

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

DAVID A. TROPP,
Plaintiff,

v.

EAGLE CREEK, INC., CONAIR
CORPORATION, BROOKSTONE, INC.,
BRIGGS & RILEY TRAVEL WARE, LLC,
BROOKSTONE, INC., DELSEY LUGGAGE
INC., EBAGS, INC., FORTUNE BRANDS,
INC., HP MARKETING CORP. LTD, L.C.
INDUSTRIES, LLC, OUTPAC DESIGNS INC.,
MAGELLAN'S INTERNATIONAL
TRAVEL CORPORATION, SAMSONITE
CORPORATION, TITAN LUGGAGE USA,
TRAVELPRO INTERNATIONAL, INC. TUMI,
INC, VICTORINOX SWISS ARMY, INC., and
DEFENDANT WORDLOCK, INC.,

Defendants.

Civil Action No.

1:08-cv-04446 (ENV) (RLM)

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION BY
CERTAIN DEFENDANTS FOR A STAY**

Ronald D. Coleman (RC 3875)
GOETZ FITZPATRICK LLP
One Penn Plaza
New York, NY 10119
212-695-8100
rcoleman@goetzfitz.com

Attorneys for Plaintiff David A. Tropp

TABLE OF CONTENTS

| | |
|--|------|
| TABLE OF AUTHORITIES | iii. |
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF FACTS AND PROCEDURAL HISTORY | 2 |
| LEGAL ARGUMENT | 10 |
| I. DEFENDANTS ARE NOT ENTITLED TO A STAY BECAUSE THEIR PENDING SUMMARY JUDGMENT MOTION IS MERITLESS. | 10 |
| II. THE PROCEDURAL POSTURE HERE, THE WEIGHING OF PREJUDICE AND THE STATUS OF THE TRAVEL SENTRY ACTION MILITATE AGAINST A STAY, NOT IN FAVOR OF IT. | 15 |
| CONCLUSION | 17 |

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <i>Advanced Software Design Corp. v. Federal Reserve Bank of St. Louis</i> , 2007 WL 3352365 (E.D. Mo. 2007) | |
| <i>Flynn v. Goldman, Sachs & Co.</i> , 1991 WL 238186 (S.D.N.Y. November 1, 1991) | 5 |
| <i>Weiss v. National Westminster Bank, PLC</i> , 242 F.R.D. 33 (E.D.N.Y. May 14, 2007) | 6 |
| <i>Costa v. AFGO Mechanical Services, Inc.</i> , 237 F.R.D. 21 (E.D.N.Y. 2006) | 8 |
| <i>Starlever Hydraulik GmbH v. Mohawk Resources Ltd.</i> , 1996 WL 172712 (N.D.N.Y. April 10, 1996) | 8 |
| <i>Larson v. United States</i> , 26 Cl. Ct. 365 (Cl. Ct. 1992) | 10, 14 |
| <i>Abbott Laboratories v. Baxter Healthcare Corp.</i> , 2004 WL 1878291 (N.D. Ill. Aug. 16, 2004) | 10 |
| <i>Monsanto Co. v. Syngenta Seeds, Inc.</i> , 503 F.3d 1352 (Fed. Cir. 2007) | 10, 14 |
| <i>In re Bingo Card Minder Corp.</i> , 152 F.3d 941 (Table) (Fed. Cir. 1998) | 10 |
| <i>Costa v. AFGO Mechanical Services, Inc.</i> , 237 F.R.D. 21, 24 (E.D.N.Y. 2006) | 8 |
| <i>O'Rourke v. Smithsonian Institution Press</i> , 399 F.3d 113 (2d Cir.2005) | |
| <i>Willard v. Constellation Fishing Corp.</i> , 136 F.R.D. 28 (D. Mass. 1991) | 8 |
| <i>Sevenson Environmental Services, Inc. v. Shaw Environmental, Inc.</i> , 477 F.3d 1361 (2d Cir. 2007) | 14 |
| <i>Rahman v. Smith & Wollensky Rest. Group, Inc.</i> , 2007 WL 1521117 (S.D.N.Y. May 24, 2007) | 3 |
| <i>Novelty, Inc. v. Mountain View Marketing, Inc.</i> , 2009 WL 3444591 *3 (S.D. Ind. October 21, 2009) | 8 |
| <i>Hachette Dist. Inc. v. Hudson County News Co., Inc.</i> , 136 F.R.D. 356 (E.D.N.Y.1991) | 10 |
| <i>Hollins v. U.S. Tennis Assoc.</i> , 469 F.Supp.2d 67 (E.D.N.Y.2006) | 11, 15 |
| <i>Syngenta Seeds, Inc. v. BTA Branded, Inc.</i> , 2007 WL 3256848, 1 (N.D. Ill. Nov. 1, | 11 |

| | |
|--|------------|
| 2007) | |
| <i>Spencer Trask Software and Info. Servs., LLC v. RPost Int'l Ltd.</i> , 206 F.R.D. 367, 368 (S.D.N.Y. 2002) | 11 |
| <i>Turner Broadcasting Sys., Inc. v. Tracinda Corp.</i> , 175 F.R.D. 554 (D. Nev. 1997) | 11 |
| <i>Nabi Biopharmaceuticals v. Roxane Laboratories, Inc.</i> , 2006 WL 3007430 (S.D. Ohio Oct.20, 2006). | 11 |
| <i>In re Enron Corp. Sec., Derivative & ERISA Litig.</i> , 2003 WL 25508889, at *2 (S.D. Tex. March 25, 2003) | 11 |
| <i>Contemporary Mission, Inc. v. United States Postal Service</i> , 648 F.2d 98 (2d Cir. 1981) | 11, 12 |
| <i>Melton v. Bank of Lexington</i> , 2008 WL 4500161 (W.D. Tenn. September 30, 2008) | 12 |
| <i>Chavous v. District of Columbia Financial Responsibility and Management Assistance Authority</i> , 201 F.R.D. 1 (D.D.C. 2001) | 12 |
| <i>Cuartero v. U.S.</i> , 2006 WL 3190521 (D. Conn. Nov. 1, 2006) | 12, 13 |
| <i>American Home Assur. Co. v. Baltimore Gas & Elec. Co.</i> , 1987 WL 10399, 1 (S.D.N.Y. April 28, 1987) | 13 |
| <i>Port Dock and Stone Corp. v. Oldcaster Northeast, Inc.</i> , 2006 WL 897996 (E.D.N.Y. March 31, 2006) | |
| <i>Hachette Dist. Inc. v. Hudson County News Co., Inc.</i> , 136 F.R.D. 356 (E.D.N.Y.1991) | 10, 11, 15 |
| <i>Network Appliance Inc. v. Sun Microsystems Inc.</i> , 2008 WL 2168917 (N.D. Cal. May 23, 2008) | 16 |
| Statutes and Rules of Court | |
| 28 U.S.C.A. § 1498 | 9, 14 |
| Local Civil Rule 26.2 | 3 |
| Fed. R. Civ. P. 33(d) | 6 |

| | |
|-----------------------------|----|
| Fed. R. Civ. P. 26(b)(5)(A) | 3 |
| Fed. R. Civ. P. 11 | 7 |
| 35 U.S.C. 282 | 10 |

Other Materials

| | |
|--|---|
| LinkedIn.com profile of Lawrence Cruz, found at http://www.linkedin.com/pub/lawrence-cruz/14/363/273 (last accessed February 15, 2010) | 7 |
| “The Advantages of Using a Patent Litigation Specialist v. a General Trial Attorney in Patent and Trade Secret Litigation,” L. Cruz, Intellectual Property Law Institute, State Bar of Texas (March 1996), found at http://www.aplf.org/news/cruz.shtml (last accessed February 15, 2010). | 7 |

PRELIMINARY STATEMENT

Plaintiff David Tropp submits this memorandum of law in opposition to the second motion by certain defendants¹ (“defendants”) to stay this action pending the resolution of *Travel Sentry, Inc. v. Tropp*, 1:06-cv-06415 (the “Travel Sentry Action”) in this Court. The motion should be denied because defendants’ conduct in this litigation has not been in the spirit of the Court’s invitation to the parties to agree to a program whereby duplicative discovery would be avoided, but, rather, has been nothing but a shell game by which defendants have produced virtually nothing; because the motion is premised on the Court pre-deciding not one but two pending substantive motions; and because if this case does not already embody the maxim of “justice delayed is justice denied,” the relief sought by defendants would assuredly bridge that gap and make it so.

This is “only” defendants’ second motion for a stay, but in fact it is merely their latest procedural device for extending the stay they have awarded themselves or cajoled from the Court for over a year. Including the period from when Mr. Tropp’s discovery demands were served until the date hereof—two months and 24 days since discovery was served in November of last year, and one year, three months and 12 days after the filing of the complaint—defendants represented by the Travel Sentry lawyers have managed to file hundreds of pages in motion practice, but **have not produced a single page of documents in response to Mr. Tropp’s document demands.**

Enough is enough! As Mr. Tropp successfully argued in the last go-round of defendants’ manipulation of plaintiff’s courtesies and the Court’s limitless patience, Mr. Tropp’s patents, U.S. Patent Nos. 7,021,537 and 7,036,728, are presumptively valid pursuant to 35 U.S.C. 282, and he is entitled to pursue claims for their infringement. The Court agreed with this in its previous ruling on a motion for a stay, as it must. Yet it can hardly be suggested that this entitlement has been realized

¹ Conair Corporation, Brookstone, Inc., Briggs & Riley Travelware LLC, Delsey Luggage Inc., eBags, Inc., Eagle Creek, a division of VF Outdoor, Inc., Master Lock Company, LLC, HP Marketing Corp., Magellan’s International Travel Corporation, Samsonite Corporation, Titan Luggage USA, Travelpro International, Inc., Tumi, Inc., TRG Accessories, LLC, and Wordlock, Inc.

in any way in the last 15 months.

Defendants' "new" grounds for this motion are unavailing. Their arrogant assertion that this time—this time!—its pending motion for summary judgment is, this time, a sure winner is of course reminiscent of their previous prediction that they would prevail on the then-pending *Markman* motion. The Court should give it no credit, except to the extent of weighing defendants' track record at "calling the shot" and appropriately discounting such predictions to a value of zero. Similarly, defendants once again misstate the relevant considerations when analyzing the stages and filing dates of the earlier- and later-filed case. All these considerations, along with defendants' disregard of the equitable and efficient considerations behind the Court's "revisit" language, militate against the relief sought.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The procedural facts as set out in the Moving Brief of defendants are adopted here for purposes of this motion. The wholly inaccurate manner in which those facts are characterized, however, as well as the plainly false assertions in defendants' submissions, are not adopted, to wit:

It is true that defendants' previous motion for a stay, in April 2009, was not denied until a year after the complaint was filed. From April until November of last year, however, a *de facto* stay was put in place by the Court—the "stay pending the stay," as Mr. Tropp called it in objecting to that action—and, as defendants acknowledge, nothing happened in the case. (DE 76-80; 88.) Defendants also admit that they were served with plaintiff's initial discovery requests on November 23, 2009. (Defendants' Moving Memorandum of Law ("Moving MOL") at 3.) Defendants' claim, however, that "responses and objections to Plaintiff's discovery requests were served on January 15, 2010," *id.*, is the height of cynicism. While they served the usual boilerplate objections and low-octane responses to the first round of interrogatories, they have, through the date hereof, not

produced a single document, or even a privilege log to support their almost universal claims of privilege,² in response to Mr. Tropp's document requests.

To the contrary, defendants, and especially defendants represented by the Travel Sentry attorneys, have engaged in a series of delaying tactics. As they admit, they requested an extension of time for the due date for their initial responses until January 15, 2010, which plaintiff granted. *Id.* Notwithstanding this extension, only on that date—and well over a year after they knew it would be necessary to address the issue—did they, via their mainly non-responsive responses and objections, assert the need for a protective order. Defendants' proposed version of that protective was submitted to plaintiff's counsel only late last week, despite the fact that defendants, who seek the order, could have begun collaborating on it and reached out to plaintiff to begin negotiations at any point after the filing of this action or at least service of discovery demands in November..

While this motion is not styled as a discovery motion, it is, in many respects, exactly that: It asks the Court to relieve defendants from the obligations placed on them, under the Federal Rules of Civil Procedure, to make discovery, and to reward defendants, *nunc pro tunc*, for their abandonment of all but a pretense of compliance with discovery thus far. Furthermore, to the extent that good faith conduct of litigation and candor toward the tribunal at all weigh into the Court's decision on this motion (and Mr. Tropp submits respectfully that, as the District Court sits as a court of equity, they must), the Court must be apprised of the full scope of the manipulative strategy to avoid virtually any substantive disclosure employed by the defendants in this action represented by the Travel Sentry legal team.

² A party that withholds documents on the ground of privilege must submit a log describing the documents so the claim of privilege can be assessed. Fed. R. Civ. P. 26(b)(5)(A). Pursuant to this Court's Local Rules, the privilege log "shall be furnished in writing at the time of the response to such discovery or disclosure . . ." Local Civil Rule 26.2. Failure to provide a privilege log in a timely manner may result in a waiver. *Rahman v. Smith & Wollensky Rest. Group, Inc.*, 2007 WL 1521117 (S.D.N.Y. May 24, 2007) (collecting cases).

To see how this is so, and how defendants have put together a motion practice strategy intended to make a joke of both the Court's ruling on a the previous stay motion and its Rules, it is necessary to consider their evasion of discovery in this matter in some detail, though only a couple of examples from their responses will be necessary. It should at all times be remembered, as the Court considers the puny fruits borne of the extended "layoff" these defendants secured via their "stay of the stay" to prepare for discovery, to address any "housekeeping" issues in a timely fashion and to prepare for efficient, mutual production of discovery in the spirit of modern disclosure practice.⁴

In that vein, Mr. Tropp has already addressed the "sudden realization" by the Travel Sentry–represented defendants, over a year into this litigation, that they could not consider complying with document production unless and until a protective order were in place. Having realized this only recently, the Travel Sentry attorneys also could not provide Mr. Tropp with their (unacceptably restrictive) draft order, with respect to discovery demands served in November, until the first week of February. In contrast, the defendants who have elected actually to comply with the Federal Rules of Civil Procedure and serve documents, Brookstone, Inc., VF Outdoor, Inc. and L.C. Industries, are all represented by independent counsel and, despite their objections, managed to serve nearly 2000 pages of responsive documents combined.

Now we ask the Court to consider what **was** produced on January 15, 2010. Almost all the responses of the defendants sharing lawyers with Travel Sentry were served in a series of dizzyingly

⁴ On this point, defendants evidently feel they score some sort of "point" by noting that Mr. Tropp declined the suggestion of the Magistrate Judge, made informally, that Mr. Tropp may wish to serve his first round of discovery demands while the motion to stay was pending. (Moving MOL at 2.) The relevance of this is not clear. Defendants can hardly be suggesting that they were surprised by the routine discovery propounded on them last November. These discovery demands, notwithstanding their automated cut-and-paste insertion of the whole kitchen sink full of objections, merely tracked the respective causes of actions and defenses and requested the standard range of identification and production of persons, documents and communications relating to them respectively.

mirror-image documents consisting almost entirely of mirror-image boilerplate objections. These non-answers reveal, by what they omit, much of what is really, as Mr. Tropp is unfortunately habituated to say in these many motions, “going on here,” and one reason the Court should deny defendants’ motion to be permitted to keep hiding the ball.

Mr. Tropp submits, as an exemplar, the discovery responses of defendant Conair, Inc. as Exhibit A to the affirmation of counsel submitted herewith (“Coleman Aff.”). We respectfully ask the Court to observe that, in addition to the gratuitous “general objections,” each and every interrogatory has also been objected to as “vague, ambiguous, overly broad, unduly burdensome, oppressive, call[ing] for the disclosure of confidential and proprietary business information and privileged information, and is not reasonably calculated to the discovery of admissible evidence,” with slight variations. This includes, for example, Interrogatory No. 5: “Identify all communications in any form between you and Travel Sentry concerning (a) the patents in suit; (b) Safe Skies or Plaintiff; or (c) Travel Sentry or the Travel Sentry Action.” Coleman Aff. Exh. A.

Now, while broad, this Interrogatory can hardly be characterized as “unduly” broad considering the issues in the case. It is not at all vague or ambiguous; it asks for communications between Conair and the plaintiff concerning three discrete topics. What is vague or ambiguous about that? And it should go without saying that this Interrogatory could not under any circumstance be deemed “not reasonably calculated to the discovery of admissible evidence.” Of course, “The ritual use of language such as ‘overly broad and burdensome’ in boilerplate ‘general objections’ to document requests raises no meaningful issue, and affords no legally sufficient basis for refusing to produce documents within the scope of the request.” *Flynn v. Goldman, Sachs & Co.*, 1991 WL 238186 *3 (S.D.N.Y. November 1, 1991). But this is not a discovery motion; and in any case Mr. Tropp respectfully submits that citation to legal authority as to this point is not necessary: The point here is that these objections are obviously groundless.

Ultimately, and despite this objection though “subject to and without waiving” it, the Travel Sentry-represented defendants, pursuant to the Federal Rules, respond by reference to documents “produced, or to be produced” in response to specified responses to Document Requests—which in the main reiterate the same inapplicable, kitchen-sink objections and evasions. But they do not include **documents**. Not one. Thus, every Interrogatory answered by reference to documents under Fed. R. Civ. P. 33(d) is completely nonresponsive as are, of course, the responses to the Document Requests themselves.

The response by the Travel Sentry–represented defendants Interrogatory No. 8 tells a similar story, but one that is troubling in its own right. It requests that Conair identify, with respect to each type of Travel Sentry products it has carried the grounds for Conair’s assertions, as affirmative defenses, that the patents in suit are invalid, unenforceable or have not been infringed. What could be more fundamental a topic of discovery? Nonetheless, Conair responds, once again:

In addition to the General Objections, Defendant objects to this interrogatory because it is unduly burdensome, and it calls for legal conclusions that the person responding to these interrogatories is not qualified to make. Defendant further objects to this interrogatory because it is premature, as discovery is still ongoing, and because it is more properly the subject of expert reports.

(Coleman Aff. Exh. A.) And, once again, “without waiving” these preposterous objections, Conair answers by reference to documents... that have not been produced. *Id.* No less cynical is the objection on the ground that the Interrogatory “calls for legal conclusions that the person responding to these interrogatories is not qualified to make.”

It does not appear that Conair’s objection is based on the fact it deems these “contention interrogatories.” Such an objection would not avail Conair anyway: Nothing in the Federal Rules of Civil Procedure or the Local Rules for the Eastern District of New York prohibits contention interrogatories at any stage of discovery. *Weiss v. National Westminster Bank, PLC*, 242 F.R.D. 33, 64 (E.D.N.Y. May 14, 2007). Rather, their objection appears to be that one such “person” who

certified these answers—Conair’s chief patent counsel, Lawrence Cruz, Esq. (Coleman Aff. Exh. A)—is “not qualified” to address this question.

Plaintiff understands that Mr. Cruz’s standards are unrelenting.⁵ But Mr. Cruz himself does appear to meet the high standards he advocates as minimal for senior patent counsel. He holds a Bachelor of Science Degree from Southern Illinois University in Electrical Engineering, is a 1992 graduate of the George Washington University Law School and is listed as patent agent in connection with 28 United States patents. He served as a Patent Examiner from 1987-1992, and has held numerous positions as patent counsel in private companies and law firms. *See* LinkedIn.com profile of Lawrence Cruz, found at <http://www.linkedin.com/pub/lawrence-cruz/14/363/273> (last accessed Feb. 15, 2010). Yet despite his experience and credentials, Conair’s patent counsel declared under oath that even he is incompetent to answer the Interrogatory in question. So: Either no one is competent to explain why Conair decided to plead these affirmative defenses; or Conair’s lawyers—Travel Sentry’s lawyers—have declined to share the two massive submissions they filed last fall detailing exactly why, when those attorneys represent Travel Sentry, **they** think the patents are both invalid and non-infringed; or Conair never had any intention of actually answering these

⁵ With some trepidation, we note that Conair’s Mr. Cruz has written elsewhere:

When an otherwise reputable, competent general practitioner or general practice firm lacks even a basic understanding of an area of law and they [sic] genuinely do not even realize it, there exists a true danger that the public will be exposed to incidences of legal malpractice and, in the case of patent litigation, potentially devastating damages or fees that could have been avoided. . . . To develop a high level of competence . . . the practitioner must not only learn many nuances of the law and procedure specific to patents and trade secrets, but he must also develop an intuitive ability to make predictions regarding the potential outcome quickly and while under pressure.

“The Advantages of Using a Patent Litigation Specialist v. a General Trial Attorney in Patent and Trade Secret Litigation,” Intellectual Property Law Institute, State Bar of Texas (March 1996), found at <http://www.aplf.org/news/cruz.shtml> (last accessed Feb. 15, 2010).

interrogatories.⁶ This last seems the most likely explanation.

So this is not, strictly speaking, a discovery motion. There has been no “meet and confer” to address these deficiencies. Indeed, it is all plaintiff could do to get a draft protective order from the parties demanding one before serving documents so at least the full scope of “production” could be apprehended first—despite the clear rule requiring either an application for a protective order or disclosure, not withholding production and then raising the issue of a protective order. *See, Costa v. AFGO Mechanical Services, Inc.* 237 F.R.D. 21, 24 (E.D.N.Y. 2006) (a party seeking to delay discovery may seek a protective order from the court, but that party may not independently withhold production without court authorization); *Willard v. Constellation Fishing Corp.*, 136 F.R.D. 28, 31 (D.Mass. 1991) (“any deferral of disclosure requires action by the Court; it cannot be accomplished unilaterally”); *Novelty, Inc. v. Mountain View Marketing, Inc.*, 2009 WL 3444591 *3 (S.D. Ind. October 21, 2009) (“a proper response to a request for production requires the responding party—within the specified time—to actually produce the responsive documents for inspection or copying”).

Here, however, the Travel Sentry–represented defendants, confident of the success not only of their summary judgment motion but this stay motion, merely saved the Court some trouble and granted their clients a unilateral stay of discovery until the propounding party satisfies this *post facto* “demand.” And demonstrating this point has been Mr. Tropp’s purpose in exposing the

⁶ Conair should not be heard to argue that while it did meet the good faith standards of Rule 11 in asserting its affirmative defenses regarding the patents in suit, it is entitled not to be “hemmed in” at this preliminary stage of the case by responding to interrogatories, even if the Federal Rules require it. In fact, Conair could have answered by at least identifying the existing basis for the allegations in its pleadings, which could have been supplemented as discovery and expert engagement proceeded. *See, Starlever Hydraulik GmbH v. Mohawk Resources Ltd.*, 1996 WL 172712, *5 (N.D.N.Y. April 10, 1996) (interrogatory requiring party to specify the basis for its belief that patent was invalid not definitive or final; party is entitled to offer such additional bases for its belief as it may obtain in discovery and respond initially only with grounds for invalidity of which is aware).

“disconnect” between these defendants’ “discovery responses” on one hand and their litigation reality on the other.

In turn, this casts light on a completely different understanding of what defendants mean when they ask for a “stay of discovery,” and, given that understanding, these discovery responses are not, really, so bad after all. That is because **these “responses” were never meant as real responses** at all. They are placeholders, filler, time-wasters. They are just as they read: a kind of joke. They were served merely to buy enough time to file and prepare a summary judgment motion on grounds so specious they either could not waste them in the Travel Sentry Action, or which, if adopted in that case, would result in that case’s dismissal (as set out in Mr. Tropp’s opposition filed separately). The § 1948 argument could, however, be useful as a cover for a “new and improved” stay motion and, from there, a new application with the Magistrate Judge for “a stay pending the stay.”

And what is the punch line of this joke? That this motion to stay will, once filed and pending, obviously be submitted as Exhibit A in a letter to the Magistrate Judge as grounds to once again freeze the case scheduling order while defendants’ collusion slowly bleeds David Tropp’s business to death. For Mr. Tropp, of course, this is no laughing matter, however.

LEGAL ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO A STAY BECAUSE THEIR PENDING SUMMARY JUDGMENT MOTION IS MERITLESS.

David Tropp's patents are presumptively valid pursuant to 35 U.S.C. 282, and he is entitled to pursue claims for their infringement in this Court. Nothing has occurred in this case that affects his patents' presumptive validity. Nor does adversary counsel's view of the merits of its pending motion for summary judgment amount to an award of summary judgment. A patent owner is **presumed** to have the right to enforce his patent rights in litigation. *See Abbott Laboratories v. Baxter Healthcare Corp.*, 2004 WL 1878291 (N.D. Ill. Aug. 16, 2004); *In re Bingo Card Minder Corp.*, 152 F.3d 941 (Table) (Fed. Cir. 1998). As this Court recognized in its opinion and order denying their previous motion based on the pendency of the Travel Sentry Action, it is not enough that an earlier-filed litigation "could" affect the litigation of which a movant seeks stayed stay—especially when, as here, there is a very good chance that it "could not." This reasoning is even more persuasive when a party such as the moving defendants here urge, not collateral estoppel based on another litigation, but a stay based on the supposedly inevitable result of a pending substantive motion in the same case.

That is not to say a court will never, when faced with an obviously meritless claim and either at the very beginning of a litigation matter or after the close of discovery, will never stay discovery pending resolution of a motion for summary judgment. Whether to do so depends on the circumstances of each case. *See Hachette Dist. Inc. v. Hudson County News Co., Inc.*, 136 F.R.D. 356 (E.D.N.Y.1991). Factors to be considered in determining whether a stay is warranted include (1) whether there has been a strong showing that the claim is unmeritorious; (2) the breadth of discovery and the burden of responding to it; (3) the risk of unfair prejudice to the party opposing the stay; (4) the nature and complexity of the action; and (5) the posture of the litigation.

See Hollins v. U.S. Tennis Assoc., 469 F.Supp.2d 67, 78 (E.D.N.Y.2006); *Port Dock and Stone Corp. v. Oldcaster Northeast, Inc.*, 2006 WL 897996 (E.D.N.Y. March 31, 2006); *Hachette*, 136 F.R.D. at 358.

But filing a summary judgment motion and crowing about how airtight it is hardly entitles a party to the presumption of winning it, much less entitlement to a stay pending its resolution. Such an outcome is one that every defendant in the world would get if it could.

Courts may limit discovery in myriad situations, such as when a defendant files a motion to dismiss pursuant to Rule 12(b)(6). However, the mere filing of such a motion does not automatically stay discovery, nor does it mean that a court will automatically grant a stay simply because the defendant asks for one. . . . Defendants point to a number of cases where courts stayed discovery pending a ruling on a motion to dismiss. However, in a majority of cases the existence of a dispositive motion was not the sole reason for the stay.”

Syngenta Seeds, Inc. v. BTA Branded, Inc., 2007 WL 3256848 *1 (N.D. Ill. Nov. 1, 2007). *See, Spencer Trask Software and Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002); *Turner Broadcasting Sys., Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556 (D. Nev. 1997); *Nabi Biopharmaceuticals v. Roxane Laboratories, Inc.*, 2006 WL 3007430 *2 (S.D. Ohio Oct.20, 2006). In addition, the pendency of a dispositive motion does not itself justify a stay of discovery. *See, In re Enron Corp. Sec., Derivative & ERISA Litig.*, 2003 WL 25508889 *2 (S.D. Tex. March 25, 2003) (“Mere inconvenience and delay do not constitute undue burden and substantial prejudice warranting a denial of a stay of discovery.”). In short, courts do not routinely grant this relief, and they certainly do not grant it when a motion as defective as defendants’ summary judgment motion (see Section II, *infra*).

Briefly, defendants’ cases are easily distinguished from the factual and procedural scenario here. *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 98 (2d Cir. 1981), the only published case defendants cite, sheds no light on how the court concluded it should grant a stay pending a dispositive motion. The court did not even grant a stay *sub silentio*; the decision merely

mentions that a stay of discovery was entered in response to a motion made scant weeks after the complaint was filed—not over a year later. In *Melton v. Bank of Lexington*, 2008 WL 4500161 (W.D. Tenn. Sept. 30, 2008), the facts were also materially unlike those here. The court’s explanation of the grounds on which it granted a stay is relegated to, “this court has previously ruled in this case that those non-specific assertions [of a need for additional discovery] do not provide a sufficient basis to hold in abeyance the summary judgment motions.” The opinion does not cite that ruling but, the little bit that is revealed about the procedural posture of the case suggests that discovery had already taken place. Another unreported decision relied on by defendants, *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1996 WL 101277 (S.D.N.Y. Mar. 7, 1996), involved complex antitrust claims regarding which the court had already made substantial legal rulings on a motion to dismiss, a motion for judgment on the pleadings was still pending and where the summary judgment motion essentially “filled in the blanks” as to certain unresolved factual issues. *See id.* at *3.

Defendants’ reliance on *Chavous v. District of Columbia Financial Responsibility and Management Assistance Authority*, 201 F.R.D. 1 (D.D.C. 2001) is also misplaced. That decision recalled the fact that “a ‘bald assertion’ by a defendant that its motion to dismiss will be granted, or that discovery would be burdensome, is generally insufficient to justify the entry of an order staying discovery,” *citing, People With AIDS Health Group v. Burroughs Wellcome Co.*, 1991 WL 221179, at *1 (D.D.C. Oct. 11, 1991). In *Chavous*, the District Court explained the rare circumstances that justified its grant of a stay:

However, the facts of the instant action [justify a stay] in two material respects. First, plaintiffs in this action [rather than defendants] have moved for summary judgment. Second, the significant privilege issues presented by the plaintiffs’ discovery requests warrant the conclusion that permitting discovery before the need for such discovery is determined would be wasteful and inefficient.

Id. at *3. Neither of these factors is present here, where it is defendants, not plaintiff, making the motion, and there are no “significant privilege issues presented by the plaintiffs’ discovery

requests.” In *Cuartero v. U.S.*, 2006 WL 3190521 (D. Conn. Nov. 1, 2006), the defendant was the Internal Revenue Service and the entire procedural and substantive theory of the underlying case was novel, not to say bizarre, and legally dubious. For that matter, “The plaintiff ha[d] not responded to the suggestion that discovery should be stayed. Nor ha[d] the plaintiff provided any explanation why discovery should go forward in the face of the defendant's assertion that this court lack[ed] jurisdiction and that the plaintiff [was] not entitled under law to the discovery he [sought].” *Id.* at 2. These facts simply are not present here. And in *American Home Assur. Co. v. Baltimore Gas & Elec. Co.*, 1987 WL 10399, *1 (S.D.N.Y. Apr. 28, 1987), Judge Haight wrote, “In the circumstances of this case, it seems better to address the threshold issue of [contract] construction first, and defer the expense and effort of discovery until that threshold has been crossed or not, as the case may be.” But the decision does not elucidate the circumstances on which the Southern District relies, and provides no guidance to the Court here.

At the root of this application, above all, is the Court's view of the merits of defendants' pending motion. In each case cited by defendants, a court granted a stay because its advance review of the pending motion led it to conclude that there has been a strong showing that plaintiff's claim is unmeritorious. Here it is respectfully submitted that this is highly unlikely, for the reasons set out in detail in Mr. Tropp's opposition to that motion. To summarize them briefly:

- The black-letter rule in the Second Circuit is that § 1498 is jurisdictional, and not an affirmative defense. Any motion to dismiss premised on this statute is properly brought, not as a summary judgment motion under Rule 56, but as a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). *See, O'Rourke v. Smithsonian Institution Press*, 399 F.3d 113, 123 (2d Cir. 2005).
- The central substantive premise of defendants' summary judgment motion is the erroneous assertion that § 1498 is a complete bar to a patent claim brought in District Court against a

private party. *See TM Patents v. IBM*, 107 F.Supp.2d 352 (S.D.N.Y. 2000).

- Defendants' insistence that § 1948's requirement that infringement be explicitly authorized by the government is met where a private company's infringing conduct that just happens to coincide with a government policy is also incorrect. *See Severson Environmental Services, Inc. v. Shaw Environmental, Inc.*, 477 F.3d 1361, 1367 (Fed. Cir. 2007).
- And, finally, defendants' argument that here only the government can be recognized as the infringer of Mr. Tropp's patents, despite not having performed all the steps of infringement or their equivalent, is legally unsupportable, *see, Monsanto Co. v. Syngenta Seeds, Inc., id.*, and would also require the Court to make a substantive finding of mixed law and fact that is entirely impossible on the undeveloped record here.

Defendants do not seek in their summary judgment motion merely to extend the law, which in and of itself would be grounds for denial. "Statutory waivers of governmental immunity, such as are embodied in § 1498(a), must be narrowly construed. Therefore, authorization or consent requires explicit acts or extrinsic evidence sufficient to prove the government's intention to accept liability for a specific act of infringement." *Larson v. United States*, 26 Cl. Ct. 365, 370 (Cl. Ct. 1992). Rather, their interpretations turn the purpose and plain language of § 1948 on its head to completely deprive a patentee of any recourse for infringement as long as some government agency, somewhere, likes what the infringer is doing, or even if the infringer is profiting from a change in official policy. At the same time, they have sought—as in their previous motion for a stay—to benefit from and rely on litigation of another case, the Travel Sentry Action, which would itself necessarily be dismissed if their interpretation of § 1948 were adopted by this Court. For these reasons, their summary judgment motion does not make a strong showing that plaintiff's claim is unmeritorious, and this motion for a stay should be dismissed.

II. THE PROCEDURAL POSTURE HERE, THE WEIGHING OF PREJUDICE AND THE STATUS OF THE TRAVEL SENTRY ACTION MILITATE AGAINST A STAY, NOT IN FAVOR OF IT.

Besides the merits of the pending summary judgment motion, other related factors to be considered in determining whether a stay is warranted are the nature and complexity of the action, the existence of prejudice and the posture of the litigation. *See Hollins v. U.S. Tennis Assoc.*, 469 F.Supp.2d at 78; *Port Dock and Stone*, 2006 WL 897996 at *2.; *Hachette*, 136 F.R.D. at 358. In making a similar analysis on the previous motion to stay, this Court considered these factors and found that they favored continuation of this long-stalled litigation. In light of the discovery abuses by defendants here, that the equities, the case management logic, and the prejudice considerations all cut in precisely the opposite direction from that suggested by defendants, as demonstrated below, and for that reason no stay should issue here.

Although they have jettisoned their original argument that a stay is warranted based on the pendency of dispositive motions in the Travel Sentry Action, defendants cannot escape this Court's earlier finding that "Both actions are filed in the same court and assigned to the same district and magistrate judge. The cases are ripe for consolidated handling. . . . While the Court is cognizant of the defendants' point that discovery in this case may be particularly labor-intensive and time-consuming given the number of parties involved, the Court views this as a further indication that discovery should get underway promptly." Memorandum and Order at 5-6.

In this regard defendants put much stock in their having secured an agreement with Mr. Tropp not to duplicate discovery, which, as the Court noted, could move the "balance point . . . in favor of a stay." This argument, however, does not serve them well for several reasons. The first is that the Court's invitation, and its rationale with respect to such an agreement, obviously applies only to a renewed motion for a stay pending the outcome of the Travel Sentry Action. There is no reason a new motion based entirely on the unrelated ground on which defendants proceed now

would implicate the issue of shared and non-duplicative discovery from the Travel Sentry Action. These are “apples and oranges.” At the same time, the Court’s observations about the efficiencies to be gained from consolidated handling are not at all attenuated by defendants’ current application. *See also, Network Appliance Inc. v. Sun Microsystems Inc.*, 2008 WL 2168917 *3 (N.D. Cal. May 23, 2008) (fact that parties were litigating two other related cases before the same court that involved similar patents and technology militated against grant of stay pending patent reexamination).

No less significantly, the Court’s conception of a more efficient discovery program based on a logical, cooperative approach to discovery could not possibly have contemplated the sort of discovery abuse under way here and set out above. The defendant-by-defendant-specific discovery sought by Mr. Tropp, and which the moving defendants have treated so contemptuously, would not even be implicated in the agreement between the two sides. Furthermore, involving as it does mainly sales, logistical and other commercial data and a search for what is likely to be a small collection of relevant, non-privileged written communications, the discovery sought by Mr. Tropp is not burdensome for sophisticated companies such as defendants, compared to the “hard core” patent discovery that has been stipulated not to be repeated.

Indeed, with respect to that discovery, the Travel Sentry defendants’ tactics have been particularly cynical. They first requested an extension of time to answer Mr. Tropp’s discovery requests, which was, of course, granted. These defendants returned evil for good by serving, on the response date, the fundamentally non-responsive discovery excerpted above and submitted in the affidavit of counsel, along with zero responsive documents—and no privilege log—followed by a motion to stay “discovery” in which they have already not participated seriously. In short, their request for an extension has metamorphosed into a motion for a limitless extension of time for

discovery properly answerable before the New Year.⁸

In sum, the procedural posture here, defendants' crafty manipulation of discovery and non-compliance with fundamental tenets of the Federal Rules governing responding to their disclosure obligations, and above all the pendency of the Travel Action, all provide reasons why the Court should not grant a stay here. The Court's "invitation" to move again for a stay if the parties agree to a plan that does not require repetition of earlier discovery is irrelevant as well, because defendants' motion is premised entirely on different grounds. And ultimately, the bad faith and dilatory tactics displayed so far by the Travel Sentry defendants should not result in their being granted yet another extension of time, in addition to those granted and those they have merely taken, to continue infringing David Tropp's patents, depriving him of the benefit of his property rights—and making a joke out of the judicial process.

CONCLUSION

For the foregoing reasons, plaintiff urges the Court to deny the motion by certain defendants to stay this action.

Respectfully submitted,

/s/
RONALD D. COLEMAN (RC 3875)

GOETZ FITZPATRICK LLP
One Penn Plaza – Suite 4401
New York, N.Y. 10119
(212) 695-8100
Attorneys for Plaintiff David A. Tropp

Dated: February 16, 2010

⁸ If anything, for this reason no stay should issue as to outstanding discovery served by plaintiff and substantively not complied with by defendant, regarding which defendants should be required to comply pursuant to this Court's normal procedures for resolution of discovery disputes. Certainly, the set of discovery demands cynically served by defendants on the eve of the submission of this opposition to the stay motion (Coleman Aff. Exh B)—evidently in optimistic anticipation of an order staying "future discovery" or the like and entirely contrary to the thrust of their motion—cannot possibly be suggested to be entitled, as an equitable matter, to the benefit of any such "grandfathering."

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

Ronald D. Coleman (RC 3875)
Joel G. MacMull (JM 8239)
GOETZ FITZPATRICK LLP
One Penn Plaza
New York, NY 10119
(212) 695-8100

Attorneys for Plaintiff David A. Tropp

| | |
|--|--|
| <p>DAVID A. TROPP, Plaintiff, v. EAGLE CREEK, INC., CONAIR CORPORATION, BROOKSTONE, INC., BRIGGS & RILEY TRAVEL WARE, LLC, BROOKSTONE, INC., DELSEY LUGGAGE INC., EBAGS, INC., FORTUNE BRANDS, INC., HP MARKETING CORP. LTD, L.C. INDUSTRIES, LLC, OUTPAC DESIGNS INC., MAGELLAN'S INTERNATIONAL TRAVEL CORPORATION, SAMSONITE CORPORATION, TITAN LUGGAGE USA, TRAVELPRO INTERNATIONAL, INC. TUMI, INC, VICTORINOX SWISS ARMY, INC., and DEFENDANT WORDLOCK, INC., Defendants.</p> | <p>CIVIL ACTION NO. 1:08-cv-04446 (ENV) (RLM)</p> <p>AFFIRMATION OF RONALD D. COLEMAN</p> |
|--|--|

Ronald D. Coleman, an attorney duly admitted to practice in the State of New York, hereby affirms that the following is true and correct:

1. I am an attorney admitted to practice law in the State of New York and a partner in the law firm of Goetz Fitzpatrick LLP. I am over the age of 18 and have personal knowledge

of the facts set forth herein, which are known to me to be true and correct. I could and would testify competently about the matters set forth herein if called upon to do so. I submit this Affirmation in support of plaintiff's motion for summary judgment and in opposition to defendants' motion for summary judgment.

2. The following documents have been produced in this litigation and their authenticity has either been confirmed by testimony or is, to the best of my understanding, not in question.

3. Attached as Exhibit A hereto is a true and correct copy of Defendant Conair Corporation's Answers to Plaintiff's First Requests for Discovery to Each Defendant.

4. Attached as Exhibit B hereto is a true and correct copy of a letter dated February 10, 2010 from counsel for Conair Corporation, Master Lock Company, LLC, HP Marketing Corp., Samsonite Corporation, Titan Luggage USA, Travelpro International, Inc., and TRG Accessories, LLC serving requests to admit, requests for production and interrogatories.

5. Attached as Exhibit C hereto is a letter from me to defense counsel dated November 11, 2009, in response to, and declining, a request that plaintiff stipulate to a 60-day stay following the court's ruling on the earlier stay motion, and urging them to bring any discovery-related issues to the fore as early as possible.

6. As of the date hereof, only the following defendants have produced documents in connection with plaintiff's document requests served November 23, 2009:

- a) Brookstone , Inc. (represented by Greenberg Traurig) – approximately 1400 pages.
- b) VF Outdoor, Inc. (represented by Greenberg Traurig) – approximately 130 pages.
- c) L.C. Industries (represented by Cowan Leibowitz) – approximately 385 pages.

7. No defendant represented in this action by Seyfarth Shaw, which is also counsel for Travel Sentry in the Travel Sentry Action, has produced a single page in response to plaintiff's document requests.

8. Neither prior to nor following service of plaintiff's initial discovery demands, did defendant counsel contact this office requesting that we discuss entering into, informing us of its wish for, or in any other way addressing the issue of a protective order.

9. Neither did any counsel for any defendant contact this office prior to the service of their respective responses to plaintiff's discovery demands to advise that absent a protective order any defendant intended to withhold documents or information from production on the grounds of confidentiality or otherwise.

10. On January 15, 2010, Joel MacMull, Esq., an associate in my office, emailed counsel of record, stating, "In reviewing your discovery responses, many of you have raised the issue of a Protective Order (though no defendant has yet proposed a draft). In an effort to resolve this matter, we enclose a proposed Protective Order for this case. Once finalized, we further propose that this same Order apply to all third party documents as well. We ask that you review the enclosed and share whatever proposed changes you have with all counsel."

11. On behalf of all but two defendants, a responsive draft containing various changes was first transmitted by William Prickett, Esq. at 4:45 PM on February 4, 2010.

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



RONALD D. COLEMAN

Dated: February 16, 2010



World Trade Center East
Two Seaport Lane
Suite 300
Boston, MA 02210-2028
(617) 946-4800
fax (617) 946-4801
www.seyfarth.com

Writer's direct phone
(617) 946-4954
Writer's e-mail
hsheldon@seyfarth.com

January 15, 2010

VIA E-MAIL

Ronald D. Coleman, Esq.
GOETZ FITZPATRICK LLP
One Penn Plaza
New York, NY 10119

Re: David A. Tropp v. Conair Corp. et al., Case No. 08-cv-04446

Dear Ron:

Enclosed please find the following documents:

- Defendant Conair Corporation's Answers to Plaintiff's First Requests for Discovery to Each Defendant;
- Defendant Master Lock Company, LLC's Answers to Plaintiff's First Requests for Discovery to Each Defendant;
- Defendant HP Marketing Corp.'s Answers to Plaintiff's First Requests for Discovery to Each Defendant;
- Defendant Samsonite Corporation's Answers to Plaintiff's First Requests for Discovery to Each Defendant (an executed copy of the answers to interrogatories will follow early next week);
- Defendant Travelpro International, Inc.'s Answers to Plaintiff's First Requests for Discovery to Each Defendant; and

ATLANTA BOSTON CHICAGO HOUSTON LOS ANGELES NEW YORK SACRAMENTO SAN FRANCISCO WASHINGTON, D.C. BRUSSELS



Ronald D. Coleman, Esq.
January 15, 2010
Page 2

- Defendant TRG Accessories, LLC's Answers to Plaintiff's First Requests for Discovery to Each Defendant.

Sincerely,

SEYFARTH SHAW LLP

A handwritten signature in black ink, appearing to read "Heidsha Sheldon".

Heidsha Sheldon

Enclosures

cc: Joel Geoffrey MacMull, Esq.
William L. Prickett, Esq.
Zachary Berk, Esq.
Gary M. Butter, Esq.
Brian A. Carpenter, Esq.
Tod S. Chasin, Esq.
Quentin R. Corrie, Esq.
Jennifer Cozeolino Tempesta, Esq.
Robert J. Kenney, Esq.
Michael B. Marion, Esq.
Michael F. Maschio, Esq.
Theodore J. McEvoy, Esq.
Stacy Bekman Radz, Esq.
Chris Lonegro, Esq.
Janet Leslie Cullum, Esq.
Carolyn Juarez, Esq.
Daniel Brown, Esq.
Omar Jabri, Esq.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
DAVID A. TROPP,

Plaintiff,

v.

CONAIR CORPORATION, BROOKSTONE,
INC., BRIGGS & RILEY TRAVELWARE LLC,
DELSEY LUGGAGE INC., EBAGS, INC.,
EAGLE CREEK, a division of VF OUTDOOR,
INC., MASTER LOCK COMPANY, LLC, HP
MARKETING CORP. LTD, L.C. INDUSTRIES,
LLC, OUTPAC DESIGNS INC., MAGELLAN'S
INTERNATIONAL TRAVEL CORPORATION,
SAMSONITE CORPORATION, TITAN
LUGGAGE USA, TRAVELPRO
INTERNATIONAL INC, TUMI, INC, TRG
ACCESSORIES, LLC, and WORDLOCK, INC.,

Defendants.
-----X

:
: Hon. Eric N. Vitaliano, U.S.D.J.

: Hon. Roanne L. Mann, U.S.M.J.

: Civil Action No. 1:08-cv-04446

**DEFENDANT CONAIR CORPORATION'S ANSWERS TO PLAINTIFF'S
FIRST REQUESTS FOR DISCOVERY TO EACH DEFENDANT**

Defendant, Conair Corporation ("Conair" or "Defendant"), by and through its attorneys,
Seyfarth Shaw LLP, hereby serves its response to Plaintiff's First Requests for Discovery,
without waiving:

1. The right to object on any ground at any time to any demand for further answers
to requests for discovery or to any other discovery procedures involving or relating to the subject
matter of the information that has been provided;
2. The right to object on any ground to the use of any of the information contained

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
DAVID A. TROPP,

Plaintiff,

v.

CONAIR CORPORATION, BROOKSTONE,
INC., BRIGGS & RILEY TRAVELWARE LLC,
DELSEY LUGGAGE INC., EBAGS, INC.,
EAGLE CREEK, a division of VF OUTDOOR,
INC., MASTER LOCK COMPANY, LLC, HP
MARKETING CORP. LTD, L.C. INDUSTRIES,
LLC, OUTPAC DESIGNS INC., MAGELLAN'S
INTERNATIONAL TRAVEL CORPORATION,
SAMSONITE CORPORATION, TITAN
LUGGAGE USA, TRAVELPRO
INTERNATIONAL INC, TUMI, INC, TRG
ACCESSORIES, LLC, and WORDLOCK, INC.,

Defendants.
-----X

:
: Hon. Eric N. Vitaliano, U.S.D.J.

: Hon. Roanne L. Mann, U.S.M.J.

:
: Civil Action No. 1:08-cv-04446

**DEFENDANT CONAIR CORPORATION'S ANSWERS TO PLAINTIFF'S
FIRST REQUESTS FOR DISCOVERY TO EACH DEFENDANT**

Defendant, Conair Corporation ("Conair" or "Defendant"), by and through its attorneys,
Seyfarth Shaw LLP, hereby serves its response to Plaintiff's First Requests for Discovery,
without waiving:

1. The right to object on any ground at any time to any demand for further answers
to requests for discovery or to any other discovery procedures involving or relating to the subject
matter of the information that has been provided;
2. The right to object on any ground to the use of any of the information contained

therein in any subsequent proceeding or action, or in the trial or any hearing in this or any proceeding or action;

3. The right at any time to supplement the responses set forth below.

GENERAL OBJECTIONS

The following general objections are applicable to each request:

1. Defendant objects to each and every request where Tropp has not offered a definition of the terms used in the request and the lack of definition has rendered the request uncertain or difficult to understand. Despite its objections, Defendant has, where possible, attempted to respond to each request as written.

2. Defendant objects to any and all requests to the extent they seek to impose upon it any obligations or responsibilities other than those mandated by the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Eastern District of New York.

3. Defendant objects to all requests that seek information (a) protected by the attorney/client or other privilege, (b) the work product doctrine, or (c) that are otherwise beyond the scope of discovery permitted by the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Eastern District of New York.

4. Defendant objects to each request to the extent that the request is overly broad, unduly burdensome, unduly expensive, seeks information that is not relevant to the subject matter of the present action, or not reasonably calculated to lead to the discovery of admissible evidence.

5. Defendant objects to each request that uses the phrase “Items utilizing the Travel Sentry Lock” and “Travel Sentry Lock” because Tropp’s definition is vague, ambiguous, overly broad, and factually inaccurate.

6. Defendant objects to each request that uses the phrase “aware of” to the extent that Tropp’s definition of that phrase includes not only actual knowledge but also information that the Defendant “should have been aware of.”

7. Pursuant to Fed. R. Civ. P. 33(a)(1), Defendant objects to each interrogatory after Interrogatory No. 7 because plaintiff is exceeding 25 interrogatories, including discrete subparts.

8. Defendant’s responses are based upon, and therefore limited by, records and information still in existence, presently recollected, and/or thus far discovered in the course of preparing these responses. Consequently, Defendant reserves the right to make any changes in these responses if it appears that any inadvertent errors or omissions have been made or additional information becomes available.

9. Defendant’s response that it will produce a particular category of documents requested does not constitute a representation that any such documents exist and indicates only that Defendant will produce non-privileged, discoverable documents responsive to Tropp’s request if there are any such documents within Defendant’s possession, custody or control.

10. Defendant incorporates by reference each of the preceding General Objections into each of the following responses as if specifically set forth therein.

REQUESTS FOR ADMISSION

REQUEST NO. 1:

Admit that you were aware of the ‘537 Patent prior to the filing of the Complaint.

RESPONSE:

Conair objects to this request to the extent that Tropp’s definition of the phrase “aware of” includes not only actual knowledge but information that Travelpro “should have been aware of.” Subject to and without waiving the foregoing objection, Conair admits that it had knowledge of the ‘537 Patent prior to the filing of the Complaint.

REQUEST NO. 2:

Admit that you were aware of the '728 Patent prior to the filing of the Complaint.

RESPONSE:

Conair objects to this request to the extent that Tropp's definition of the phrase "aware of" includes not only actual knowledge but information that Conair "should have been aware of." Subject to and without waiving the foregoing objection, Conair admits that it had knowledge of the '728 Patent prior to the filing of the Complaint.

REQUEST NO. 3:

Admit that you were aware of the Travel Sentry Action prior to the filing of the Complaint.

RESPONSE:

Conair objects to this request to the extent that Tropp's definition of the phrase "aware of" includes not only actual knowledge but information that Conair "should have been aware of." Subject to and without waiving the foregoing objection, Conair admits that it had knowledge of the Travel Sentry Action prior to the filing of the Complaint.

REQUEST NO. 4:

Admit that you were aware of Safe Skies prior to the filing of the Complaint.

RESPONSE:

Conair objects to this request to the extent that Tropp's definition of the phrase "aware of" includes not only actual knowledge but information that Conair "should have been aware of." Subject to and without waiving the foregoing objection, Conair admits that it had knowledge of Safe Skies prior to the filing of the Complaint.

REQUEST NO. 5:

Admit that you were aware of plaintiff's claims regarding the Travel Sentry Lock prior to the filing of the Complaint.

RESPONSE:

Conair objects to this request because it is vague and ambiguous. Conair further objects to this request to the extent that Tropp's definition of the phrase "aware of" includes not only actual knowledge but information that Conair "should have been aware of." Subject to and without waiving the foregoing objections, Conair admits that it had knowledge that Plaintiff claims that Travel Sentry and its licensees infringe upon the claims of the '537 and '728 Patents but Conair denies the Plaintiff's claims.

REQUEST NO. 6:

Admit that you have, at any time since April 4, 2006 sold or distributed, or at present do sell or distribute, Items utilizing the Travel Sentry Lock.

RESPONSE:

Conair objects to this request because it is vague and ambiguous. Subject to and without waiving the foregoing objections, Conair admits that since April 4, 2006, it has sold luggage locks and other products incorporating the Travel Sentry trademark.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify each and every Item utilizing the Travel Sentry Lock you have sold, whether domestically or overseas, since April 4, 2006.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is vague, ambiguous and unduly burdensome. Subject to and without waiving the foregoing objections, to the extent this interrogatory seeks information regarding locks marked with Travel Sentry's trademark, Defendant responds to this interrogatory as follows:

- TSM-N90TS - Inspection Status Lock in assorted colors
- TSM-390TS - same as above, but in black and silver assortment
- TSM-393TS - 3-Dial combo lock made w. ABS plastic
- TSM-396TS - 4-Dial EZ read combo lock

- TSM-R01TS - padlock w. plastic housing in assorted colors
- TSM-B01TS - same as above but in all black housing
- TSM-A01TS - brass padlock
- TSM-2A01TS - brass padlock 2 pack

INTERROGATORY NO. 2:

Identify each and every Luggage Lock not utilizing the Travel Sentry Lock you have sold, whether domestically or overseas, since January 1, 2004.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is vague, ambiguous, overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 3:

For each and every Item or Luggage Lock identified in your answers to Interrogatories (1) and (2) sold at Wholesale:

- a. State the dates upon which they were was sold;
- b. State the price at which they were sold;
- c. Identify the purchasers of that Item;
- d. State the quantity of each Item sold to each purchaser;
- e. State your direct costs of sale for that Item;
- f. State your fixed costs of sale for that Item;
- g. State your gross revenue derived from sales of that Item;
- h. State your gross profit derived from sales of that Item;
- i. State all projections by you or those engaged by you with respect to the foregoing subsections (a) through (e) of this Interrogatory, whenever made.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for the disclosure of

confidential and proprietary business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, to the extent this interrogatory seeks information regarding locks marked with Travel Sentry's trademark, Defendant responds to this interrogatory as follows:

Pursuant to Fed. R. Civ. 33(d), the answer to this interrogatory may be derived or ascertained from Defendant's business records and the burden of ascertaining or deriving the answers is substantially the same for the Plaintiff as it is for Defendant. As such, in response to this interrogatory, Defendant specifies the following records from which the answer to this interrogatory may be obtained: Any and all documents produced, or to be produced, by Defendant in response to Tropp's Document Request Nos. 6, 19, 20, 22 and 26.

INTERROGATORY NO. 4:

As to Travel Sentry:

- a. Describe the legal and business relationship between you and Travel Sentry;
- b. Identify any agreements between you, whether written or otherwise, including agreements to which you are both parties in addition to other third parties, which:
 - i Formed, created or referred to any relationship described in your response to subsection (a) of this Interrogatory, including, but not limited to any agreement for the payment of royalties; or
 - ii Constituted at any time an agreement for indemnification, joint defense, or reimbursement of costs or legal fees in connection with patent litigation.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for the disclosure of confidential and proprietary business information and information subject to the attorney-client privilege, and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Defendant responds to this interrogatory as follows:

Pursuant to Fed. R. Civ. 33(d), the answer to this interrogatory may be derived or ascertained from Defendant's business records and the burden of ascertaining or deriving the answers is substantially the same for the Plaintiff as it is for Defendant. As such, in response to this interrogatory, Defendant specifies the following records from which the answer to this interrogatory may be obtained: Any and all documents produced, or to be produced, by Defendant in response to Tropp's Document Request Nos. 6, 11, 24 and 25.

INTERROGATORY NO. 5:

Identify all communications in any form between you and Travel Sentry concerning:

- a. The patents in suit;
- b. Safe Skies or Plaintiff; or
- c. Travel Sentry or the Travel Sentry Action.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for the disclosure of confidential and proprietary business information and privileged information, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant responds to this interrogatory as follows:

Pursuant to Fed. R. Civ. 33(d), the answer to this interrogatory may be derived or ascertained from Defendant's business records and the burden of ascertaining or deriving the answers is substantially the same for the Plaintiff as it is for Defendant. As such, in response to this interrogatory, Defendant specifies the following records from which the answer to this

interrogatory may be obtained: Any and all documents produced, or to be produced, by Defendant in response to Tropp's Document Request Nos. 1, 4, 6, 7, 11, 19, 21, 22, 24, and 25.

INTERROGATORY NO. 6:

Identify all communications in any form between, produced, transmitted or received within or by your organization, at any level of management, concerning:

- a. The patents in suit;
- b. Safe Skies or Plaintiff; or
- c. Travel Sentry or the Travel Sentry Action.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for the disclosure of confidential and proprietary business information and privileged information, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant responds to this interrogatory as follows:

Pursuant to Fed. R. Civ. 33(d), the answer to this interrogatory may be derived or ascertained from Defendant's business records and the burden of ascertaining or deriving the answers is substantially the same for the Plaintiff as it is for Defendant. As such, in response to this interrogatory, Defendant specifies the following records from which the answer to this interrogatory may be obtained: Any and all documents produced, or to be produced, by Defendant in response to Tropp's Document Request Nos. 1, 4, 6, 16-22, 24, and 25.

INTERROGATORY NO. 7:

Identify all communications in any form between you and any third party concerning:

- a. The patents in suit;
- b. Safe Skies or Plaintiff; or
- c. Travel Sentry or the Travel Sentry Action.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is vague, ambiguous, overly broad, unduly burdensome, calls for information protected by the attorney-client privilege and/or work product protections, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant responds to this interrogatory as follows:

Pursuant to Fed. R. Civ. 33(d), the answer to this interrogatory may be derived or ascertained from Defendant's business records and the burden of ascertaining or deriving the answers is substantially the same for the Plaintiff as it is for Defendant. As such, in response to this interrogatory, Defendant specifies the following records from which the answer to this interrogatory may be obtained: Any and all documents produced, or to be produced, by Defendant in response to Tropp's Document Request Nos. 1, 4, and 12-15.

INTERROGATORY NO. 8:

Separately for each Item identified in your responses to Interrogatories (1) and (2), describe fully and in detail any basis for contending that one or more claims of either of the patents in suit is:

- i Invalid;
- ii Unenforceable due to any legal ground; or
- iii Not infringed by you.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is unduly burdensome, and it calls for legal conclusions that the person responding to these interrogatories is not qualified to make. Defendant further objects to this interrogatory because it is premature, as discovery is ongoing, and because it is more properly the subject of expert

reports. Subject to and without waiving the foregoing objections, Defendant responds to this interrogatory as follows:

See documents produced or to be produced in response to Tropp's Document Request Nos. 5 and 7. Pursuant to Fed. R. Civ. P. 26(e)(2), Defendant agrees to supplement its response to this interrogatory as necessary in accordance with any schedule for expert disclosures entered in this case.

INTERROGATORY NO. 9:

Identify all freight forwarders, customs brokers and other parties involved in or with information relating to the shipping, importation or related logistics for Item utilizing the Travel Sentry Lock.

ANSWER:

In addition to the General Objections, Defendant objects to this interrogatory because it is vague, ambiguous, unduly burdensome, oppressive, and it calls for the disclosure of confidential and proprietary business information. Subject to and without waiving the foregoing objections, to the extent this interrogatory seeks information regarding locks marked with Travel Sentry's trademark, Defendant responds to this interrogatory as follows:

Pursuant to Fed. R. Civ. 33(d), the answer to this interrogatory may be derived or ascertained from Defendant's business records and the burden of ascertaining or deriving the answers is substantially the same for the Plaintiff as it is for Defendant. As such, in response to this interrogatory, Defendant specifies the following records from which the answer to this interrogatory may be obtained: Any and all documents produced, or to be produced, by Defendant in response to Tropp's Document Request No. 26.

INTERROGATORY NO. 10:

Identify all persons with first-hand knowledge concerning any of your responses to the foregoing Interrogatories.

ANSWER:

Subject to and without waiving the foregoing General Objections, Defendant responds to this interrogatory as follows:

Larry Cruz
Chief Patent Counsel
Conair Corporation
1 Cummings Pt. Rd.
Stamford, CT 06904

Robin Linsley
Product Manager
Conair Corporation
1 Cummings Pt. Rd.
Stamford, CT 06904

Jeanne Brunetti
Marketing
Conair Corporation
1 Cummings Pt. Rd.
Stamford, CT 06904

See also Certain Defendants' Fed. R. Civ. P. 26(a)(1) Initial Disclosures dated April 30, 2009, Section A.

INTERROGATORY NO. 11:

Identify all documents concerning any of your responses to the foregoing Interrogatories.

ANSWER:

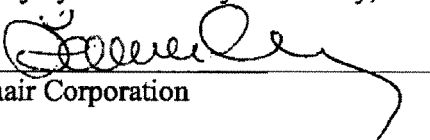
Defendant objects to this interrogatory because it is overly broad, unduly burdensome and oppressive. Subject to and without waiving the foregoing objections, Defendant responds to this interrogatory as follows:

See documents produced, or to be produced, by Defendant in response to Tropp's Requests for Documents and Things.

VERIFICATION

I, Lawrence Cruz, Chief Patent Counsel, have read the foregoing responses to interrogatories. The information in these responses has been obtained from Conair Corporation's agents, employees or others whom I believe reliable and capable of ascertaining the facts stated therein. As to those matters set forth in the responses about which I have personal knowledge, I believe these answers to be true; as to those matters on which I have no personal knowledge and am relying upon those who have prepared those answers, I have no reason to believe those answers are not true.

Signed under the pains and penalties of perjury this 14th day of January, 2010.



Conair Corporation
By:
Its:

REQUESTS FOR DOCUMENTS AND THINGS

REQUEST NO. 1:

All documents identified or otherwise concerning your responses to the Interrogatories herein.

RESPONSE:

In addition to the General Objections, Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, and it calls for confidential and proprietary business information and documents protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 2:

Two representative exemplars of each Item identified in your response to Interrogatory (1).

RESPONSE:

In addition to the General Objections, Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, and oppressive.

REQUEST NO. 3:

All documents identified, referred to or utilized in preparation of your initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1).

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, and calls for information protected by the attorney-client privilege and work product doctrine. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 4:

All documents and things concerning or relevant to the patents in suit.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for documents protected by the attorney-client privilege and/or work product doctrine, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant agrees to produce non-privileged documents responsive to other, more narrowly focused requests, if any, in its possession, custody or control.

REQUEST NO. 5:

All documents and things concerning, supporting or tending not to support any defense you intend to assert in this action, including, but not limited to:

- a. A defense of non-infringement;

- b. A defense of patent invalidity;
- c. Any other defense asserted by Travel Sentry as a defense to the counterclaims of plaintiff in the Travel Sentry Action.

RESPONSE:

In addition to the General Objections, Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, not reasonably calculated to lead to the discovery of admissible evidence, and it calls for information protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving the foregoing objections, Defendant agrees to produce non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 6:

All documents and things concerning the Travel Sentry Lock.

RESPONSE:

In addition to the General Objections, Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, to the extent this request seeks documents regarding locks marked with Travel Sentry's trademark, Defendant agrees to produce non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 7:

All documents containing discoverable information relating to any claim made herein or any defense you intend to assert or will assert, or which any other defendant has asserted or at the time of your service of responses hereto has asserted.

RESPONSE:

In addition to the General Objections, Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, not reasonably calculated to

lead to the discovery of admissible evidence, and calls for documents protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 8:

All catalogs, advertisements, marketing materials and other documents documenting your sale of Items utilizing the Travel Sentry Lock.

RESPONSE:

In addition to the General Objections, Defendant objects to this request because it is overly broad, unduly burdensome, oppressive, and calls for confidential and proprietary business information. Subject to and without waiving the foregoing objections, to the extent this request seeks documents regarding locks marked with Travel Sentry's trademark, Defendant agrees to produce non-privileged documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 9:

All communications between you and plaintiff.

RESPONSE:

In addition to the General Objections, Defendant objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 10:

All communications between you and Safe Skies.

RESPONSE:

In addition to the General Objections, Defendant objects to this request because it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 11:

All communications between you and Travel Sentry concerning the Travel Sentry Action.

RESPONSE:

Defendant objects to this request because it is overly broad, unduly burdensome, calls for confidential and proprietary business information, calls for documents protected by the attorney-client privilege and/or work product doctrine, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control subject to the entry of a Protective Order in this case.

REQUEST NO. 12:

All communications between you and any third party concerning plaintiff.

RESPONSE:

Defendant objects to this request because it is overly broad, unduly burdensome, calls for documents protected by the attorney-client privilege and/or work product doctrine, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 13:

All communications between you and any third party concerning Safe Skies.

RESPONSE:

Defendant objects to this request because it is overly broad, unduly burdensome, calls for documents protected by the attorney-client privilege and/or work product doctrine, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 14:

All communications between you and any third party concerning Travel Sentry.

RESPONSE:

Defendant objects to this request because it is overly broad, unduly burdensome, calls for documents protected by the attorney-client privilege and/or work product doctrine, and is not reasonably calculated to lead to the discovery of admissible evidence. Discoverable documents responsive to this request will be produced in response to Tropp's other, more narrow requests, seeking relevant documents.

REQUEST NO. 15:

All communications between you and any third party concerning the Travel Sentry Action.

RESPONSE:

Defendant objects to this request because it is overly broad, unduly burdensome, calls for information protected by the attorney-client privilege and/or work product protection, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 16:

All internal communications concerning plaintiff.

RESPONSE:

Defendant objects to this request because it is overly broad, unduly burdensome, oppressive, not reasonably calculated to lead to the discovery of admissible evidence, and calls for documents protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 17:

All internal communications concerning Safe Skies.

RESPONSE:

Defendant objects to this request because it is overly broad, unduly burdensome, oppressive, not reasonably calculated to lead to the discovery of admissible evidence, and calls for documents protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 18:

All internal communications concerning the Travel Sentry Action.

RESPONSE:

Defendant objects to this request because it is overly broad, unduly burdensome, oppressive, and calls for documents protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 19:

All documents concerning orders or arrangements for or any other aspect of the manufacture of Items utilizing the Travel Sentry Lock.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for confidential and proprietary business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, to the extent this request seeks documents regarding locks marked with Travel Sentry's trademark, Defendant agrees to produce non-privileged documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 20:

All documents concerning sales of Items utilizing the Travel Sentry Lock.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for confidential and proprietary business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, to the extent this request seeks documents regarding locks marked with Travel Sentry's trademark, Defendant agrees to produce non-privileged documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 21:

All documents concerning packaging of Items utilizing the Travel Sentry Lock including but not limited to:

- a. documents concerning packaging, whether actually used or only planned, suggested or contemplated;

- b. exemplars of each type of packaging used; and
- c. all other communications concerning packaging.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for confidential and proprietary business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, to the extent this request seeks documents regarding locks marked with Travel Sentry's trademark, Defendant agrees to produce non-privileged documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 22:

All documents and records relating to the sale, purchase or manufacture of Items utilizing the Travel Sentry Lock.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for confidential and proprietary business information, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, to the extent this request seeks documents regarding locks marked with Travel Sentry's trademark, Defendant agrees to produce non-privileged documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 23:

All documents and records relating to the sale or purchase by you of merchandise manufactured or sold by Safe Skies.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, calls for information protected by the attorney-client privilege and/or work product doctrine, and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control.

REQUEST NO. 24:

All intellectual property licensing agreements concerning the Travel Sentry Lock or any intellectual property associated with the Travel Sentry Lock.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, and calls for confidential and proprietary business information. Subject to and without waiving the foregoing objections, to the extent this request seeks documents regarding locks marked with Travel Sentry's trademark, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 25:

All documents concerning licensure, use, placement and otherwise concerning the Travel Sentry "red diamond" logo.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, and calls for confidential and proprietary business information. Subject to and without waiving the foregoing objections, Defendant agrees to produce all non-privileged

documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 26:

All documents relating to shipping of Items utilizing the Travel Sentry Lock to Wholesale customers, including, but not limited to:

- a. shipping receipts;
- b. bills of lading; and
- c. freight invoices.

RESPONSE:

Defendant objects to this request because it is vague, ambiguous, overly broad, unduly burdensome, oppressive, not reasonably calculated to lead to the discovery of admissible evidence, and calls for confidential and proprietary business information. Subject to and without waiving the foregoing objections, to the extent this request seeks documents regarding locks marked with Travel Sentry's trademark, Defendant agrees to produce all non-privileged documents responsive to this request, if any, in its possession, custody or control, subject to the entry of a Protective Order in this case.

REQUEST NO. 27:

All documents concerning your policies with respect to document retention or destruction, including any documentation of destruction of materials responsive to any of these Requests for Documents and Things.

RESPONSE:

Defendant objects to this request because it is vague and ambiguous, calls for documents protected by the attorney-client privilege and/or work product doctrine, and is not reasonably calculated to lead to the discovery of admissible evidence.

Dated: Boston, Massachusetts
January 15, 2010

SEYFARTH SHAW LLP

/s/ Heidsha Sheldon

William L. Prickett (WP-7278)

Heidsha Sheldon (HS-6493) (*Pro hac vice*)

Zachary W. Berk (ZB-0459) (*Pro hac vice*)

SEYFARTH SHAW LLP

World Trade Center East

Two Seaport Lane, Suite 300

Boston, MA 02210-2028

(617) 946-4800

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2010, I served the foregoing **RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR DISCOVERY TO EACH DEFENDANT** upon counsel for Plaintiff, as well as all counsel who have entered an appearance in this action, via e-mail (PDF version).

/s/ Heidsha Sheldon

Heidsha Sheldon



World Trade Center East
Two Seaport Lane
Suite 300
Boston, MA 02210-2028
(617) 946-4800
fax (617) 946-4801
www.seyfarth.com

Writer's direct phone
(617) 946-4954
Writer's e-mail
hsheldon@seyfarth.com

February 10, 2010

VIA E-MAIL RCOLEMAN@GOETZFITZ.COM

Ronald D. Coleman, Esq.
GOETZ FITZPATRICK LLP
One Penn Plaza
New York, NY 10119

Re: David A. Tropp v. Conair Corp. et al., Case No. 08-cv-04446

Dear Ron:

On behalf of our clients, defendants Conair Corporation, Master Lock Company, LLC, HP Marketing Corp., Samsonite Corporation, Titan Luggage USA, Travelpro International, Inc., and TRG Accessories, LLC ("Defendants"), enclosed for service in the above-referenced action are the following documents:

1. Certain Defendants' First Requests to Admit to Plaintiff;
2. Certain Defendants' First Request for Production of Document and Things; and
3. Certain Defendants' First Set of Interrogatories to Plaintiff.

Please note that Defendants' service of the enclosed discovery requests is not, and shall not constitute, a waiver in any respect of their position that discovery in this case should be stayed or the arguments set forth in their pending Motion to Stay Discovery Pending Resolution of Motion for Summary Judgment (the "Motion to Stay"). Defendants serve the enclosed discovery requests as a precautionary and protective measure in the event that the Court denies the Motion to Stay.

Sincerely,

SEYFARTH SHAW LLP

/s/ Heidsha Sheldon
Heidsha Sheldon

HS:hs

ATLANTA BOSTON CHICAGO HOUSTON LOS ANGELES NEW YORK SACRAMENTO SAN FRANCISCO WASHINGTON, D.C. BRUSSELS



Ronald D. Coleman, Esq.
February 10, 2010
Page 2

Enclosures

cc: Joel Geoffrey MacMull, Esq.
William L. Prickett, Esq.
Zachary Berk, Esq.
Gary M. Butter, Esq.
Brian A. Carpenter, Esq.
Tod S. Chasin, Esq.
Quentin R. Corrie, Esq.
Jennifer Cozeolino Tempesta, Esq.
Anthony DiFilippi, Esq.
Robert J. Kenney, Esq.
Michael B. Marion, Esq.
Michael F. Maschio, Esq.
Theodore J. McEvoy, Esq.
Stacy Bekman Radz, Esq.
Janet Leslie Cullum, Esq.
Carolyn Juarez, Esq.
Daniel Brown, Esq.
Omar Jabri, Esq.



GOETZ FITZPATRICK LLP
Attorneys at Law
www.goetzfitz.com
One Penn Plaza, New York, NY 10119 | (T) 212-695-8100 | (F) 212-629-4013

Ronald D. Coleman
Partner
rcoleman@goetzfitz.com

November 11, 2009

BY EMAIL

All Counsel of Record

Re: **Tropp v. Conair Corp. et al.**
Civil Action No. 1:08-cv-04446

Dear Counsel:

I write in response to Will Prickett's letter of November 9th.

An affirmative, stipulated scheme to avoid replication of effort and expense in discovery here is a measure which, as Will's letter candidly acknowledges, was first suggested by plaintiff many seasons ago, and which Mr. Tropp still supports. At that time, defendants not only rejected the entire idea, which hardly matters now. What does matter is that they never suggested that a ground for their lack of interest was that there would be a need for a 60-day "learning-curve period" such as has been proposed by Seyfarth.

In fact, during a very practical and earnest colloquy before Magistrate Judge Mann in connection with defendants' "stay pending the stay" request, Judge Mann actually urged plaintiff to serve discovery at that time so that the defendants' deadlines to respond would run automatically and immediately in the event Judge Vitaliano were to deny the stay. We also discussed the issue, from plaintiff's perspective, of the permissibility of sharing material under seal in the Travel Sentry case in this litigation. Both of these aspects of that discussion presented ideal opportunities for defendants to raise the concerns reflected in Will's letter, which none of them did.

Naturally there are issues among defendants that may have complicated the process. Presumably these would include the fact (alluded to in plaintiff's brief in opposition to the stay motion) that there at least appears to be a serious conflict of interest in Seyfarth's representation of what by all indications are parties with diverging, and even adversarial, interests in the two cases. The complexities of these relationships and



GOETZ FITZPATRICK LLP

All Counsel
November 11, 2009
Page 2 of 3

interests, however, are best known to defendants, and should have militated in favor of defendants raising and grappling with them during the extended period of inactivity in this matter, not now.

Judge Vitaliano did indeed offer conceptual support of to our idea of a stipulation among the parties to avoid replication and duplication of effort and expense. But nothing in his opinion suggests that the court would endorse the tack of a new two-month freeze on discovery—at the end of which no one can even say that the defendants themselves would be sufficiently in agreement to begin negotiations, much less conclude them successfully. It is not hard to imagine a whole new series of rolling stay requests during the process of attempting to both coordinate the defendants' respective positions and frame a mutually acceptable convention. Judge Vitaliano's decision makes clear that the court obviously agrees with plaintiff that there has been enough delay here already. This is surely the reason he wrote that the equities might shift in the direction of a stay "if the parties in this action all agreed," etc. -- not before they did so.

Moreover, plaintiff has nothing to gain, and everything to lose, from ceding the benefit of even initial discovery prior to completion of the court-ordered mediation process. We will request production, for example, of defendants' respective sales and profits relating to the subject merchandise, and of relevant communications among defendants or between any defendant and Travel Sentry that would go to knowledge, intent and other relevant factors affecting both liability and damages. Certainly defendants have no intention of engaging in the mediation process in any but the best of faith. But without disclosure, Mr. Tropp would have no quantitative basis on which to formulate a settlement position in mediation, much less to accept any offer, rendering mediation a sterile exercise and, ironically, a waste of time and money. And no one can seriously suggest that a request to put the mediation on (what would amount to) indefinite hold to avoid this problem would be entertained by the court; nor would plaintiff join in any such request. In any event discovery of this nature would certainly not be included in the category of discovery appropriate for "recycling" from the Travel Sentry case, and there is simply no reason, even under Seyfarth's reasoning requiring a stay for coordination of defendants' positions as to common issues, to stay such discovery.

Seyfarth's "proposal to make a proposal (next year)," therefore, much like the "stay pending a stay" opposed by Mr. Tropp, amounts, with all due respect, merely to a request for yet more delay of a litigation matter that has already been unreasonably and, as has now been made judicially clear, unjustifiably stalled—at considerable prejudice to Mr. Tropp—in return for nothing.

For these reasons, our client will not consider stipulating to a 60-day stay of the proceedings. Defendants—as a group, individually or as part of blocs with like interests, as the case may be—are obviously welcome to put forward alternative proposals at any point along the way at which such a plan would make sense. For plaintiff's part, because Mr. Tropp has no interest in re-litigating what has already been litigated, we will attempt to formulate an approach on this subject for defendants' consideration as well, unless we get the impression from defendants that doing so would be a waste of time. We will turn to that after service of Mr. Tropp's initial discovery demands, which will take place promptly.



GOETZ FITZPATRICK LLP

All Counsel
November 11, 2009
Page 3 of 3

On a related note: At the beginning of the litigation we requested that all parties waive the FRCP requirements for physical service in favor of service by email where practical and fair. At that time defendants declined, without explanation, to stipulate. Ever the optimist, I am asking again: Can we, at least in this small way, make some effort to avoid doing things the hard way?

Thank you for your efforts so far.

Respectfully submitted,

Ronald D. Coleman