

01-29-2004

Form PTO-1594  
(Rev. 10/02)  
OMB No. 0651-0027 (exp. 6/30/2005)  
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U.S. DEPARTMENT OF COMMERCE  
U.S. Patent and Trademark Office

To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):

Blueberry Sales, L.P. *1-26-04*

- Individual(s)
- General Partnership
- Corporation-State
- Other \_\_\_\_\_
- Association
- Limited Partnership

Additional name(s) of conveying party(ies) attached?  Yes  No

3. Nature of conveyance:

- Assignment
- Security Agreement
- Other \_\_\_\_\_
- Merger
- Change of Name

Execution Date: 12/30/03

2. Name and address of receiving party(ies)

Name: BHC Interim Funding, L.P. and

Internal

Address: BHC Interim Funding II, L.P.

Street Address: 444 Madison Avenue, 25th Floor

City: New York State: NY Zip: 10022

- Individual(s) citizenship \_\_\_\_\_
- Association \_\_\_\_\_
- General Partnership \_\_\_\_\_
- Limited Partnership Delaware
- Corporation-State \_\_\_\_\_
- Other \_\_\_\_\_

If assignee is not domiciled in the United States, a domestic representative designation is attached:  Yes  No  
(Designations must be a separate document from assignment)  
Additional name(s) & address(es) attached?  Yes  No

4. Application number(s) or registration number(s):

A. Trademark Application No.(s) \_\_\_\_\_

B. Trademark Registration No.(s) 2732158

Additional number(s) attached  Yes  No

5. Name and address of party to whom correspondence concerning document should be mailed:

Name: Richard C. Weinblatt

Internal Address: Wolf, Block, Schorr and Solis-Cohen LLP

Street Address: 1650 Arch Street - 22nd Floor

City: Philadelphia State: PA Zip: 19103

6. Total number of applications and registrations involved: 1

7. Total fee (37 CFR 3.41).....\$ 40.00

- Enclosed
- Authorized to be charged to deposit account

8. Deposit account number:

OPR/FINANCE  
JAN 26 AM 8:02

DO NOT USE THIS SPACE

9. Signature.

Richard C. Weinblatt  
Name of Person Signing

*Richard C. Weinblatt*  
Signature

January 22, 2004  
Date

Total number of pages including cover sheet, attachments, and document: 10

01/28/2004 M6ETACHE 00000073 2732158

Mail documents to be recorded with required cover sheet information to:  
Commissioner of Patent & Trademarks, Box Assignments  
Washington, D.C. 20231

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40.00 OP

TRADEMARK  
REEL: 002904 FRAME: 0544

## TRADEMARK SECURITY AGREEMENT

This Trademark Security Agreement (the "**Agreement**"), dated as of December 30, 2003, is made by and between **BLUEBERRY SALES, L.P.**, a Texas limited partnership (the "**Borrower**"), and **BHC INTERIM FUNDING, L.P. and BHC INTERIM FUNDING II, L.P.** (collectively, the "**Lenders**").

### RECITALS

Borrower and the Lenders and certain other parties affiliated with Borrower are parties to a Loan and Security Agreement dated as of even date herewith (as the same may hereafter be amended, supplemented or restated from time to time, the "**Credit Agreement**") setting forth the terms on which the Lenders have made certain loans or other financial accommodations to or for the account of the Borrower.

As collateral security for the making of any loan or other financial accommodation to the Borrower under the Credit Agreement or otherwise, the Lenders have required the execution and delivery of this Agreement by the Borrower.

ACCORDINGLY, in consideration of the mutual covenants contained in the Credit Agreement and herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Definitions. Capitalized terms used herein and not otherwise defined shall have the meanings assigned thereto in the Credit Agreement. In addition, the following terms have the meanings set forth below:

"**Obligations**" has the meaning assigned thereto in the Credit Agreement.

"**Trademarks**" means all of the Borrower's now owned or existing or hereafter acquired or arising, right, title and interest in and to any and all trademarks, registered trademarks, trademark applications, trade names, service marks, registered service marks, service mark applications and collective membership marks, including, without limitation, the marks listed on Exhibit A, and (a) all renewals thereof, (b) all income, royalties, damages and payments now or hereafter due and/or payable under or with respect thereto, including, without limitation, payments under all licenses entered into in connection therewith and damages and payments for past, present or future infringements or dilutions thereof, (c) the right to sue for past, present and future infringements and dilutions thereof, (d) the goodwill associated therewith, (e) all other rights corresponding thereto throughout the world, and (f) all proceeds thereof.

2. Security Interest. As collateral security for the Obligations, Borrower hereby grants to the Lenders, a security interest in the Trademarks, with power of sale to the extent permitted by law (the "**Security Interest**"). The Lenders are hereby authorized to file financing statements against the Borrower, in accordance with the Uniform Commercial Code as adopted in the State of New York from time to time. By its signature hereto, the Borrower hereby authorizes the Lenders to file against the Borrower, one or more financing, continuation or amendment statements pursuant to the Uniform Commercial Code in form and substance satisfactory to the Lenders.

3. Representations, Warranties and Agreements. The Borrower hereby represents, warrants and agrees as follows:

(a) **Trademarks.** To the best of the Borrower's information, Exhibit A accurately lists all Trademarks owned by the Borrower as of the date hereof and accurately reflects the existence and status of registrations and applications pertaining to the Trademarks as of the date hereof. Each of the Trademarks listed on Exhibit A is subsisting, has not been adjudged invalid or unenforceable, in whole or in part, and is valid and enforceable.

(b) **Title.** The Borrower has absolute title to each Trademark free and clear of all security interests, liens and encumbrances. The Borrower (i) will have, at the time the Borrower acquires any rights in Trademarks hereafter arising, absolute title to each such Trademark free and clear of all security interests, liens and encumbrances, and (ii) will keep all Trademarks free and clear of all security interests, liens and encumbrances. No other person has any rights in or to any Trademarks, except present and future licensees to use and sublicense the Trademarks and related materials granted to subsidiaries, affiliates, related parties and resellers.

(c) **Valid Security Interest.** This Agreement creates a valid security interest in favor of the Lenders in the Trademarks, as security for the Obligations. Upon the filing of (i) a copy of this Security Agreement with the U.S. Patent and Trademark Office, and (ii) a UCC financing statement with the Secretary of State of Texas listing the Borrower as "Borrower," the Lenders as "Lenders" and the Trademarks as collateral, the security interest of the Lenders, in the Trademarks will be a perfected first priority security interest.

(d) **No Sale.** The Borrower will not sell or otherwise dispose of any Trademarks, or any interest therein (including, without limitation, pursuant to any license with respect thereto) without the Lender's prior written consent.

(e) **Infringement; Defense.** To the best of the Borrower's knowledge, no infringement or unauthorized use is presently being made of any of the Trademarks by any person. To the best of the Borrower's knowledge, the past, present and contemplated future use of the Trademarks by the Borrower has not, does not and will not infringe upon or violate any right, privilege or license of or with any other person. The Borrower will at their own expense, and using their best efforts, protect and defend the Trademarks against all claims or demands of all persons other than Lenders.

(f) **Maintenance.** The Borrower will at its own expense maintain the Trademarks to the extent reasonably advisable in their business including, but not limited to, filing all applications to register and all affidavits and renewals possible with respect to issued registrations. The Borrower covenants that, except if it determines not to proceed with an application or maintenance of a mark for business purposes (for example, non-use), it will neither abandon nor fail to pay any maintenance fee due and payable on any Trademark, nor fail to file any required affidavit in support thereof, without first providing the Lenders: (i) sufficient written notice, as provided in the Credit Agreement, to allow the Lenders to timely pay any such maintenance fees which may become due on any of said Trademarks, or to file any affidavit with respect thereto, and (ii) a separate written power of attorney or other authorization to pay such maintenance fees, or to file such affidavit, should such be necessary or desirable.

(g) **Lenders' Right to Take Action.** If the Borrower fails to perform or observe any of their covenants or agreements set forth in this Section 3, and if such failure continues for a period of ten (10) calendar days after the Lenders give the Borrower written notice thereof (or, in the case of the agreements contained in subsection (f), immediately upon the occurrence of such failure, without notice or lapse of time), or if the Borrower notifies the Lenders that they intend to abandon a Trademark, the Lenders may (but need not) perform or observe such covenant or agreement on behalf and in the name, place and stead of the Borrower (or, at the Lenders' option, in the Lenders' own name) and may (but need not) take any and all other actions which the Lenders' may reasonably deem necessary to cure or correct such failure. The Lenders' shall not have any duty with respect to the Trademarks. Without limiting the generality of the foregoing, the Lenders' shall not be under any obligation to take any steps to preserve rights in the Trademarks against any other parties, but the Lenders' may do so at their option as provided in this Agreement.

(h) **Costs and Expenses.** Except to the extent that the effect of such payment would be to render any loan or forbearance of money usurious or otherwise illegal under any applicable law, the Borrower shall pay the Lenders on demand the amount of all moneys expended and all costs and expenses (including reasonable attorneys' fees) incurred by the Lenders in connection with or as a result of the Lenders taking action under subsection (g) or exercising their rights under Section 7, together with interest thereon from the date expended or incurred by the Lenders at the highest rate then applicable to any of the Obligations.

(i) **Power of Attorney.** To facilitate the Lenders' taking action under subsection (g) and exercising their rights under Section 7, after and during the continuance of an Event of Default, the Borrower hereby irrevocably appoints (which appointment is coupled with an interest) the Lenders, or their delegate, as the attorney-in-fact of the Borrower with the right (but not the duty) from time to time to create, prepare, complete, execute, deliver, endorse or file, in the name and on behalf of the Borrower, any and all instruments, documents, applications, financing statements, and other agreements and writings required to be obtained, executed, delivered or endorsed by the Borrower under this Section 3, or, necessary for the Lenders, after and during the continuance of an Event of Default, to enforce or use the Trademarks or to grant or issue any exclusive or non-exclusive license under the Trademarks to any third party, or to sell, assign, transfer, pledge, encumber or otherwise transfer title in or dispose of the Trademarks to any third party. The Borrower hereby ratifies all that such attorney shall lawfully do or cause to be done by virtue hereof. The power of attorney granted herein is coupled with an interest and shall be irrevocable until the termination of the Credit Agreement as provided therein and the payment and performance of all Obligations (as defined therein).

4. **Borrower's Use of the Trademarks.** The Borrower and their related parties and affiliates shall be permitted to control and manage the Trademarks, including the right to exclude others from making, using or selling items covered by the Trademarks and any licenses thereunder and specifically including any right to enter into any licenses, in the same manner and with the same effect as if this Agreement had not been entered into, so long as no Event of Default occurs and remains uncured.

5. **No Royalties.** The Borrower hereby agrees that the Lenders' right to use the Trademarks as authorized hereunder in connection with the Lenders' exercise of their rights and

remedies under paragraph 7 or under the Credit Agreement shall be co-extensive with the Borrower's rights in and to such Trademarks and with respect thereto and the Lenders shall have no liability to the Borrower for royalties or other related charges on account of any such use.

6. Events of Default. Each of the following occurrences shall constitute an event of default under this Agreement (herein called "**Event of Default**"): (a) an Event of Default, as defined in the Credit Agreement, shall occur; or (b) the Borrower shall fail promptly to observe or perform any covenant or agreement herein binding on them and which is not cured within 25 days from the occurrence of such failure to observe or perform; or (c) any of the representations or warranties contained in Section 3 shall prove to have been incorrect in any material respect when made.

7. Remedies. Upon the occurrence and during the continuation of an Event of Default, the Lenders may, at their option, take any or all of the following actions:

(a) The Lenders may exercise any or all remedies available under the Credit Agreement.

(b) The Lenders may sell, assign, transfer, pledge, encumber or otherwise dispose of the Trademarks.

(c) The Lenders may enforce the Trademarks and any licenses thereunder, and if the Lenders shall commence any suit for such enforcement, the Borrower shall, at the request of the Lenders, do any and all lawful acts and execute any and all proper documents required by the Lenders in aid of such enforcement.

(d) The Lenders shall have, in addition to all of the rights and remedies hereunder, all rights and remedies allowed by law and the rights and remedies of the Lenders under the Uniform Commercial Code as enacted in any jurisdiction in which the Trademarks may be located or deemed located.

Upon the occurrence and during the continuation of an Event of Default, the Borrower agrees to assign, convey and otherwise transfer title in and to the Trademarks to the Lenders or any transferee of the Lenders and to execute and deliver to the Lenders or any such transferee all such agreements, documents and instruments as may be necessary, in the exercise of the Lenders' commercially reasonable judgment, to effect such assignment, conveyance and transfer. All of the Lenders' rights and remedies with respect to the Trademarks, whether established hereby, by the Credit Agreement, by any other Document or by law, shall be cumulative and may be exercised separately or concurrently.

8. Intentionally deleted.

9. Miscellaneous. This Agreement has been duly and validly authorized by all necessary action, corporate or otherwise, on the part of the Borrower. This Agreement can be waived, modified, amended, terminated or discharged, and the Security Interest can be released, only explicitly in a writing signed by the Lenders. A waiver signed by the Lenders shall be effective only in the specific instance and for the specific purpose given. Mere delay or failure to act shall not preclude the exercise or enforcement of any of the Lenders' rights or remedies. All

rights and remedies of the Lenders shall be cumulative and may be exercised singularly or concurrently, at the Lenders' option, and the exercise or enforcement of any one such right or remedy shall neither be a condition to nor bar the exercise or enforcement of any other. The Lenders shall not be obligated to preserve any rights the Borrower may have against prior parties, to realize on the Trademarks at all or in any particular manner or order, or to apply any cash proceeds of Trademarks in any particular order of application. This Agreement shall be binding upon and inure to the benefit of the Borrower and the Lenders and their respective participants, successors and assigns and shall take effect when signed by the Borrower and delivered to the Lenders, and the Borrower waives notice of the Lenders' acceptance hereof. The Lenders may execute this Agreement if appropriate for the purpose of filing, but the failure of the Lenders to execute this Agreement shall not affect or impair the validity or effectiveness of this Agreement. A carbon, photographic or other reproduction of this Agreement or of any financing statement shall have the same force and effect as the original for all purposes of a financing statement. If any provision or application of this Agreement is held unlawful or unenforceable in any respect, such illegality or unenforceability shall not affect other provisions or applications which can be given effect and this Agreement shall be construed as if the unlawful or unenforceable provision or application had never been contained herein or prescribed hereby. All representations and warranties contained in this Agreement shall survive the execution, delivery and performance of this Agreement and the creation and payment of the Obligations.

10. APPLICABLE LAW. THIS AGREEMENT SHALL BE GOVERNED BY, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE INTERNAL LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES.

11. WAIVER OF JURY TRIAL. THE BORROWER AND LENDERS HEREBY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, THE TERM NOTE OR THE OTHER LOAN DOCUMENTS. THE BORROWER AND LENDERS ACKNOWLEDGE THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO ENTER INTO A BUSINESS RELATIONSHIP, THAT EACH HAS ALREADY RELIED ON THE WAIVER IN ENTERING INTO THIS AGREEMENT, THE TERM NOTE AND THE OTHER LOAN DOCUMENTS AND THAT EACH WILL CONTINUE TO RELY ON THE WAIVER IN THEIR RELATED FUTURE DEALINGS. THE BORROWER AND EACH LENDER FURTHER WARRANT AND REPRESENT THAT EACH HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT EACH KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.


12. CONSENT TO JURISDICTION. THE BORROWER HEREBY CONSENTS TO THE JURISDICTION OF ANY STATE OR FEDERAL COURT LOCATED WITHIN THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND IRREVOCABLY AGREES THAT, SUBJECT TO LENDER'S ELECTION, ALL ACTIONS OR PROCEEDINGS ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE TERM NOTE, OR THE OTHER LOAN DOCUMENTS SHALL BE LITIGATED IN SUCH COURTS. THE BORROWER ACCEPTS FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES,

GENERALLY AND UNCONDITIONALLY, THE NON-EXCLUSIVE JURISDICTION OF THE AFORESAID COURTS AND WAIVES ANY DEFENSE OF FORUM NON CONVENIENS, AND IRREVOCABLY AGREES TO BE BOUND BY ANY JUDGMENT RENDERED THEREBY IN CONNECTION WITH THIS AGREEMENT, THE TERM NOTE, THE OTHER LOAN DOCUMENTS OR THE OBLIGATIONS. IF THE BORROWER PRESENTLY IS, OR IN THE FUTURE BECOMES, A NONRESIDENT OF THE STATE OF NEW YORK, THE BORROWER HEREBY WAIVES PERSONAL SERVICE OF ANY AND ALL PROCESS AND AGREES THAT ALL SUCH SERVICE OF PROCESS MAY BE MADE UPON THE BORROWER BY CERTIFIED OR REGISTERED MAIL, RETURN RECEIPT REQUESTED, DIRECTED TO THE BORROWER, AT THE BORROWER'S ADDRESS AS MOST RECENTLY NOTIFIED BY THE BORROWER IN WRITING AND SERVICE SO MADE SHALL BE COMPLETE TEN (10) DAYS AFTER THE SAME HAS BEEN POSTED AS AFORESAID.

[SIGNATURE PAGE FOLLOWS]

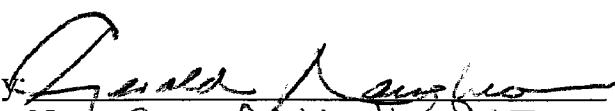
IN WITNESS WHEREOF, the parties have executed this Trademark Security Agreement as of the date written above.

Blueberry Sales, L.P.  
By Blueberry Enterprises, LLC, general partner

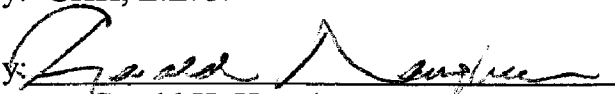
By:   
Name: Brad Ducorsky  
Title: Managing Member

Lenders:

BHC INTERIM FUNDING, L.P.  
By BHC GP, L.L.C., its General Partner  
By BHC Investors, L.L.C., its Managing Member

By:   
Name: Gerald H. Houghton  
Title: Managing Member

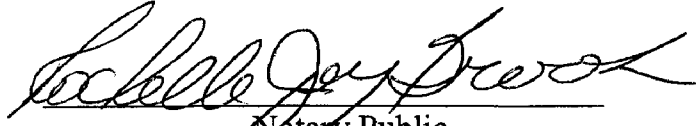
BHC INTERIM FUNDING II, L.P.  
By: BHC Interim Funding Management, L.L.C.,  
its General Partner  
By: BHC Investors II, L.L.C.,  
its Managing Member  
By: GHH, L.L.C.

By:   
Name: Gerald H. Houghton  
Title: Managing Member



STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

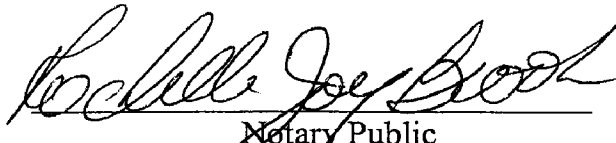
The foregoing instrument was acknowledged before me this 30th day of December, by Brad Ducorsky, Managing Member of Blueberry Enterprises, LLC, general partner of Blueberry Sales, L.P.

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

ROCHELLE JOY BROOK  
Notary Public, State of New York  
No. 30 01BR4755294  
Qualified in Nassau County  
Commission Expires 12/31/06

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

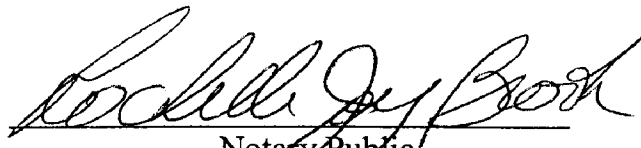
The foregoing instrument was acknowledged before me this 30th day of December by Gerald H. Houghton, a Manager of BHC Interim Funding LP and BHC Interim Funding II.

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

ROCHELLE JOY BROOK  
Notary Public, State of New York  
No. 30 01BR4755294  
Qualified in Nassau County  
Commission Expires 12/31/06

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

The foregoing instrument was acknowledged before me this 30th day of December by Gerald H. Houghton, Managing Member of GHH, L.L.C.

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

ROCHELLE JOY BROOK  
Notary Public, State of New York  
No. 30 01BR4755294  
Qualified in Nassau County  
Commission Expires 12/31/06

EXHIBIT A

TRADEMARKS, SERVICE MARKS

<u>Trademark</u>	<u>Reg. No.</u>	<u>Reg. Date</u>	<u>Owner</u>
ULTIMINTS	2,732,158	July 1, 2003	Blueberry Sales, Inc.