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Filing date: **11/13/2017**

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

Proceeding	91235147
Party	Plaintiff Fabricut, Inc.
Correspondence Address	PENINA MICHLIN CHIU FREDERIC DORWART LAWYERS PLLC 124 EAST FOURTH STREET, OLD CITY HALL TULSA, OK 74103 UNITED STATES Email: pchiu@fdlaw.com
Submission	Motion to Compel Discovery or Disclosure
Filer's Name	Penina Michlin Chiu
Filer's email	pchiu@fdlaw.com, jburden@fdlaw.com
Signature	/Penina Michlin Chiu/
Date	11/13/2017
Attachments	2017-11-13 Motion to Compel.pdf(1036255 bytes )

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

FABRICUT, INC., an	)	
Oklahoma corporation,	)	Opposition No.: 91235147
	)	
Opposer,	)	IN THE MATTER OF
	)	
	)	Application Serial No.: 86/754,994
	)	Filed: September 12, 2015
v.	)	Mark: <b>FABRI CUT</b>
	)	Class: 08
	)	Published: June 6, 2017
NOEL EDWARD HARVEY, an	)	
individual and citizen of the	)	
United Kingdom,	)	
Applicant.	)	

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**OPPOSER’S MOTION TO COMPEL**

Pursuant to TBMP §523.01 and 37 C.F.R. § 2.120(f), Opposer Fabricut, Inc. hereby moves to compel Applicant Noel Edward Harvey to respond to Opposer’s First Request for Production of Documents and First Set of Interrogatories (collectively referred to herein as “*Discovery Requests*”). In support, Opposer states:

1. On October 5, 2017, Opposer served its Discovery Requests on counsel for Mr. Harvey by electronic transmission. A copy of the service transmission and the Discovery Requests are attached hereto as **Exhibit A**.
2. Pursuant to TBMP §403.03 and 37 §CFR 2.120(a)(3), Applicant’s responses to the Discovery Requests were due on November 6, 2017. No responses were received on this date.
3. On November 7, 2017 counsel for Opposer contacted counsel for Applicant, noted that no responses had yet-been received, and requested that the responses be served no later than November 10, 2017.

4. On November 8, 2017, counsel for Applicant stated that responses were forthcoming, but did not commit to making responses by any specific date. *See* email string attached hereto as **Exhibit B**.

5. To date, Opposer has received **no** responses or objections to its Discovery Requests.

6. Pursuant to TBMP §523.01 and 37 C.F.R. § 2.120, a motion to compel is appropriate where one party refuses to respond to discovery. Further, Opposer has made a good faith effort by correspondence, to resolve the issues presented by this motion, and has been unable to reach agreement with the Applicant. TBMP §523.02. This Motion is timely pursuant to TBMP §523.03.

7. A responding party forfeits its right to object to discovery where it is unable to show that its failure to respond was the result of excusable neglect. *See* TBMP § 403.03; *No Fear Inc. v. Rule*, 54 USPQ.2d 1551, 1554 (TTAB 2000) (stating that the Board has great discretion in determining whether such forfeiture should be found). In this instance, Applicant disregarded the discovery response deadline, did not object to the Discovery Requests, nor did Applicant request any extensions of time from Opposer. Despite this, Opposer followed up with Applicant, requested the discovery responses and provided additional time to Applicant, unprompted. Applicant continued to disregard even the extended deadline provided by Opposer. Under these circumstances the Board should exercise its discretion in determining that Applicant has forfeited its right to object to discovery.

WHEREFORE, Opposer respectfully requests that the Board enter an order compelling Applicant to respond to the Discovery Requests without objections and such further relief as the Board deems appropriate.

RESPECTFULLY SUBMITTED,

Dated: November 13, 2017

By: */Penina Michlin Chiu/*  
Penina Michlin Chiu, Cal. Bar No. 239431  
pchiu@fdlaw.com  
Jared Burden, OBA No. 30026  
jburden@fdlaw.com  
FREDERIC DORWART, LAWYERS PLLC  
124 East Fourth Street  
Tulsa, Oklahoma 74103  
918/583-9922 – Telephone  
918/583-8251 – Facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by electronic transmission on the 13<sup>th</sup> day of November, 2017, on counsel for Applicant at major@mwzb.com, culver@mwzb.com, and docketing@mwzb.com.

*/Jared Burden/*  
Jared Burden

# EXHIBIT A

## Burden, Jared

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**From:** Burden, Jared  
**Sent:** Thursday, October 5, 2017 9:04 AM  
**To:** 'major@mwzb.com'; 'culver@mwzb.com'; 'docketing@mwzb.com'  
**Cc:** Chiu, Penina; Simms, Amber  
**Subject:** Fabricut, Inc. v. Harvey, Opposition No. 91235147  
**Attachments:** 2017-10-05 - First Set of Interrogatories.pdf; 2017-10-05 First Request for Production of Documents.pdf

Dear Sirs,

Please find attached Opposer's first discovery requests in the above-captioned action. Don't hesitate to contact me if you have any questions.

Sincerely,

Jared M. Burden  
FREDERIC DORWART, LAWYERS  
Old City Hall  
124 East Fourth Street  
Tulsa, Oklahoma 74103  
(918) 583-9922 (Main)  
(918) 583-8251 (Fax)  
[jburden@fdlaw.com](mailto:jburden@fdlaw.com)

*This transmission is confidential. If you are not the intended recipient, you may not use or disclose it. If you have received this transmission in error, please notify the sender. No statement in this message (or an attachment) is intended to represent a legal opinion, and no such statement should be relied upon without requesting and obtaining from the sender confirmation in a manually signed writing. This communication is not intended by the sender to be used, and it cannot be used, for the purpose of avoiding penalties under United States federal tax laws.*

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

FABRICUT, INC., an	)	
Oklahoma corporation,	)	Opposition No.: 91235147
	)	
Opposer,	)	IN THE MATTER OF
	)	
	)	Application Serial No.: 86/754,994
	)	Filed: September 12, 2015
v.	)	Mark: <b>FABRI CUT</b>
	)	Class: 08
	)	Published: June 6, 2017
NOEL EDWARD HARVEY, an	)	
individual and citizen of the	)	
United Kingdom,	)	
Applicant.	)	

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**PLAINTIFF'S FIRST SET OF INTERROGATORIES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Opposer Fabricut, Inc. hereby requests that Applicant Noel Edward Harvey serve upon the undersigned attorneys at pchiu@fdlaw.com answers, under oath, to each of the following interrogatories within thirty (30) days of service of these interrogatories.

**DEFINITIONS**

1. "Opposer" means Fabricut, Inc., the Opposer in the above-captioned proceeding.
2. "Applicant", "you", or "your" means Applicant Noel Edward Harvey, his companies and any subsidiaries, divisions, predecessor and successor companies, affiliates, parents, any partnership or joint venture to which he may be a party, and/or each of the foregoing entities' employees, agents, officers, directors, representatives, consultants, accountants, and attorneys, including any person who served in any such capacity at any time during the relevant time period specified herein.

3. "Opposer's Marks" means the marks identified in Paragraphs 2 and 7 and Exhibit A of the Notice of Opposition in this proceeding, including common law rights as well as the enumerated Registrations.

4. "Answer" means the Answer to Notice of Opposition filed by Applicant in this matter on July 13, 2017.

5. "Challenged Mark" means the mark for FABRI CUT that is the subject of U.S. Trademark Application Serial No. 86/754,994 and this proceeding, as well as the marks FABRI-CUT and FABRICUT that are the subject of the foreign registration upon which U.S. Serial no. 86/754,994 is based.

6. "Concerning" means consisting of, referring to, relating to, reflecting, or being in any way logically or factually connected with the matter discussed.

7. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

8. "Date" means the exact day, month, and year if ascertainable, or, if not, the best available approximation (including relationship to other events).

9. "Describe" means set forth fully and unambiguously every fact relevant to the subject of the interrogatory, of which you (including your agents and representatives) have knowledge or information.

10. "Document" is synonymous in meaning and equal in scope to its usage in FRCP 34(a)(1)(A). The term "document" refers to any document now or at any time in Applicant's possession, custody, or control. A person is deemed in control of a document if the person has any ownership, possession, or custody of the document, or the right to secure the document or a copy thereof from any person or public or private entity having physical possession thereof.



11. "Identify" with respect to a person who is an individual means to state that person's full name, present or last known address, and current or last known place of employment.

12. "Identify" with respect to a person that is not an individual means to state its: full name, legal form, date of organization, state of incorporation or organization or other business or license authority, present or last known address and telephone number, and the identity of its chief executive officer, partners, or persons in equivalent positions.

13. "Identify" with respect to a document means to give, to the extent known, the (a) type of document; (b) general subject matter; (c) date of the document; and (d) author(s), addressee(s) and recipient(s). In the alternative, the responding party may produce the documents, together with identifying information sufficient to satisfy Rule 33 of the Federal Rules of Civil Procedure.

14. "Identify" with respect to communications means to give, to the extent known, (a) a description of the substance of the communication; (b) the form of the communication (e.g., telephone, facsimile, email, etc.); (c) the identity of each person that was a party to and/or present at the time of the communication, as well as the full name, present or last known address, and the current or last known place of employment of each person; (d) the identity of the person whom you contend initiated the communication; and (e) the time, date, and place of the communication.

15. The term "mark" means any trademark, service mark, trade name, word, name, symbol, logo or device (including any key word or metatag) or any combination thereof.

16. The term "person" means any natural person or any legal entity, including, but not limited to, any business or governmental entity, organization, or association.

17. The terms "and" and "or" shall be construed either conjunctively or disjunctively as necessary to bring within the scope of the interrogatory all responses that might otherwise fall outside the scope of this interrogatory.

18. The terms "all," "any," or "each" encompass any and all of the matter discussed.

19. The use of singular form includes plural, and vice versa.

20. The use of present tense includes past tense, and vice versa.

21. The masculine form shall also be construed to include the feminine and vice versa.

### **INSTRUCTIONS**

1. Answers to these interrogatories shall be served upon the undersigned attorneys at pchiu@fdlaw.com within thirty (30) days of service of these interrogatories under oath.

2. Each interrogatory is to be answered fully based on information in your possession, custody, or control, or in the possession, custody, or control of your representatives, agents, or attorneys.

3. If you object to any interrogatory or any portion of an interrogatory on the ground that the answer reflects or would reveal the substance of a privileged communication, identify:

- a. the nature of the privilege claimed;
- b. the person who made the communication, whether oral or in writing;
- c. if the communication was oral, all persons present while the communication was made;
- d. if the communication was written, the author, addressees, and any other recipients;
- e. the relationship of the author of the communication to each recipient;
- f. the relationship of the persons present to the person who made the communication;

- g. the date and place of the communication; and
- h. the general subject matter of the communication.

4. Unless otherwise stated herein, these interrogatories cover the time period from January 1, 2012 up to and including the present.

5. Unless otherwise stated herein, these interrogatories apply to activities in or in connection with the United States and the United Kingdom.

6. If you respond to an interrogatory by reference to documents pursuant to Federal Rule of Civil Procedure 33(d), identify the documents with specificity, including by identifying the applicable Bates Number range to the extent the documents are produced in response to document requests in this proceeding.

7. For the convenience of the Board and the parties, each interrogatory should be quoted in full immediately preceding the response.

8. These interrogatories are continuing in nature. If you receive or otherwise become aware of information responsive to any interrogatory after you have served your answers to these interrogatories, you must promptly supplement your answers to these interrogatories to provide such information, as required by Federal Rule of Civil Procedure 26(e) and TBMP § 408.03.

### **INTERROGATORIES**

**INTERROGATORY NO. 1:** Describe in detail the facts and circumstances concerning your conception, creation, selection, and adoption of the Challenged Mark.

**INTERROGATORY NO. 2:** Identify all persons who participated in any way in the conception, creation, development, analysis, clearance, selection, approval, or adoption of the Challenged Mark.

**INTERROGATORY NO. 3:** Identify each trademark search, investigation, survey, or any other inquiry conducted by or for Applicant concerning the availability to use or register the Challenged Mark.

**INTERROGATORY NO. 4:** Identify each person involved in the review of any trademark search, investigation, or other inquiry conducted by or for Applicant concerning the availability to use or register the Challenged Mark.

**INTERROGATORY NO. 5:** Identify by jurisdiction and registration or serial number any and all federal, state, and international trademark registration(s) and application(s), whether current (including pending) or dead, for the Challenged Mark or any mark that resembles or incorporates the Challenged Mark in whole or in part.

**INTERROGATORY NO. 6:** Identify all goods and services that Applicant has offered for sale, sold, or provided under or in connection with the Challenged Mark in the United States or through websites accessible from the United States.

**INTERROGATORY NO. 7:** Identify all goods and services that Applicant has offered for sale, sold, or provided under or in connection with the Challenged Mark in the United Kingdom and European Community.

**INTERROGATORY NO. 8:** For each good or service that you have offered, sold, or provided under or in connection with the Challenged Mark, state the date ranges of actual and planned use of the Challenged Mark in connection with the good or service, including the specific date of first use or intended first use of the mark for each good or service.

**INTERROGATORY NO. 9:** For each good or service that you have offered, sold, or provided under or in connection with the Challenged Mark, state the suggested or expected retail price of the good or service.

**INTERROGATORY NO. 10:** Describe the nature of any advertisements, promotional materials, and marketing materials (for example, newspaper advertisements, magazine advertisements, internet websites, television commercials, brochures), including by identifying the specific media (for example, *The New York Times*, *Time* magazine, Google.com, CBS Network television) in which Applicant is using, has used, or plans to use the Challenged Mark.

**INTERROGATORY NO. 11:** Identify all persons who participated in or were or are responsible for the marketing, advertising, or distribution of any goods or services offered for sale, sold, or intended to be offered for sale or sold by or for Applicant under or in connection with the Challenged Mark.

**INTERROGATORY NO. 12:** Identify all website(s) displaying the Challenged Mark that are owned, operated, or controlled by Applicant or that display the Challenged Mark under an agreement with Applicant or under Applicant's authorization, and all persons who participated in or were or are responsible for the creation and development of each website.

**INTERROGATORY NO. 13:** Describe all market research conducted by or on behalf of Applicant concerning the Challenged Mark or any goods or services marketed or proposed to be marketed under the Challenged Mark, including the results of such research.

**INTERROGATORY NO. 14:** Describe all channels of trade in the United States through which Applicant has offered for sale, sold, or intends to offer for sale or sell goods or services under or in connection with the Challenged Mark.

**INTERROGATORY NO. 15:** Describe all classes and/or types of customers (for example, age, gender, socioeconomic group) that comprise the intended market for goods or services offered for sale, sold, or intended to be offered for sale or sold under or in connection with the Challenged Mark.

**INTERROGATORY NO. 16:** Identify the geographic regions in the United States in which Applicant has or has caused to be advertised, promoted, marketed, displayed, distributed, offered for sale, or sold, or plans or intends to advertise, promote, market, display, distribute, offer for sale, or sell, either directly or through others, any goods or services under or in connection with the Challenged Mark.

**INTERROGATORY NO. 17:** Identify by name and location all trade shows in the United States where goods or services under the Challenged Mark have been displayed, promoted, or sold.

**INTERROGATORY NO. 18:** Identify and describe all expenditures incurred by you in connection with the development, production, distribution, promotion, advertisement, and sale of any goods or services under the Challenged Mark, including by identifying the nature and amount of each expenditure.

**INTERROGATORY NO. 19:** State the profits derived from the sales of products or services bearing the Challenged Marks in the United States and an explanation of how such profits were calculated.

**INTERROGATORY NO. 20:** State the profits derived from the sales of products or services bearing the Challenged Marks in the United Kingdom and European Community and an explanation of how such profits were calculated.

**INTERROGATORY NO. 21:** Describe the date and circumstances of Applicant first becoming aware of Opposer's use and registration of Opposer's Marks.

**INTERROGATORY NO. 22:** Identify all agreements concerning the Challenged Mark by date, parties to the agreement, and the subject matter of the agreement.

**INTERROGATORY NO. 23:** Identify all agreements concerning goods or services sold or intended to be sold in connection with the Challenged Mark.

**INTERROGATORY NO. 24:** Describe in detail any communications between Applicant and any third party concerning Opposer or Opposer's Marks, and any actions taken by Applicant as a result of such communications.

**INTERROGATORY NO. 25:** Describe in detail any communications between Applicant and Opposer.

**INTERROGATORY NO. 26:** Describe each and every instance of which Applicant is aware in which any person has been in any way confused, mistaken, or deceived as to the origin or sponsorship of any goods or services sold or offered for sale under or in connection with the Challenged Mark.

**INTERROGATORY NO. 27:** Identify all marks and names of which Applicant is aware that are used or registered by third parties in connection with textiles, fabrics, trimmings, drapery hardware, wallcoverings, and cutting or sewing implements, and that include the term(s)/element(s) FABRI and/or CUT.

**INTERROGATORY NO. 28:** Describe all facts that would support a contention that Applicant owns any rights in the Challenged Mark.

**INTERROGATORY NO. 29:** Describe all facts and circumstances that support Applicant's allegation in Paragraph 11 of the Answer denying that the Challenged Mark is similar to Opposer's Mark.

**INTERROGATORY NO. 30:** Describe all facts and circumstances that support Applicant's allegation in Paragraph 13 of the Answer denying that the Challenged Mark will cause confusion with Opposer's Mark.

**INTERROGATORY NO. 31:** Describe all facts and circumstances that support Applicant's allegation in Paragraph 15 of the Answer denying that the Challenged Mark merely describes a characteristic, function or feature of Applicant's goods.

**INTERROGATORY NO. 32:** Describe all facts and circumstances that support Applicant's allegation in Paragraph 16 of the Answer contending that Applicant is entitled to a priority date or registration based on Section 44(d) or 44(e) of the Trademark Act.

**INTERROGATORY NO. 33:** Identify and describe all administrative proceedings and litigation involving the Challenged Mark or any allegation that Applicant violated the trademark rights of any third party, other than this proceeding.

**INTERROGATORY NO. 34:** State Applicant's total annual sales of each good and service under or in connection with the Challenged Mark in the United States, for each year since Applicant first used the Challenged Mark.

**INTERROGATORY NO. 35:** State Applicant's total annual sales of each good and service under or in connection with the Challenged Mark in the United Kingdom and European Community, for each year since Applicant first used the Challenged Mark.

**INTERROGATORY NO. 36:** State Applicant's total annual advertising expenditures for goods and services under or in connection with the Challenged Mark for each year since Applicant first used the Challenged Mark.

**INTERROGATORY NO. 37:** Describe each communication, whether oral or written, that you made or received, including internal communications, regarding your selection of the Challenged Mark.

**INTERROGATORY NO. 38:** Identify all licenses relating to the Challenged Mark to which you are or were a party.



**INTERROGATORY NO. 39:** Identify all documents that were reviewed in preparing responses to these Interrogatories.

**INTERROGATORY NO. 40:** Identify all persons that furnished information for the responses to these interrogatories, designating the number of each interrogatory for which such persons furnished information.

RESPECTFULLY SUBMITTED,

Dated: October 5, 2017

By: /Penina Michlin Chiu/  
Penina Michlin Chiu, Cal. Bar No. 239431  
pchiu@fdlaw.com  
Jared Burden, OBA No. 30026  
jburden@fdlaw.com  
FREDERIC DORWART, LAWYERS  
124 East Fourth Street  
Tulsa, Oklahoma 74103  
918/583-9922 – Telephone  
918/583-8251 – Facsimile

**COUNSEL FOR OPPOSER, FABRICUT, INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by electronic transmission on the 5<sup>th</sup> day of October, 2017, on counsel for Applicant at major@mwzb.com, culver@mwzb.com, and docketing@mwzb.com.

/Jared Burden/  
Jared Burden

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

FABRICUT, INC., an	)	
Oklahoma corporation,	)	Opposition No.: 91235147
	)	
Opposer,	)	IN THE MATTER OF
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	)	Application Serial No.: 86/754,994
	)	Filed: September 12, 2015
v.	)	Mark: <b>FABRI CUT</b>
	)	Class: 08
	)	Published: June 6, 2017
NOEL EDWARD HARVEY, an	)	
individual and citizen of the	)	
United Kingdom,	)	
Applicant.	)	

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**OPPOSER’S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120, Opposer Fabricut, Inc. hereby requests that Applicant Noel Edward Harvey respond to the following requests for the production of documents and things by providing written responses thereto and producing for inspection and copying the documents and things requested herein to the offices of Opposer's attorneys, Frederic Dorwart Lawyers, PLLC, 124 East Fourth Street, Tulsa, OK 74103, Attn: Penina Michlin Chiu, within thirty (30) days of service of this request.

**DEFINITIONS**

1. "Opposer" means Fabricut, Inc., the Opposer in the above-captioned proceeding.
2. "Applicant", "you", or "your" means Applicant Noel Edward Harvey, his companies and any subsidiaries, divisions, predecessor and successor companies, affiliates, parents, any partnership or joint venture to which he may be a party, and/or each of the foregoing entities' employees, agents, officers, directors, representatives, consultants, accountants, and

attorneys, including any person who served in any such capacity at any time during the relevant time period specified herein.

3. "Opposer's Marks" means the marks identified in Paragraphs 2 and 7 and Exhibit A of the Notice of Opposition in this proceeding, including common law rights as well as the enumerated Registrations.

4. "Challenged Mark" means the mark for FABRI CUT that is the subject of U.S. Trademark Application Serial No. 86/754,994 and this proceeding, as well as the marks FABRI-CUT and FABRICUT that are the subject of the foreign registration upon which U.S. Serial No. 86/754,994 is based.

5. "Answer" means the Answer to Notice of Opposition filed by Applicant in this matter on July 13, 2017.

6. "Concerning" means consisting of, referring to, relating to, reflecting, or being in any way logically or factually connected with the matter discussed.

7. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

8. "Document" is synonymous in meaning and equal in scope to its usage in FRCP 34(a)(1)(A). The term "document" refers to any document now or at any time in Applicant's possession, custody, or control. A person is deemed in control of a document if the person has any ownership, possession, or custody of the document, or the right to secure the document or a copy thereof from any person or public or private entity having physical possession thereof.

9. The term "mark" means any trademark, service mark, trade name, word, name, symbol, logo or device (including any key word or metatag) or any combination thereof.

10. The terms "and" and "or" shall be construed either conjunctively or disjunctively as necessary to bring within the scope of the interrogatory all responses that might otherwise fall outside the scope of this interrogatory.

11. The terms "all," "any," or "each" encompass any and all of the matter discussed.

12. The use of singular form includes plural, and vice versa.

### **INSTRUCTIONS**

1. All documents are to be produced as they are kept in the usual course of business with any identifying labels, file markings, or similar identifying features, and shall be organized and labeled to correspond to the categories requested herein. If there are no documents in response to a particular request or if you withhold any responsive documents or categories of documents based on any objections, you shall state so in writing.

2. Electronically stored information (ESI) must be produced in its original native format with its accompanying metadata.

3. These requests call for the production of all responsive documents in your possession, custody, or control, or in the possession, custody, or control of your employees, predecessors, successors, parents, subsidiaries, divisions, affiliates, partners, joint venturers, brokers, accountants, financial advisors, representatives, and agents or other persons acting on your behalf, without regard to the physical location of such documents.

4. If any document was, but no longer is, in your possession, subject to your control, or in existence, include a statement:

- (a) identifying the document;
- (b) describing where the document is now;
- (c) identifying who has control of the document;

(d) describing how the document became lost or destroyed or was transferred;  
and

(e) identifying each of those persons responsible for or having knowledge of the loss, destruction, or transfer of this document from your possession, custody, or control.

5. Each request contemplates production of all documents in their entirety. If a portion of a document is responsive to one or more requests, the document shall be produced in its entirety.

6. If any document is withheld in whole or in part for any reason including, without limitation, a claim of privilege or other protection from disclosure such as the work product doctrine, business confidentiality, or trade secret protection, set forth separately with respect to each such document:

(a) the ground of privilege or protection claimed;

(b) each and every basis under which the document is withheld;

(c) the type of document;

(d) its general subject matter;

(e) the document's date; and

(f) other information sufficient to enable a full assessment of the applicability of the privilege or protection claims, as required by FRCP 26(b)(5) and TBMP § 406.04(c).

7. To the extent you assert that a document contains information that should be protected from disclosure (based on the attorney-client privilege, work product doctrine, or another protection) and non-privileged information, the non-privileged portions of the document must be produced. For each such document, indicate the portion of the document withheld by stamping the words "MATERIAL REDACTED" on the document in an appropriate location that does not obscure the remaining text.

8. Unless otherwise stated herein, all documents requested are for the period commencing January 1, 2012 up to and including the present.

9. Unless otherwise stated herein, all document requests apply to activities in or in connection with the United States and the United Kingdom.

10. For the convenience of the Board and the parties, each document request should be quoted in full immediately preceding the response.

11. These requests are continuing, and your response to these requests must be promptly supplemented when appropriate or necessary in accordance with Federal Rule of Civil Procedure 26(e) and TBMP § 408.03.

### **REQUESTS FOR PRODUCTION**

**DOCUMENT REQUEST NO. 1:** All Documents identified in Applicant's initial disclosures pursuant to Federal Rule of Civil Procedure 26(a), dated September 25, 2017.

**DOCUMENT REQUEST NO. 2:** All Documents identified in response to Opposer's First Set of Interrogatories.

**DOCUMENT REQUEST NO. 3:** All Documents relied upon by Applicant in drafting the Answer.

**DOCUMENT REQUEST NO. 4:** All Documents concerning the allegation in Paragraph 11 of the Answer denying that the Challenged Mark is similar to Opposer's Mark.

**DOCUMENT REQUEST NO. 5:** All Documents concerning the allegation in paragraph Paragraph 13 of the Answer denying that the Challenged Mark will cause confusion with Opposer's Mark.

**DOCUMENT REQUEST NO. 6:** All Documents concerning the allegation in paragraph Paragraph 15 of the Answer denying that the Challenged Mark merely describes a characteristic, function or feature of Applicant's goods.

**DOCUMENT REQUEST NO. 7:** All Documents concerning the allegation in paragraph Paragraph 16 of the Answer contending that Applicant is entitled to a priority date or registration based on Section 44(d) or 44(e) of the Trademark Act.

**DOCUMENT REQUEST NO. 8:** All Documents concerning Applicant's consideration, selection, conception, creation, or adoption of the Challenged Mark for use on or in connection with any goods or services.

**DOCUMENT REQUEST NO. 9:** Documents sufficient to show the circumstances of Applicant's first use of the Challenged Mark anywhere in the United States and/or on a website accessible from the United States, including, but not limited to, the time, place, and manner of such use.

**DOCUMENT REQUEST NO. 10:** Documents sufficient to show the circumstances of Applicant's first use of the Challenged Mark anywhere in the United Kingdom or European Community, including, but not limited to, the time, place, and manner of such use.

**DOCUMENT REQUEST NO. 11:** All Documents concerning any federal trademark or service mark application filed by Applicant for the Challenged Mark, including, but not limited to, all Documents concerning the decision to file the application and copies of all documents submitted to or received from the United States Patent and Trademark Office in connection with the application.

**DOCUMENT REQUEST NO. 12:** All Documents concerning any state trademark registrations sought or obtained by Applicant for the Challenged Mark, including, but not limited to, copies of all documents submitted to or received from any state trademark registration agency.

**DOCUMENT REQUEST NO. 13:** All Documents concerning any United Kingdom or European Community trademark registrations sought or obtained by Applicant for the Challenged Mark, including, but not limited to, copies of all documents submitted to or received from any state trademark registration agency.

**DOCUMENT REQUEST NO. 14:** Documents sufficient to identify all goods and services actually or planned or intended to be sold, offered, or licensed by Applicant under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 15:** Documents sufficient to identify all words, terms, phrases, and other designations used by Applicant to categorize, describe, or define the goods and services actually or intended to be sold, offered, or licensed by Applicant under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 16:** All Documents concerning any assessment, evaluation or consideration by Applicant of how to categorize, describe, or define the goods and services actually or planned or intended to be sold, offered, provided, or licensed under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 17:** Documents sufficient to show any plans for development or expansion of the goods or services that are offered, sold, provided, or licensed in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 18:** Documents sufficient to identify all channels of trade through which Applicant advertises, promotes, distributes, sells, offers, or licenses, or plans to advertise, promote, distribute, sell, offer, or license, any goods or services under or in connection with the Challenged Mark, including, but not limited to, documents identifying the distributors, retail, or



other business outlets that offer or will offer Applicant's goods or services in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 19:** Documents sufficient to identify the geographic regions in the United States in which Applicant has or has caused to be advertised, promoted, distributed, sold, offered, or licensed, or plans or intends to advertise, promote, distribute, sell, offer, or license, any goods or services under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 20:** Documents sufficient to show each visual, oral, and other manner in which Applicant has presented or authorized the presentation of the Challenged Mark, including, but not limited to, all pronunciations of and typestyles, fonts, typefaces, designs, shapes, graphics, and colors used for or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 21:** Representative samples of each type of advertisement and promotional material (e.g., print, radio, television, brochures, catalogues, flyers, press releases, website pages, website banners, in-store displays, point-of-sale promotional items) that has displayed or that will display the Challenged Mark, including documents sufficient to show every manner of presentation of the Challenged Mark in each type of advertisement or promotional material.

**DOCUMENT REQUEST NO. 22:** Representative samples of all tags, labels, signs, and packaging that have displayed or that will display the Challenged Mark, including documents sufficient to show every manner of presentation of the Challenged Mark in such materials.

**DOCUMENT REQUEST NO. 23:** All newspaper, magazine, newsletter, trade journal, website, and other media coverage, in any form or medium (print, electronic, or other), concerning the Challenged Mark, whether or not authored by any official member of the press.

**DOCUMENT REQUEST NO. 24:** Documents sufficient to identify all persons actually or intended to be employed, retained, or engaged by Applicant to advertise, market, distribute or promote the Challenged Mark or any goods or services under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 25:** Documents sufficient to identify the target purchasers or potential purchasers of goods or services actually or planned or intended to be sold, offered, distributed, or licensed by Applicant under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 26:** All Documents concerning or identifying any person to or with whom Applicant has marketed, sold, offered, distributed, or licensed, or intends to market, sell, offer, distribute or license any goods or services under or in connection with any Challenged Mark.

**DOCUMENT REQUEST NO. 27:** Documents sufficient to identify each price at which Applicant has marketed, sold, offered, distributed, or licensed, or intends to market, sell, offer, distribute, or license, any goods or services in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 28:** Documents sufficient to identify any graphic, package, product, or other designers contacted or engaged by Applicant with respect to the preparation of any materials bearing or otherwise using the Challenged Mark, and all Documents concerning Communications between Defendant and each designer.

**DOCUMENT REQUEST NO. 29:** All Documents concerning Applicant's knowledge of Opposer or Opposer's Mark, including, but not limited to, all Documents concerning Communications about or with Opposer or about Applicant's awareness of Opposer's use of any of Opposer's Marks.

**DOCUMENT REQUEST NO. 30:** All Documents concerning any trademark searches, trademark clearances, internet print-outs, and other inquiries conducted by or on behalf of Applicant concerning the availability to use or register the Challenged Mark.

**DOCUMENT REQUEST NO. 31:** All Documents concerning any opinion letter, analysis, or other Communication concerning whether Applicant has the freedom, right, or ability to use or register the Challenged Mark as a trademark, service mark, domain name, or other designation of origin, including the opinion Document and Documents sufficient to show the identity of the individual or entity that requested the opinion, when the opinion was requested, and who prepared the opinion.

**DOCUMENT REQUEST NO. 32:** All studies, surveys, investigations, research, development, analyses, or opinions concerning the Challenged Mark, including, but not limited to, any such Documents comparing the Challenged Mark to any of Opposer's Marks or concerning any actual confusion or likelihood of confusion between the Challenged Mark (or any mark that incorporates in whole or in part the Challenged Mark or is similar thereto) and any of Opposer's Marks.

**DOCUMENT REQUEST NO. 33:** Documents sufficient to show any complaint, petition, demand, objection, administrative proceeding, or civil action made or brought by or against Applicant in which any trademark, trade dress, dilution, unfair competition, copyright, or domain name claims were asserted.

**DOCUMENT REQUEST NO. 34:** All Documents concerning any complaint, petition, demand, objection, administrative proceeding, or civil action concerning the Challenged Mark.

**DOCUMENT REQUEST NO. 35:** All Documents concerning any instances of actual or possible confusion, mistake, deception, or association of any kind between Opposer, any of Opposer's

Marks or Opposer's goods or services on the one hand, and Applicant, the Challenged Mark or Applicant's goods or services on the other hand.

**DOCUMENT REQUEST NO. 36:** All Documents concerning any Communications in which any person inquired about, commented on or mentioned Opposer, Opposer's Mark, or Opposer's goods or services in any way.

**DOCUMENT REQUEST NO. 37:** All Documents concerning any consumer, governmental, or other complaints or investigations concerning the goods or services sold, offered, distributed, or licensed by Applicant under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 38:** Documents sufficient to show the volume (in dollars and units) of annual sales of all goods or services sold or licensed under or in connection with the Challenged Mark for each of the last five years.

**DOCUMENT REQUEST NO. 39:** Documents sufficient to show, for each of the last five years, all costs and amounts expended by Applicant and its licensees to promote, market, and advertise goods or services actually or planned or intended to be sold, offered, distributed, provided, or licensed under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 40:** All agreements between or among Applicant and any other person concerning the Challenged Mark or goods and services sold or planned to be sold in connection with the Challenged Mark, or the actual or planned manufacture, advertisement, promotion, marketing, distribution, sale, offer, or licensing of any goods or services under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 41:** Documents sufficient to identify all third parties that did, do or will manufacture, sell, offer, distribute or license goods or services under or in connection with the Challenged Mark.

**DOCUMENT REQUEST NO. 42:** Documents sufficient to show Applicant's registration, licensing, current or previous ownership, or transfer of any domain name that incorporates the Challenged Mark, in whole or in part.

**DOCUMENT REQUEST NO. 43:** All Documents concerning Opposer or any goods or services sold, offered, or licensed, directly or indirectly, by or on behalf of Opposer under or in connection with any of Opposer's Marks that are not responsive to or that you are not otherwise producing in response to any other request contained herein.

**DOCUMENT REQUEST NO. 44:** Documents sufficient to show all third party marks of which Applicant is aware that resemble or are similar to the Challenged Mark or any of Opposer's Marks and that are used or registered in connection with textiles, fabrics, trimmings, hardware, wallcoverings, and cutting or sewing implements.

**DOCUMENT REQUEST NO. 45:** To the extent not produced in response to the foregoing requests, all Documents that support or refute Applicant's defense of this proceeding, including, but not limited to, any Documents that support or refute any factual allegations or legal theories or conclusions Applicant has presented or relied on or intends to present or rely on in connection with such defense.

**DOCUMENT REQUEST NO. 46:** All articles of organization, operating agreements, by-laws, organization charts, and certificates of authority of any predecessor or affiliated entity providing products or services under the Challenged Mark.

RESPECTFULLY SUBMITTED,

Dated: October 5, 2017

By: /Penina Michlin Chiu/  
Penina Michlin Chiu, Cal. Bar No. 239431  
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918/583-8251 – Facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by electronic transmission on the 5<sup>th</sup> day of October, 2013, on counsel for Applicant at major@mwzb.com, culver@mwzb.com, and docketing@mwzb.com.

/Jared Burden/  
Jared Burden

# EXHIBIT B

## Burden, Jared

---

**From:** Scott Major <major@mwzb.com>  
**Sent:** Wednesday, November 8, 2017 7:24 PM  
**To:** Burden, Jared; Michael Culver; Millen, White, Zelano & Branigan, P.C.  
**Cc:** Chiu, Penina; Simms, Amber  
**Subject:** RE: Fabricut, Inc. v. Harvey, Opposition No. 91235147

Jared,

We are working on the responses. Of course, we had been hopeful that your client would accept our side's entirely reasonable settlement offer.

Scott

---

**From:** Burden, Jared [mailto:JBurden@fdlaw.com]  
**Sent:** Tuesday, November 07, 2017 5:19 PM  
**To:** Scott Major; Michael Culver; Millen, White, Zelano & Branigan, P.C.  
**Cc:** Chiu, Penina; Simms, Amber  
**Subject:** RE: Fabricut, Inc. v. Harvey, Opposition No. 91235147

Dear Sirs,

Fabricut's first discovery requests were served via email on October 5, 2017. Pursuant to 37 CFR 2.120 and TBMP 403.03, responses should have been served no later than yesterday, November 6, 2017. To date, we have not received responses, nor have we received any objections or requests for extension. Please provide responses no later than Friday, November 10. Failing that, Fabricut will move to compel responses. Please contact me if you have any questions or would like to discuss.

Sincerely,

---

**From:** Burden, Jared  
**Sent:** Thursday, October 05, 2017 9:04 AM  
**To:** [major@mwzb.com](mailto:major@mwzb.com); [culver@mwzb.com](mailto:culver@mwzb.com); [docketing@mwzb.com](mailto:docketing@mwzb.com)  
**Cc:** Chiu, Penina <[PChiu@fdlaw.com](mailto:PChiu@fdlaw.com)>; Simms, Amber <[asimms@fdlaw.com](mailto:asimms@fdlaw.com)>  
**Subject:** Fabricut, Inc. v. Harvey, Opposition No. 91235147

Dear Sirs,

Please find attached Opposer's first discovery requests in the above-captioned action. Don't hesitate to contact me if you have any questions.

Sincerely,

Jared M. Burden  
FREDERIC DORWART, LAWYERS  
Old City Hall  
124 East Fourth Street  
Tulsa, Oklahoma 74103  
(918) 583-9922 (Main)  
(918) 583-8251 (Fax)



[jburden@fdlaw.com](mailto:jburden@fdlaw.com)

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