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

Proceeding	91213597
Party	Defendant Tigercat International Inc.
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Attachments	Applicant Motion for Leave to Disclose and Rely on Rebuttal Expert Report.PDF(24843 bytes)

Applicant asked Opposer if Opposer would consent to Applicant seeking leave to file a sur-rebuttal report and providing a sur-rebuttal report commenting solely upon Opposer's new rebuttal survey by Mr. Poret, data resulting from the survey, and Mr. Poret's opinion. See Exhibit 1. Applicant has retained an expert other than Mr. Berger to provide the sur-rebuttal report, if allowed, so that the sur-rebuttal report directed to the Poret survey does not offer any correction or amplifications to the report or survey of Mr. Berger. Applicant's sur-rebuttal report will not include any new evidence nor a new survey. Opposer refused to consent to Applicant being permitted to offer an expert critique of their rebuttal survey expert's work. See Exhibit 2. Accordingly, Applicant is compelled to bring this motion.

The Board should permit Applicant's expert to critique Mr. Poret's rebuttal opinion and survey so that it understands all relevant perspectives on the dueling survey formats and opinions to be offered by the parties. Opposer has not fully justified its choice of the survey design at issue, and appears to have based it on allegations in the Notice of Opposition without regard to the facts as they have been developed in the case. Applicant's expert, if allowed to address the rebuttal report, will explain how the Ever-Ready design chosen by Opposer's expert is inappropriate for the facts of this case and its methodology, particularly the use of the control cell and the sample size, is flawed. Denying Applicant the opportunity to present expert evidence in rebuttal of Opposer's new expert survey produced after the close of the time for disclosure of expert reports would prejudice Applicant and undermine any decision issued by the Board because it would only have half the story on Opposer's survey. Opposer had its opportunity to provide a critique to Applicant's expert survey and a rebuttal survey. Applicant should be allowed to provide an expert critique of Opposer's expert's survey and Applicant has timely sought to do so. Denying Applicant the opportunity to provide this timely, relevant expert testimony and critique will unfairly prejudice Applicant and diminish the quality of the analysis

of the surveys in this case, and the ultimate issue of likelihood of confusion. Granting the instant Motion to permit this limited sur-rebuttal expert report would benefit the Board in its ability to make a just determination of the merits of this case with no cognizable prejudice to Opposer.

The Board may set the periods of time for rebuttal expert disclosures pursuant to 37 CFR § 2.120(a)(2). Mr. Poret chose a very different survey format than that used by Mr. Berger. In this case, Mr. Berger performed a survey using a *Squirt* methodology. Mr. Poret conducted his own survey utilizing an *Ever-Ready* format. Tigercat should be allowed to provide an expert opinion regarding Mr. Poret's survey design solely to rebut and critique the methodology and execution of the survey conducted by Mr. Poret as well as his analysis of the data resulting from the survey.

Applicant has offered to provide Opposer Applicant's sur-rebuttal expert report within thirty (30) days of the service of Mr. Poret's report, so as not to delay the proceeding. The parties have agreed to provide and allow for the deposition of Applicant's sur-rebuttal expert, if the Board grants Applicant leave for its sur-rebuttal expert report. The parties have also agreed to continue with deposition discovery in this proceeding in connection with depositions unrelated to the instant issue. Pretrial disclosures by Opposer are not yet due. The trial period has not yet opened for either party, and Opposer is not prejudiced by allowing an expert report directed solely to Opposer's rebuttal survey and expert report.

An essentially identical issue was presented and decided recently in *Newegg Inc. v. Schoolhouse Outfitters, LLC*, Opposition No. 91214178 (March 30, 2016) (precedential) (panel permitted a sur-rebuttal expert report concerning a previously undisclosed survey and report, reasoning that such sur-rebuttal report was warranted under the circumstances where there were

two conflicting expert surveys using different survey methods). For the reasons set forth above, Tigercat respectfully requests that its motion be granted, that the sur-rebuttal expert report be allowed.

Respectfully submitted,

Date: May 4, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the attached Applicant's Memorandum in Support of its Motion For Leave to Allow a Rebuttal Expert Report to Opposer's Survey Expert Report was served on counsel for the Opposer on the date listed below via email:

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Dated: May 4, 2016

By: s/John F. Metzger/
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