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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**

BEAU L. TARDY,

Opposer,

Opp. No. 91205896

v.

WILD BRAIN ENTERTAINMENT, INC.

Applicant.

**APPLICANT’S REQUEST FOR RECONSIDERATION
OF THE BOARD’S APRIL 3rd ORDER**

Applicant, Wild Brain Entertainment, Inc., respectfully requests pursuant to TBMP § 518 and 37 CFR 2.127(b) that the Board reconsider the Order (D.I. 51) that it issued in this matter on April 3, 2015. Through that Order, the Board denied Applicant’s Renewed Motion to Compel on the grounds that Applicant did not file a reply brief to dispute Opposer’s contention that the matter was supposedly moot. *See* D.I. 51, p. 2. According to the Board, Opposer stated that “he and Applicant ‘have had email discussions regarding standing and evidence and Opposer has supplemented its discovery responses with a Supplemental Disclosure to make corrective information known to Applicant as a part of the discovery process,’” and that “Applicant did not file a reply brief in which it disputed this statement.” *See id.* (quoting D.I. 48, p. 1).

Based on the facts before it, the Board erred in reaching its finding of mootness. More specifically, it appears that the Board mistakenly believed that the parties had discussions (or that Opposer made disclosures) *subsequent* to the filing of Applicant’s motion. Opposer’s statement in his brief about “email discussions” and a “Supplemental Disclosure” (*see* D.I. 48, p. 1),

however, referred to exchanges the parties had *before* Applicant filed its motion, and Opposer did not make any claim or attach any evidence to his brief to suggest otherwise. In fact, it was the inadequacy of those supposed “disclosures” that **was the basis for Applicant’s motion**.

The inadequacy of Opposer’s Supplemental Disclosures was discussed in detail in Applicant’s opening brief. For example, in the “Background” section of its Renewed Motion to Compel (D.I. 45), Applicant provided a history of the parties’ interactions and attached Opposer’s original and amended Supplemental Disclosures as exhibits. *See* D.I. 45, Exs. D, E. Applicant then explained that those Disclosures *did not include answers* to the interrogatories:

Following issuance of the Board’s Order, Wild Brain contacted Opposer and attempted to get discovery in this case back on track. To that end, Wild Brain sought to “arrange a process for securing responses to Wild Brain’s outstanding discovery requests” and suggested that after Opposer served answers to the interrogatories and supplemental discovery response, the parties could meet and confer about any open issues that remained. *See* Exhibit C(1). In response, **Opposer served what he termed a “Supplemental Disclosure,” which included certain additional documents, but no answers to Wild Brain’s interrogatories or document requests.** *See* Exhibits C(2), D. Undeterred, Wild Brain persisted, pointing out to Opposer that the Board explained that he had “a duty to correct or supplement his discovery responses as needed,” *see* Exhibit C(3) (citing to D.I. 43, p. 8), and calling his attention to the requirements of Federal Rule 33(b) (which requires a party to answer each interrogatory, to the extent it is not objected to, “separately and fully in writing under oath”) and Federal Rule 34(b) (which similar requires a written response). *See* Exhibit C(5). Wild Brain also reminded Opposer of the fact that the Board *expressly discussed* certain interrogatories (and provided guidelines as to what would constitute proper responses), and agreed to limit the scope of certain other requests. *See* Exhibits C(7), (10).

None of this, however, moved Opposer, who has remained steadfast in his view that his “Supplemental Disclosures” are sufficient. *See* Exhibits C(4), (6), (11). Opposer also continues to refuse to meet and confer, saying **again** that he will only do so with the involvement of “the Board attorney.” *See* Exhibit C(8); *but cf.* D.I. 43, pp. 2-3 (explaining that such a position was “not well-taken” and noting that “[t]he Board has neither the time nor the personnel to participate in meet and confer conferences to resolve parties’ discovery disputes as a matter of course”).

Thus, the parties are back where they started. Opposer has refused to provide answers to interrogatories and has only produced the documents that “will be used by” him at trial, rather than all documents in his possession, custody, or control responsive to Wild Brain’s document requests. *See* Exhibits C(10), C(11); *see also* Exhibit E (Opposer’s amended “Supplemental Disclosure”). Furthermore, Opposer has refused to meet and confer regarding these matters, although, to be fair, it is not clear how further discussions might resolve this dispute considering that Opposer refuses even to accept that he has an *obligation* to answer Wild Brain’s interrogatory requests (or provide supplemental answers to its document requests). *See generally* Exhibits C(1)-(11) (email exchanges between the parties over the course of two weeks).

D.I. 45, pp. 3-4 (first bolding added); *see also id.*, Exs. D, E. Applicant also discussed the emails between the parties and included those as exhibits as well, *see id.*; *see also id.*, Exs. C(1)-(11), and then explained in the “Argument” section why the information and disclosures Opposer provided were inadequate and justified the Board issuing an order to compel. *See id.*, pp. 4-7.

The Board’s assumption that Applicant did not “dispute” Opposer’s position that his Supplemental Disclosures had resolved the parties’ discovery dispute was therefore erroneous—the inadequacy of the information Opposer provided in the wake of the Board’s previous instructions was the reason Applicant filed its Renewed Motion in the first place. *See generally id.* To be sure, Applicant did not file a reply brief, but that was only because one was not necessary. The content of Opposer’s Supplemental Disclosures and the parties’ email exchanges was fully addressed in Applicant’s opening brief, and Opposer did not raise any new issues in his opposition brief.¹ Thus, if Applicant *had* filed a reply brief, it would only have been to rehash

¹ To the extent that there was confusion in this case, it likely stems from Opposer’s unartful use of the term “moot.” Opposer was not claiming that the Applicant’s motion was *legally* moot because of some event that took place after the filing of the motion. Rather, Opposer was arguing that his supplemental disclosures were sufficient discovery responses and that, as a consequence, Applicant’s renewed motion to compel should be denied *on the merits*. Applicant, of course, disagrees.

earlier arguments, which would have been wasteful and is strongly disfavored by the Board. *See* TMBP, § 502.03 (“the Board generally discourages the filing of reply briefs on motions”).

Applicant therefore respectfully requests that the Board reconsider and set aside its finding that Applicant’s Renewed Motion to Compel is somehow “moot.” The question of whether Opposer has complied with his discovery obligations was fully briefed and should be decided on the merits before this case is allowed to proceed to trial.

Respectfully submitted,

Dated: April 8, 2015

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CERTIFICATE OF SERVICE

I certify that a true copy of APPLICANT'S REQUEST FOR RECONSIDERATION OF THE BOARD'S APRIL 3RD ORDER 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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