

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: May 6, 2011

Opposition No. **91184978**

McNeil-PPC, Inc.

v.

Walgreen Co.

Ann Linnehan, Interlocutory Attorney

The parties' stipulated motion (filed January 3, 2011) concerning the introduction of certain produced documents at trial is granted. Opposer's consented motion (filed January 14, 2011) to extend time is granted. The parties' stipulated motion (filed January 19, 2011) concerning the trial testimony of Ms. Woo is granted. The parties' stipulated motion (filed January 24, 2011) concerning the discovery deposition of James Donohue is granted. Opposer's objections (filed February 11, 2011) to applicant's pretrial disclosures are noted. The parties' stipulated motion (filed February 15, 2011) concerning Dr. Simonson is granted. The parties' stipulated motion (filed March 9, 2011) for taking a testimony deposition outside the testimony period and for the rescheduling of rebuttal

deadlines is granted. Dates are reset in accordance with this motion.

This case now comes up for consideration of applicant's motion (filed December 28, 2010) to preclude opposer from introducing certain documents during its trial period.¹ The motion is fully briefed. For purposes of this order, the Board presumes the parties' familiarity with the pleadings, the history of the proceeding and the arguments and evidence submitted with respect to the current motion.

In support of its motion, applicant asserts that preclusion of certain documents, specifically Bates Nos. McNeil 5040-5128, 5133-5161, and 5175-9498, is proper because opposer produced such documents one day after discovery had closed and well after any opportunity for applicant to take further discovery from opposer to determine the nature and meaning of said documents. Applicant argues that opposer's late production unfairly prejudices applicant to the extent it has prevented applicant from being able to take any deposition testimony, issue follow up interrogatories, or pursue other discovery avenues.

¹ The Board notes that applicant has made a good-faith effort to resolve the present dispute prior to seeking the Board's intervention. The Board further notes that opposer's trial period is now over.

The motion is not construed as a motion in limine, which the Board does not hear. See *Greenhouse Systems Inc. v. Carson*, 37 USPQ2d 1748, 1750 (TTAB 1995). Rather, under the circumstances of this case, applicant's motion is more akin to a motion to strike the documents pursuant to Fed. R. Civ. P. 37(c)(1). Such rule states, in pertinent part, that a party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording the other party to be heard, may impose other appropriate sanctions.

After carefully considering the parties arguments, the Board finds that preclusion of the documents is not appropriate. In this case, applicant merely produced documents one day after the close of discovery. Although opposer clearly could have been more prompt in providing the documents before the close of discovery, applicant's delay of one day does not warrant the exclusion of these documents. Opposer produced the subject documents in response to applicant's discovery requests well in advance of trial. This is not a case in which opposer has failed to

produce documents at all (to the contrary, it sounds like opposer has produced thousands of documents) or made an outright statement that the information would not be provided. It appears that some if not most of the documents at issue were produced to supplement opposer's production or to respond to a third set of document requests. Thus, the Board finds that it would be unduly harsh to impose the preclusion sanction under Federal Rule 37(c)(1). This is particularly true given that discovery responses may be supplemented at any time, even during trial. See *Vignette Corporation v. Marino*, 77 USPQ2d 1408 (TTAB 2005). Here, any prejudice applicant felt it had suffered could have been rectified by its moving to reopen discovery after it received opposer's documents, rather than waiting for two months to go by before it filed its present motion.

Parties have a duty to supplement their discovery responses when information or documents come to their attention. See Fed. R. Civ. P. 26(e) and TBMP § 408.03 (2d. ed. rev. 2004). In this case, the Board does not find that opposer did not fulfill its duty merely because it produced the subject documents one day after the discovery period's end.

Applicant's motion to preclude is denied.

Dates remain as set in the parties' March 9, 2011 motion.