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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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Date	08/25/2014
Attachments	APPLICANT'S MOTION TO COMPEL-MOTION TO STAY (M1280228).pdf(1640627 bytes)

likelihood of confusion, and dilution. Caterpillar in its Notice cited seventeen (17) registrations of trademarks as the basis for its opposition. The registrations relied on include registrations for the mark CATERPILLAR and the mark CAT, all for use on a wide variety of goods and services. Tigercat timely filed its Answer to the Notice (Doc. 4) and denied the salient allegations in the Notice.

Tigercat served its Initial Disclosures on Caterpillar on February 28, 2014. Tigercat served its First Set of Interrogatories (Nos. 1-19) on Caterpillar on March 17, 2014, and Caterpillar served its responses and objections on May 15¹. Tigercat served its First Requests for Production (Nos. 1-29) on Caterpillar on March 17, 2014, and Caterpillar served its responses and objections on May 15². On March 25 and May 15, 2014, Caterpillar produced documents, Bates range CAT000001-010930, comprising numerous documents, many non-responsive and outdated and all without identifying what documents were supposedly responsive to what requests.

On June 23, counsel for Tigercat wrote to counsel for Caterpillar detailing specific inadequacies in the May 15 interrogatory responses and requesting supplemental responses by July 14³. Caterpillar failed to fully respond to Interrogatory Nos. 1, 2, 3, 8, 9, 10, 11, 12, 13, 16 and 17, ten of the nineteen interrogatories, as detailed in Tigercat's June 23 letter. In that letter, Tigercat also sought clarification with respect to responses to Interrogatory No. 15.

On June 26, counsel for Tigercat wrote to counsel for Caterpillar detailing specific inadequacies in the March 25 and May 15 request for production responses and production by Caterpillar, and requesting that Caterpillar advise by July 3 whether Caterpillar would supplement

¹ Copies of Tigercat's First Set of Interrogatories and Caterpillar's responses are attached as Exhibits A and B to the Bell declaration.

² Copies of Tigercat's First Requests for Production and Caterpillar's responses are attached as Exhibits C and D to the Bell declaration.

³ A copy of that letter is attached as Exhibit E to the Bell Declaration.

its responses and produce the responsive documents by July 11⁴. Caterpillar produced no documents responsive to Requests for Production Nos. 14, 15, 20, 21, 23, 24, 25, 28, and 29, as detailed in Tigercat's June 26 letter. Caterpillar's produced limited documents in connection to Requests for Production Nos. 17, 18 19, 22, 26 and 28⁵. In the June 26 letter, Tigercat also sought clarification with respect to the response to Request No. 16.

As of the date of this motion, Caterpillar has not supplemented its responses to any of the discovery requests in issue as identified in the letters of June 23 and June 26.

A. Tigercat's Good Faith Efforts to Resolve the Discovery Dispute

On July 29, counsel for Tigercat sought to schedule a meet and confer telephone conference to discuss the outstanding discovery issues.⁶

What was supposed to be a meet and confer telephone conference was held on July 31 with counsel for Caterpillar. However, during the call, counsel for Caterpillar was not prepared to discuss the discovery dispute and provided no further information regarding any of Caterpillar's responses to the outstanding discovery issues, and represented that he could not say what would be responded to or produced, and when, or what would not be. Counsel for Caterpillar requested until August 11 to respond and the parties agreed to have a second call on August 11 during which call counsel Caterpillar was to be in a position to discuss the discovery dispute. On August 1, counsel for Tigercat wrote to counsel to Caterpillar confirming the details of the July 31 meet and confer conference and the date and time for the conference of August 11.⁷

On the evening of August 8, a Friday, counsel for Caterpillar wrote to counsel for Tigercat

⁴ A copy of that letter is attached as Exhibit F to the Bell Declaration

⁵ Caterpillar produced only publicly available examples of oppositions and federal decisions for RFP Nos. 17 and 18, a blank sample license agreement for RFP No. 19, publicly available documents for RFP No. 22 and produced documents for RFP Nos. 26 and 28, but no market research/consumer studies or surveys.

⁶ A copy of that e-mail is attached as Exhibit G to Bell declaration.

⁷ A copy of that e-mail is attached as Exhibit H to the Bell declaration.

delaying the August 11 call, and for the first time placing conditions and limitations on Tigercat's scope of discovery prior to Caterpillar supplementing its responses.⁸

On August 11, counsel for Tigercat wrote to counsel for Caterpillar expressing disappointment at the further delay in resolving the discovery dispute, and asking for a response by August 13 with document production by August 20.⁹

On August 13, counsel for Caterpillar responded reiterating his demand for limitations on the scope of Tigercat's discovery requests with respect to goods, industries and fields without responding to the specific issues raised by Tigercat as to the deficiencies in Caterpillar's responses and production.¹⁰

On August 15, counsel for Tigercat responded pointing out the factual inaccuracies in Caterpillar's statement regarding the goods of Tigercat's pending application, and setting out the scope of permitted discovery based on the registrations Caterpillar pled in the Notice of Opposition. Counsel for Tigercat asked for a simple yes or no answer with respect to whether Caterpillar would be providing supplemental responses and document production by August 18.¹¹

On August 18, counsel for Caterpillar responded reiterating his demand that Tigercat limit the scope of its discovery requests with respect to industry and field of use of Tigercat's goods without responding to any substantive outstanding discovery issues.¹²

On August 19, counsel for Tigercat wrote to counsel for Caterpillar again pointing out the scope of permitted discovery based on the pleadings and asked again for a point-by-point response to the outstanding discovery issues by August 20, with supplemental document production by

⁸ A copy of that letter is attached as Exhibit I to the Bell declaration.

⁹ A copy of that letter is attached as Exhibit J to the Bell declaration.

¹⁰ A copy of that letter is attached as Exhibit K to the Bell declaration.

¹¹ A copy of that letter is attached as Exhibit L to the Bell declaration.

¹² A copy of that letter is attached as Exhibit M to the Bell declaration

August 25.¹³

Despite Tigercat's good faith efforts to resolve the discovery dispute with Caterpillar, Caterpillar has refused to respond to the issues raised in Tigercat's letters of June 23 and June 26, 2014 and has come unprepared to the agreed meet and confer and has otherwise delayed and failed to provide either adequate responses or appropriate grounds for its failure to provide adequate answers to interrogatories and production of documents and things. Tigercat accordingly brings this motion to compel.

II. CATERPILLAR'S FAILURE TO RESPOND TO PROPER DISCOVERY WARRANTS GRANT OF THIS MOTION TO COMPEL

Caterpillar has sought to avoid its discovery obligations by improperly seeking to limit Tigercat's discovery. A party is entitled to obtain "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed.R.Civ.P. 26(b)(1); *see also* TBMP §402.01. "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* The scope of discovery in an opposition proceeding is not subject to dispute: it is based on what has been pled in the notice of opposition and what is in the application which is the subject of the opposition. *Varian Associates v. Fairfield-Noble Corp.*, 188 USPQ 581, 583 (TTAB 1975), *see also* TBMP §402. Caterpillar's Notice of Opposition sets forth as grounds Caterpillar's alleged priority, likelihood of confusion, and dilution. In its Notice, Caterpillar cited seventeen registrations of trademarks as the basis for its opposition. The registrations relied on include registrations for the marks CATERPILLAR and CAT, for use on a wide variety of goods and services. In its pending application, Tigercat set forth its description of goods as "off road industrial vehicles, namely, skidders and purpose-built prime

¹³ A copy of that letter is attached as Exhibit N to the Bell declaration.

movers, carrying aerial devices, mulchers and sprayers". The application, filed on an intent-to-use basis, was subsequently amended prior to publication to an in-use basis. Caterpillar needs no additional information to determine the relevant scope of discovery, and Tigercat is not required to limit the scope of discovery to exclude matters raised in the pleadings and its application.

Tigercat is entitled to discovery as to goods and services in each registration on which Caterpillar relies. *The Phillies v. Philadelphia Consolidated Holding Corp.*, 107 USPQ2d 2149 (TTAB 2013). Tigercat is entitled to discovery as to the goods and services Caterpillar has not sold and is not selling under the marks on which it relies, as this bears on the validity of the registrations and accuracy of declarations filed in support of such registrations. *J. B. Williams Co. v. Pepsodent G.m.b.H.*, 188 USPQ 577, 579 (TTAB 1975). Caterpillar improperly seeks to limit Tigercat's discovery with unacceptable conditions and has stated Caterpillar will not further respond to Tigercat's requests unless its improper limits are accepted.

As of the date of this motion, Caterpillar has not provided responsive answers nor documents to interrogatories and requests for production directed to Opposer's Marks, Goods and Services, actual confusion, third party use of the term "CAT" and Opposer's knowledge of Applicant and Applicant's Mark; areas of discovery expressly permitted under the TBMP¹⁴ The specific discovery requests, Caterpillar's responses and the deficiencies with respect to each are set out below.

A. Caterpillar's Non-Responsive Answers and Lack of Production of Documents Directed to Opposer's Marks, Goods and Services.

Interrogatory Nos. 1, 2, 3, 8, 9, 10, and 11, and Requests for Production Nos. 18, 19, 20, 21, 24, 25, 26, 27, 28 and 29, *set out below*, are directed to Opposer's Marks and Goods and

¹⁴ TBMP §§402, 405.02, 406.02, 414(9), 414 Note 17, *See also Neville Chemical Co. v. Lubrizol Corp.*, 183 USPQ 184, 187 (TTAB 1974).

Services. Caterpillar selected the registrations it relies on in its Notice, each of which lists numerous goods and services. The Interrogatories specifically request information for each of the goods and services identified in each registration Caterpillar relies on. These include CAT and CATERPILLAR Marks. Caterpillar must respond for each good and service and each registration. *See The Phillies v. Philadelphia Consolidated Holding Corp.* 107 USPQ2d 2149 (TTAB 2013), *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 USPQ2d 1671, 1675 (TTAB 1988). Caterpillar has not answered the Interrogatories nor produced responsive documents and Caterpillar's objections are not well taken.

Caterpillar's attempt to limit discovery to specific fields of use is improper¹⁵. The goods and services in the registrations Caterpillar relies on are not limited to the forestry and vegetation management fields. Caterpillar must answer the interrogatory and produce requested documents without limitation to the forestry and vegetation management fields. *The Phillies v. Philadelphia Consolidated Holding Corp.* 107 USPQ2d 2149 (TTAB 2013).

Interrogatory No. 2 is directed to Opposer's Marks, as relied on its Notice and Opposer's equipment, specifically, the percentage of Opposer's equipment sold under Opposer's Marks which is yellow. Caterpillar's objection that the term "equipment" is unclear is unfounded because "equipment" has a common dictionary definition, and is limited only by the goods identified in the registrations relied on in its Notice. The determination of a percentage is a simple numerical calculation.

Interrogatory No. 3 is directed to Opposer's Goods and Services, as relied on in its Notice. If Caterpillar does not use feline imagery in connection with the sale and offering for sale of Opposer's Goods, Caterpillar must state so. Neither Opposer's other brands, not listed in the

¹⁵ Caterpillar has sought to limit its responses and production to Interrogatory No. 1 and Request Nos. 18, 19, 20, and 21 on that basis.

Notice nor third party uses of “BIG CAT” are relevant nor responsive. Caterpillar’s objection that “feline imagery” is vague, ambiguous and indefinite is baseless. Terms used in interrogatories may be given their common or dictionary definitions and may be defined using the context of the interrogatories and claims themselves. *See Adobe Sys. Inc. v. Christenson*, no. 10-422, 2011 WL 540278, at *4 (D. Nev. Feb 7, 2011) . The terms “feline” and “imagery” are common terms readily understood. Caterpillar must provide an answer as to what, if any, feline imagery it uses with the registrations of the marks it relies on.

Interrogatory No. 8 is directed to purchasers of Opposer’s Good and Services and is expressly permitted by TBMP §414(3).

Interrogatory Nos. 9, 10, and 11 and Request for Production Nos. 24, 25, 26, 27, 28 and 29 are directed to market research, consumer studies and style guides.¹⁶ If Caterpillar has no market research or consumer studies or style guides directed to the subject matter identified in the interrogatory, Caterpillar must say so. *Mack Trucks, Inc. v. Monroe Auto Equipment Co.*, 181 USPQ 286, 287 (TTAB 1974).

INTERROGATORY NO. 1:

Identify the person(s) most knowledgeable about: (a) the use of Opposer’s Marks on each and every one of Opposer’s Goods and Services; and (b) the advertising, promotion and sale of Opposer’s Goods and Services under Opposer’s Marks. (c) the creation of all style guides for use of Opposer’s Marks.

RESPONSE TO INTERROGATORY NO. 1:

Opposer objects to this request to the extent that it seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure, the Trademark Rules of Practice, and/or the TBMP by requesting that Opposer identify employees beyond those who have relevant information upon which Opposer may rely in this proceeding. Opposer further objects to this request as the term “style guides” is vague, ambiguous and indefinite because it has not been

¹⁶ Caterpillar’s objection in part to Request No. 29 that “style guide” for use of Opposer’s Marks is vague, ambiguous and indefinite because it has not been defined is unfounded given the common usage of the term with respect to corporate trademarks and brands.

defined. Subject to these objections and the general objections above, Opposer identifies Ed Stembidge, Product Identity Manager at Caterpillar, Inc., 100 NE Adams Street, Peoria, IL 61629-9240 as the person most knowledgeable about subpart (a) and (c) and Ed Stembidge and Michael Duncan, Industry Manager, Caterpillar Forest Products, 100 NE Adams Street, Peoria, IL 61629-9240 as the person most knowledgeable about subpart (b).

INTERROGATORY NO. 2:

Identify what percentage of Opposer's equipment sold under Opposer's Marks are yellow.

RESPONSE TO INTERROGATORY NO. 2:

Opposer objects to this request to as irrelevant to this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this interrogatory as overly broad and unduly burdensome to the extent that it seeks sales information outside the United States. Opposer objects to this interrogatory as overly broad and unduly burdensome to the extent that it requests information regarding the color of all of Opposer's equipment sold under Opposer's Marks. Opposer also manufactures several brands of products which are not yellow. Subject to these objections, and the general objections above, Opposer responds that its CAT brand predominantly features a yellow and black color scheme, including machinery, parts and accessories, and retail merchandise. Caterpillar refers to its yellow color scheme as "Caterpillar Yellow" or "Yellow Blood," and claims trade dress protection in the "Caterpillar Yellow" color. In terms of an actual percentage, Opposer cannot quantify the percentage of Opposer's equipment sold under Opposer's Marks that is yellow.

INTERROGATORY NO. 3:

Identify all feline imagery Opposer uses in connection with the sale and offering for sale of Opposer's Goods.

RESPONSE TO INTERROGATORY NO. 3:

Opposer objects to this interrogatory to the extent it covers information that is irrelevant to this proceeding. Opposer further objects to this interrogatory as overly broad and unduly burdensome to the extent that it seeks sales information outside the United States. Moreover, Opposer objects to the phrase "feline imagery" as vague, ambiguous, and indefinite because it has not been defined. Opposer additionally objects to this interrogatory as overly broad and unduly burdensome to the extent that it requests information spanning the life of Opposer's products. Subject to these objections and the general objections above, Opposer has several brands, including CAT, CAT FINANCIAL, CAT REMAN, CAT RENTAL STORE, ANCHOR COUPLING, ASIATRAK, FG WILSON, HALCO, HINDUSTAN, HYPAC, MAK, MWM, OLYMPIAN, PERKINS, PRENTICE, PROGRESS RAIL, PYROBAN, SEM, ZHENGZHOU, SIWEI, SOLAR TURBINES, TURBOMACH, TURNER POWERTRAIN SYSTEMS and UNIT

RIG. The CAT brand is the cornerstone of the Caterpillar brand portfolio, representing products and services made by Caterpillar. In 1949, “Cat” began appearing on machine trade dress. Over time, the level of familiarity with the CAT brand made it possible to rely on it as a primary public-facing brand name. Thus, “Cat” and development of the CAT brand were not based on the use of feline imagery and have not relied upon feline imagery in conjunction with the sale or offer for sale of Opposer’s Goods. Nevertheless, Caterpillar is commonly referred to as “Big Cat” by third-parties and in media references. Significantly (*sic*), various media outlets have made widespread, unsolicited use of the “Big Cat” nickname to refer to Caterpillar and/or its products, from prominent print publications like the Washington Post, Los Angeles Times, and Chicago Tribune, to television and radio programs such as CNBC News. And because Caterpillar is regarded as a bellweather with respect to the economy, it is commonly referred to as “Big Cat” by the media and others in the financial world. A tiger is obviously a type of “Big Cat.” A representative summary of the unsolicited media uses of the “Big Cat” nickname—which stretches back over twenty years—appears in the chart below. (*See Exhibit B pages 5-7 of Bell Declaration.*)

INTERROGATORY NO. 8:

Identify five (5) representative purchasers for each of Opposer’s Goods and Services sold under Opposer’s Marks during the last five (5) years.

RESPONSE TO INTERROGATORY NO. 8:

Opposer objects to the interrogatory as overly broad and unduly burdensome to the extent that it requests identification of purchasers for “each of Opposer’s Goods and Services.” Opposer objects to this interrogatory as overly broad and unduly burdensome to the extent that it seeks information outside the United States. Subject to these objections and the general objections above, for at least the last five years, each of Opposer’s Goods and Services have been sold to individuals, businesses, and governments through the www.cat.com, www.parts.cat.com, www.catrentalstore.com, catused.cat.com, www.shopcaterpillar.com websites, catalogs containing CAT goods and services, and Opposer’s independently owned and operated network of Caterpillar dealers. From there the independent dealers sell the goods and services to customers.

INTERROGATORY NO. 9:

Identify all market research and consumer studies done by or on behalf of Opposer or any third party related to Opposer’s Marks since 2000.

RESPONSE TO INTERROGATORY NO. 9:

Opposer objects to this Request to the extent it is duplicative of Interrogatory No. 11. (*sic*) Opposer objects to this interrogatory as overly broad and unduly burdensome to the extent that “all market research and consumer studies . . . related to Opposer’s Marks” covers

information and documents that are irrelevant to this proceeding. Opposer also objects to this interrogatory to the extent that it seeks information covered by the attorney-client privilege or the work product doctrine. Opposer objects to the terms “market research” and “consumer studies” as vague, ambiguous, and indefinite because they have not been defined. Notwithstanding this objection, to the extent this interrogatory is understood, Opposer will produce non-privileged research considered responsive to this request.

INTERROGATORY NO. 10:

Identify all market research and consumer studies done by or on behalf of Opposer related to any tie or association or recognition of an association between Opposer’s “CAT” Marks and Opposer’s “CATERPILLAR” Marks since 2000.

RESPONSE TO INTERROGATORY NO. 10:

Opposer objects to this interrogatory as overly broad and unduly burdensome to the extent that “all market research and consumer studies” covers information and documents that are irrelevant to this proceeding. MRIS (*sic*) further objects to the phrase “related to ‘referral-only’ or original brokers . . .” as overly broad and unduly burdensome to the extent it pertains to communications unrelated to this litigation. Opposer also objects to this interrogatory to the extent that it seeks information covered by the attorney-client privilege or the work-product doctrine. Moreover, Opposer objects to the terms “market research,” “consumer studies,” “tie,” “association,” or “recognition of an association” as vague, ambiguous, and indefinite because they have not been defined. Opposer further objects to this interrogatory as irrelevant and unlikely to lead to the discovery of admissible evidence to the extent that it seeks information regarding “Opposer’s CATERPILLAR Marks” which are not relevant to this proceeding.

INTERROGATORY NO. 11:

Identify all market research and consumer studies done by or for Opposer or by any third party related to the fame or recognition or awareness of Opposer’s Marks since 2000.

RESPONSE TO INTERROGATORY NO. 11:

Opposer objects to this interrogatory as overly broad and unduly burdensome to the extent that “all market research and consumer studies” covers information and documents that are irrelevant to this proceeding. Opposer also objects to this interrogatory to the extent that it seeks information covered by the attorney-client privilege or the work-product doctrine. Moreover, Opposer objects to the terms “market research” and “consumer studies” as vague, ambiguous, and indefinite because they have not been defined. Notwithstanding this objection, to the extent this interrogatory is understood, Opposer will produce such non-privileged research considered responsive to this request.

REQUEST NO. 18:

Documents sufficient to identify all objections by Opposer to any third party use of any mark or name or domain name containing or comprising “CAT” since 2000.

RESPONSE TO REQUEST NO. 18:

Opposer objects to this request to the extent that it is duplicative of Request No. 15. Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks “all objections by Opposer to any third party use of any mark or name or domain name” (emphases added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this request to the extent that it seeks information covered by the attorney-client privilege or the work-product doctrine. Opposer further objects to this request on the ground it seeks information that is publicly available and equally available to Applicant. Opposer further objects to this request to the extent that it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks objections regarding “any third party use of any mark or name or domain name” (emphases added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. For the purposes of its response, Opposer will produce communications from Opposer to third-parties regarding their use of CAT or CAT-formative mark in conjunction with the promotion or sale of goods and/or services in the forestry and vegetation management fields to the extent such documents exist. Subject to the above general and specific objections, Opposer will produce responsive, relevant, and non-privileged documents.

REQUEST NO. 19:

All documents referring or relating to any licenses for Opposer’s Marks.

RESPONSE TO REQUEST NO. 19:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks “all documents” (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer objects to this request to the extent that it seeks documents covered by the attorney-client privilege or the work-product doctrine. Opposer also objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery to the extent it is not limited by time. Opposer further objects to this request to the extent that it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks “any licenses for Opposer’s Marks” (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. For the purposes of its response, Opposer will produce licenses for Opposer’s Marks for goods or services in the forestry and vegetation management fields to the extent such documents exist. Subject to the above general and specific objections, Opposer will produce responsive, relevant,

and non-privileged documents.

REQUEST NO. 20:

All documents referring or relating to any coexistence agreements related to or referring to Opposer's Marks.

RESPONSE TO REQUEST NO. 20:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "all documents" (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer objects to this request to the extent that it seeks documents covered by the attorney-client privilege or the work-product doctrine. Opposer also objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery to the extent it is not limited by time. Opposer further objects to this request to the extent that it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "any coexistence agreements related to or referring to Opposer's Marks" (emphases added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. For the purposes of its response, Opposer will produce coexistence agreements for Opposer's Marks for goods or services in the forestry and vegetation management fields to the extent such documents exist. Subject to the above general and specific objections, Opposer will produce responsive, relevant, and non-privileged documents.

REQUEST NO. 21:

All documents referring or relating to any consent agreements related to or referring to Opposer's Marks.

RESPONSE TO REQUEST NO. 21:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "all documents" (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer objects to this request to the extent that it seeks documents covered by the attorney-client privilege or the work-product doctrine. Opposer also objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery to the extent it is not limited by time. Opposer further objects to this request to the extent that it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "any consent agreements related to or referring to Opposer's Marks" (emphases added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. For the purposes of its response, Opposer will produce consent agreements for Opposer's Marks for goods or services in the forestry and vegetation management fields to

the extent such documents exist. Subject to the above general and specific objections, Opposer will produce responsive, relevant, and non-privileged documents.

REQUEST NO. 24:

All documents referring or relating to all market research and consumer studies done by or on behalf of Opposer or any third party related to Opposer's Marks since 2000.

RESPONSE TO REQUEST NO. 24:

Opposer objects to this request to the extent that it is duplicative of Request No. 27. Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "all documents referring or relating to all market research and consumer studies documents" (emphases added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer also objects to this request to the extent that it seeks information and documents subject to the attorney-client privilege or the work-product doctrine. Moreover, Opposer objects to the terms "market research" and "consumer studies" as vague, ambiguous, and indefinite because they have not been defined. Subject to and without waiving its general and specific objections and to the extent that it understands this request, Opposer will produce representative responsive, relevant, and non-privileged documents.

REQUEST NO. 25:

All documents referring or relating to all market research and consumer studies done by or on behalf of Opposer related to any tie or association or recognition of an association between Opposer's "CAT" Marks and Opposer's "CATERPILLAR" Marks since 2000.

RESPONSE TO REQUEST NO. 25:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "all documents" (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer objects to this request as overly broad, unduly burdensome, and beyond the scope of discovery to the extent it seeks "all market research and consumer studies" covering information and documents that are irrelevant to this proceeding. Opposer also objects to this request to the extent that it seeks information and documents subject to the attorney-client privilege or the work-product doctrine. Moreover, Opposer objects to the terms "market research," "consumer studies," and "tie" as vague, ambiguous, and indefinite because they have not been defined. Opposer further objects to this request as irrelevant and unlikely to lead to the discovery of admissible evidence to the extent that it seeks information regarding "Opposer's CATERPILLAR Marks" which are not asserted nor otherwise at-issue in this proceeding.

REQUEST NO. 26:

All documents referring or relating to purchaser recognition of Opposer's Marks since 2000.

RESPONSE TO REQUEST NO. 26:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "all documents" (emphasis added), which could

include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer also objects to this request to the extent that it seeks information and documents subject to the attorney-client privilege or the work-product doctrine. Moreover, Opposer objects to the term “purchaser recognition” as vague, ambiguous, and indefinite because it has not been defined. Subject to and without waiving its general and specific objections and to the extent that it understands this request, Opposer will produce representative responsive, relevant, and non-privileged documents to the extent such documents exist.

REQUEST NO. 27:

All documents referring or relating to all market research and consumer studies done by or for Opposer or by any third party related to the fame or recognition or awareness of Opposer’s Marks since 2000.

RESPONSE TO REQUEST NO. 27:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks “all documents” (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer objects to this request as overly broad, unduly burdensome, and beyond the scope of discovery to the extent it seeks “all market research and consumer studies” covering information and documents that are irrelevant to this proceeding. Opposer also objects to this request to the extent that it seeks information and documents subject to the attorney-client privilege or the work-product doctrine. Moreover, Opposer objects to the terms “market research” and “consumer studies” as vague, ambiguous, and indefinite because they have not been defined. Opposer further objects to this request to the extent it seeks documents outside Opposer’s care, custody or control. Subject to and without waiving its general and specific objections and to the extent that it understands this request, Opposer will produce representative responsive, relevant, and non-privileged documents.

REQUEST NO. 28:

All documents referring or relating to consumer recognition of Opposer’s Marks since 2000.

RESPONSE TO REQUEST NO. 28:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks “all documents” (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer also objects to this request to the extent that it seeks information and documents subject to the attorney-client privilege or the work-product doctrine. Moreover, Opposer objects to the term “consumer recognition” as vague, ambiguous, and indefinite because it has not been defined. Subject to and without waiving its general and specific objections and to the extent that it understands this request, Opposer will produce representative responsive, relevant, and non-privileged documents to the extent such documents exist.

REQUEST NO. 29:

All style guides for use of Opposer’s Marks.

RESPONSE TO REQUEST NO. 29:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks “all style guides” (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery to the extent it is not limited by time. Opposer also objects to this request to the extent that it seeks information and documents subject to the attorney-client privilege or the work-product doctrine. Opposer further objects to this request as the term “style guides” is vague, ambiguous and indefinite because it has not been defined. Subject to and without waiving its general and specific objections and to the extent that it understands this request, Opposer will produce representative responsive, relevant, and nonprivileged documents to the extent such documents exist.

B. Caterpillar’s Non-Responsive Answers and Lack of Production of Documents Directed to Actual Confusion.

Interrogatory Nos. 16 and 17, and Requests for Production Nos. 14 and 15, *set out below*, are directed to actual confusion.¹⁷ Caterpillar has alleged as grounds likelihood of confusion and dilution. Information regarding inquiries as to affiliation between Opposer and Applicant and between Opposer and third parties is relevant to the determination of likelihood of confusion under the *DuPont* factors and to the alleged fame of Opposer’s marks. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). In response to Request for Production No. 15, Caterpillar cited the *Chicago Bears Football Club, Inc.* case¹⁸ That case does not stand for the proposition that discovery of third party use is outside the scope of relevant discovery. Evidence of third party use was submitted in that case and is expressly permitted in TBMP §414(9). Caterpillar must respond.

INTERROGATORY NO. 16:

Describe in detail each occasion when anyone has inquired of Opposer whether Applicant and Opposer are affiliated or otherwise related.

RESPONSE TO INTERROGATORY NO. 16:

¹⁷ Request No. 18 is also directed to confusion to the extent Caterpillar objected to the third party use on that basis.
¹⁸ See *Chicago Bears Football Club, Inc. v. 12th Man/Tennessee LLC*, 83 USPQ2d 1073 (TTAB 2007).

Opposer objects to this interrogatory to the extent it calls for information protected from disclosure by the attorney-client privilege and/or work product doctrine. Opposer also objects to this interrogatory as overly broad and unduly burdensome in that it requests identification of “each occasion” such communications, which could information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this interrogatory as premature to the extent that Opposer’s investigations are ongoing and that discovery is still ongoing, and Opposer reserves the right to supplement its response to this interrogatory. Subject to this objection, and the general objections above, and without waiving any claims of privilege or work product, as Applicant knows, Opposer initiated this proceeding because of Applicant’s apparent plans to expand its rights beyond the forestry field and its resulting concern that such plans would create a likelihood of consumer confusion.

INTERROGATORY NO. 17:

Describe in detail each occasion when anyone has inquired of Opposer whether Opposer is affiliated or otherwise related to any third party using “CAT” as a mark or name or as a component of a mark or name or domain name for any goods or services.

RESPONSE TO INTERROGATORY NO. 17:

Opposer objects to this interrogatory to the extent that it seeks information covered by the attorney-client privilege or the work-product doctrine. Opposer further objects to the terms “affiliated” or “otherwise related” as vague, ambiguous, and indefinite because it has not been defined. Opposer also objects to this request on the ground it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Information about instances of confusion or association between Opposer and third-parties has no bearing on the issues in this case. Moreover, to the extent that this Interrogatory requests information regarding Applicant, it is duplicative of Interrogatory No. 16.

REQUEST NO. 14:

Documents sufficient to identify each occasion when anyone has inquired of Opposer whether Applicant and Opposer are affiliated or related.

RESPONSE TO REQUEST NO. 14:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks “each occasion” (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer also objects to this request to the extent it calls for information protected from disclosure by the attorney-client privilege and/or work product doctrine. Subject to the above general and specific objections, as Applicant knows, Opposer initiated this proceeding because of Applicant’s apparent plans to expand its rights beyond the forestry field and its resulting concern that such plans would cause consumer confusion. Accordingly, Opposer will produce responsive, relevant, and non-privileged documents.

REQUEST NO. 15:

Any documents related to any inquiry about any third party using “CAT” as a mark or name or as a component of a mark or name or domain name for any goods or services.

RESPONSE TO REQUEST NO. 15:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks documents regarding “any inquiry about any third party using ‘CAT’ . . . for any goods or services ” (emphases added) including goods and services unrelated to Opposer’s Goods and Services, which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this request on the ground it seeks information regarding objections to third parties that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Information about marks that have not been asserted by Opposer in this proceeding and about arguments Opposer may have made with respect to those marks in other proceedings has no bearing on any issue in this case. See *Chicago Bears Football Club, Inc. v. 12th Man/Tennessee LLC*, 83 U.S.P.Q.2d 1073 (T.T.A.B. 2007) (The fact that the CHICAGO BEARS did not sue fan Web sites that used its name had no relevance to its opposition to registration of the mark 12th BEAR for fan jewelry, clothing, and the like. A likelihood of confusion was found.). Opposer further objects to this request to the extent that it seeks information covered by the attorney-client privilege or the work-product doctrine. Opposer further objects to this request on the ground it seeks information that is publicly available and equally available to Applicant.

C. Caterpillar’s Non-Responsive Answers and Lack of Production of Documents Directed to Third Party Use of the term “CAT”.

Interrogatory Nos. 12 and 13 and Request for Productions No. 17 are directed to third party use of the term “CAT”; discovery expressly permitted in TBMP §414(9). *American Society of Oral Surgeons v. American College of Oral & Maxillofacial Surgeons*, 201 USPQ 531, 533 (TTAB 1979) (relevant to show mark is weak). *Domino's Pizza Inc. v. Little Caesar Enterprises Inc.*, 7 USPQ2d 1359, 1363 n.9 (TTAB 1988) *See also* TBMP §414 (9). TigerCat in its effort to resolve the discovery dispute amended Interrogatory Nos. 12 and 13 and Request for Productions No. 17¹⁹ to clarify that the information sought is the identity of the third party(ies) of which Caterpillar is

¹⁹ See Bell Declaration, Exhibit E page 3 and Exhibit F page 2.

aware, but Caterpillar has not supplemented its answers or responses. Again, in response to Interrogatory Nos. 12 and 13, Caterpillar cited the *Chicago Bears Football Club, Inc.* case²⁰, which does not stand for the proposition that discovery of third party use is outside the scope of relevant discovery.²¹

INTERROGATORY NO. 12:

Identify all third party uses of “CAT” as a mark or name or component of a mark or name or domain name in connection with any goods or services identified in Opposer’s Registrations.

RESPONSE TO INTERROGATORY NO. 12:

Opposer objects to this request to the extent it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Information about marks that have not been asserted by Opposer in this proceeding and about arguments Opposer may have made with respect to those marks in other proceedings has no bearing on any issue in this case. See *Chicago Bears Football Club, Inc. v. 12th Man/Tennessee LLC*, 83 U.S.P.Q.2d 1073 (T.T.A.B. 2007) (The fact that the CHICAGO BEARS did not sue fan Web sites that used its name had no relevance to its opposition to registration of the mark 12th BEAR for fan jewelry, clothing, and the like. A likelihood of confusion was found.). Opposer further objects to this interrogatory to the extent that it seeks information covered by the attorney-client privilege or the work-product doctrine. Opposer further objects to this interrogatory on the ground it seeks information that is publicly available and equally available to Applicant.

INTERROGATORY NO. 13:

Identify all third party uses of “CAT” as a mark or name or component of a mark or name or domain name in connection with any off road vehicles or parts and/or attachments therefor or in connection with any other goods or services offered for sale or sold by Opposer.

RESPONSE TO INTERROGATORY NO. 13:

Opposer objects to this request on the ground it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Information about marks that have not been asserted by Opposer in this proceeding and about arguments Opposer may have made with respect to those marks in other proceedings has no bearing on any issue in this case. See *Chicago Bears Football Club, Inc. v. 12th Man/Tennessee LLC*, 83 U.S.P.Q.2d 1073 (T.T.A.B. 2007) (The fact that the CHICAGO BEARS did not sue fan Web sites that used its name had no relevance to its opposition to registration of the mark 12th BEAR for fan jewelry, clothing, and the like. A likelihood of confusion was found.). Opposer further objects to

²⁰ See *Chicago Bears Football Club, Inc. v. 12th Man/Tennessee LLC*, 83 USPQ2d 1073 (TTAB 2007).

²¹ Evidence of third party use was submitted in that case and is expressly permitted in TBMP §414(9).

this interrogatory to the extent that it seeks information covered by the attorney-client privilege or the work-product doctrine. Opposer further objects to this interrogatory to the extent it seeks information that is publicly available and equally available to Applicant.

REQUEST NO. 17:

Documents sufficient to identify all third parties using “CAT” as a mark or name or as a component of a mark or name or domain name for any goods or services.

RESPONSE TO REQUEST NO. 17:

Opposer objects to this request to the extent that it is duplicative of Request No. 15. Opposer objects to this request on the ground it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer also objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks identification of “all third parties using ‘CAT’ . . . for any good or services” (emphases added) including goods and services unrelated to Opposer’s Goods and Services, which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this request to the extent that it seeks information covered by the attorney-client privilege or the work-product doctrine. Opposer further objects to this request on the ground it seeks information that is publicly available and equally available to Applicant.

D. Caterpillar’s Non-Responsive Answers and Lack of Production of Documents Directed to Opposer’s Knowledge of Applicant.

Request Nos. 16²², 22 and 23, *set out below*, are directed to Caterpillar’s knowledge of Applicant and its TIGERCAT Mark. Caterpillar and Tigercat have co-existed in the marketplace for over two decades. Given this extensive co-existence in the marketplace, discovery of the nature and extent of Caterpillar’s knowledge of Tigercat is proper discovery as it goes to the second, third, fourth and sixth factors of dilution.²³ Such discovery is proper without limitation to documents from within the United States, since Tigercat is based in Canada and dealings between the

²² With respect to Request for Production No. 16 and Interrogatory No. 15, Tigercat also sought clarification of Opposer’s responses. Both responses contain the same verbiage: “Applicant first became aware of this plan through Applicant’s filing of the application, which is being opposed. Therefore, Applicant objects to this interrogatory to the extent it seeks information predating the filing date of this Application.”. Caterpillar is not Applicant. Caterpillar must clarify its responses

²³ 15 U.S.C. §1125, See also *Rolux Watch U.S.A., Inc. v. AFP Imaging Corporation*, 101 USPQ2d 1188 (TTAB 2011).

companies were not geographically limited. Such discovery is proper without limitation of the response timeframe to the filing date of the instant Application because of the parties' long co-existence in the marketplace. Tigercat is entitled to this discovery. *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 USPQ2d 1671, 1675 (TTAB 1988).

REQUEST NO. 16:

All documents referring or relating to Applicant and/or Applicant's Mark.

RESPONSE TO REQUEST NO. 16:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "all documents" (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery to the extent that it seeks documents relating to the Applicant or Applicant's Marks as opposed to the particular products that are the subject of the opposed application, which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer also objects to this request to the extent that it seeks information subject to attorney-client and attorney-work-product privileges. Opposer further objects to this request as overly broad, unduly burdensome, and beyond the scope of discovery to the extent that it seeks documents about Applicant or Applicant's Marks from outside of the United States. Moreover, as Applicant knows, Opposer initiated this proceeding because of Applicant's apparent plans to expand its rights beyond the forestry field. Applicant first became aware of this plan through Applicant's filing of the application, which is being opposed. Therefore, Opposer objects to this request to the extent it seeks information predating the filing date of this Application. Subject to the above general and specific objections, Opposer will produce responsive, relevant, and non-privileged documents.

REQUEST NO. 22:

All documents which identify the circumstances in which Opposer first had any knowledge of Applicant or the use of the mark TIGERCAT by Applicant.

RESPONSE TO REQUEST NO. 22:

Opposer objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "all documents" (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer objects to this request to the extent that it seeks documents covered by the attorney-client privilege or the work-product doctrine. Opposer further objects to this request as overly broad, unduly burdensome, and beyond the scope of discovery to the extent

that it seek documents about Opposer's knowledge outside of the United States. Opposer further objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery to the extent that it seeks documents relating to Tigercat as opposed to the particular products that are the subject of the opposed application, which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Moreover, as Applicant knows, Opposer initiated this proceeding because of Applicant's apparent plans to expand its rights beyond the forestry field. Opposer first became aware of this plan through Applicant's filing of the application, which is being opposed. Therefore, Opposer objects to this request to the extent it seeks information predating the filing date of this Application. Subject to the above general and specific objections, Opposer will produce responsive, relevant, and non-privileged documents to the extent such documents exist.

REQUEST NO. 23:

All Tigercat materials which Opposer has.

RESPONSE TO REQUEST NO. 23:

Opposer objects to this request as duplicative of Request No. 16. Opposer also objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery in that it seeks "all Tigercat materials" (emphasis added), which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this request to the extent it is overbroad, unduly burdensome, and beyond the scope of discovery to the extent that it seeks documents relating to Tigercat as opposed to the particular products that are the subject of the opposed application, which could include documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Moreover, Opposer objects to this request to the extent that it seeks information subject to attorney-client and attorney-work-product privileges. Opposer further objects to this request as overly broad, unduly burdensome, and beyond the scope of discovery to the extent that it seeks documents about Tigercat from outside of the United States. Moreover, as Applicant knows, Opposer initiated this proceeding because of Applicant's apparent plans to expand its rights beyond the forestry field. Opposer first became aware of this plan through Applicant's filing of the application, which is being opposed. Therefore, Opposer objects to this request to the extent it seeks information predating the filing date of this Application. Subject to the above general and specific objections, Opposer will produce responsive, relevant, and nonprivileged documents.

E. Caterpillar's Lack of Responses and Production of U.S. Information While Producing Corresponding Foreign Information.

Caterpillar has engaged in selective production and objection with regards to information pertaining to Opposer's Marks, Goods and Services in the United States. Interrogatory No. 18 is directed to Caterpillar's U.S. sales. Sales numbers are specifically permitted discovery.²⁴

²⁴ TBMP §414 (18).

Caterpillar responded by listing its worldwide sales initially, and noting the percent of sales attributable to the United States market.²⁵ The sale numbers are undifferentiated and without attribution and with no supporting documents. Caterpillar, however, also produced a number of documents that show world sales and advertising, showed examples of advertisements in Canadian publications and showed Canadian sales figures, by year, by category and by product from 1978 to 2008. Tigercat pointed out this Canadian-based production and again requested the corresponding responsive production pertaining to the United States. Caterpillar has not supplemented its response in any manner. Caterpillar cannot have it both ways. Caterpillar cannot produce the information when it wants to use it, and refuse discovery when Caterpillar does not want to provide information to support its claims. Tigercat does not want information or documents dealing with non-United States matters as long as Caterpillar will not introduce or mention or seek to rely on anything outside the United States.²⁶

Caterpillar's conduct in the concurrent trademark action in the European Union (EU) with respect to the pending Community Trademark Application of Tigercat further exemplifies Caterpillar's selective responses and production of documents. In that action, Caterpillar produced consumer surveys from a number of EU countries²⁷. Caterpillar objected to production of consumer surveys and market research in this proceeding, stating: "Moreover, Opposer objects to the terms "market research" and "consumer studies" as vague, ambiguous, and indefinite because they have not been defined."²⁸ The objection is baseless and disingenuous. Caterpillar clearly

²⁵ Caterpillar can figure out what a percent is in this instance, but Caterpillar could not manage it in response to Interrogatory No 2., which asked for the percentage of equipment which is yellow.

²⁶ In the June 26, 2014 letter, counsel for Tigercat stated: It appears document Bates Number 04519 – 04536 is responsive to certain of Tigercat's interrogatories and requests for production, and relates to Canadian sales, by year, by category and by product from 1978 to 2008. Please provide the same information in the same format for United States sales for the same years up to and including 2014.

²⁷ Such documents were part of Caterpillar's initial submission in the case.

²⁸ See Request Nos., 24, 25, 26, 27, and 28, as referenced in the June 26, 2014 letter. (Bell Dec. Exh. F).

knows what consumer research and surveys are. Caterpillar having brought this proceeding, cannot decide what it wants to and does not want to produce, and when it will decide to do so, nor produce only such documents when it is in Caterpillar's interest. Caterpillar has failed to identify and produce relevant documents or even state whether or not such documents exist.

III. CONCLUSION

In circumstances where a party fails to fully respond to an interrogatory or a request for production, the requesting party is entitled to move the Board for an order compelling disclosure or discovery, provided that it has made a good faith attempt to resolve the issue without Board intervention. 37 CFR § 2.120(e). Tigercat has made a good faith effort to secure responses from Caterpillar without Board intervention, and Caterpillar has not complied with its discovery obligations. Tigercat is entitled to an order to compel responses to the interrogatories and production requests identified herein, and production of the requested documents, without objection, within thirty (30) days of such order.

IV. MOTION TO SUSPEND

Pursuant to 37 CFR § 2.120(e)(2), Tigercat respectfully requests that the Board suspend these proceedings, including the expert disclosure deadline of August 27, 2014 pending its disposition of this motion to compel. Tigercat sought an extension of the deadlines from Caterpillar and it was discussed in the meet and confer telephone conference on July 31, but counsel for Caterpillar has not stated either consent or refusal to consent to the extension.

Respectfully submitted, this 25th day of August, 2014.

By:



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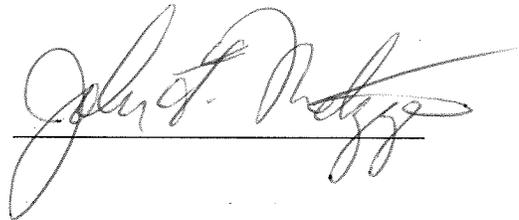
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Applicant's Motion to Compel was served on counsel for Opposer listed below via electronic mail and U.S. mail:

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Dated: August 25, 2014

A handwritten signature in cursive script, appearing to read "Christopher P. Foley", is written over a horizontal line.