

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

Mailed: June 21, 2012

Opposition No. **91194974**

Opposition No. 91196358

Promark Brands Inc. and H.J.
Heinz Company

v.

GFA Brands, Inc.

Cheryl S. Goodman, Interlocutory Attorney:

On March 26, 2012 and April 30, 2012, applicant made expert disclosures. On May 3, 2012, opposer filed a motion to strike expert Philip Johnson's report ("Johnson Report"). The motion is fully briefed.

In support of its motion, opposer argues that the "Johnson Report" does not constitute proper rebuttal and that the Board "should not allow GFA to turn a supplemental report into a rebuttal report." Opposer contends that the Johnson Report is a "brand-new independent survey that has nothing to do with rebutting the [Heinz's] Sabol Report" and that applicant is "packaging the information it should have submitted" as expert disclosure. Opposer submits that it "will suffer real prejudice" if the report is not stricken as it has "no opportunity to rebut the Johnson Report through its own proper rebuttal." Opposer also asserts that

allowing "the report to stand establishes a precedent" when a party does not abide by the Board's discovery schedule.

In response, applicant argues that the Board does not entertain motions in limine and that objections regarding the Johnson Report are properly left for trial. Applicant submits that the Board has a policy against addressing rebuttal evidence before trial and that opposer's motion should be denied on this basis. Applicant also argues that the Johnson Report is proper rebuttal. Applicant further states that opposer could have "availed themselves of their right under Rule 26(a)(2)(D)(ii) to submit contradictory or rebuttal evidence" on the same subject matter as the Johnson Report but chose not to do so.

In reply, opposer argues that its motion is "procedurally proper and advisable on the merits" arguing that "to avoid unnecessary waste Opposer filed a Motion to Strike a mere four business days after receipt of the Johnson Report." Opposer submits that the motion to strike is "narrowly drawn" and the Board has discretion to hear this motion as discovery is still open. Alternatively, opposer submits that to the extent that the Board declines to rule on the motion to strike, it seeks an extension of discovery to enable the taking of Mr. Johnson's deposition.

Opposer's motion to strike essentially seeks a ruling on the admissibility of particular evidence in advance of

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the evidence being introduced at trial. Therefore, the motion is properly construed as a motion in limine, which the Board does not hear.¹ See *Byer California v. Clothing for Modern Times Ltd.*, 95 USPQ2d 1175, 1178 (TTAB 2010); *Greenhouse Systems Inc. v. Carson*, 37 USPQ2d 1748, 1750 (TTAB 1995). Also, the Board does not examine trial evidence prior to final deliberations in a proceeding, and any substantive, non-procedural objection relating to improper rebuttal is normally raised in a party's brief on the case. *General Council of the Assemblies of God v. Heritage Music Foundation*, 97 USPQ2d 1890 (TTAB 2011); TBMP Section 707.02(c) (3d ed. rev. 2011).

Accordingly, opposer's motion to strike is denied.

Opposer's motion to extend discovery is granted to the extent that discovery, having closed on May 31, 2012, is reopened for opposer for the purpose of expert discovery only with respect to Mr. Johnson.

Proceedings will be suspended until July 21, 2012 for expert discovery. TBMP Section 409 (3d. ed. rev. 2012).

Proceedings will resume on the following schedule.

Expert Discovery Suspension Period Ends	7/21/12
Proceedings Resume	7/22/12
Plaintiff's Pretrial Disclosures	8/17/12
Plaintiff's 30-day Trial Period Ends	10/01/12
Defendant's Pretrial Disclosures	10/16/12

¹ The Board's order dated March 16, 2012, noted that the Board does not hear motions in limine. March 16, 2012 order n.3, p. 4.

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Defendant's 30-day Trial Period Ends	11/30/12
Plaintiff's Rebuttal Disclosures	12/15/12
Plaintiff's 15-day Rebuttal Period Ends	1/14/13

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.