

## **BULKY DOCUMENTS**

(Exceeds 300 pages)

**Proceeding/Serial No: 92049221**

**Filed: 8-10-09**

**Title: PLAID INC. V. PLAID, INC.**

**Part 1 of 2**



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United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Re: **PLAID INC. v. PLAID, INC.**  
**Cancellation No.: 92049221**

77/113,125

Enclosed for filing is the Respondent's Memorandum of Law in Position to Motion for Summary Judgment, along with the Affidavit of Francis G. Pennarola and Darryl Ohrt.

If you have any questions, please call.

Very truly yours,

  
Francis G. Pennarola

/cp  
Enclosures



08-10-2009



In its Preliminary Statement, Petitioner follows with "Faced with this daunting set of facts, Respondent has resorted to arguing that its purportedly greater use of the internet and social media in connection with its business makes confusion between Petitioner and Respondent unlikely. But this makes no sense."

Petitioner's statement is false. Respondent did not resort to greater use of the Internet, Respondent planned all along to build its business in connection with its mark using the Internet.

A literal interpretation of Respondent's custom-crafted description of goods and services reveals what Petitioner has failed to see. Respondent's reasons for rebranding Respondent's company, and adopting and using the name PLAID as a service mark were entirely in connection with the Internet and intended to be through the Internet. Virtually every specimen, document, and thing Respondent has produced reveal Respondent's mark in connection with the Internet, which is the only "on-line medium" in the world, and Respondent has produced hundreds of documents in support of its extensive use of on-line medium.

The key word in Respondent's custom-crafted description is the word "through".

Respondent's Mark PLAID is for "Advertising and marketing services; design of advertising materials for others; Advertising services, namely promoting the goods, services, and brand identity of third parties **through** print, audio, video, digital and on-line medium."

Respondent's and Respondent's Attorney's choice of words was extraordinarily significant, and truthful, and specific. In custom-crafting Respondent's description of goods and services, there exists a panoply of other choices of wording Respondent could have used as an alternate to "through" including "via", "using", "with", "by way of", "employing",



"utilizing". While there were many alternate ways to craft the description, Respondent and Respondent's Attorney chose the exact wording, followed by the term "through".

Respondent set out to do and Respondent accomplished exactly what Respondent described in Respondent's Registration, "namely promoting the goods, services, and brand identity of third parties, **through** print, media, audio, video, digital and on-line medium".

As the evidence reveals, Respondent was highly interested in and quickly became prominent and well known in social media (on-line medium) since the day Respondent filed the application that matured to the Registration Petitioner seeks to cancel. Respondent made a conscientious decision to rebrand Respondent's company, rename it PLAID, and change the focus of Respondent's business to on-line medium.

Petitioner goes on to state "Whether or not Respondent uses one tool more than another in connection with the provision of the same types of services offered by Petitioner makes no difference". Respondent disagrees, and to the contrary, a preponderance of Respondent's evidence reveals this makes all the difference in the accuracy of the respective parties' stated descriptions of goods and services.

Petitioner's argument is fatally flawed. The Internet and social media are the primary tools of Respondent, used by Respondent to an extreme degree approaching that of broadcast television as evidenced by Respondent's PLAID NATION TV Tour broadcast in high definition "live" as well as "on demand" and available for replay anytime years after, via Internet (the on-line medium), worldwide (Ohrt Affidavit, paragraphs 17 and 18, Exhibit C). An annual tour across the United States, now in its third year, this year Respondent's PLAID NATION TV Tour was sponsored by FORD, SPRINT, SUBWAY, Q HOTEL & SPA and

SONY. Petitioner's mark PLAID and the marks of other "third parties", namely sponsors, clients and other parties unaffiliated with Respondent, appear alongside each other on the very same pages. Trademarks, brand mentions, and ads of third parties surround the embedded video produced by Respondent in these pages on Respondent's websites related to Plaid TV. Respondent quite literally did as Respondent's description states to an extreme degree, "namely promoting the goods, services, and brand identity of third parties, through print, media, audio, video, digital and on-line medium." Respondent agrees its use of print is minimal though existent, yet its use of media, audio, video, digital and on-line medium was and remains extensive, significant, and prolific. (Ohrt Affidavit, Paragraphs 17,18, Exhibits C, T (pages 115-160).

To the contrary, Petitioner's use of its mark in connection with "promoting the goods, services, and brand identity of third parties, through print, media, audio, video, digital and on-line medium", with the exception of "print", is de minimus. Furthermore, other than in use as a "portfolio piece" or "sample" of Petitioner's work resulting from Petitioner's services, Respondent has never seen any finished product of Petitioner where the mark of Petitioner and the mark of any other party unassociated with Petitioner, appear on the same page as is typical in much of the evidence Respondent has provided.

Petitioner copied Respondent's description of goods and services nearly verbatim, including the word "through".

While the meaning of the description applies to Respondent, it does not apply to Petitioner in the evidence Petitioner presented. There remains a question as to if Petitioner has or could have provided all - or any - of the goods and services as described in Petitioner's

identical trademark application as of the dates of first use Petitioner claims. Since Petitioner petitioned to cancel all of Respondent's Mark, and not just a part, Petitioner's claims must be viewed in relation to the exact description of goods and services stated in Petitioner's Application and in Petitioner's Notice of Cancellation.

Petitioner states "Second, the evidence demonstrates that Petitioner, like Respondent, makes significant use of the internet and social media." This statement is misleading as Respondent's use has been extensive since its inception while Petitioner's use is minimal.

Petitioner further states "Third, the evidence also shows that Respondent, like Petitioner, does not limit its branding, advertising and marketing services to the use of the internet and social media, but also provides extensive traditional deliverables to its clients." This statement is also untrue in that Respondent does not provide "extensive" traditional deliverables, and the evidence reveals the vast majority of deliverables of Respondent after Respondent's adoption of Respondent's mark PLAID are indeed not traditional. Petitioner seems to be confusing Respondent's former business as VIA with Respondent's significantly changed business once Respondent rebranded and adopted Respondent's now Registered Trademark PLAID.

Respondent agrees both Respondent and Petitioner use the name Plaid Inc., even though Petitioner also refers to itself as "Plaid Creative". Both parties are involved, to one degree or another, in providing branding, advertising, marketing, and design services of some sort. Customers, potential customers, and intended customers of both parties are highly sophisticated purchasers who must make a highly sophisticated purchasing decision and

therefore always can and will distinguish the dissimilarities between the nature of the services of Petitioner and the services of Respondent as discussed further below.

Petitioner premises its opposition in part on the Trademark Application it filed on April 18, 2008. That application bears scrutiny, as it utilizes the identical, customized description of services, prepared by the Respondent. The specimens filed in support of Applicant's claim of use and first use of an identical mark filed years after such alleged use also bear scrutiny.

There are material issues of fact and the Petitioner is not entitled to summary judgment as a matter of law. The Motion for Summary Judgment should be denied.

### ARGUMENT

#### I. STANDARD FOR SUMMARY JUDGMENT:

Summary Judgment is proper when no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. Scott Fetzer Company v. Gehring, 288 F.Supp. 2d 696, Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrell, 477 U.S. 317, 106 S.Ct. 2540, 91 L.Ed.2d 265 (1986). "Material fact is one that is necessary to establish an element under the substantive law governing a claim (citations omitted). A fact is "genuine" if it such that a reasonable jury could return a verdict for the non-moving party." Fetzer p. 701. In considering summary judgment, the Board must accept the facts in the light most favorable to the non-moving party. Where there are genuine issues of material fact, the motion for summary judgment must be denied.

Further, to prevail on its motion, the Petitioner must establish that it is entitled to judgment as a matter of law. Considering all appropriate facts and the application of the law to those facts, Petitioner has not established that it is entitled to judgment as a matter of law.

II. LIKELIHOOD OF CONFUSION:

A key inquiry in these proceedings is whether there is a likelihood of confusion between the Petitioner's alleged mark "Plaid" and Respondent's Registered Mark "Plaid", and the actual uses thereof, as well as the actual dates of use. Petitioner alleges in Petitioner's Notice of Cancellation Allegation No. 9 that Petitioner's later-filed trademark application "will be refused because of Respondent's Registration of the identical mark...". On the surface and on face value this may well be true, as Petitioner copied Respondent's description of goods and services from Respondent's US trademark Registration custom crafted by Respondent and Respondent's Attorney. The second reason Petitioner's later-filed application for an identical mark may be refused registration is due to deficiencies and potentially fatal flaws in Petitioner's application and the specimens Petitioner hastily assembled as evidenced by the Bellataire presentation Petitioner relies on in both its application and its Petition to Cancel the Mark of Respondent. In deposition, when asked about the Bellataire presentation and what it represented, Carol Costello's response was: "Looks like it's the same presentation, but somehow the -- it looks like some sort of font failure in the printing. It should be the same presentation. It's weird." (Transcript of the Deposition of Carol Costello ("Costello Tr.") at pages 12 and 20) and "This [the Bellataire presentation] looks like its had some sort of font failure and some of the language has fallen off the bottom of some of the pages...I don't know why they're different." (Costello Tr. Page 20) Legally, the Bellataire specimen not only

"should be the same presentation", it must be. Petitioner has attempted to build Petitioner's case relying upon it. Yet clearly the Bellataire presentation is "different", truncated as Petitioner admitted, does not resemble nor function as a "true and identical copy" and, *inter alia*, this "error" or "omission" has misled Respondent, Respondent's Attorney, the USPTO and the TTAB since the time Petitioner brought the Petition to Cancel against Respondent's Registered trademark. According to United States Trademark Law Rules of Practice and Federal Statutes, USPTO, January 16, 2009, at least one of the specimens provided in connection with Petitioner's identical trademark application filed basis 1(a) was not "legitimate". §2.56 Specimens: (a) An application under section 1(a) of the Act, an amendment to allege use under §2.76, and a statement of use under §2.88 must each include one specimen showing the mark as used on or in connection with the goods, or in the sale or advertising of the services in commerce and (2) A service mark specimen must show the mark as actually used in the sale or advertising of the services. Furthermore the Bellataire presentation does not evidence use in interstate commerce as Petitioner, located in New York City, admitted the Bellataire presentation was presented in New York City. Since the matter is in part about whether or not Petitioner's application for an identical mark is "valid", in deposition of Petitioner Carol Costello, Attorney for Respondent asked Petitioner "...just focusing on the company Plaid Inc., as of October 4, 2005, how many of these companies had Plaid Inc. done work for [under the mark PLAID]?" (Costello Tr. 24) Petitioner's response was as Respondent suspected and as many who have worked for others do when they leave their former employer and strike out on their own: "I've worked with PricewaterhouseCoopers for ten years at various companies. Was I doing something under the Plaid name at that point? I

honestly don't know." (Costello Tr. 25) Respondent acknowledges that prior to its adoption of the Service Mark "Plaid", Petitioner was incorporated in the State of New York with that name. Both parties are involved in marketing, advertising and branding; nevertheless, there is a genuine issue of material fact as to whether Petitioner's use of its corporate name functions as a Service Mark and stands for the services it provides, or whether it is simply the name of the company. Not every company name functions as a Service Mark. Trademark Manual of Examining Procedure, Fifth Edition, § 1202.01: Refusal of Matter Used Solely as a Trade Name.

In the most broad and general definition which does not seem to apply, both parties develop and create the advertising and promotion of others for others. However, as a rule and historically, the clients of advertising agencies and design firms desire only their own brand name or trademark to appear on the finished goods that result from the service without any mention of the advertising agency or design firm. Contrary to the rule, and contrary to any evidence Petitioner has provided, Respondent is a unique exception as Respondent's Mark appears next to and often on the same page as that of the Marks of Respondent's clients and others (Ohrt Affidavit, paragraphs 16 and 18, Exhibit C, Exhibit V, p 2). The Mark of Respondent and marks of various third party brands Respondent promotes are cleverly woven and integrated into a single page. Respondent integrates brand-specific video content, a Twitter social media text sidebar with brand mentions, product placement in the video, and various brand-specific ads and logos of other third-party brands surrounding the video on the same page, and has developed an innovative, entertaining, and powerful way to promote the brands of third parties "through media" exactly as described in Respondent's description. The

USTREAM broadcast tool, Respondent's choice this year, and similar to third party Internet broadcast services Respondent used in prior years, features the USTREAM mark. The USTREAM video screen control bars have hyperlinks to additional third parties not affiliated with Respondent. Respondent's promotion of third parties "through on-line medium" is greater in number of third party brands that appear on a single page, and to a degree greater than most broadcast network television websites, while indisputably and overwhelmingly greater than any evidence Petitioner has offered to contradict this statement.

In considering the question of likelihood of confusion, the Board should be cognizant of how dissimilar the services of the two parties are and the diverse and dissimilar universe in which the two parties named Plaid function and whether Petitioner's mark indeed serves as a Service Mark rather than a name. Respondent makes extensive use of the Internet and social media, both for its clients and on its own behalf (Ohrt Affidavit, paragraphs 15, 16, 17, 18 and 19, plaidnation.com, Exhibit C to Ohrt Affidavit). A review of the materials attached to the Affidavit of Carol Costello, president of the Petitioner, reveals that most are print based or constitute work for PricewaterhouseCoopers, a longstanding client of Carol Costello, a relationship which existed long before the incorporation of Plaid-NY (Costello Tr., page 25).

Respondent has used its PLAID Service Mark as a service mark in a manner that is in full compliance with all the rules and regulations set forth to be eligible for and to maintain a USPTO Service Mark while Petitioner's claims fail to meet this threshold.

An important distinction between the parties' offerings is that Respondent quite literally does provide the services set forth in its Registration. Respondent accomplishes all of the above by cleverly integrating Respondent's Mark with the marks of Respondent's clients via its



websites, and as in the description above, does so "through print, audio, video, digital and on-line medium." (Ohrt Affidavit, paragraph 18) Of the 1,600 or so pages of alleged evidence provided by Petitioner in support of its claims, Petitioner does not appear to promote the goods and services of third parties "through" any of its own media, nor in any unusual way, as Respondent has always been well known for doing. This important aspect and dissimilarity, among others, may be why no actual confusion Respondent is aware of exists.

This remains true even though Respondent has become significantly famous with a significant following, a verifiable audience, consumer and trade awareness and good will.

The lack of the likelihood of confusion is demonstrated by the paucity of actual confusion in the two years in which the Petitioner and the Respondent have co-existed. A review of the only competent evidence submitted by Petitioner (Respondent objects to the hearsay attributed to Marty Orzio in paragraph 32 of the Costello Affidavit), the Affidavit of Jamie Scalera is telling. In it Ms. Scalera states:

In searching for information on the Internet, I came upon a number of pieces of information about a branding advertising agency known as 'Plaid'. At the time, I did not realize that there were two agencies that used 'Plaid'. Thus I believed the information I was viewing related to Plaid-NY. I did not learn, until some time later, that the information at issue related to another company, Plaid-CT.

It should be noted that Carol Costello and Jamie Scalera are "Friends" on Facebook (Pennarola Affidavit, Exhibit 6). In a trademark case involving a dispute between a senior mark and a junior use, Walters v. Mattel Inc., 210 F.3d 1108, 54 U.S.P.Q.2d 1501 (2000), the Court noted that allegations from persons in close association and intimate contact with the senior user do not reflect the views of the purchasing public, and that it was proper for the

District Court to find evidence of actual confusion from acquaintances, friends and family insufficient. Id. at 1111.

The TTAB has long recognized the concept of "Internet Time". In the case of In re: Styleclick.com, Inc., 57 U.S.P.Q.2d 1145, 2001 W.L. 15915 (Trademark Trial GR and App. Bd., 2000), the Bd. noted:

While by most standards, one to three years in the past would be viewed as 'recent', a year or two is an 'eternity in Internet time', given the rapid advancement of the Internet in every facet of daily life (most especially, e-mail).

The Board's early recognition of the role of the Internet, and the impact it would have on time was prophetic in the year 2000. Given the Internet's rapid proliferation into the mainstream today, while two years was an eternity in Internet time about ten years ago, six months is an eternity today. That only one instance of alleged confusion has been offered by the Petitioner is telling. There is no likelihood of confusion.

The Petitioner is all but invisible on the Internet. According to alexa.com, the Internet website ranking service, Respondent's websites, plaidnation.com and thinkplaid.com, rank far higher in popularity than that of the Petitioner (Pennarola Affidavit). alexa.com has been cited in a trademark case, Vista India v. Raaga, LLC, 501 F.Supp.2d 605(U.S.D.C.DNJ, 2007), as well as numerous law review articles as a credible source.

Further, there are multiple marketing, branding and market research agencies which incorporate the word "Plaid" in their names. (Ohrtd Affidavit, paragraph 24, Exhibits F to Q) They include some whose presence on the Internet and in the real world predate both the Petitioner and the Respondent and some who follow. Evidence of third party marks raise

issues of fact for summary judgment purposes, Lloyds Food Products, Inc. v. Eli's Inc., 987 F.2d 766, 25 U.S.P.Q.2d 2027 (1993).

III. THE DU PONT FACTORS:

The Court, in the Application of E. I. du Pont de Nemours & Company (476 F.2d 1357, 177 U.S.P.Q. 563 (CCPA 1973) sets forth 13 factors, which, when of record, must be considered. As noted in the decision in the du Pont case, the evidentiary elements are not listed in order of merit. Each may, from case to case, play a dominant role. On the surface and on face value, with identical descriptions of goods and services for identical Marks as Petitioner copied the earlier-filed description of Respondent, it appears that most of the DuPont Factors would weigh in favor of Petitioner IF Petitioner stated a claim upon which relief can be granted. It does not.

The 13 factors are discussed as follows:

**I. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.**

The Petitioner's corporate name is identical to the Respondent's registered Mark in appearance and sound. The mark PLAID is arbitrary when used in connection with the services of either party and therefore the Mark alone has no connotation or commercial impression in the minds of consumers or the trade other than that resulting from use. Based on a preponderance of evidence in support of Respondent and little in support of Petitioner, it appears indisputable that Respondent has used its Mark far more extensively, to a much greater degree, and with a far larger audience than Petitioner could ever claim in direct connection with Respondent's custom-crafted description of goods and services associated

with the Mark. Respondent is developing and has developed secondary meaning in Respondent's Mark PLAID in the minds of consumers and the trade in connection with all the goods and services while the evidence reveals that Petitioner has not.

**II. The similarity or dissimilarity and nature of the goods or services as described in an application of registration or in connection with which a prior mark is in use.**

As Petitioner virtually copied Respondent's customized description verbatim in Petitioner's Application, the goods and services listed by both parties are the same. Note, Respondent's application filing date of February 22, 2007, is some 14 months before the Petitioner's filing date of April 18, 2008; and no party, including Petitioner, ever opposed Respondent's application. The Petitioner appears to use the word Plaid as its name and not as a service mark. A review of Exhibit A to the Costello deposition (entitled "A Branding Presentation for Bellataire") indicates on each page that the presentation is copyright, Plaid Inc. While Petitioner's copyright notice appears on this "presentation", Petitioner has shown no evidentiary materials, no evidence, and provided no unequivocal testimony that reveals Petitioner used all the goods and services in its description of goods and services in its application as of the dates claimed. No determination has ever been made as to if Petitioner's pleaded Mark could ever proceed to registration based upon the specimens filed.

Further, the Petitioner's apparent bad faith in copying the Respondent's description warrants consideration as the Board weighs this factor. This factor is neutral at best for Petitioner.

**III. The similarity or dissimilarity of established, likely to continue trade channels.**

The 'Channels of Trade' Factor concerns how and to whom the respective products are sold and distributed... This factor is very significant in illuminating what actually happens in the marketplace and, where other factors are not particularly probative, is of a special importance... [citing Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 931 F.2d 1100, 1110, 18 U.S.P.Q.2d 1587, 1595 (6<sup>th</sup> Cir. 1991)]. The threshold significance of trade channels is where they lead and whether, at the end, the same classes of persons are exposed to the marks and issue under circumstances likely to result in confusion.

The Likelihood of Confusion in Trademark Law, Richard L. Kilpatrick, Practicing Law Institute, New York City, May 2009, § 5-12.1.

As a threshold matter, the Board should decline to consider the Petitioner's evidence and argument concerning this factor as it objected to the Respondent's Interrogatory No. 3 seeking information about the channels of trade which Petitioner utilized and provided no evidence. Interrogatory No. 3 is as follows (Pennarola Affidavit, Exhibit H):

Interrogatory No. 3: Describe the channels of trade or distribution used by Petitioner to date, and describe the channels of trade or distribution intended to be used in the future by Petitioner in providing the services or goods identified in the answer to Interrogatory No. 1 under the mark "Plaid".

Response: Petitioner objects to this Interrogatory on the grounds that the phrase "[d]escribes (sic) the channels of trade or distribution" is vague and ambiguous. Petitioner further objects to this Interrogatory on the grounds that it is unduly burdensome.

Petitioner offered no evidence during the discovery phase on this factor.

If it was going to offer evidence on this du Pont factor, Petitioner had a duty to supplement its answer to discovery. It cannot rely on evidence it did not provide in discovery.

Given Petitioner's stonewalling, Petitioner is not entitled to any presumptions about "normal" trade channels, or any channels of trade.

This alone warrants finding this factor in favor of the Respondent.

The Respondent makes heavy use of the Internet to market its services and reach potential clients. Its websites include thinkplaid.com, plaidnation.com, houseofplaid.com and brandflakesforbreakfast.com. The sites are updated constantly and generate significant traffic. (Ohrt Affidavit, paragraphs 16 and 20, Exhibits C, D, T, W and X). The site maintained by the Petitioner, plaid-creative.com, is frozen in time. It has not changed since January 2008 (at least as of this writing) and generates little traffic (Ohrt Affidavit, paragraphs 27 and 28, Pennarola Affidavit, Exhibit F).

Respondent acknowledges that it has not limited its channels of trade in its registration. Given, however, that the Petitioner has only now just identified its alleged four channels of trade (e-mail, word of mouth, direct mail and its website), (Costello Affidavit, paragraph 28), those bear scrutiny. The first two, e-mail and word of mouth, are both highly personal and specifically targeted. Direct mail would specifically identify Petitioner and not result in confusion with Respondent. Finally, its claimed use of the Internet as a channel of trade has to be examined in light of its static website and limited traffic. Petitioner has alleged that it is well known to its clients and prospective clients (Costello Affidavit, paragraph 30). This claim alone belies the claim of likelihood of confusion. Certainly, at best, this factor is neutral.

**IV. The conditions under which and buyers to whom sales are made; i.e., impulse versus careful, sophisticated purchasing.**

This factor favors the Respondent. As the purchasing decision of any client of Petitioner or Respondent significantly affects the businesses of the clients of each of the parties, purchasers of either of the party's services thoughtful and highly motivated. The

evidence offered by Respondent, which shows fee quotes and billings, ranging from the tens to the hundreds of thousands of dollars (Costello Affidavit, paragraph 6, Exhibit D), is strong evidence that purchasing decisions in this business are *carefully, and not casually*, made by sophisticated purchasers. The parties, while both engaged in creating advertising for others, operate in and attract clients from two different ends of the advertising spectrum, with the term "advertising" used here in its broadest sense. Providers of highly customized creative services such as those offered by the parties are inherently unique and distinctive. Purchasers of creative services are therefore attracted to either of the Parties by the distinctive nature of the offerings of the Providers, as well as the experience and style and approach of the providers. The purchasing decision is unlike that of products like milk, where the nature of the goods is highly similar. Furthermore, multiple companies in the same field as Petitioner and Respondent, a number offering services more closely related to that of Petitioner than that of Respondent, in the same geographic area, use the word "Plaid" as part of their names. In addition, very few traditional advertising agencies such as Petitioner appears to be ever apply for or become eligible for a US Federal Trademark primarily because the finished goods do not bear the Mark of the advertising agency and instead bear the mark of the client of the advertising agency. Respondent is neither a traditional nor a typical advertising agency. Because of Respondent's atypical and uncommonly broad use of Respondent's Mark alongside and on the same pages as the Marks of Respondent's clients, a significant and far greater number of the finished goods of Respondent do bear the Mark of Respondent. The buyers for both companies' services are sophisticated purchasers, not impulse buyers, given the Petitioner's pricing structure (note the \$250,000 proposal referenced at Costello's Affidavit,

paragraph 6, Exhibit D) and Petitioner's hourly rates (Ohrt Affidavit, paragraph 29, Exhibits R and S).

Both Petitioner and Respondent have enjoyed considerable success, despite each other's existence and those of other Plaid branded agencies. The lack of actual confusion provides further evidence of the sophistication of the purchasers of the two Plaids' services.

The proper focus is on marketing professionals (Costello Affidavit, paragraph 27, Ohrt Affidavit, paragraph 30). The Restatement Third of Unfair Competition § 20 provides:

The care expected of purchasers against which the likelihood of confusion is measured is determined by the marketing environment in which the goods or services are ordinarily bought or sold. Some factors to be considered are the manner in which the goods are purchased... the manner in which the goods are marketed... and the class of prospective purchasers.

The test for measuring a likelihood of confusion must be applied to the relevant purchasing public and not a hypothetical public. In applying the test, the court must place itself in the shoes of the consumer of the product and then ask, when buying under the usual conditions, whether the source of the product would be confused or whether the consumer would believe the plaintiff and defendant are in some way connected or the plaintiff is the sponsor of the defendant.

USA Networks v. Gannett Co., Inc., 584 F.Supp. 195 (DC Colo. 1984).

In the USA Networks' case, the court found that the proper audience were advertisers and not TV viewers. In the present case, the proper audience is purchasers of highly customized advertising and promotional solutions and services. The only potential place for confusion is on the Internet, yet even on the Internet, the websites of the respective parties are significantly dissimilar, with significantly dissimilar offerings and a significantly dissimilar approach. Potential clients and potential purchasers of Petitioner's services who know the



Petitioners' URL, [www.plaid-creative.com](http://www.plaid-creative.com), will have no difficulty in finding it on the Internet and will not come across the Respondent, nor be confused or misled in the unlikely event that they do find the websites of Respondent. If they mistyped, they would come across "Plaid Creative" and [www.plaidcreative.com](http://www.plaidcreative.com) (Ohrt Affidavit, Exhibit O). A potential client knowing the name "Plaid" and using a search engine will come up with any number of "Plaid" related advertising sites. Lastly, sophisticated purchasers will not choose an advertising agency or marketing firm based upon either party's website alone.

As with much else, advice is available on the Internet in selecting an ad agency (Pennarola Affidavit, Exhibit E). The Internet article: "How to Choose an Ad Agency" (marketing agency) suggests a number of steps:

1. Develop a long list of agencies (get referrals).
2. Conduct an initial research.
3. Develop a request for a proposal (RFP).

The list goes on and the process inherently avoids likelihood of confusion as well as any specter of actual confusion. This factor favors the Respondent.

**V. The fame of the prior mark (sales, advertising, length of use).**

Each of the parties has enjoyed some commercial success though for very different reasons. Petitioner has maintained and apparently expanded upon Carol Costello's long standing relationship with PricewaterhouseCoopers Ms. Costello established long before using the mark "Plaid" (Costello Affidavit, Exhibits C, E, H, Q, R and S). According to Carol Costello's Affidavit, the Petitioner is well known among its clients and potential clients (Costello Affidavit, paragraph 30). To the contrary, according to Darryl Ohrt, the Respondent

is well known among its clients, potential clients and the social media and Internet world (Ohrt Affidavit, paragraphs 14 and 15, Exhibit U). The two parties have co-existed with the same name for two years with no ill effects, and no actual confusion. In view of that co-existence alone, this factor favors the Respondent.

Petitioner's claim to have spent more than \$900,000 in time and money promoting its services under the Mark "Plaid" is substantially undocumented. Exhibit U to the Costello Affidavit is unenlightening. No evidence of any funds spent by Petitioner has been offered. Undifferentiated hours alleged to have been spent are meaningless. Respondent objects to their consideration as any evidence supporting the "fame" of the Petitioner's mark.

**VI. The number and nature of similar marks on similar goods.**

The word "Plaid" is not unique to Petitioner and Respondent, even in the world of advertising, branding, and consulting. Respondent has provided evidence of at least 12 other uses of the word "Plaid" in connection with those services. They happen to be ones with registered domain names and websites. There are doubtless others.

Where marks, similar wholly or in part, are used by numerous sources ("Third Parties") in the same field, the owner's mark tends to be weak as an indicator of a single source. Data Concepts, Inc. v. Digital Consulting, Inc., 150 F.3d 620, 47 U.S.P.Q.2d. 1672, 1676 (6 Cir. 1998). As such, it is entitled to only a narrow scope of protection, Freedom Savings & Loan Association v. Way, 757 F.2d 1176, 226 U.S.P.Q. 123, 127 (11th Cir. 1985), citing Sun Banks of Florida, Inc. v. Sun Federal Savings & Loan Association, 651 F.2d 311, 211 U.S.P.Q. 844, 848-849 (5th Cir. 1981) and Amstar Corp. v. Dominos Pizza Inc., 615 F.2d 252, 259, 205 U.S.P.Q. 969, 975 (5th Cir. 1980) quoting Restatement of Torts §

729 (1938) ("the greater the number of identical or more or less similar trademarks already in use on different kinds of goods, the less is the likelihood of confusion"). This factor strongly favors the Respondent.

**VII. The nature and extent of any actual confusion.**

The Petitioner has not shown any credible evidence of actual confusion, a friend's declaration (Scalera Declaration, Pennarola Affidavit, Exhibit G) and an interested party's hearsay statement about alleged third party confusion (Costello Affidavit, paragraph 32) fail to meet the Petitioner's burden. As the Petitioner's own documentation indicates (Costello Affidavit, paragraph 29), its business has not suffered. This evidences a lack of actual confusion. Pfizer Inc. v. Astra Pharm. Prods. Inc., 858 F.Supp. 1303, 33 U.S.P.Q.2d 1545, 1560-61 (FDNY 1994).

The Restatement [3<sup>rd</sup>] of Unfair Competition, § 23(2) provides:

An absence of likelihood of confusion may be inferred from the absence of proof of actual confusion if the actor and the other have made significant use of their respective designations in the same geographic market for substantial periods of time. *Id.* at 249-50 (1995).

Consider the following: (1) the Petitioner's claim to have spent \$900,000 in time and money, in less than four years (Costello Affidavit, paragraph 29) promoting its services as "Plaid"; (2) two questionable anecdotes (one from a friend, one hearsay) of actual confusion in the two year period from June 1, 2007, the two Plaids have co-existed (an eternity in Internet time where both companies promote themselves); (3) the sophistication of the purchasers of the Petitioner's and Respondent's services; and (4) the disparate sections of the advertising world where the two companies operate, the lack of actual confusion is significant and permits an

inference of no likelihood of confusion (Oreck Corporation v. U.S. Floor Systems, Inc., 803.2d 166, 231 U.S.P.Q. 634 (5th Cir. 1986) (Lack of evidence of actual confusion after 17 months found highly significant.) This factor strongly favors the Respondent.

**VIII. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.**

Discussed in connection with VII above. This factor favors the Respondent.

**IX. The variety of goods on which a mark is or is not used (House Mark, "Family" Mark, Product Mark).**

Respondent makes heavy use of its Service Mark in the Internet and social media environments (Ohrt Affidavit, paragraphs 14, 15 and 16, Exhibits C, D and E), as well as in blogs appearing in Advertising Age, a leading publication (Ohrt Affidavit, paragraph 16, Exhibit U). Further, Respondent's plaidnation.com website reveals evidence of extreme use of all the goods and services and Respondent's valid use of its mark as a US Federal Service Mark. (Ohrt Affidavit, paragraphs 16, 17, 18, Exhibits C, T (115-160), V and W). Plaid is but one of a family of marks, including Plaid Nation and Think Plaid, that Respondent uses. Though Petitioner failed to inquire, Respondent also owns, operates, constantly updates and maintains content on Respondent's other websites including, but not limited to, plaid.us.com, houseofplaid.com, plaiddesign.com, plaidinteractive.com, plaidnation.com, plaidnevergoesoutofstyle.com, plaidpresents.com, plaidtasticten.com, plaidtv.com, thehouseofplaid.com, and thinkplaid.com; all using PLAID in combination with other terms as compound Marks based on Respondent's Mark PLAID and with Respondent's Mark the first and therefore predominant element (Ohrt Affidavit, paragraphs 19, 20, Exhibits C, D, T (115-160), W and X). Most websites of Respondent offer content that is always changing to

maintain viewer interest, search engine ranking, currency, and relevance to the audience.

Respondent uses its Mark to a far greater degree than Petitioner. This factor favors the Respondent.

- X. Market interface between the applicant and the owner of the prior mark: (a) a mere "consent" to register or use; (b) agreement provisions designed to preclude confusion, i.e., limitations on continued use of the marks by each party; (c) assignment of mark, application, registration and goodwill of the related business; (d) laches and estoppel attributed to owner of prior mark and indicative of lack of confusion.**

The Petitioner mischaracterizes and misinterprets this du Pont element in its brief, and its argument should not be considered with regard to this factor. There is no evidence in the record relating to Sections (a) – (c). As to Section (d), laches and estoppel attributed to the owner of a prior Mark and indicative of lack of confusion, the six months' delay between when the Respondent started using the Mark "Plaid" in commerce (ten months since filing the application), it is evidence of actual or constructive acquiescence in the Respondent's use by the Petitioner. Six months may not seem like a long period of time, but given the substantial fame of the Respondent and the blogosphere and social media, certainly the Petitioner knew or should have known, had Petitioner actually used "Plaid" as a Service Mark, of the Respondent's activities. This factor favors the Respondent.

- XI. The extent to which applicant has a right to exclude others from use of its mark on its goods.**

Petitioner's argument here is based on its prior use of its company name. Respondent has previously conceded that Petitioner was incorporated as "Plaid" prior to Respondent's use of the Plaid Service Mark. Respondent does not concede that the use by Petitioner, prior to

Respondent's, gave rise to superior rights in the Petitioner to be able to exclude the Respondent from its use of the Plaid name in connection with the services it provides.

Prior to registering for its trademark on an intent to use basis, Respondent, through its attorney, commissioned a trademark search by Thomson & Thomson, a copy of which is annexed to the Ohrt Affidavit as Exhibit B. That search, dated February 9, 2007, some 18 months after the Petitioner was incorporated, did not reveal the Petitioner's alleged Mark, let alone its existence (Ohrt Affidavit, paragraph 4). This is certainly evidence that the Petitioner, prior to the Respondent's filing its trademark application on February 22, 2007, was not using "Plaid" as a Service Mark and had no rights to exclude Respondent.

Further, as the case has developed, Respondent has identified other marketing agencies which incorporate the word "Plaid" in their name (see Ohrt Affidavit, paragraph 24, Exhibits F to Q). As some of these uses predate the Petitioner's incorporation, Petitioner would have no right to exclude them from using "Plaid" in connection with such services. No doubt Petitioner will attempt to draw a meaningful distinction between "Pretentious Plaid" (the name of an earlier established marketing agency) and its use of "Plaid". Both Petitioner and Respondent must acknowledge that others have the right to use Plaid in connection with advertising, marketing and branding. This factor favors the Respondent.

**XII. The extent of potential confusion, i.e., whether de minimus or substantial.**

The record is free of probative evidence of actual confusion and based on the lack of contact by others in the marketplace seeking either the Petitioner or other Plaid brand agencies (Ohrt Affidavit, paragraph 26); the potential for confusion seems de minimus. This may seem to be a bold statement. Nevertheless, facts do not lie. In the two years of co-existence, there

is no evidence of actual confusion. Further, the Petitioner's agency seems to have thrived in the face of multiple "PLAIDS". This factor favors the Respondent.

CONCLUSION

As is evident, there are material facts in dispute, and the Petitioner is not entitled to summary judgment as a matter of law. The facts proven and the law favor the maintenance of the Respondent's registration for the Service Mark "Plaid". The lack of evidentiary support of Petitioner's claims favor a dismissal of this Cancellation proceeding.

WHEREFORE, Respondent prays the Board deny Petitioner summary judgment, and, if the Board finds appropriate, Respondent prays the Petition to Cancel be dismissed in its entirety with prejudice, and that the Board agrees a registrations should be maintained by Respondent/Registrant for its trademark PLAID in IC 035 and IC 042, and the Trademark Trial and Appeal Board grant such other relief as it deems just and proper.

Respectfully Submitted,

THE RESPONDENT,  
PLAID, INC.

Dated: August 7, 2009

By: 

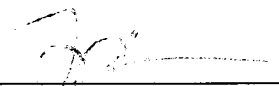
Francis G. Pennarola  
Chipman, Mazzucco, Land &  
Pennarola, LLC  
30 Main Street, Suite 204  
Danbury, CT 06810  
Attorney for Respondent

CERTIFICATION

This is to certify that I, Francis G. Pennarola, Esq., Attorney for Respondent, today served the above Respondent's Objection to Motion for Summary Judgment on Petitioner by Federal Express Mail, addressed to David B. Gordon, Esq., Schoeman, Updike & Kaufman LLP, Attorneys for Petitioner, 60 East 42<sup>nd</sup> Street, New York, NY 10165. Tel 212-661-5030.

Dated: August 7, 2009

By: \_\_\_\_\_

  
Francis G. Pennarola  
Chipman, Mazzucco, Land &  
Pennarola, LLC  
30 Main Street, Suite 204  
Danbury, CT 06810  
Attorney for Respondent

P:\Client (Active) Based Directories\Plaid (Ohrt)\appeal\Respondent's\_Memo\_of\_Law\_in\_Opp final 8.07.doc





**Exhibit A:**

Excerpts from the transcript of the deposition of Carol Costello cited in the accompanying Memorandum of Law.

**Exhibit B:**

A copy of Petitioner's Trademark/Service Mark Application from TEAS.

**Exhibits C-1 – C-12:**

Specimens filed with Petitioner's Trademark Application.

**Exhibit D:**

Petitioner's presentation deck to Bellataire produced in response to the Respondent's Request for Production, Bates stamped PET 000846-000921.

**Exhibit E:**

How to choose an ad agency (marketing agency). Download by affiant from the Internet on August 3, 2009.

**Exhibit F:**

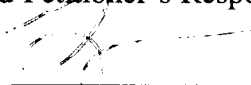
Petitioner's website as produced in Discovery, Bates stamped PET 001290-001332.

**Exhibit G:**

Portion of Carol Costello's Facebook page downloaded by affiant from the Internet on July 14, 2009.

**Exhibit H:**

Respondent's Interrogatory 3 to Petition and Petitioner's Response.

  
\_\_\_\_\_  
Francis G. Pennarola

Subscribed and sworn to before me this 4th day of August 2009.

  
\_\_\_\_\_  
Notary Public

CAROL A. PETERSEN  
NOTARY PUBLIC  
MY COMMISSION EXPIRES JAN. 31, 2011

**EXHIBIT A**

## COSTELLO

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Q. What does this represent?

A. That's a DVD and a DVD case.

Q. And is this an original design with your company?

A. Yes.

Q. While I happen to be on that page, the Bellataire logo, which looks like the lower case B and the word Bellataire, is that something that your company designed or did it come with it?

A. That's the existing logo mark that was something to be reviewed.

Q. Okay.

A. To change. They kind of liked it, but we had some recommendations for them.

Q. All right.

MR. PENNAROLA: Mark this for me.

(Respondents Exhibit C, documents Bates stamped PET 433 - 508, marked for identification.)

Q. Showing you what's been marked as exhibit C, what does this represent?

A. Looks like it's the same presentation, but somehow the -- it looks like

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## COSTELLO

some sort of font failure in the printing. It should be the same presentation. It's weird.

(Perusing.)

Q. Well, let me ask a question.

A. Yeah.

Q. Is it an earlier version of the presentation?

A. I have to compare it page by page to tell you.

Q. Okay.

A. Do you want me to do that?

Q. If you could, quickly.

A. (Perusing.) Yeah, these are the same. This looks like it's had some sort of font failure and some of the language has fallen off the bottom of some of the pages. I don't know why. I apologize. I don't know why they're different. But they are the same deck.

Q. When you say font failure, what do you mean?

A. Meaning -- how do I explain font failure? Sometimes computers, like especially if you go from like a Mac to a PC, sometimes there's font recognition, and it could be, I

1 COSTELLO

2 Plaid?

3 A. Yes, through Veronica.

4 Q. Okay. If you just turn to page 853  
5 of Exhibit B, I just have a quick question.

6 A. Which one is B, this one?

7 Q. That's B, yeah. (Indicating.)

8 A. (Perusing.)

9 Q. Okay, just focusing on the company  
10 Plaid Inc., as of October 4, 2005, how many of  
11 these companies had Plaid Inc. done work for?

12 A. This -- let me answer your question.  
13 Can we say that we -- when you say done work --

14 Q. I'm referring to advertising,  
15 branding, whatever Plaid Inc. does, work done  
16 by the company as the company.

17 A. As Plaid.

18 Q. As the company.

19 A. As Plaid.

20 Q. As we'll talk about individuals  
21 after, but --

22 A. Okay, okay.

23 Q. But as opposed to individuals, had  
24 the company done work for any of these  
25 companies?

## 1 COSTELLO

2 A. I'll tell you the source of my  
3 hesitation. I've worked with  
4 PricewaterhouseCoopers for ten years at various  
5 companies. Was I doing something under the  
6 Plaid name at that point? I honestly don't  
7 know. It's likely. I don't think I've not  
8 talked to that client almost every day of my  
9 professional career for years, so I am sure I  
10 probably spoke to him in my capacity as Plaid  
11 prior to this day.

12 Q. Okay.

13 A. Yeah.

14 MR. GORDON: And so the record's  
15 clear, she's pointing to a date.

16 THE WITNESS: I'm sorry. To this.

17 Q. To October?

18 A. October the 4.

19 Q. Okay. But is it fair to say that  
20 most of the list represents work or companies  
21 that people associated with Plaid had done work  
22 for in a prior life?

23 A. Oh, yes, absolutely. Absolutely.

24 Q. Okay. And I guess --

25 A. Standard procedure for a young

**EXHIBIT B**



TESS was last updated on Sat Jul 26 04:15:08 EDT 2008

TESS HOME NEW USER STRUCTURED FREE FORM BROWSE DICT SEARCH OG BOTTOM HELP

Logout

Please logout when you are done to release system resources allocated for you.

## Record 1 out of 1

TARR Status

ASSIGN Status

TDR

TTAB Status

( Use the "Back" button of the Internet Browser to return to TESS)

# Plaid

<b>Word Mark</b>	PLAID
<b>Goods and Services</b>	IC 035. US 100 101 102. G & S: Advertising and marketing services; Design of advertising materials for others; Advertising services, namely promoting the goods, services and brand identity of third parties through print, audio, video, digital and on-line medium. FIRST USE: 20050914. FIRST USE IN COMMERCE: 20051004
	IC 042. US 100 101. G & S: Visual design services in the nature of designing visual elements for online, broadcast, print, outdoor and other communication media. FIRST USE: 20050914. FIRST USE IN COMMERCE: 20051004
<b>Standard Characters Claimed</b>	
<b>Mark Drawing Code</b>	(4) STANDARD CHARACTER MARK
<b>Serial Number</b>	77451901
<b>Filing Date</b>	April 18, 2008
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1A
<b>Owner</b>	(APPLICANT) Plaid Inc. CORPORATION NEW YORK 73 Spring Street, Suite 303A New York NEW YORK 10012
<b>Attorney of Record</b>	David B. Gordon
<b>Type of Mark</b>	SERVICE MARK
<b>Register</b>	PRINCIPAL
<b>Live/Dead Indicator</b>	LIVE

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2008-07-27 14:07:56 ET

Serial Number: 77451901 Assignment Information Trademark Document  
Retrieval

Registration Number: (NOT AVAILABLE)

Mark

# Plaid

(words only): PLAID

Standard Character claim: Yes

Current Status: Newly filed application, not yet assigned to an examining attorney.

Date of Status: 2008-04-22

Filing Date: 2008-04-18

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: (NOT AVAILABLE)

If you are the applicant or applicant's attorney and have questions about this file,  
please contact the Trademark Assistance Center at  
[TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov)

Current Location: 042 -New Application Processing

Date In Location: 2008-04-22

**LAST APPLICANT(S)/OWNER(S) OF RECORD**

1. Plaid Inc.

**Address:**

Plaid Inc.  
73 Spring Street, Suite 303A  
New York, NY 10012  
United States

**Legal Entity Type:** Corporation

**State or Country of Incorporation:** New York

**GOODS AND/OR SERVICES**

**International Class:** 035

**Class Status:** Active

Advertising and marketing services; Design of advertising materials for others;  
Advertising services, namely promoting the goods, services and brand identity of third  
parties through print, audio, video, digital and on-line medium

**Basis:** 1(a)

**First Use Date:** 2005-09-14

**First Use in Commerce Date:** 2005-10-04

**International Class:** 042

**Class Status:** Active

Visual design services in the nature of designing visual elements for online, broadcast,  
print, outdoor and other communication media

**Basis:** 1(a)

**First Use Date:** 2005-09-14

**First Use in Commerce Date:** 2005-10-04

**ADDITIONAL INFORMATION**

(NOT AVAILABLE)

**MADRID PROTOCOL INFORMATION**

(NOT AVAILABLE)

**PROSECUTION HISTORY**

**NOTE:** To view any document referenced below, click on the link to "Trademark  
Document Retrieval" shown near the top of this page.

2008-04-22 - New Application Entered In Tram

**ATTORNEY/CORRESPONDENT INFORMATION**

**Attorney of Record**

David B. Gordon

**Correspondent**

DAVID B. GORDON  
SCHOEMAN, UPDIKE & KAUFMAN LLP  
60 E 42ND ST FL 39  
NEW YORK, NY 10165-0023  
Phone Number: 212-661-5030  
Fax Number: 212-687-2123

**EXHIBIT C**

A branding  
presentation for  
Bellataire

by Plaid 10.04.05

Work to agree the strategy

Explore price point

Refine the language, get the story  
right

Align the basic communications mix

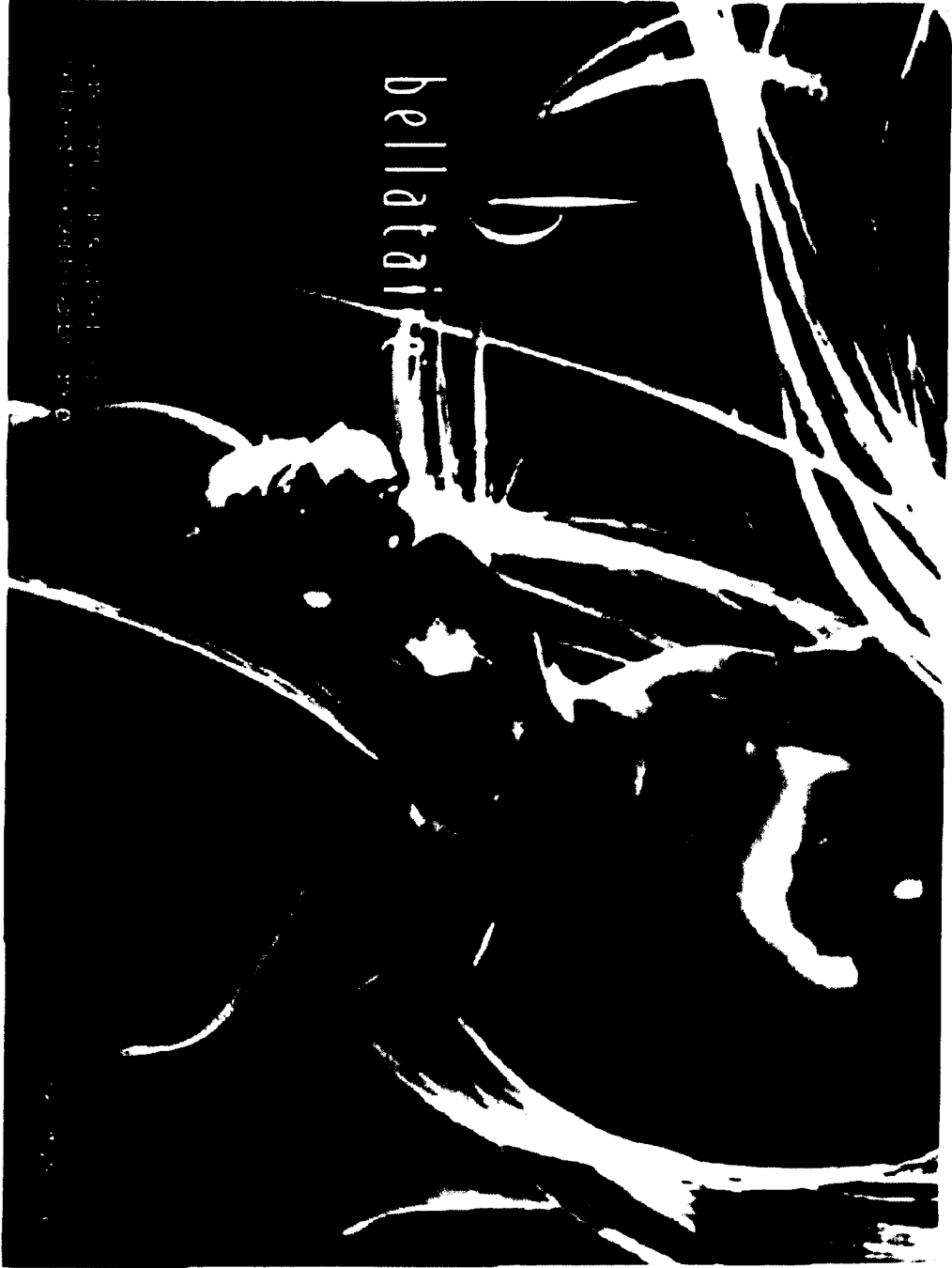
Refresh the visual identity

Holiday brand campaign (national  
print)

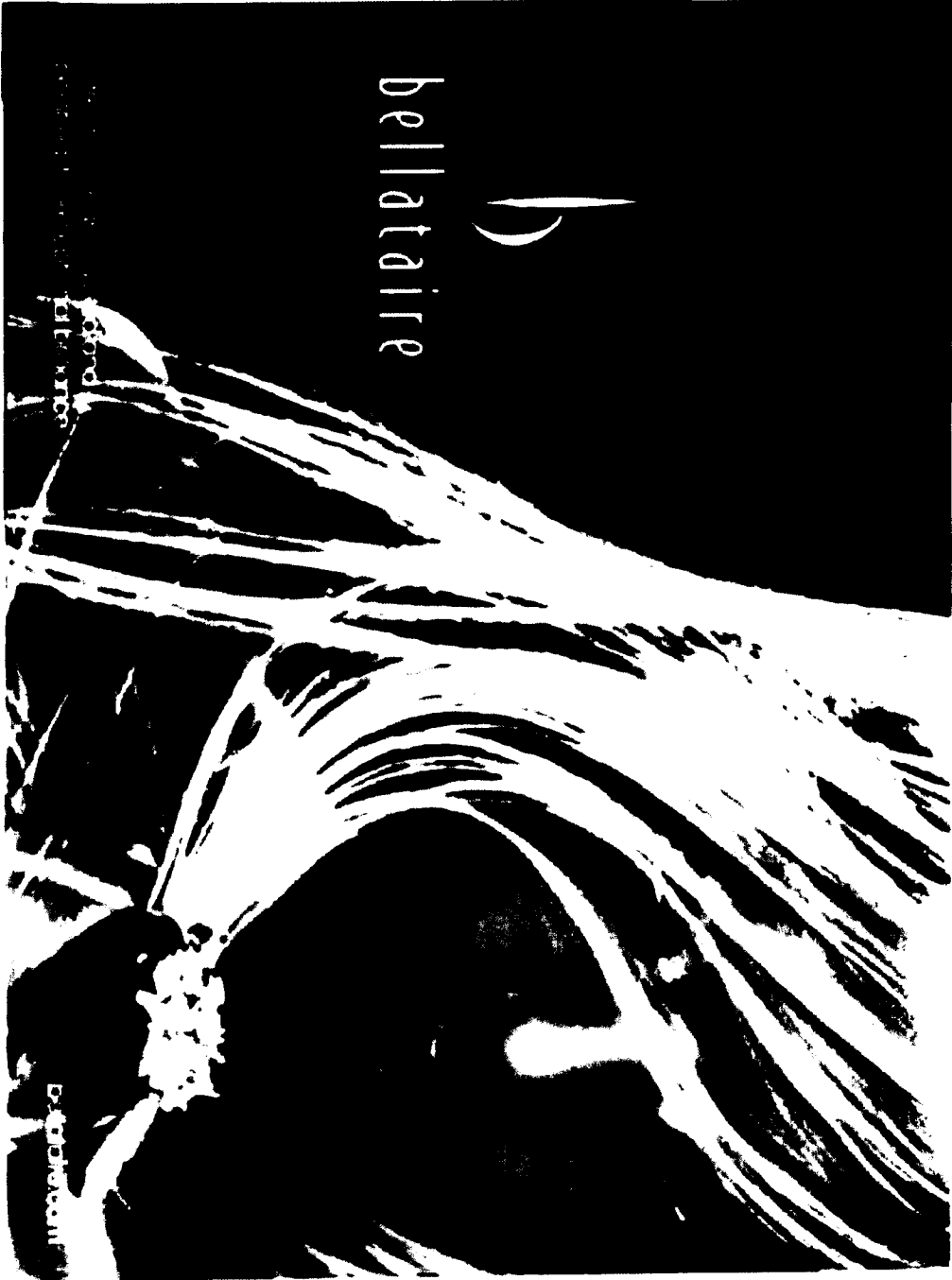
Coop opportunity (local print)

In-store materials

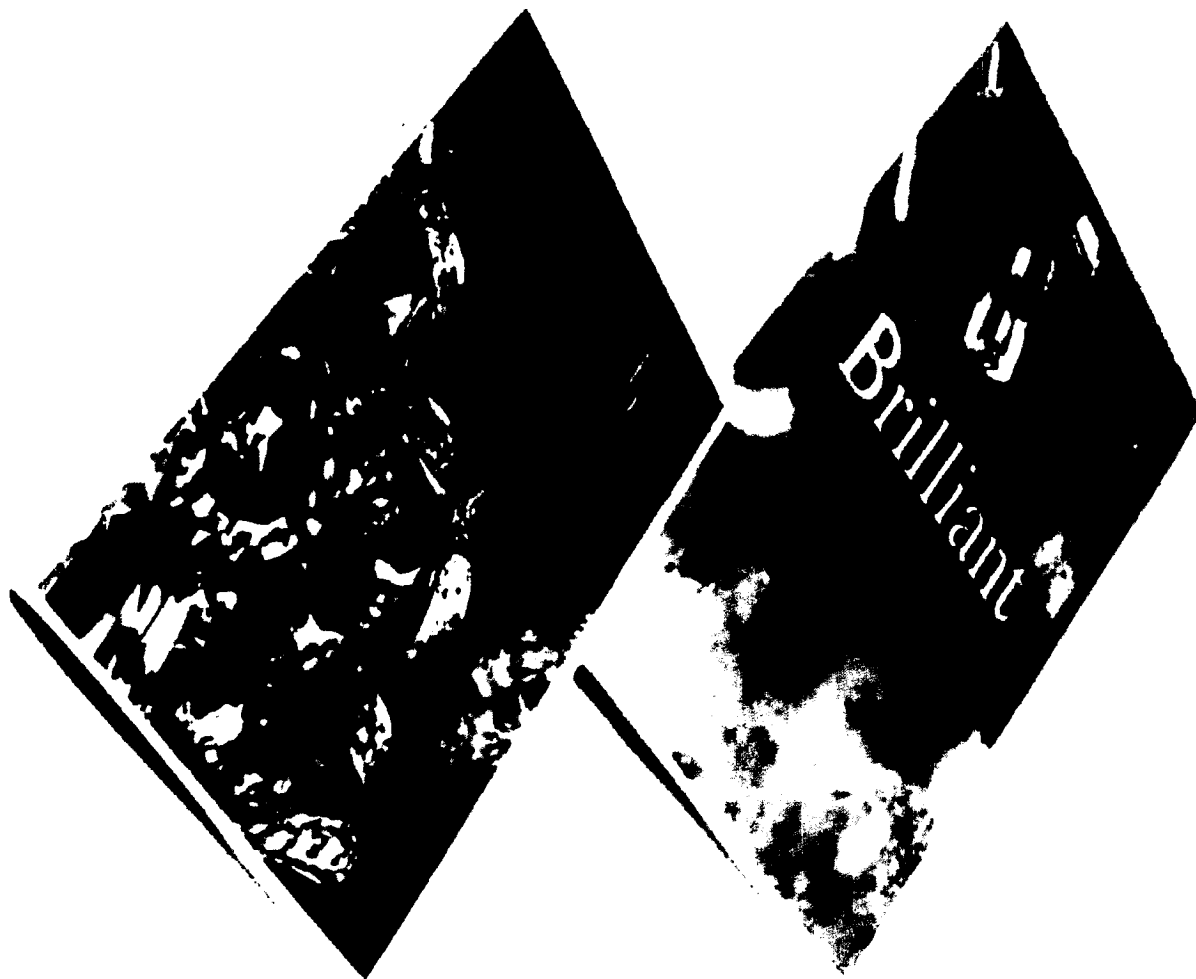
Sales tools (brochures & fact  
sheets)







BOOK PHOTO 4





A branding  
presentation for  
Bellataire

by Plaid 10.04.05

**EXHIBIT D**

# A branding presentation for Bellataire

by Plaid 10.04.05

PENGAD 800-831-8889  
EXHIBIT  
940499221  
B  
Plaid  
4-23-09 AR

Hello.

About Plaid

What we know about you

Your opportunity

Our approach

**CONFIDENTIAL**

# What is Plaid?

© Plaid, 2005

PET000848



We are Plaid, a creative agency  
that specializes in brand.

Our approach is to unite creative  
thinkers who believe good ideas,  
well-executed, make a big  
difference.

CONFIDENTIAL

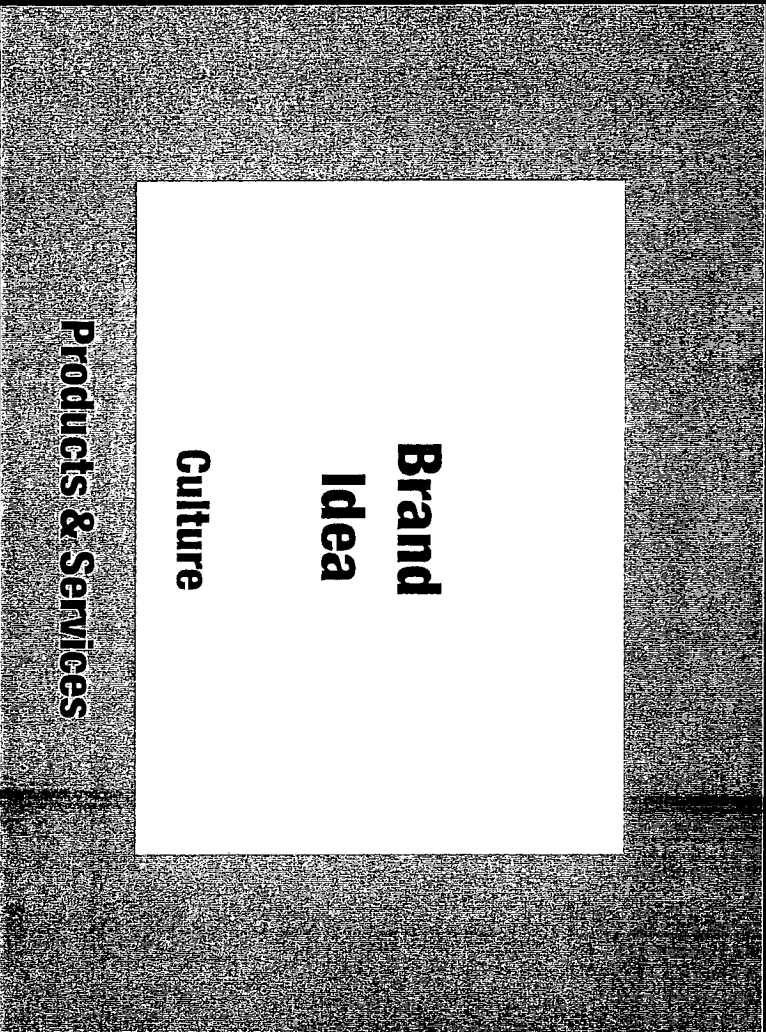
# IGNITE

© Plaid, 2005

PET000850

CONFIDENTIAL

DO MORE



Absolut Vodka  
American Eagle Outfitters  
Barnes & Noble  
Burton Snowboards  
Carters  
Chambord  
Elle Magazine  
Ford Motor Company  
Issey Miyake  
Leading Hotels of the World  
McDonalds  
Moet Hennessy  
MTV  
National Gallery of Art  
Nike  
New York Magazine  
Nylon Magazine  
Orbitz.com  
Pravda Vodka  
PricewaterhouseCoopers  
Smith & Nephew  
Spike TV  
Starwood Hotels  
Tag Heuer  
Wonderbra  
Working Mother Magazine

CONFIDENTIAL

LKI  
GE-POL  
HPHT  
1%  
GIA

# Your brand

You have focused on your process

‘Discover the beauty within’

‘Beauty unveiled’

‘The diamond nature intended’

‘restored to their original beauty’

# Science

Off-color diamonds restored by  
GE scientists

Atomic misalignment

Whoops from mother nature

GE helps mother nature

Voila, what mother nature intended



## Value pricing

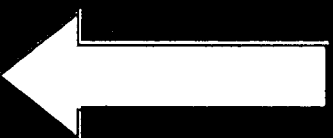
Your website says you once were offered at a premium

You heavily incentivize the trade, sharing your supply advantage with them

You encourage, but do not require, sales at a discount to 'normal' diamonds

Net message:  
'we're not as good'

1. Rare, exceptional
2. 'Restored'
3. Value pricing



Your story  
erodes  
rather than  
builds

Which company do you want to be?

NATURAL

BUT RESTORED

WHAT NATURE  
INTENDED



'THE ULTIMATE  
DIAMOND'

RARE

EXCEPTIONAL

Your starting point could take you  
further

1. Rare, exceptional
2. ~~'Restored'~~
3. ~~Value pricing~~

**Focus on driving consumer desire,  
no apologies**

- 1. Rare, exceptional**
- 2. Consumer desire**
- 3. Belief**
- 4. Parity pricing +**



**Build from your  
strength. Price  
sends the  
strongest  
message of all  
in the luxury  
goods market**

**Sell the product,  
not the process**

**Sell the diamond,  
not HPHT**

**Selling HPHT lowers the barriers to  
market for other HPHT companies**



The luxury market is an  
emotional market

# The importance of seduction

© 2005 Plaid, Inc.

Water  
Crystals  
Vodka

© Plaid, 2005

PET000867

Evian  
Swarovski  
Absolut

Attract the trade to your product with  
your brand story so that you can rely  
less and less on your discount.

Use consumer desire to focus more on  
aiding their sale

# How can Bellataire seduce and create desire?



CONFIDENTIAL

CONFIDENTIAL

# Your Lazare Kaplan pedigree

© Plaid, 2005

PET000872



# Science = Seduction

© Plaid, 2005

PET000873

**“GE, while a fabulous company, isn’t  
a name consumers associate with  
the romance of diamonds.”**

**Tanya Fratto, GE Gem Technologies**

The history of the diamond market is  
about craftsmanship

High pressure, high temperature is  
21st century craftsmanship

Leave science behind,  
focus on seduction

© 2005 PETCO, INC.

# Pride not apologies

© Plaid, 2005

PET000878

Tell your own story,  
don't let it get told for you

Use customer demand and desire to  
drive change, and the retelling of  
your story



You don't have a story remotely like  
anyone else's. You break the mold.

Think of yourselves as a 21st century  
diamond company

With a modern process, a modern  
look & feel, and a different approach  
to a very tradition-bound market

Drive desire for superior brilliance

Bellataire means  
unmatched brilliance

# Support the claim with your pedigree and process

Best cut - cut by hand for optimal reflection and refraction of light. The best cut in the business.

Best color - the purest color due to a patented high temperature pressurization process that refines the color of the purest stones

Best clarity - only the clearest diamonds can become Bellataire diamonds

Best quality - only 1% of diamonds in the world can qualify as Bellataire diamonds. Bellataire are rare.

**Make it easy to find the best**  
**Become associated with the highest end of**  
**the quality spectrum**

**Bellataire means the best**

<b>Color</b>	<b>D E F</b>
<b>Clarity</b>	<b>IF - VVS</b>
<b>Cut</b>	<b>Ideal/excellent (handcut)</b>
<b>Carat</b>	<b>bigger is better (!)</b>
<b>Type</b>	<b>2a (1%)</b>

# Your proposition

1. Rare, exceptional - 1%
2. Superior brilliance
3. 21st Century craftsmanship & the best cut in the business
4. Parity pricing +



Build from strength to strength

But you can't sell your superior  
brilliance with a brand identity that  
looks and feels like other diamond or  
jewelry companies



Avoid the visual and emotional  
language that characterizes most  
luxury jewelry brands

You can't out-Nike, Nike, and you  
can't out-DeBeers, DeBeers

A Diamond is Forever. The Diamond Source

Q Inquisitor

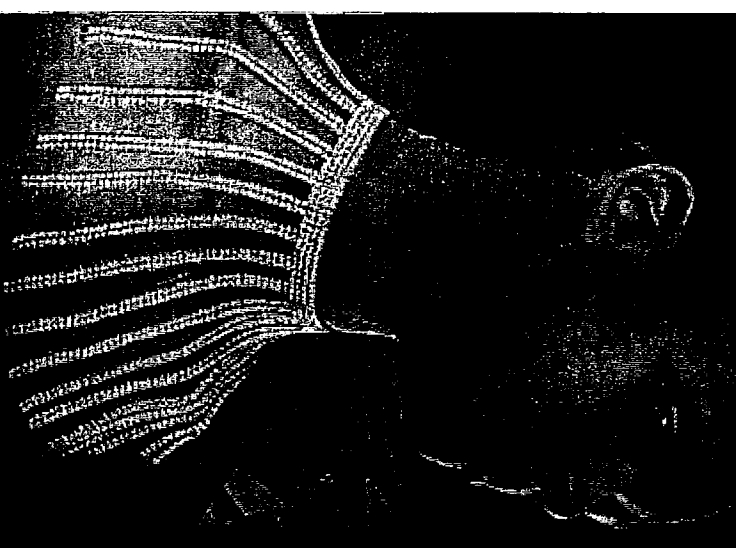


PHOTO BY SAKHJAL GUY

THIS SITE IS FOR U.S. RESIDENTS. REVIEW OUR PRIVACY POLICY.

A DIAMOND IS FOREVER  
DIAMOND TRADING COMPANY

**THE DESIGN GALLERY**

Explore our gallery of hundreds of pieces of beautiful diamond jewelry.

CLICK TO ENTER

**"I Forever Do"**

Celebrate This Anniversary With a Piece of Eternity

ENTER HERE

**DESIGN YOUR OWN RING**

Create your own three stone diamond ring or diamond engagement ring from a selection of stone shapes, sizes, and bands!

CLICK TO ENTER

**THE RING TRUE TEST**

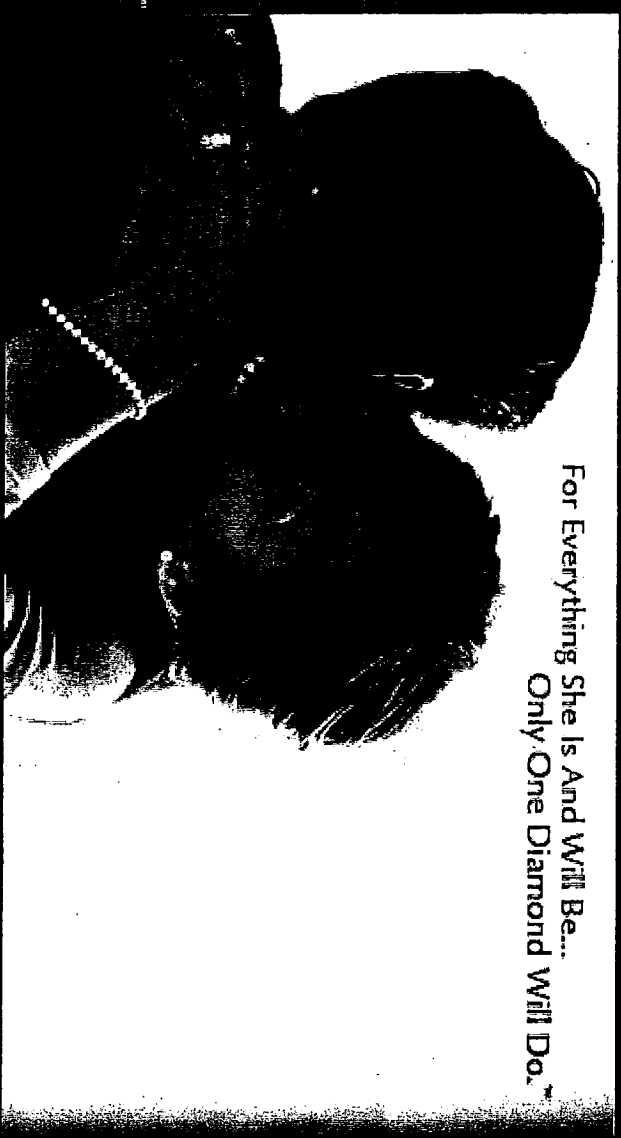
WHICH DIAMOND RING HAND FIND REFLECTS YOU BEST?

ENTER HERE

4C'S DIAMOND GUIDE

WHAT'S HOT

For Everything She Is And Will Be...  
Only One Diamond Will Do.™



THE HEARTS ON FIRE™ DIAMOND

THE DREAM™ DIAMOND

JEWELRY BY HEARTS ON FIRE™

FIND A HEARTS ON FIRE™ JEWELER

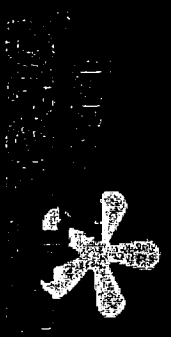
ASK THE DIAMOND WIZARD

THE HEARTS ON FIRE™ BRAND

TELL A FRIEND ABOUT HEARTS ON FIRE™



RENT A HEARTS ON FIRE™ DVD,  
VIDEO OR BROCHURE



HEARTS ON FIRE  
THE WORLD'S MOST PERFECTLY CUT DIAMOND

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Legal Disclaimer | Retailer License

台灣

# De Beers

- BRIDAL COLLECTION
- COLLECTIONS
- ENLIGHTENMENT
- ABOUT DE BEERS
- OUR STORES

## FOREVER, NOW NEW RADIANCE COLLECTION

MAKE AN  
APPOINTMENT

BOOK A PRIVATE,  
PERSONAL VIEWING  
WITH ONE OF OUR  
SENIOR COLLECTION  
ADVISORS

New Radiance  
Collection



Radiance Experience  
See the Fire of Life...



De Beers Diamond  
Beauty Scan



[Make An Appointment](#)

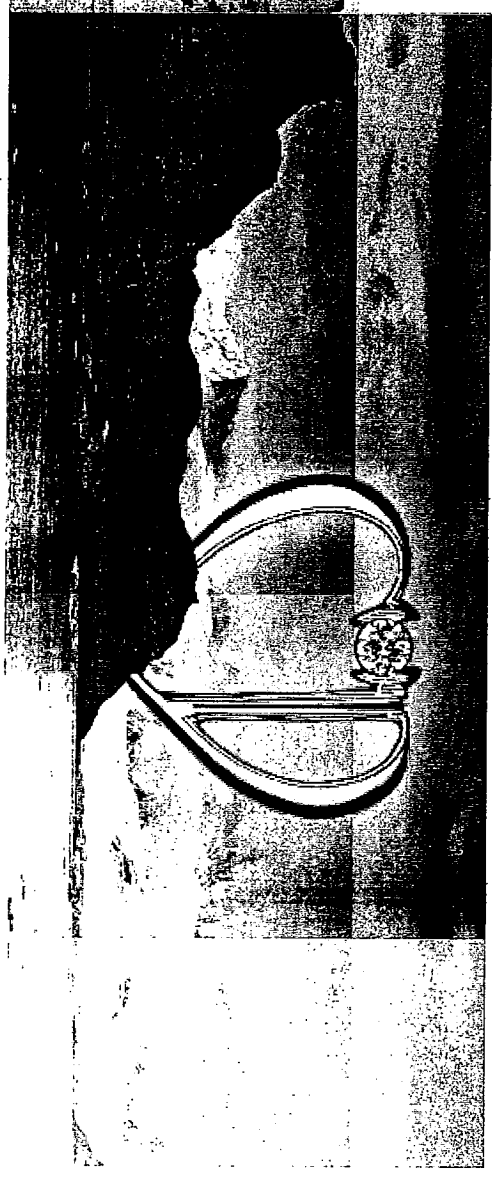
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> website by Large



# CANADIA<sup>™</sup> *Diamonds*

- CLASSIC COLLECTION
- EVENING COLLECTION
- UNIQUE ORIGIN
- BUYERS GUIDE
- WHERE TO BUY
- THAT SPECIAL DAY
- NEWS & PRESS



HOME CONTACT US ABOUT US C.O.R.E

You are different, be different



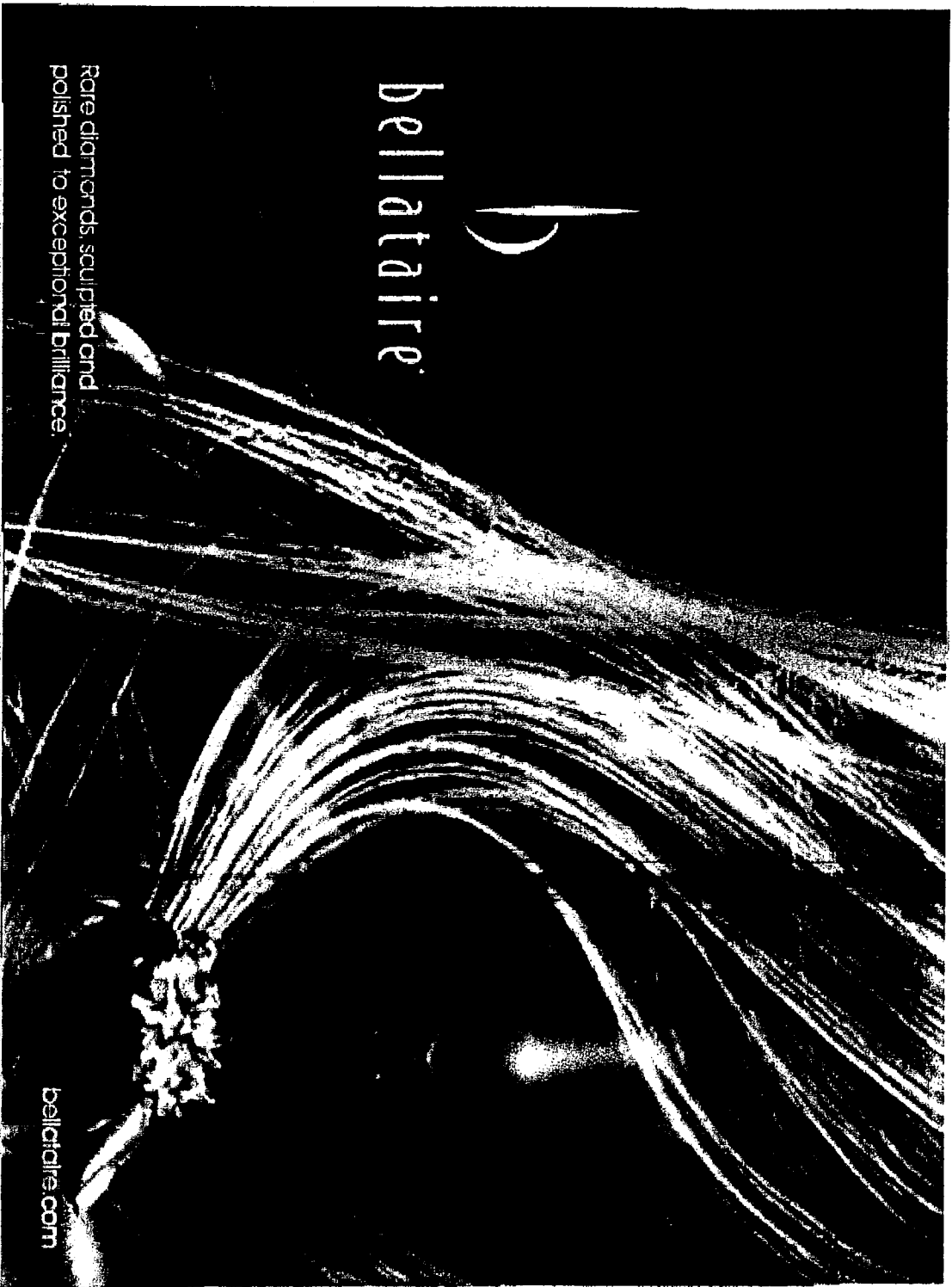




# Bellataire image exploratory

Copyright © 2005

# 4 approaches

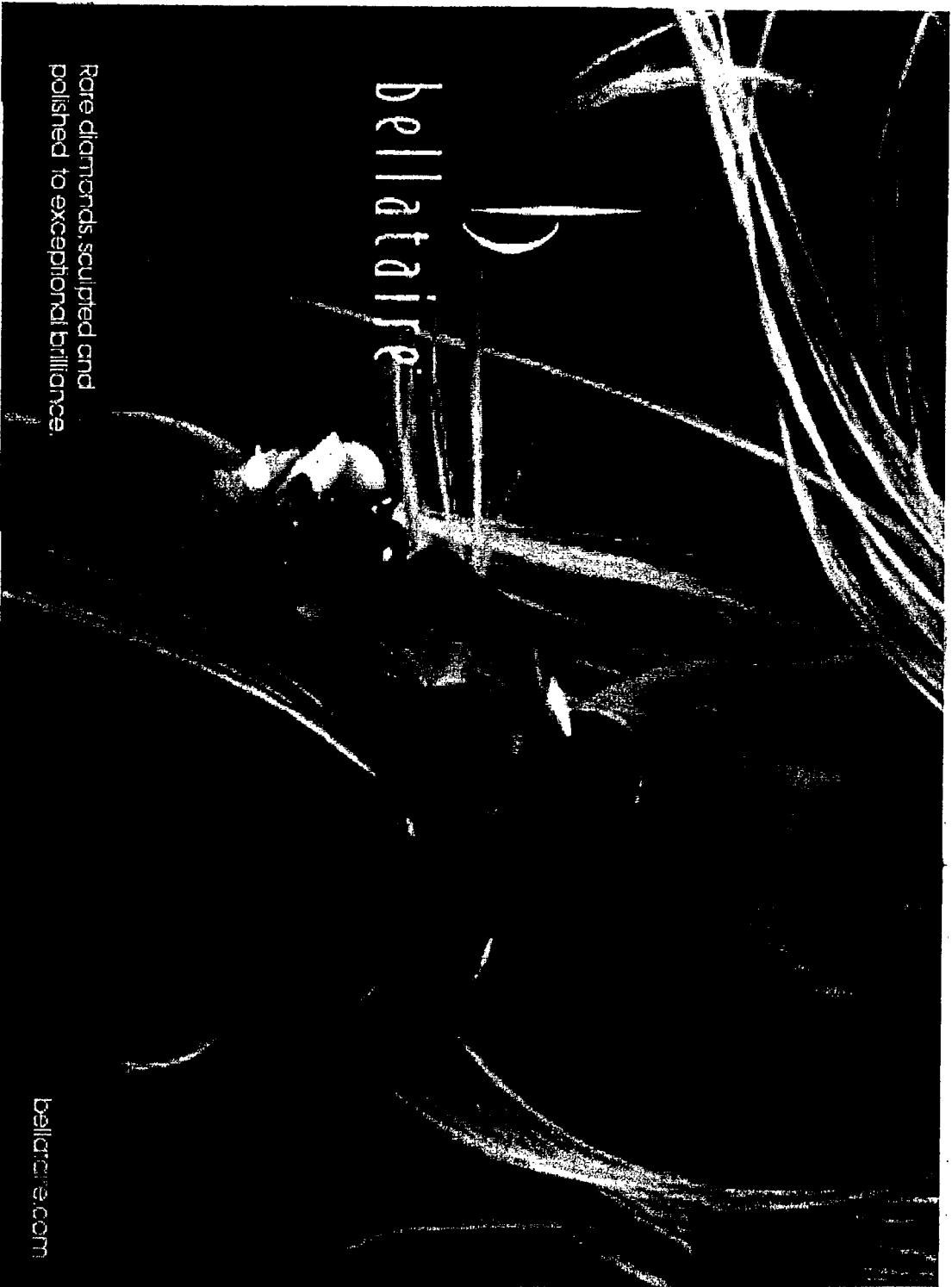


bellataire

Rare diamonds, sculpted and polished to exceptional brilliance.

bellataire.com

QUINCY JONES



bellataire

Rare diamonds, sculpted and polished to exceptional brilliance.

[bellataire.com](http://bellataire.com)

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PET000901

Advertisement 2005

b

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PET000902



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Bellataire  
Holiday Collection  
2006



bellataire  
Holiday Collection  
2006



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COMMERCIAL



Brilliant. Bellaire.  
Rare diamonds, sculpted and polished to exceptional brilliance.

 bellaire

© Plaid, 2005

PET000906

Could this be right for you?

Would this direction help improve  
your bargaining power with your  
customers?

Would improved customer bargaining  
power improve your bargaining  
power with the trade?

Would this direction help you to  
reduce threat to margins that exist in  
the supply chain?

Would this direction enable you to  
keep your lead & reduce the threat of  
other HPHT companies?

**Would this direction help to increase  
the barriers to entry for new HPHT  
companies?**



How to get there

# How to get there

Work to agree the strategy

Explore price point

Refine the language, get the story right

Align the basic communications mix

Refresh the visual identity

Holiday brand campaign (national print)

Coop opportunity (local print)

In-store materials

Sales tools (brochures & fact sheets)

Web

Further down the road. . .

Programs to extend reach and impact

Align other elements of the sales process and  
brand experience

Jeweler selection criteria

Jeweler program

Packaging

Product design

Product placement

PR

# Approach

4 simple phases of work:

Exploration

Strategic refinement

Creative exploration

Delivery

# Exploration

Short interviews with key  
stakeholders

An audit of your marketing materials

Strategic refinement

Reshape your brand story

Agree the foundation for your  
refreshed visual identity

## Creative exploration

Provide two creative directions which will illustrate options for how the brand can communicate consistently across mediums, i.e., advertising, marketing collateral and web.

# Delivery

## Example deliverables:

Final print-ready files for brand ads, co-op ads and in-store promotional materials

Marketing brochure and a new presentation to use in your sales efforts.

Web update



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Thank you

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PET000921

Work to agree the strategy

Explore price point

Refine the language, get the story  
right

Align the basic communications mix

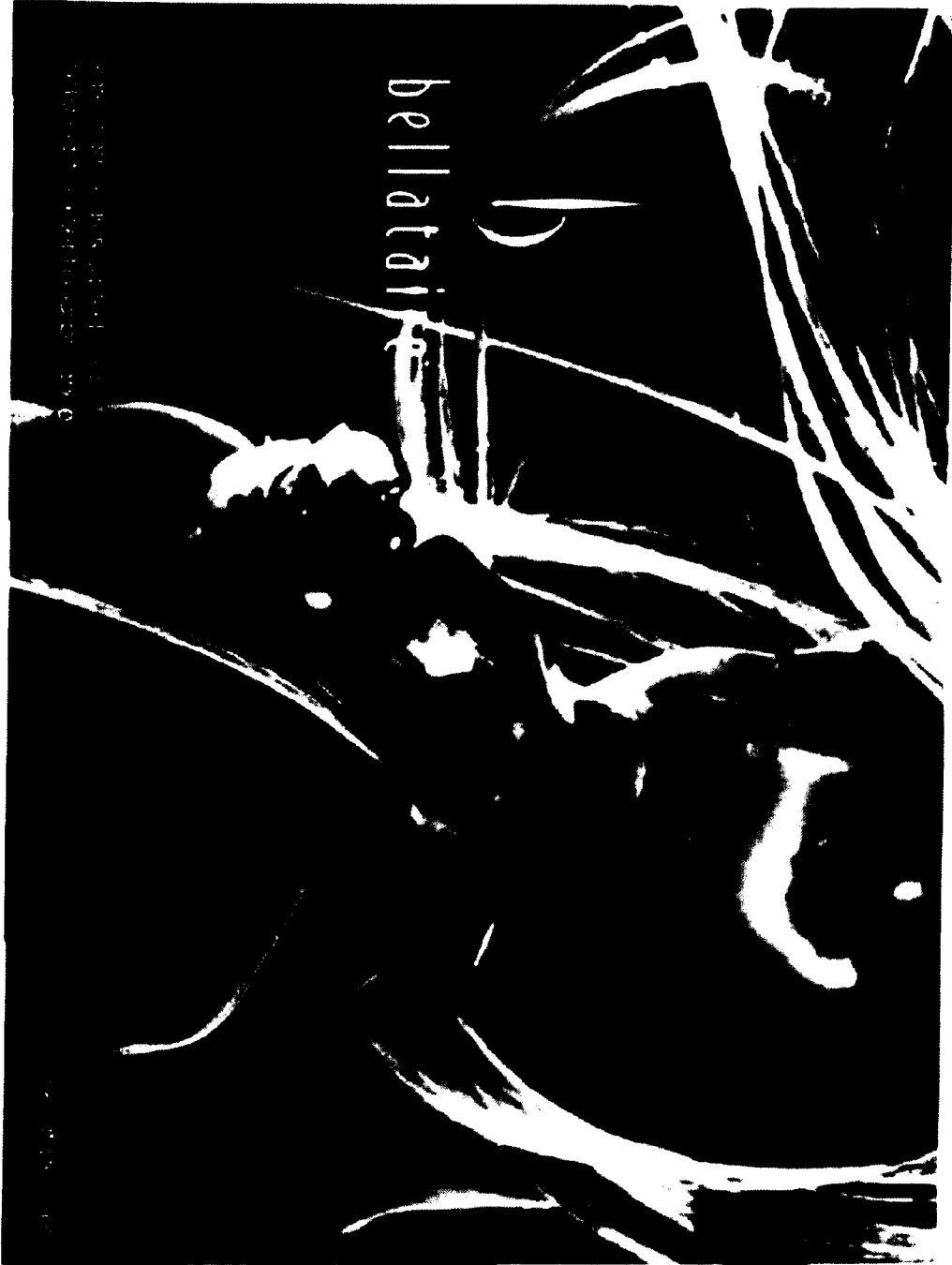
Refresh the visual identity

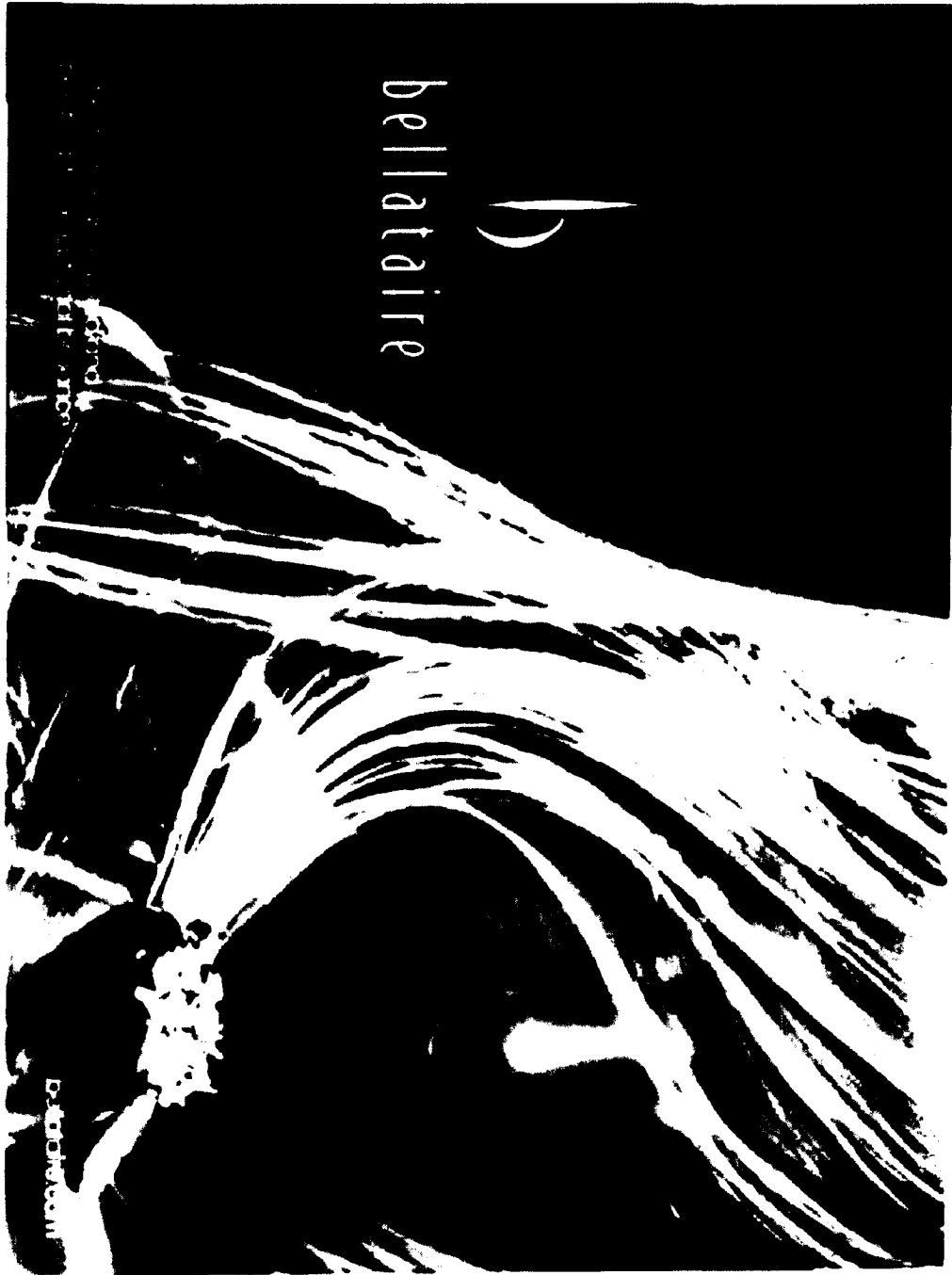
Holiday brand campaign (national  
print)

Coop opportunity (local print)

In-store materials

Mailers to mail (brochures & fact  
sheets)



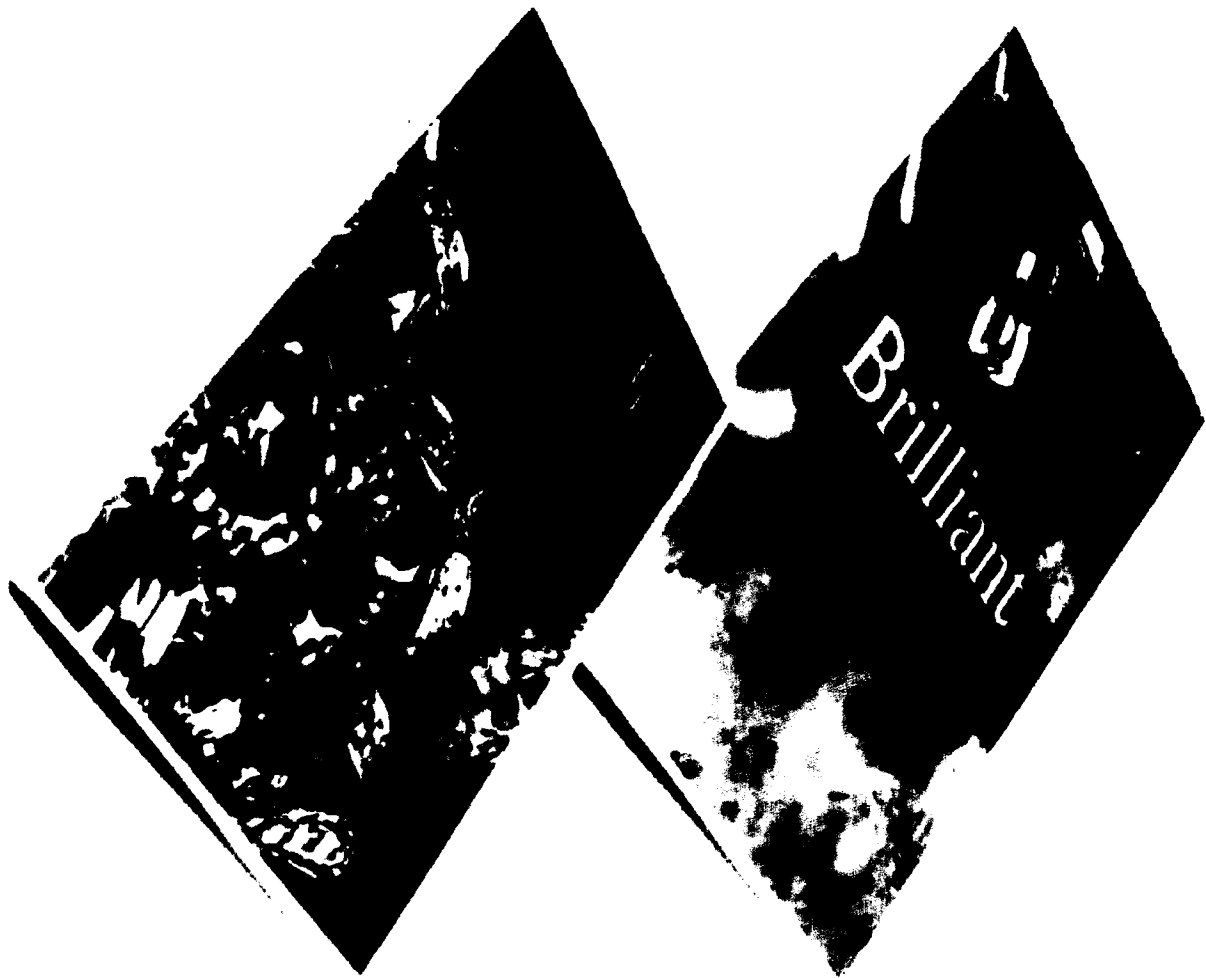


bellataire

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**EXHIBIT E**



# WebMarketCentral

Where

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[Email Newsletters](#)

## How to Choose an Ad Agency (Marketing Agency)

Related pages: [How to Write an Ad Agency RFP](#)

Selecting an advertising agency (alternatively known as a marketing agency or creative agency) - or, more to the point, the *right* agency - is a crucial decision for any company. Choosing wisely will lead to visible, positive results for your company. The wrong agency fit, conversely, will not only be a waste of money but also make your marketing life miserable. Too many companies take a haphazard approach to this critical decision; they may get lucky, or they may not. Based on experience, here is a structured approach that should lead to the best decision.

**Step 1:** Develop a long list of agencies to evaluate. The best source in compiling this list is referrals from colleagues. Additional sources are the local Yellow Pages or internet resources such as [agencylist.com](#). Start with at least 12 agencies to investigate further, but no more than 20.

**Step 2:** Conduct your initial research. Use the internet to check out the agencies on your initial list and eliminate any obvious poor fits. Some agencies focus on specific industry niches, while others have a broader focus but are clearly more business-to-business (b2b) or business-to-consumer (b2c) oriented. Most agencies won't work with two or more clients who are direct competitors, so if you see one of your closest competitors on an agency's client/reference list, drop them from consideration. Make sure each agency includes the services you need among their core competencies. The goal in this step is reduce your initial list down to six to ten agencies for further consideration.

**Step 3:** Develop your request for proposal (RFP). This step is actually somewhat controversial, as there are "experts" out there who will tell you not to use an RFP, but rather to utilize a request for information (RFI), which is largely more a semantical difference than a substantive one; the goal is to collect some specific information from each of the agencies on your list, whatever you want to call this. Other sources will tell you that agencies hate RFPs, when what they really mean is that agencies hate poorly-crafted RFPs; following the outline [How to Write an Ad Agency RFP](#) will help avoid this outcome.

In developing your RFP, remember that you are seeking to establish a business relationship with a marketing agency, so 1) respect their time, and 2) don't just ask questions, but also give the agency enough information about your industry, your company, and your specific needs to determine if there is a fit from their perspective.

Have all of the individuals on your internal selection team sign off on the RFP before sending it out; there is nothing more frustrating, for you or the agencies involved, than to go through the entire RFP process only to have to do it over - because a key individual on your end wasn't consulted, you didn't ask the right questions, you didn't have the objective(s) identified properly, or due to some other avoidable circumstance.

**Step 4.** Call each agency on your list. Introduce yourself and your company, and tell them you'd like to include them in your RFP process. This step serves three purposes: first, it allows any agency which doesn't want to respond to your RFP, for any reason, to opt out of the process right away. Second, it enables you to speak directly to an appropriate individual at the agency and begin establishing a rapport. Third, it assures that you will be sending your RFP to the right person at the agency. You should tell this person how many agencies will be receiving the RFP. You don't have to volunteer the specific names of the other agencies you'll be contacting, but should provide this information if asked.

**Step 5:** Send out the RFPs to the agencies who have agreed to participate. Make yourself available to answer their (inevitable) questions, and let them know that you are available for this. If you have included any out-of-town agencies on your list, be aware that they may expect at least partial reimbursement for their travel expenses if you invite them to give a presentation; get agreement from your internal selection team (specifically those with expense approval authority) beforehand as to how you will handle this.



- SEO Basics
- SEO Copywriting
- Content Basics
- Build Site Traffic
- Interactive PR
- Marketing Plan
- B2B Lead Gen
- SEM Best Practice
- Web and Podcasts
- Content Selection

Step 6: Evaluate the RFP responses, eliminating those agencies which are less than an excellent fit for your needs, in order to get down to your short list of finalists (at least two, but certainly no more than five). In evaluating the responses, ask questions such as: are you comfortable with their experience, size and resources? With their approach to your challenge(s) and objective(s)? Are you confident that your account will be large enough to be important to them? Are you impressed by the quality and tone of their creative work?

And of course, call their references. Specifically, ask about their satisfaction with their agency relationship. Does the agency consistently meet specified timelines? Do they adhere to their quoted prices? Are they easy/pleasant to work with? What results have been achieved?

Step 7. Arrange for presentations from each of your finalist agencies. Ideally, unless you are able to eliminate an agency from consideration after the first presentation, you should schedule two presentations with each agency: one at your facility (to give their personnel some impression of your offices, people and work environment) and a second at their agency, including a tour.

At this step you and your evaluation team will have the opportunity to share with the agency representatives more information about your industry, your company, and your unique strengths, challenges and goals. Each agency has the opportunity to tell you more about their capabilities, approach and practices. While the facts are certainly important, the most critical criterion at this point is chemistry: are you comfortable with the agency's team, and are they people you look forward to working with and entrusting with your company's promotional activities?

Step 8. Finally, after reviewing the RFP responses and meeting with your finalist agencies, it's time to make your final selection. Regardless of the titles involved, your internal selection team should agree to discuss the merits of the competing agencies as peers in a freewheeling discussion. In a perfect world, you would all agree on which agency was the clear winner; in the real world, compromise will likely be necessary on someone's part, and the final decision may not be yours. That's why the freewheeling discussion component is critical; if one individual (e.g. your CEO or CMO) ultimately makes the final decision, at least all of the facts and opinions of the team have been aired.

As the last step, you need to inform each of the finalist agencies of your decision. Because the rejections are tougher, I recommend getting these out of the way first. Call each agency and let them know of your decision and, in a positive manner, the reasoning behind it. Follow up with an email thanking them for their participation in your process, praising their strengths, and again briefly stating your rationale for the final selection. Then, call the winning agency and give them the good news.

Best of luck with your agency selection process.

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<a href="#">Web Marketing News</a>	<a href="#">E-Commerce News</a>	<a href="#">Knowledge</a>	<a href="#">Resoun</a>

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**EXHIBIT F**

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PET001290

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Office Memorandum

PET001291

SECRET

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PET001292

**CONFIDENTIAL**

PET001293

**CONFIDENTIAL**

Sometimes a brand needs to be treated, and sometimes it needs to be refreshed because everything around it is shifting. The most important thing is to convey who and what you are with clarity and simplicity. We can help you identify your brand needs and use them to drive your business in a competitive marketplace.



**CONFIDENTIAL**

Strategy doesn't go any where without imagination. What should your brand look like? How should it make people feel? The way you bring your brand to life is what makes it emotionally unique and memorable.

PET001295

**CONFIDENTIAL**

It's not enough to say you're different. You have to live your difference in everything you do. A great brand doesn't just sit on a piece of paper. Instead it's out in the world, creating an experience. From how your employees behave to the way you innovate products and services, to the way problems are solved, a great brand experience is in the details.

PET001296

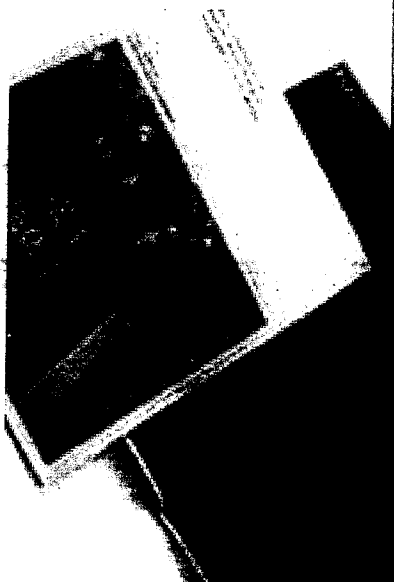
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A great brand ignites an energy that attracts people to it. Energy creates more energy. Start with a good idea and then make the spark fly.

PET001297

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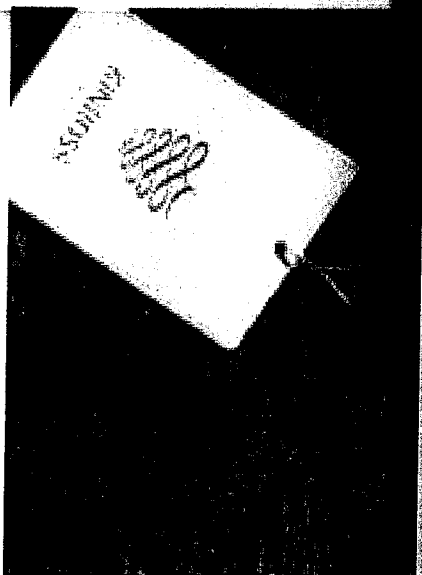
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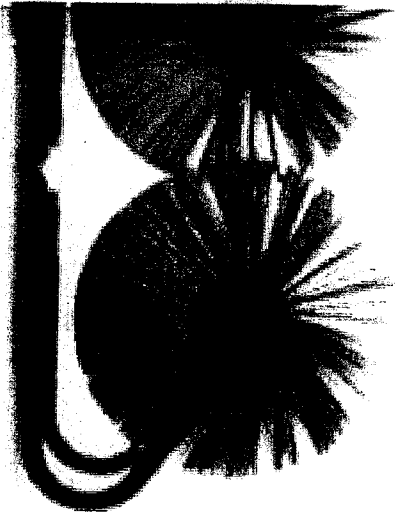
OUT THROUGH TO GET THROUGH



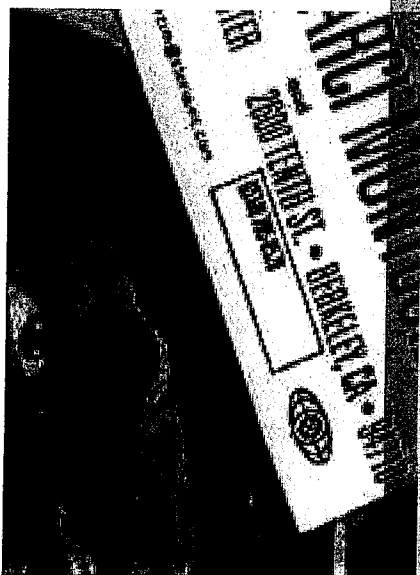
WHEN CAN YOU LEARN IN 30 MINUTES?



A LITTLE LUXURY & INNOVATION



CREATING BRANDS AND BRANDS



THE BEGINNING OF A STORY

*Now we've  
got you...  
how long can  
we keep you?*

MAKING THE MOST OF TIME

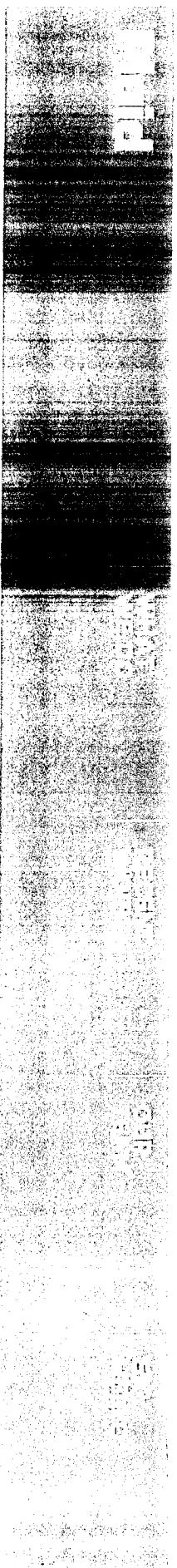
PET001298

CUT THROUGH TO GET THROUGH

Get to the point to stand out from the crowd

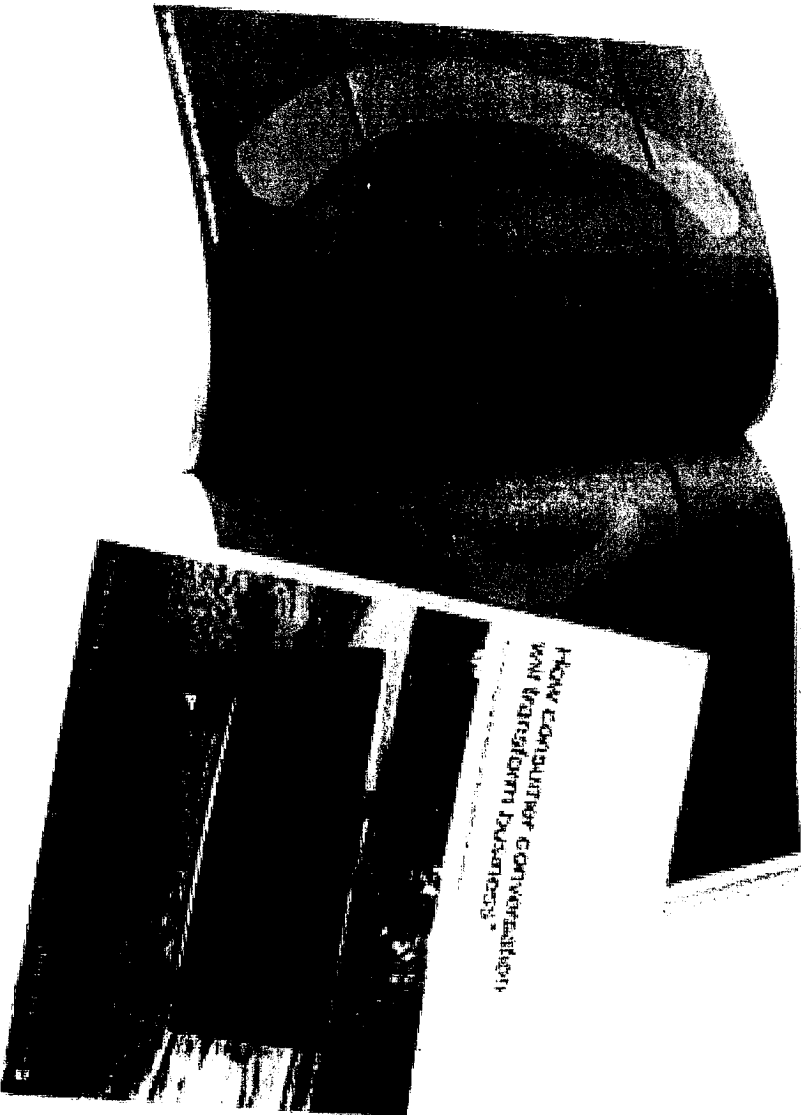
Proprietors of Coopers faced a predicament after the sale of their consulting business to IBM. They needed a clear positioning and identity to let the world know the kind of business consulting they still offered in partnership with our client team. We earned a positioning and identity for PwC's Advisory services, which distinguishes them as consultants who speak their client's language with refreshing clarity and "consultantness." The simplicity and directness of the approach suggested the analyst community which put PwC back on the top ten consultants list.

CUT THROUGH TO GET THROUGH  
A LITTLE LUXURY & HONOR  
THE BEGINNING OF A NEW  
FROM YOUR JOB LEADERSHIP  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON...



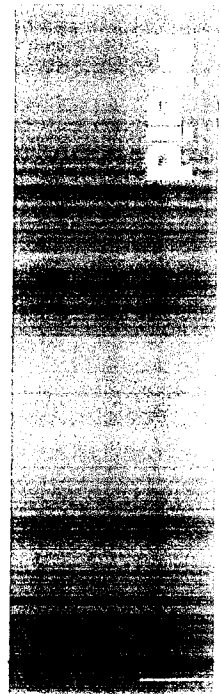
**CUT THROUGH TO GET THROUGH**

Paid helped PwC redesign its approach to communicating, using a simpler, bolder voice, greater strategic insight, and a strict editorial policy—as well as a cleaner, more modern look and feel.



DO YOU WANT TO GET THROUGH  
A DENSE LUXURY & INSURANCE  
THE BEGINNING OF A...  
WHAT CAN YOU LEARN FROM NOTES  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON... 1991





**A LITTLE LUXURY & INNOVATION**

GET THROUGH TO GET THROUGH  
A LITTLE LUXURY & INNOVATION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN FROM THE PROCESS?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON THE

**A brand lives and luxuriates in the details**

When Kinross Cashmere came to Plaid for help in transforming into a luxury fashion brand, we discovered a large part of what they are was going unrecognized. We helped uncover a brand story rooted in 200 years of Scottish tradition, show we used that story to inspire a new identity, a whole new collections approach, and innovative ways to present the garments as pieces of luxury.

In keeping with the hand-dated traditions of Kinross, we hand-dated some innovations too. Small things count. Labels shouldn't shout at you, neck tags shouldn't scratch, and hangers should be easy to remove.

The new brand was inspired everywhere at Kinross and increased sales.



**CONFIDENTIAL**

**PRIMA**

MEMO

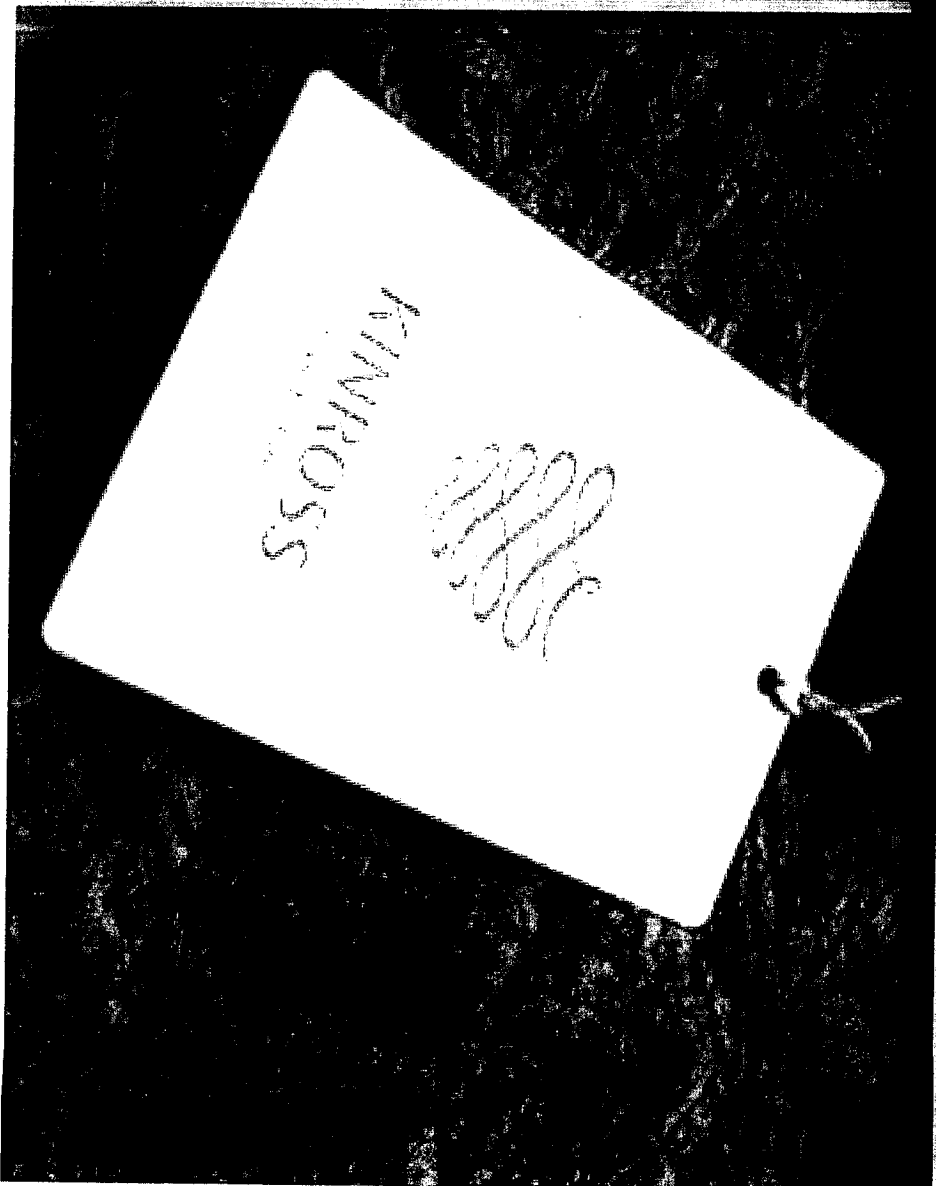
PERSON

DATE

REMARKS

**A LITTLE LUXURY & INNOVATION**

The Kinross insignia is inspired by the long journey of handcrafting and care that goes into each garment.



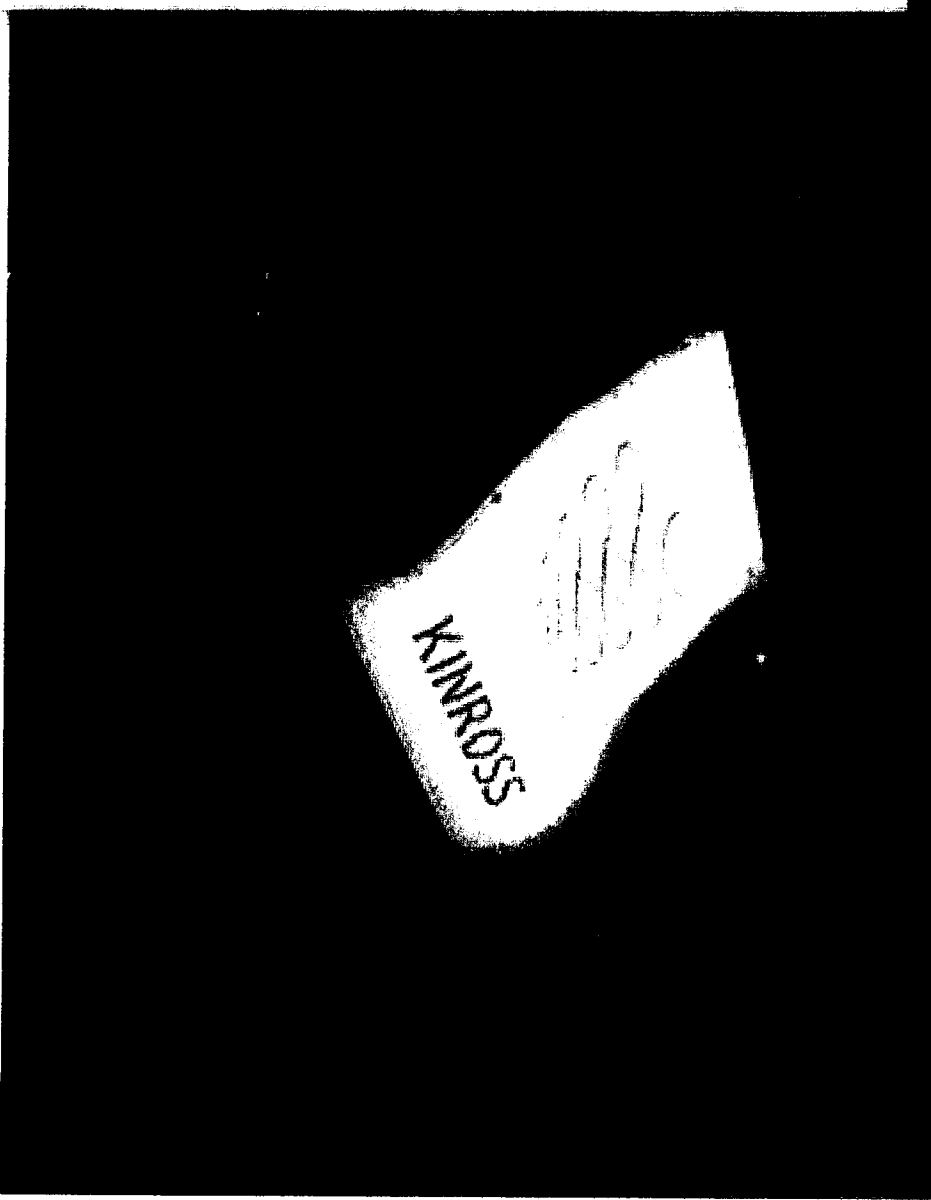
OUT THROUGH TO GET BEHIND  
A LITTLE LUXURY & INNOVATION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 60 SECONDS?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME

1 | 2 | 3

PET001303

**A LITTLE LUXURY & INNOVATION**

Two pieces of thread, sewn in by hand, help keep each Kinross sweater beautiful by ensuring the neck tag is easy to remove. A transparent tag quickly informs.



OUR PROUDLY TOGETHER  
A LITTLE LUXURY & INNOVATION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN FROM THE  
CREATING BRAND ENDS  
A MAGAZINE BASED ONLINE

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Media

Media

Media

Media

Media

**A LITTLE LUXURY & INNOVATION**

Put daily breakable hood on the hanging ensures seasons hood never go down a Kinross sweater.



OUR THROUGH TO GET THROUGH  
A LITTLE LUXURY & INNOVATION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 10 MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME

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**THE BEGINNING OF A STORY**

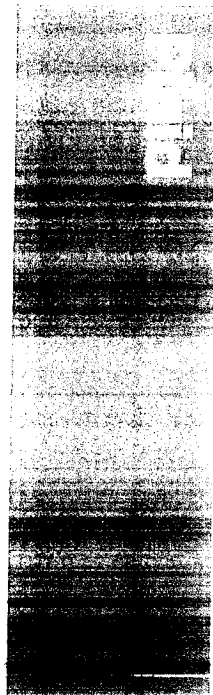
**Coming soon to a theater near you**

Storia Pictures asked Fried to create a brand story and identity for the launch of their new film company. Our inspiration comes from Storia's dedication to the art of storytelling. Our approach taps into the classic film noir style and translates to distinctive Storia as a film studio committed to the film tradition of a story well told.

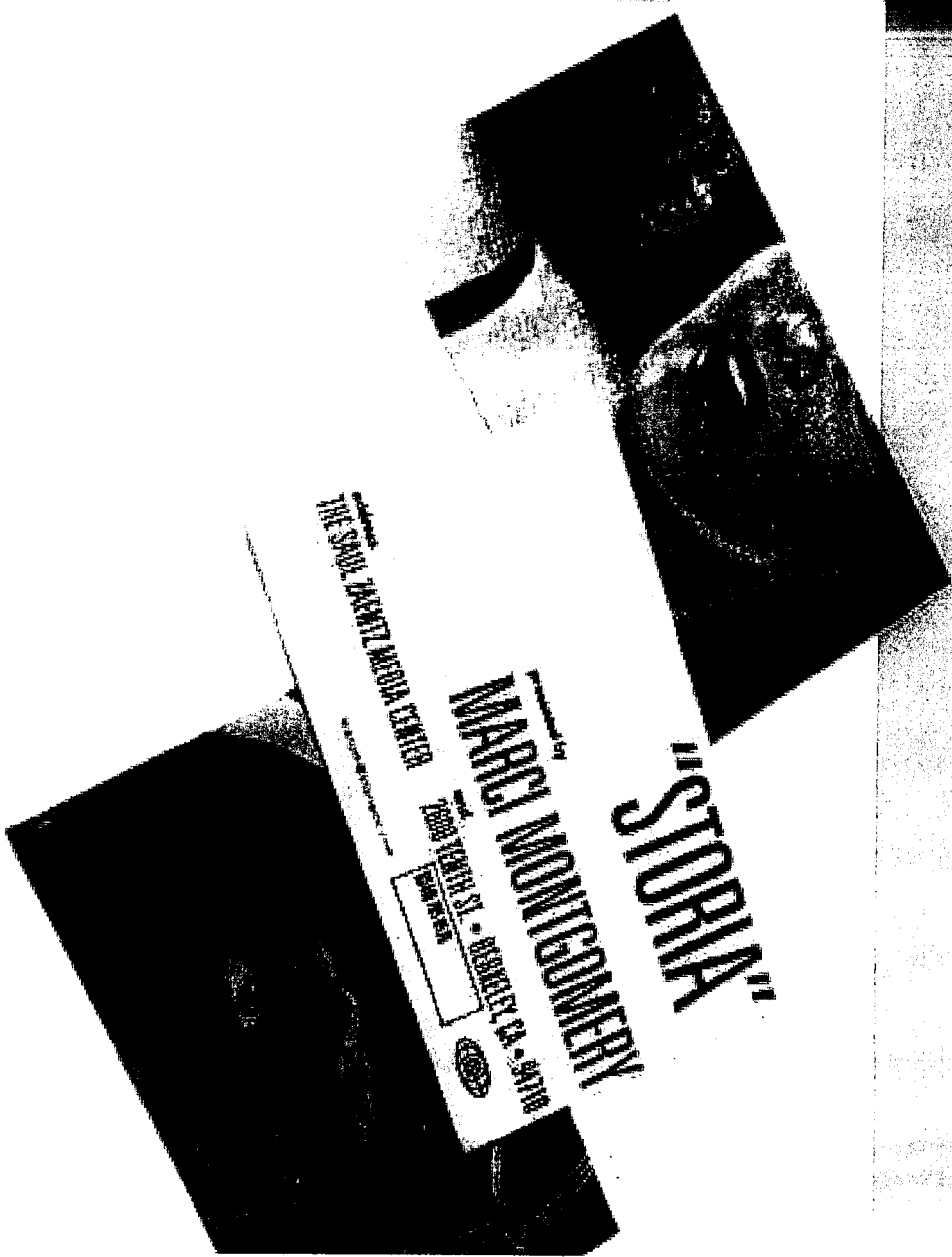
GET FAROUGH TO GET...  
A LITTLE LUXURY & INDIVIDUALITY  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 10 MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ONLINE

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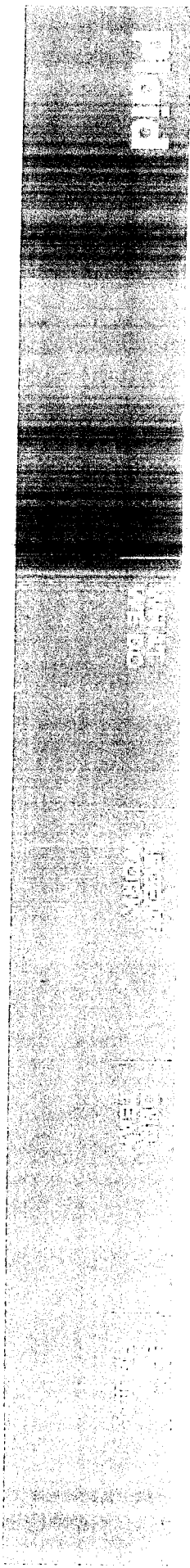


**THE BEGINNING OF A STORY**



OUR THROUGH TO GET THROUGH  
A LITTLE LUXURY AND MORE OF IT  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN FROM THESE  
CREATING BRANDS AND ENVI  
A MAGAZINE BASED ON THE

**CONFIDENTIAL**



**WHAT CAN YOU LEARN IN 10 MINUTES?**

**If you had ten minutes every month to educate a million-dollar audience, how would you do it?**

PriceWaterhouseCoopers advises some of the world's most important companies on critical business issues.

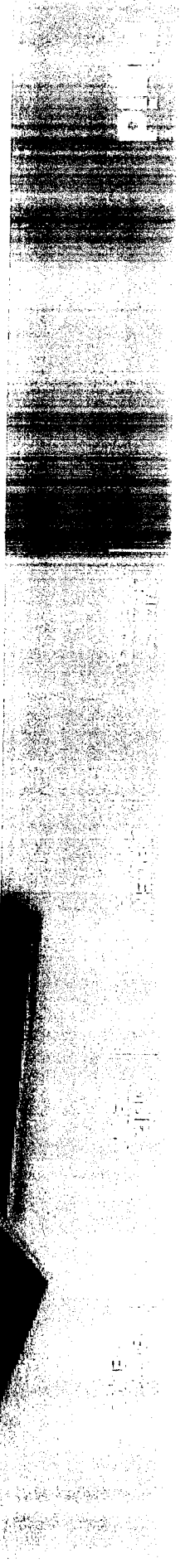
When they enlisted our help to create a branded communications vehicle that speaks directly to CEOs, we know we were facing a seriously time-deprived audience.

Our solution was to speak to CEOs on their own terms. 10Minutes contains a succinct and crisp point of view on exactly what CEOs want and need to know - and gives clear direction on what to do next.

GO THROUGH TO GET YOUR OWN  
A LITTLE LUXURY & INNOVATION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 10 MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME

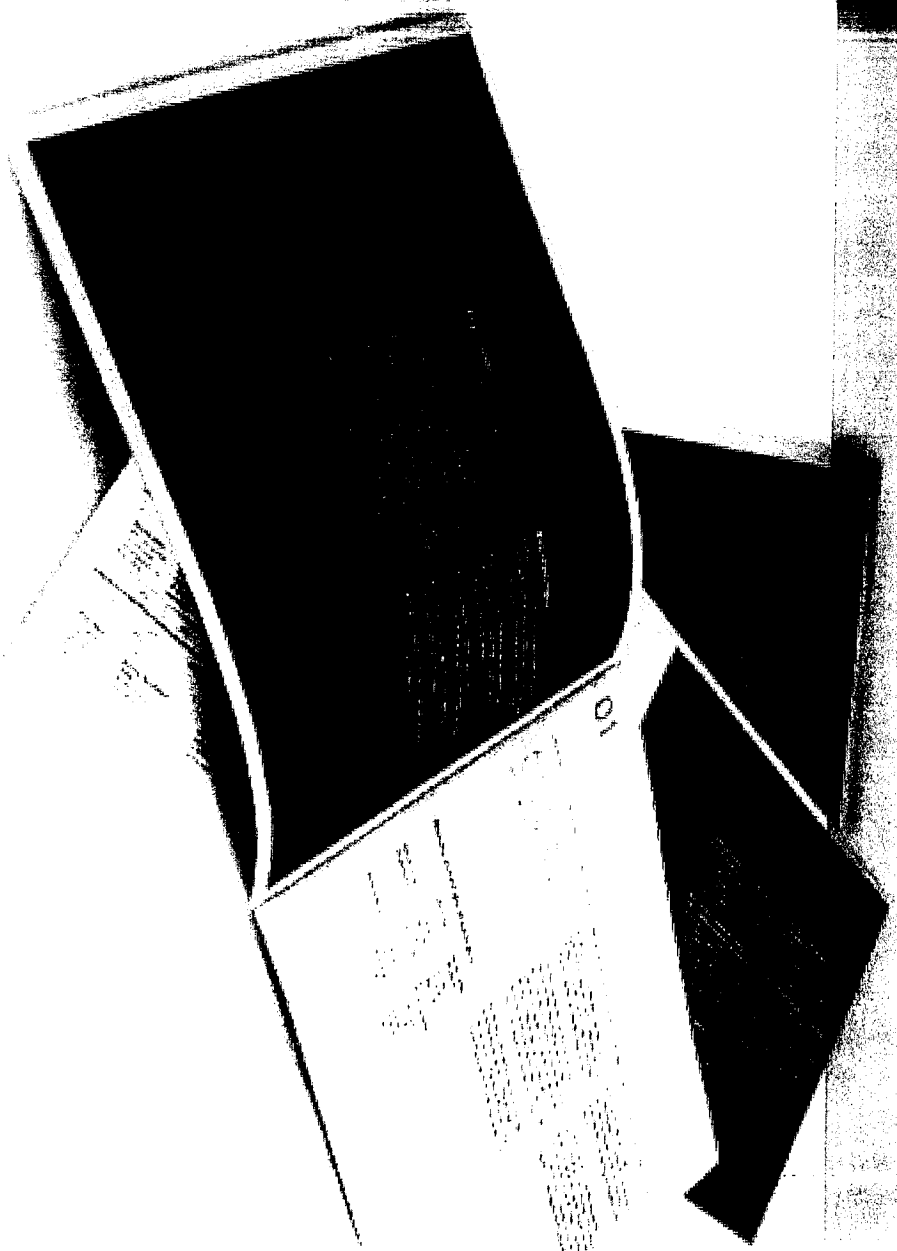
PET001308





**WHAT CAN YOU LEARN IN 10MINUTES?**

10Minutes is written in English, not "consultantese" and is edited to be sharp and focused in its delivery - just like CEOs.



GET THROUGH TO GET THROUGH  
ADAPTE LUXURY & INNOVATION  
THE BEGINNING OF A NEW  
WHAT CAN YOU LEARN IN 10MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME



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Private

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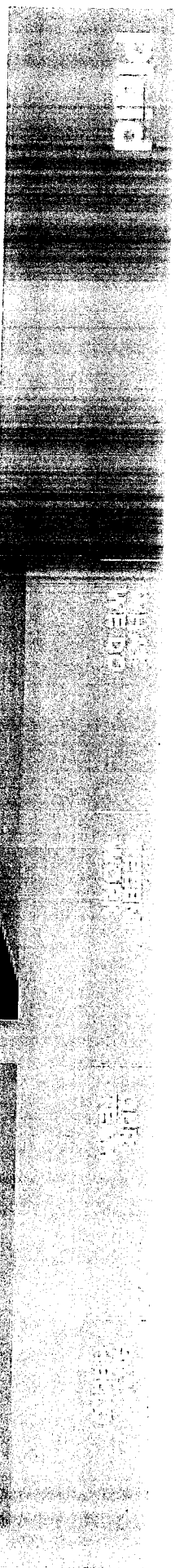
**WHAT CAN YOU LEARN IN 10 MINUTES?**

Each 10 Minutes focuses on a single topic, contains several "in brief" features, and offers immediate action steps.

First stop: Foreign  
Next up: All US  
companies?

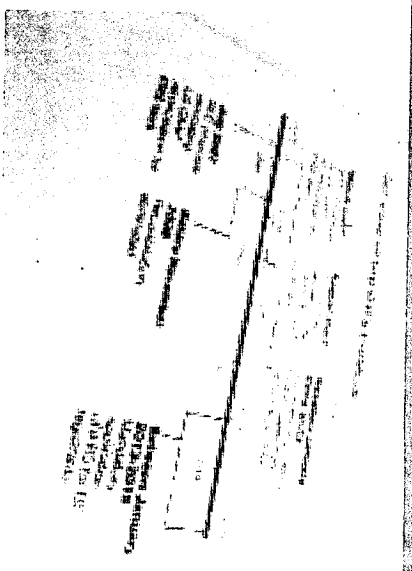
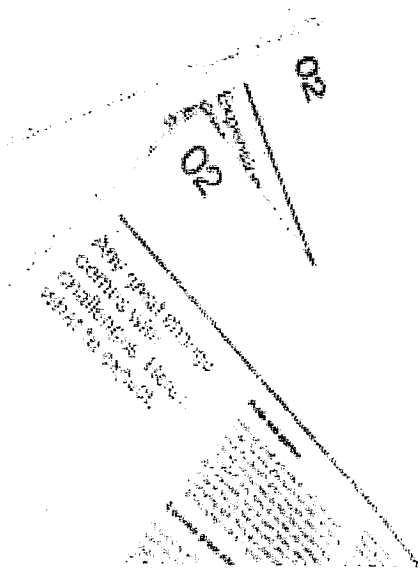
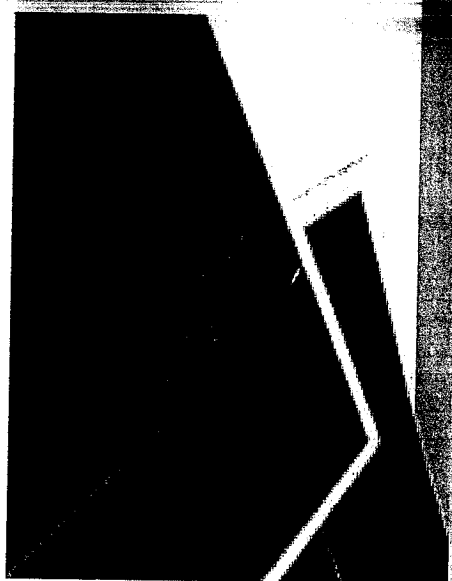
01

CUT THROUGH TO GET THROUGH  
A LITTLE LUXURY & WANDERING  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 10 MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME



**WHAT CAN YOU LEARN IN 10MINUTES?**

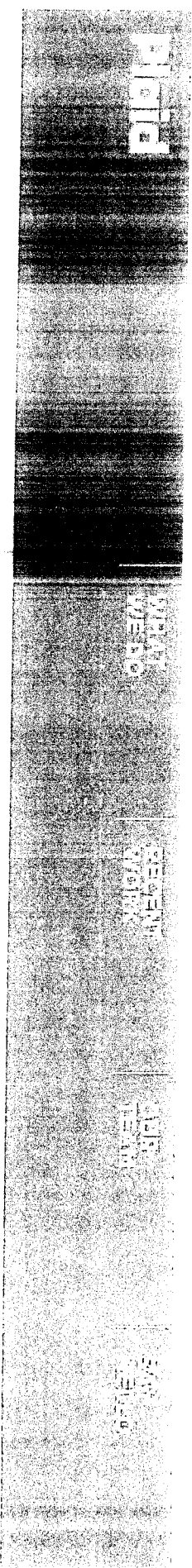
Each 10Minutes is designed to complement the direct and hard-hitting style of PwC's full-length publications, which Paid also created.



Several key challenges:

- Planning and preparing for change
- Understanding how / why change is occurring
- Exploring new and different business models
- Redefining roles and processes
- Identifying new opportunities

GO THROUGH TO GET THROUGH  
A LITTLE LUXURY & INNOVATION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 10MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ONLINE



CREATING BRAND ENERGY

Not every company helps their people to eat, sleep, and breathe the brand—but they should

PricewaterhouseCoopers wanted to bring employees together, get them excited about their new brand, and give them the tools they need to bring it to life for clients.

PwC helped transform a weeklong, off-campus learning and education event into a high-energy brand experience that's both immersive and fun.

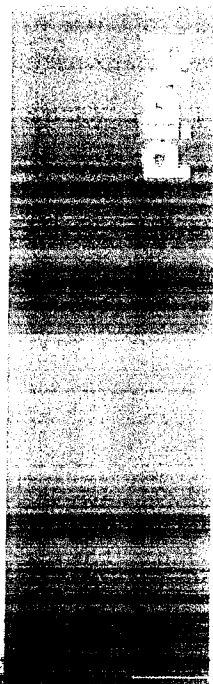
Now an annual event, Advisory University is one of the most highly anticipated events of the year, bringing PwC's people together to help refresh the brand.

OUT THROUGH TO GET THROUGH  
A LITTLE LUXURY AROUND  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN FROM  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME

www.pwc.com

PET001313

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## CREATING BRAND ENERGY

We transformed the world's largest Marriott into an intimate brand space through environmental design and communications planning. From in-room experiences to stage design to parties, contests, and learning kiosks, every detail was designed to reinforce the message.



HOW DO YOU GET TO THE  
A LITTLE LUXURY & IN THE  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN FROM  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME

1 | 2 | 3 | 4

PET001314

**CREATING BRAND ENERGY**  
Even the pool



OUT THROUGH TO GET THROUGH  
A LITTLE LUXURY AND...  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN...  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON...

PROFIT

MARKET

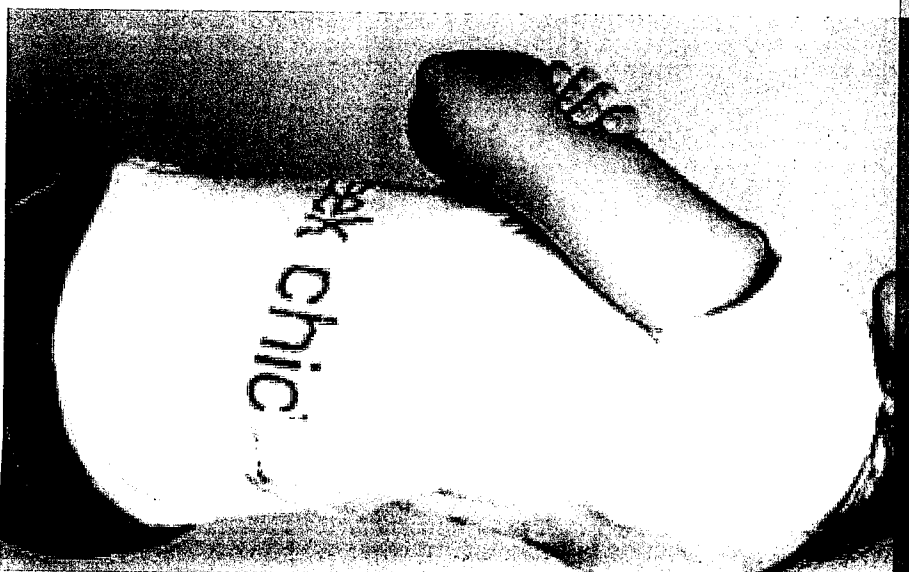
POWER

PLAY

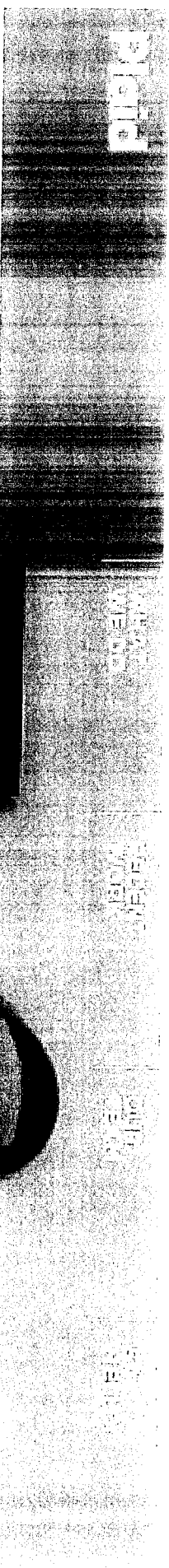
PERFORMANCE

**CREATING BRAND ENERGY**

Consultants with a sense of humor.



CUT THROUGH TO GET INSIGHT  
A LITTLE LUXURY & INNOVATION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 10 MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME



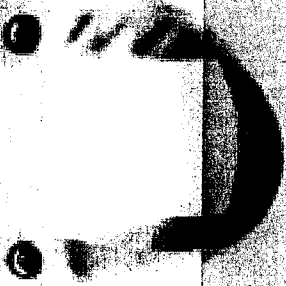
**CREATING BRAND ENERGY**

The brand idea "Pivot" is How?  
comes to life.



How to identify?

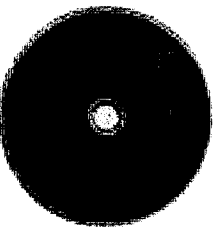
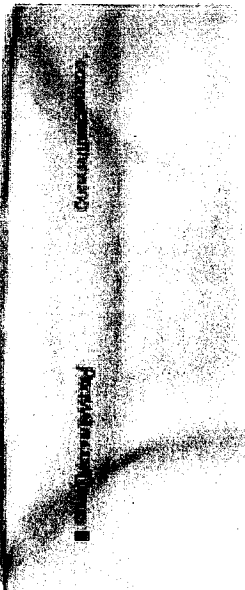
How to  
keep it  
together\*



How to create energy?

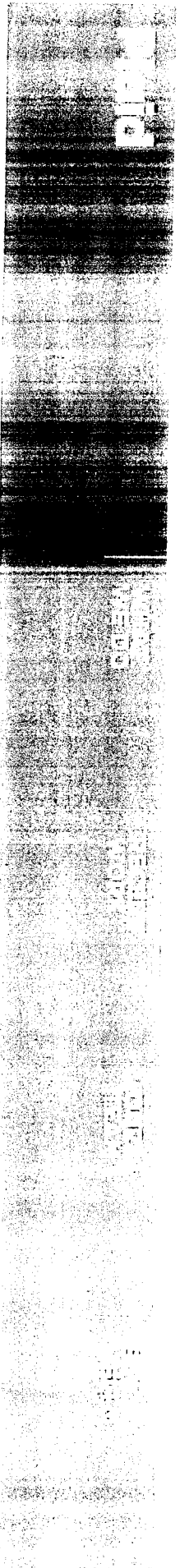
Joe is  
How?

How  
SUNO?



OUT THROUGH TO GET THROUGH  
A LITTLE LUXURY & INNOVATION  
THE BEGINNING OF A BRAND  
WHAT CAN YOU LEARN FROM THIS?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME

**CONFIDENTIAL**



**A MAGAZINE BASED ON TIME**

**Now that we've got you, how can we keep you?**

Advertising agency J. Walter Thompson needed a brand book to showcase its creativity and its philosophy of "creating ideas that people want to spend time with." Reorganizing that time is a precious commodity, this brand book is designed to communicate JWP ideas quickly.

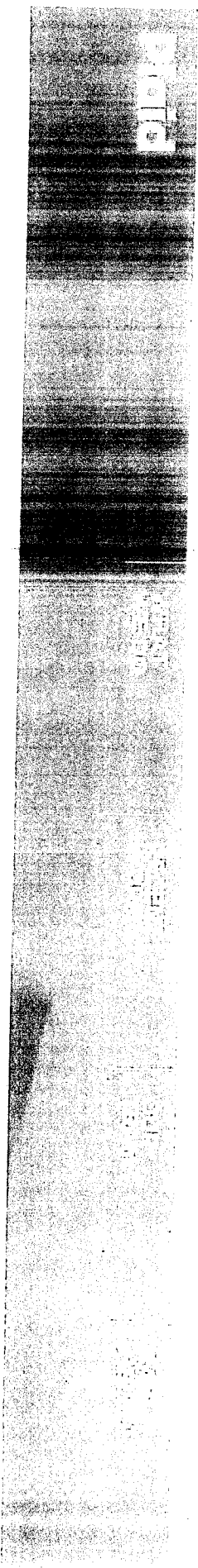
Each page is time coded to let the reader choose how much time they'd like to spend. The book can be read three ways: in a 60-second overview, a 30-minute summary, or a half hour immersion. Attention is earned on every page. Each level of the book is written to entice the reader to spend more time. No matter how the book is read, it becomes clear to the reader that creativity is the only way to keep someone's attention.

GET THROUGH TO GET THE MESSAGE  
A LITTLE LUXURY & INDULGENCE  
THE BEGINNING OF A BRAND  
WHAT CAN YOU LEARN FROM THE ARTISTS?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME

PET001318



**CONFIDENTIAL**



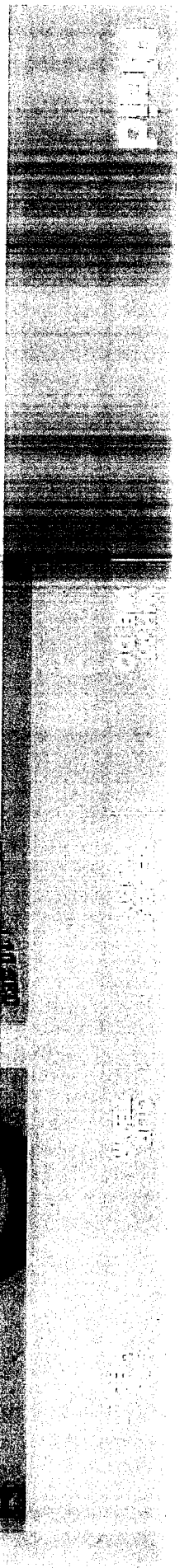
**A MAGAZINE BASED ON TIME**

A Brand Book to showcase JWT's  
creativity and intellect.

*Now we've  
got you...  
how long can  
we keep you?*

JWT

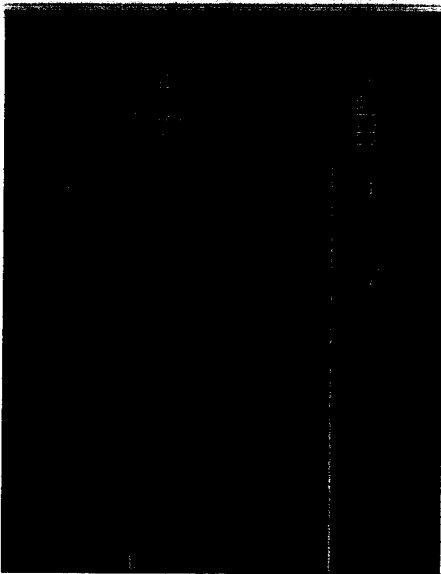
OUT THROUGH TO GET THROUGH  
A LIFE OF LUXURY & INNOVATION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 30 MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME



**A MAGAZINE BASED ON TIME**

Readers can choose how much time to spend reading.

ON **Time** Bob J Chair



**D**  
An ad

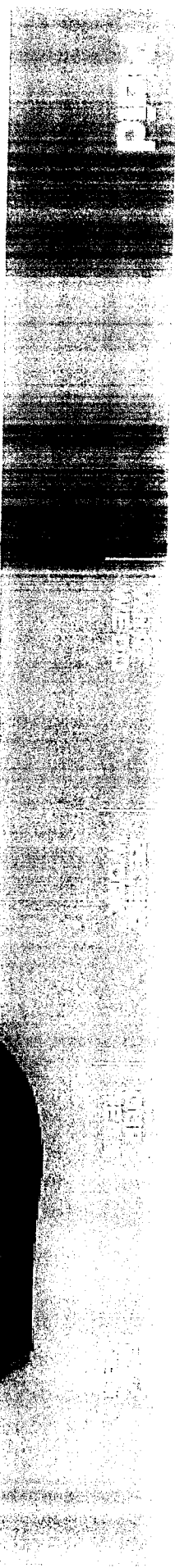
gily lucrative and appealing audience  
s. Not a bad state to be in for what wi  
ad "left on the shelf."

25 MIN

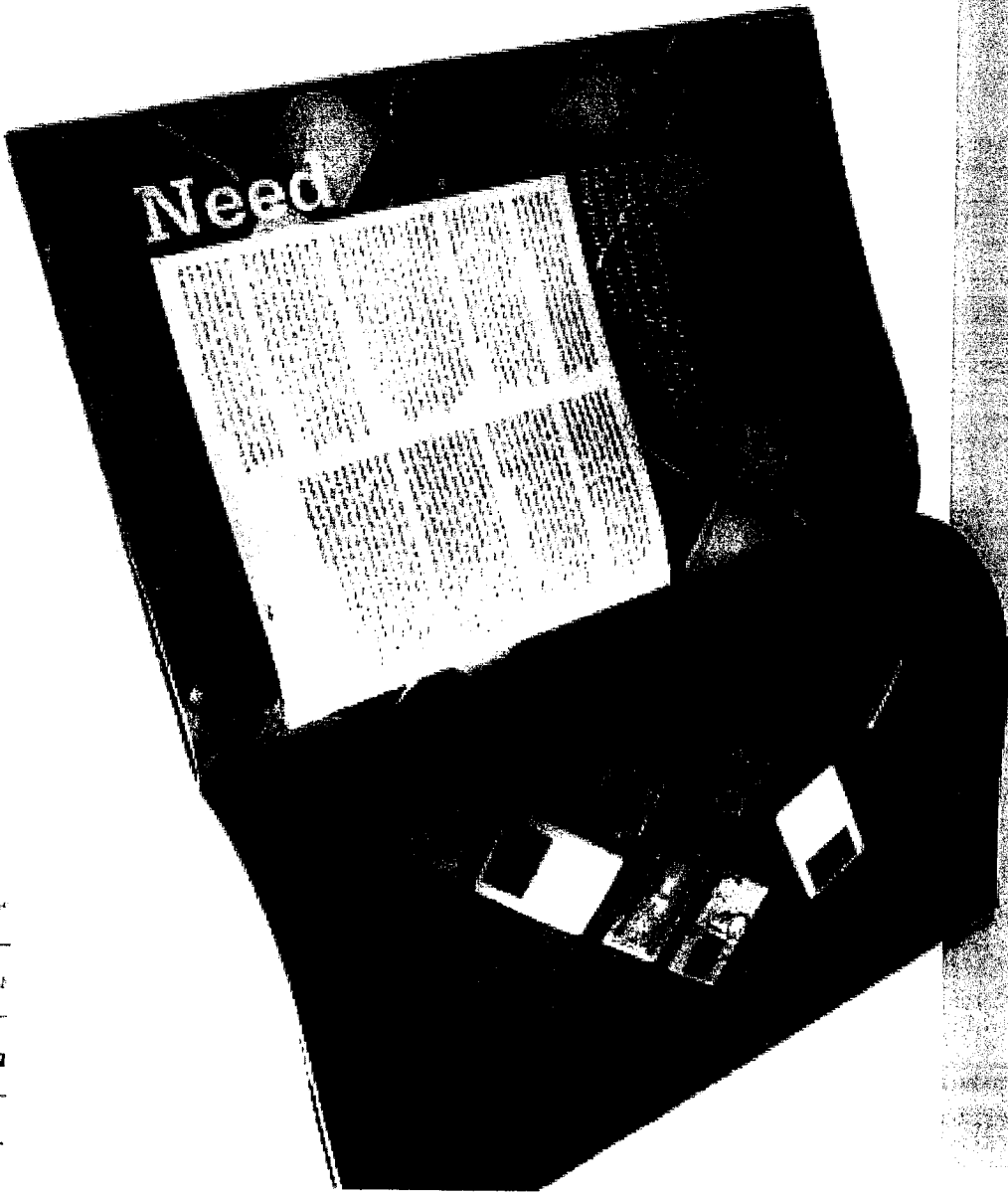
1 | 2 | 3 | 4

OUT THROUGH TO GET THROUGH  
A LITTLE LUXURY & IMMERSION  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN IN 10 MINUTES?  
CREATING BRAND ENERGY  
A MAGAZINE BASED ON TIME

**CONFIDENTIAL**



**A MAGAZINE BASED ON TIME**  
Creativity earns attention on every page.

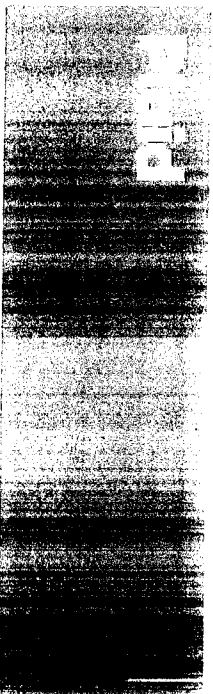


... THROUGH THE GERMANS...  
... THE LUXURY & INNOVATION...  
... THE BEGINNING OF A...  
... WHAT CAN YOU LEARN FROM...  
... CREATING BRAND ENERGY...  
... A MAGAZINE BASED ON TIME...

1 | 2 | 3 | 4

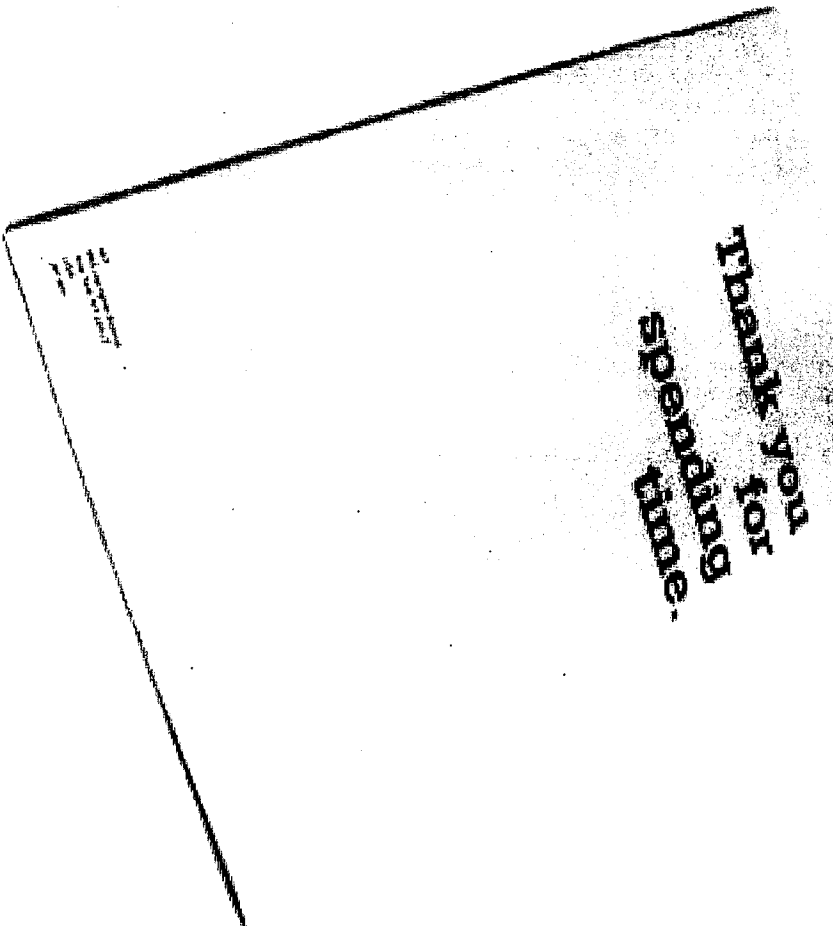
PET001321

**CONFIDENTIAL**



**A MAGAZINE BASED ON TIME**

Always end with a thank you.



Thank you for  
buying  
some  
time

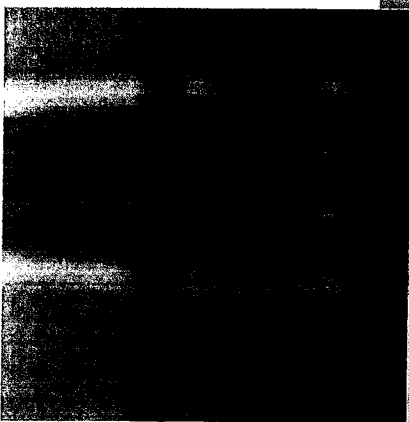
© 1999 Time Inc. Magazine  
All rights reserved.

OUT THROUGH TO GET THE BEST OF  
A LITTLE LUXURY & INSPIRE YOU  
THE BEGINNING OF A STORY  
WHAT CAN YOU LEARN FROM SPENDERS?  
CREATING BRAND EQUITY  
A MAGAZINE BASED ON TIME

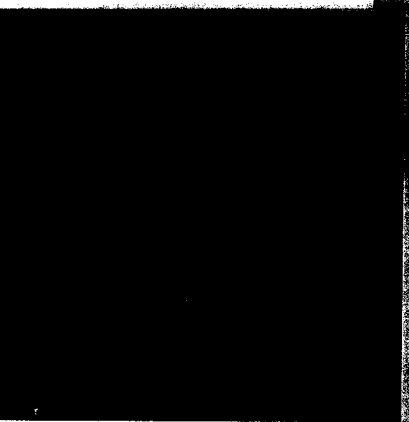
1 | 2 | 3 | 4

PET001322

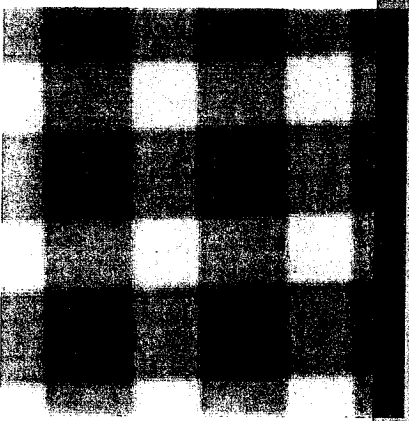
**CONFIDENTIAL**



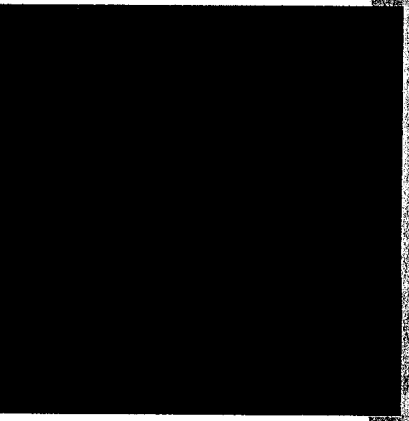
JAROL



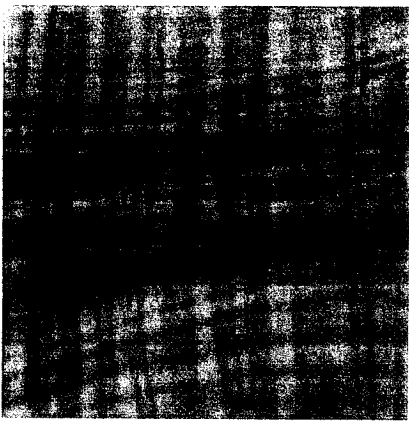
VERONICA



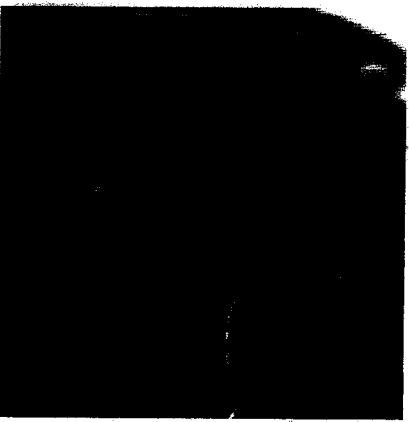
QUEEN



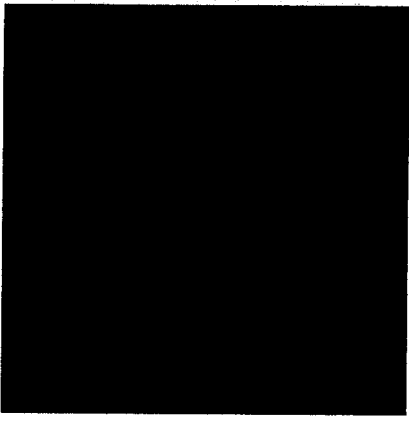
JOSE



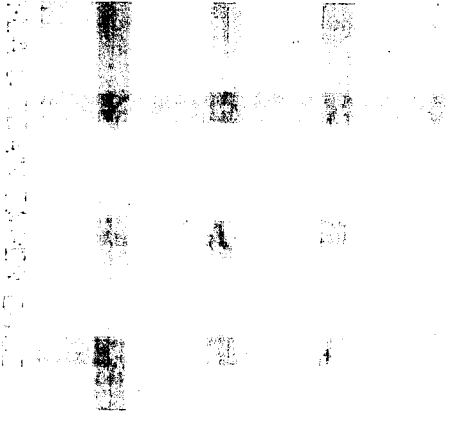
ANTALIE



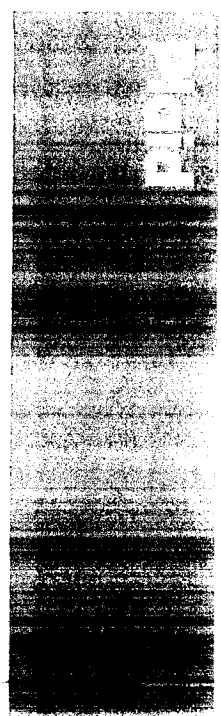
PATRICIA



TOM



PET001323



**CAROL**

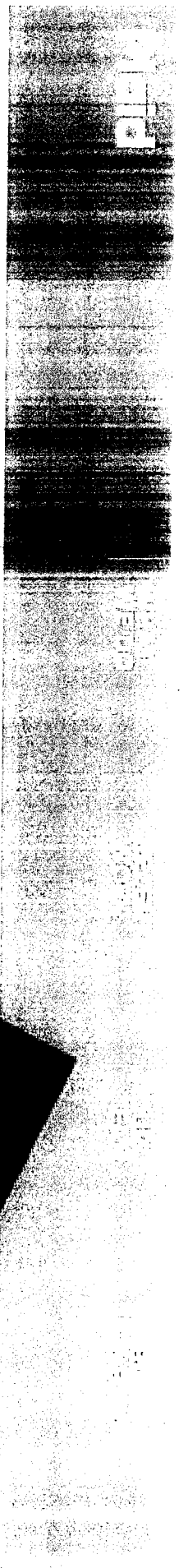
Carol Costello is a founding partner at Paid.

She made her way into branding through the pathway of political strategy at Roper Starch Worldwide, where she helped poll the nation on important policy issues such as women's role in combat during the first Gulf War.



CAROL  
VERONICA  
JOSH  
NATALIE

PAUL  
JAY  
CHRISTIE

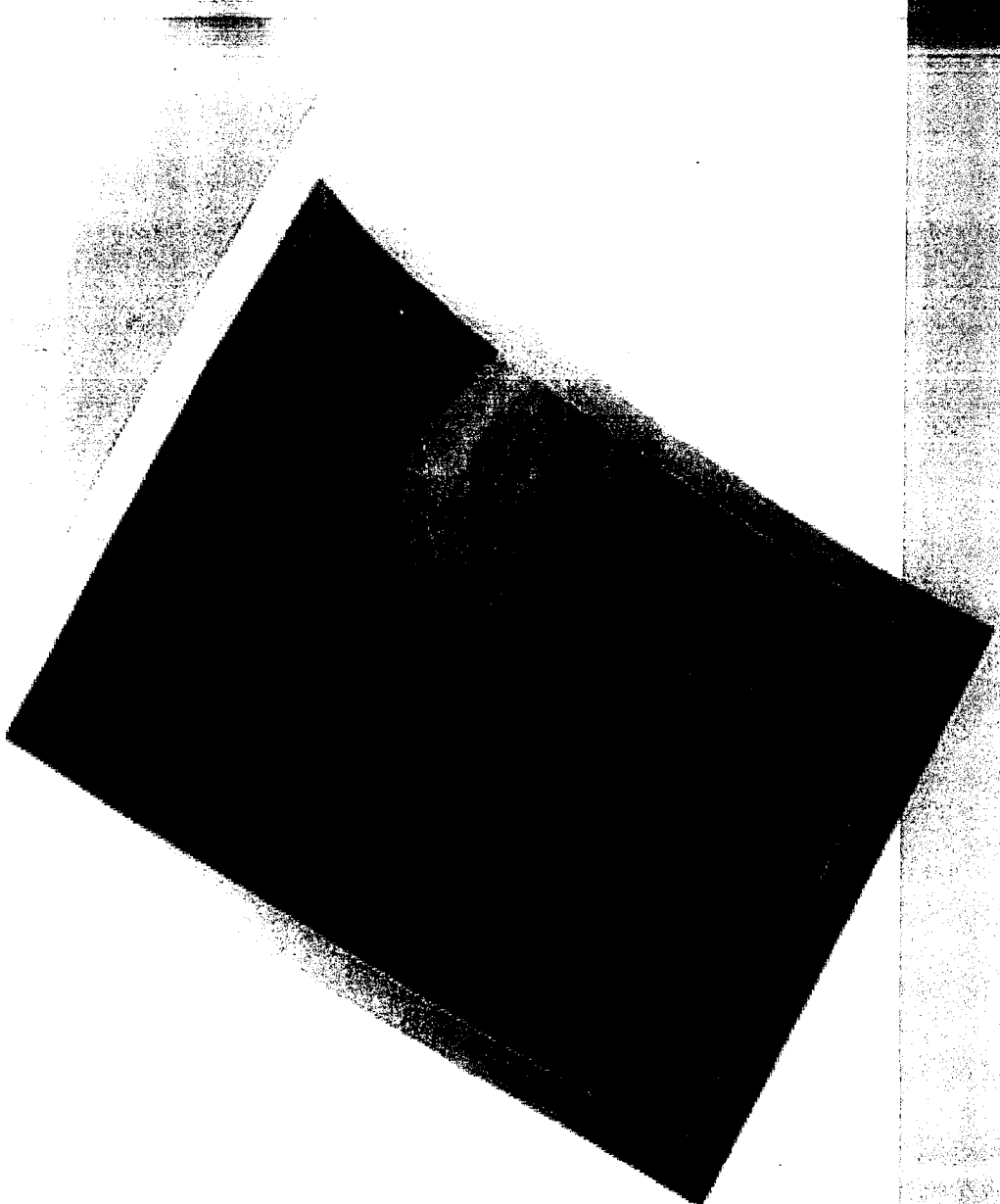


**VERONICA**

Veronica Hinzinger is a founding partner at Paid.

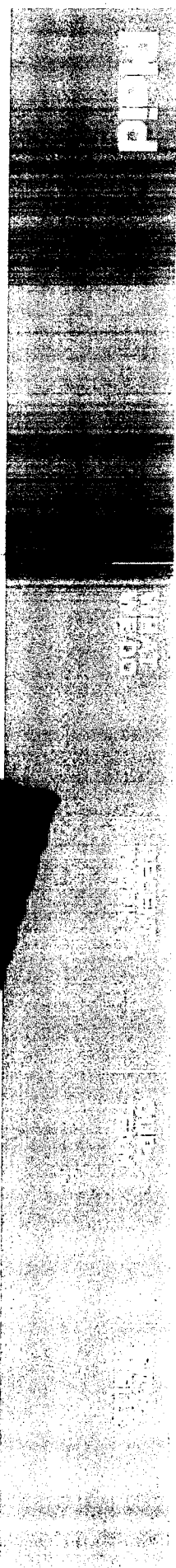
She has mastered multiple roles over the course of her career, progressing from client-side to agency-side to "our own agency"-side.

Before founding Paid, Veronica managed global initiatives for



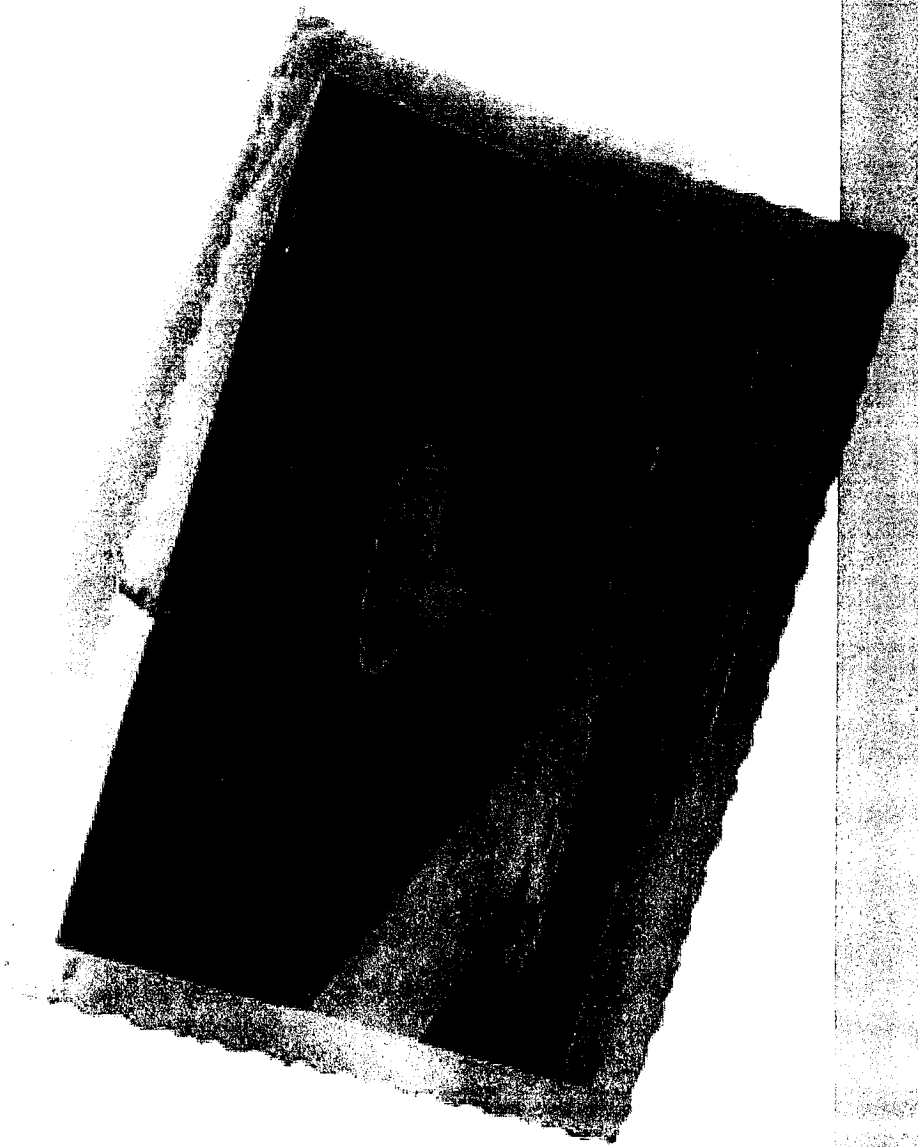
STANLEY  
VERONICA  
ELLEN  
JOHN  
KATHARINE

PAID  
PAID  
PAID  
PAID  
PAID



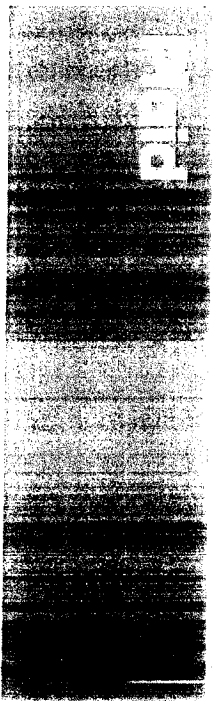
**ELEEN**

As a trained painter and designer, Elleen brings precision and an artistic eye to everything she touches. Prior to joining Plaid, Elleen helped direct the New York and San Francisco offices of Foliovision



- CAROL
- VERONICA
- ELEEN
- JOSH
- NATASHA
- PLAID TEAM
- EXPERIENCE





**JOSH**

...the appearance of the ...

Josh Smith is a designer at Paid.

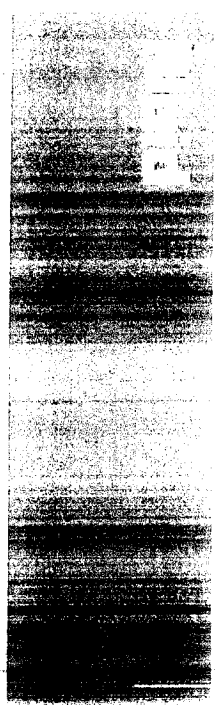
Before Paid, he set out from his hometown of Nova Scotia as a struggling painter, ventured across the prairies, and eventually landed at the Alberta College of Art and Design. (We're happy his journey didn't stop there.)

While still in school, Josh launched



CAROL  
VERONICA  
ELLEN  
JOSH  
METALIE

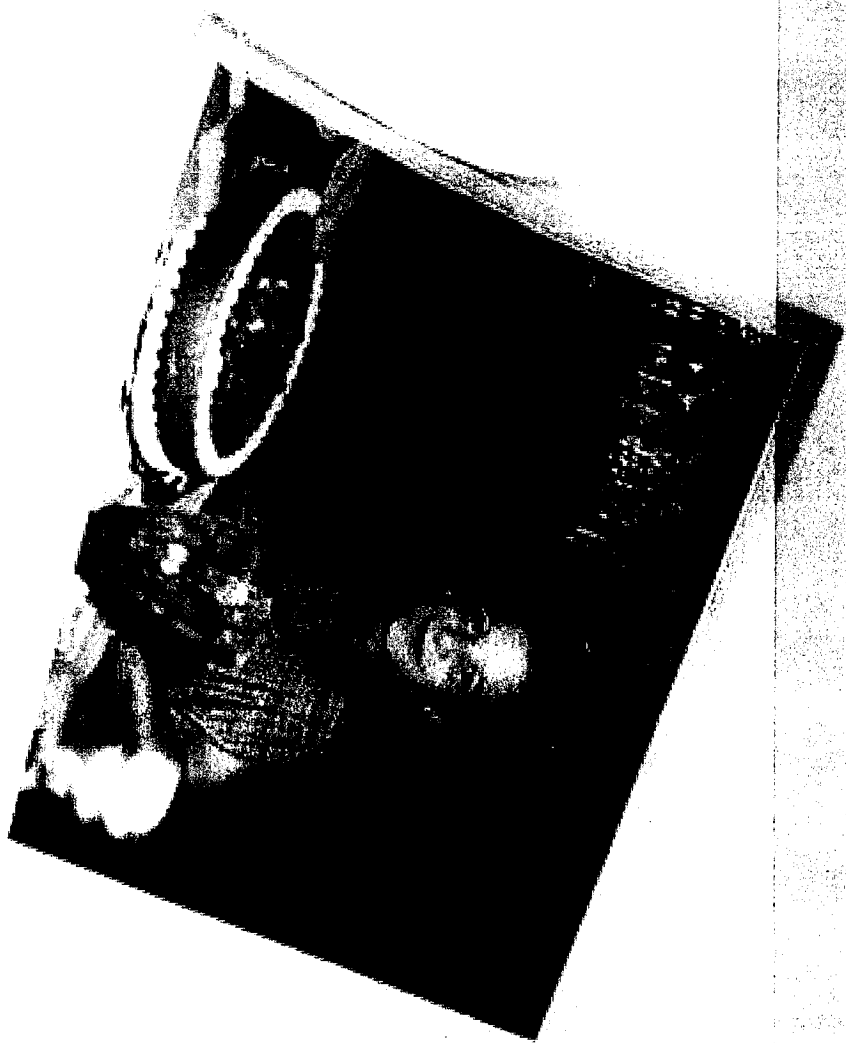
PAID  
PAID  
PAID  
PAID  
PAID



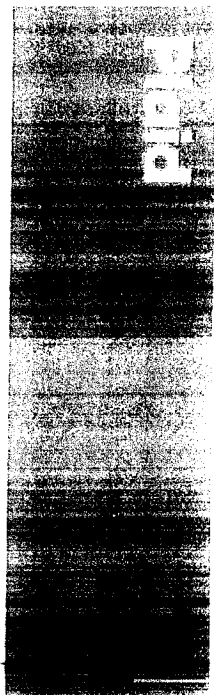
**NATALIE**

Natalie From Zashow is an account manager at Ford.

A big fan of advertising since she was a kid, Natalie hooked off her career at Ogilvy & Mather's Brand Integration Group (BIG). where she worked on high clearance assignments for clients like The Economist, Marcel, and Ford Motor Company.



- CAROL
- VERONICA
- ELLEN
- JOSE
- NATALIE

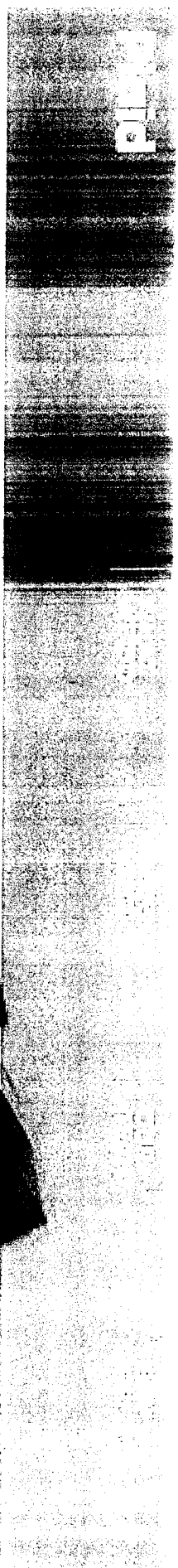


**PATRICIA**  
Patricia Garcia-Romero is a  
consultant director at Paid.

Before joining Paid, Patricia  
specialized in helping brands find  
and articulate their voice. She has  
nurtured and advised brands both  
new and old to reach their full  
potential and connect with their  
customers on deeper levels.

- CAROL
  - VERONICA
  - ELLEN
  - JOSH
  - NATALIE
- PATRICK
  - EMILY
  - SEAN
  - EMILY

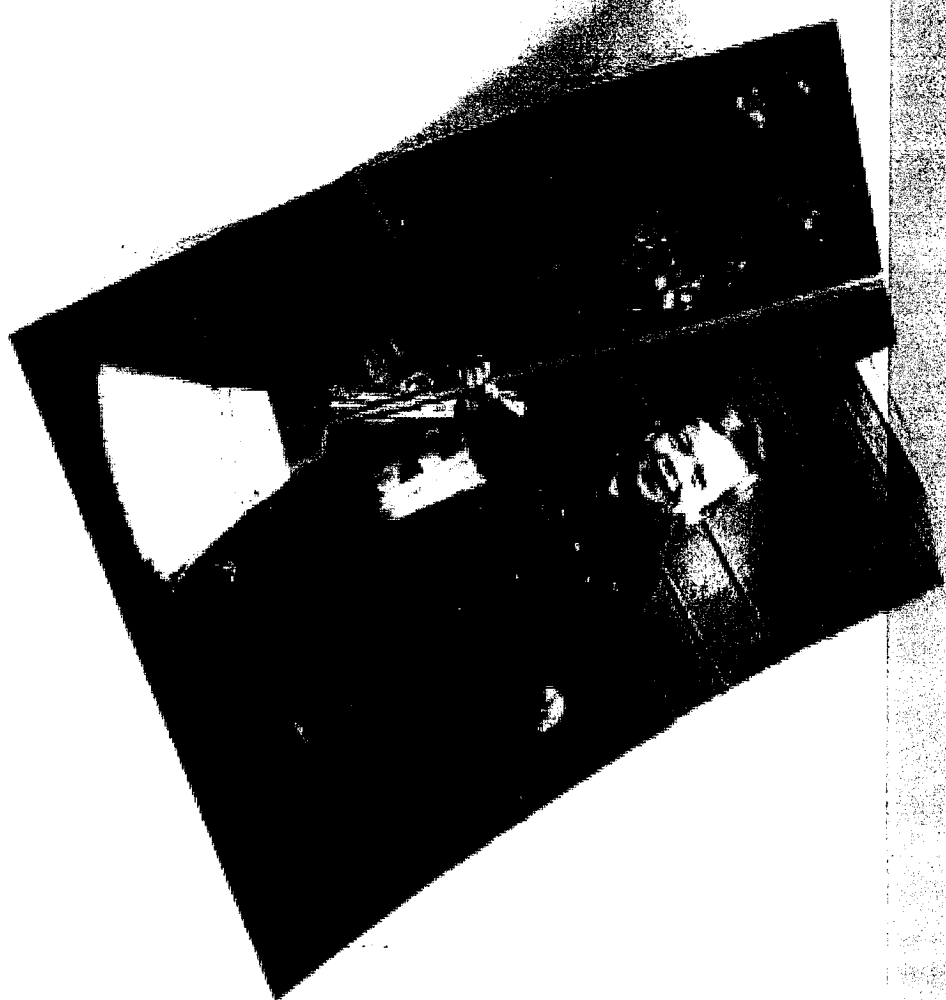




**TOM**

Thomas Weider is a designer at Pfaltz.

Tom first joined Pfaltz as an intern and didn't miss a beat showing us that his edge goes into his work. His allegiance to non-precious, hard working design happened while studying under the venerable Larry and Kristin Sonnese.



CHRISTOPHER  
VERONICA  
ELLEN  
JOSH  
NATALIE

PHOTOGRAPHY  
BY  
PHOTOGRAPHY  
BY

PLAID TEAM EXPERIENCE

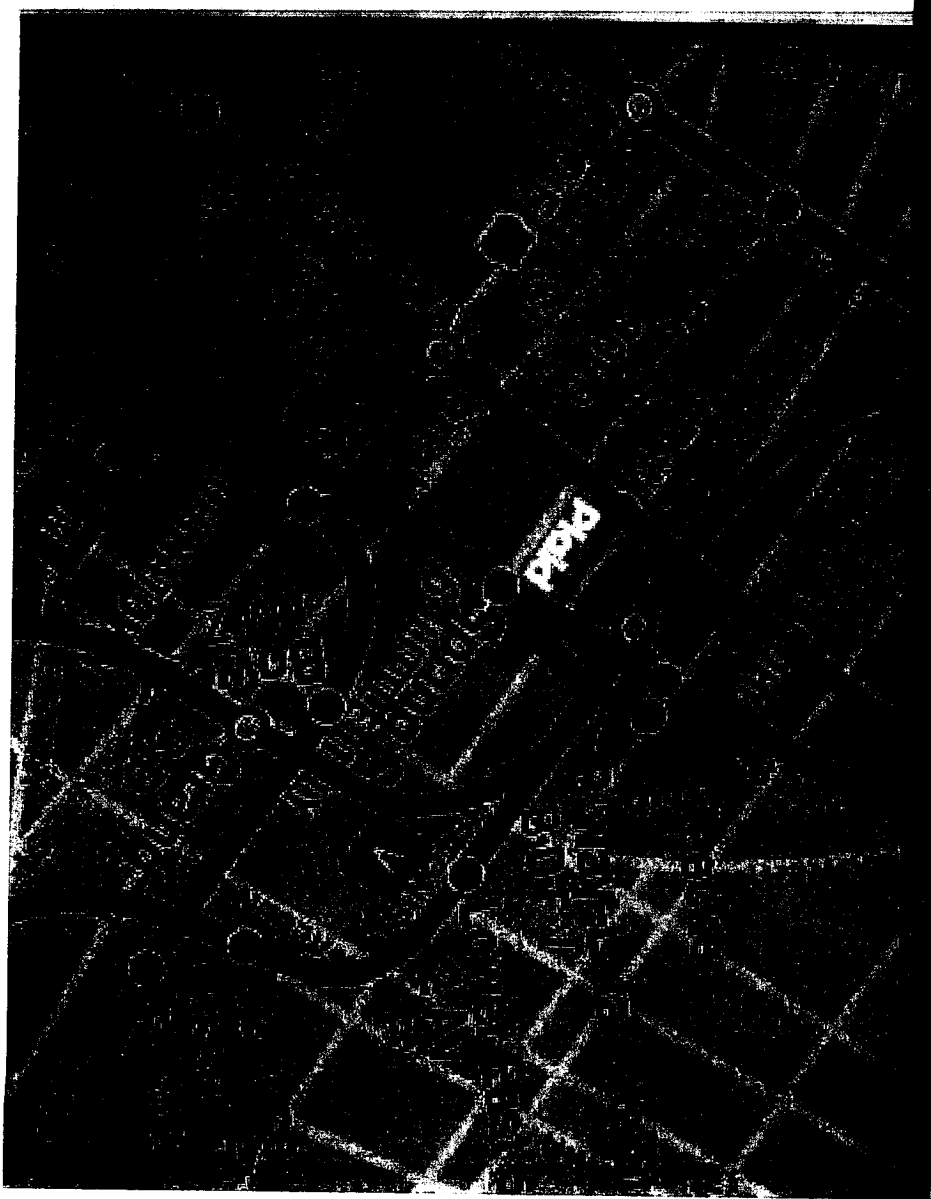
- Absolute Vodka
- Adobe
- American Express
- AT&T
- Aveda
- AXA
- B&W
- Barnes & Noble
- Bath & Body Works
- Bioherm
- Calicut Tourism
- Canyon River Blues Jeans
- Cartier's
- Cetaphil
- Chico's
- Citibank
- Club Monaco
- Danpak Gin
- Destiny USA
- Discovery Channel
- Economic Development
- Asso. of Puerto Rico
- Embassy Suites
- Enla
- The Ford Motor Company
- Fujitsu Japan
- The Gap
- General Mills
- Glenn
- Glorypark
- Hind
- Holland America Line
- ImClone Systems
- Interace/FLOH
- Iyengar Yoga
- Johnson & Johnson
- Kiehl's
- Kinross Cashmere
- Kmart
- LG
- Elly Peltzer
- Martinson
- The McGraw Hill
- Companies
- Meredith Tourism
- New York City
- New York Times Digital
- Mike
- Morlin Digital Art
- The North Face
- Ovitz
- Pre-watershouse/Coopers
- Pro-Am Design
- Romy Marita
- Roy's Restaurants
- Sawdoy
- Seas
- Sharon Hotels
- Worldwide
- SmithKlineBeecham
- Staubel's
- Starwood Hotels
- Stora
- Strategic
- Sundance Foundation
- Telcelo New Zealand
- Tishman Spayer
- The Travel Channel
- Travelocity
- Trish McEvoy
- Jays
- Wags Records
- Windsor Cruises

BACK TO TEAM

CONFIDENTIAL

212-319-3503

70 Spring Street, Suite 303A  
New York, NY 10012



PET001332

**EXHIBIT G**

Home Profile **Friends** **Inbox 2**

Francis Pennaro

**Carol Costello** Friends

Showing: Recently Updated

Show: Choose an option...

Displaying friends 51 - 100 of 132.

- Recently Added
- All Friends
- Invite Friends
- Everyone**
- Find Friends

Se

**Jamie Scalera**  
New York, NY

**Jen Rolfe**

**Jenny Hudak**

**Joakim Wijkstrom**  
Miami, FL

**Johann Wachs**  
New York, NY

**John Lee**  
Hilton

**Julia Wachs**  
Neue Galerie  
New York, NY

**Jurene Fremstad**  
New York, NY  
Deutsch

**Justin Bingham**  
Bacon Academy '12  
Hartford, CT

**Katy Norberg Brunner**

**Kelly McMasters**  
New York, NY

Applications





Home Profile Friends **Inbox 2**

Francis Pennaro

**Jamie Scalera Friends**

Showing: Recently Updated **Everyone**

Se

Show: Choose an option...

Displaying friends 51 - 100 of 496.

Prev

**Ariane Herrera**  
New York, NY

**Arlene Adoremos Steinwald**  
New York, NY  
Euro RSCG Worldwide

**Arrow Kruse**

**Arun Nemali**

**Asheen Naidu**  
Saatchi & Saatchi  
BBH  
New York, NY

**Ashleigh Bounds Loewy**  
New York, NY

**Bari Komitee**  
New York, NY

**Becca Lawson**  
BBH  
San Francisco, CA  
Goodby, Silverstein & Partners

**Becky Herman**  
Silicon Valley, CA

**Becky Jungmann**  
Los Angeles, CA

Applications



**EXHIBIT H**

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

In the Matter of Trademark Reg No. 3,412,392  
For the Mark: PLAID  
Date Registered: April 15, 2008

_____	)	
	)	
PLAID INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
PLAID, INC.	)	Cancellation No. 92049221
	)	
Respondent.	)	
_____	)	

**RESPONSES AND OBJECTIONSS TO RESPONDENT'S  
FIRST SET OF INTERROGATORIES TO PETITIONER**

Petitioner Plaid Inc. ("Petitioner"), by its counsel, Schoeman, Updike & Kaufman, LLP, hereby sets forth its responses and objections to "Registrant's First Set of Interrogatories to Petitioner" (the "Interrogatories").

**INTRODUCTION**

Petitioner will respond to the Interrogatories on the basis of the best information available to it at the time of gathering responsive data, within the limits of and subject to the General Objections set forth below. The fact that Petitioner is willing to respond to any particular Interrogatory does not constitute an admission or acknowledgement that such Interrogatory is proper, that the information sought is relevant or within the proper bounds of discovery, or that requests for similar information will be treated in a similar fashion. Any response by Petitioner to any specific Interrogatory shall not be deemed an

that "PLAID" is intended to be used or advertised, or marketed or promoted in all of the foregoing categories.

Interrogatory No. 2

Identify with specificity the type(s) of customers to whom Petitioner provides or intends to provide its services or goods identified in the answer to Interrogatory No. 1 under the mark "PLAID".

Response: Petitioner objects to this interrogatory on the ground that the phrase "types of customers" is vague and ambiguous. Notwithstanding and without waiving the foregoing objections, Petitioner states that it provides and/or intends to provide services and goods to clients across multiple industries and sectors including: Professional services, Fashion, Consumer products, Entertainment/Celebrities, Advertising and branding, Art & Leisure, Hotel, Public relations, Software, Computers, Information technology (IT), Mobile technology, Engineering, Biotechnology, Science, Insurance, Healthcare, Pharmaceuticals, Law, Finance, Investment Banking, Brokerage, Consulting, Securities, Automobile, Energy, Real estate, Food and beverage, Manufacturing, Shipping, Internet, Retirement, Research, Shipping, Hospitality, Education, Construction, Internet, Travel, Military, Human resources, Printing, Media, Cosmetics, Shoes, Toy, Retail, Specialty retailers and Furniture.

Interrogatory No. 3

Describe the channels of trade or distribution used by Petitioner to date, and describe the channels of trade or distribution intended to be used in the future by

Petitioner in providing the services or goods identified in the answer to Interrogatory No. 1 under the mark "PLAID".

Response: Petitioner objects to this interrogatory on the ground that the phrase "[d]escribes the channels of trade or distribution" is vague and ambiguous. Petitioner further objects to this interrogatory on the ground that it is unduly burdensome.

Interrogatory No. 4

Identify all advertising, promotional materials, marketing materials, envelopes, stationery, invoices, and all other objects used by Petitioner to date that display Petitioner's alleged mark "PLAID"; and separately identify same that are intended to be used by Petitioner that display Petitioner's alleged mark "PLAID". For existing uses to date, it will be a sufficient answer to this interrogatory if Petitioner provides samples of all such materials in lieu of identification. For intended uses, Petitioner, to the best of its ability, must identify such intended objects and uses.

Response: Petitioner objects this interrogatory on the ground that the phrase "Identify all advertising, promotional materials, marketing materials, envelopes, stationery, invoices" is vague and ambiguous. Petitioner further objects to this interrogatory on the ground that it is unduly burdensome. Notwithstanding and without waiving the foregoing objections, Petitioner used "Plaid" with the following:

- Promotional items, i.e. bags
- Email
- Direct mail
- Facebook page
- LinkedIn page
- Blog
- Animation/flash piece

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

Trademark Registration No.: 3,412,392

Mark: PLAID

Date Registered: April 15, 2008

\_\_\_\_\_)  
PLAID INC. )  
Petitioner, ) Cancellation No.: 92049221  
v. )  
PLAID, INC. )  
Respondent. )

STATE OF CONNECTICUT)

) ss: Danbury

COUNTY OF FAIRFIELD )

August 7, 2009

**AFFIDAVIT OF DARRYL OHRT**

DARRYL OHRT, being duly sworn, deposes and says:

1. I am President of Plaid, Inc., the Respondent in this cancellation proceeding. I make this Affidavit based on personal knowledge and in opposition to Petitioner's Motion for Summary Judgment.

2. The Respondent is the owner of the registered Mark "PLAID", Registration Number 3,412,392 (the "Registration"), annexed hereto. (Ohrt Affidavit, Exhibit A)

3. The description of the services set forth in the Registration, in both classes, was based on a careful analysis of Respondent's business activities and renewed focus and was custom crafted by Respondent's attorney and me.

4. Prior to registering the Mark, my attorney obtained and I thoroughly reviewed a Full trademark search from Thomson & Thomson now known as Thomson CompuMark, which revealed no apparently conflicting marks. The search dated February 9, 2007, is annexed hereto as Exhibit B. As in my answer, Affirmative Defense No 40: On February 9, 2007, 13 days prior to filing Registrant's Serial No 77/113,125 Application, Registrant and Attorneys for Registrant obtained and reviewed a 177 page Thomson CompuMark Trademark Research Report "Full US Search" for goods and services "Advertising, Marketing, Branding, Design". The report herein described revealed no common law, applied for, or other uses of the mark PLAID by Plaintiff, nor any mention of Plaintiff whatsoever.

5. Respondent began using the Mark PLAID in interstate commerce on June 1, 2007, as the evidence and the specimens filed with Respondent's Statement of Use reveal.

6. Respondent filed its trademark application SN 77/113,125 (the '125 Mark) on February 22, 2007, as Intent to Use 1(b) as the records of the USPTO reveal.

7. Respondent's '125 mark was Published for Opposition on October 2, 2007, and no party opposed Respondent's Mark at all as the records of the USPTO reveal.

8. Respondent filed a Statement of Use for the '125 Mark PLAID with accurate and acceptable specimens on January 30, 2008, revealing a date of first use of June 1, 2007, for all of the goods and services in Respondent's '125 application.

9. Respondent's '125 application matured to registration and was granted US Trademark Registration No 3412392 (the '392 registration) on April 15, 2008.

10. No party, other than Petitioner, has ever objected to Respondent's Mark.

11. Petitioner filed an application with a virtually identical description of goods and services in identical classes on April 18, 2008, along with a Petition to Cancel the Mark of Respondent on the same day.

12. Respondent believes it to be an "impossible coincidence" that Petitioner's later-filed application filed on April 18, 2008, could be coincidentally identical to that of Respondent's '392 Registration as the services set forth in Respondent's registration, in both classes, is custom crafted by Respondent's attorney and me. Respondent's '125 application would have been visible to and should have been seen by Petitioner on the USPTO web site on or before April 18, 2008.

13. Petitioner's application for an identical mark, with an identical description of goods and services, had no time for examination as prosecution of Applicant's mark was suspended with Petitioner's filing of this Cancellation. Therefore, Applicant's pleaded application and associated specimens have never been examined by the USPTO trademark examiner and have never been determined to be acceptable. The specimens, at least the Bellataire and Kinross presentations, in the Notice of Cancellation and Petitioner's application for Petitioner's alleged Mark, do not bear the mark of Petitioner in an acceptable manner.

(Exhibit T - Respondent's Initial Disclosure- Pages T-53 to T-56, T-90 to T-101)

14. Respondent has been actively engaged in social media, new media, and Internet broadcasting, and has taken extraordinary and innovative measures to build Respondent's



brand in connection with Respondent's '392 registration and Mark, using every available and qualified Internet and new media tool. (Exhibit T - Respondent's Initial Disclosure - Pages T-103 to T-160)

15. Respondent has become well known and famous for Respondent's pioneering efforts in social media and new media via the Internet, and these efforts have been recognized by major advertising industry publications, as well as both advertising and non-advertising industry related blogs, articles, web sites, Twitter feeds, and other media feeds. (Exhibit T - Respondent's Initial Disclosure - Pages T-103 to T-160; Exhibits U, V, W, and X)

16. Respondent has obtained substantial notoriety as an innovative leader in social networking and interactive media through its own websites [plaidnation.com](http://plaidnation.com) (Respondent's Internet broadcast site), [thinkplaid.com](http://thinkplaid.com) (Respondent's online brochure), [brandflakesforbreakfast.com](http://brandflakesforbreakfast.com) (Respondent's own blog discussing brands and brand-related topics), and others. Home Pages copies of the three sites are annexed hereto as Exhibits C, D and E. (see also, Exhibit T - Respondent's Initial Disclosure, Pages T-115 to T-130)

17. Similar to airing a new television series, and the word of mouth and consumer awareness it brings the moment it airs, the Internet presence of Respondent has led numerous other web sites unaffiliated with Respondent to link to, therefore promote, and significantly extend the consumer awareness of Respondent under Respondent's Mark PLAID. (Exhibit T - Respondent's Initial Disclosure - Pages T-115 to T-160; Exhibits U, V, W and X)

18. In addition to creating material for clients, Respondent produces and broadcasts its own media content "live" as well as "on demand" for anytime viewing, typified by the PlaidNation TV Tour. This media of Respondent, revealed on the website [plaidnation.com](http://plaidnation.com),

consists of video that can be viewed full screen and in high definition, alongside Plaid TV Tour sponsor advertising, and including product placement in the Twitter sidebar, as well as in the audio/video media itself that focuses on and promotes various brands of third parties. Ford Motor Company provided the vehicle for the 2009 PlaidNation Tour, as a sponsor. Other sponsors included SPRINT, SUBWAY, SONY and Q HOTEL & SPA. Sponsor logos appear on the same web page as PLAID, PLAIDNATION, PLAID NATION, PLAIDNATION TV and PLAID TV. The theme of the Plaid Nation TV tour is creativity and innovation in how the brands came to be and how they are evolving. Some of the featured brands are clients of Respondent while many are entities Respondent finds of interest and of interest to Respondent's worldwide audience and therefore many are unaffiliated third parties. The Ustream Internet broadcast video tool used by Respondent also links to the advertisements of other third parties. (Exhibit T - Respondent's Initial Disclosure - Pages T-115 to T-160; Exhibits V, W and X)

19. Respondent's media broadcast web site at plaidnation.com properly uses Respondent's trademark PLAID as a trademark indicating the source of goods and the quality associated with the mark. Respondent also uses related Marks where the term "plaid" is the first and therefore the predominant feature and element in the minds of consumers and the trade. These other marks include PLAIDNATION, PLAID NATION, PLAIDNATION TV and PLAID TV..

(Exhibit T - Respondent's Initial Disclosure - Pages T-115 to T-160; Exhibits V, W and X)

20. The Respondent has a substantial Internet presence and all of its websites, thinkplaid.com, plaidnation.com, houseofplaid.com, and Respondent's blogs, consistently rank

far higher in popularity and audience and viewership in the United States and worldwide than the Petitioner's single website, plaid-creative.com. Respondent's other websites including, but not limited to, plaid.us.com, houseofplaid.com, plaiddesign.com, plaidinteractive.com, plaidnation.com, plaidnevergoesoutofstyle.com, plaidpresents.com, plaidtasticten.com, plaidtv.com, thehouseofplaid.com, and thinkplaid.com; all using PLAID in combination with other terms as compound Marks based on Respondent's Mark PLAID and with Respondent's Mark the first and therefore predominant element. (Exhibit T - Respondent's Initial Disclosure - Pages T-115 to T-160; Exhibits U, V, W and X)

21. Petitioner uses its web site at plaid-creative.com as an "online brochure" that is contrary to the manner in which Respondent uses its web site in connection with and bearing the mark of Respondent and the marks of third parties thus, Respondent promotes third parties "through on-line medium".

22. As in Respondent's description of goods and services in Respondent's US trademark Registration No. 3412392, Respondent, uses its Mark for "Advertising services, namely promoting the goods, services, and brand identity of third parties through print, audio, video, digital and on-line medium" as revealed at Respondent's web site located at plaidnation.com. As a result of Respondent's efforts and activities related to Respondent's web site at plaidnation.com, Respondent garners the business of others and provides "Advertising and marketing services; design of advertising materials for others" and "Visual design services in the nature of designing visual elements for online, broadcast, printing, outdoor and other communication media". The description of goods and services in

Respondent's registration, when viewed in its entirety and as a whole, is absolutely and unequivocally true, correct, and especially so in terms of it all being through on-line medium.

23. Respondent is an advertising professional in his mid-forties, and after Respondent's careful review of the specimens provided by Petitioner in support of Petitioner's claims, along with Petitioner's discovery responses, Respondent cannot specifically identify all the goods and services of Petitioner in actual use as of the date of first use Petitioner claims, nor as of today.

24. In addition to Petitioner and Respondent, a number of similar and related businesses use the term "Plaid" in the name of their businesses, many in the same geographic area, many earlier than the date of first use claimed by Petitioner, without any objection of Petitioner known to Respondent. These third party businesses that are neither related to, affiliated with, nor sponsored by Petitioner or Respondent include:

- a. PRETENTIOUS PLAID and PretentiousPlaid.com (registry data and homepage annexed hereto as Exhibit F). Domain name created December 11, 2004;
- b. PLAID GROUP and PlaidGroup.com (registry data and homepage annexed hereto as Exhibit G). Domain name created April 23, 2003;
- c. PLAID FROG and PlaidFrog.com (registry data and homepage annexed hereto as Exhibit H). Domain name created July 4, 2009;
- d. PLAID TRACTOR and PlaidTractor.com (registry data and homepage annexed hereto as Exhibit I). Domain name created September 3, 2003;
- e. PLAID DOG DESIGN and PlaidDogDesign.com (registry data and homepage annexed hereto as Exhibit J). Domain name created March 4, 2006;

f. PLAID PARK and PlaidPark.com (registry data and homepage annexed hereto as Exhibit K). Domain name created December 7, 2008;

g. PLAID SKIRT MARKETING and PlaidSkirtMarketing.com (registry data and homepage annexed hereto as Exhibit L). Domain name created February 6, 2009;

h. PINK PLAID DESIGN and PinkPlaidDesign.com (registry data and homepage annexed hereto as Exhibit M). Domain name created May 15, 2008.

i. EI PLAID and EiPlaid.com (registry data and homepage annexed hereto as Exhibit N).

j. PLAID CREATIVE and Plaidcreative.com (registry data and homepage annexed hereto as Exhibit O).

k. PLAID PANTS media and Plaidpantsmedia.com (registry data and webpage annexed hereto as Exhibit P).

l. PLAID SHEEP and Plaidsheep.ca (registry data and homepage annexed hereto as Exhibit Q).

All of Exhibits F through Q were downloaded from the Internet on the dates appearing on the exhibits.

25. The records of the USPTO reveal only two marks for the trademark PLAID in connection with "advertising", namely the earlier-filed and registered trademark of Respondent, and the later-filed Application of Petitioner.

26. No one has ever contacted the Respondent looking for the Petitioner, nor has anyone ever advised the Respondent that, while looking for Respondent, it first came across the Petitioner. Respondent is therefore unaware of any actual confusion between the alleged

mark of Petitioner and the '392 Mark of Respondent even though the marks have presumably been in use concurrently, according to Petitioner's claims, and to the same degree, scope and extent, according to Petitioner's Preliminary Statement.

27. The Petitioner has not updated its website since January 2008, while the Respondent's websites are updated weekly, if not more frequently. Frequent updates make web sites more interesting to viewers; and technically appear more relevant and recent to the software algorithm that search engines use to determine site ranking. Therefore, frequently updated websites typically appear on first page results for various and more numerous search terms, while less frequently updated websites can be lost 2, 5, even hundreds of pages into the typical 10 sites per page of search results, and therefore infrequently updated web sites such as that of Petitioner may not be found at all. Furthermore, websites like that of Respondent containing a lot of relevant, recent text also rank higher than those that predominantly consist of pictures. Petitioner's website uses a modern and attractive Internet software known as "Flash", however Flash sites rarely rank well in search engine results since they are "pictures", not textual, and search engines can only "see" text while pictures are "invisible" to the search engines. Petitioner's website has been a Flash site since its inception and as of today remains so. One of the reasons Thomson CompuMark gave for the full trademark search report not revealing the Petitioner's website at all was due to Petitioner's use of Flash. A complete copy of the Petitioner's website is attached to the Pennarola Affidavit (Exhibit I).

28. Given that Petitioner's site has not been updated since January 2008, it is difficult to imagine how the Petitioner could have spent more than \$900,000 in time and money promoting its services as alleged in paragraph 29 of the Costello Affidavit, let alone \$500,000

in connection with the promotion of its business and the Mark "PLAID" prior to June 1, 2007. Carol Costello, the Petitioner's president, alleges in her Affidavit that Petitioner promotes and delivers its services through e-mail, its website, direct mail and word of mouth advertising (Costello Affidavit, paragraph 28).

29. The fees charged by the Respondent are currently based on \$165 an hour. (See Exhibits R and S, client proposals annexed hereto). Those charged by the Petitioner are substantially higher (see Exhibit B to Costello Affidavit showing fees in 2005 ranging from \$170 to \$340 per hour. See also Exhibit D where Petitioner estimated fees over a four month period of \$250,000).

30. Consumers of the types of services offered by the Petitioner and Respondent are sophisticated marketing professionals that always make sophisticated as opposed to casual purchasing decisions. As evidenced by Exhibits B, C, E, H, Q, R and S to the Costello Affidavit, much of Petitioner's work is done for PricewaterhouseCoopers, a personal client of Carol Costello for ten years. (Costello Tr., page 25) Ten years is prior to Carol Costello's alleged date of first use of the alleged Mark "Plaid". Respondent believes that Ms. Costello wrongly relies on a few specimens in her application for her alleged mark "Plaid" that contain reference to work done prior for PricewaterhouseCoopers as "somehow" evidentiary of having done all the things listed in her identical application for an identical mark. When asked in deposition, if all the goods and services described in Petitioner's application were in use in interstate commerce at the time Ms. Costello's attorney filed the pleaded application, Ms. Costello replied "I don't know". (Costello Tr. Page 25)

31. The Petitioner and Respondent have co-existed in a highly interactive world for the past two years with no credible evidence of actual confusion and little likelihood of confusion based on their respective web presences, Respondent's being substantial, Petitioner's being nearly invisible barring a search for "Plaid Creative" the name the search engines "see" when they see plaid-creative.com.

32. Carol Costello's Affidavit itself demonstrates that Respondent's trademark and its activities as Plaid have had no effect on Petitioner's business or renown (Costello Affidavit, paragraph 30, "Petitioner is now well known among its base clients, potential clients, with whom it has discussed business opportunities, as 'Plaid'"). Further, its revenues have increased.

33. Petitioner promotes and delivers its services through e-mail, its website, direct mail and word of mouth advertising. (Costello Affidavit, paragraph 28) Given the paucity of evidence of actual confusion and its well known status among its clients and potential clients (Costello Affidavit, paragraph 30), there is no likelihood of confusion. The purchasing decision by any entity interested in the services of Petitioner or Respondent, by nature of the cost and importance of such a decision, is always highly sophisticated and carefully researched, and there can be no actual confusion.

34. While Registrant filed its trademark application on February 22, 2007, based on intent to use the Mark "PLAID", it first used the Mark in commerce on June 1, 2007, and for all the goods and services listed in Registrant's '392 registration. Registrant heard nothing from the Petitioner until receiving a letter from Petitioner's attorney, David Gordon, on December 6, 2007. By Petitioner's actions and inactions, a period of more than 6 months, the



Petitioner has acquiesced in Respondent's use of the Mark "PLAID", as Respondent stated in its answer, Affirmative Defense No. 29.

35. As stated in Respondent's answer, Affirmative Defense No. 30, Petitioner now uses and has used its alleged mark as a trade name and not as a trademark.

36. As stated in Respondent's answer, Affirmative Defense No. 32, "The alleged mark of Petitioner does not appear on the majority of finished goods that result from Petitioner's services and instead the mark of Petitioner's client's appears on the finished goods of Petitioner. Registrant extensively uses its mark as a trademark on web Sites, blogs, and social media." The alleged mark of Petitioner does not appear on the majority of finished goods that result from Petitioner's services appears to remain true of Petitioner to this day.

37. As stated in Respondent's answer, Affirmative Defense No. 33, "Registrant has developed significant good will in Registrant's mark and use thereof to the extent that consumers and the trade would be confused if the mark of Registrant were cancelled and the alleged mark of Petitioner allowed." This is due to the acquiescence of Petitioner and the speed at which a Mark and its related goods and services can become known to masses when effectively promoted via the Internet, as those of Respondent have.

38. As stated in Respondent's answer, Affirmative Defense No. 34, "Registrant has developed a far greater degree of fame than Petitioner via the Internet and new media, with *inter alia* a web blog at Blog.ThinkPlaid.com that is visited by approximately 450 unique visitors per day; a web Site at PlaidNation.com that averages approximately 170 unique visitors per day; a web Site at ThinkPlaid.com that is visited by approximately 185 unique visitors per day; and a web blog at brandflakesforbreakfast.com averaging 4000 unique visitors

per day." These numbers have surely increased since the time Respondent filed its answer over one year ago and since Ford, Sprint, and Q Hotel and Spa sponsor this year's PlaidNation Tour.

39. As stated in Respondent's answer, Affirmative Defense No. 39, "As of May 26, 2008, Alexa.com statistics reveal Registrant's web Site Thinkplaid.com with a traffic ranking of 984,840; and Registrant's web Site PlaidNation.com with a traffic ranking of 6,585,490." On July 23, 2009, Alexa.com reports a ranking for PlaidNation.com of 1,894,095 that represents an increase of 4,691,395 towards No. 1 ranking, with No. 1 ranking being the most popular website in the world.

40. As of July 23, 2009, Alexa.com reports no data whatsoever for the web site of Petitioner located at plaid-creative.com.

41. The degree to which Respondent uses and has used the Internet and social media since its adoption of its Mark has been extraordinarily extensive in scope and range, and very unique in terms of methods, which is entirely contrary to Ms. Costello's "That is far from true" statement (Costello Affidavit, paragraph 33). For years, all of the following apply and evidence clearly supports this (Ohrt Affidavit, Exhibit T - Respondent's Initial Disclosure, - Pages T-115 to T-160; Exhibits T, U, V W and X). Respondent has broadcast "live", as well as on demand, from its website. Respondent is a famous blogger with blogs under Respondent's mark and on the blogs of numerous third parties. The evidence clearly reveals that Respondent, since its date of first use, has attracted a worldwide audience and achieved significant notoriety for its unique use of the Internet and social media, using and promoting tools just released, especially those relating to the Internet, broadcast, social media, while

Petitioner's use of the Internet and social media again borders on the ephemeral. Evidence of Respondent's degree of use is overwhelming in documents alone, even though the documents represent and reveal only a moment in time, with each representative of hundreds of hours of online medium broadcasts of Respondent, especially, but not limited to all relating to PLAID TV. In contrast, the evidence Petitioner provided is nearly non-existent, or a tremendous stretch at best, as Petitioner has characterized "questionable" documents it provided as being a "catch-all" for all the goods and services in Petitioner's pleaded application SN 77/451,901 (the '901 application). Respondent believes that Petitioner's application also has fatal flaws for this very reason. In terms of any evidentiary materials Petitioner has provided, or testimony, Respondent finds these to be dated well after the date Petitioner claims as a date of first use, and some quite recent.

42. Respondent's fame and that of the PLAID NATION Tour have led it to be recognized by a leading publication, Advertising Age, as evidenced by Exhibit T annexed hereto. Exhibit T is entitled "How our Experiment in Self-Promotion Revved the Plaid Engine". Exhibit T was downloaded for the Internet on August 5, 2009.

43. In Petitioner Carol Costello's Affidavit filed with Petitioner's Motion for Summary Judgment, Ms. Costello makes 33 numbered statements. If the trademark application upon which Petitioner relies were true and accurate for all the goods and services, each numbered paragraph of Ms. Costello's Affidavit should indicate a date as early as Petitioner's alleged date of first use, which is October 4, 2005. Of the 33 numbered paragraphs, paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 29, or twenty-two of the thirty-three numbered paragraphs, do not state a date as early as

October 4, 2005. Ms. Costello is the person most knowledgeable about the use of the Mark "Plaid", yet seems unable to state a date of first use for all the goods and services as of the date Ms. Costello claimed in her application.

44. In Petitioner Carol Costello's affidavit, paragraph 24 is entirely unsupported and untruthful in that Petitioner states "Throughout its existence" ["its' must mean as 'Plaid'] and Ms. Costello goes on to state "...Petitioner has utilized all available media, including print, audio, video, digital and online as well as social media (including blogs, Twitter, Twibs, Facebook, LinkedIn, etc.)." According to Twitter's own web site located at <http://twitter.com/about#about>, Twitter's own website specifically reads "Twitter is a privately funded startup with offices in the SoMA neighborhood of San Francisco, CA. Started as a side project in March of 2006, Twitter has grown into a real-time short messaging service that works over multiple networks and devices." The problem with Ms. Costello's statement is that Twitter did not exist since October 4, 2005, the date Petitioner claims it came into existence. Furthermore, upon information and belief, Petitioner did not use Twitter until January 31, 2009, a date well into this proceeding.

45. Respondent notes other deficiencies and questionable statements in Petitioner Carol Costello's Affidavit filed with Petitioner's Motion for Summary Judgment that do not support use of Petitioner's alleged Mark as a Service Mark used in interstate commerce, or are too vague and ambiguous to determine if they could support Petitioner's claims. Respondent believes that if Petitioner's claims were valid, Petitioner would clearly state dates, actions, and reference documents of Petitioner that unequivocally prove Petitioner's claims in Petitioner's Notice of Cancellation specifically related to Petitioner's alleged priority in relation to the