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

Proceeding	91207848
Party	Plaintiff Rodeo Realty, Inc.
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Submission	Motion for Sanctions
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Rodeo Realty, Inc.,

Opposer,

v.

William Ambrose Kennedy,

Applicant.

Opposition No. 91207848

Serial No. 76710265

Mark: Rodeo Realty

OPPOSER’S MOTION FOR SANCTIONS; DECLARATION IN SUPPORT

Opposer Rodeo Realty, Inc. (“Opposer”) hereby moves the Board for Sanctions against William Ambrose Kennedy (“Applicant”). Applicant has failed to obey the Board’s Order against him compelling discovery relating to Applicant’s Initial Disclosures, Responses to Opposer’s Requests for Production of Documents and Opposer’s Interrogatories. Opposer therefore requests the Board to strike Applicant’s Answer and/or to enter judgment against Applicant sustaining the Opposition.

On July 5, 2014, the Board granted Opposer’s Motion to Compel Discovery based on Applicant’s failure to provide full and formal Initial Disclosures, a full and final set of responses to Opposer’s Request for Production of Documents and verified answers to Opposer’s Interrogatories. Opposer provided evidence to the Board on September 17, 2014 that the Board’s above-referenced Orders had still not been complied with. Those orders have still not been complied with to this day. Sanctions against Applicant are therefore warranted.

The authority to grant sanctions against a party who disobeys one or more orders of the Board relating to discovery is in 37 C.F.R. §2.120(g), which provides, in part, as follows:

...if a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery,... the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board will not hold any person in contempt or award expenses to any party.

F.R.Civ. P. 37(b)(2) provides that when a party fails to comply with an order compelling discovery, there can be issued "further just orders." The Rule then sets forth examples of what such orders may be, including:

1. Striking pleadings in whole or in part [F.R. Civ. P. 37(b)(2)(A)(iii)];
2. Rendering a default judgment against the disobedient party

[F.R.Civ.P.37(b)(2)(A)(vi)].

Despite numerous courtesies extended to Applicant by Opposer in connection with discovery in these proceedings, Applicant has ignored and/or treated the Board's orders with disrespect. Such conduct has now gone on for many months. Opposer has already spent a considerable amount of money in defending its registered trademark in these proceedings. The time has now come to stop the waste of resources and to sustain Opposer's Opposition.

Opposer therefore moves the Board to do the following:

1. Suspend proceedings pending the ruling on this Motion, or to reset trial dates as appropriate,
2. Strike Applicant's Answer,
3. Render a default judgment against Applicant sustaining the Opposition,
4. Make such further or other orders as may be just.

In the event that the Board is not disposed to strike Applicant's Answer and render a default judgment against Applicant, F.R.Civ.P. 37(b) also provides that the Board may make an order "prohibiting the disobedient party from supporting or opposing designated claims or

defenses, or from introducing designated matters in evidence.” Opposer therefore moves, in the alternative, as follows:

1. That Applicant be precluded from presenting any evidence at trial,
2. That Applicant be prohibited from supporting any claims that he has, or will have, legitimate trademark rights in RODEO REALTY,
3. That the trial scheduling dates be reset so that Opposer – and not Applicant – be able to complete discovery,
4. For such further or other orders as may be just.

Respectfully submitted,

DATED: November 4, 2014



Alan M. Kindred, California bar member
Co-Counsel for Opposer
Rodeo Realty, Inc.

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**DECLARATION OF ALAN M. KINDRED IN SUPPORT OF OPPOSER'S MOTION
FOR SANCTIONS**

I, Alan M. Kindred, declare as follows:

1. I am one of Opposer's attorneys in this proceeding. My colleague, Douglas H. Morseburg remains as one of Opposer's attorneys of record. If called upon to testify to the matters set forth in this Declaration, I could competently do so. The matters of fact set forth in this Declaration are based on my personal knowledge.
2. On April 11, 2014, Opposer filed and served a Motion to Compel discovery on Applicant. A copy of Opposer's brief on that motion is attached hereto as Exhibit 1.
3. On July 5, 2014, the Board granted Opposer's Motion to Compel Discovery. A copy of that Order is attached as Exhibit 2.
4. Applicant has failed to comply with the above referenced Order compelling discovery from Applicant.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Pasadena, California this 4th day of November, 2014.



Alan M. Kindred

Exhibit 1

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

Rodeo Realty, Inc.

Opposer

v.

William Ambrose Kennedy

Applicant

Serial No. 76710265

Opposition No. 91207848

Mark: Rodeo Realty

**OPPOSER’S MOTION TO COMPEL APPLICANT’S INITIAL
DISCLOSURES AND RESPONSES TO OPPOSER’S
INTERROGATORIES AND REQUESTS FOR PRODUCTION**

Opposer Rodeo Realty, Inc. (“Opposer”), by and through its attorneys, hereby moves the Board to Compel applicant William Ambrose Kennedy (“Applicant”) to serve Opposer with his initial disclosures, respond to Opposer’s interrogatories, and supplement his responses to Opposer’s requests for production.

I. INTRODUCTION

This motion has been brought after repeated efforts to get Opposer to comply with his discovery duties. Opposer has repeatedly reminded Applicant of his discovery obligations. Applicant repeatedly promised discovery would be forthcoming. Applicant and Opposer (collectively, the “Parties”) repeatedly extended the close of discovery to allow Applicant additional time to respond.

After all this, Applicant has failed to respond to *any* of Opposer’s interrogatories. He has failed to submit initial disclosures. His responses to document requests are insufficient. As a result of Applicant’s intransigence, Opposer has been forced to bring the instant motion.

II. FACTUAL BACKGROUND

This case commenced on November 5, 2012. Opposer answered the notice of opposition on December 7, 2012. Discovery opened on January 15, 2013.

On May 3, 2013, the parties held their discovery conference. Opposer served its initial disclosures on June 3, 2013. Applicant has never served any initial disclosures.

On August 15, 2013, Opposer served two sets of written discovery on Applicant, including a First Set of Interrogatories containing 15 questions and a First Set of Requests for Production of Documents which sought documents in 12 individual categories. Declaration of William D. Bowen in Support of Opposer's Motion To Compel ("Bowen Decl.") ¶ 2, Exs. A, B. Applicant failed to respond by the due date. Bowen Decl. ¶ 3.

On September 30, 2013, Opposer wrote Applicant to meet and confer regarding his discovery duties and remind him that his responses and initial disclosures were overdue. *Id.* ¶ 4, Ex. C. On October 2, 2013, Applicant produced three pages of documents to Opposer along with a perfunctory response. *Id.* ¶ 5, Ex. D.

Since then, Opposer has made repeated efforts to secure written responses to its interrogatories and to secure documents responsive to its Requests for Production, all to no avail.

Opposer wrote to Applicant on November 14, 2013 seeking an extension of discovery and requesting a meet and confer on his insufficient responses. *Id.* ¶ 6, Ex. E. After much back and forth, the parties held a telephonic meet and confer on January 14, 2014. *Id.* ¶ 7, Ex. F. The Parties discussed discovery issues at length and Applicant agreed to supplement his discovery. *Id.* ¶¶ 8-13. After months of follow up by Opposer, *id.* Ex. G, Applicant finally produced less than 20 pages of additional documents. *Id.* ¶ 13, Exs. G, H. Counsel for Opposer wrote a final time to get Applicant to comply with his discovery obligations, *id.* ¶ 14, Ex. I, and Applicant ignored the letter. *Id.* ¶ 15. The instant motion followed.

III. ARGUMENT

Applicant is deliberately avoiding his discovery obligations. Opposer's discovery efforts and diligent follow-up with Applicant have been met with minimal, inadequate responses.

Applicant has produced less than thirty pages of material responsive to at most one production request. Opposer's interrogatories have been totally ignored despite repeated reminders. Applicant has had over a year to complete and serve his initial disclosures, but has not done so. It is high time for Applicant to be held accountable for his deficient discovery responses. The Board should grant the instant motion.

A. Applicant Should Be Ordered To Immediately Serve Initial Disclosures

Though it has been well over a year since discovery opened, Applicant still has not submitted his initial disclosures. Opposer is impeded in its ability to conduct effective discovery as it has had no notice of individuals likely to have discoverable information or documents Applicant plans to use to support his claims or defenses. *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 5 (D.D.C. 2009) (criticizing party for evasive initial disclosures on suit challenging TTAB decision, and noting “[t]he 1993 Advisory Committee Notes make it clear that the purpose of these disclosures is to ‘assist other parties in deciding which depositions will actually be needed.’”). There is no excuse for failure to prepare *any* initial disclosures. *See id.* (citing Fed. R. Civ. P. 26(a)(1)(E) (“[A] party is not excused from making its disclosures because it has not fully investigated the case . . .”). But Applicant should be ordered to prepare and serve the initial disclosures he should have served long ago.

B. Applicant Should Be Ordered To Immediately Respond to Opposer's Interrogatories

Opposer served Applicant with interrogatories over six months ago, on August 15, 2014. Bowen Decl. ¶ 2, Ex. C. Despite the fact that Board rules allow 75 interrogatories, 37 C.F.R. § 2.120(d)(i), Opposer served Applicant with only 15 interrogatories to respond to on essential elements of its case. *Id.* Ex. C. Opposer's responses were due on September 16, 2013. Fed. R. Civ. P. R. 33(b)(2). Applicant's responses are more than six months overdue.

Interrogatories are an important discovery device. “The primary purpose of discovery is to ‘make a trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.’” *Barnes v. District of Columbia*, 283 F.R.D. 8

(D.D.C. 2012) (quoting *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)). Interrogatories are part of the discovery process and help litigants prepare for trial by narrowing issues and determining what evidence they will need at trial. *Id.* (citing 8B Charles Alan Wright, et. al., Fed. Prac. & Proc. § 2162 (3d Ed. 2012)); *see also O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1365 (Fed. Cir. 2006) (holding contention interrogatories are “useful in narrowing and sharpening the issues, which is a major purpose of discovery,” and they allow parties to “pin down [the other’s] theories of liability [and] theories of defense, thus confining discovery and trial preparation to information that is pertinent to the theories of the case.”) (citing *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947)).

By refusing entirely to answer Opposer’s interrogatories, Applicant is making this procedure a game of “blind man’s bluff.” In order to determine whether Applicant’s mark should be cancelled, Opposer needs information on the factual information relevant to assessing likelihood of confusion. “Likelihood of confusion is a question of law with underlying factual findings made pursuant to the *DuPont* factors.” *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, No. 2013-1353, 2014 U.S. App. LEXIS 5511 (Fed. Cir. Mar. 26, 2014) (citing *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 1381 (Fed. Cir. 2006)). Assessing these factors requires information that is uniquely within Applicant’s possession, custody, or control, including but not limited to 1) the channels of trade the potential mark is being used in or will be used in, 2) the nature of the goods or services with which the applicant uses or plans to use the mark and, 3) the intended market for the potential mark and the characteristics of the buyers in that market. *See id.* (enumerating the factors in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973)): Without information from Applicant, Opposer is left to guess at the channels of trade, characteristics of buyers, and the nature of the goods and services Applicant intends to market and sell. Opposer cannot reasonably make its case in the absence of that information. This is why it propounded interrogatories aimed at learning information on these issues. *See Bowen Decl. Ex. C.*

Applicant should not be able to force Opposer to guess at information essential to its case. Applicant should be ordered to answer Opposer's interrogatories in full, under oath, and in writing, without objections. Fed. R. Civ. P. R. 33(b)(3),(4).

C. Applicant Should Be Ordered To Supplement His Responses to Opposer's Requests for Production

Unlike his other discovery duties, which were totally ignored, Applicant made a halfhearted effort to respond to Opposer's requests for production. He initially produced three pages, two weeks late. Bowen Decl. ¶ 5, Ex. D.

Applicant's initial discovery responses did not directly address the bulk of Opposer's discovery requests. He provided no objections nor indicated why no documents responsive to most of Opposer's discovery requests were produced. Applicant's supplemented responses which still consist of less than 30 pages of documents and a haphazard list of documents that are missing, are still insufficient. *See id.* Ex. H. Applicant's response must either state that documents will be produced "for each item or category," as required by the Federal Rules. *See* Fed. R. Civ. P. R. 34(b)(2).

Opposer's interrogatories are reproduced below, with an explanation of how Applicant's responses are deficient.

Request for Production No. 1.

Opposer requested as follows:

1. All documents and things relating to Your motivation and intent in choosing to use RODEO REALTY in conjunction with Your Products.

Applicant did not respond to this request, providing no indication as to whether there were any documents relating to his motivation and intent in choosing his proposed mark. There also appear to be no documents responsive to this request in his production. Opposer finds it difficult to believe Applicant has no documents responsive to this request. Such documents might include preliminary drafts of the script, pitches to studios, producers, financiers, talent, and

other participants in the production process, or emails regarding his motivation to use RODEO REALTY as the title of the script.

Opposer is entitled to request documents that are “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. R. 26(b)(1). This request is likely to lead to information on numerous *DuPont* factors, including Applicant’s intended market, channels of trade, and the nature of his goods and services. 476 F.2d at 1361. Applicant’s should be ordered to supplement his response and produce all documents responsive to this request in his possession, custody, or control.

Request for Production No. 7

Opposer requested as follows:

7. All documents and things supporting any contention by You that Opposer’s Products are dissimilar to Your Products.

Opposer cannot locate any documents responsive to this request and Applicant’s list of documents contains no statement that addresses this request. This request is reasonably calculated to lead to the discovery of admissible evidence as it goes to the heart of the second *DuPont* factors – similarity of goods. 476 F.2d at 1357. Applicant should be ordered to respond to this request and produce responsive documents or state that none exist.

Request for Production No. 9

9. All documents and things relating to how You initially became aware of Opposer’s Mark.

Opposer cannot locate any documents responsive to this request and Applicant’s list of documents contains no statement that addresses this request. This request is reasonably calculated to lead to the discovery of admissible evidence as it relates to whether Applicant intended there to be confusion between Applicant and Opposer’s mark, and thus the extent of likely confusion. 476 F.2d at 1357. Applicant should be ordered to respond to this request and produce responsive documents or state that none exist.

Request for Production No. 12

12. A copy of each opinion letter rendered to You concerning the availability for registration of the term RODEO REALTY.

Opposer cannot locate any documents responsive to this request and Applicant's list of documents contains no statement that addresses this request. This request is reasonably calculated to lead to the discovery of admissible evidence as it relates to whether Applicant selected his proposed mark believing there would be confusion between Applicant and Opposer's mark, and thus the extent of likely confusion. 476 F.2d at 1357. Applicant should be ordered to respond to this request and produce responsive documents or state that none exist.

Requests for Production Nos. 2-6, 8, 10-11

It appears to Opposer from the list of documents Applicant submitted that he is taking the position that there are no documents responsive to these requests in his possession, custody, or control. Bowen Decl. Ex. H. However, Applicant has not made clear what requests his statements apply to and for which requests he is unable to produce documents. As argued above, Applicant should be ordered to supplement his responses so that there is a clear response "for each item or category" requested by Opposer. Fed. R. Civ. P. R. 34(b)(2).

IV. REQUEST TO EXTEND SCHEDULE

Opposer respectfully requests that the Board extend the dates in this Opposition for 60 days from the date of the Board's ruling. Opposer has been unable to conduct any follow up discovery because of Applicant's failure to provide adequate responses and documents and to substantively respond to Opposer's interrogatories.

V. CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board grant Opposer's Motion to Compel, and order Applicant to 1) immediately prepare and serve initial disclosures on Opposer, 2) immediately respond to Opposer's interrogatories under oath, fully and completely, in writing, and without objections and 3) supplement his responses to Opposer's requests for production and produce additional documents responsive to the requests. Opposer

further requests that the board extend the dates in this proceeding, and particularly the close of discovery, for 60 days from the date of the Board's ruling.

Dated: April 11, 2014

Respectfully submitted,

SHELDON MAK & ANDERSON PC

By: William D. Bowen
William D. Bowen

Attorneys for Opposer Rodeo Realty, Inc.

Exhibit 2

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: July 5, 2014

Opposition No. 91207848

Rodeo Realty, Inc.

v.

William Ambrose Kennedy

Amy Matelski, Paralegal Specialist:

On April 11 2014, opposer filed a motion to compel applicant's initial disclosures. Applicant did not file a brief in response thereto within the time provided under Trademark Rule 2.127(a).

Opposer seeks an order directing applicant to serve initial disclosures on opposer, respond to opposer's interrogatories, and supplement its responses to opposer's request for production of documents.

The motion to compel is hereby granted as conceded. *See* Trademark Rule 2.127(a); TBMP § 502.04.

A party that fails to respond to interrogatories or document requests during the time allowed therefor, and that is unable to show that its failure was the result of excusable neglect, may be found, upon motion to compel filed by the propounding party, to have forfeited its right to object to the

discovery request on its merits. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000); TBMP § 403.03.

Accordingly, applicant is directed to serve, within **THIRTY DAYS** of the mailing date of this order, its initial disclosures, responses to opposer's first set of interrogatories and first request for production of documents. Applicant must respond in full and without objection on the merits thereof inasmuch as applicant failed either to timely respond or to object to said discovery requests. *Id.*

In the event that applicant fails to serve full responses as ordered herein, opposer's remedy may lie in a motion for sanctions, as appropriate. *See Trademark Rule 2.120(g)(1); TBMP § 411.05.*

Proceedings are resumed. Trial dates are reset as indicated below:

Expert Disclosures Due	9/2/2014
Discovery Closes	10/2/2014
Plaintiff's Pretrial Disclosures	11/16/2014
Plaintiff's 30-day Trial Period Ends	12/31/2014
Defendant's Pretrial Disclosures	1/15/2015
Defendant's 30-day Trial Period Ends	3/1/2015
Plaintiff's Rebuttal Disclosures	3/16/2015
Plaintiff's 15-day Rebuttal Period Ends	4/15/2015

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.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 4th day of November, 2014, a true copy of the foregoing **OPPOSER'S MOTION FOR SANCTIONS; DECLARATION IN SUPPORT** was served on the opposing party via email and via United States first class mail, postage prepaid, addressed as follows:

William Ambrose Kennedy
873 East Squantum Street
North Quincy, MA 02171

Email: billkenn@gmail.com

A handwritten signature in cursive script, appearing to read "A.M. Kindred", written over a horizontal line.

Alan M. Kindred