

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

Mailed: October 4, 2013

Opposition No. 91204070

Brody Chemical Company, Inc.

v.

Tammy L. Goldthorpe fka
Tammy Price

**Robert H. Coggins,
Interlocutory Attorney:**

Motion to Strike

Now before the Board is applicant's motion (filed June 4, 2013) to strike from opposer's notice of reliance the following matter: Exhibit 2, Exhibit 3, Exhibit 4, and the wording at lines 13-18 on page 2 of the notice of reliance itself. Opposer has filed a brief in opposition thereto.

Exhibits 2 and 3

Exhibit 2 is applicant's response to opposer's first request for production of documents, and documents produced -or the lack of documents produced- therewith. Exhibit 3 is the declaration of opposer's counsel stating that no

documents were produced by applicant in response to opposer's first request for production of documents.

Because opposer failed to file a motion to compel discovery, opposer may not rely on applicant's failure to respond to its document requests as admissions against interest by applicant. See *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1719 (TTAB 2008) (party that receives response it believes inadequate but fails to file a motion to test sufficiency of response, may not thereafter complain about its insufficiency); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1656 (TTAB 2002) (having failed to file motion to compel, defendant will not later be heard to complain that interrogatory responses were inadequate); *Chianti Ruffino Esportazione Vinicola Toscana S.p.A. v. Colli Spolenti Spoletoducale SCRL*, 59 USPQ2d 1383, 1383 (TTAB 2001) ("Any deficiencies in applicant's discovery responses should have been addressed by the timely filing of a properly-supported motion to compel discovery prior to the commencement of opposer's testimony period"); TBMP § 523.04 (3rd ed. rev.2 2013). Moreover, Trademark Rule 2.123(b) provides, in relevant part, that testimony may be submitted by affidavit, but only by written agreement of the parties. See *Calypto Technology Inc. v. Calypso Capital Management LP*, 100 USPQ2d 1213, 1216-19 (TTAB 2011); and *Tri-Star Marketing LLC v. Nino Franco Spumanti S.R.L.*, 84 USPQ2d

1912, 1914 (TTAB 2007). Inasmuch as there is no evidence of an agreement between the parties that testimony may be submitted by affidavit, the declaration of opposer's counsel is impermissible. In view thereof, the motion to strike is **granted** as to Exhibits 2 and 3.

Exhibit 4

Exhibit 4 is a printout from the Office's TSDR database of the file history of subject application Serial No. 85099334. It is unclear why applicant would move to strike this exhibit when applicant concedes, correctly, that the information contained therein is automatically of record pursuant to Trademark Rule 2.122(b). Although submission of this exhibit was unnecessary, it is nonetheless not improper. In view thereof, the motion to strike is **denied** as to Exhibit 4.

Lines 13-18 on p. 2

The following wording is at issue:

These discovery responses and documents all demonstrate that the only product that has ever been sold bearing the SLIPPERY WIZARD mark was the Brody Chemical SLIPERY WIZARD asphalt release product and that Ms. Goldthorpe has otherwise not used the mark in commerce. These documents also demonstrate that Brody Chemical first used the mark in commerce and all advertisements bearing the mark have always identified Brody Chemical and not Ms. Goldthorpe.

Applicant moves to strike this wording because, in applicant's opinion, it constitutes impermissible argument

and is not appropriate for introduction by notice of reliance. Opposer did not object to the striking of this wording; opposer did not address this issue at all in its brief in opposition to the motion. In view thereof, the motion to strike is **granted** as to lines 13-18.

Schedule

Proceedings are **resumed**. It is noted that opposer has filed, during the period of suspension pending disposition of the motion to strike, its main brief on the case. In view thereof, dates are reset on the following schedule.

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|------------------------------------|-------------------|
| Applicant's main brief due: | 11/01/2013 |
| Opposer's reply brief due: | 11/16/2013 |

Briefs shall be filed in accordance with Trademark Rule 2.128. An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.