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

Proceeding	91159137
Party	Defendant NATURAL SOURCE INTERNATIONAL, LTD. NATURAL SOURCE INTERNATIONAL, LTD. PMB 331 208 EAST 51st STREET NEW YORK, NY 10022
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Attachments	NSI Reply Compel.pdf (8 pages)(263058 bytes)

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

In re Matter of U.S. Application Serial No. 76/504,365
For: NATURAL SOURCE and Design
Filed: April 8, 2003
Date of Publication: December 2, 2003

THRESHOLD ENTERPRISES LTD.,	)	
	)	
Opposer,	)	
v.	)	Opposition No.: 91159137
	)	(Parent)
NATURAL SOURCE INTERNATIONAL, LTD.,	)	
	)	
Respondent.	)	
	)	
_____	)	

In re Matter of U.S. Application Serial No. 76/506,477
For: SOURCED FROM NATURE . . . PERFECTED BY SCIENCE
Filed: April 14, 2003
Date of Publication: January 6, 2004

THRESHOLD ENTERPRISES LTD.,	)	
	)	
Opposer,	)	
v.	)	Opposition No.: 91159361
	)	
NATURAL SOURCE INTERNATIONAL, LTD.,	)	
	)	
Respondent.	)	
	)	
_____	)	

APPLICANT'S REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERY, EXTEND APPLICANT'S TIME TO TAKE DISCOVERY AND FOR PROTECTIVE ORDER

Applicant, Natural Source International, Ltd. ("NSI"), pursuant to Trademark Rule 2.120(e), 37 C.F.R. § 2.120(e), Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a) and Rule 37

of the Federal Rules of Civil Procedure, through its undersigned attorneys, hereby respectfully submits this Reply Brief in support of its motion to the Trademark Trial and Appeal Board (the "Board") for an order compelling Opposer, Threshold Enterprises Ltd. ("Threshold"), to provide full and complete discovery, to enter a protective order, and to extend Applicant's time to take discovery.

NSI set forth detailed arguments supporting its request for relief in its moving papers, and will not repeat them here. NSI submits this short Reply, however, to point out a few important facts about Threshold's opposition papers. The most important fact is that those papers do not at any point address the substantive merits of NSI's motion. Thus, notwithstanding that Threshold has filed papers that it calls an "opposition" to NSI's motion, Threshold has not, in fact, responded at all to the motion. The Board should therefore treat the motion as conceded pursuant to Trademark Rule 2.127(a).

Threshold's total failure to produce a single document to this date, and failure to respond to any of NSI's objections concerning Threshold's refusal to provide discovery, are all the more unforgivable because Threshold has had such a long time to comply with its obligations. It is years since the discovery requests were served. It is over seven months since this proceeding was re-instituted following failed settlement negotiation. It is almost three months since NSI first complained to Threshold about Threshold's discovery failures and set forth its detailed objections by letter. NSI has repeatedly tried to get Threshold to comply with its discovery obligations to no avail, and to this date Threshold still has not produced a single document, not even the documents that it purportedly agreed to produce in its written responses to NSI's document requests.

Rather than produce any discovery or respond to the arguments made in NSI's moving papers, Threshold instead makes several excuses as to why it has not produced or responded. None of these excuses justify Threshold's continued failures. First, Threshold complains that NSI "waited" until August 2, 2006 to lodge its objections to Threshold's failure to provide discovery. Opp. Brief at 3. As a preliminary matter, Threshold has an independent obligation to produce discovery. NSI never would have guessed that Threshold would take such a cavalier attitude towards its discovery obligations. It was not until after NSI produced its discovery and weeks passed without reciprocal production that NSI realized that Threshold had no intention of complying with its obligations. In any event, August 2, 2006 was well before the discovery cut-off and therefore well within the appropriate time to object to Threshold's responses.

Next, Threshold seeks to excuse its failures based upon a personnel change within the company. Opp. Brief at 3. The issues raised by NSI's motion are primarily, if not completely, legal in nature. Threshold does not bother to explain who this employee is, why that employee is the only person who could address the issue at Threshold, or even why a Threshold employee's opinion would be relevant to whether NSI's discovery requests were legally permissible in this proceeding. Moreover, since the personnel change allegedly took place in early August, there is simply no reason that this change justifies Threshold's failure to respond substantively to NSI's motion or to produce and documents to this date.

Threshold also alleges that NSI's counsel "failed to further communicate with opposer before filing its motion." Opp. Brief at 4. This attempt to blame NSI for Threshold's own intransigence is both false and outrageous. In its moving papers, NSI set forth the numerous attempts it made to get Threshold to fulfill its discovery obligations, or even give some

substantive justification for those failures, to that this dispute could be resolved without burdening the Board. Threshold repeatedly refused to respond other than to delay. None of Threshold's responses addressed the merits of NSI's articulated concerns. Threshold refused to even give a date certain by which NSI could expect a substantive response. With the end of the discovery period rapidly approaching, NSI had not choice but to bring this motion. Even after it did, Threshold has still refused to address the substantive merits.

Threshold next argues that the Board should not impose "sanctions" upon Threshold, on the ground that even though it has failed to produce any documents, it technically has not yet been separately ordered to produce by the Board. Opp. Brief at 4. This argument only proves that NSI's motion should be granted because Threshold apparently takes the position that it need not take discovery obligations seriously until the Board has in fact compelled production. More importantly, however, NSI has not asked for sanctions. NSI has merely asked for a protective order (for Threshold's benefit, since NSI has already produced its discovery) and an order compelling discovery from Threshold and extending the discovery period for NSI so that NSI is not unfairly prejudiced (and Threshold not improperly benefited) by Threshold's flagrant disregard of its obligations. Threshold's argument about sanctions is a straw man.

Next, Threshold seeks to excuse its failures by noting that it has recently retained "additional counsel." Opp. Brief at 4. This excuse is no more valid than the others. First, Threshold indicated this retention was taking place as of August 30, 2006. Threshold gives no explanation why counsel has been unable to muster a response to NSI's fully articulated discovery issues between then and October 16, 2006, the date Threshold's opposition papers were due. Indeed, Threshold did not even seek an extension of its time to file the opposition papers. More importantly, Threshold's original counsel, Ms. Merz, remains counsel of record in

this proceeding. Ms. Merz is an experienced trademark attorney, who is perfectly capable of addressing discovery issues. The cumulative addition of extra lawyers provides no justification for Threshold's continued failure to address the discovery issues raised in NSI's motion.

Threshold alleged that its "additional" counsel would be in a position to respond directly to NSI's counsel with its discovery positions by October 20, 2006. Opp. Brief at 5. Threshold apparently believes that after ignoring NSI's repeated attempts to get discovery and forcing NSI to make this motion, it can simply ignore the motion as long as it promises to have an "initial discovery conference on substantive issues" by that date, which is after NSI's time to oppose the motion and after the discovery cut-off. NSI respectfully submits that the Board should not reward this willful flaunting of discovery procedures and motion practice rules. NSI also notes that despite its counsel's agreement to have such discussions, Threshold has still not provided any substantive response to NSI's discovery issues. After being contacted by Threshold's counsel, counsel for NSI agreed to participate in conference call and gave an entire week's availability for such a call. Threshold's counsel changed the time for the planned call and then canceled at the last minute. NSI suggested that Threshold provide its position in writing to save time, and in light of the fact that NSI's position had already been set forth in detail. NSI has not received any further word on the substantive discovery issues from Threshold.

Finally, Threshold asks the Board to extend the discovery deadline for both parties for sixty days. Opp. Brief at 5. NSI respectfully submits that the Board should deny this request. As a preliminary matter, Threshold made this request one business day before the close of discovery and long after NSI produced its discovery. Threshold has made absolutely no showing to justify why it should be given more discovery. Allowing Threshold to extend its

time for discovery under these circumstances, and particularly in light of its continued failure to fulfill its own discovery obligations or otherwise prosecute its own case, would unfairly reward Threshold for its own bad behavior.

CONCLUSION

For the reasons set forth above, Applicant respectfully renews its request that the Board issue an Order:

1. Compelling Opposer, within thirty (30) days of the mailing date of the Order, to respond in writing fully and completely, without objection, to Applicant's First Set of Interrogatories as set forth above;

2. Compelling Opposer, within thirty (30) days of the mailing date of the Order, to produce all documents responsive to Applicant's First Set of Document Requests, as set forth above, at the offices of Thelen Reid & Priest LLP, located at 875 Third Avenue, New York, New York 10022;

3. Unilaterally granting Opposer a 60 day extension of time in which to take additional discovery, commencing on the date that Opposer fully complies with the Board's Order compelling discovery, above;

4. Entering the protective order attached as Exhibit 5;

5. Sanctioning Opposer for its obstructive and dilatory behavior by barring Opposer from objecting to any of Applicant's discovery requests;

6. Resetting the trial and testimony periods in conformity with Applicant's new discovery deadline;

7. Suspending the proceeding pending the resolution of this motion; and

8. Ordering any further relief the Board deems just.

Dated: November 1, 2006

Respectfully submitted,

THELEN REID & PRIEST LLP

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CERTIFICATE OF SERVICE

The undersigned states:

I hereby certify that a true and complete copy of the foregoing Motion to Compel Discovery, Extend Applicant's Time For Discovery and For Protective Order has been served on counsel for Opposer, by mailing said copy on September 25, 2006, via First Class Mail, postage prepaid to: Mary Catherine Merz, Merz and Associates, P.C., 1140 Lake Street, Suite 304, Oak Park, Illinois, 60301 and Steven L. Baron, Mandell Menkes LLC, 333 West Wacker Drive, Suite 300, Chicago, Illinois, 60606.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 1, 2006, at New York, New York.

/Paul M. Fakler/

Paul M. Fakler