

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

WINTER

Mailed: November 18, 2014

Opposition No. 91213057

Hybrid Athletics, LLC

v.

Hylete LLC

**Before Kuhlke, Lykos, and Hightower,
Administrative Trademark Judges.**

By the Board:

By way of background, on May 21, 2014, Opposer filed a motion to compel additional and complete responses to its interrogatories and document requests served on March 4, 2014. Specifically, Opposer requested that Applicant be ordered to provide withheld, responsive confidential information and documents because the Board's standard protective order is applicable to this proceeding. As required under Trademark Rule 2.120(e), Opposer provided a copy of the served discovery, a copy of Applicant's responses thereto, and a showing that Opposer had made a good faith effort to resolve the discovery dispute before filing the motion to compel. Applicant did not respond to Opposer's motion to compel. In view thereof, in its order mailed July 4, 2014, the Board granted Opposer's motion as conceded under Trademark Rule 2.127(a) and allowed Applicant until thirty days from the

mailing date of that order to serve on Opposer's counsel complete responses without objection¹ to Opposer's discovery.

This case now comes up for consideration of Opposer's fully briefed motion (filed August 13, 2014) for sanctions under Trademark Rule 2.120(g), by which Opposer requests that the Board sustain the opposition in view of Applicant's failure to respond to the Board's July 4, 2014 order. In support of its motion, Opposer states that Applicant failed to serve any responses by the deadline set forth in the Board's order and has yet to serve upon Opposer any responses in accordance with the Board's order.

In response, Applicant argues that Opposer has failed to respond to Applicant's settlement overtures and that Applicant has sought to contact Opposer on several occasions to no avail. Because "it is clear that Opposer refuses to participate in any sort of settlement discussion" (response at 1), Applicant requests that the Board require a telephone conference with the parties so that Applicant can better understand Opposer's discovery requests and provide more clear and complete responses.

In its reply, Opposer asserts that Applicant has failed to show excusable neglect for its failure to timely respond to the Board's order. In particular, Opposer points out that Applicant's settlement offer was sent after the

¹ We note that Applicant had responded to some of Opposer's discovery requests. However, when the Board grants a motion to compel that is uncontested, as Opposer's was in this case, the Board generally will order any remaining discovery responses to be provided without objection. *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1554 (TTAB 2000).

Board's compel order, that Opposer rejected the settlement offer, and that, in any case, settlement discussions do not justify a party's inaction or delay in meeting a deadline.

Based on the record before us, we agree with Opposer that discovery sanctions in this case are warranted, but not to the extreme of entry of judgment. For instance, although Applicant has inappropriately withheld responses based on assertions of various privileges, such conduct appears to be the result of Applicant's misunderstanding of the function of the Board's standardized protective agreement, which is applicable to this proceeding and provides guidelines for parties to protect confidential information and materials. Nonetheless, there is no requirement for a party to engage in settlement discussions; and Applicant "bears responsibility for following the rules and Board requirements, including the schedule set by the Board." *Patagonia, Inc. v. Azzolini*, 109 USPQ2d 1859, 1862 (TTAB 2014) (default judgment entered against *pro se* applicant after repeatedly failing to participate in discovery conference). Furthermore, even if the parties had indeed been actively engaged in settlement discussions, Applicant's failure to timely respond to the Board's order does not constitute excusable neglect. *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998) ("it is well established that the mere existence of settlement negotiations alone does not justify a party's inaction or delay"). Clearly, Applicant should have, but did not, respond fully or timely to the Board's

order regarding discovery. In view thereof, Opposer's motion for discovery sanctions is granted, but only to the following extent.

- (1) To the extent that Applicant has to date failed to respond fully to Opposer's discovery requests, we impose the estoppel sanction. Specifically, Applicant is advised that **it cannot submit at trial or rely on as evidence at trial, any information or documents that were the subject of Opposer's discovery requests, but which were not served on Opposer prior to the filing of Opposer's motion for sanctions.** See Fed. R. Civ. P. 37(c)(1). See also *National Aeronautics and Space Administration v. Bully Hill Vineyards Inc.*, 3 USPQ2d 1671, 1672 n.3 (TTAB 1987) (opposer's exhibits identified in applicant's brief as within the scope of documents requested by applicant but not produced by opposer during discovery, excluded from consideration); and TBMP § 527.01(e) (2014).
- (2) Applicant is **ORDERED** to review TBMP § 414 (2014), which provides detailed guidelines regarding the scope of discovery in Board proceedings. That section of the TBMP may be accessed at the following URL: http://www.uspto.gov/trademarks/process/appeal/Chapter_400_2014.PDF.
- (3) Applicant is **ORDERED** to review the Board's protective order, which may be accessed at the following URL:
<http://www.uspto.gov/trademarks/process/appeal/guidelines/stndagmnt.jsp>.

Applicant is also reminded that parties have a continuous duty to supplement discovery responses “in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1)(A). *See, e.g., Hunter Indus., Inc. v. The Toro Company*, 110 USPQ2d 1651 (TTAB 2014); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc. dba Watermark Cruises*, 107 USPQ2d 1750 (TTAB 2013); and TBMP § 408.03 (2014). Therefore, should Applicant find information or materials that are responsive to Opposer’s previously served discovery, Applicant should promptly supplement its responses.²

Proceeding Resumed: Trial Dates Reset

This proceeding is resumed. Trial dates are reset³ as shown in the following schedule:⁴

² To be clear, (i) information and materials properly served on Opposer prior to its filing of the motion to compel and (ii) supplementary responses to said information and materials are not subject to the estoppel sanction. Only information and materials provided to Opposer following the Board’s July 4, 2014 order and this order, which were previously and inappropriately withheld, are subject to the estoppel sanction.

³ It is noted that the trial schedule set forth in the Board’s July 4, 2014, order was incorrect insofar as the close of the discovery period was reset to close on January 1, 2015 (almost six months from date of resumption), when there was only one month remaining in the discovery period at the time the motion to compel was filed on May 21, 2014. In view of this scheduling error, the discovery period shall be reset in this order to include only the discovery period remaining at the time the motion to compel was filed, with time allowed for service of expert disclosures, if any.

⁴ In the event that Applicant responds to this order by serving additional information and materials on Opposer’s counsel, should Opposer believe that it

Expert Disclosures Due	12/3/2014
Discovery Closes	1/2/2015
Plaintiff's Pretrial Disclosures Due	2/16/2015
Plaintiff's 30-day Trial Period Ends	4/2/2015
Defendant's Pretrial Disclosures Due	4/17/2015
Defendant's 30-day Trial Period Ends	6/1/2015
Plaintiff's Rebuttal Disclosures Due	6/16/2015
Plaintiff's 15-day Rebuttal Period Ends	7/16/2015

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. *See* Trademark Rule 2.125, 37 C.F.R. § 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. § 2.129.



needs additional time for follow-up discovery, it may file a motion for a unilateral extension of the discovery period.