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

Proceeding	92044624
Party	Plaintiff J. Christopher Carnovale
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Date	08/14/2008
Attachments	brandexp.pdf (62 pages)(2440960 bytes)

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

J. CHRISTOPHER CARNOVALE :
Petitioner :
v. : Canc. No. 92044624
THE BRAND EXPERIENCE LLC :
Registrant :

PETITIONER’S MOTION TO COMPEL DISCOVERY OR FOR SANCTIONS

Petitioner J. Christopher Carnovale (“Petitioner”), by its undersigned counsel, hereby respectfully moves pursuant to Rules 33, 34, and 37 of the Federal Rules of Civil Procedure for entry of an Order compelling Registrant The Brand Experience LLC (“Registrant”) to fully and properly respond to Petitioner’s discovery requests, as follows:

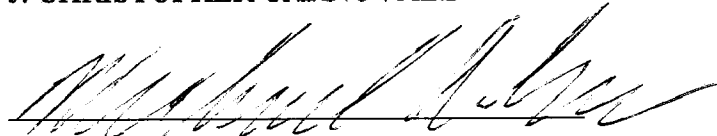
- (1) to provide answers to Petitioner’s First Set of Discovery Requests Nos. 1-37 and to produce responsive documents.
- (2) to provide complete answers to Applicant’s Interrogatory Nos. 2, 4, 6, 7, 8, 9, 11, 13, 15, 16, 20, 22, 25, 27, 28, 30 and 31.

Petitioner has repeatedly made good faith efforts to secure Registrant’s cooperation. Thus far, however, these efforts have been unsuccessful. The grounds for this motion are set forth in the accompanying Memorandum.

Respectfully submitted,

J. CHRISTOPHER CARNOVALE

By:

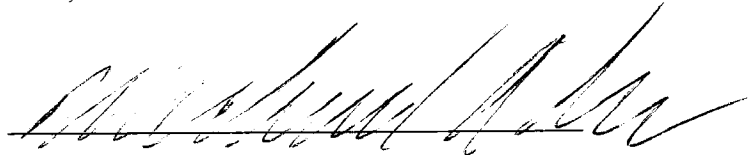


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Attorneys for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing is being served upon Registrant's counsel Wayne Harper of Greenberg Traurig, PA at Suite 650, 450 South Orange Avenue, Orlando, Florida 32801 by first class mail, postage prepaid, on Aug. 14, 2008.



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

J. CHRISTOPHER CARNOVALE :
Petitioner :
v. : Canc. No. 92044624
THE BRAND EXPERIENCE LLC :
Registrant :

**MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO COMPEL
DISCOVERY OR FOR SANCTIONS**

I. INTRODUCTION

Petitioner J. Christopher Carnovale ("Petitioner") is a Canadian citizen who has been engaged for many years in the clothing business. Petitioner owns all right, title and interest in and to the mark THE SUNSCREEN THAT NEVER WEARS OFF! for clothing products.

Petitioner has continuously used the mark THE SUNSCREEN THAT NEVER WEARS OFF! in connection with its clothing products for many years. Petitioner has filed Application No. 76/599,475, THE SUNSCREEN THAT NEVER WEARS OFF!, for men's ladies' and children's clothing, namely shirts, tops, blouses, jackets, cover-ups, skirts, pants, jumpsuits, robes, and hats, in Int. Class 25 ("the Mark").

On June 14, 2005, Petitioner filed Cancellation No. 92044624 seeking the cancellation of three registrations allegedly owned by Registrant:

Reg. No. 2,384,600, THE 50+ SUNSCREEN THAT WON'T RUB OFF;

Reg. No. 2,477,694 THE SUNSCREEN THAT WON'T RUB OFF; and

Reg. No. 2,593,603 SUNSCREEN KIDS WANT TO WEAR.

Registrant failed to file an answer to the Petition for Cancellation and, on April 25, 2006, the Board issued a default judgment granting the Petition. On February 22, 2007, Registrant filed a motion to vacate the default judgment alleging that it had never received the Petition for Cancellation and that it had become aware of the Cancellation proceeding only after its registrations had been cancelled. On November 13, 2007, the Board issued an order vacating the default judgment previously entered and resuming the proceeding.

On April 18, 2008, Petitioner served written interrogatories and requests for production on Registrant. Copies of Petitioner's interrogatories and requests for production are enclosed as Exhibit A. In these interrogatories and requests for production, Petitioner seeks information and documents relevant to the issues in this case including priority of rights, likelihood of confusion, and Registrant's apparent discontinuation of use of its marks. Answers to Petitioner's interrogatories and requests for production were due on or before May 23, 2008. On May 22, 2008, Registrant served its answers to Petitioner's first set of interrogatories. A copy of Registrant's answers is enclosed as Exhibit B. However, Registrant never served any answers to Petitioner's requests for production, nor contacted Petitioner to seek an extension of time.

On June 27, 2008, Petitioner's counsel sent to Registrant's counsel a deficiency letter specifically identifying the inadequacies in Registrant's answers to Petitioner's first set of interrogatories. The letter also noted that Registrant failed to serve answers to Petitioner's requests for production, which were more than one month past due at that time, and that Registrant had not produced any documents. A copy of Petitioner's deficiency letter is enclosed as Exhibit C. Petitioner asked Registrant to respond to the letter, to serve its answers to Petitioner's first set of interrogatories and to produce documents by July 2, 2008.

On July 2, 2008, Registrant's counsel sent an e-mail to Petitioner's counsel indicating

that he would respond by the following day, July 3, 2008. A copy of this e-mail is enclosed as Exhibit D. However, Registrant's counsel has never responded to Petitioner's deficiency letter and never served answers to Petitioner's discovery requests as promised. Answers to Petitioner's document requests are now more than two months late.

In a last attempt to solve this controversy, on July 11, 2008, Petitioner's counsel sent an e-mail to Registrant's counsel reiterating the request for an answer to the deficiency letter of June 27, 2008, and to the requests for production. Petitioner advised that it was not willing to waive its rights to obtain fully responsive answers and noted that it would seek the Board's intervention if Petitioner's good faith efforts were unsuccessful. A copy of this e-mail is enclosed as Exhibit E.

Petitioner's counsel also asked whether Registrant was willing to provide answer to Petitioner's requests for production, and to respond to the deficiency letter of June 27, 2008. Registrant's counsel never responded, and to date, after more one month and a half from Petitioner's counsel's letter of June 27, 2008, detailing the deficiencies in Registrant's answers to Petitioner's first set of interrogatories, and more than two months since the date Registrant's answers to Petitioner's requests for production were due, Registrant has not provided fully responsive answers to the interrogatories, and has not responded at all to the requests for production. Registrant's counsel has failed to even indicate when, or if, these responses will ever be provided, choosing to simply ignore Petitioner's counsel letter and e-mails.

Petitioner's repeated, unsuccessful attempts to obtain fully responsive answers show that Petitioner has complied with the parties' mutual obligation to engage in a good faith effort to resolve discovery disputes, and that Registrant has blatantly chosen to ignore Petitioner's requests.

This motion seeks an order compelling Registrant to provide complete answers to Petitioner's Interrogatory Nos. 2, 4, 6, 7, 8, 9, 11, 13, 15, 16, 20, 22, 25, 27, 28, 30, 31, and to serve its answers to Petitioner's requests for production without any objections, producing all documents responsive to the requests. (Registrant has produced a few documents without indicating how they are responsive to any of the requests).

II. ARGUMENT

A. Petitioner Should Be Compelled To Respond To Registrant's Interrogatories

Petitioner should be compelled to respond to Registrant's discovery requests because so far it has failed to meet its obligations under TBMP § 408, which provides that parties must "cooperate with one another in the discovery process."

1. Registrant's Answers to Interrogatories Nos. 2, 4, 6, 7, 8, 9, 11, 13, 15, 16, 20, 22, 25, 27, 28, 30, 31 Are Deficient

Interrogatory No. 2. Interrogatory No. 2 asked Registrant to identify all employees of Registrant or any other persons who have had responsibility for the marketing, advertising, or sale of any products or services under Registrant's Marks. In its answer, Registrant stated that Mark Schmidt is the sole person responsible for marketing. This answer is clearly insufficient, because Registrant failed to identify the person(s) responsible for the advertising or sale of any products. The information requested is relevant to this proceeding, is discoverable and should be provided. If there has been no advertising or sale, Registrant should so indicate. Otherwise, it should be compelled to provide the information sought.

Interrogatory No. 4 asked Registrant to identify and describe the facts relating to the acquisition or selection of Registrant's Marks, including without limitation the identity of the persons involved in the selection and the date of the selection of those marks. In its answer, Registrant merely stated that "Registrant" conceived the marks as a "visualized statement" of

how Registrant's products would allegedly benefit consumers, and explained how this marketing technique has been widely used in connection with global brands. Registrant failed to identify any fact related to the acquisition or selection of the marks, including the identity of any person(s) involved and the date(s) of the selection or acquisition. If no rights in the mark were acquired from another party, Registrant should so state and should indicate who selected the mark. The information sought is relevant to this proceeding and it is discoverable, thus Registrant should be compelled to provide it.

Interrogatory No. 6 asked Registrant to describe the facts related to the date(s) and manner in which each of Registrant's Marks was first used in connection with the sale or advertising of any products or services specifying the place(s) of said first sale; the first customer(s); the manner in which Registrant's Marks were first used in connection with said first sale (how the mark was displayed on containers, packaging or advertisements); and the nature of the products or services first sold under Registrant's Marks. In its answer, Registrant merely stated that "the dates and actual samples of materials which used Registrant's Marks are contained in the respective Trademark Applications Registrant filed for these Marks". This answer does not provide the requested information. The Applications referred to by Registrant contain only a claimed date of first use referring generally to the entire class, and only one specimen of use. Registrant failed to identify how each of Registrant's Marks was first used in connection with each product, the date and place of said first sale, the first customer, and the nature of the products first sold and the manner the mark was displayed in that first sale. The information sought by Petitioner is relevant to this cancellation proceeding, is discoverable and should be provided. Because Registrant failed to provide a responsive answer, notwithstanding

Petitioner's repeated requests, Registrant should be compelled to provide a fully responsive answer.

Interrogatory Nos. 7 and 8 asked Registrant to identify the period of time, if any, during which Registrant discontinued and resumed the sale of any such products under Registrant's Marks with respect to any of the products listed in its registrations. In its answer to Interrogatory No. 7 Registrant admitted that it "has not actively used Registration No. 2,384,600 for the past few years in actual marketing and sales materials". However, in response to this Interrogatory, Registrant stated that it allegedly had "a high profile, continuous use" of Registration No. 2,477,694 and Reg. No. 2,593,603 since their first use in the USA. These answers are not responsive since they refer to use of registrations and the interrogatories inquire as to use of marks. Registrant was asked to identify any period of time in which use of a mark was discontinued. This information is clearly relevant to the issues of validity and abandonment of Registrant's Marks, is discoverable and must be provided. Thus, Registrant should be compelled to amend its answer and provide the identification of each period of time in which any of its marks has not been used.

Interrogatory No. 9 asked Registrant to identify all persons who designed or made any materials or other items on which Registrant's Marks have ever been displayed, including without limitation any labels, hangtags, packages, containers, bags, clothing, signs, advertisements, brochures, sales literature, catalogs, artwork, Websites, or other materials. Registrant refused to provide an answer objecting that the information sought is a trade secret or confidential and that Registrant would not disclose the information in the absence of a protective order. Petitioner pointed out to Registrant that this objection is groundless and unacceptable because a standardized protective agreement is in place in this proceeding, under the TTAB

Rules. However, Registrant still refused to provide the information. Registrant also objected on the ground that that this Interrogatory allegedly requests information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. This objection is clearly also groundless. Individuals who prepared materials on which the marks have been displayed, may have relevant information concerning how, where and when the marks have been used. Because the objections raised are groundless, they should be withdrawn and Registrant should be compelled to provide them.

Interrogatory No. 11 asked Registrant to identify all persons who ever engaged in any communication including the communication of any opinion relating to any investigation or trademark search relating to Registrant's Marks. In its answer Registrant failed to identify these individuals, except for Mark Schmidt. The information sought is relevant and discoverable, and Registrant should be compelled to provide it.

Interrogatory No. 13 asked Registrant to identify the purchasers or classes of purchasers to whom Registrant has sold any products or services under Registrant's Marks. In its answer, Registrant merely alluded to "Trade Customers who purchase SUNSAFE products for sale to their customers", and direct customers who purchase SUNSAFE products directly from SUNSAFE catalog, web site or promotional events. This answer is clearly insufficient because it fails to properly identify the classes of purchasers. The terms "Trade Customers" is vague because it could encompass any type of retailers, including clothing wholesalers, high end department stores, clothing retailers, online stores, outlets, discount department stores. Registrant should identify which type of retailers purchased its products. The term "direct retail customers" does not identify a class of purchasers, but merely anyone who ever purchased SUNSAFE products not for resale. Because the information sought is relevant and discoverable,

Registrant should be compelled to supplement this answer by providing the identification of each class of purchasers of products sold under Registrant's Marks.

Interrogatory No. 15 and 16 asked Registrant to identify an annual basis for each year since Registrant's Marks were first used, the amount of revenue generated by the sale of products or services under Registrant's Marks, and the dollar amount spent on advertising products or services offered under Registrant's Marks. Registrant refused to provide a responsive answer objecting that the information sought is allegedly trade secret or confidential. Registrant stated that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, Registrant objection is unwarranted and should be withdrawn. Because the information sought is relevant to this proceeding and is discoverable, Registrant should be compelled to provide a fully responsive answer to this Interrogatory.

Interrogatory No. 20 sought facts relating to any market research, including any focus group study or survey relating to Registrant's Marks or the goods or services sold under the marks. Registrant refused to provide a responsive answer objecting that the information sought is allegedly trade secret or confidential. Registrant stated that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, Registrant's objection is not justified, and Registrant should be compelled to provide this relevant and discoverable piece of information.

Interrogatory No. 22 sought all oral or written agreements relating to Registrant's Marks, including without limitation all licenses, assignments, co-existence agreements, partnership agreements, or joint venture agreements. Registrant refused to provide a responsive answer objecting that the information sought is allegedly trade secret or confidential. Registrant stated that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, Registrant's objection is unjustified because under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, Registrant should be compelled to provide the information sought.

Interrogatory No. 25 sought all trade channels through which products or services have been sold under Registrant's Marks, including any retail stores, wholesale outlets, Internet websites, direct mail operations or other trade channels. Registrant stated that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, Registrant's objection should be withdrawn because under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, Registrant should be compelled to withdraw the objection and to provide the information sought.

Interrogatory No. 27 asked Registrant to identify each state or other geographic area where products bearing each of Registrant's Marks are currently being sold. In its answer, Registrant stated that it "continues to sell and/or advertise products under Registrant's Marks in all 50 United States, most US Territories and Internationally (including Canada)." This answer is insufficient and unacceptable, and seems to contradict at least one previous answer given by Registrant. In its answer to Interrogatory No. 7, Registrant admitted that it "has not actively

used” the mark identified in Reg. No. 2,384,600 “for the past few years”. Petitioner pointed out to Registrant that its answer to this interrogatory was deficient and that it contradicted other answers, but Registrant failed to answer to Petitioner’s remarks and to amend or supplement its answer to this interrogatory. Because the information sought is relevant and discoverable, Registrant should be compelled to answer to this interrogatory with a clear indication, for each of the Registrant’s Marks, of the states and geographic areas where products under said mark are currently sold.

Interrogatory No. 28 sought the identity of representative retail outlets or other locations in each state identified in the preceding interrogatory where products bearing Registrant’s Marks are currently being sold. Registrant refused to answer and alleged that the information sought is a trade secret or confidential. As already discussed above, because under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one, Registrant’s objection is unjustified and should be withdrawn. Accordingly, Registrant should be compelled to provide the information sought.

Interrogatory No. 30 sought the identity of each manufacturer that made each type of product currently being sold under each of Registrant’s Marks. Registrant refused to answer and alleged that the information sought is a trade secret or confidential. Registrant stated also that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, Registrant’s objection is unjustified and should be withdrawn, since under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Registrant also objected alleging that the information sought is not relevant to the issues in this proceeding. This objection is invalid and should be withdrawn. The information sought is relevant to this proceeding because it may lead

to discoverable information relating to the use of Registrant's Marks, the nature of the products sold under Registrant's Marks and the extent of use. Thus, Registrant should be compelled to withdraw the objection and provide the information sought.

Interrogatory No. 31 sought all facts on which Registrant bases each defense that Registrant intends to assert in the pending cancellation petition. In its answer, Registrant alleges that it "has had a high profile, continuous use of Registrations Nos. 2,384,600; 2,477,694; and 2,593,603 since their first use in the USA". However, in other answers (see answer to Interrogatory No. 7), Registrant admits that the mark identified in Reg. No. 2,384,600 has not been used for years. These answers are contradictory and must be revised. Moreover, Registrant alleges that "no evidence of a substantial investment in advertising and promoting its goods was uncovered by third party research conducted in 2001". However, Registrant never identified any third-party research conducted in 2001. Petitioner pointed out these inconsistencies to Registrant and asked Registrant to revise its answers to previous interrogatories concerning searches by providing information identifying the search referred to above, including without limitation the identity of the person(s) who conducted the search, the nature of the search, the date, and any document relating or referring to the search. However, Registrant failed to do so. Because the information sought is relevant and discoverable, Registrant should be compelled to revise its answers to previous interrogatories concerning searches by providing information identifying the search referred to above, including without limitation the identity of the person(s) who conducted the search, the nature of the search, the date, and any document relating or referring to the search.

B. Petitioner Should Be Compelled To Respond To Registrant's Requests For Production Without Objection And To Produce All Responsive Documents

1. Registrant Should Be Compelled to Serve Written Answers

Petitioner served its first set of requests for production (Req. Nos. 1-37) on April 18, 2008. Rule 34(b) of the Federal Rules of Civil Procedure provides that the "party upon who the request is served shall serve a written response within 30 days after service of the request." Thus, Registrant's answers were due by May 23, 2008. To date, Registrant has not provided any answers nor requested any extension, and Registrant's answers are now more than two months past due. Registrant never even indicated if and when it would provide its answers. Registrant's unreasonable lack of cooperation and refusal to respond to Petitioner's requests for production is preventing Petitioner from obtaining documents and information highly relevant to Petitioner's claims. Thus, Registrant should be compelled to provide fully responsive answers to Petitioner's requests for productions Nos. 1-37 with no objections.

1. Registrant Should Be Compelled to Produce All Documents Fully Responsive to Petitioner's Requests No. 1-37

Thus far, Registrant has produced only a few documents potentially responsive to only a few of the requests for production served in this proceeding. Accordingly, Registrant should also be compelled to provide all documents responsive to Petitioner's Requests for Production Nos. 1-37 as follows.

Request No. 1 sought all documents that Registrant was required to identify in its responses to Petitioner's first set of interrogatories, or from which it derived information used in preparing those responses.

Requests No. 2 sought documents referring or relating to the organizational structure of Registrant, including without limitation any articles of incorporation, by-laws, and lists of

Registrant's current or former officers, directors and managerial employees and/or descriptions of their duties and responsibilities.

Request No. 3 sought all documents referring or relating to the date(s) and manner in which Registrant or any of its current or former agents first learned of the use or intended use of Petitioner's Mark.

Request No. 4 sought all documents referring or relating to any partnership agreements or joint venture agreements referring or relating to Registrant's Marks that was entered into between Registrant and any other person or entity.

Request No. 5 sought all documents referring or relating to any of Registrant's current or former employees, managers and agents and/or descriptions of their duties and responsibilities.

Request No. 6 and 7 sought all documents relating to the selection, creation, design, decision to register, or registration of Registrant's Marks including, any minutes or notes from any meetings or any e-mails in which such topics were discussed, and all documents referring or relating to any trademark search or evaluation of any records conducted by or on behalf of Registrant to determine whether other persons had used or sought registration of Registrant's Marks, or any word or phrase similar to Registrant's Marks, or whether Registrant's use of Registrant's Marks would conflict with the rights of any person or entity.

Registrant failed to produce any documents responsive to Request Nos. 1 through 7 and it should be compelled to do so.

Request No. 8 and 9 sought representative samples of all documents or other materials on which Registrant's Marks have been displayed, and any correspondence, purchase orders, records of payment or invoices sent to or received from any printer or other person involved in the creation, of such materials. Registrant merely produced a handful of what appear to be

newspaper advertisements, and a photocopy of a label. The documents do not refer to all of the marks and Registrant failed to produce any other document responsive to Request Nos. 8 and 9.

Request No. 10 sought representative samples of all documents or other materials that identify explain or describe any products or services sold or intended for sale by Registrant under Registrant's Marks. Registrant produced a few of photocopies of advertisements and what appear to be copies of pages of a brochure. These do not refer to all of the products allegedly sold by Registrant under each of Registrant's Marks. Thus, Registrant should be compelled to produce all documents responsive to this request. If no additional documents responsive to this request exist, Registrant should so state.

Request No. 11 and 12 sought all documents referring or relating to the date and manner in which Registrant first used Registrant's Marks in connection with the sale of any product or service, and in connection with the advertising of each product or service ever offered under Registrant's Marks.

Request No. 13 and No. 14 sought documents relating to the annual amount of revenue derived from the sale of products or services sold under Registrant's Marks from the date of first use of Registrant's Marks to the present, and documents relating to the nature and annual amount of all advertising, promotional or product development expenditures incurred in connection with each product or service offered under Registrant's Marks from the date of first use to the present.

Requests No. 15 and 16 sought all documents referring or relating to Registrant's Marks that were ever sent to or received from any advertising agency, public relations firm, or design firm, and all marketing plans, media plans, business plans or other strategic planning documents referring or relating to Registrant's Marks or products or services offered or intended for sale under said Mark.

Request No. 18 sought all documents referring or relating to Registrant's Marks that Registrant has filed with or received from any federal, state or local governmental office or regulatory agency, including without limitation all documents filed or received in connection with any application to register Registrant's Marks.

Request No. 19 sought all documents relating to any third party use, registration or application to register any mark containing the phrase THE SUNSCREEN THAT WON'T RUB OFF or any similar words or phrases.

Requests No. 20 and 21 sought all documents referring or relating to any objections made by Registrant concerning the use or registration of any mark containing the phrase THE SUNSCREEN THAT WON'T RUB OFF or any similar words or phrases, and documents relating to any civil or administrative action or proceeding involving Registrant's Marks.

Requests No. 22 and No. 23 sought all documents referring or relating to the compliance or non-compliance by Registrant with federal, state and local laws and regulations in connection with products sold under Registrant's Marks and packaging labels and advertisements used in connection with such products, and all documents referring or relating to any complaints received from customers or others concerning any products or services sold under Registrant's Marks.

Registrant produced no documents responsive to Request Nos. 11 to 23. The documents are obviously relevant and Registrant should be compelled to produce them or state that no such documents exist.

Request No. 24 sought all documents referring or relating to any press release, newspaper article or other publication that has ever mentioned Registrant or any products or services sold or offered under Registrant's Marks. Registrant produced a few documents that may be responsive.

However, Registrant should state whether the documents produced are all responsive documents available, or if they are just a sample. And Registrant should be compelled to produce all documents responsive to this request, or to state that no additional responsive documents exist.

Requests No. 25 and 26 sought all documents relating to any instances of actual confusion that may have resulted from the similarity between Registrant's Marks and Petitioner's Mark, including misdirected mail, telephone calls or other communications received by Registrant that were intended for Petitioner, or other instances wherein any person or business entity has been confused, mistaken or deceived as a result of the use of Registrant's Marks or the similarity between the parties' marks, and all documents referring or relating to any action taken, or planned to be taken, by Registrant to identify or prevent any instances of actual confusion arising from the use of Registrant's Marks.

Request No. 27 sought all documents referring or relating to any surveys or other research that Registrant has commissioned, performed or considered performing, including research to determine whether there is any likelihood of confusion has Registrant's Marks and marks used or owned by Petitioner or any third party.

Requests No. 28 and 29 sought all documents referring or relating to the prospective customers for goods offered under Registrant's Marks, and all documents referring or relating to the sales methods or sales channels through which products or services have been sold or offered under Registrant's Marks.

Request No. 30 sought all documents referring or relating to communications between Registrant and any or its employees, agents or representatives regarding the use or registration of Registrant's Marks.

Request No. 31 sought all documents referring or relating to any licenses, assignments or other agreements referring or relating to Registrant's Marks.

Request No. 32 asked for representative samples of all mailing lists or other documents that identify Registrant's prospective customers.

Request No. 33 and 37 asked for all documents referring or relating to any domain names ever owned by Registrant containing the phrase the SUNSCREEN THAT WON'T RUB OFF or similar words or phrases, and for all documents referring or relating to any websites displaying Registrant's Marks.

Requests No. 34 and 35 asked for all documents referring to any persons with knowledge of the facts of this proceeding, and for all documents referring or relating to any witnesses or expert witnesses that Registrant may call to testify in this proceeding or on which any such expert intends to rely.

Request No. 36 sought all documents that Registrant intends to use during the testimony period or in any trial of this matter.

Registrant produced no document responsive to Request Nos. 25 to 36. Moreover, because no written responses were served, Petitioner cannot tell whether documents were not produced because no documents exist, or because Registrant is refusing to produce them. All of the documents sought are obviously relevant and discoverable. Any objection to production of documents has been waived and, therefore, Registrant should be compelled to produce them or to state that no responsive documents exist.

III. CONCLUSION

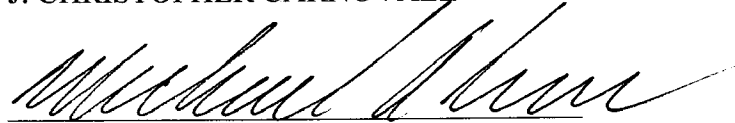
For the foregoing reasons, Petitioner respectfully requests an order compelling Registrant

(1) to provide complete answers to Petitioner's Interrogatory Nos. 2, 4, 6, 7, 8, 9, 11, 13, 15, 16, 20, 22, 25, 27, 28, 30, 31; and (2) to provide answers to Petitioner's Requests for Production Nos. 1-37 without objections, and to produce all documents responsive to these requests.

(1) to provide complete answers to Petitioner's Interrogatory Nos. 2, 4, 6, 7, 8, 9, 11, 13, 15, 16, 20, 22, 25, 27, 28, 30, 31; and (2) to provide answers to Petitioner's Requests for Production Nos. 1-37 without objections, and to produce all documents responsive to these requests.

J. CHRISTOPHER CARNOVALE

By:



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Attorneys for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion is being served upon Registrant's counsel Wayne Harper of Greenberg Traurig PA at Suite 650, 450 S. Orange Avenue, Orlando Florida 32801 by first class mail, postage prepaid this 14th day of August 2008.

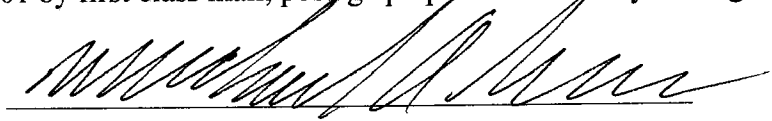


EXHIBIT A

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

J. CHRISTOPHER CARNOVALE :
Petitioner :
v. : Canc. No. 92044624
THE BRAND EXPERIENCE LLC :
Registrant :

PETITIONER'S FIRST SET OF INTERROGATORIES

Petitioner, J. Christopher Carnovale ("Petitioner") propounds the following interrogatories to be answered by Registrant, The Brand Experience LLC ("Registrant"), in writing under oath, within thirty (30) days pursuant to Rule 33 of the Federal Rule of Civil Procedure.

DEFINITIONS

The following definitions apply to these interrogatories and other discovery requests.

1. "Document" shall have the full meaning ascribed to it in Rule 34 of the Federal Rules of Civil Procedure, and shall include all tangible sources of information, including but not limited to: (a) the original and any non-identical copy (whether different from the original because of handwritten notes or underlining made thereon, attachments affixed thereto, or otherwise) or drafts thereof, of any handwritten, typewritten, printed, recorded, electronically stored or graphic matter, however produced or reproduced, including but not limited to charts, plans, drawings, art work, transparencies, sketches, blueprints, files, electronic mail, computer data and/or tapes, reports, travel reports, expense reports, memoranda, notes, minutes, letters and other correspondence, testimony, summaries, abstracts, studies, surveys, graphs, statistics, tables, forms, work papers, logs, indexes, drafts, advertisements, and scripts; and (b) any mechanical,

9. If at any time you obtain knowledge that the answer given in response to any interrogatory or document request was not correct when given or is no longer correct, a statement in writing under penalty of perjury consisting of the correct answer to such interrogatory shall be promptly provided.

10. If you contend that any item of information requested by the interrogatories or document requests is privileged, in whole or in part, as a ground for its non-production or non-disclosure, for each alleged privileged item or document, provide all information required by Rule 26 of the Federal Rules of Civil Procedure, the Local Rules and relevant case law.

INTERROGATORIES

1. Identify the persons who have the best knowledge concerning the facts at issue in this cancellation proceeding, including without limitation the use of Registrant's Marks in connection with each product or service sold or intended for sale under Registrant's Marks.

2. Identify all employees of Registrant or any other persons who have had responsibility for the marketing, advertising, or sale of any products or services under Registrant's Marks.

3. Describe the facts relating to the date and manner in which Registrant or its employees or agents first became aware of the use of Petitioner's Mark in the United States

4. Describe the facts related to the acquisition or selection of Registrant's Marks, including without limitation the names of persons involved in and the date of the selection.

5. Describe the nature of each product or service sold or intended for sale under Registrant's Marks, specifying which have been sold.

6. Describe the facts related to the date(s) and manner in which each of Registrant's Marks was first used in connection with the sale or advertising of any products or services

specifying the place(s) of said first sale, the first customer(s), the manner in which Registrant's Marks were first displayed in connection with said first sale, and the nature of the products or services first sold under Registrant's Marks.

7. State whether the use of any of Registrant's Marks has ever been discontinued for a period of one year with respect to any of the products listed in Registrant's Registrations.

8. If Registrant ever discontinued use of Registrant's Marks with respect to any of the products listed in its registrations, identify the period of time, if any, during which Registrant discontinued and resumed the sale of any such products under Registrant's Marks.

9. Identify all persons who designed or made any materials or other items on which Registrant's Marks have ever been displayed, including without limitation any labels, hangtags, packages, containers, bags, clothing, signs, advertisements, brochures, sales literature, catalogs, artwork, Websites, or other materials.

10. Describe the facts related to any investigation conducted with respect to Registrant's Marks, including any trademark search to determine whether other persons had used or registered a mark similar to Registrant's Marks and the records examined in any such search.

11. Identify all persons who ever engaged in any communication including the communication of any opinion relating to any investigation or trademark search relating to Registrant's Marks.

12. Describe the facts related to each instance in which a person has been actually confused, mistaken, or deceived with respect to the parties Marks, including any instance of confusion as to the identity or relationship of the parties to this proceeding, or the marks used on their goods and services, or the source of said goods or services.

13. Identify the purchasers or classes of purchasers to whom Registrant has sold any products or services under Registrant's Marks.
14. Identify all sales or distribution trade channels through which products or services have been or will be sold under Registrant's Marks.
15. Identify on an annual basis for each year since Registrant's Marks was first used, the amount of revenue generated by the sale of products or services under Registrant's Marks.
16. Identify on an annual basis for each year since Registrant's Marks first appeared in advertisements the dollar amount spent on advertising products or services offered under Registrant's Marks.
17. Identify all advertising and promotional methods or media used to advertise or promote the sale of any goods or services under Registrant's Marks.
18. Identify each advertising agency or public relations firm that has ever performed any services relating to Registrant's Marks.
19. Identify the date or dates on which Registrant first distributed or published advertisements or promotional materials bearing Registrant's Marks.
20. Describe the facts relating to any market research, including any focus group study or survey relating to Registrant's Marks or the goods or services sold under the marks.
21. Describe any actions taken by Registrant to identify or prevent any instances of confusion arising from the similarities between the parties' marks.
22. Identify all oral or written agreements relating to Registrant's Marks, including without limitation all licenses, assignments, co-existence agreements, partnership agreements, or joint venture agreements.

23. Describe all oral or written communications between Registrant and Petitioner including the substance of each communication.

24. Describe all proceedings, including civil actions, criminal actions or inter partes proceedings before any court, the Patent and Trademark Office or any administrative agency, relating to Registrant's Marks, specifying the names of all parties and status of each action or proceeding.

25. Describe all trade channels through which products or services have been sold under Registrant's Marks, including any retail stores, wholesale outlets, Internet websites, direct mail operations or other trade channels.

26. Identify each state or other geographic area where Registrant has ever sold products or services under Registrant's Marks.

27. Identify each state or other geographic area where products bearing each of Registrant's Marks are currently being sold.

28. Identify representative retail outlets or other locations in each state identified in the preceding interrogatory where products bearing Registrant's Marks are currently being sold

29. With respect to expert witnesses expected to be called to testify on Registrant's behalf in this proceeding, disclose all information required to be disclosed pursuant to the Federal Rules of Civil Procedure.

30. Identify each manufacturer that made each type of product currently being sold under each of Registrant's Marks.

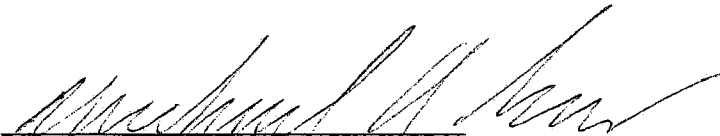
31. Describe all facts on which Registrant bases each defense that Registrant intends to assert in the pending cancellation petition.

32. Describe all facts on which Registrant bases each denial of the allegations contained in the cancellation petition.

33. Identify each person who provided information or otherwise assisted in the preparation of answers to the foregoing interrogatories specifying the information which (s)he provided.

If the response to any interrogatory is believed by Registrant to contain confidential information or trade secrets, it should be so designated in accordance with the protective order in effect in this proceeding..

J. CHRISTOPHER CARNOVALE

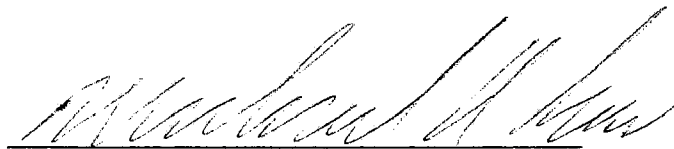
By 

Michael A. Grow
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
202-857-6389

Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petitioner's first set of interrogatories is being served upon Registrant's counsel Wayne Harper of Greenberg Traurig, PA at Suite 650, 450 South Orange Avenue, Orlando, Florida 32801 by first class mail, postage prepaid, on April 18, 2008.



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

J. CHRISTOPHER CARNOVALE	:	
		Petitioner
		:
		v.
		:
		Canc. No. 92044624
THE BRAND EXPERIENCE LLC	:	
		Registrant
		:

PETITIONER'S FIRST REQUEST FOR PRODUCTION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, and the Trademark Rules of Practice., Petitioner, J. Christopher Carnovale ("Petitioner"), hereby requests that Registrant, The Brand Experience LLC ("Registrant"), produce for inspection and copying the documents listed below, at the offices of Arent Fox LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036, within thirty (30) days of the date of service of this request or at such other time and place as may be mutually agreed upon by the parties.

This request seeks the production of documents as of the date on which Registrant responds and, as to those requests falling within Rules 26(e)(1) and (2) of the Federal Rules of Civil Procedure, shall be deemed continuing, requiring Registrant to serve upon Petitioner such further responses promptly after Registrant has acquired additional knowledge or information.

If Registrant is aware with respect to any request that any responsive document once existed but has been destroyed, identify the document, the person who destroyed it, why it was destroyed, and the manner in which it was destroyed.

DEFINITIONS AND INSTRUCTIONS

The definitions and instructions set forth in Petitioner's first set of interrogatories are incorporated herein by reference and made a part hereof.

CLAIM OF PRIVILEGE

If you contend that documents responsive to any request are privileged, in whole or in part, as a ground for their non-production and/or production in redacted form, for each allegedly privileged document provide all information required by Rule 26(b)(5) of the Federal Rules of Civil Procedure, including but not limited to: (1) state expressly the factual and legal grounds for exclusion, and (2) for each document provide the: (a) author, (b) title, (c) date, (d) addressee(s), recipient(s) and/or distributee(s), (e) type of document, and (f) subject matter.

DOCUMENT REQUESTS

1. All documents that Registrant was required to identify in its responses to Petitioner's first set of interrogatories, or from which it derived information used in preparing those responses.
2. Documents referring or relating to the organizational structure of Registrant, including without limitation any articles of incorporation, by-laws, and lists of Registrant's current or former officers, directors and managerial employees and/or descriptions of their duties and responsibilities.
3. All documents referring or relating to the date(s) and manner in which Registrant or any of its current or former agents first learned of the use or intended use of Petitioner's Mark.

4. All documents referring or relating to any partnership agreements or joint venture agreements referring or relating to Registrant's Marks that was entered into between Registrant and any other person or entity.

5. All documents referring or relating to any of Registrant's current or former employees, managers and agents and/or descriptions of their duties and responsibilities.

6. All documents referring or relating to the selection, creation, design, decision to register, or registration of Registrant's Marks including without limitation, any minutes or notes from any meetings or any e-mails in which such topics were discussed.

7. All documents referring or relating to any trademark search or evaluation of any records conducted by or on behalf of Registrant to determine whether other persons had used or sought registration of Registrant's Marks, or any word or phrase similar to Registrant's Marks, or whether Registrant's use of Registrant's Marks would conflict with the rights of any person or entity.

8. Representative samples of all documents or other materials on which Registrant's Marks has been displayed, including without limitation, all signs, labels, packages, containers, hangtags, bags, clothing, advertisements, flyers, brochures, handbills, Websites, sales literature, stationery, business cards, decals, badges, or other materials.

9. All documents referring or relating to the creation, design, printing or manufacture of any materials on which Registrant's Marks has ever been displayed, including without limitation, any correspondence, purchase orders, records of payment or invoices sent to or received from any printer or other person involved in such creation, design, development, or manufacture.

10. Representative samples of all documents or other materials that identify explain or describe any products or services sold or intended for sale by Registrant under Registrant's Marks.

11. All documents referring or relating to the date and manner in which Registrant first used Registrant's Marks in connection with the sale of any product or service.

12. All documents referring or relating to the date and manner in which Registrant first used Registrant's Marks in connection with the advertising of each product or service ever offered under Registrant's Marks.

13. All documents referring or relating to the annual amount of revenue derived from the sale of products or services sold under Registrant's Marks from the date of first use of Registrant's Marks to the present, including without limitation all financial reports or sales summaries referring or relating to such sales.

14. All documents referring or relating to the nature and annual amount of all advertising, promotional or product development expenditures incurred in connection with each product or service offered under Registrant's Marks from the date of first use to the present.

15. All documents referring or relating to Registrant's Marks that were ever sent to or received from any advertising agency, public relations firm, or design firm.

16. All marketing plans, media plans, business plans or other strategic planning documents referring or relating to Registrant's Marks or products or services offered or intended for sale under said Mark.

17. All documents referring or relating to any meetings, correspondence, telephone calls or other communications between Registrant and Petitioner.

18. All documents referring or relating to Registrant's Marks that Registrant has filed with or received from any federal, state or local governmental office or regulatory agency, including without limitation all documents filed or received in connection with any application to register Registrant's Marks.

19. All documents referring or relating to any third party use, registration or application to register any mark containing the phrase THE SUNSCREEN THAT WON'T RUB OFF or any similar words or phrases.

20. All documents referring or relating to any objections made by Registrant concerning the use or registration of any mark containing the phrase THE SUNSCREEN THAT WON'T RUB OFF or any similar words or phrases.

21. All documents referring or relating to any civil, criminal or administrative action or proceeding involving Registrant's Marks, including without limitation any proceeding before the United States Patent and Trademark Office or any state or federal court.

22. All documents referring or relating to the compliance or non-compliance by Registrant with federal, state and local laws and regulations in connection with products sold under Registrant's Marks and packaging labels and advertisements used in connection with such products.

23. All documents referring or relating to any complaints received from customers or others concerning any products or services sold under Registrant's Marks.

24. All documents referring or relating to any press release, newspaper article or other publication that has ever mentioned Registrant or any products or services sold or offered under Registrant's Marks.

25. All documents referring or relating to any instances of actual confusion that may have resulted from the similarity between Registrant's Marks and Petitioner's Mark, including misdirected mail, telephone calls or other communications received by Registrant that were intended for Petitioner, or other instances wherein any person or business entity has been confused, mistaken or deceived as a result of the use of Registrant's Marks or the similarity between the parties' marks.

26. All documents referring or relating to any action taken, or planned to be taken, by Registrant to identify or prevent any instances of actual confusion arising from the use of Registrant's Marks.

27. All documents referring or relating to any surveys or other research that Registrant has commissioned, performed or considered performing, including research to determine whether there is any likelihood of confusion has Registrant's Marks and marks used or owned by Petitioner or any third party.

28. All documents referring or relating to the prospective customers or prospective customers for goods or services offered under Registrant's Marks.

29. All documents referring or relating to the sales methods or sales channels through which products or services have been or will be sold or offered under Registrant's Marks.

30. All documents referring or relating to communications between Registrant and any of its employees, agents or representatives regarding the use or registration of Registrant's Marks.

31. All documents referring or relating to any licenses, assignments or other agreements referring or relating to Registrant's Marks.

32. Representative samples of all mailing lists or other documents that identify Registrant's prospective customers.

33. All documents referring or relating to any domain names ever owned by Registrant containing the phrase the SUNSCREEN THAT WON'T RUB OFF or similar words or phrases.

34. All documents referring or relating to any persons with knowledge of the facts of this proceeding.

35. All documents referring or relating to any witnesses or expert witnesses that Registrant may call to testify in this proceeding or on which any such expert intends to rely.

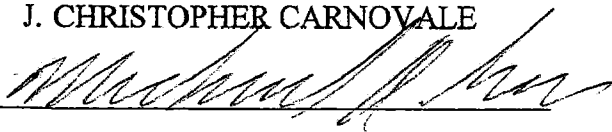
36. All documents that Registrant intends to use during the testimony period or in any trial of this matter.

37. All documents referring or relating to any websites displaying Registrant's Marks.

If the response to any request is believed by Registrant to contain confidential information, it should be so designated and access thereto will be confined to Petitioner's counsel unless further dissemination is authorized by mutual agreement of the parties or by order of the Board.

J. CHRISTOPHER CARNOVALE

By



Michael A. Grow
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
202-857-6389

Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petitioner's first request for production is being served upon Registrant's counsel Wayne Harper of Greenberg Traurig, PA at Suite 650, 450 South Orange Avenue, Orlando, Florida 32801 by first class mail, postage prepaid, on April 10, 2008.

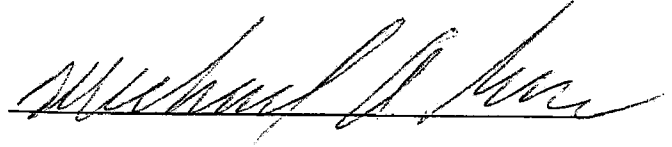
A handwritten signature in black ink, appearing to read "Michael D. Moore", is written over a horizontal line.

EXHIBIT B

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

CHRISTOPHER CARNOVALE,

Petitioner,

-against-

THE BRAND EXPERIENCE, LLC.

Registrant.

Cane. No.. 92044624

**THE BRAND EXPERIENCE, LLC'S RESPONSES AND OBJECTIONS TO
PETITIONER'S FIRST SET OF INTERROGATORIES**

RESERVATION OF RIGHTS

The Brand Experience reserves all objections to the admissibility of any information disclosed in response to these requests. Inadvertent disclosure of any documents shall not be a waiver of any claim of privilege, work-product protection or any other exemption from disclosure. These responses are based on information within Kenneth Gordon's knowledge, possession and control as of this date. The Brand Experience reserves the right to amend or supplement these responses as further information becomes available during the course of the proceeding.

GENERAL OBJECTIONS

The Brand Experience objects to the Instructions and these Requests to the extent that they:

1. Seek the disclosure of documents that are protected by the attorney-client privilege, work-product doctrine or any other applicable privilege or protection.

2. Seek to impose obligations beyond the requirements of the Rules of the Trademark and Trial Appeals Board.

3. Seek the disclosure of documents that are confidential and proprietary business information in the absence of a protective order that has been agreed upon by the parties to the above-captioned proceeding, and entered by the Board.

INTERROGATORIES

1. Identify the persons who have the best knowledge concerning the facts at issue in this cancellation proceeding, including without limitation the use of Registrant's Marks in connection with each product or service sold or intended for sale under Registrant's Marks.

RESPONSE

Mark Schmidt, Managing Partner, The Brand Experience LLC

2. Identify all employees of Registrant or any other persons who have had responsibility for the marketing, advertising, or sale of any products or services under Registrant's Marks.

RESPONSE

Mark Schmidt is the sole person responsible for marketing Registrant's Marks

3. Describe the facts relating to the date and manner in which Registrant or its employees or agents first became aware of the use of Petitioner's Mark in the United States

Mark Schmidt first became aware of Petitioner's Mark in late 2006 during a phone call with USPTO on a totally unrelated matter. During this phone call, when Mark Schmidt inquired as to whether Registrant's Mark was due for a Section 8 Affidavit, USPTO informed him the Registrant's Marks had been cancelled. Upon further inquiry, USPTO informed Mark Schmidt of the name of Petitioner and Petitioner's filing.

4. Describe the facts related to the acquisition or selection of Registrant's Marks, including without limitation the names of persons involved in and the date of the selection.

RESPONSE

Registrant conceived the marks as a “visualizing statement” of how the Registrant’s Brand of sun protective apparel, “SUNSAFE”, will benefit the consumer. This is a tried and true marketing practice employed by global Brands such as “Coke – The Real Thing”, and “IBM – Solutions for a Small Planet”. In the Registrant’s Case, “SUNSAFE – THE SUNSCREEN THAT WON’T RUB OFF”, helps explain an important benefit of sun protective apparel. Likewise, “SUNSAFE – SUNSCREEN KIDS WANT TO WEAR” offers parents a solution to convincing their kids to wear sunscreen.

5. Describe the nature of each product or service sold or intended for sale under Registrant's Marks, specifying which have been sold.

RESPONSE

The nature of products sold under Registrant’s Mark are those that are sold under the SUNSAFE Brand Name (reg no 2,256,964 registered on 6/29/1999), specifically: “sun protective clothing, namely swimwear, long and short sleeved shirts, T-shirts, jackets, cover-ups, pants, dresses, footwear and headwear” in Int’l Class 25,

6. Describe the facts related to the date(s) and manner in which each of Registrant's Marks was first used in connection with the sale or advertising of any products or services specifying the place(s) of said first sale, the first customer (s), the manner in which Registrant's Marks were first displayed in connection with said first sale, and the nature of the products or services first sold under Registrant's Marks.,

The dates and actual samples of materials which used Registrant's Marks are contained in the respective Trademark Applications Registrant filed for these Marks.

7. State whether the use of any of Registrant's Marks has ever been discontinued for a period of one year with respect to any of the products listed in Registrant's Registrations.

RESPONSE

The registrant has not actively used Registration No 2,384,600 for the past few years in actual marketing and sales materials.

8. If Registrant ever discontinued use of Registrant's Marks with respect to any of the products listed in its registrations, identify the period of time, if any, during which Registrant discontinued and resumed the sale of any such products under Registrant's Marks.

RESPONSE

The registrant has had high profile, continuous use of Registrations No's 2,477,694; and 2,593,603 since their first use in the USA.

9. Identify all persons who designed or made any materials or other items on which Registrant's Marks have ever been displayed, including without limitation any labels, hangtags, packages, containers, bags, clothing, signs, advertisements, brochures, sales literature, catalogs, artwork, Websites, or other materials.

RESPONSE

The information requested is a trade secret or otherwise confidential. Petitioner objects to the disclosure of the above information in the absence of a confidentiality agreement between the parties.

Petitioner further objects to this interrogatory as requesting information which is not relevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence.

10. Describe the facts related to any investigation conducted with respect to Registrant's Marks, including any trademark search to determine whether other persons had used or registered a mark similar to Registrant's Marks and the records examined in any such search,

RESPONSE

Prior to formally filing the Mark "THE SUNSCREEN THAT WON'T RUB OFF", Registrant engaged a third party research firm, Federal Research Corporation (FRC), based in Washington DC, to research whether this Mark was used in commerce in the USA. This research was conducted across 3 levels: The Federal Trademark Register, State Trademark Registers, and what FRC titles a "Common Law" Search, which included researching national yellow pages, newspapers and the internet. Their Research turned up NO conflicting Marks. They also filed the Mark on behalf of Registrant on April 6, 2000 (Exhibit D).

This result was further reinforced through USPTO's own trademark process, in which no external objections were raised at any time during the publication process prior to the Mark being issued on Aug 14, 2001.

Over five years later in late 2006, (upon learning in a phone call with USPTO on an unrelated matter that our Marks had been cancelled), the registrant conducted two Google searches: The first for THE SUNSCREEN THAT WON'T RUB OFF. Of three Results, the third result states both the Mark and SunSafe's toll free telephone number: 1-800-SUNSAFE.

The second search for SUNSCREEN THAT NEVER WEARS OFF revealed many web retailers using this Mark (exhibit F). Significantly, none of these retailers are based in the US. Several are based in Canada.

11. Identify all persons who ever engaged in any communication including the communication of any opinion relating to any investigation or trademark search relating to Registrant's Marks.

RESPONSE

Trademark Search Specialists of FRC, Lawyers of USPTO, and Mark Schmidt.

12. Describe the facts related to each instance in which a person has been actually confused, mistaken, or deceived with respect to the parties Marks, including any instance of confusion as to the identity or relationship of the parties to this proceeding, or the marks used on their goods and services, or the source of said goods or service.

RESPONSE

No instances are known

13. Identify the purchasers or classes of purchasers to whom Registrant has sold any products or services under' Registrant's Marks.

RESPONSE

Trade Customers (who purchase SUNSAFE products for sale to their customers), and Direct Retail Customers who purchase SUNSAFE products directly from a SUNSAFE catalog, web site, or promotional event.

14. Identify all sales or' distribution trade channels through which products or services have been or will be sold under Registrant's Marks.

RESPONSE

All Trade and Direct-to-Consumer Channels.

15. Identify on an annual basis for each year since Registrant's Marks was first used, the amount of revenue generated by the sale of products or services under Registrant's Marks.

RESPONSE

The information requested is a trade secret or otherwise confidential. Petitioner objects to the disclosure of the above information in the absence of a confidentiality agreement between the parties.

16. Identify on an annual basis for each year since Registrant's Marks first appeared in advertisements the dollar amount spent on advertising products or services offered under Registrant's Marks.

RESPONSE

The information requested is a trade secret or otherwise confidential. Petitioner objects to the disclosure of the above information in the absence of a confidentiality agreement between the parties.

17. Identify all advertising and promotional methods or media used to advertise or promote the sale of any goods or services under Registrant's Marks.

RESPONSE

Trade Show Participation, Direct Advertising in Magazines, PR, Internet Advertising and Key Word Search, Direct Mail, Participation in Direct-to-Consumer Events (Baby Fairs, Skin Cancer Screenings, Public Information Events), Donations to Skin Cancer/Melanoma Organizations, Web Site, Catalogs.

19. Identify the date or dates on which Registrant first distributed or published advertisements or promotional materials bearing Registrant's Marks

RESPONSE

28 May, 1998.

20. Describe the facts relating to any market research, including any focus group study or survey relating to Registrant's Marks or the goods or services sold under the marks.

RESPONSE

The information requested is a trade secret or otherwise confidential. Petitioner objects to the disclosure of the above information in the absence of a confidentiality agreement between the parties.

21. Describe any actions taken by Registrant to identify or prevent any instances of confusion arising from the similarities between the parties' marks.

RESPONSE

None.

22. Identify all oral or written agreements relating to Registrant's Marks, including without limitation all licenses, assignments, co-existence agreements, partnership agreements, or joint venture agreements.

RESPONSE

The information requested is a trade secret or otherwise confidential. Petitioner objects to the disclosure of the above information in the absence of a confidentiality agreement between the parties.

23. Describe all oral or written communications between Registrant and Petitioner including the substance of each communication.

RESPONSE

None, exclusive of this proceeding.

24. Describe all proceedings, including civil actions, criminal actions or inter partes proceedings before any court, the Patent and Trademark Office or any administrative agency, relating to Registrant's Marks, specifying the names of all parties and status of each action or proceeding.

RESPONSE

None.

25. Describe all trade channels through which products or services have been sold under Registrant's Marks, including any retail stores, wholesale outlets, Internet websites, direct mail operations or other trade channels.,

RESPONSE

The information requested is a trade secret or otherwise confidential. Petitioner objects to the disclosure of the above information in the absence of a confidentiality agreement between the parties.

26. Identify each state or other geographic area where Registrant has ever sold products or services under Registrant's Marks.

RESPONSE

Registrant has sold and/or advertised products under Registrant's Marks in all 50 United States, most US Territories and Internationally (including Canada).

27. Identify each state or other geographic area where products bearing each of Registrant's Marks are currently being sold.

RESPONSE

Registrant continues to sell and/or advertise products under Registrant's Marks in all 50 United States, most US Territories and Internationally (including Canada)

28. Identify representative retail outlets or other locations in each state identified in the

preceding interrogatory where products bearing Registrant's Marks are currently being sold.

RESPONSE

The information requested is a trade secret or otherwise confidential. Petitioner objects to the disclosure of the above information in the absence of a confidentiality agreement between the parties.

29. With respect to expert witnesses expected to be called to testify on Registrant's behalf in this proceeding, disclose all information required to be disclosed pursuant to the Federal Rules of Civil Procedure.

RESPONSE

None.

30. Identify each manufacturer that made each type of product currently being sold under each of Registrant's Marks.

RESPONSE

The information requested is a trade secret or otherwise confidential. Petitioner objects to the disclosure of the above information in the absence of a confidentiality agreement between the parties.

Petitioner further objects to this interrogatory as requesting information which is not relevant to the issues in this proceeding and not reasonably calculated to lead to the discovery of admissible evidence.

31. Describe all facts on which Registrant bases each defense that Registrant intends to assert in the pending cancellation petition.

The registrant has had high profile, continuous use of Registrations No's 2,384,600; 2,477,694; and 2,593,603 since their first use in the USA. These Marks have been promoted nationally in the USA through major national publications, television programs, a joint education program with a National

Medical Association, and Trade Shows to name just a few venues in which the Registrant has invested. Any active competitor in the “sun protective apparel market space” would have noticed and been aware of Registrant’s active use of these Marks prior to June 17, 2004, which is the date that petitioner filed a trademark application with the USPTO.

Prior to formally filing the Mark “THE SUNSCREEN THAT WON’T RUB OFF”, Registrant engaged a third party research firm, Federal Research Corporation (FRC), based in Washington DC, to research whether this Mark was used in commerce in the USA. This research was conducted across 3 levels: The Federal Trademark Register, State Trademark Registers, and what FRC titles a “Common Law” Search, which included researching national yellow pages, newspapers and the internet. Their Research turned up NO conflicting Marks. They also filed the Mark on behalf of Registrant on April 6, 2000 (Exhibit D).

This result was further reinforced through USPTO’s own trademark process, in which no external objections were raised at any time during the publication process prior to the Mark being issued on Aug 14, 2001.

A search for SUNSCREEN THAT NEVER WEARS OFF revealed many web retailers using this Mark (exhibit F). Significantly, none of these retailers are based in the US. Several are based in Canada.

No evidence of a “substantial investment in advertising and promoting its goods” was uncovered by third party research conducted in 2001. The evidence in 2006 suggests only Canadian exposure

The evidence in the Market clearly demonstrates Registrant’s use of the Mark in the USA.

Registrant had NO KNOWLEDGE of the Petitioner’s prior use of their alleged mark. Third Party Research conducted prior to filing of the Registrant’s Mark turned up NO use of THE SUNSCREEN THAT NEVER WEARS OFF! (Exhibit D).

Registrant Challenges Petitioner to prove “interstate commerce” and dollar volume of interstate commerce.

Registrant further highlights the web site registration dates of both companies. This is significant because the internet is a major driver/contributor to “interstate commerce”, especially for “small businesses” which registrant believes characterizes both parties in this case.

www.sunveil.com was created in the ICANN Register on Sept 24, 1998.

www.sunsafe.com was created in the ICANN Register on May 28, 1998

Registrant's web site pre-dates the registration of www.sunveil.com by almost 4 months, demonstrating Registrant's priority through this channel in interstate commerce.

Petitioner and Registrant are not affiliated or connected in any way. Petitioner has had zero contact with Registrant (and vice versa) other than through proceedings with the USPTO. As such, and based on no credible market evidence of priority or investment in advertising and goodwill, Petitioner is in no position to "approve" or "grant permission" for anything.

Petitioner states that "upon information and belief", Registrant adopted "the registered marks" ... "to cause confusion among purchasers..." Registrant states, for the record, that Petitioner's Mark was never a "registered mark" at any time in Registrant's adoption and use of Registrant's Marks. Registrant had NO KNOWLEDGE of the Petitioner's prior use of their alleged mark.

Registrant further maintains its priority and use of these marks in the USA. Third Party Research demonstrated NO use of "THE SUNSCREEN THAT NEVER WEARS OFF!" in the marketplace in 2000.

Dated: May 22, 2008

The Brand Experience, LLC

By its Attorneys,


Wayne Harper
Greenberg Traurig PA
450 S. Orange Avenue, Suite 650
Orlando, FL 32801

(407) 254-2609 (Telephone)

(407) 650-8454 (Facsimile)

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

CHRISTOPHER CARNOVALE,

Petitioner,

-against-

THE BRAND EXPERIENCE, LLC.

Registrant.

Cane. No.. 92044624

CERTIFICATE OF SERVICE

I, Wayne Harper, hereby certify that on May 23, 2008 I served a true and correct copy of

**THE BRAND EXPERIENCE, LLC'S RESPONSES AND OBJECTIONS TO
PETITIONER'S FIRST SET OF INTERROGATORIES**

by express mail and by email upon:

Michael A. Fox, Esq.
Arent Fox, LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Tel: 202.857.6000 | Fax: 202.857.6395

grow.michael@arentfox.com

Attorneys for Petitioner

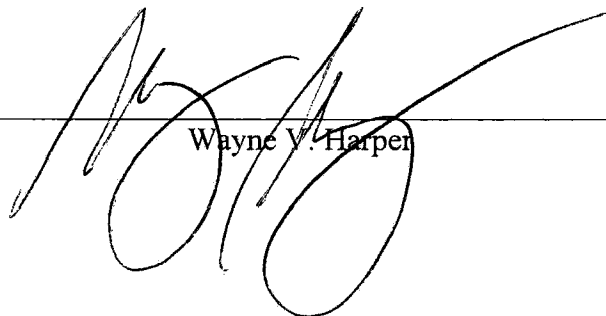

Wayne V. Harper

EXHIBIT C

TTI ARENT FOX, DC

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Arent Fox

Date: June 27, 2008
Pages (including cover): 7
Attorney #: 1177
Client.Matter #: 019543.00006

Michael A. Grow
 202.857.6389 DIRECT
 202.857.6395 FAX
 grow.michael@arentfox.com

PLEASE DELIVER TO:

Name/Company	Fax #	Verify #
Wayne Harper, Esq.	407.420.5909	407.254.2609
Hard Copy Sent: Yes	VIA FIRST CLASS MAIL	

MESSAGE/INSTRUCTIONS

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Arent Fox

June 27, 2008

VIA FACSIMILE

Mr. Wayne Harper
Greenberg Traurig PA
450 S Orange Avenue Suite 650
Orlando, FL 32801

Michael A. Grow
Attorney
202.857.6389 DIRECT
grow.michael@arentfox.com

Re: Carnovale v. The Brand Experience, LLC
Cancellation No. 92044624
Your Reference : Our File: 019543.00006.01.001

Dear Mr. Harper:

We have reviewed the responses of The Brand Experience, LLC ("TBE" or "Registrant") to the First Set of Interrogatories of our client Christopher Carnovale ("Carnovale" or "Petitioner"). We received no response to the First Request For Production of Documents that was served with the Interrogatories and we have received no documents. The purpose of this letter is to bring to your attention this omission and the deficiencies in these responses. We are writing to you to comply with our mutual obligation to engage in a good faith effort to resolve discovery disputes before filing a motion to compel. To avoid unduly prolonging this matter, please respond to this letter and produce the requested documents by July 2, 2008.

INTERROGATORIES¹

Interrogatory No. 2. Interrogatory No. 2 asked TBE to identify all employees of Registrant or any other persons who have had responsibility for the marketing, advertising, or sale of any products or services under TBE's Marks. In its answer, TBE stated that Mark Schmidt is the sole person responsible for marketing. This answer is clearly insufficient, because TBE failed to identify the person(s) responsible for the advertising or sale of any products. The information requested is relevant to this proceeding, is discoverable and should be provided. If there has been no advertising or sale, you should so indicate.

Interrogatory No. 4 asked TBE to identify and describe the facts relating to the acquisition or selection of TBE's Marks, including without limitation the identity of the persons involved in the selection and the date of the selection of those marks. In its answer, TBE merely

¹ The summary of each request herein is not intended to limit the actual request contained in Applicant's interrogatories, and is simply for ease of explanation here.

Arent Fox

stated that “Registrant” conceived the marks as a “visualized statement” of how Registrant’s products would allegedly benefit consumers, and explained how this marketing technique has been widely used in connection with global brands. TBE failed to identify any fact related to the acquisition or selection of the marks, including the identity of any person(s) involved and the date(s) of the selection or acquisition. If no rights in the mark were acquired from another party, you should so state and you should indicate who selected the mark. The information sought is relevant to this proceeding and it is discoverable.

Interrogatory No. 6 asked TBE to describe the facts related to the date(s) and manner in which each of Registrant's Marks was first used in connection with the sale or advertising of any products or services specifying the place(s) of said first sale; the first customer(s); the manner in which Registrant's Marks were first used in connection with said first sale (how the mark was displayed on containers, packaging or advertisements); and the nature of the products or services first sold under Registrant's Marks. In its answer, TBE merely stated that “the dates and actual samples of materials which used Registrant’s Marks are contained in the respective Trademark Applications TBE filed for these Marks”. This answer does not provide the requested information. The Applications referred to by TBE contain only a claimed date of first use referring generally to the entire class, and only one specimen of use. TBE failed to identify how each of Registrant’s Marks was first used in connection with each product, the date and place of said first sale, the first customer, and the nature of the products first sold and the manner the mark was displayed in that first sale. The information sought by Petitioner is relevant to this cancellation proceeding, is discoverable and should be provided. Please let us know whether your client is willing to voluntarily supplement its answer to this Interrogatory and provide a fully responsive answer.

Interrogatory Nos. 7 and 8 asked TBE to identify the period of time, if any, during which TBE discontinued and resumed the sale of any such products under Registrant's Marks with respect to any of the products listed in its registrations. In its answer to Interrogatory No. 7 TBE admitted that it “has not actively used Registration No. 2,384,600 for the past few years in actual marketing and sales materials”. However, in response to this Interrogatory, TBE stated that it allegedly had “a high profile, continuous use” of Registration No. 2,477,694 and Reg. No. 2,593,603 since their first use in the USA. These answers are not responsive since they refer to use of registrations and the interrogatories inquire as to use of marks. TBE was asked to identify any period of time in which use of a mark was discontinued. This information is clearly relevant to the issues of validity and abandonment of Registrant’s Marks, is discoverable and must be provided. Thus, let us know whether your client is willing to amend its answer and provide the identification of each period of time in which any of its marks has not been used.

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Interrogatory No. 9 asked TBE to identify all persons who designed or made any materials or other items on which TBE's Marks have ever been displayed, including without limitation any labels, hangtags, packages, containers, bags, clothing, signs, advertisements, brochures, sales literature, catalogs, artwork, Websites, or other materials. TBE refused to provide an answer objecting that the information sought is a trade secret or confidential and that TBE would not disclose the information in the absence of a protective order. This objection is groundless and unacceptable. A standardized protective agreement is in place in this proceeding, under the TTAB Rules. Therefore, this information must be provided. TBE also objected on the ground that that this Interrogatory allegedly requests information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. This objection is also groundless. Individuals who prepared materials on which the marks have been displayed, may have relevant information concerning how, where and when the marks have been used. Because the objections raised are groundless, they should be withdrawn and the information sought should be provided.

Interrogatory No. 11 asked TBE to identify all persons who ever engaged in any communication including the communication of any opinion relating to any investigation or trademark search relating to Registrant's Marks. In its answer TBE failed to identify these individuals, except for Mark Schmidt. The information sought is relevant and discoverable, and should be provided. Please let us know whether your client will identify each of the individuals that engaged in communication.

Interrogatory No. 13 asked TBE to identify the purchasers or classes of purchasers to whom TBE has sold any products or services under Registrant's Marks. In its answer, TBE merely alluded to "Trade Customers who purchase SUNSAFE products for sale to their customers", and direct customers who purchase SUNSAFE products directly from SUNSAFE catalog, web site or promotional events. This answer is clearly insufficient because it fails to properly identify the classes of purchasers. The terms "Trade Customers" is vague because it could encompass any type of retailers, including clothing wholesalers, high end department stores, clothing retailers, online stores, outlets, discount department stores. TBE should identify which type of retailers purchased its products. As for the terms "direct retail customers", they do not identify a class of purchasers, but merely anyone who ever purchased SUNSAFE products not for resale. Please supplement this answer by providing the identification of each class of purchasers of products sold under Registrant's Marks.

Interrogatory No. 15 and 16 asked TBE to identify an annual basis for each year since Registrant's Marks were first used, the amount of revenue generated by the sale of products or services under Registrant's Marks, and the dollar amount spent on advertising products or services offered under Registrant's Marks. TBE refused to provide a responsive answer objecting that the information sought is allegedly trade secret or confidential. TBE stated that it

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would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, the information must be provided.

Interrogatory No. 20 sought facts relating to any market research, including any focus group study or survey relating to Registrant's Marks or the goods or services sold under the marks. TBE refused to provide a responsive answer objecting that the information sought is allegedly trade secret or confidential. TBE stated that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, the information must be provided.

Interrogatory No. 22 sought all oral or written agreements relating to Registrant's Marks, including without limitation all licenses, assignments, co-existence agreements, partnership agreements, or joint venture agreements. TBE refused to provide a responsive answer objecting that the information sought is allegedly trade secret or confidential. TBE stated that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, the information must be provided.

Interrogatory No. 25 sought all trade channels through which products or services have been sold under Registrant's Marks, including any retail stores, wholesale outlets, Internet websites, direct mail operations or other trade channels. TBE stated that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, the information must be provided.

Interrogatory No. 27 asked TBE to identify each state or other geographic area where products bearing each of Registrant's Marks are currently being sold. In its answer, TBE stated that it "continues to sell and/or advertise products under Registrant's Marks in all 50 United States, most US Territories and Internationally (including Canada)." This answer is insufficient and unacceptable, and seems to contradict at least one previous answer given by TBE. In its answer to Interrogatory No. 7, TBE admitted that it "has not actively used" the mark identified in Reg. No. 2,384,600 "for the past few years". Thus, please supplement your answer to this Interrogatory with a clear indication, for each of the Registrant's Marks, of the states and geographic areas where products under said mark are currently sold.

Arent Fox

Interrogatory No. 28 sought the identity of representative retail outlets or other locations in each state identified in the preceding interrogatory where products bearing Registrant's Marks are currently being sold. TBE refused to answer and alleged that the information sought is a trade secret or confidential. As already discussed above, under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. Accordingly, the information must be provided.

Interrogatory No. 30 sought the identity of each manufacturer that made each type of product currently being sold under each of Registrant's Marks. TBE refused to answer and alleged that the information sought is a trade secret or confidential. TBE stated that it would not provide the information sought in the absence of a confidentiality agreement. As already discussed above, under TTAB Rules a standardized confidentiality agreement is automatically in place in any cancellation proceeding, including this one. TBE also objected alleging that the information sought is not relevant to the issues in this proceeding. This objection is invalid and should be withdrawn. The information sought is relevant to this proceeding because it may lead to discoverable information relating to the use of Registrant's Marks, the nature of the products sold under Registrant's Marks and the extent of use. Thus, please let us know whether your client will voluntarily withdraw the objection and provide the information sought.

Interrogatory No. 31 sought all facts on which TBE bases each defense that TBE intends to assert in the pending cancellation petition. In its answer, TBE alleges that it "has had a high profile, continuous use of Registrations Nos. 2,384,600; 2,477,694; and 2,593,603 since their first use in the USA". However, in other answers (see answer to Interrogatory No. 7), TBE admits that the mark identified in Reg. No. 2,384,600 has not been used for years. These answers are contradictory and must be revised. Moreover, TBE alleges that "no evidence of a substantial investment in advertising and promoting its goods was uncovered by third party research conducted in 2001". However, TBE never identified any third-party research conducted in 2001. Please revise your answers to previous interrogatories concerning searches by providing information identifying the search referred to above, including without limitation the identity of the person(s) who conducted the search, the nature of the search, the date, and any document relating or referring to the search.

REQUESTS FOR PRODUCTION

TBE failed to respond to the requests for production served with the interrogatories and it has produced no documents. Any objections have been waived. Please provide full responses immediately and produce all responsive documents.

Arent Fox

Sincerely,

A handwritten signature in black ink, consisting of several overlapping, slanted strokes that form the letters 'MAG' followed by a long horizontal flourish.

Michael A. Grow

EXHIBIT D

From: HarperW@gtlaw.com [mailto:HarperW@gtlaw.com]
Sent: Wednesday, July 02, 2008 4:56 PM
To: Giuliani, Chiara; Grow, Michael A.; Henry, Eileen
Subject: RE: Carnovale v. The Brand Experience LLC- Cancellation No. 92044624

We will provide responses to your latest letter tomorrow, July 3. Specifically, we are still attempting to locate current addresses for specific individuals you requested.

We look forward to settling any discovery deficiencies quickly, and will not raise any objections to your inability to produce within the designated time frames so long as all matters can be resolved without dispute.

If you have any concerns regarding your client's trade secrets within discovery materials, please propose an attorney-eyes only agreement that protects your client's confidential information, as well as ours.

7/3/2008

EXHIBIT E

Giuliani, Chiara

From: Giuliani, Chiara
Sent: Friday, July 11, 2008 4:19 PM
To: 'HarperW@gtlaw.com'
Cc: Grow, Michael A.; Henry, Eileen
Subject: RE: Carnovale v. The Brand Experience LLC- Cancellation No. 92044624

Dear Mr. Harper:

Thank you for your answer. We confirm that we are willing to try to resolve amicably any discovery controversy. However, we are not waiving our right to request the Board's intervention in case our good faith efforts fail. As you know, we served interrogatories and requests for production on April 18, 2008, and your client's answers were due by May 23, 2008. On May 22, 2008, your client served its answers and objections to Carnovale's first set of interrogatories. However, your client never served its answers to Carnovale's requests for production, which are now over one month and a half past due, and never requested our consent to an extension. On June 27, 2008, we sent you a letter detailing the deficiencies in your client's answer to Carnovale's interrogatories, and pointing out that no answers to the requests for production were ever served. It appears that we have not received a response to our letter, and that your client still has not served its answers to the requests for production. Please let us know whether your client is willing to voluntarily respond to Carnovale's requests for production, and when we will receive your answer to our letter of June 27, 2008. If you have any questions, please do not hesitate to contact us.

Best Regards

Chiara Giuliani

Chiara Giuliani, Esq.

Arent Fox LLP | 1050 Connecticut Avenue, NW
Washington, DC 20036-5339

202.857.8920 DIRECT | 202.857.6395 FAX

giuliani.chiara@arentfox.com | www.arentfox.com

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