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

Proceeding	91207895
Party	Plaintiff Hokie Objective Onomastics Society LLC
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Date	12/29/2014
Attachments	HOOS - Reply in Support of Rule 56(d) Motion.pdf(834153 bytes )

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

HOKIE OBJECTIVE ONOMASTICS	)	
SOCIETY LLC,	)	
	)	
Opposer,	)	
v.	)	Opposition No. 91207895
	)	
VIRGINIA POLYTECHNIC INSTITUTE	)	Serial No. 85-531,923
AND STATE UNIVERSITY,	)	
	)	
Applicant.	)	

**OPPOSER’S REPLY IN SUPPORT OF ITS RULE 56(D) MOTION FOR  
DISCOVERY TO RESPOND TO  
APPLICANT’S MOTION FOR SUMMARY JUDGMENT**

“Summary judgment is a drastic remedy,” *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1323, 217 U.S.P.Q. 641 (Fed. Cir. 1983), and “is to be granted cautiously in order to preserve substantive rights,” *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626, 222 U.S.P.Q. 741 (Fed. Cir. 1984) (quoting *Exxon Corp. v. Nat’l Foodline Corp.*, 579 F.2d 1244, 1246, 198 U.S.P.Q. 407, 408 (C.C.P.A. 1978)). For this reason, ““the granting of summary judgment will be held to be error when discovery is not yet completed.”” *Metro. Life Ins. Co. v. Bancorp Servs., L.L.C.*, 527 F.3d 1330, 1337 n.3, 87 U.S.P.Q.2d 1140 (Fed. Cir. 2008) (quoting 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2741, at 413-16 & n.2 (3d ed. 1998)). In particular, ““summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.”” *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

Opposer accordingly has moved for discovery under Rule 56(d). Such a motion should be granted “when the party opposing the summary judgment motion has been unable to obtain responses to his discovery requests’ and the discovery sought would be essential to opposing summary judgment and ‘relevant to the issues presented by the motion for summary judgment.’” *Baron Servs. v. Media Weather Innovations LLC*, 717 F.3d 907, 912, 106 U.S.P.Q.2d 1686 (Fed. Cir. 2013) (quoting *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988) (applying Eleventh Circuit law).

**1. Applicant Cannot Make False and Prejudicial Assertions and Then Claim That Those Assertions are “Not Relevant” and Therefore Immune to Challenge.**

Here, the “issues presented by the motion for summary judgment” include several factual assertions about Applicant’s alleged historical use of the HOKIE mark since “the late 1890s.” (Hincker Decl. ¶ 3; *see* Mot. Summ J. at 4.) Applicant now states that these assertions, which Applicant itself included in its Motion for Summary Judgment and in the attached Declaration of Mr. Hincker, are “simply not relevant.” (Applicant’s Opp’n at 2-3.) Applicant cannot have it both ways. These assertions did not find their way into Applicant’s Motion for Summary Judgment by accident or random chance. Applicant intentionally included these assertions in its Motion for the purpose of persuading the Board that Applicant’s position is correct and that its Motion should be granted. These assertions thus are “issues presented by the motion for summary judgment.” *See Baron Servs.*, 717 F.3d at 912. As detailed in Opposer’s Rule 56(d) Motion and in the accompanying Affidavit, Opposer cannot respond to these assertions without discovery. (*See* Opposer’s Rule 56(d) Mot. at 2-3.) The discovery Opposer seeks is narrowly tailored to address only these issues. (*See id.* at 3-4.)

Applicant should not be permitted to blindside Opposer by making false and prejudicial statements of fact — while knowing that Opposer cannot challenge those statements — and

then claim that those same statements are somehow “not relevant” and so should be immune to challenge. Applicant’s assertions are “issues presented by the motion for summary judgment,” *see Baron Servs.*, 717 F.3d at 912, and so require that Opposer be permitted to conduct discovery under Rule 56(d).

**2. Applicant Asserts that Opposer Had “Six Months” to Challenge Applicant’s Discovery Responses, But the Actual Period Was Fifteen Days.**

Finally, it is important to correct a misstatement in Applicant’s Opposition Memorandum. Applicant states that in response to Opposer’s second set of discovery requests, “Virginia Tech served its answers and objections on **April 21, 2014, six months** before it moved for summary judgment.” (Applicant’s Opp’n at 4 (emphasis in original).) However, this is incorrect. While it is true that the signature of Applicant’s counsel on page 22 of Applicant’s answers and objections is dated April 21, 2014 (*see* Ex. 1 to Finch Decl. at 22), the certificate of service on page 24 of Applicant’s answers and objections is dated September 19, 2014 (*see id.* at 24). In other words, it would seem that Applicant finished preparing its answers and objections in April and then “sat on” them for almost five months before deciding to send them to Opposer shortly before filing its Motion for Summary Judgment.

Furthermore, when Applicant sent its answers and objections to Opposer, Applicant did not include any responsive documents. Rather, Applicant stated, “[w]e will serve responsive documents within the next two weeks.” (*See* Ex. 1.) Seventeen days later, on October 6, 2014, Applicant sent the responsive documents to Opposer. (*See* Ex. 2.) Applicant then served its Motion for Summary Judgment on October 21, 2014. Applicant’s repeated assertions in its Opposition (*see* Opp’n at 4, 5) that “six months” passed between the service of its answers and objections and the filing of its Motion for Summary Judgment therefore is incorrect. Instead of “six months,” only fifteen days passed between Applicant’s service of its responsive documents on October 6 and the filing of its Motion for Summary Judgment on October 21. In this

context, it is perfectly understandable and reasonable that “Opposer was just about to begin discussion of these objections with Applicant, preparatory to the possible filing of a Motion to Compel, when Applicant filed its Motion and these proceedings were accordingly suspended.” (Opposer’s Rule 56(d) Mot. at 3.)

For the foregoing reasons, Opposer requests that the Board enter an order pursuant to Federal Rule of Civil Procedure 56(d) permitting Opposer to conduct the discovery indicated in Opposer’s Rule 56(d) motion and allotting a reasonable time within which to do so, so that Opposer then will be able to respond to Applicant’s Motion for Summary Judgment.

HOKIE OBJECTIVE ONOMASTICS SOCIETY LLC

By:



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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014, I served the foregoing by first-class mail upon the following, with a courtesy copy via e-mail:

Norm J. Rich, Esq.; Robert S. Weisbein, Esq.  
FOLEY & LARDNER LLP  
90 Park Avenue  
New York, NY 10016



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# EXHIBIT 1 TO APPLICANT'S REPLY IN SUPPORT OF RULE 56(D) MOTION

**From:** "RWeisbein@foley.com" <RWeisbein@foley.com>  
**Subject:** Virginia Tech's Responses to HOOS Second Set of Discovery Requests  
**Date:** September 19, 2014 3:20:11 PM EDT  
**To:** "keith@creekmorelaw.com" <keith@creekmorelaw.com>  
**Cc:** "NRich@foley.com" <NRich@foley.com>, "WWalker@foley.com" <WWalker@foley.com>

2 Attachments, 1.1 MB

Keith: Attached are Virginia Tech's written responses to HOOS's Second Set of Discovery Requests. We will serve responsive documents within the next two weeks.

Regards.

Rob

**Robert S. Weisbein**

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[APPLICANT'S RESPONSES TO OPPOSER'S SECOND DISCOVERY REQUESTS.PDF \(1 MB\)](#)



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CLIENT/MATTER NUMBER  
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October 6, 2014

**VIA FEDERAL EXPRESS DELIVERY**

Keith Finch, Esq.  
The Creekmore Law Firm PC  
318 North Main Street  
Blacksburg, VA 24060

Re: *Hokie Objective Onomastics Society LLC v.  
Virginia Polytechnic Institute and State University*  
Opposition No. 91207895

Dear Keith:

Enclosed is a disc containing PDF files of the various Virginia Tech documents responsive to Opposer's Second Discovery Requests.

Sincerely yours,

A handwritten signature in blue ink, appearing to be "RSW", written over a blue ink scribble.

Robert S. Weisbein

RSW:wsw  
Enclosure

cc: Virginia Polytechnic Institute and State University