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

Proceeding	91205896
Party	Defendant Wild Brain Entertainment, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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BEAU L. TARDY

Opposer,

Opp. No. 91205896

v.

WILD BRAIN ENTERTAINMENT, INC.

Applicant.

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**REPLY BRIEF IN SUPPORT OF  
APPLICANT’S MOTION TO COMPEL DISCOVERY**

Applicant, Wild Brain Entertainment, Inc., seeks an order compelling Opposer, Beau L. Tardy, to produce documents and things and answer interrogatories relating to his claimed past use of “DIZZY,” which is the mark at issue in this case. As Applicant explained in its moving papers (D.I. 39), Opposer made a number of factual allegations in his original Notice of Opposition (D.I. 1) relating to his claim of standing, claims he then repeated in further pleadings and in his own later-filed trademark application. *See generally* D.I. 39, pp. 3-4. Opposer, however, has refused to produce any documents or other material relating to his factual claims, claiming that they are not relevant to this proceeding. *See id.*, pp. 5-6; *see also id.*, Exs. D, E.

Because the discovery Applicant seeks is highly relevant to issues in this case—*e.g.*, Opposer’s claim of “standing,” *see* D.I. 1, ¶ 1; *see also, e.g.*, D.I. 39, Ex. A, ¶ 1, including the related question of whether Opposer had standing at the time he initiated these proceedings; *cf. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000)—Applicant submits that Opposer should be compelled to produce documents and

information responsive to the propounded requests. *See generally* D.I. 39, pp. 7-8. Opposer, for his part, opposes the grant of requested relief, arguing that issues such as “chain of title” and his alleged past use of the DIZZY mark are irrelevant to this case. *See* D.I. 41, pp. 1-2. Opposer even goes so far as to say that if there *were* documents that showed that Opposer did not own any common law rights in the asserted DIZZY mark at the time he filed his Notice of Opposition (and Applicant is beginning to suspect that is the case), that material would for some reason “not be admissible.” *See id.*, p. 1. Applicant disagrees. *See Ritchie v. Simpson*, 50 USPQ2d 1023, 1029 (Fed. Cir. 1999) (allegations made in the pleadings in support of standing must later be affirmatively proved by the plaintiff at trial); *see also Stephen Slesinger Inc., v. Disney Enterprises Inc.*, 98 USPQ2d 1890, 1895 n.15 (TTAB 2011) (a party with no ownership interest in a mark lacks standing to claim that it would be damaged by another’s registration).

Opposer bases his “no relevance” argument primarily on his belief that because he later filed an application to register the DIZZY mark, standing was somehow retroactively conveyed upon him as of the time he initiated these proceedings. *See* D.I. 41, p. 2 (citing *American Vitamin Products Inc. v. Dowbrands Inc.*, 22 U.S.P.Q.2d 1313 (TTAB 1992)). In *American Vitamin*, however, the Board found that the petitioner met the standing threshold because it alleged that it was “engaged in the manufacture and sale of goods which are related to those identified in the subject registrations,” allegations that, the Board noted, raised “a question of fact to be determined at trial.” *See id.* at 1313-14. The case does not support the broad contention that a party with no interest in a mark can initiate an opposition and then “cure” its lack of standing by later filing a new application—if it did, standing could rarely be challenged. Moreover, Opposer is overlooking the fact that the later-filed application on which he wishes to

rely to establish standing retroactively was filed on the basis of *use* (not an intent-to-use) and contains statements (*e.g.*, the claim that no other party has the right to use the mark) that would be fraudulent if it can be shown that Opposer knew he lacked rights in the DIZZY mark.

Opposer is trying to have it both ways. He wants to argue to the Board that he made prior use of the DIZZY mark and to rely on that past use to help establish standing. *See, e.g.*, D.I. 41, p. 2 (claiming that because Applicant supposedly “admitted” in its original Answer that a website used by non-party “Dizzy Worldwide Productions” displayed a cartoon for “DIZZY THE CAT” that “appear[ed] to be” from 2006 [based on a copyright notice], that “admission ... should be enough” to establish Opposer’s standing). At the same time, Opposer wishes to deny Applicant discovery into the basis for the very facts that he has alleged. That cannot be permitted.

There is no proof Opposer was using the DIZZY mark for any goods or services when he initiated this opposition, or that he is or ever was a competitor of Applicant’s. *Cf.* D.I. 1, ¶ 1 (alleging prior use); D.I. 39, Attach. A, ¶ 1 (claiming “Opposer has ... standing because of [his] interests as a competitor”). Further, there is no evidence that Opposer was contemplating (or that he had grounds for) filing his own DIZZY application at the time this case began. Given that, Opposer’s ability to prove standing—which is his burden—is doubtful at best.

Opposer makes much of the fact that Applicant did not earlier move to dismiss Opposer’s Notice of Opposition for lack of standing, suggesting that, as a consequence, Applicant conceded that any facts other than the filing of Opposer’s new DIZZY application are irrelevant. *See* D.I. 41, pp. 2-3. However, just the opposite is true. To be clear, Applicant did not (and could not) move to dismiss this case for failure to plead standing because Opposer actually *pled* standing—namely, that he was a competitor of Applicant who had used the DIZZY mark to offer goods and

services similar to those covered by Applicant's pending application. *See, e.g.*, D.I. 1, ¶ 1 (alleging prior use); D.I. 39, Attach. A, ¶ 1. The issue now is whether Opposer will be able to *prove up* his standing claims if and when this case ever reaches trial, *see, e.g., Ritchie*, 50 USPQ2d at 1029, (Fed. Cir. 1999), which is why Applicant needs the requested discovery.

Respectfully submitted,

Dated: August 11, 2014

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**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing *Reply Brief In Support Of Applicant's Motion To Compel Discovery* was served on the parties or counsel indicated below by electronic mail sent to the address(es) listed below (as agreed to by the parties):

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