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

Proceeding	91202898
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Opposer L'Oréal S.A. and L'Oréal USA, Inc. (collectively, "L'Oréal" or "Opposer") respectfully submit this brief in opposition to applicant Mikhail Levitin T/A MIKHAIL LEVITIN INSTITUTE's ("Applicant") motion to compel discovery ("Applicant's Motion"). Applicant's Motion cites Rules 30 and 31, yet Applicant never noticed a deposition or served a subpoena duces tecum. Applicant's Motion also cites Rule 33. L'Oréal opposes Applicant's Motion to the extent it moves to compel answers to interrogatories. Should the Trademark Trial and Appeal Board (the "Board") also treat Applicant's Motion as one to compel L'Oréal's responses to Applicant's document requests and/or as a motion to test the sufficiency of L'Oréal's responses to Applicant's requests for admission, despite the failure to make any reference to such requests in Applicant's Motion, L'Oréal submits this brief in opposition thereto.

Applicant's Motion is barred by the Trademark Rules as untimely. If the Board for some reason decides to consider and grant Applicant's Motion, in whole or in part, L'Oréal respectfully requests that it be provided a full opportunity to object and respond to any of Applicant's discovery requests. Separately, although L'Oréal did not consent to Applicant's since-granted extension request, L'Oréal does not contest such extension, but respectfully requests that the Board correct Applicant's error regarding the schedule, and reset the dates accordingly.

PRELIMINARY STATEMENT

Applicant's motion is untimely. The Board has no discretion to consider a motion to compel that is filed after the opening of opposer's testimony period. Here, L'Oréal's testimony period has opened and closed. Applicant's Motion thus must be denied. Should the Board nonetheless consider Applicant's Motion, it must be denied as procedurally defective and substantively deficient. Among other defects, Applicant's Motion fails to include the discovery requests at issue. Applicant refers to discovery depositions, although no such depositions ever were

noticed. It is not clear whether Applicant intends his motion to address document requests and/or requests to admit. He makes no mention of them. Quite naturally, the Board cannot grant a motion to compel without knowing exactly what it is compelling. As the substance of his motion, Applicant asserts that he was “misled” by L’Oréal’s own requests for extensions of time and assurances that L’Oréal would agree to his requests for extensions of time. As noted below, Applicant could not have relied on any such requests or assurances by L’Oréal, inasmuch as they occurred *after* the deadline for serving discovery had passed (with the exception of a single request for an extension needed for L’Oréal to respond to Applicant’s much earlier motion to dismiss). Applicant never requested an extension of the discovery period. Applicant cannot disregard deadlines and clear Orders of the Board, only to later plead ignorance and reliance on events that had not yet occurred. It would throw this proceeding into upheaval and cause prejudice to L’Oréal to grant Applicant’s untimely motion to compel responses to discovery requests that themselves were untimely. It would be improper and manifestly unjust for the Board to do so. L’Oréal respectfully requests that Applicant’s Motion be denied.

ARGUMENT

I. Applicant’s Motion to Compel Is Untimely And May Not Be Considered

The Trademark Rules and the Trademark Trial and Appeal Board Manual of Procedure Third Edition, Revision 2 (June 2013) (the “TBMP”) could not be clearer. 37 C.F.R. § 2.120(e) requires that “[a] motion to compel discovery *must* be filed prior to the commencement of the first testimony period as originally set or as reset” (emphasis added). The TBMP expands upon that requirement:

[T]he motion [to compel] should be filed within a reasonable time after the failure to respond to a request for discovery ... and must, in any event, be filed before the first testimony period opens.... If testimony periods are reset prior to the opening of the plaintiff's testimony period-in-chief, a motion to compel filed before a first trial period opens is timely. However, once the first trial period opens, a motion to compel filed thereafter is untimely, even if it is filed prior to the opening of a rescheduled or reset testimony period-in-chief for plaintiff. There is no provision in the rule for Board discretion to consider an untimely motion to compel.

TBMP § 523.03.

L'Oréal's trial period, as reset by motion of the parties granted on January 25, 2013, opened on March 12, 2013. Applicant filed his motion on June 19, 2013, more than three months after the trial period opened and more than one month after it closed. Moreover, Applicant's Motion was filed almost four months after Applicant served his discovery requests, which themselves were untimely. There is no reading of the law, the rules, or the TBMP that allows the Board to consider Applicant's untimely motion. Accordingly, Applicant's Motion must be denied.

II. Apart From Being Untimely, Applicant's Motion Is Defective

In addition to being untimely, Applicant's Motion fails to comply with the basic requirements for a motion to compel. L'Oréal recognizes that the Board may be inclined to view submissions by pro se applicants with greater leniency, but respectfully points out that the Board already has advised this Applicant during this proceeding of the need for all parties to comply with the governing rules and procedures. Specifically, the Board's August 15, 2012 Order denying Applicant's combined Motion to Dismiss, Motion for Judgment on the Pleadings, and Motion for Summary Judgment reminded Applicant that "[s]trict compliance with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel," and informed Applicant that the TBMP is available on the Internet at www.uspto.gov. *Board Order Denying Summary Judgment, August 15, 2012*. Applicant's Motion is defective or deficient in a number of ways.

First, Applicant's Motion fails to include the discovery requests at issue, and purports to be based in part on L'Oréal's refusal to cooperate with deposition requests, although Applicant never sought to take discovery depositions. The Trademark Rules clearly provide that "[a] motion to compel discovery shall include a copy of the request for designation or of the relevant portion of the discovery deposition; or a copy of the interrogatory with any answer or objection that was made; or a copy of the request for production, any proffer of production or objection to production in response to the request, and a list and brief description of the documents or things that were not produced for inspection and copying." 37 C.F.R. § 2.120(e). The TBMP, which is available to Applicant online, also states that "[a] motion to compel must include a copy of the request for discovery and the response thereto, as specified in 37 C.F.R. § 2.120(e)." TBMP § 523.02.

Applicant's Motion does not include any of the discovery requests at issue. Had Applicant included his discovery requests, it would be evident that Applicant never served L'Oréal with a notice of deposition or a subpoena duces tecum and, accordingly, that those portions of Applicant's Motion that refer to "the deponent," to "refus[al] to answer a question under Rule 30 or 31" and to "fail[ure] to make a designation under Rule 30(b)(6) or 31(a)(4)" are baseless, erroneous, and irrelevant, and cannot be seriously considered or granted. To the extent that Applicant's Motion refers to interrogatories, those requests are not included with the Motion. Applicant's Motion does not reference Applicant's document requests and, to the extent that Applicant appears to have copied the pertinent portion of his motion from the language of Rule 37 of the Federal Rules of Civil Procedure, appears to have intentionally omitted the portion of that rule regarding production of documents (namely, Fed. R. Civ. P. 37(a)(3)(B)(iv)). Accordingly, L'Oréal believes that the only fair reading is that Applicant's document requests are not a subject of the motion. However, should the Board consider Applicant's Motion to pertain to *all* discovery requests, L'Oréal respectfully points out that Applicant also failed to include a copy of his Request for Production of Documents

with his motion. Further, although a motion to compel is not the proper means to compel responses to requests for admission, if the Board so treats Applicant's Motion, L'Oréal respectfully points out that Applicant failed to include those requests with his motion as well. The rule is in place so that the Board knows the nature of the discovery requests at issue. The Board cannot compel L'Oréal to respond to requests without knowing which requests are at issue and what information or documents Applicant seeks.

Second, the Trademark Rules clearly provide that "[a] motion to compel ... discovery must be supported by a written statement by the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion but the parties were unable to resolve their differences." 37 C.F.R. § 2.120(e), TBMP § 523.02. Rule 37 of the Federal Rules of Civil Procedure also states that a motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Applicant's Motion does not include the required statement.

Third, Applicant's Motion was not properly served. As with Applicant's prior motion (Applicant's combined Motion to Dismiss, Motion for Judgment on the Pleadings, and Motion for Summary Judgment), Applicant served his Motion to Compel on only one of the two email addresses of record for Opposer in this proceeding. In its brief in opposition to Applicant's prior motion, Opposer pointed out the defect, did not there rely on improper service as a basis for its opposition, and asked the Board to remind Applicant of the need for all parties, including those acting pro se, to adhere to the requirements for the submission and service of papers in Board

proceedings. The Board did so in its August 15, 2012 Order. Disregarding that Order and that reminder, Applicant again served his motion improperly.

L'Oréal respectfully submits that Applicant's Motion is fatally defective and should not be considered or, if considered, should be denied on that basis.

III. Apart From Being Untimely and Defective, Applicant's Motion Fails On Its Merits

Applicant served his discovery requests on or about February 26, 2013. *See* Declaration of Natalie G. Furman, dated July 2, 2013 ("Furman Declaration"), attached hereto, at ¶ 3. That was more than three months after the close of the discovery period set by the Board in its August 15, 2012 Order. "A party has no obligation to respond to an untimely request for discovery," TBMP § 403.01, and L'Oréal, accordingly, did not. Applicant did not inquire about responses to his discovery requests until at least three months later, after L'Oréal's testimony period had opened and closed. *Id.* at ¶ 4.

Applicant now states, in Applicant's Motion, that Applicant was "misled by [L'Oréal's] repetitious requests for extending time" and assurances of cooperation if Applicant needed an extension of time. Applicant's statements are unsupported by the facts and are contradicted by the record. A review of the proceeding's history clearly shows that Applicant could not have been "misled" by "repetitious requests for extending time," when L'Oréal had made only one such request at the time that discovery closed, which was prior to Applicant's having served discovery. Specifically, the timeline for the proceeding, available on the TTAB Web site, shows the following relevant dates:

- April 19, 2012 – Applicant files a motion that ultimately is treated as a combined Motion to Dismiss, Motion for Judgment on the Pleadings, and Motion for Summary Judgment;
- April 24, 2012 – L'Oréal files a motion on consent to extend the time to respond to Applicant's combined motion;
- August 15, 2012 – The Board issues an Order denying Applicant's combined motion and setting forth a new schedule, with the discovery period set to close on November 12, 2012;
- November 12, 2012 – Discovery closes;
- December 19, 2012 – L'Oréal files a motion on consent to extend its trial period;
- January 25, 2012 – L'Oréal files a motion on consent to extend its trial period;
- March 11, 2013 – L'Oréal's trial period opens;
- April 11, 2013 – L'Oréal files a motion on consent to extend its trial period;
- May 11, 2013 – L'Oréal's trial period closes;
- June 19, 2013 – Applicant files Motion to Compel.

As previously stated, Applicant served his discovery requests on or about February 26, 2013. *See* Furman Declaration at ¶ 3. However, the deadline for discovery had passed on November 12, 2012. At that time, L'Oréal had requested a *single* extension of time, which was to extend its time to respond to Applicant's combined motion. It simply is not credible that Applicant's failure to serve discovery within the required period is attributable in any part to that one request by L'Oréal. It also is not credible – because it is impossible – that Applicant's failure to serve discovery within the

required period is attributable to anything that L'Oréal purportedly said or did *after* that deadline already had passed.

Furthermore, Applicant never requested or filed a motion (whether on consent or otherwise) for an extension of the discovery period. *See* Furman Declaration at ¶ 5. L'Oréal readily acknowledges that it may have told Applicant that as a courtesy it would agree to reasonable requests for extensions of time throughout the proceedings, if Applicant needed additional time to put on his case. Indeed, had Applicant requested an extension of the discovery period, L'Oréal would have consented. He did not. Having failed to make any such request before the deadline, Applicant cannot be heard to ask – months after discovery closed – that his untimely discovery be allowed. To the extent that Applicant means that his Motion to Compel (rather than the requests themselves) is untimely due to L'Oréal's extension requests, L'Oréal's respectfully points out that the rule is clear and does not give the Board or the parties the discretion to “agree” to extend the time for filing a motion to compel after the testimony period has opened.

The discovery period closed long ago. L'Oréal's testimony period has opened and closed. Following proper procedure, L'Oréal took discovery and submitted evidence during the proper periods, as set by the Board. Applicant is required to follow the same schedule. Although parties may agree to extend deadlines, Applicant may not merely disregard deadlines only to complain after the fact. As previously pointed out, the rules are clear that “[a] party has no obligation to respond to an untimely request for discovery,” TBMP § 403.01. Having complied with all proper procedures and having already submitted its case-in-chief, L'Oréal would be severely prejudiced by the reopening at this time of the discovery period and by the taking of discovery by Applicant *after* the filing of L'Oréal's Notice of Reliance. Would L'Oréal's own testimony period then be reopened? Would it in turn be permitted to serve additional discovery requests? Parties to proceedings, and the

Board itself, rely on the schedule to maintain control over and the orderly progression of the case, and to ensure that the rules do not favor or disfavor either party in seeking discovery or putting on its case. In the interest of fairness, the rules must be applied uniformly to parties whether they are represented or not. Although small technical errors may be forgiven a pro se applicant, flagrant disregard for deadlines and procedure cannot be.

Here, Applicant failed to adhere to a clear discovery deadline, failed to file a motion to compel within a reasonable time after he eventually, but in an untimely fashion, served discovery, and instead filed his motion after L'Oréal's testimony period had not only opened, but also had closed. The substance of Applicant's Motion betrays his disregard for the Board's schedule. His sole explanation for having missed the discovery deadline, namely, his reliance on L'Oréal's own extension requests and assurances of cooperation, ignores the actual sequence of deadlines and events. It would be manifestly unfair of the Board, and cause great prejudice to L'Oréal, to grant Applicant's untimely and unsupported Motion to Compel.

As noted above, Applicant's Motion must be denied as untimely, as deficient procedurally, and as unsupported on the merits. If for any reason the Board entertains or grants Applicant's Motion and allows discovery, L'Oréal expects that it will be given a clear statement of which discovery, and a full opportunity to object and respond to Applicant's discovery requests.

IV. If Deemed A Motion to Reopen Discovery, Applicant's Motion Must Be Denied

To the extent that Applicant's Motion is deemed to constitute or include a motion to reopen the discovery period, the motion must be denied because Applicant's failure to serve timely discovery was not due to excusable neglect. A party that wishes to take action after a deadline has expired must show that its failure to act within the allowed time was the result of "excusable neglect." *See* Fed. R. Civ. P. 6(b); TBMP § 509.01(b)(1). Whether a party has shown excusable

neglect is determined based on the analysis set forth in *Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), as adopted by the Board in *Pumpkin Ltd. v. The Seeds Corps*, 43 U.S.P.Q.2d 1582 (T.T.A.B. 1997). Under *Pioneer* and *Pumpkin*, a determination of excusable neglect “must take into account all relevant circumstances surrounding the party’s omission or delay, including (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.” TBMP § 509.01(b)(1). The third factor – whether the delay was within the reasonable control of the movant – is the most important. *Id.* In addition, “[a] party moving to reopen its time to take required action must set forth with particularity the detailed facts upon which its excusable neglect claim is based; mere conclusory statements are insufficient.” *Id.*

Applicant’s Motion fails to set forth with particularity *any* detailed facts showing excusable neglect. Rather, Applicant makes conclusory statements that he is “not a lawyer and was misled by [L’Oréal’s] repetitious request for extending time” and that L’Oréal “reassured [Applicant] that if and when [Applicant] needed a[n] extension of a deadline or any other cooperation from [L’Oréal], it would not be a problem.” As previously noted, Applicant cannot have relied on L’Oréal’s “repetitious requests for extending time” before such requests occurred. At the time that discovery closed, L’Oréal had requested exactly one extension of time. Even if the facts were as Applicant suggests (which they are not), Applicant never requested an extension of time to serve discovery. L’Oréal’s purported assurances regarding its future willingness to extend deadlines cannot form the basis for Applicant’s excusable neglect when Applicant never asked L’Oréal (or the Board) to extend the discovery period, and instead simply disregarded the deadline and filed his discovery requests more than three months later. There are no particular facts alleged in Applicant’s Motion that can support a finding of excusable neglect.

Taking the most important *Pioneer* factor first, Applicant's delay in serving discovery indisputably was within Applicant's reasonable control, as was the delay in filing his motion to compel. Applicant chose not to serve discovery within the allotted period and chose not to request an extension of that discovery period. Had he requested such an extension before discovery closed, L'Oréal would have agreed to it. That L'Oréal *would have* consented, however, does not excuse Applicant from making the request if he needed additional time, and certainly does not excuse Applicant's taking three months beyond the deadline to serve his requests. Applicant's supposed reliance on L'Oréal, even if true, would not wrest control over serving timely discovery away from Applicant. He had every ability either to serve discovery on time or to request that the period be extended. He elected not to do either. Similarly, the delay in filing the motion to compel and, if so construed, to reopen was entirely within Applicant's control. Applicant served his discovery requests on or about February 26, 2013, did not inquire as to L'Oréal's response until after the close of L'Oréal's testimony period, and did not file a motion to compel until June 19, 2013. *See* Furman Declaration at ¶¶ 3-4. Again, Applicant has not advanced a single legitimate or reasonable explanation for why he delayed, much less one that would show that the delay was not in his reasonable control.

Another key factor under *Pioneer* and *Pumpkin* is the length of the delay and its potential impact on judicial proceedings. Applicant did not miss the discovery deadline by a few days and quickly move to rectify his failure before the proceeding progressed much further. To be clear: Applicant served discovery more than three months after the discovery period closed; he filed his motion to compel nearly four months after that. Both delays were substantial. Applicant's Motion was filed more than seven months after the close of discovery. There is no question that reopening discovery so long after the deadline, and after L'Oréal has presented (and Applicant has had a

chance to review) its case-in-chief, would have an enormous and detrimental impact on the judicial proceeding.

With respect to the potential prejudice to nonmovant, L'Oréal recognizes that "prejudice" as understood by the Supreme Court in *Pioneer* and the Board in *Pumpkin* means more than "mere inconvenience and delay" and more than the "loss of any tactical advantage," and instead refers to prejudice to L'Oréal's ability to litigate the case. TBMP § 509.01(b)(1). L'Oréal respectfully argues that reopening discovery after seven months and after the close of testimony goes beyond "mere inconvenience and delay" and that it would suffer prejudice within the meaning of *Pioneer* and *Pumpkin* if the Board were to reopen discovery after a delay of that magnitude and, significantly, after L'Oréal already has amassed and submitted evidence – including testimony declarations – under its Notice of Reliance.

The final factor in determining excusable neglect is whether Applicant acted in good faith. L'Oréal respectfully reminds the Board that it previously denied a motion by Applicant as being untimely, that it previously admonished Applicant of the need to comply strictly with the Trademark Rules, that it urged Applicant to obtain a copy of those Rules, and that it informed Applicant that the TBMP is available for free online. L'Oréal also points out that Applicant asserts a factually impossible basis for his failure to timely serve discovery (namely, reliance on L'Oréal's "repetitious requests," when such reliance on events yet to occur is plainly impossible). Finally, as set forth in greater detail below, on the same day that Applicant filed the instant motion, he also filed a motion to extend time, in which he represented to the Board that he had received L'Oréal's express consent to extend when, in fact, he had not. *See* Furman Declaration at ¶ 6. He improperly filed that motion as a motion on consent, by virtue of which it was automatically granted. L'Oréal acknowledges that it does not have evidence of Applicant's *bad* faith. L'Oréal also acknowledges that a pro se applicant

may be treated with greater leniency than experienced counsel. However, Applicant's untimely discovery and untimely motion to compel do not represent the first or only time he has disregarded the Board's rules and procedures. At some point – a point which L'Oréal respectfully believes has been reached – a party's utter disregard for deadlines, schedules, and rules cannot be excused as good faith error. Particularly when combined with the direct misrepresentation in Applicant's June 19, 2013 motion to extend, L'Oréal respectfully suggests that Applicant's behavior as a whole is not indicative of a party acting in good faith and weighs against a finding of excusable neglect.

Because Applicant fails to set forth with particularity detailed facts that would support a finding of excusable neglect, because the delay in seeking discovery and the delay in filing the motion to reopen (if it is so deemed) was entirely within Applicant's reasonable control, because the delay is substantial and granting a motion to reopen would create upheaval in the progression of the proceeding, because L'Oréal would be prejudiced by a decision to reopen discovery after it already submitted its case-in-chief, and because Applicant does not appear to be able to rely on his good faith with respect to the obligation to adhere to the Trademark Rules, the motion, should it be construed as one to reopen, must be denied.

V. Applicant's Motion to Extend Is Improper and Must Be Corrected

On June 19, 2013, the same day that Applicant filed Applicant's Motion, Applicant filed a "Motion for an Extension of Answer or Discovery or Trial Periods With Consent," requesting a thirty-day extension, which was granted by the Board on the same day. That motion is improper in several ways.

First, Applicant represented that the motion was filed with L'Oréal's consent. It was not. L'Oréal first became aware of the motion after it was filed, when Applicant emailed a copy of the Board order granting it. *See* Furman Declaration at ¶¶ 5-6. Although L'Oréal has made a general

statement in the past that it would be willing to consent to reasonable requests for extensions of time (and would have consented to this motion, had it been asked), Applicant nonetheless needed to secure *actual* and *express* consent before representing to the Board that he “has secured the *express* consent of all other parties to this proceeding for the extension and resetting of dates requested herein” (emphasis added).

Second, Applicant represented that the parties have not held the discovery conference as required under Trademark Rules 2.120(a)(1) and (a)(2). In fact, the parties held the discovery conference on February 15, 2012, as stated in the parties’ Motion on Consent to waive initial disclosures, filed with the Board on March 15, 2012.

Third, Applicant failed to serve the motion electronically (or by any means) and did not enter any of the email addresses of record in the motion itself, despite stating that “Mikhail Levitin T/A Mikhail Levitin Institute has provided an e-mail address herewith for itself *and for the opposing party* so that any order on this motion may be issued electronically by the Board” (emphasis added) and despite certifying that “a copy of this paper has been served upon all parties, at their address of record by ... email on this date.” Rather than serving the motion, as is required, Applicant emailed a copy of the Board order granting it. *See* Furman Declaration at ¶ 6.

Apparently, Applicant must have been viewing an old schedule and, in filing the form for the motion, erroneously stated that “The Close of Plaintiff’s Rebuttal Period is currently set to close on 06/25/2013. Mikhail Levitin T/A Mikhail Levitin Institute requests that such date be extended for 30 days, or until 07/25/2013....” However, the next deadline was not the Close of [L’Oréal’s] Rebuttal Period, but the Close of Applicant’s Trial Period (previously set to close on July 10, 2013). Applicant’s error had the effect of creating a schedule that shows his testimony period as already closed, although he has not submitted any testimony via a Notice of Reliance.

L'Oréal does not contest the extension of Applicant's testimony period, if that is what Applicant hoped to achieve. L'Oréal does, however, object to the misrepresentations in the motion, specifically including the misrepresentation to the Board that the motion was made with L'Oréal's express consent. Nonetheless, in the interest of ensuring the orderly progression of the proceeding, L'Oréal respectfully requests that the Board correct Applicant's error, extend Applicant's testimony period by thirty days, and reset all subsequent dates accordingly, at the time that it removes the proceeding from suspension.

CONCLUSION

The Board should refuse to consider Applicant's Motion. It was filed after the opening (and close) of L'Oréal's testimony period. The rules are clear that the Board has no discretion to consider such an untimely motion. In addition, Applicant's Motion is procedurally deficient in several ways, including (but not limited to) the fact that it does not include Applicant's discovery requests and is unclear about which requests, specifically, are at issue. To the extent that Applicant's Motion refers to depositions and documents to be produced further to depositions, the motion must be denied as baseless, as Applicant never noticed any depositions. To the extent that Applicant intends Applicant's Motion to relate to all discovery requests, it is deficient in that it does not address requests for production of documents and inasmuch as a motion to compel is not the proper motion for requests to admit. Even if considered on the merits, Applicant's Motion must fail. Applicant disingenuously alleges that he was "misled" by L'Oréal's "repetitious requests" for extensions and assurances of cooperation. However, at the time of the deadline for serving discovery, L'Oréal had requested only one extension, in order to allow it to respond to Applicant's previous combined motion to dismiss. Any further requests (whether deemed "repetitious" or not) occurred after discovery already had closed. Clearly, Applicant could not have relied on events yet

to occur when he failed to serve discovery within the required time. There was no legitimate reason for Applicant not to have served discovery within the proper time, and there is no legitimate basis for him to request – or for the Board to grant – responses to discovery now, more than *seven months* after that deadline, almost *four months* after discovery actually was served, more than *three months* after L'Oréal's testimony period opened, and more than *two months* after the testimony period closed. To do so would prejudice L'Oréal, would throw this proceeding into disarray, would reward Applicant for disregarding a clear schedule, and would call into question the requirement that all parties must adhere to the Trademark Rules and Board orders. Applicant cannot use a motion to compel, filed more than *seven months* after the deadline, to rectify his own unjustified failure to adhere to the schedule.

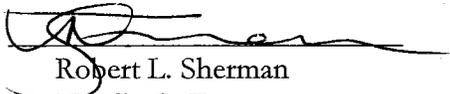
L'Oréal respectfully submits that the Board has no discretion to consider Applicant's Motion but, if considered, requests that the Board deny the Motion, correct the schedule error in Applicant's motion for an extension of time, remind Applicant yet again of his obligation to comply with all rules, and remove the proceeding from suspension.

Dated: July 2, 2013

Respectfully submitted,

PAUL HASTINGS LLP

By:

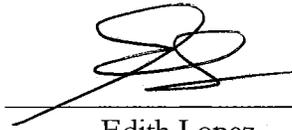

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 2, 2013, a true and complete copy of the foregoing **OPPOSER'S BRIEF IN OPPOSITION TO APPLICANT'S MOTION TO COMPEL** was served on Applicant electronically, as agreed upon by the parties, by sending said copy by email to Mikhail Levitin at vitality@ptd.net and at mslevitin@verizon.net.



Edith Lopez

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

In the Matter of Serial No. 85/270,272
Published in the Official Gazette on August 2, 2011
For the Mark: FOREAL FORÉAL BY MIKHAIL

L'Oréal S.A. and L'Oréal USA, Inc.,)	
)	
Opposer,)	
v.)	Opposition No. 91202898
)	
Mikhail Levitin T/A MIKHAIL)	
LEVITIN INSTITUTE)	
)	
Applicant.)	
)	

**DECLARATION OF NATALIE G. FURMAN
IN OPPOSITION TO APPLICANT'S MOTION TO COMPEL**

I, Natalie G. Furman, declare as follows:

1. I am an attorney employed by the firm of Paul Hastings LLP, attorneys of record for Opposer L'Oréal S.A. and L'Oréal USA, Inc. (collectively, "L'Oréal" or "Opposer") in this opposition proceeding.

2. I submit this declaration in opposition to the Motion to Compel filed by Applicant Mikhail Levitin T/A MIKHAIL LEVITIN INSTITUTE ("Applicant"), based upon my personal knowledge, except where stated to be "upon information and belief" in which case I believe such information to be true.

3. On or about February 26, 2013, Paul Hastings LLP received an envelope via U.S. Mail containing Applicant's First Set of Interrogatories, Applicant's First Set of Requests for Admissions, and Applicant's First Set of Document Requests. The certificates of service attached to

Applicant's First Set of Interrogatories and First Set of Requests for Admissions state that service was made by electronic transmission and by first class mail on February 26, 2013. No attorney of record and, on information and belief, no one else employed by Paul Hastings LLP received the electronic transmission. There was no certificate of service attached to Applicant's First Set of Document Requests, but those were received along with the First Set of Interrogatories and First Set of Requests for Admissions.

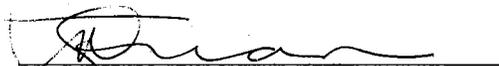
4. The discovery requests were untimely and, therefore, Opposer did not respond to them. Applicant did not inquire about Opposer's responses until May 30, 2013.

5. At no time during the course of this proceeding has Applicant sought consent to file a request for extension of time, for any purpose, from me, from any other attorney of record, or, on information and belief, from any other person employed by Paul Hastings LLP.

6. Specifically, Applicant did not seek or obtain express consent to file the June 19, 2013 motion requesting a thirty-day extension of time, which he nonetheless filed as a motion on consent and which he failed to serve. I became aware of that motion when Applicant emailed me a copy of the Board Order granting it.

7. I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, NY
July 2, 2013


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