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

Proceeding	91214795
Party	Defendant Sean Broihier and Associates, LLC
Correspondence Address	AMY SULLIVAN CAHILL STITES & HARBISON PLLC 400 W MARKET ST STE 1800 LOUISVILLE, KY 40202-3352 UNITED STATES acahill@stites.com
Submission	Motion to Extend
Filer's Name	Amy S. Cahill
Filer's e-mail	acahill@stites.com
Signature	/Amy S. Cahill/
Date	10/06/2014
Attachments	Motion for Extension - INSTAPRINTS.pdf(318553 bytes)

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

INSTAGRAM, LLC,)	
)	
Opposer,)	
)	Opposition No.
v.)	91214795
)	
SEAN BROIHIER AND ASSOCIATES, LLC)	
)	
Applicant.)	

**APPLICANT’S MOTION FOR EXTENSION OF TIME AND
TO DEEM RESPONSES TO REQUESTS FOR ADMISSIONS TIMELY**

Comes the Applicant, Sean Broihier & Associates, LLC, by counsel, and requests an extension of time of five (5) days in which to respond to Opposer’s Requests for Admission pursuant to 37 CFR § 2.120(a)(3) and Federal Rule of Civil Procedure 6(b)(1)(B). More specifically, Applicant seeks to have its responses to Opposer’s requests for admission, which responses were served on September 17, 2014, deemed timely on grounds that any delay was the result of excusable neglect.

FACTUAL BACKGROUND

Opposer Instagram, LLC served its First Set of Requests for Admissions (“Requests”) on July 30, 2014. Pursuant to Board rules, the deadline for Applicant’s responses to the Requests was properly calculated to be September 3, 2014. TBMP §§ 403.03. In advance of the deadline, counsel for Applicant requested a two week extension of time in which to respond to the thirty-four Requests. Declaration of Amy S. Cahill attached hereto as Exhibit A (“Cahill Decl.”), ¶¶ 2, 3. Opposer, through its counsel, agreed to the two week extension of time in exchange for a

consented extension of the discovery period by thirty (30) days. Cahill Decl., ¶ 4. Said consented request for extension of the discovery period was filed with the Board and granted by Order dated August 29, 2014. Discovery is currently set to close on November 12, 2014.

On September 17, 2014, Applicant served its responses to the Requests. The responses were complete, substantive and not made in an effort to circumvent Applicant's discovery obligations under the rules. Cahill Decl., ¶ 5 and Exhibit 1 thereto. The September 17, 2014 deadline was calculated by adding two weeks, plus an additional five days for mailing to the original deadline. Cahill Decl., ¶ 6. The addition of five (5) days for mailing in calculating the new deadline was the result of excusable neglect and did not result in prejudice or hardship to Opposer. Cahill Decl., ¶ 6.

On October 1, 2014, Opposer's counsel¹ wrote to the undersigned stating its position that the Requests were deemed admitted because the responses were served five (5) days after the properly calculated extended deadline. Cahill Decl. ¶ 7 and Exhibit 2 thereto.

ARGUMENT

Applicant seeks an extension of time to respond to the Requests of an additional five (5) days under the standard established by Federal Rule of Civil Procedure 6(b)(1)(B).

When an act may or must be done within a specified time, the court may, for good cause, extend the time ... on motion made after the time has expired if the party failed to act because of excusable neglect. Fed.R.Civ.P. 6(b)(1)(B).

The Board has interpreted the "excusable neglect" standard in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997) and *Old Nutfield Brewing Company Ltd. v. HudsonValley Brewing Company, Inc.*, 65 USPQ2d 1701 (TTAB 2002), and follows the legal

¹ Opposer substituted counsel between the time it granted the extension and the time it wrote the letter objecting to the timeliness of the requests, which may explain the two week delay in asserting the deficiency.

test established by the Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). The Board adopted the Supreme Court's view that a determination of excusable neglect is an equitable determination, that takes into account of all of the relevant circumstances, including (1) the danger of prejudice to the non-movant, (2) the length of the delay and its potential impact on proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395.

Applicant's five (5) day delay in serving responses to the Requests does not result in prejudice to Opposer. Specifically, as a *quid pro quo* for a two week extension of time to respond to discovery, Plaintiff consented to a thirty (30) days extension of the entire discovery period, which request was granted by the Board. The five (5) day delay does not deprive Opposer from the opportunity to serve follow-up discovery in the remaining discovery period of the proceeding.

The length of any delay is minimal. The receipt of Applicant's discovery responses five (5) days beyond their due date under the discovery deadlines in place does not result in prejudice to Opposer nor impact the timing of the proceedings.

The delay was not made for an improper purpose. Applicant acted in good faith in inadvertently including additional days for mailing the responses into extended period. There was no tactical advantage gained by the five (5) day delay, and Applicant has and would agree to further extension of the discovery period to address the five (5) days of time lost due to the Applicant's excusable neglect. Cahill Decl., ¶ 6.

In contrast, the harm to Applicant in having the Requests deemed admitted would be highly detrimental and far outweigh any prejudice to Opposer in being deprived of Applicant's responses to the Requests for a period of five (5) additional days.

For the reasons set forth above, Applicant asks that its Motion for Extension of Time and to Deem Responses to Requests for Admissions Timely be granted and that its responses to Opposer's First Requests for Admissions served on September 17, 2014 be deemed timely.

This 6th day of October, 2014.

By: /s Amy Sullivan Cahill
Amy Sullivan Cahill
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Louisville, Kentucky 40202
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Fax: (502) 779-9805
acahill@stites.com

Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been served upon the Registrant by mailing said copy on this 6th day of October, 2014, via First Class Mail, postage prepaid to Opposer's attorney of record, namely:

BOBBY GHAJAR
PILLSBURY WINTHROP SHAW PUTTMAN LLP
725 S FIGUEROA ST, STE 2800
LOS ANGELES, 90017
UZBEKISTAN
Bobby.Ghajar@pillsburylaw.com

s/Amy Sullivan Cahill
Attorney for Applicant

B5233:5526:998102:1:LOUISVILLE

EXHIBIT A

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

INSTAGRAM, LLC,)	
)	
Opposer,)	
)	Opposition No.
v.)	91214795
)	
SEAN BROIHIER AND ASSOCIATES, LLC)	
)	
Applicant.)	

DECLARATION OF AMY SULLIVAN CAHILL

The undersigned, Amy Sullivan Cahill, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements may jeopardize the validity of this document, declares as follows.

1. I am counsel of record for Applicant Sean Broihier & Associates, LLC in the above proceeding. I have first-hand knowledge of the facts set forth herein and am competent to testify as to the matters stated herein.

2. Opposer Instagram, LLC served its First Set of Requests for Admissions (“Requests”) on July 30, 2014. Pursuant to Board rules, the deadline for Applicant’s responses to the Requests was properly calculated to be September 3, 2014.

3. In advance of the deadline, I requested a two week extension of time in which to respond to the thirty-four Requests.

4. Opposer, through its counsel, agreed to the two week extension of time in exchange for a consented extension of the discovery period by thirty (30) days.

5. On September 17, 2014, Applicant served its responses to the Requests. The responses were complete, substantive and not made in an effort to circumvent Applicant's discovery obligations under the rules. See Exhibit 1.

6. The September 17, 2014 deadline for the responses was calculated by adding two weeks, plus an additional five days for mailing to the original deadline. The addition of five (5) days for mailing in calculating the new deadline was the result of excusable neglect and was not undertaken for any improper purpose. Applicant has and would agree to an extension of the discovery period to address this delay.

7. On October 1, 2014, Opposer's counsel wrote to the undersigned stating its position that the Requests were deemed admitted because the responses were served five (5) days after the properly calculated extended deadline. See Exhibit 2.

I declare under penalty of perjury under the laws of the United States of America that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true as of this date.

This 6th day of October, 2014.

By: /s Amy Sullivan Cahill
Amy Sullivan Cahill

EXHIBIT 1

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

In the matter of application Serial No. 85/742,628
For the Trademark INSTAPRINTS
Published in the Official Gazette on October 8, 2013

INSTAGRAM, LLC,

Opposer,

v.

SEAN BROIHIER AND ASSOCIATES, LLC,

Applicant.

Opposition No. 91214795

**RESPONSE TO OPPOSER'S FIRST SET OF REQUESTS FOR
ADMISSION TO APPLICANT**

Pursuant to Federal Rule of Civil Procedure 26 and 36, and Trademark Rules 2.116(a) and 2.120, Applicant Sean Broihier and Associates, LLC (Applicant), by and through counsel, hereby makes the following objections and responses to the First Set of Requests for Admission propounded by Opposer Instagram, LLC (Opposer). These objections and responses are based upon the best relevant information presently available to Applicant. These responses are provided without prejudice to any right of Applicant to offer evidence on its behalf or to object to the relevance, competence, or admissibility on any ground of any evidence or witness offered by Opposer. These responses do not constitute an admission of competence or admissibility of evidence or a waiver of objection on any grounds. The responses given herein are without prejudice to Applicant's right to supplement or revise these responses if further investigation or discovery so indicates.

REQUESTS FOR ADMISSION

ADMISSION NO. 1: Admit that YOU were aware of Instagram prior to YOUR selection and adoption of the INSTAPRINTS MARK.

RESPONSE: Applicant objects to this request on the grounds that it is vague. The term “aware” is not defined. Failure to define the term “aware” prevents any meaningful answer to this request for admission. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, and based on the definition of “aware” as understood and being used by Applicant, ADMIT.

ADMISSION NO. 2: Admit that YOU were aware of one or more of the INSTAGRAM MARKS at the time that YOUR application to register the INSTAPRINTS MARK was filed with the United States Patent and Trademark Office.

RESPONSE: Applicant objects to this request on the grounds that it is vague. The term “aware” is not defined. Failure to define the term “aware” prevents any meaningful answer to this request for admission. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, and based on the definition of “aware” as understood and being used by Applicant, ADMIT.

ADMISSION NO. 3: Admit that YOU did not conduct a trademark clearance search prior to filing YOUR application to register the INSTAPRINTS MARK with the United States Patent and Trademark Office.

RESPONSE: Applicant objects to this request on the grounds that it is vague. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT that Applicant did not conduct a trademark clearance search for the INSTAPRINTS MARK before Applicant filed its application to register the INSTAPRINTS MARK with the United States Patent and Trademark Office.

ADMISSION NO. 4: Admit that YOU were aware that one or more of the INSTAGRAM MARKS were registered in the United States prior to filing YOUR application to register the INSTAPRINTS MARK with the United States Patent and Trademark Office.

RESPONSE: Applicant objects to this request on the grounds that it is vague. The term “aware” is not defined. Failure to define the term “aware” prevents any meaningful answer to this request for admission. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, and based on the definition of “aware” as understood and being used by Applicant, DENY that Applicant was aware of Opposer’s registration of the INSTAGRAM MARKS prior to filing.

ADMISSION NO. 5: Admit that YOU did not seek legal advice CONCERNING YOUR decision to adopt the INSTAPRINTS MARK prior to filing YOUR application to register the INSTAPRINTS MARK with the United States Patent and Trademark Office.

RESPONSE: Applicant objects to this request on grounds that it seeks information protected by the attorney-client privilege. Without waiving and in conformance with that

objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, DENY.

ADMISSION NO. 6: Admit that Instagram did not consent to YOUR application to register the INSTAPRINTS MARK.

RESPONSE: Applicant objects to this request on the grounds that it is vague. The term “consent” is not defined. Failure to define the term “consent” prevents any meaningful answer to this request for admission. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, and based on the definition of “consent” as understood and being used by Applicant as implying express consent, ADMIT.

ADMISSION NO. 7: Admit that YOU are not currently licensed or otherwise authorized by Instagram to use any of the INSTAGRAM MARKS in connection with the goods and services offered under the INSTRAPRINTS MARK.

RESPONSE: Applicant objects to this request on the grounds that it is vague. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT.

ADMISSION NO. 8: Admit that YOU do not contest Instagram’s ownership of the INSTAGRAM MARKS.

RESPONSE: Applicant objects to this request on the grounds that it is vague. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT.

ADMISSION NO. 9: Admit that YOU do not contest the validity of any of Instagram's applications or registrations for the INSTAGRAM MARKS.

RESPONSE: Applicant objects to this request on the grounds that it is vague. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT.

ADMISSION NO. 10: Admit that the INSTAGRAM MARKS are well-known.

RESPONSE: Applicant cannot admit or deny this request as it seeks a legal conclusion on a genuine issue for trial and, after a reasonable inquiry, the information that is known or readily obtainable is insufficient to enable Applicant to admit or deny the request.

ADMISSION NO. 9: Admit that the INSTAGRAM MARKS were well-known at the time YOU filed YOUR application to register the INSTAPRINTS MARK.

RESPONSE: Applicant cannot admit or deny this request as it seeks a legal conclusion on a genuine issue for trial and, after a reasonable inquiry, the information that is known or readily obtainable is insufficient to enable Applicant to admit or deny the request.

ADMISSION NO. 12: Admit that the INSTAGRAM MARKS are famous.

RESPONSE: Applicant cannot admit or deny this request as it seeks a legal conclusion on a genuine issue for trial and, after a reasonable inquiry, the information that is known or readily obtainable is insufficient to enable Applicant to admit or deny the request.

ADMISSION NO. 10: Admit that the INSTAGRAM MARKS were famous at the time YOU filed YOUR application to register the INSTAPRINTS MARK with the United States Patent and Trademark Office.

RESPONSE: Applicant cannot admit or deny this request as it seeks a legal conclusion on a genuine issue for trial and, after a reasonable inquiry, the information that is known or readily obtainable is insufficient to enable Applicant to admit or deny the request.

ADMISSION NO. 11: Admit that both the INSTAPRINTS MARK and the INSTAGRAM MARKS contain the component “INSTA.”

RESPONSE: Without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT that both the INSTAPRINTS MARK and the INSTAGRAM MARK contain the formative “INSTA.”

ADMISSION NO. 12: Admit that “INSTA” is the dominant component of the INSTAPRINTS MARK.

RESPONSE: Applicant cannot admit or deny this request as it seeks a legal conclusion on a genuine issue for trial and, after a reasonable inquiry, the information that is known or readily obtainable is insufficient to enable Applicant to admit or deny the request.

ADMISSION NO. 13: Admit that the component “INSTA” as it appears in the INSTAPRINTS MARK is a reference to Instagram.

RESPONSE: DENY.

ADMISSION NO. 14: Admit that at least as recently as July 30, 2014, the INSTAPRINTS WEBSITE advertised “Instagram Prints” “from the World’s Greatest Instagram Photographers,” as shown in the screenshot below.



RESPONSE: ADMIT insofar as one page of the INSTAPRINTS WEBSITE previously stated “Instagram Prints Purchase Museum Quality Prints from the World’s Greatest Instagram Photographers”; DENY as to remainder.

ADMISSION NO. 15: Admit that at least as recently as July 30, 2014, the INSTAPRINTS WEBSITE advertised “iPhone and Galaxy cases from the World’s Greatest Instagram Photographers,” as shown in the screenshot below.



RESPONSE: ADMIT insofar as one page of the INSTAPRINTS WEBSITE previously stated “Phone Cases Purchase iPhone and Galaxy Cases from the World’s Greatest Instagram Photographers”; DENY as to remainder.

ADMISSION NO. 16: Admit that in order for a user of the INSTAPRINTS WEBSITE to open an account as an artist or photographer, the visitor must authorize the INSTAPRINTS WEBSITE to access the visitor’s Instagram account.

RESPONSE: Applicant objects to this request on the grounds that because the terms “user” and “visitor” are not defined, the request is impermissibly vague and ambiguous. Failure to define the terms “user” and “visitor” prevents any meaningful answer to this request for admission. Without waiving and in conformance with those objections, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, and based on the definitions of “user” and “visitor” as understood and being used by Applicant, DENY.

ADMISSION NO. 17: Admit that a user of the INSTAPRINTS WEBSITE may import digital photographs from the user's Instagram account.

RESPONSE: ADMIT.

ADMISSION NO. 21: Admit that all goods available for sale on the INSTAPRINTS WEBSITE incorporate digital photographs that have been imported from Instagram user accounts.

RESPONSE: DENY.

ADMISSION NO. 18: Admit that the majority of goods available for sale on the INSTAPRINTS WEBSITE incorporate digital photographs that have been imported from Instagram user accounts.

RESPONSE: Applicant cannot admit or deny this request because, after a reasonable inquiry, the information that is known or readily obtainable is insufficient to enable Applicant to admit or deny.

ADMISSION NO. 19: Admit that you market the INSTAPRINTS WEBSITE as an online marketplace for Instagram photographs.

RESPONSE: ADMIT that Applicant promotes the INSTAPRINTS WEBSITE as an online marketplace for user-uploaded photographs, including those imported by users of Instagram.

ADMISSION NO. 20: Admit that you market the INSTAPRINTS WEBSITE as an online marketplace enabling Instagram users to earn money by selling prints, greeting cards, and mobile phone cases bearing digital photographs imported from Instagram.

RESPONSE: Applicant objects to this request on the grounds that it is vague, ambiguous, and compound. Without waiving and in conformance with those objections, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT that it promotes the INSTAPRINTS WEBSITE as an online marketplace enabling photographers to sell prints, greeting cards, and mobile phone cases bearing digital photographs, DENY as to remainder.

ADMISSION NO. 21: Admit that you market services on the INSTAPRINTS WEBSITE that enable Instagram users to create prints, greeting cards, and mobile phone cases bearing digital photographs imported from Instagram.

RESPONSE: Applicant objects to this request on the grounds that it is vague, ambiguous, and compound. Without waiving and in conformance with those objections, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT that Applicant markets services on the INSTAPRINTS WEBSITE that enable photographers to sell prints, greeting cards, and mobile phone cases bearing digital photographs; DENY as to remainder.

ADMISSION NO. 22: Admit that the prints, greeting cards, and mobile phone cases, which bear digital photographs imported from Instagram and are offered by YOU on the INSTAPRINTS WEBSITE under the INSTAPRINTS MARK, are advertised on the Internet.

RESPONSE: Applicant objects to this request on the grounds that it is vague, ambiguous, and compound. Without waiving and in conformance with those objections, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT that Applicant offers goods under the INSTAPRINTS MARK on the Internet; DENY as to remainder.

ADMISSION NO. 23: Admit that YOUR services enabling Instagram users to sell products bearing digital photographs imported from Instagram are advertised on the Internet.

RESPONSE: ADMIT that Applicant advertises services under the INSTAPRINTS MARK on the Internet; DENY as to remainder.

ADMISSION NO. 24: Admit that the prints, greeting cards, and mobile phone cases, which bear digital photographs imported from Instagram and are offered by YOU on the INSTAPRINTS WEBSITE under the INSTAPRINTS MARK, are made available to consumers over the Internet.

RESPONSE: Applicant objects to this request on the grounds that it is vague, ambiguous, and compound. Without waiving and in conformance with those objections, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT that goods sold through the INSTAPRINTS WEBSITE are made available to consumers over the Internet.

ADMISSION NO. 25: Admit that YOUR services enabling Instagram users to sell products bearing digital photographs imported from Instagram are made available over the Internet.

RESPONSE: ADMIT that the services Applicant sells in connection with the INSTAPRINTS MARK are made available over the internet; DENY as to remainder.

ADMISSION NO. 30: Admit that the prints, greeting cards, and mobile phone cases, which bear digital photographs imported from Instagram and are offered by YOU on the INSTAPRINTS WEBSITE under the INSTAPRINTS MARK, are marketed, advertised, and sold to users of the Instagram service.

RESPONSE: Applicant objects to this request on the grounds that it is vague and compound. Without waiving and in conformance with those objections, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT that Applicant markets, advertises, and sells goods on the INSTAPRINTS WEBSITE under the INSTAPRINTS MARK to photographers, including users of the Instagram service.

ADMISSION NO. 31: Admit that YOUR services enabling Instagram users to sell products bearing digital photographs imported from Instagram are marketed, advertised, and sold to users of the Instagram service.

RESPONSE: Applicant objects to this request on the grounds that it is vague and compound. Without waiving and in conformance with those objections, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, ADMIT that Applicant markets, advertises, and sells services on the INSTAPRINTS WEBSITE under the INSTAPRINTS MARK to photographers, including users of the Instagram service.

ADMISSION NO. 26: Admit that the goods and services YOU offer under the INSTAPRINTS MARK are related to the goods and services that Instagram offers under the INSTAGRAM MARKS.

RESPONSE: Applicant objects to this request on the grounds that it is vague, overly broad, and ambiguous. The term “related to” is not defined. Failure to define the term “related to” prevents any meaningful answer to this request for admission. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, and based on the definition of “reference to” as understood as being used by Applicant, ADMIT that Applicant offers goods and services on the INSTAPRINTS WEBSITE under the INSTAPRINTS MARK to photographers, including users of the Instagram service and that the services both permit third-party uploaded photographs; however, Applicant states that there can be no likelihood of confusion between Opposer’s INSTAGRAM MARKS and Applicant’s INSTAPRINT MARK.

ADMISSION NO. 27: Admit that Exhibit A is a true and accurate copy of a press release issued on YOUR behalf on June 25, 2012.

RESPONSE: No Exhibit attached to requests, therefore unable to admit or deny.

ADMISSION NO. 28: Admit YOU wrote the press release shown in Exhibit A.

RESPONSE: No Exhibit attached to requests, therefore unable to admit or deny.

ADMISSION NO. 29: Admit that YOU own the business operating under the name “Fine Art America,” which offers goods and services through the website located at fineartamerica.com.

RESPONSE: Applicant objects to this request on the ground that it is irrelevant.

ADMISSION NO. 30: Admit that Exhibit B is a true and correct copy of a discussion “post” written by YOU approximately two years ago.

RESPONSE: No Exhibit attached to requests, therefore unable to admit or deny.

ADMISSION NO. 31: Admit that YOU are not the first registrant of the Instaprints.com domain name.

RESPONSE: Applicant objects to this request on the ground that it is irrelevant.

ADMISSION NO. 32: Admit that YOU did not own the Instaprints.com domain name prior to May 30, 2012.

RESPONSE: Applicant objects to this request on the ground that it is irrelevant.

ADMISSION NO. 33: Admit that YOU displayed the Instagram stylized script logo shown below on the INSTAPRINTS WEBSITE at least as recently as July 30, 2014.

Option #2: Import Images from Instagram



RESPONSE: ADMIT that one page of the Instaprints web site previously displayed the script logo shown above.

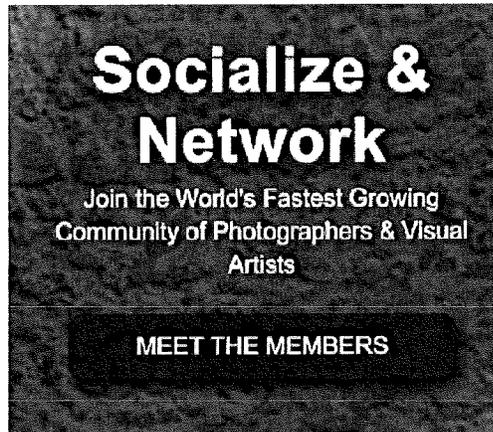
ADMISSION NO. 40: Admit that at the time YOU adopted the INSTAPRINTS MARK, you intended consumers to associate the INSTAPRINTS MARK with Instagram and the INSTAGRAM MARKS.

RESPONSE: Applicant objects to this request on the grounds that it is impermissibly vague, overly broad, and ambiguous. The term "associate" is not defined. Failure to define the term "associate" prevents any meaningful answer to this request for admission. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, DENY.

ADMISSION NO. 41: Admit that you adopted the INSTAPRINTS MARK with the intention of capitalizing on the goodwill of the INSTAGRAM MARKS.

RESPONSE: Applicant objects to this request on the grounds that it is impermissibly vague, overly broad, and ambiguous. The terms “capitalizing” and “goodwill” are not defined. Failure to define these terms prevents any meaningful answer to this request for admission. Without waiving and in conformance with that objection, and without waiving and expressly reserving any and all equitable defenses, including but not limited to laches, estoppel, and acquiescence, DENY.

ADMISSION NO. 34: Admit that at least as recently as July 30, 2014, the INSTAPRINTS WEBSITE stated that it could be used to “Socialize and Network,” and that the website serves a “Community of Photographers & Visual Artists,” as shown in the screenshot below.



RESPONSE: ADMIT insofar as one page of the INSTAPRINTS WEBSITE stated “Socialize & Network Join the World’s Fastest Growing Community of Photographers & Visual Artists”; DENY as to remainder.

Respectfully submitted,

s/Amy S. Cahill/

Amy S. Cahill
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Telephone: (502) 587-3400
Email: acahill@stites.com
COUNSEL FOR APPLICANT, SEAN BROIHIER
AND ASSOCIATES, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on this 17th day of September, 2014 upon:

Brendan J. Hughes
Rebecca Givner-Forbes
COOLEY LLP
1299 Pennsylvania Ave., N.W., Suite 700
Washington, D.C. 20004

/Amy S. Cahill/

Amy S. Cahill

EXHIBIT 2



Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street, Suite 2800 | Los Angeles, CA 90017-5406 | tel 213.488.7100 | fax 213.629.1033

Bobby A. Ghajar
tel 213.488.7551
bobby.ghajar@pillsburylaw.com

October 1, 2014

Via email acahill@stites.com

Amy S. Cahill, Esq.
Stites & Harbison PLLC
P400 W. Market Street, Suite 1800
Louisville, Kentucky 40202

**Re: *Instagram, LLC v. Sean Broihier & Associates, LLC*
Meet and Confer Request Relating to Discovery**

Dear Ms. Cahill:

My firm has substituted in as counsel for Instagram, LLC (“Instagram”) in connection with the pending opposition against your client’s application to register the mark INSTAPRINTS. Please direct all future communications regarding this matter to my attention.

We have reviewed your client’s responses to Instagram’s First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission, as well as Applicant’s document production to date. This letter seeks to initiate the meet and confer process with you regarding a number of deficiencies in your client’s discovery responses and production. Please review this letter, and let us know when next week you are available to meet and confer. Please note that this letter is not intended to be exhaustive, and we reserve the right to supplement Instagram’s position.

General Deficiencies

Your client asserts the same boilerplate objection in response to numerous Interrogatories and a separate boilerplate objection in response to numerous Requests for Production of Documents. The use of boilerplate objections is inappropriate and may be grounds for finding that Applicant has waived all objections. *See, e.g., Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 379 (C.D. Cal. 2009) (“unexplained and unsupported boilerplate objections are improper.”); *E.E.O.C. v. Safeway Store, Inc.*,

2002 WL 31947153 (N.D. Cal. 2002) (“Where, as here, the responding party provides a boilerplate or generalized objection, said objections are inadequate and tantamount to not making any objection at all.”). Moreover, Applicant has not explained the basis of its objections (*e.g.*, stating that a request is “overly broad and unduly burdensome” without also indicating the reason for that objection). Please review Applicant’s objections, and either withdraw the boilerplate objections or explain the basis of the objections, including whether Applicant has withheld any information or documents on the basis of those objections.

Deficiencies in Applicant’s Responses to First Set of Interrogatories

We have not located any signed verification for Applicant’s responses to the Interrogatories. Unless we are mistaken, please confirm that you will send us a signed verification by next week.

Interrogatory 12 – Applicant’s answer that it “cannot determine when it first heard of or learned of...” Instagram’s goods or services is insufficient. Applicant has this information, and we are entitled to its response.

Interrogatory 13 – This request asks Applicant to identify each Instagram username and developer account that it currently uses or has previously used. Applicant instead answered that it “maintains various user names and developer accounts with Instagram.” This answer is evasive and non-responsive. Applicant must provide a complete answer that identifies past and present user names and developer accounts that it has used.

Interrogatory 14 – This request asks Applicant to identify its communications with third parties regarding Instagram or its trademark rights. Instead, Applicant’s response focused only on its direct communications with Instagram. Please provide a complete response to the interrogatory posed.

Interrogatory 19 – As to Applicant’s actual and anticipated expansion plans for the Instaprints service, Applicant provided two examples, and then concluded “among others.” We are entitled to particularity, not an open-ended response.

Interrogatory 20 – Please supplement Applicant’s responses to identify all online and offline channels through which Applicant has marketed, advertised, or promoted its goods and services under the INSTAPRINTS mark. Alternatively, confirm that Applicant has only marketed, advertised, or promoted its products through the three sites listed.

Interrogatory 22-28 – These requests asks Applicant to provide all facts relating to its various affirmative defenses. Instead of providing such facts, Applicant avoided any substantive response and concluded that it “need not identify all facts in support of its legal position.” Applicant’s responses are evasive and incomplete. Moreover, we believe many of these “affirmative defenses” fail as a matter of law. Unless they are voluntarily withdrawn by Applicant, we will consider filing a motion with the Board seeking their dismissal.

Interrogatory 30 – Applicant declines to substantively respond to this interrogatory asking it to identify the agreements, contracts, or licenses it has entered into regarding the INSTAPRINTS mark. Instagram is entitled to know, for example, whether Applicant is licensing the INSTAPRINTS trademark to third parties, or has entered into any trademark coexistence or cobranding agreements. Applicant must supplement its response accordingly.

Deficiencies in Applicant’s Responses to First Set of Requests for Production of Documents

Beyond its use of unsubstantiated and boilerplate objections, it does not appear that Applicant has produced a meaningful number of responsive documents, despite stating in its responses that it would produce documents “sufficient to meet the needs of the request.” This qualification causes us concern, because it is not clear to us what Applicant deems “sufficient to meet the needs of the request.” The requests are clear, and Applicant must produce all responsive documents.

In this regard, Applicant’s document production is deficient. Of the 188 pages of documents that it produced, the majority of the production is comprised of file wrappers for third party trademarks that you apparently downloaded from the USPTO website. By our count, there are fewer than 35 pages relating to the INSTAPRINTS mark, and those are screenprints of multiple pages from the publicly-available instaprints.com website. Applicant did not produce any correspondence, financial information, web traffic information, advertising, or other categories of documents responsive to Instagram’s document requests. Applicant must immediately supplement its production.

Applicant’s Responses to First Set of Requests for Admission Are Deemed Admitted

Pursuant to your agreement with prior counsel (memorialized in emails dated August 28 and August 29), Applicant’s responses to Instagram’s Requests for Admission were due September 12. As indicated in Applicant’s proof of service, its responses

to the Requests for Admission were untimely served on September 17. Under Fed. R. Civ. P. Rule 36(a)(3), Opposer's responses are deemed admitted due to Applicant's failure to timely respond. *See also* TBMP 407 *et seq.*

* * *

In light of these issues, please let us know when Applicant will produce additional documents and supplement its interrogatories. Please also confirm your availability for a phone call next week (October 6-9) to discuss these issues.

We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Bobby Ghajar", with a long horizontal line extending to the right.

Bobby Ghajar