEP § 1402.01.

I note that you have been attorney of record for more than 2,000 records in the U.S. Patent and Trademark Office and dozens of proceedings before the Trademark Trial and Appeal Board (“TTAB”).

The meaning of the term “specificity” also should not require explanation in the context of TTAB practice. Should Opposer truly have doubt regarding the meaning of “specificity” or any other English word contained in the interrogatories, the meaning is plainly available in *The American Heritage® Dictionary of the English Language, Fourth Edition* or any comparable reference book.

If you wish to discuss this matter, or to request a telephone conference with the interlocutory attorney at the Board, do not hesitate to contact me.

Sincerely,



Erik M. Pelton

FAX COVER PAGE

TO: Jay H. Geller

FAX NUMBER: 310-449-1394

DATE: November 26, 2007

FROM:



Attorneys at Law
Erik M. Pelton*
Christopher R. Shiplett**
Benjamin D. Pelton***
of counsel

PO Box 100637
Arlington, VA 22210
T: 703.525.8009
F: 703.525.8089

*NJ Bar
** VA Bar
*** VA MD & NY Bar
erikpelton.com

TOTAL NUMBER OF PAGES (including cover):3

COMMENTS:

See attached.

**If there are any transmission errors or questions regarding this fax, please contact
Erik M. Pelton & Associates, PLLC**

| | | |
|------------------|--------------|---------------------|
| <i>telephone</i> | <i>fax</i> | <i>email</i> |
| 703-525-8009 | 703-525-8089 | emp@tm4smallbiz.com |

TRANSMISSION VERIFICATION REPORT

TIME : 11/26/2007 13:15
NAME :
FAX : 7035258089
SER. # : BRDL5F987563

| | |
|--------------|-----------------|
| DATE, TIME | 11/26 13:14 |
| FAX NO./NAME | 3104491394 |
| DURATION | 00:00:49 |
| PAGE(S) | 03 |
| RESULT | OK |
| MODE | STANDARD ECM |