

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: October 5, 2015

Opposition No. 91217237

WhatsApp Inc.

v.

WhysUp, LLC

**George C. Pologeorgis,
Interlocutory Attorney:**

This case now comes before the Board for consideration of Opposer's motion, (filed September 8, 2015) to compel responses to Opposer's first set of written discovery. Applicant has not filed a brief in response to Opposer's motion.

In its motion, Opposer seeks responses to its first set of interrogatories and first request for production of documents and things. Opposer asserts that it served the aforementioned discovery requests upon applicant on July 3, 2015, but has yet to receive any responses thereto.

Pursuant to Trademark Rule 2.120(e)(2), Opposer's motion is timely.¹

Moreover, a party that fails to respond to a request for discovery, and is unable to show that its failure was the result of excusable neglect, may be found, upon motion to compel, to have forfeited its right to object to the discovery requests on

¹ The Board finds that Opposer has demonstrated a good faith effort to resolve the parties' discovery dispute prior to seeking Board intervention, as required by Trademark Rule 2.120(e)(1).

their merits. Inasmuch as nothing in the record indicates that Applicant's failure to respond was the result of excusable neglect, Applicant has waived its right to object to Opposer's interrogatory and document requests on the merits, and must respond in full and without objection (except for objections based upon privilege), since Applicant neither timely responded nor objected to Opposer's discovery requests. *See No Fear, Inc. v. Rule*, 54 USPQ2d 1551, 1554 (TTAB 2000).

Accordingly, Opposer's motion to compel is **GRANTED** as conceded to the extent noted below. *See* Trademark Rule 2.127(a).²

Applicant is ordered to provide Opposer full and complete responses to Opposer's interrogatory requests **without objection** (except for objections based privilege) by **November 4, 2015**. Such responses must be verified by Applicant. *See* Fed. R. Civ. P. 33(b)(5); TBMP § 405.04(c)(2015). Applicant is also ordered to copy and produce non-privileged responsive documents to all of Opposer's document requests **without objection** (except for objections based on privilege) by **November 4, 2015**. To the extent Applicant objects to any of the interrogatory and/or document requests based upon privilege, Applicant is required to provide Opposer with a privilege log by **November 4, 2015**.

If there are no responsive, non-privileged documents in Applicant's possession, custody or control which are responsive to any of Opposer's document requests, Applicant must so state affirmatively in its response to the corresponding document request.

² Trademark Rule 2.127(a) reads, in relevant part: "When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded."

To the extent Applicant has already **fully** produced documents responsive to any of Opposer's document requests, Applicant must so state in its response to the particular document request and **identify, by bates number, the documents which are responsive to each request.**

Should Applicant fail to serve on Opposer the discovery responses as ordered herein, as well as a privilege log, if applicable, the Board will entertain a motion for sanctions in the form of entry of judgment against Applicant.³ See Trademark Rule 2.120(g)(1).

Trial Schedule

Proceedings are hereby resumed.

Discovery for Applicant closes on **October 7, 2015**.

Discovery for Opposer closes on **November 15, 2015**.

Remaining trial dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	12/30/2015
Plaintiff's 30-day Trial Period Ends	2/13/2016
Defendant's Pretrial Disclosures Due	2/28/2016
Defendant's 30-day Trial Period Ends	4/13/2016
Plaintiff's Rebuttal Disclosures Due	4/28/2016
Plaintiff's 15-day Rebuttal Period Ends	5/28/2016

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

³ In the event Applicant fails to provide Opposer with full and complete responses to the outstanding discovery, as required by this order, Applicant will be barred from relying upon or later producing documents or facts at trial withheld from such discovery. See Fed. R. Civ. P. 37(c)(1).

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Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.