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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

In the matter of Application Serial No.: 85/806,379

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For the mark: HOLAIRA

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Boston Scientific Corporation and
Asthmatx, Inc.

Opposition No. 91215699

Opposers,

v.

Holaira, Inc.

Applicant.

**APPLICANT'S NON-CONFIDENTIAL
RESPONSE
TO OPPOSERS' EVIDENTIARY
OBJECTIONS AND APPLICANT'S NON-
CONFIDENTIAL OBJECTIONS TO
OPPOSERS' EVIDENCE**

Dated: November 17, 2015

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Pursuant to TBMP § 707.02(c) and § 707.03(c), Applicant Holaira, Inc. hereby responds to Opposers' Objections to Applicant's Evidence and asserts its own objections to Opposers' evidence, as provided below.

INTRODUCTION

Opposers' objections to Applicant's evidence are without merit and should be overruled. Opposers' objections can be summarized into three categories: (1) objections to the evidence of numerous third-party registrations for marks containing the letter string LAIR or AIR, similar to Opposers' ALAIR mark; (2) objections to the introduction of Opposers' own trademark search performed as part of the process of selecting, clearing, and registering the ALAIR mark; and (3) objections to the introduction of an analysis of the ALAIR name conducted by marketing experts retained by Opposers. These objections are not well founded. With respect to the third-party registrations, Opposers' main argument is that Applicant did not produce the documents during the discovery period and, therefore, cannot introduce the documents into evidence. This argument lacks any basis in the law. First, it is well-established that a party need not research third-party registrations to develop responses to discovery. Second, there is no dispute that these third-party registrations were not in Applicant's possession during the discovery period and, accordingly, could not have been produced at that time. Once Applicant's counsel possessed the records, the records were produced. Furthermore, Opposers' relevance and other objections to the third-party registrations are inconsistent with applicable law. With respect to the introduction of their own trademark search and analysis of the ALAIR name, Opposers object based on hearsay. However, as explained in detail below, these documents are not hearsay and, in any event, squarely fall within an exception to the hearsay rule and should, accordingly, be accepted into evidence.

With respect to their own evidentiary offering, Opposers' attempt to introduce documents and testimony inadmissible based on substance and procedure. Indeed, as detailed below, much of the testimony and documents offered by Opposers are inadmissible hearsay, violate the best evidence rule, and, accordingly, must be excluded from the record. For example, Opposers attempt to introduce internet print-outs to prove facts discussed in the articles (specifically overlap of certain medical conditions). This is classic inadmissible hearsay. Further, Opposers attempt to introduce testimony and documents in their rebuttal trial period, but none of the proffered evidence is rebuttal. Instead, Opposers' rebuttal submissions are merely an attempt to shoehorn last-minute submissions to buttress their case in chief. This is not a permissible use of rebuttal, and, accordingly, such testimony and documents must be stricken.

RESPONSE TO OPPOSERS' OBJECTIONS

I. APPLICANT'S INTRODUCTION OF THIRD-PARTY MARKS EVIDENCE WAS NOT UNTIMELY OR PREJUDICIAL.

On July 6, 2015, Applicant properly filed evidence of third-party use and registration of certain marks with the Board under cover of a notice of reliance. *See* 37 C.F.R. § 2.122(e) (“[O]fficial records . . . may be introduced in evidence by filing a notice of reliance on the material being offered. . . . The notice of reliance shall be filed during the testimony period of the party that files the notice.”); *see also* 37 C.F.R. § 2.121(e) (“A party need not disclose, prior to its testimony period, any notices of reliance it intends to file during its testimony period.”). Opposers contend that this evidence should be excluded because it was not previously provided to Opposers in Applicant's discovery responses during the discovery period. (Dkt. No. 28 (Opposers' Evid. Br.) at 3–4.¹) Opposers' objection lacks merit and should be overruled.

¹ “Opposers' Evid. Br.” refers to Opposers' Objections to Applicant's Evidence, Dkt. No. 28.

A. Applicant Was Not Required To Produce In Discovery Evidence Not Within Its Possession Or Control.

During discovery, a party is not required to produce documents that are not yet within its possession or control. *See Alcatraz Media v. Chesapeake Marine Tours*, 107 U.S.P.Q.2d 1750, 1758 (T.T.A.B. 2013) (denying motion to strike for failure to produce documents during discovery because party “certainly cannot be said to have refused to produce the [documents] in question during discovery as they were not then in petitioner’s possession”); *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 U.S.P.Q.2d 1341, 1348 (T.T.A.B. 2013) (“[I]t is clear that the objected-to documents were obtained or created by opposer in anticipation of its testimony period and were not responsive documents that were already within its possession or control when opposer was responding to document requests.”). Moreover, it is well established that a party has no duty to conduct an investigation of third-party uses in response to discovery requests. *See, e.g., Sheetz*, 108 U.S.P.Q.2d at 1348 (a party need not investigate third-party use to respond to discovery requests); *Rocket Trademarks Pty Ltd v. Phard S.p.A.*, 98 U.S.P.Q.2d 1066, 1071–72 (T.T.A.B. 2011) (a party has no duty to conduct an investigation of third-party uses in response to discovery requests); *Sports Auth. Mich. Inc. v. PC Auth. Inc.*, 63 U.S.P.Q.2d 1782, 1788 (T.T.A.B. 2001) (“[I]t is clear that PCA was under no obligation to search for third-party uses that would be responsive to the interrogatory.”).

The discovery period in this proceeding ended on December 7, 2014. (Dkt. No. 2 at 2.) As provided in its Notice of Reliance, Applicant did not possess the objected-to documents until they were obtained and compiled by Applicant during its testimony period.² Because these

² Applicant obtained and printed the documents between June 30 to July 6, 2015. (*See* Dkt. Nos. 17–18, Applicant Exs. 1–76 (providing print date for each document).) Applicant promptly thereafter filed the evidence on July 6, 2015. Furthermore, Opposers requested: “All documents, other than those produced in response to any of the foregoing requests, upon which Applicant intends to rely in connection with this proceeding.” (Dkt. No. 28 (October

documents “were obtained or created by [Applicant] in anticipation of its testimony period[, they] were not responsive documents that were already within its possession or control when [Applicant] was responding to document requests” and were not within the scope of discovery. *Sheetz*, 108 U.S.P.Q.2d at 1348. Moreover, Applicant “certainly cannot be said to have refused to produce the [documents] in question during discovery as they were not then in [Applicant’s] possession.” *Alcatraz Media*, 107 U.S.P.Q.2d at 1758 (denying motion to strike for failure to produce documents during discovery because party did not possess the documents at that time). Furthermore, because Applicant “was under no obligation to search for third-party uses that would be responsive,” there is no basis for Opposers’ claim that Applicant’s evidence of third-party use and registration is untimely. *Sports Auth.*, 63 U.S.P.Q.2d at 1788 (finding no undue delay where printed documents evidencing third-party use were produced months after discovery because documents were “promptly produced” and there was “no evidence to support [a] contention that printing of the documents was intentionally delayed, so as to delay production”). Once Applicant possessed the documents at issue, the documents were produced to Opposers. (*See supra* note 2.)

Notably, Opposers engaged in the same conduct about which they now complain. For example, on May 6, 2015, the same day Opposers submitted the evidence gathered in their testimonial period, Opposers produced to Applicant several new documents simultaneously submitted to the Board by Notice of Reliance or attorney affidavit. (Dkt. No. 12, Exs. 12-15, 21, 25; Dkt. No. 13, Ex. 37; Appendix 1 (Affidavit of Dennis E. Hansen (Hansen Aff.) ¶ 3, Ex. A).)

19, 2015 Sitzman Decl. Ex. A (Opposers’ Doc. Req. 25)). Applicant responded: “Holaira objects to the extent any request seeks production of documents *not in the custody, possession or control* of Holaira” (*Id.* (October 19, 2015 Sitzman Decl. Ex. B (Applicant’s Resp. to Doc. Req., General Objections, ¶ 3 (emphasis added)))); and “Subject to and without waiving the foregoing general objections, Holaira will produce responsive, non-privileged documents.” (*Id.* (Applicant’s Resp. to Doc. Req. 25).)

In fact, over half of the 1,505 pages produced by Opposers in this proceeding were produced *after* the close of the discovery period. (See Appendix 1 (Hansen Aff.) ¶ 3, Ex. A.) Given their own conduct, Opposers cannot legitimately complain about the timing of Applicant's disclosure of third-party registrations.

B. Opposers Were Not Prejudiced By Applicant's Third-Party Marks Evidence.

It is widely recognized that evidence of third-party use and registration of similar marks is sufficiently "common" that it "should not . . . come as a surprise." *Rocket Trademarks*, 98 U.S.P.Q.2d at 1072 ("[A]pplicant's attempt to present evidence of third-party use . . . should not have come as a surprise because it is common practice to introduce third-party use to demonstrate that a mark is weak and, therefore, entitled to only a narrow scope of protection."). So too here. Applicant's reliance on third-party registrations came as no surprise. In fact, Opposers were well aware of the issue of third-party registrations well before Applicant's trial submissions. Opposers' Vice President of Marketing testified about numerous third-party marks during cross and re-direct examination on April 9, 2015. (Dkt. No. 22, Passafaro Tr. at 65:19–80:11, 161:7–174:9, Passafaro Applicant's Ex. 1.) Because Opposers were aware of the issue of third-party use and registration, they were capable of researching the issue themselves. *Rocket Trademarks*, 98 U.S.P.Q.2d at 1072 (noting that third-party registrations and other documents evidencing third-party use "were equally accessible to opposer, *i.e.*, they were publicly available via the internet"). Moreover, Opposers had thirty days between the close of Applicant's testimony period and the opening of its rebuttal period to prepare any rebuttal against the evidence of third-party use. TBMP § 701 ("[T]he plaintiff's rebuttal testimony period is scheduled to open 30 days after the close of the defendant's testimony period."). This was more than enough time to prepare a response. *Rocket Trademarks*, 98 U.S.P.Q.2d at

1071–72 (rejecting argument that thirty days is not enough time to prepare rebuttal against the evidence of third-party use).

Because Applicant’s evidence of third-party registration and use of marks similar to the ALAIR mark was not untimely and Opposers had ample time to respond, Opposers’ objection should be overruled and the evidence should be accepted and considered by the Board.

II. APPLICANT’S EVIDENCE OF SIMILAR THIRD-PARTY MARKS USED IN CONNECTION WITH SIMILAR GOODS AND SERVICES IS RELEVANT TO THE STRENGTH OF OPPOSERS’ MARK.

Opposers’ secondary objection with respect to Applicant’s evidence of third-party marks is that it is not relevant. This objection, however, flies in the face of well-established law and must be rejected. Evidence is relevant if it has “any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.” Fed. R. Evid. 402. In opposition proceedings, “[l]ikelihood of confusion must be analyzed on a case-by-case basis, considering all evidence actually relevant to that inquiry. . . .” *Juice Generation, Inc. v. G.S. Enters. LLC*, 794 F.3d 1334, 1338, 115 U.S.P.Q.2d 1671, 1674. It has been long-recognized that “evidence of third-party use bears on the strength or weakness of an opposer’s mark.” *Id.* at 1338 (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1373, 73 U.S.P.Q.2d 1689, 1689 (Fed. Cir. 2005)). Indeed, the clear relevance of this evidence is demonstrated in Applicant’s Trial Brief.

Applicant has a right to present evidence of similar third-party marks registered in connection with similar products to establish that Opposers’ mark is not entitled to broad protection. Contrary to Opposers’ argument, third-party marks need not be identical to be relevant. *See, e.g., Jack Wolfskin Ausrustung Fur Draussen GMBH & Company KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373–74, 1373 n.2, 116 U.S.P.Q.2d 1129, 1136 n.2 (Fed. Cir. 2014) (holding that third-party marks used to identify colleges and universities, sports

teams, businesses offering pet-related services, shoes, children's clothing, cold-weather jackets and gear, collectible stuffed teddy bears, and Cheetos snack foods were all relevant to the issue of the strength of a mark used only for clothing). Indeed, evidence of third-party marks is relevant if it shows that an element or a syllable contained in a mark at issue is widely used on related goods. *Id.*; see *Shoe Corp. v. Juvenile Shoe Corp.*, 266 F.2d 793, 795–96, 121 U.S.P.Q. 510, 510 (C.C.P.A. 1959) (holding that, in determining whether word or syllable in trademark has a descriptive or suggestive significance as applied to merchandise, it is proper to take notice of extent to which word or syllable has been used in trademarks by third parties on similar merchandise). This is because evidence of third-party use of similar marks on similar goods “can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.” *Jack Wolfskin*, 116 U.S.P.Q.2d at 1136 (quoting *Juice Generation*, 794 115 U.S.P.Q.2d at 1674). This is precisely the case here. The evidence of third-party marks shows that because AIR is such a common element for marks used on similar goods, Opposers’ ALAIR mark is not entitled to broad protection. Because this evidence tends to prove a fact of consequence, it is relevant. *Id.* at 1374; *Juice Generation*, 115 U.S.P.Q.2d at 1674.

Opposers further complain that the third-party evidence is inadmissible because “a number of the exhibits . . . do not show use as a mark.” (Dkt. No. 27, Opposers’ Trial Br. at 5, 6.) However, Applicant has provided evidence of the third-party marks’ use in U.S. commerce, including those registered under Sections 44 and 66. (Dkt. No. 18, Applicant’s Exs. 45–53, 55–71, 73–76.) Moreover, contrary to Opposers’ argument, evidence of third-party registrations, on its own, is per se relevant. *Juice Generation*, 115 U.S.P.Q.2d at 1675 (“A real evidentiary value of third party registrations per se is to show the sense in which . . . a mark is used in ordinary parlance. Third party registrations are relevant to prove that some segment of

the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.”) (citation omitted); *Jack Wolfskin*, 116 U.S.P.Q.2d at 1136 (rejecting argument that, because third-party registrations “are not evidence that the marks are in use,” they are not relevant); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917, 189 U.S.P.Q. 693, 694–95 (C.C.P.A. 1976) (holding that even if “there is no evidence of actual use” of “third-party registrations,” such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). Therefore, Applicant’s evidence of third-party registrations is relevant and admissible. *See Jack Wolfskin*, 116 U.S.P.Q.2d at 1136 (“[E]vidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.”) (quoting *Juice Generation*, 115 U.S.P.Q.2d at 1674.

III. THE TRADEMARK SEARCH REPORT AND BRANDING PRESENTATION ARE NOT INADMISSIBLE UNDER THE RULE AGAINST HEARSAY.

A. Opposers Waived Their Objections To The Trademark Search Report And Branding Presentation.

The Board need not consider the substance of Opposers’ objections because the objections were waived. A party may waive an objection to evidence by failing to raise the objection at the appropriate time. TBMP § 707.04; Fed. R. Civ. P. 32(d)(3)(A). An objection that can be cured must be made promptly or it is waived. *Id.* Where documents are used in a deposition, as they were here, Opposers were required to object at that time. *Pass & Seymour, Inc. v. Syrelec*, 224 U.S.P.Q. 845, 847 (T.T.A.B. 1984) (objection on ground of hearsay with no foundation for establishing an exception waived since defect could have been cured if objection was raised during the deposition). The reason for this is obvious—a party cannot lie in the weeds holding an objection that can be cured by asking a witness simple foundational questions

upon assertion of the objection. To hold otherwise would deny the offering party an opportunity to cure any basis for objection by eliciting foundational testimony. As explained in *Pass & Seymour*, “the rule obviously envisions a situation in which a timely objection as, for example, on the ground of failure to lay an adequate foundation, could have enabled the problem to be remedied at the deposition.” 224 U.S.P.Q. at 847.

Applicant introduced both of these documents during the deposition of Karen Passafaro, and both Applicant and Opposers elicited testimony from Ms. Passafaro regarding them. (*Compare* Dkt. No. 22, Passafaro Applicant’s Exs. 1, 18, *with* Dkt. No. 20, Applicant’s Exs. 96, 97.) Opposers made no objections to either of these documents at that time. (Dkt. No. 22, Passafaro Tr. at 64–65, 140:1–158:25.) Moreover, Opposers extensively questioned Ms. Passafaro about both of these documents during re-direct examination. (*Id.* at 161:7–174:9; 175:9–182:3.) It was incumbent upon Opposers to object at that time if they believed the foundation for avoiding a hearsay problem was lacking, which would have given Applicant the ability to cure any such objection. Because Opposers chose to not object and, instead, questioned their own witness regarding the documents without noting the questioning was under protest to the admission of the documents, Opposers waived any objections. *Pass & Seymour*, 224 U.S.P.Q. at 847.

B. The Trademark Search Report And Branding Presentation Are Admissible As Business Records.

Under Federal Rule of Evidence 803(6), business records may be authenticated by testimony of a custodian or other qualified witness that: (1) the records were made at or near the time of the event that was recorded; (2) the records were kept in the course of a regularly conducted activity; and (3) it was the regular practice of the business to make the records of that activity. Fed. R. Evid. 803(6). The phrase “other qualified witness” is given “the broadest

interpretation.” *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1132 (8th Cir. 1994) (quotation omitted). There is no requirement that the person laying the foundation for a business record participated in the preparation of the record or has knowledge about the specific circumstances of its preparation. *Id.*; *see also United States v. Page*, 544 F.2d 982, 987 (8th Cir. 1976) (“[I]t is unnecessary that the identification witness have personal knowledge of the actual creation of the document.”); *see also United States v. Morton*, 483 F.2d 573, 577 (8th Cir. 1973).

Applicant introduced both the trademark search report and the branding presentation during the deposition of Karen Passafaro. (Dkt. No. 22, Passafaro Tr. at 65:19–67:12; 141:3–15, Passafaro Applicant’s Exs. 1, 18.) Ms. Passafaro has served as Opposers’ Vice President of Marketing since 2005. (*Id.* at 8:6–18.) In this role, she is “responsible for the global marketing of the Bronchial Thermoplasty franchise.” (*Id.* at 8:25–9:1.) In developing marketing strategy for Opposers’ product, she considers factors such as “the competitive landscape at the time,” “potential competition,” and “what is happening in the marketplace.” (*Id.* at 15: 22–16 :5; 17:1–6; 26:15-18.) Ms. Passafaro is also responsible for the marketing budget, which includes Opposers’ spending on public relations, advertising, and marketing research. (*Id.* at 15:25–16:2; 22:18–23.)

Both Applicant and Opposers elicited testimony from Ms. Passafaro regarding these documents. In regards to the branding presentation, Ms. Passafaro testified that she was familiar with the document, that it was “a presentation reflecting an analysis that [Opposers] retained Strategem Healthcare Communications to perform,” and that it was created in 2009. (Dkt. No. 22, Passafaro Tr. at 141:9–20, 145:12–18, 177:18–20.) As for the trademark search report, Ms. Passafaro testified that, in selecting the ALAIR mark, Opposers went through the “typical process for a trademark or product name,” and that this included performing trademark searches.

(*Id.* at 9:5–14, 67:2–9.) She also confirmed that the trademark search report is a copy of one of these trademark searches performed by Opposers, and that it was created in July of 2002. (*Id.* at 65:19–67:12.) Therefore, the trademark search report and branding presentation qualify as business records under Federal Rule of Evidence 803(6). Furthermore, because these documents were “created by a party” and “produced during the discovery period,” they fit squarely within the parties’ stipulation regarding documents created by a party and produced during discovery. (Dkt. No. 14, Ex. 26 (Stipulation) at ¶ 2.) As such, the parties have agreed that the trademark search report and branding presentation “are authentic, qualify as business records for purposes of FRE 803(6)(B), and may be introduced into evidence through the affidavit of a party’s counsel.” (*Id.*) Accordingly, the Board should overrule Opposers’ objections to these documents.

C. The Trademark Search Report And The Branding Presentation Are Admissible For Non-Hearsay Purposes.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, “offer[ed] in evidence *to prove the truth of the matter asserted in the statement.*” Fed. R. Evid. 801(c) (emphasis added). Evidence not offered for its truth is not hearsay. *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 65 n.2 (2d Cir. 2003) (reports used to establish state of mind admissible as non-hearsay).

Both documents are relevant (and admissible as non-hearsay) to show Opposers’ knowledge, belief, and state of mind. In particular, the trademark search establishes that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████ *Jerrold Elecs. Corp. v. Magnavox Company*, 199 U.S.P.Q. 751, 758 (T.T.A.B. 1978) (recognizing that such awareness “reflect[s] a belief, at least by [Opposers], who would be most concerned about avoiding confusion and mistake” that their mark could coexist with other marks containing AIR and LAIR “provided there is a difference”); *Sure-Fit Prods. Co. v. Saltzon Drapery Co.*, 117 U.S.P.Q. 295, 297 (C.C.P.A. 1958) (“It seems both logical and obvious . . . that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong marks.”).

The branding presentation is relevant for similar reasons. Opposers repeatedly reference their various “marketing efforts.” (Dkt. No. 27, Opposers’ Trial Br. at 12–15, 32–33.) Interestingly, the ALAIR mark is not prominently featured in any of Opposers’ advertisements or other promotional materials produced in this proceeding, including Opposers’ own website. (Dkt. No. 22, Passafaro Tr. at 119:13–120:20, 122:14–124:17, 155:8–156:15, Passafaro Applicant’s Exs. 6-15; Dkt. No. 20, Applicant’s Exs. 85-94.) Instead, these materials emphasize “bronchial thermoplasty.” (*Id.*) Applicant introduces the branding presentation, which was created by Opposers’ marketing firm on orders from and with assistance by Opposers’ employees, (Dkt. No. 22, Passafaro Tr. at 141:11–143:21; 145:1–9), and later presented to Opposers’ leadership (*id.* at 143:24–144:8), as evidence that Opposers’ knowledge of the weakness of the ALAIR mark led it to minimize ALAIR in advertising and focus on “bronchial thermoplasty” instead. Indeed, this is what the document shows—Strategem concluded that ALAIR “does not differentiate within the competitive landscape” due to the inclusion of AIR in many competitive marks and Opposers chose to emphasize “bronchial thermoplasty” instead.

Thus, neither the trademark search report nor the branding presentation is hearsay because both are relevant for a non-hearsay purpose. Therefore, even if the Board finds this

evidence to be otherwise inadmissible on hearsay grounds, it is still admissible evidence of Opposers' state of mind, *i.e.*, what Opposers thought and understood regarding the weakness of their mark.

D. The Trademark Search Report And Branding Presentation Are Admissible As Adverse Party Admissions.

A statement is not hearsay if it is offered against a party and is a statement "by the party's agent or employee on a matter within the scope of that relationship and while the relationship existed." Fed. R. Evid. 801(d)(2)(D). The trademark search report was created by Opposers in 2002 and produced during discovery. (Dkt. No. 22, Passafaro Tr. at 65:19-66:8; 67:7-12.) As such, it is not hearsay and is admissible against Opposers as an adverse party admission, even if the search was conducted by Opposers' counsel. *Williams v. Union Carbide Corp.*, 790 F.2d 552, 555-56 (6th Cir. 1986) ("It is the general rule that statements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney.") (quotation omitted); *Hanson v. Waller*, 888 F.2d 806, 814 (11th Cir.1989).

The branding presentation was also produced by Opposers during discovery. (Dkt. No. 22, Passafaro Tr. at 141:3-10, Passafaro Applicant's Ex. 18.) It was created by Strategem Healthcare Communications ("Strategem"), a marketing firm retained by Opposers in 2009, in order to analyze Opposers' brand and help Opposers market their product. (*Id.* at 142:2-145:9.) The branding presentation reflects the analysis Strategem was hired to perform, and it was created and presented to Opposers at that time. (*Id.* at 141:11-15.) Therefore, the branding presentation is also admissible as an adverse party admission. Fed. R. Evid. 801(d)(2)(D).

APPLICANT'S OBJECTIONS TO OPPOSERS' EVIDENCE

Much of the evidence offered by Opposers is inadmissible based on the Federal Rules of Evidence and due to procedural deficiencies. Accordingly, as set forth below, Opposers'

proffered evidence cannot be accepted into evidence and cannot be considered by the Board in this matter.

I. OPPOSERS' EVIDENCE OF MEDIA EXPOSURE IS INADMISSIBLE HEARSAY AND VIOLATES THE BEST EVIDENCE RULE.

In an attempt to demonstrate that the ALAIR mark is strong, Opposers rely on testimony regarding the contents of certain news reports to demonstrate purported media exposure for the brand. (Dkt. No. 27, Opposers' Trial Br. 32 (citing Dkt. No. 22, Passafaro Tr. 56:7–57:2).) However, this testimony is inadmissible hearsay and violates the best evidence rule. Under the applicable evidentiary rules, a statement is inadmissible as hearsay if it is an out-of-court statement offered for the truth of the matter asserted in the statement. Fed. R. Evid. 801(c). Furthermore, the applicable rules prohibit the admission of testimony to prove the contents of a document when the document is not supplied in the evidentiary record. Fed. R. Evid. 1002 (requiring “[a]n original writing, recording, or photograph . . . in order to prove its content”) Opposers' offered testimony violates both rules and is, accordingly, inadmissible.

Specifically, Opposers offered the testimony of Karen Passafaro that the Alair system has received “significant media exposure,” including being featured in reports by “Good Morning America, the CBS Morning Show, [the] Wall Street Journal, [the] San Francisco Chronicle, [and the] New York Times,” to prove that its ALAIR mark is “commercially strong.” (Dkt. No. 27, Opposers' Trial Br. at 14, 32 (citing Dkt. No. 22, Passafaro Tr. at 56:7–57:2, 57:16–19).) However, Opposers made the choice to not admit into evidence these “reports.” Accordingly, the testimony regarding what the reports say (*i.e.* that they make reference to ALAIR) is inadmissible hearsay. Fed. R. Evid. 801(c). In addition, the testimony about what the reports say is a direct violation of the best evidence rule, which requires “[a]n original writing,

recording, or photograph . . . in order to prove its content” Fed. R. Evid. 1002. For these reasons, Ms. Passafaro’s statements should be excluded.³ Fed. R. Evid. 802.

Notably, these objections would not necessarily be viable as to the reports themselves. However, Opposers strategically chose to not submit the reports into the record, demonstrating the importance of the rule against hearsay and the best evidence rule. Although Ms. Passafaro testified that the reports were about the Alair system, implying that the reports would have used the ALAIR mark, the reports actually make no mention of the ALAIR mark.⁴ Instead, the reports focus on the phrase “bronchial thermoplasty,” just as Opposers have done in their own marketing. (*Id.*) This is likely the reason that Opposers chose not to offer the documents themselves into evidence. The reports, which make no mention of ALAIR, do not demonstrate that Opposers’ ALAIR mark is commercially strong. To the contrary, they suggest that the ALAIR mark is not well known or distinctive, as even news organizations do not use it to identify Opposers’ goods and services.

This was the only evidence offered by Opposers in support of their assertion that its ALAIR mark has received “significant press.” Because this assertion is entirely without factual support, it cannot be accorded evidentiary value or consideration. *See* TBMP 704.06(b) (“Factual statements made in a party’s brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial.”); *Boston Red Sox Baseball Club LP*

³ The inadmissibility of Ms. Passafaro’s testimony is not something that could be cured at any point. Even if Opposers had chosen to introduce into evidence the actual media reports at issue, Ms. Passafaro’s testimony regarding the contents of the reports would still be hearsay and would still violate the best evidence rule. The inadmissibility of Ms. Passafaro’s testimony is not cured by introducing the documents at issue. To be clear, Applicant does not object at this time to the admission of the media reports themselves because Opposers never chose to offer those documents into evidence.

⁴ *See, e.g.,* <http://www.cbsnews.com/videos/effective-new-treatment-for-severe-asthma/>; http://well.blogs.nytimes.com/2012/09/03/relief-for-severe-asthma-at-a-high-price/?_r=0; <http://www.thedoctorstv.com/videos/asthma-treatment>.

v. *Sherman*, 88 U.S.P.Q.2d 1581, 1587 (T.T.A.B. 2008) (statements in brief not supported by evidence not accorded evidentiary value or consideration).

II. OPPOSERS' INTERNET PRINTOUTS OFFERED TO PROVE THE INTERRELATEDNESS OF MEDICAL CONDITIONS IS INADMISSIBLE HEARSAY.

Internet documents introduced through Trademark Rule 2.122(e) “are admissible only to show what has been printed, not the truth of what has been printed.” *Safer, Inc. v. OMS Invs., Inc.*, 94 U.S.P.Q.2d 1031, 1040 (T.T.A.B. 2013). When offered to prove the truth of any matters contained therein, such evidence constitutes inadmissible hearsay and should not be considered. *Syngenta Crop Prot., Inc. v. Bio-Chek, LLC*, 90 U.S.P.Q.2d 1112, 1117 n.7 (T.T.A.B. 2009) (“A printed publication is only admissible for what it shows on its face; unless it falls within an exception to the hearsay rule it will not be considered to prove the truth of any matter stated in the publication.”) (citing *7-Eleven, Inc. v. Wechsler*, 83 U.S.P.Q.2d 1715, 1717 n.2 (T.T.A.B. 2007)). Opposers have offered several internet printouts and publications. (See Dkt. No. 12, Opposers’ Exs. 18–25; Dkt. No. 23, Opposers’ Exs. 68–72; Dkt. No. 25, Opposers’ Exs. 75–77; Dkt. No. 29, Wahr Ex. 7.) Opposers offer these documents in an attempt to prove their belief that asthma and COPD are medically the same. For example, Opposers have argued that a Wikipedia page for “Obstructive Lung Disease” (Dkt. No. 12, Opposers’ Ex. 20); a page, purportedly from Johns Hopkins’ Obstructive Lung Disease Clinic, entitled “About our Practice” (Dkt. No. 12, Opposers’ Ex. 21); a page, purportedly from Johns Hopkins, entitled “Health Alerts Topic Page: Lung Disorders” (Dkt. No. 12, Opposers’ Ex. 22); and a page, purportedly from the National Library of Medicine, entitled “Medical Subject Headings” (Dkt. No. 12, Opposers’ Ex. 25), all prove that “[a]sthma is considered both a pulmonary disease and an ‘obstructive lung disease.’” (Dkt. No. 27, Opposers’ Trial Br. at 11.) Opposers also cite printouts from a webpage describing a document entitled “Asthma, COPD, and Asthma-Overlap

Syndrome” (Dkt. No. 23, Opposers’ Ex. 68); an internet document entitled “Diagnosis of Diseases of Chronic Airflow Limitation” (Dkt. No. 23, Opposers’ Ex. 69); and an article entitled “Diagnosing Asthma-COPD Overlap Syndrome” (Dkt. No. 23, Opposers’ Ex. 70); all documents that contain assertions about research, diagnoses, and treatment of respiratory diseases, to supposedly prove that “[t]he medical community has coined a new term for [the overlap of COPD and asthma], ‘Asthma-COPD Overlap Syndrome’ (‘ACOS’), and has utilized this term in researching, diagnosing, and treating obstructive lung diseases.” (Dkt. No. 27, Opposers’ Trial Br. at 11.)

Using these documents for this purpose is not allowed. Opposers cannot use these webpages to prove the truth of matters asserted therein—*i.e.* that there is some relatedness between COPD and Asthma. Fed. R. Evid. 801(c). Such a use is a clear violation of the rule against hearsay. *Id.* Furthermore, the documents have no probative value or relevance for any non-hearsay purpose. That is, the mere existence of these documents or the fact that it was printed is not relevant. Accordingly, this evidence should be excluded. *Safer*, 94 U.S.P.Q.2d at 1040; *Syngenta Crop Prot.*, 90 U.S.P.Q.2d at 1117 n.7.

In addition to the documents specifically cited in their brief, Opposers offered into the record several similar documents to which Opposers did not cite in their brief. (*See* Dkt. No. 12, Opposers’ Exs. 18–19, 23–25; Dkt. No. 23, Opposers’ Exs. 71–72; Dkt. No. 25, Opposers’ Exs. 75–77; Dkt. No. 29, Wahr Ex. 7.⁵) These documents, all apparently offered to prove the truth of the matters asserted in the documents and not merely for their existence, also violate the rule against hearsay and must be excluded. Fed. R. Evid. 801(c); *Safer*, 94 U.S.P.Q.2d at 1040; *Syngenta Crop Prot.*, 90 U.S.P.Q.2d at 1117 n.7.

⁵ Counsel for applicant objected to the use of this document during the testimony of Dr. Wahr and did not waive the objection.

III. THE TESTIMONY AND DOCUMENTS INTRODUCED DURING OPPOSERS' REBUTTAL PERIOD IS IMPROPER REBUTTAL EVIDENCE, CONSTITUTES INADMISSIBLE HEARSAY, AND SHOULD BE EXCLUDED.

Opposers are attempting to impermissibly buttress their case-in-chief through the rebuttal testimony period. In particular, in their case-in-chief Opposers offered evidence regarding the relatedness of the goods at issue and the supposed medical interrelatedness between asthma and COPD. (Dkt. No. 22, Passafaro Tr. at 18:5–19:19, 180:11–182:3, 184:18–24; Dkt. No. 12, Opposers' Ex. 18–24). Apparently displeased with the quantum or quality of the evidence they chose to introduce during their case-in-chief, Opposers now attempt to supplement the record on these issues through rebuttal. This new evidence, however, is not in response to any new issues identified or raised by Applicant during its testimonial period and is not proper rebuttal evidence.

Rule 2.121(b)(1) provides the procedure for presenting a party's case in inter partes proceedings. *See* 37 C.F.R. § 2.121(b)(1) (specifying that the Board will set "a testimony period for the plaintiff to present its case in chief, a testimony period for the defendant to present its case and to meet the case of the plaintiff, and a testimony period for the plaintiff to present evidence in rebuttal"). This procedure clearly distinguishes between evidence properly considered part of a plaintiff's case-in-chief and that which is properly introduced as rebuttal. Evidence introduced on rebuttal that serves as proof of the opposer's case-in-chief is improper rebuttal evidence. *Chemetron Corp. v. Self-Organizing Sys., Inc.*, 166 U.S.P.Q. 495, 499 n.6 (T.T.A.B. 1970) ("Since material of this type pertains to a party's case-in-chief, the proper procedure for opposer to have followed was to move before the Board to reopen its testimony period."). Evidence improperly introduced during rebuttal period should not be considered. *Boswell v. Mavety Media Group Ltd.*, 52 U.S.P.Q.2d 1600, 1603 (T.T.A.B. 1999) ("For the same reason that it would be unfair to applicant to allow opposers to submit the dictionary definitions as part of opposers' rebuttal testimony, at a point where applicant has no opportunity to respond,

it would be inappropriate for the Board to consider what opposers failed to make of record in the proper manner.”). It is even improper to introduce newly discovered evidence during the rebuttal period if it actually relates to the case-in-chief. *Rowell Labs., Inc. v. Canada Packers Inc.*, 215 U.S.P.Q. 523, 529 n.2 (T.T.A.B. 1982) (rejecting improper attempt to introduce newly discovered evidence by way of rebuttal testimony rather than moving to reopen testimony period).

All of the evidence Opposers submitted during the rebuttal period relates to the case-in-chief and is improper rebuttal. Opposers offer the following documents and testimony:

- Testimony of Dr. Narinder Shargill. (Dkt. No. 25, Opposers’ Ex. 74.)
- An internet printout entitled “Asthma, COPD, and Asthma-COPD Overlap Syndrome.” (Dkt. No. 23, Opposers’ Ex. 68.)
- An internet printout entitled “Asthma, COPD, and Asthma-COPD Overlap Syndrome.” (Dkt. No. 23, Opposers’ Ex. 69.)
- An internet printout entitled “Diagnosing Asthma-COPD Overlap Syndrome” (Dkt. No. 23, Opposers’ Ex. 70.)
- An internet printout entitled “Journal of Asian Pacific Society of Respiratory, Airway Vista 2015 Speakers.” (Dkt. No. 23, Opposers’ Ex. 71.)
- An internet printout entitled “‘Off-Label’ and Investigational Use of Marketed Drugs, Biologics, and Medical Devices – Information Sheet.” (Dkt. No. 23, Opposers’ Ex. 72.)
- An e-mail dated September 15, 2010. (Dkt. No. 25, Opposers’ Ex. 75.)
- A “Concept Submission Form” for a research study dated June 2, 2015. (Dkt. No. 25, Opposers’ Ex. 76.)
- An internet printout entitled “Bronchial Thermoplasty in Severe Asthma.” (Dkt. No. 25, Opposers’ Ex. 77.)

Dr. Shargill’s testimony is inadmissible for multiple reasons. As an initial matter, all of his testimony is improper rebuttal testimony. Dr. Shargill testified regarding: (1) a subset of patients that exhibit symptoms of both asthma and COPD (Dkt. No. 25, Opposers’ Ex. 74 (Shargill Decl.) ¶ 3); (2) the potential use of Opposers’ medical device to treat COPD rather than asthma (*Id.* ¶¶ 4–7; and (3) the relatedness between Opposers’ medical device and Applicant’s medical device (*Id.* ¶ 8.). Each of these topics are part of and were specifically addressed in

Opposers' case-in-chief, demonstrating that the testimony is not true rebuttal testimony. *Chemetron*, 166 U.S.P.Q. at 499 n.6. Indeed, although Opposers claim that Dr. Shargill is testifying in rebuttal to Dr. Wahr, the witness presented by Opposers prior to Dr. Wahr's testimony covered the same topics. Ms. Passafaro testified regarding patients who exhibit symptoms of both asthma and COPD. (Dkt. No. 22, Passafaro Tr. at 180:11–182:3.) Ms. Passafaro testified regarding the potential to use Opposers' medical device to treat COPD. (*Id.* at 181:23–184:24.) And Ms. Passafaro testified regarding the relatedness between Opposers' medical device and Applicant's medical device. (*Id.* at 18:5–19:19.) Opposers could have introduced Dr. Shargill's testimony during their case-in-chief, but they did not. Likewise, Opposers were long ago in possession of the documents they attempt to introduce through Dr. Shargill's testimony (Dkt. No. 25, Opposers' Exs. 69, 75–77), but chose not to introduce the documents in their case-in-chief and did not produce the documents in discovery. Opposers cannot now legitimately claim Dr. Shargill's testimony and the documents on which he relies are rebuttal when the topics were clearly covered in their case-in-chief. *Rowell*, 215 U.S.P.Q. at 529 n.2 (testimony and publications “consisted of material intended to buttress petitioner's case-in-chief and hence constituted improper rebuttal”). As such the testimony and the documents should not be considered. T.B.M.P. § 706; 37 C.F.R. § 2.123(l) (“Evidence not obtained and filed in compliance with the rules of practice governing inter partes proceedings before the Board will not be considered by the Board.”); *Rowell*, 215 U.S.P.Q. at 529 n.2 (holding improper rebuttal evidence “has no probative value” and will not be considered); *Boswell*, 52 U.S.P.Q.2d at 1603; *Chemetron*, 166 U.S.P.Q. at 499 n.6; *see also* T.B.M.P. § 707.03(c) (objection on improper rebuttal grounds may be raised for the first time in or with a party's brief on the case).

Paragraph 5 of Dr. Shargill's testimony is similarly inadmissible as is the exhibit cited therein. (Dkt. No. 25, Opposers' Ex. 74 (Shargill Decl.) ¶ 5; Opposers' Ex. 77.) As set forth above, the internet printout submitted as Opposers' Exhibit 77 is not admissible for the truth of the statements contained in the document. *Safer*, 94 U.S.P.Q.2d at 1040; *Syngenta Crop Prot.*, 90 U.S.P.Q.2d at 1117 n.7. However, as is made clear by Dr. Shargill's testimony, this is precisely the purpose for which Opposers offer the document. (Dkt. No. 25, Opposers' Ex. 74 (Shargill Decl.) ¶ 5.) In his testimony, Dr. Shargill explains that this document is offered to show that "Dr. Yoneda and colleagues . . . have treated COPD patients with the ALAIR® system as recently reported in [Exhibit 77]" (*Id.*) The exhibit is not admissible for this purpose, and Dr. Shargill's testimony, based on the contents of the exhibit, is also inadmissible. Fed. R. Civ. P. 801.

Paragraph 7 of Dr. Shargill's Declaration and the document Opposers attempt to introduce through the testimony are similarly inadmissible hearsay. (Dkt. No. 25, Opposers' Ex. 74 (Shargill Decl.) ¶ 7, Opposers' Ex. 76.) Paragraph 7 attempts to introduce and quotes from Opposers' Exhibit 76. (*Id.*) The document is an out-of-court statement that Opposers are offering to prove the truth of the matters asserted in the document. Indeed, as reflected in Dr. Shargill's testimony, Opposers intend to use the document to prove [REDACTED]. (*Id.*) Opposers' Exhibit 76 is, accordingly, inadmissible hearsay as is Dr. Shargill's testimony based upon and/or quoting Opposers' Exhibit 76. Fed. R. Civ. P. 801.

business records exception. (*See* Dkt. No. 14, Opposers' Ex. 26 (Stipulation) at ¶ 2.) Furthermore, Opposers failed to lay any foundation to meet any exception to the hearsay rule.

The documents attached to Opposers' Rebuttal Notice of Reliance are also improper rebuttal and cannot be considered by the Board.⁷ (Dkt. No. 23, Opposers' Ex'. 68-72, 77.) Opposers' Exhibits 68 through 71 and 77 are offered as evidence related to the medical overlap or interrelatedness of asthma and COPD. (Dkt. No. 23, Opposers' Rebuttal Notice of Reliance at ¶ 1.) However, this topic was addressed in Opposers' case-in-chief through the attempted submission of several hearsay exhibits and the testimony of Ms. Passafaro. (Dkt. No. 12, Opposers' Exs. 18-24; Dkt. No. 22, Passafaro Tr. at 18:5-19:19, 180:11-82:3, 184:18-24.) Opposers' Exhibit 72 is offered as "evidence of use of medical devices for non-indicated uses." (Dkt. No. 23, Opposers' Rebuttal Notice of Reliance at ¶ 1.) Opposers claim that this is in rebuttal to Dr. Wahr's testimony. (*Id.*) However, this cannot be proper rebuttal because (1) the ability for a physician to use or not use the devices to treat the same or similar conditions was an issue for Opposers' case-in-chief; and (2) this document does not speak to, address, or rebut Dr. Wahr's testimony in any form or fashion. Dr. Wahr testified that there should be no current off-label use of the HOLAIRA product because the product is not yet approved for any use by the FDA. (Dkt. No. 29, Wahr Tr. at 49:12-19.) This document misses the mark because it only discusses off-label use of products that have a use indication from the FDA. (Dkt. No. 23, Opposers' Ex. 72.)

IV. THE NUNBERG REPORT IS IRRELEVANT AND UNRELIABLE.

Expert testimony that is not reliable is inadmissible. Fed. R. Evid. 702; *see also Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). While linguists' expert testimony is generally admitted as relevant, their opinions typically have little evidentiary value. *See, e.g., Stix Prods. Inc. v. United Merchants & Mfrs., Inc.*, 189 U.S.P.Q. 693, 786 (S.D.N.Y. 1968)

⁷ The documents are also inadmissible hearsay. (*See Infra.*)

“The idea that a particular intonation, stress pattern or pronunciation used by a customer governs whether she is asking for a brand name or is describing a class of goods disregards the polyglot nature of consumers and their differences in speech, dialect and language.”). Moreover, any testimony, including expert testimony, should be excluded if it has no material relevance. Fed. R. Evid. 402.

Linguist testimony that fails to take into account the relevant context, such as the relevant customer, the purchasing process, or how customers are introduced to the product, is not helpful in determining the commercial impression of marks:

It is fundamental that the commercial impression of marks depends largely upon how the purchasers of the goods marketed thereunder perceive them; that **the understanding of the marks must be determined in light of the relevant purchasing sector and not that of linguistic experts** or those familiar with the meaning or derivation of words . . . ;

Ferro Corp. v. Nicofibers, Inc., 196 U.S.P.Q. 41, 45 (T.T.A.B. 1997). Indeed, the law is clear, “where as here the goods are of a technical nature, the degree of sophistication or knowledge of the average purchaser must be taken into account” when assessing the commercial impression of a mark. *Id.*

Nunberg’s abstract and theoretical testimony fails to consider any of the relevant context and is therefore unhelpful, irrelevant, and inadmissible. Nowhere in his analysis does he assess or even mention the relevant consumers—specially trained pulmonologists—or the manner in which those customers will encounter the mark—through direct interaction with a company-employed sales representative. (Dkt. No. 14, Opposers’ Ex. 27 (Nunberg Rpt.)) Moreover, many of his conclusions are based on assumptions not supported by the factual record. For example, to conclude that the marks are pronounced similarly, Nunberg admits that he “assume[s] that a substantial proportion of the customers and users of these products will be

among the many native Spanish-speakers in the health care industries.” (*Id.* at ¶ 18.) However, Nunberg is not an expert in the demographics of the healthcare industry, and Opposers cite to absolutely no evidence suggesting that the parties’ relevant customers—pulmonologists—tend to speak Spanish. Such evidence does not even exist with respect to patients, who are, in any event, not even relevant for the trademark analysis. (*Cf.* Dkt. No. 22, Passafaro Tr. at 53:21–22 (“I don’t know numbers of Spanish-speaking patients.”).) Because Nunberg’s testimony and conclusions are unsubstantiated, assume facts that do not exist, and ignore the relevant purchasers, they are irrelevant and inadmissible. *See Gen. Cigar Co. v. G.D.M. Inc.*, 988 F.Supp. 647, 660–61, 45 U.S.P.Q.2d 1481, 1491–92 (S.D.N.Y. 1997) (linguist’s associations between mark and foreign language were not relevant because offering party had not established that prospective purchasers speak the foreign language); Fed. R. Evid. 702.

In addition, Nunberg’s opinions go well beyond his stated expertise and invade the province of the Board. Nunberg concludes “the marks HOLAIRA and ALAIR convey similar overall commercial impressions in terms of sight, sound, and meaning.” (Dkt. No. 14, Opposers’ Ex. 27 (Nunberg Rpt.).) This, however, is a legal determination for the Board. Because Nunberg’s conclusion goes to the ultimate issue, the Board should disregard his testimony. *Marx v. Diners Club, Inc.*, 550 F.2d 505, 509 (2d Cir. 1977) (expert testimony consisting of legal conclusions regarding existence of contract or meaning of its terms not admissible), *cert. denied*, 434 U.S. 861 (1977); *Sparton Corp. v. United States*, 82 U.S.P.Q.2d 1666, 1674 n.11 (Fed. Cl. 2007) (“It is wholly inappropriate for legal arguments to be presented to the Court in the form of expert testimony.”)

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board overrule Opposers' objections to Applicant's evidence and sustain Applicant's objections to Opposers' evidence.

APPENDIX 1

**APPLICANT'S RESPONSE TO OPPOSERS' EVIDENTIARY
OBJECTIONS AND APPLICANT'S OBJECTIONS TO OPPOSER'S EVIDENCE**

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

In the matter of Application Serial No.: 85/806,379
Filed: December 19, 2012
For the mark: HOLAIRA
Published in the *Trademark Official Gazette* on December 3, 2013

Boston Scientific Corporation and
Asthmatx, Inc.

Opposition No. 91215699

Opposers,

v.

**AFFIDAVIT OF
DENNIS E. HANSEN**

Holaira, Inc.

Applicant.

STATE OF MINNESOTA)
) ss:
COUNTY OF HENNEPIN)

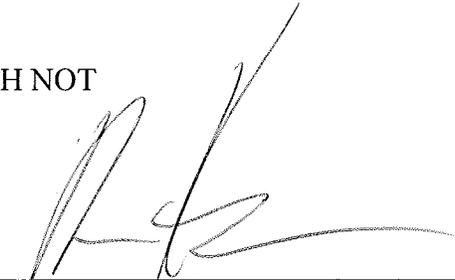
Dennis E. Hansen, being first duly sworn and warned that willful false statements and the like so made are punishable by fine, or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this document, states the following:

1. I am an attorney representing Holaira, Inc. (“Applicant”) in the above-captioned matter (“Opposition”).
2. The information contained in this Affidavit is based upon my personal knowledge.
3. Attached as Exhibit 1 are true and correct copies of letters from Opposers’ counsel serving document productions via CD, bearing the below referenced bates label ranges:

- a. September 10, 2014, bates labeled BSC000001-BSC000855;
- b. November 18, 2014, bates labeled BSC000856-BSC000859;
- c. November 26, 2014, bates labeled BSC000860-BSC000861;
- d. December 8, 2014, bates labeled BSC000862-BSC001505;
- e. April 8, 2015, bates labeled BSC001508-BSC001509; and
- f. May 6, 2015, bates labeled BSC001510-BSC001525.

FURTHER YOUR AFFIANT SAYETH NOT

Dated: November 17, 2015

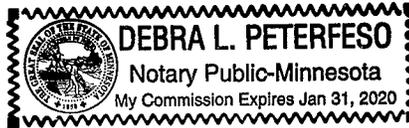


DENNIS E. HANSEN

Subscribed and sworn to before me
this 17th day of November, 2015.



Debra L. Peterfeso
Notary Public – Minnesota
My Commission Expires Jan. 31, 2020




WINTHROP WEINSTINE
ATTORNEYS AND COUNSELORS AT LAW

September 10, 2014

Bradley J. Walz
Direct Dial: (612) 604-6725
Direct Fax: (612) 604-6825
bwalz@winthrop.com

VIA HAND DELIVERY

Barbara J. Grahn
OPPENHEIMER WOLFF & DONNELLYLLP
200 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402-3338

RE: Boston Scientific Corporation and Astmatx, Inc. vs Holaira, Inc.
Opposition No.: 91215699
Our File No.: 13448.69

Dear Ms. Grahn:

Enclosed and served upon you by hand delivery is a true and correct copy of the following:

1. Opposers' Answers to Holaira, Inc.'s First Set of Interrogatories; and
2. Opposers' Response to Holaira, Inc.'s First Set of Requests for Production of Documents.
3. CD of responsive documents Bates labeled BSC000001-BSC000855;
4. Privilege Log.

We will forward the signature page to the Answers to Interrogatories when we receive it from our client.

Best regards,

WINTHROP & WEINSTINE, P.A.


Bradley J. Walz

Enclosures

BJW/ekm


WINTHROP WEINSTINE
ATTORNEYS AND COUNSELORS AT LAW

November 18, 2014

Timothy D. Sitzmann
Direct Dial: (612) 604-6689
Direct Fax: (612) 604-6989
Tsitzmann@winthrop.com

VIA FIRST CLASS MAIL

Barbara J. Grahn
Dennis E. Hansen
OPPENHEIMER WOLFF & DONNELLY LLP
200 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402-3338

RE: Boston Scientific Corporation and Astmatx, Inc. v. Holaira, Inc.
Opposition No.: 91215699
Our File No.: 13448.69

Dear Barb and Dennis:

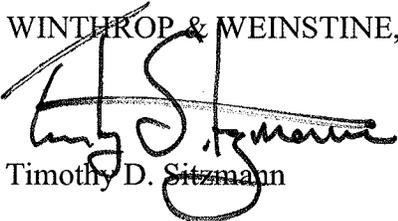
Upon further review, the two undated records on page 1 were inadvertently included as part of Opposers' Privilege Log. These documents were produced and are bates numbered BSC000095 - BSC000096 and BSC000621 - BSC000622. The documents on page 3 dated February 28 and March 21, 2014 have been produced and are bates numbered BSC000856 - BSC000859. The remaining entries have been supplemented.

In light of the foregoing, please find enclosed and served upon you true and correct copies of:

- 1) Opposers' Supplemental Responses to Applicant's First Set of Requests for Production of Documents;
- 2) Opposers' Supplemental Privilege Log;
- 3) A list of individuals identified in Opposers' Supplemental Privilege Log; and
- 4) CD of Documents Produced, Bates Range BSC000856 - BSC000859.

Best regards,

WINTHROP & WEINSTINE, P.A.


Timothy D. Sitzmann

Enclosures
9714076v1


WINTHROP WEINSTINE
ATTORNEYS AND COUNSELORS AT LAW

November 26, 2014

Timothy D. Sitzmann
Direct Dial: (612) 604-6689
Direct Fax: (612) 604-6989
Tsitzmann@winthrop.com

VIA FIRST CLASS MAIL

Barbara J. Grahn
Dennis E. Hansen
OPPENHEIMER WOLFF & DONNELLY LLP
200 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402-3338

RE: Boston Scientific Corporation and Asthmatx, Inc. v. Holaira, Inc.
Opposition No.: 91215699
Our File No.: 13448.69

Dear Barb and Dennis:

Please find enclosed and served upon you true and correct copies of:

- 1) Opposers' Second Supplemental Responses to Applicant's First Set of Requests for Production of Documents;
- 2) A CD containing Documents Produced, Bates Range BSC000860 – BSC000861.

Best regards,

WINTHROP & WEINSTINE, P.A.


Timothy D. Sitzmann

Enclosures
9747765v1

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DEC 08 2014

December 8, 2014

Timothy D. Sitzmann
Direct Dial: (612) 604-6689
Direct Fax: (612) 604-6989
Tsitzmann@winthrop.com

VIA FIRST CLASS MAIL

Barbara J. Grahn
Dennis E. Hansen
OPPENHEIMER WOLFF & DONNELLY LLP
200 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402-3338

RE: Boston Scientific Corporation and Asthmatx, Inc. v. Holaira, Inc.
Opposition No.: 91215699
Our File No.: 13448.69

Dear Barb and Dennis:

Please find enclosed and served upon you true and correct copies of:

- 1) Opposers' Third Supplemental Responses to Applicant's First Set of Requests for Production of Documents;
- 2) A CD containing Documents Produced, Bates Range BSC000862 – BSC001505.

Best regards,

WINTHROP & WEINSTINE, P.A.


Timothy D. Sitzmann

Enclosures
9784348v1


WINTHROP WEINSTINE
ATTORNEYS AND COUNSELORS AT LAW

April 8, 2015

Timothy D. Sitzmann
Direct Dial: (612) 604-6689
Direct Fax: (612) 604-6989
Tsitzmann@winthrop.com

VIA FIRST CLASS MAIL

Barbara J. Grahn
Dennis E. Hansen
OPPENHEIMER WOLFF & DONNELLY LLP
200 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402-3338

RE: Boston Scientific Corporation and Asthmatx, Inc. v. Holaira, Inc.
Opposition No.: 91215699
Our File No.: 13448.69

Dear Barb and Dennis:

Please find enclosed and served upon you true and correct copies of:

- 1) Opposers' Fourth Supplemental Responses to Applicant's First Set of Requests for Production of Documents;
- 2) Documents Produced, Bates Range BSC001508 – BSC001509.

Best regards,

WINTHROP & WEINSTINE, P.A.


Timothy D. Sitzmann

Enclosures
10230919v1


WINTHROP WEINSTINE
ATTORNEYS AND COUNSELORS AT LAW

May 6, 2015

Timothy D. Sitzmann
Direct Dial: (612) 604-6689
Direct Fax: (612) 604-6989
Tsitzmann@winthrop.com

VIA FIRST CLASS MAIL

Barbara J. Grahm
Dennis E. Hansen
OPPENHEIMER WOLFF & DONNELLY LLP
200 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402-3338

RE: Boston Scientific Corporation and Asthmatx, Inc. v. Holaira, Inc.
Opposition No.: 91215699
Our File No.: 13448.69

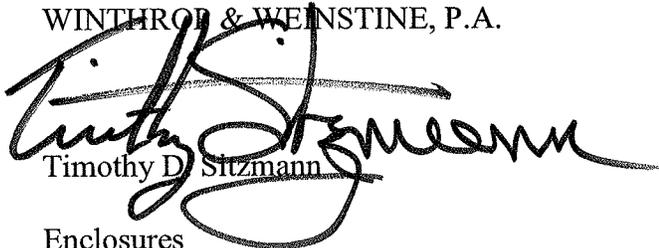
Dear Barb and Dennis:

Please find enclosed and served upon you true and correct copies of:

- 1) Opposers' Fifth Supplemental Responses to Applicant's First Set of Requests for Production of Documents;
- 2) Documents Produced, Bates Range BSC001510 – BSC001525;
- 3) Notice of Reliance; and
- 4) Affidavit of Timothy D. Sitzmann.

Best regards,

WINTHROP & WEINSTINE, P.A.


Timothy D. Sitzmann

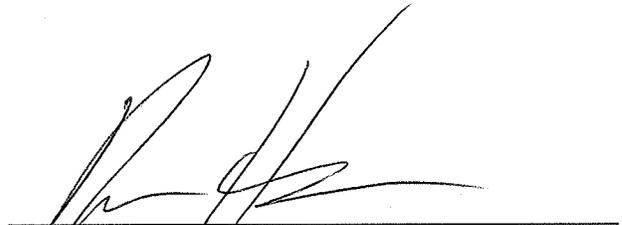
Enclosures
10346320v1

3. The Affidavit of Dennis E. Hansen submitted as Appendix 1 to Applicant's Response to Opposers' Evidentiary Objections and Applicant's Objections to Opposers' Evidence,

upon the within named counsel by United States Mail, using an envelope addressed as set forth below, with postage prepaid, and depositing the same in the United States Mail at Minneapolis, Minnesota:

Timothy D. Sitzmann, Esq.
Stephen R. Baird, Esq
Bradley J. Walz, Esq.
Winthrop & Weinstine
Capella Tower, Suite 3500
225 South Sixth Street
Minneapolis, MN 55402-4629

Attorneys for Opposers



DENNIS E. HANSEN

Subscribed and sworn to before
this 17th day of November, 2015



Notary Public – Minnesota
My Commission Expires Jan. 31, 2020

