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Filing date: **06/30/2011**

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

Proceeding	92044624
Party	Plaintiff J. Christopher Carnovale
Correspondence Address	MICHAEL A GROW ARENT FOX PLLC 1050 CONNECTICUT AVENUE NW WASHINGTON, DC 20036-5339 UNITED STATES henrye@arentfox.com, TMDocket@arentfox.com
Submission	Motion for Default Judgment
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Signature	/Michael A. Grow/
Date	06/30/2011
Attachments	Brand Experience.pdf (41 pages)(1816909 bytes)

Despite Registrant's failure to comply, Petitioner has made a good faith effort to obtain Registrant's cooperation. In fact, Petitioner has sent correspondence specifying the deficiencies in Registrant's responses. Copies of the communications are attached as Exhibit B. However, Registrant has made no effort to correct those deficiencies. While Registrant stated that he would respond by today, June 30, 2011, no such response and no further documents were received by the close of business on that date. Thus, Petitioner's efforts to avoid filing this motion have been unsuccessful.

Petitioner's testimony is scheduled to open tomorrow, July 1, 2011. However, Petitioner should not be required to incur the cost of presenting testimony because Registrant has willfully disobeyed the Board's discovery order and has withheld information and documents highly relevant to the key issues in this proceeding.

The cancellation petition is based on likelihood of confusion and abandonment of Registrant's marks through non-use. In the course of discovery, Petitioner asked Registrant to produce documents and information relating to the alleged sale of products under the marks. See Petitioner's First Set of Interrogatories Nos. 7 and 15 and First Request for Production Nos. 13 and 14. (No answers were served in response to the First requests for Production.

This information is obviously relevant with respect to both counts in the cancellation petition. However, Registrant refused to provide this information in response to the first set of discovery requests. Petitioner asked for sales information again in the Second Set of Interrogatories Nos. 34 and 35 and in the Second Request for Production, Nos. 40 and 41.

Despite the obvious relevance of the information, Registrant has failed to provide any sales figures and it has produced no invoices or other documents showing actual sales.

Registrant served a document purporting to respond to Petitioner's Interrogatories on May 7, 2011. However, that document is unsworn, contains evasive statements, and does not provide any meaningful information. A copy of the document is attached as Exhibit C.

Registrant failed to provide any response to the second request for production of documents. Thus, Registrant did not even attempt to comply with that portion of the Board's Order.

Because Registrant has twice failed to comply with the Board's orders, Petitioner is entitled to entry of judgment.

ARGUMENT

If a party fails to comply with an order of the Board relating to discovery, including an order compelling discovery, the Board may order appropriate sanctions as defined in Trademark Rule 2.120(g)(1) and Fed. R. Civ. P. 37(b)(2), including entry of judgment. *Baron Philippe De Rothschild, S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848 (TTAB 2000); *Unicut Corp. v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984); *Caterpillar Tractor Co. v. Catfish Anglers Together, Inc.*, 194 U.S.P.Q. 99 (TTAB 1976). Default judgment is justified where there is a strong showing of willful evasion. *See Unicut*, 222 USPQ at 344. In *Baron Philippe*, the Board granted judgment on a motion for sanctions where the applicant willfully failed to comply with an Order compelling the production of documents and providing a witness for deposition within thirty (30) days of the Board's Order. *Baron Philippe*, 55 U.S.P.Q.2d at 1852. Thus, judgment is appropriate where a party willfully fails to comply with a discovery order.

Judgment should be entered against Registrant in view of its willful failure to comply with the Board's Order directing Registrant to provide full and complete answers to Petitioner's second set of discovery requests. Petitioner's counsel has been involved in a good faith effort to obtain complete answers, including information relating to sales of products under the marks at

issue in an effort to avoid the filing of a motion. However, Registrant has failed to supplement its discovery responses. Because Petitioner seeks cancellation on the grounds of abandonment, such information is highly relevant. Therefore, it is obvious that Registrant has deliberately evaded its discovery responsibilities in this case, and has willfully failed to comply with the Board's April 22 Order.

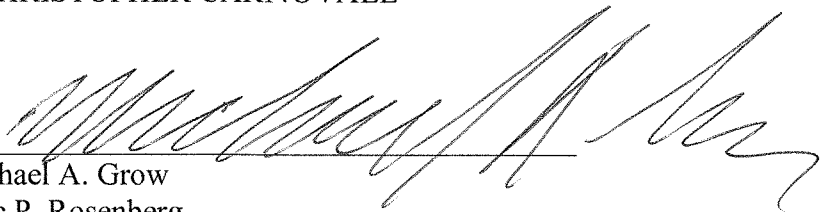
Petitioner's motion for sanctions in the form of judgment against Registrant should be granted. Even if the case were allowed to go forward, Registrant should be precluded from relying on any sales evidence that was never produced in discovery. Thus, Registrant could not refute Petitioner's claim that Registrant's marks have been abandoned..

The Board clearly stated in its April 22 Order that if Registrant failed to comply with the order, the Board would consider a motion for default judgment. Thus, Registrant is well aware of the possible consequences of its non-compliance with the Board's order and it has no basis for complaining if the Board enters default judgment.

CONCLUSION

For the foregoing reasons, default judgment should be entered.

J. CHRISTOPHER CARNOVALE

By 
Michael A. Grow
Alec P. Rosenberg
ARENT FOX LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 857-6000
Facsimile: (202) 857-6395

Attorneys for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing is being served upon Mark Schmidt of The Brand Experience LLC at 1521 Alton Road, #8, Miami Beach, Florida 33139 by first class mail, postage prepaid, on June 30, 2011.

A handwritten signature in black ink, appearing to read "Mark Schmidt", is written over a horizontal line.

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 SECOND 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,

magnetic or electronic or other recordings of any voice, sound, image or data including but not limited to photographs, microfilms, video and audio tapes, film, sound recordings, CDs, record albums, and any other data compilation in Registrant's possession, custody or control wherever located.

2. "Tangible things" shall mean any physical object not included within the definition of "document" above including, but not limited to, models, mock-ups, prototypes and samples.

3. The pronouns "you" and "your" and/or the term "Registrant" shall mean the Registrant The Brand Experience LLC, and all of its parents, predecessors, subsidiaries, affiliates, divisions and groups, and each of their directors, officers, employees, shareholders, agents, representatives and consultants.

4. The term "Petitioner" shall mean the Petitioner J. Christopher Carnovale in the above-captioned action, and all of his predecessors in business, employees, agents, representatives, attorneys and consultants.

5. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

6. "And" and "or" shall be construed conjunctively or disjunctively as necessary to make these document requests inclusive rather than exclusive.

7. "Each", "any" and "all" mean each and every.

8. "Person" means any individual or entity, including but not limited to partnerships, corporations or any other form of business or any legal, governmental, or business entity.

9. “Entity” means any legal or business entity of any kind and includes, without limitation, corporations, partnerships, trusts, associations and organizations.

10. The term “communication” means any exchange or transmission of words or ideas to another person or an entity, including without limitation conversations, discussions, e-mails, facsimiles, letters, memoranda, meetings, notes, speeches, or other transfer of information, whether written, oral, or by any other means, whether direct or indirect, formal or informal, and includes any document which abstracts, digests, transcribes or records any such communication.

11. The term “Petitioner’s Mark” refers to the mark THE SUNSCREEN THAT NEVER WEARS OFF, and any other marks owned by Petitioner containing the phrase SUNSCREEN THAT NEVER WEARS OFF, described in the petition to cancel.

12. The term “Registrant's Marks” refers to the alleged marks identified in Registration Nos. 2384600, THE 50+ SUNSCREEN THAT WON'T RUB OFF; 2477694, THE SUNSCREEN THAT WON'T RUB OFF; and 2593603, SUNSCREEN KIDS WANT TO WEAR, and the phrase SUNSCREEN THAT WON'T RUB OFF, alone or in combination with other words.

13. The term “mark” includes trademarks, service marks, collective marks, certification marks, and trade names as defined in 15 U.S.C. § 1127, regardless of whether any such mark is federally registered.

14. The term “referring or relating to” means comprising, relating to, or in any way relevant within the meaning of Rule 26(b) (1) of the Federal Rules of Civil Procedure.

15. As used herein, the term “identify” means:

(1) In the case of a person, to state:

a. name;

- b. last known residence;
 - c. employer or business affiliation; and
 - d. occupation and title or position held.
- (2) In the case of a company, to state:
- a. the name;
 - b. if incorporated, the place of incorporation;
 - c. the principal place of business; and
 - d. the name and address of the person or persons having knowledge of the matter with respect to which the company is named.
- (3) In the case of a document, to state:
- a. the identity of the person or persons who prepared it, the sender and recipient, if any;
 - b. the title or a description of the general nature of its subject matter;
 - c. the date of preparation;
 - d. the date and manner of distribution and publication, if any;
 - e. the location of each copy and the identity of the present custodian;
 - f. the identity of the person or persons who can identify it;
 - g. the contents of the document verbatim; and
 - h. if privilege is claimed, the specific basis for the claim.

In lieu of the foregoing, a copy may be supplied.

- (4) In the case of an act or event, to state:
- a. a description of the act or event;
 - b. when it occurred;

- c. where it occurred;
- d. the names and addresses of the person or persons involved in or who performed said act (or, in the case of an omission, the person or persons failing to perform);
- e. the identity of all persons who have knowledge, information or belief about the act;
- f. when the act, event or omission first became known; and
- g. the circumstances and manner in which such knowledge was first obtained.

16. The terms “state,” “describe,” or “explain” mean, when used with respect to a fact, event, action, defense, or allegation, to provide a complete description of all details concerning such fact, event, action, defense, or allegation, including the date, place, factual basis, pertinent facts, and names and addresses of all persons with knowledge relating to each such fact, event, action, defense, or allegation.

INSTRUCTIONS

The following instructions apply in answering these interrogatories and other discovery requests:

1. The interrogatories and document requests are continuing in nature and, pursuant to Rule 26 of the Federal Rules of Civil Procedure, Registrant has a duty to supplement its answers promptly upon obtaining or learning of further responsive information.

2. The answer to each interrogatory or document request shall include such knowledge or information as is within Registrant’s possession, custody, or control including, but not limited to, knowledge, information and documents in the possession, custody, or control of

Registrant's officers, directors, accountants, consultants, attorneys, or other agents or representatives.

3. The answers to interrogatories must be furnished separately and fully in writing under oath or verification by Registrant declaring, under penalty of perjury, that the answers are true and accurate to the best of its current knowledge, information, and belief. If an answer depends upon the knowledge of a person other than the person signing the answers, each such person should be identified in the answer.

4. The answers shall include the knowledge of Registrant's representatives and agents including, but not limited to, its consultants, accountants and your attorneys.

5. If an objection is raised to all or any part of an interrogatory or document request, state the grounds of the objection with sufficient specificity to permit determination of the basis for and propriety of such objection, including citations where legal authority is relied upon, and answer to the extent the interrogatory or document request is not objectionable. All objections shall be signed by the attorney making them.

6. All answers and objections to interrogatories or document requests shall be made within thirty (30) days of the service of these interrogatories in writing.

7. Registrant shall not refer to documents generally in lieu of answering; if the burden upon you of deriving an answer from documents is the same as it is upon Petitioner, you may elect to refer to documents which are specifically identified from which the response may be readily obtained. Such a response constitutes a representation under oath by you and your counsel that, after reasonable investigation, those conditions have been met.

8. The full text of the interrogatory (or part thereof) to which any answer is intended to respond is to be restated immediately preceding such answer.

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

34. Identify and describe all facts on which Registrant bases the allegation that it has continuously used the marks THE SUNSCREEN THAT WON'T WEAR OFF and the THE SUNSCREEN THAT KIDS WANT TO WEAR.

35. Supplement all of Registrant's responses to Petitioner's First Set of Interrogatories with information that is current and complete as of the date of this Second Set of Interrogatories.

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

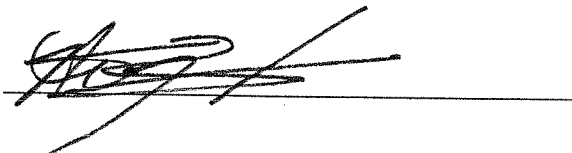


Michael A. Grow
Alec Rosenberg
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
202-857-6389

Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petitioner's second 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 May 7, 2010.



**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 SECOND 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

38. The CD referenced in the email from Wayne Harper dated December 10, 2008.

39. All labels and other things bearing Registrant's Marks, all purchase orders or other requests for the purchase or acquisition of labels and other things bearing Registrant's Marks, all documents evidencing payment by Registrant or others for labels and other things bearing Registrant's Marks.

40. All documents showing the sale of clothing products on which labels and other things bearing Registrant's Marks have been used.

41. All documents referring or relating to the information Registrant was required to provide in response to Petitioner's Second Set of Interrogatories.


42. All written communications between Registrant and any third party relating to the testing of products sold or intended for sale under Registrant's Marks.

43. All documents that are responsive to any of Petitioner's discovery requests previously served in this proceeding that have not yet been produced.

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

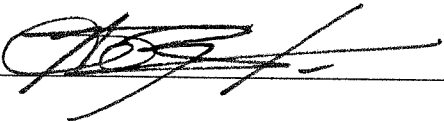


Michael A. Grow
Alec P. Rosenberg
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
202-857-6000

Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petitioner's second 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 May 7, 2010.



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.

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.

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.

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

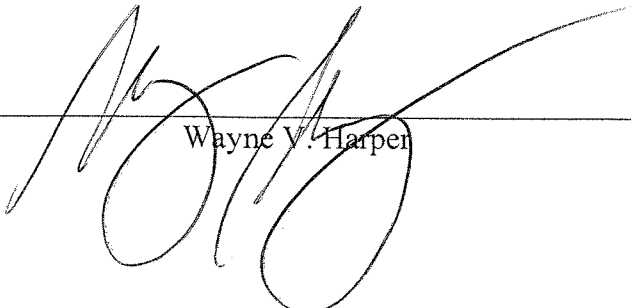
**THE BRAND EXPERIENCE, LLC'S RESPONSES AND OBJECTIONS TO
PETITIONER'S FIRST SET OF INTERROGATORIES**

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

**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

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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 or 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 14, 2008.

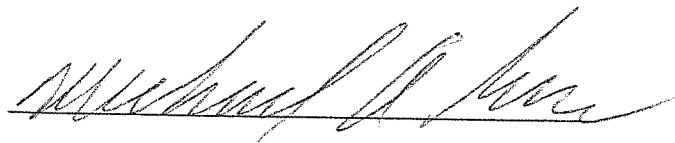
A handwritten signature in cursive script, appearing to read "Michael D. Harper", written over a horizontal line.

EXHIBIT B

Henry, Eileen

Subject: FW: letter re Carnovale v The Brand Experience LLC Cancellation No. 92044624

From: Mark Schmidt [<mailto:mark@sunsafe.com>]

Sent: Tuesday, June 28, 2011 11:52 AM

To: Grow, Michael A.

Subject: Re: letter re Carnovale v The Brand Experience LLC Cancellation No. 92044624

Dear Mr. Grow,

We will address what you term "deficiencies" by June 30.

Mark Schmidt

Henry, Eileen

Subject: FW: letter re Carnovale v The Brand Experience LLC Cancellation No. 92044624

From: Grow, Michael A.
Sent: Monday, June 27, 2011 10:16 AM
To: 'Mark Schmidt'
Cc: Rosenberg, Alec; jfuhrer@ridoutmaybe.com
Subject: RE: letter re Carnovale v The Brand Experience LLC Cancellation No. 92044624

Dear Mr. Schmidt:

We have no record of having ever received a CD from Mr. Harper or you in this case. He sent us a handful of documents, none of which show sales of products under your alleged mark.

Michael A. Grow
Partner

Arent Fox LLP | Attorneys at Law
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
202.857.6389 DIRECT | 202.857.6395 FAX
grow.michael@arentfox.com | www.arentfox.com

CONFIDENTIALITY NOTICE: This e-mail and any attachments are for the exclusive and confidential use of the intended recipient. If you received this in error, please do not read, distribute, or take action in reliance upon this message. Instead, please notify us immediately by return e-mail and promptly delete this message and its attachments from your computer system. We do not waive attorney-client or work product privilege by the transmission of this message.

From: Mark Schmidt [<mailto:mark@sunsafe.com>]
Sent: Friday, June 24, 2011 8:11 PM
To: Grow, Michael A.
Cc: Rosenberg, Alec; jfuhrer@ridoutmaybe.com
Subject: Re: letter re Carnovale v The Brand Experience LLC Cancellation No. 92044624

Dear Mr. Grow,

You reference a "CD referred to by Wayne Harper".

Please confirm, unambiguously with a yes or no answer: Have you ever received this CD?

The facts are:

- * We have produced this material en masse per your requests
- * This information was all passed to counsel
- * Determining a) if Arent Fox received this information and b) what information Arent Fox received from previous counsel will help correct what you allege are "deficiencies".

I require this information before close of business on Monday, June 27.

Thank You.

Mark Schmidt
The brand Experience LLC

Arent Fox

June 24, 2011

BY EMAIL ONLY: mark@sunsafe.com

Mr. Mark Schmidt
Managing Partner
The Brand Experience LLC
2521 Alton Road. #8
Miami Beach, Florida 33139

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

**Re: Carnovale v. The Brand Experience LLC
Cancellation No. 92044624
Our File: 19543-006**

Dear Mr. Schmidt:

We have reviewed your responses to the interrogatories and requests for production served on May 7, 2011, in accordance with the Board's order in the above proceeding. The purpose of this letter is to direct your attention to deficiencies in the letter in the hope that they can be resolved. The responses are deficient for the following reasons.

The second set of interrogatories sought information as to the factual basis for your allegation that Brand Experience's marks have been used continuously since the alleged first use date. The Board's order required that you respond without objection. In response, you merely stated that the marks have been used continuously without providing any factual support. You produced photocopies of alleged care labels and the back page of a catalog. However, these documents do not show continuous use of anything. Moreover, a back cover of a catalog does not constitute evidence that the mark is presently being used in conjunction with the goods listed in the registrations at issue. Please advise whether you intend to correct this deficiency.

The Board's order also required Brand Experience to respond without objection to our second request for production. These requests sought the CD referred to by Wayne Harper in his email of December 10, 2008; representative samples of labels, purchase orders, and other documents evidencing the continuing sale of products under the marks at issue, and any written communications with third parties relating to the testing of products for sale under the marks at issue. You have never produced any such material. If such documents do not exist, you should so state. Otherwise, please advise whether you intend to correct this deficiency.

In view of the schedule currently in place, we will need to receive a response from you no later than **June 30, 2011**.

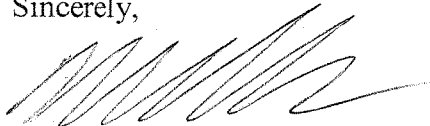
June 24, 2011

Page 2

Arent Fox

Please let us have your response by that date.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Grow". The signature is fluid and cursive, with several loops and a long horizontal stroke at the end.

Michael A. Grow

cc: Janet Fuhrer, Esq
Alec Rosenberg, Esq.

EXHIBIT C

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

mailed Friday, May 6, 2011

CASE Number 92044624

J. Christopher Carnovale (Petitioner)

vs.

The Brand Experience LLC (Registrant)

In compliance with The Board's Order dated April 22, 2011 to respond to Petitioner's Second Set of Interrogatories, and after verifying and receiving from Alec Rosenberg of Petitioner's Counsel on May 4, 2011 the Second Set of Interrogatories in question, I am hereby serving the responses to the two outstanding items as ordered.

INTERROGATORY # 34 from page 7 of Petitioner's Second Set of Interrogatories served on May 7, 2010: Identify and describe all facts on which Registrant bases the allegation that it has continuously used the marks THE SUNSCREEN THAT WON'T WEAR OFF and THE SUNSCREEN KIDS WANT TO WEAR.

Registrant's Reply

As a preface, the following distinctions are made:

- Registrant's MARK to which claims are made is THE SUNSCREEN THAT WON'T RUB OFF®
- Registrant makes no allegations. Rather, Registrant unequivocally states and provides evidence that these Marks have been continuously used and remain in use today.

In addition, Responses served in reply to the First Set of Interrogatories include numerous examples of the use of these MARKS in Commerce.

Addressing specifically the Interrogatory's purpose to "Identify and describe all facts":

- 1) It is important to understand that the above MARKS were conceived to supplement and enhance consumers' perception of the Registrant's SUNSAFE® BRAND.
 - a. This point is best illustrated by the use of other, better known Brands' use of this concept. For example:
 - i. McDonalds® --- IM LOVIN IT®
 - ii. Coke® --- THE REAL THING®
 - iii. IBM® --- SOLUTIONS FOR A SMALL PLANET®
- 2) Therefore, these MARKS are most often used together with the SUNSAFE® BRAND.

- 3) Also Relevant is the understanding that SUNSAFE's product range encompasses a broad range of market segments: Baby, Kids, Teen, Adult.
 - a. The MARK THE SUNSCREEN KIDS WANT TO WEAR® has been – and continues to be – used in conjunction with SUNSAFE's Baby, Kids and Teen Product categories
 - b. The MARK THE SUNSCREEN THAT WON'T RUB OFF® has been – and continues to be – used across ALL product categories .

INTERROGATORY # 35 from page 7 of Petitioner's Second Set of Interrogatories served on May 7, 2010: Supplement all of Registrant's responses to Petitioner's First Set of Interrogatories with information that is current as of the date of this Second Set of Interrogatories.

Registrant's Reply

Because the First Set of Interrogatories represented primarily specific examples of the use of MARKS in Commerce since the date of first use, and also historical sales data, etc, Registrant interprets this interrogatory to demand evidence of use of these MARKS in Commerce today.

Specifically:

The MARK THE SUNSCREEN THAT WONT RUB OFF® has been – and continues to be -- used in the following applications:

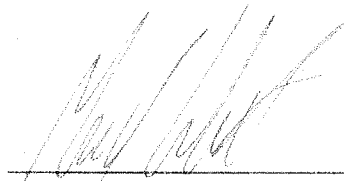
- 1) On the Care Label directly affixed to EACH SUNSAFE Branded apparel item sold and exhibited
 - a. **Please see updated CARE LABEL SAMPLE below**
- 2) On the Back Cover of the SUNSAFE® Catalog distributed to customers via Dermatologist Offices, by request, at promotional events, and included in EACH ORDER shipped to customers
 - a. **See Copy of Back Cover of SUNSAFE® Catalog below**
- 3) On EACH invoice sent to customers upon completion of an internet order
- 4) On the web site, www.sunsafe.com on an occasional and circulating basis

The MARK THE SUNSCREEN KIDS WANT TO WEAR® has been – and continues to be – used in the following applications:

- 1) At the Beginning of the SUNSAFE® Kids' Products Section on Page 24 of the SunSafe Catalog distributed to customers via Dermatologist Offices, by request, at promotional events, and included in EACH ORDER shipped to customers
 - a. **See Copy of page 24 of the SUNSAFE® Catalog below**

pg 2 of 6

Signed for and behalf of The Brand Experience LLC,


_____ 5/6/11
Mark Schmidt date

Managing Partner

The Brand Experience LLC

1521 Alton Rd., #8

Miami Beach, FL 33139

305-632-9634

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petitioner's second set of interrogatories is being served upon Petitioner's Counsel Michael Grow of Arent Fox LLC at 1050 Connecticut Ave, NW, Washington, DC 20036 by email and through the ESTTA System on May 6, 2011, and by first class postage, prepaid, on May 7, 2011

Samples of the Use of the Marks in Commerce Referenced are attached/below:

PO 3 of 6

Care label
(actual size)

enlarged view

monthly
SUNSAFE®

MARK

© 1999 SunSafe, Inc. All rights reserved.
This SunSafe is made in the U.S.A.

Do not use SunSafe if you are allergic to any of the ingredients listed on this label. If you are allergic to any of the ingredients listed on this label, do not use SunSafe. If you are allergic to any of the ingredients listed on this label, do not use SunSafe.

Use SunSafe only on clean, dry skin. Avoid contact with eyes. Wash eyes immediately if contact occurs. Rinse thoroughly with water. Do not use if you have a skin condition that has not been treated by a doctor. Use SunSafe only on clean, dry skin.

© 1999 SunSafe, Inc. All rights reserved.
P00000000000000

SUNSAFE® is a trademark of SunSafe, Inc.
1.800.SUNSAFE
www.SUNSAFE.com

SUNSAFE®

© 1999 SunSafe, Inc. All rights reserved.
This SunSafe is made in the U.S.A.
Do not use SunSafe if you are allergic to any of the ingredients listed on this label. If you are allergic to any of the ingredients listed on this label, do not use SunSafe. If you are allergic to any of the ingredients listed on this label, do not use SunSafe.

Use SunSafe only on clean, dry skin. Avoid contact with eyes. Wash eyes immediately if contact occurs. Rinse thoroughly with water. Do not use if you have a skin condition that has not been treated by a doctor. Use SunSafe only on clean, dry skin.

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P00000000000000

SUNSAFE® is a trademark of SunSafe, Inc.
1.800.SUNSAFE
www.SUNSAFE.com

ps 4 of 6

BACK COVER of Catalog



S

Protect your young beauties

Wear our hat in the water!

4" brim for maximum protection



light, fast drying fabric keeps you cool, comfortable & protected all day!

The SunSafe® Beautiful Bucket Hat page 12

The SunSafe® Great Sun Escape AquaShirt page 13

The Best AquaShirt Ever page 16



See a greater selection at www.sunsafe.com

SUNSAFE
1521 ALLEN ROAD, BE
MIAMI BEACH, FL 33139

For more information visit www.sunsafe.com Call us at 1-800-796-2133

PRESORT
STANDARD
U.S. POSTAGE
PAID
SUNSAFE

Page 5 of 6



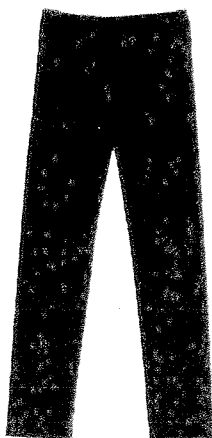
The SunSafe® Kids
want to wear®

24
Beginning
of Kids'
section in
catalog



SunSafe® Kids' Ultimate AquaShirt

Shield your precious ones in maximum protection from neck to waist, and relax in the knowledge that every batch of our fabric is tested to meet our rigorous standards. Great in and out of the water. Team it up with an existing suit or our SwimPants. FABRIC: SUNSAFE® 50+UPF AQUA®. COLOR: WHITE, ROYAL/CAPRI, FLORAL. SIZE: 2, 4, 6, 8, 10, 12, 14
#L01, \$36.00



SunSafe® Kids' Ultimate AquaPants

You can't find better leg protection from the sun's harmful rays – especially the back. Team them up with our Ultimate AquaShirt® for maximum protection. Lightweight and fast drying. FABRIC: SUNSAFE® 50+UPF AQUA®, FOUR-WAY STRETCH FOR ULTIMATE COMFORT. MADE IN USA. COLOR: ROYAL, BLACK. SIZE: 2, 4, 6, 8, 10, 12, 14
#P01-L, \$28.00

pg 8 of 6

The SunSafe® Kids' Legionnaire Hat

Our over-sized, protective bill and neck drape help keep the sun away from little faces, ears, and necks. Lightweight and dries quickly. Great both in and out of the water. *Please remember that for maximum protection from reflected light, sunscreen should be applied to exposed skin.* FABRIC: SUNSAFE® 50+UPF AQUA®. COLOR: FLORAL, ROYAL (SEE PAGE 27), CAPRI (SEE PAGE 28) SIZE: SMALL (FITS 9 MONTHS TO 3 YEARS. INCLUDES TIE), LARGE (FITS AGES 3 AND UP)
#H01, \$20.00



SunSafe® It's A Wrap Sarong

Did you know your childrens' thighs are particularly vulnerable to sun damage? Keep them protected in this adorable piece, and while you are at it – get one for yourself. Comfortable, lightweight and quick drying. FABRIC: SUNSAFE® 50+UPF AQUALITE®, WITH FOUR-WAY STRETCH. MADE IN USA. MACHINE WASHABLE. COLORS: FLORAL, BLACK. KIDS' SIZE: SMALL. ADULT SIZES: MED, LG
#KLS, \$38.00