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

Proceeding	91214492
Party	Plaintiff Under Armour, Inc.
Correspondence Address	AARON Y SILVERSTEIN SAUNDERS & SILVERSTEIN LLP 14 CEDAR STREET , SUITE 224 AMESBURY, MA 01913 1831 UNITED STATES trademarks@massiplaw.com,asilverstein@massiplaw.com
Submission	Motion for Sanctions
Filer's Name	Aaron Y. Silverstein
Filer's e-mail	trademarks@massiplaw.com,asilverstein@massiplaw.com
Signature	/asilverstein/
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as appropriate.” Accordingly, Under Armour respectfully requests the entry of sanctions against Applicant and/or other relief as the Board deems appropriate. Under Armour also requests that this proceeding be suspended pending disposition of this Motion.

## **I. BACKGROUND**

On January 15, 2014, Under Armour filed a Notice of Opposition against Application Serial No. 85844392 for the mark ARMOR & GLORY. (Dkt. No. 1.) On January 15, 2014, the Board instituted this proceeding and set discovery to open on March 26, 2014. (Dkt. No. 2.)

On February 24, 2014, Applicant filed its Answer.<sup>1</sup> (Dkt. No. 3.)

On March 5, 2014, Under Armour filed a Motion to Strike Applicant’s Affirmative Defenses and an Opposition to Applicant’s Motion for a More Definite Statement. (Dkt. Nos. 5 and 6.)

On March 26, 2014, Under Armour served its First Set of Interrogatories, First Set of Requests for the Production of Documents and Things, and First Request for Admissions on Applicant. (Declaration of Aaron Y. Silverstein in Support of Opposer’s Motion to Compel Discovery Responses (“Silverstein Decl.”)<sup>2</sup> ¶ 3, Jul. 17, 2014.)

On April 22, 2014, the Board granted Under Armour’s Motion to Strike Affirmative Defenses and denied Applicant’s Motion for a More Definitive Statement, and reset the discovery and trial schedule. (Dkt. No. 8.) Per the new schedule, discovery was set to open on May 12, 2014. (*Id.*)

On May 20, 2014, counsel for Under Armour sent an email to Marcus Bivines, counsel for Applicant, confirming that Applicant’s responses to Under Armour’s discovery requests would be due on or before June 11, 2014. (Silverstein Decl. ¶ 4, Jul. 17, 2014;

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<sup>1</sup> Applicant’s Answer incorporated a Motion for a More Definite Statement.

<sup>2</sup> Dkt. No. 10

Silverstein Decl. Ex. A, Jul. 17, 2014.) This extension was a courtesy to Applicant, as the discovery requests had been timely served in accordance with the Board's initial schedule that was issued on January 15, 2014.

The June 11, 2014 deadline for Applicant to respond to Under Armour's discovery requests came and went—Applicant failed to serve any responses on Under Armour and did not request additional time to respond to such requests by the deadline. (Silverstein Decl. ¶ 5, Jul. 17, 2014.)

Counsel for Under Armour made several good-faith attempts to contact Mr. Bivines about Applicant's outstanding discovery requests. Specifically, counsel for Under Armour left voicemail messages for Mr. Bivines on June 9, 11, 16, and 18, 2014. (Silverstein Decl. ¶ 6, Jul. 17, 2014.) Mr. Bivines did not return any of these messages. (Silverstein Decl. ¶ 6, Jul. 17, 2014.)

Counsel for Under Armour also sent emails to Mr. Bivines on May 20 and 21, and June 4, 9, 11, and 18, 2014. (Silverstein Decl. ¶ 7, Jul. 17, 2014; Silverstein Decl. Ex. B, Jul. 17, 2014.)

The lone response counsel for Under Armour received from Mr. Bivines in connection with the above-referenced voicemails and emails was a single email on June 10, 2014, stating that Mr. Bivines would call counsel for Under Armour on June 10, 2014. (Silverstein Decl. ¶ 8, Jul. 17, 2014; Silverstein Decl. Ex. C, Jul. 17, 2014.) Counsel for Under Armour never received a call from Mr. Bivines on June 10, 2014. (Silverstein Decl. ¶ 9, Jul. 17, 2014.)

Because of Mr. Bivines' radio silence, counsel for Under Armour sent a letter to Mr. Bivines, via email and UPS on July 2, 2014, in a final good-faith effort to resolve the ongoing

discovery issues. (Silverstein Decl. ¶ 10, Jul. 17, 2014; Silverstein Decl. Ex. D, Jul. 17, 2014.) Mr. Bivines never responded to the July 2, 2014 letter. (Silverstein Decl. ¶ 10, Jul. 17, 2014.)

On July 17, 2014, Under Armour filed a Motion to Compel Discovery Responses. (“Motion to Compel”). (Dkt. No. 9.) Applicant did not file a response to the Motion to Compel.

On October 22, 2014, the Board issued an Order granting Under Armour’s Motion to Compel. (Dkt. No. 12.) Pursuant to the Order, the Board gave Applicant twenty (20) days from October 22, 2014 to serve responses to Under Armour’s discovery requests. (Order at 2.)

Consistent with Applicant’s previous conduct, Applicant failed to serve any discovery responses on Under Armour by the Board-imposed November 11, 2014 deadline. (Silverstein Declaration in Support of Opposer’s Motion for Sanctions and to Suspend (“Silverstein Decl.”) ¶ 5, Dec. 2, 2014.) Applicant has not served any discovery responses to date nor has it communicated with Under Armour at all. (Silverstein Decl. ¶ 6, Dec. 2, 2014.) Applicant’s failure to respond to any of Under Armour’s discovery requests is in clear violation of the Board’s October 22, 2014 Order.

## **II. Argument.**

### **A. Judgment Should Be Entered Against Applicant.**

Trademark Rule 2.120(g)(1) provides, “the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure” if a party does not comply with a Board order relating to discovery. 37 C.F.R. § 2.120(g)(1); *see also* TBMP § 527.01. One such discovery sanction is an order “rendering a default judgment against the disobedient party.” Fed. R. Civ. P. 37(b)(2)(A)(vi); *see* TBMP § 527.01. “Default judgment is a harsh remedy, but it is justified where no less drastic remedy would be

effective, and there is a strong showing of willful evasion.” *Baron Philippe de Rothschild S.A. v. Styl-rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1854 (T.T.A.B. 2000).

Default judgment is particularly appropriate for the present situation. For six months, Applicant has routinely brushed off Under Armour’s requests for discovery, avoiding any and all of Under Armour’s attempts to resolve the discovery issues. Rather than fulfill its discovery obligations, Applicant’s modus operandi has been to willfully disregard Under Armour’s requests.

Such has Applicant conducted itself in front of the Board. Applicant has flagrantly disregarded the Board’s unequivocal Order directing Applicant to respond to Under Armour’s discovery requests—one can only construe Applicant’s conduct as willful.

The Board has previously entered default judgment against parties who have engaged in similar conduct. *See MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 U.S.P.Q.2d 1477, 1477 (T.T.A.B. 2000) (granting a Motion for Default Judgment where a party repeatedly failed to respond to the other party’s discovery requests and disregarded the Board’s Order to Compel); *Baron Philippe de Rothschild S.A.*, 55 U.S.P.Q.2d at 1854 (T.T.A.B. 2000) (entering judgment against applicant where “applicant and its counsel have engaged in a pattern of dilatory tactics, have purposely avoided applicant’s discovery responsibilities in this case, and have willfully failed to comply with the Board’s . . . order [to compel].”); *see also Unicut Corp. v. Unicut, Inc.*, 222 U.S.P.Q.2d 341, 344 (T.T.A.B. 1984) (entering judgment against a party evading discovery); *Caterpillar Tractor Co. v. Catfish Anglers Together, Inc.*, 194 U.S.P.Q. 99, 100 (T.T.A.B. 1976) (entering default judgment against a party for failing to answer interrogatories).

There is no reason why Applicant should not bear the consequences of such blatant disregard for the Board’s orders and the discovery process that has unnecessarily wasted the

Board and Under Armour's time and resources. Applicant has consistently demonstrated its disinterest in this case and unwillingness to comply with the Board's Orders, rules, and procedures. Accordingly, sanctions in the form of judgment against Applicant should be entered.

**B. Suspension Is Appropriate.**

Trademark Rule 2.127(d) provides that when a party files a motion that is potentially dispositive of a proceeding, the Board will suspend all matters not germane to the motion. 37 C.F.R. 2.127(d); *see* TBMP § 510.03(a). Further, the Board has discretion to suspend proceedings for good cause under C.F.R. § 2.127 and TBMP § 510.

Under Armour requests that this proceeding be suspended pending disposition of this Motion. Suspension of the proceeding will save the time and resources of both the parties and the Board. Absent further suspension of the proceeding, and given the upcoming December 19, 2014 deadline for the close of discovery, Under Armour will be forced to move forward with the proceeding without the benefit of any discovery responses.

**III. Conclusion.**

For the reasons stated above, Under Armour respectfully requests that the Board grant Under Armour's Motion for Sanctions in the nature of entering judgment against Applicant and suspend all proceedings not germane to this Motion. Applicant has dug its own grave here, and any prejudice that Applicant may experience from a default judgment is self-inflicted and more than justified.

Dated: December 2, 2014

Respectfully submitted,

/s/Aaron Y. Silverstein  
Aaron Y. Silverstein  
Saunders & Silverstein LLP  
14 Cedar Street, Ste. 224  
Amesbury, MA 01913  
+1-978-463-9130  
asilverstein@massiplaw.com

Attorneys for Opposer  
UNDER ARMOUR, INC.

**CERTIFICATE OF SERVICE**

I certify that on December 2, 2014, a true and accurate copy of the foregoing **OPPOSER'S MOTION FOR SANCTIONS AND TO SUSPEND**, and all exhibits thereto, was served by first class mail, postage prepaid, upon counsel for Applicant:

Marcus J Bivines  
303 S Peters Avenue  
Norman, OK 73069

/s/Aaron Y. Silverstein  
Aaron Y. Silverstein