

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

BUO

Mailed: July 1, 2015

Opposition No. 91213527

*Omaha Steaks International, Inc.*

*v.*

*Greater Omaha Packing Co., Inc.*

**Benjamin U. Okeke, Interlocutory Attorney:**

***Expert Disclosure***

Inasmuch as Opposer, on June 11, 2015, disclosed plans to use expert testimony, proceedings are suspended, *nunc pro tunc*, pending the parties' compliance with Fed. R. Civ. P. 26(a)(2) and the exchange of discovery limited to planned expert testimony, including that of any rebuttal expert. Trademark Rule 2.120(a)(2).<sup>1</sup>

To the extent that the use of experts did not form part of the parties' discovery conference discussions, the parties shall promptly confer on the arrangements for the completion of disclosures relating to planned expert testimony, including any testimony by a rebuttal expert, and for exchanging and responding to new discovery

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<sup>1</sup> Trademark Rule 2.120(a)(2) states, in part: Upon disclosure by any party of plans to use expert testimony, whether before or after the deadline for disclosing expert testimony, the Board may issue an order regarding expert discovery and/or set a deadline for any other party to disclose plans to use a rebuttal expert.

requests, if any, related to the identified expert(s). Such discussions should also encompass stipulations regarding the introduction into evidence of the testimony of expert witnesses; for example, whether, in lieu of testimony, the parties introduce the expert report(s), whether the expert testimony may be provided by affidavit or declaration,<sup>2</sup> or whether the witnesses will present testimony and discuss exhibits in testimony depositions.

Federal Rule 26(a)(2) provides that a party planning to use an expert solely to contradict or rebut an adverse party's expert must disclose such plans within thirty days of the adverse party's prior disclosure. However, Trademark Rule 2.120(a)(2) provides that the Board may set a deadline for disclosing plans to use a rebuttal expert. Accordingly, if Applicant has not already complied with the requirements of the federal rule, it is allowed until **TWENTY DAYS** from the date of this order to disclose any planned rebuttal expert testimony. Federal Rule 26(a)(2) also details what information and materials must be provided for a party to satisfy its disclosure obligation with respect to experts. *See* "Miscellaneous Changes to Trademark Trial and Appeal Board Rules," 72 Fed. Reg. 42242, 42246 (Aug. 1, 2007).

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<sup>2</sup> Parties that stipulate that the testimony of a witness may be introduced by affidavit or declaration may also reserve the right to conduct in-person cross-examination, if necessary.

*Fed. R. Civ. P. 26(a)(2) Disclosure of Expert Testimony.*

- (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
- (B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
  - (ii) the facts or data considered by the witness in forming them;
  - (iii) any exhibits that will be used to summarize or support them;
  - (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
  - (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
  - (vi) a statement of the compensation to be paid for the study and testimony in the case.
- (C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
  - (ii) a summary of the facts and opinions to which the witness is expected to testify.
- (D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

The parties must supplement these disclosures when required under Rule 26(e).

***Suspension***

As mentioned above, proceedings are **SUSPENDED** pending the completion of expert discovery. Upon the completion of expert discovery and the service of information required by Federal Rule 26(a)(2), the parties must inform the Board so that proceedings may be resumed. Remaining discovery, disclosure, and trial dates will be reset upon resumption of the proceeding.