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

Proceeding	91217238
Party	Defendant FLIPAGRAM, INC.
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Date	03/24/2016
Attachments	Response to Objection and Opposition to Motion to Strike.160324 (00072566xA1ADA).pdf(29121 bytes)

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

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12 INSTAGRAM, LLC, a Delaware limited
liability company,

13 Opposer/Registrant

14 v.

15 FLIPAGRAM, INC., a California corporation,

16 Applicant/Petitioner
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**FLIPAGRAM'S RESPONSE TO
INSTAGRAM'S OBJECTION/MOTION TO
STRIKE THE AVILA DECLARATION AND
THE GRAY REPLY DECLARATION
SUPPORTING FLIPAGRAM'S
DISCOVERY MOTIONS**

Opposition No. 91217238

Application No. 86042264

1 Opposer Instagram has filed a general objection to the Gray Reply Declaration and the Avila
2 Declaration in their entirety, including all exhibits thereto, and moved to strike all these materials in blanket
3 fashion. There is no merit to Opposer’s objection and its motion must be denied.

4 It is hornbook law that a reply declaration may respond to matters placed at issue by the opponent in
5 its opposition brief. *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.* 767 F.Supp. 1220, 1235 (S.D.N.Y.
6 1991), *rev’d on other grounds*, 967 F.2d 742 (2nd Cir. 1992); *see In re ConAgra Foods, Inc.* (C.D. Cal. 2014)
7 302 FRD 537, 559, fn. 87 (evidence submitted in direct response to evidence raised in opposition “is not
8 ‘new’”; it “provides full context to [the opponent’s] selected recitation of the facts”) (citations omitted). Such
9 materials do not unfairly spring evidence on the opposing party. To the contrary, they are necessary because
10 without them, the opposing party itself would gain an unfair advantage by raising new evidence and issues in
11 its opposition papers. *See Litton, supra*, at 1235.

12 The Avila and Gray Reply Declarations perform precisely this purpose. Opposer’s papers raise new
13 evidence and argument, forcing Flipagram to respond within the limitations of a reply. For example, in
14 opposing the Motion to Compel, Opposer claims for the first time that it has now rendered numerous discovery
15 requests moot by serving supplemental responses – which Opposer did not actually do until a *month after*
16 *Flipagram filed its motion*. (MTC Opp. at 7, 9, 12, 15, 18, 20.) Flipagram’s declarations debunk these claims
17 by detailing Instagram’s supplemental responses and providing concrete examples of why they do not satisfy
18 its discovery obligations. (*See, e.g.*, Gray Reply Decl., Exhs. A-E; Avila Decl., Exh. F.) Similarly, Opposer’s
19 papers assert new and peculiar arguments not raised in the parties’ exhaustive meet-and-confer discussions.
20 For example, Instagram – one of the largest makers of mobile device software in the world – claims not to
21 understand what terms such as “mobile device” mean, forcing Flipagram to demonstrate that it most certainly
22 does. (*See Avila Decl.*, Exhs. A-B.) Opposer also claims for the first time that Flipagram’s naked licensing
23 claim cannot survive a dispositive motion, compelling Flipagram to demonstrate the strength of this claim and
24 show why, at the very minimum, discovery is likely to raise factual questions on this issue. (*Id.* at Exhs. C-E.)

25 Opposer’s lone specific objection, to the “Reference Guide: Opposer’s Mootness Claims” (Exhibit A
26 to the Gray Reply Declaration), is equally meritless. This document is a demonstrative exhibit and soundly
27 proper under the Evidence Code. “Pedagogical summaries,” allowing a party to sort evidence and display it in
28 a helpful presentation, are routinely admissible as exhibits under FRE 611. Similarly, FRE 1006 specifically

1 permits even substantive summary exhibits “to prove the content of voluminous writings ... that cannot be
2 conveniently examined.” Flipagram’s “Reference Guide” performs both of these tasks. In opposing the
3 Motion to Compel, Opposer asserts broadly that it has mooted various requests, attaching voluminous
4 supplemental responses and claiming to have produced “hundreds” of supplemental documents. Flipagram’s
5 exhibit summarizes Opposer’s responses by highlighting the requests, Opposer’s corresponding responses, and
6 the responsive documents that Opposer actually produced, illustrating the arguments presented in Flipagram’s
7 brief.

8 For the foregoing reasons, Opponent’s objections are not well taken and the Board should deny Opposer’s
9 motion to strike.

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11 Dated: March 24, 2016

Respectfully submitted,

12 HARVEY SISKIND LLP

13 */Thomas A. Harvey/*

14 _____
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CERTIFICATE OF TRANSMISSION

I hereby certify that a true and correct copy of FLIPAGRAM’S RESPONSE TO INSTAGRAM’S OBJECTION/MOTION TO STRIKE THE AVILA DECLARATION AND THE GRAY REPLY DECLARATION SUPPORTING FLIPAGRAM’S DISCOVERY MOTIONS (Opposition No. 91217238) is being electronically transmitted to the Trademark Trial and Appeal Board on March 24, 2016.

/Thomas A. Harvey/
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