

ESTTA Tracking number: **ESTTA753750**

Filing date: **06/21/2016**

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

Proceeding	91223088
Party	Defendant Liberty Mutual Insurance Company
Correspondence Address	REBECCA B LEDERHOUSE BAKER & MCKENZIE LLP 300 E RANDOLPH STREET SUITE 5000 CHICAGO, IL 60601-6342 UNITED STATES chiusptomail@bakermckenzie.com, rebecca.lederhouse@bakermckenzie.com, lisa.gates@bakermckenzie.com
Submission	Motion to Compel Discovery
Filer's Name	Rebecca B. Lederhouse
Filer's e-mail	rebecca.lederhouse@bakermckenzie.com
Signature	/Rebecca B. Lederhouse/
Date	06/21/2016
Attachments	opp 91223088 Motion to Compel Scanned.pdf(215693 bytes ) opp 91223088 Declaration in Support of Motion to Compel Scanned.pdf(79068 bytes ) opp 91223088 Exhibits to Declaration in Support of Motion to Compel Scanned.pdf(953695 bytes )

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

In the matter of Application No. 86496558

Lytx, Inc.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91223088
	)	
Liberty Mutual Insurance Company	)	
	)	
Applicant.	)	
_____	)	

**APPLICANT'S MOTION TO COMPEL DISCOVERY**

Liberty Mutual Insurance Company ("Applicant") requests that the Board compel Lytx Inc. ("Opposer") to provide discovery responses and in support states as follows:

**I. INTRODUCTION**

On April 11, 2016, Applicant timely served Opposer with interrogatories and request for production of documents. Opposer did not provide any objections, responses, answers or documents to these discovery requests before the May 16, 2016 due date and has to this date still not provided any objections, responses, answers or documents. Nor has Opposer explained its failure to do so. Applicant made a good faith effort to resolve the issue of Opposer's failure to respond to Applicant's discovery requests by sending emails and leaving a voice mail message, but Opposer's attorney has not responded to any of the attempts. Because Opposer has not provided any response or explanation for its failure to respond to Applicant's discovery requests, this matter cannot be resolved by the parties despite Applicant's good faith efforts. Applicant requests that the Board compel Opposer to provide responses to Applicant's discovery requests and produce documents.

## II. BACKGROUND

Opposer opposed Applicant's trademark application for DRIVE COACH on August 3, 2015. (1 TTABVUE) alleging likelihood of confusion and dilution.

On April 11, 2016, Applicant timely served Opposer with Applicant's First Set of Requests for the Production of Documents and Things and Applicant's First Set of Interrogatories, collectively, "Applicant's Discovery Requests." (Declaration<sup>1</sup> of Rebecca Lederhouse, par. 4, Applicant's Discovery Requests, Exhibit 1).

Opposer filed a Motion to Extend the Discovery Period. (5 TTABVUE). The Board extended discovery until June 5, 2016. (7 TTABVUE). Opposer did not serve any discovery requests during the extended discovery period. (Declaration of Rebecca Lederhouse, par. 6).

Opposer did not respond to Applicant's Discovery Requests by May 16, 2016 or at any other time. (Declaration of Rebecca Lederhouse, par. 7). To this day, Opposer has not responded to Applicant's Discovery Requests. *Id.*

To resolve Opposer's failure to respond to Applicant's Discovery Requests, Applicant's counsel sent an email to Opposer's counsel on June 7, 2016 asking for the responses, documents and answers:

Lytx has not responded to Liberty Mutual's Request for Production of Documents or produced responsive documents or answered the Interrogatories served on April 11. They are now overdue and objections have been waived. Please provide the responses, the responsive documents, and the answers so that I receive them no later than June 14, 2016.

This email is an attempt to resolve a discovery dispute resulting from Lytx' failure to respond to discovery and satisfies Liberty Mutual's obligations under 37 CFR § 2.120(e) and TBMP § 523.02.

Opposer did not respond. (Declaration of Rebecca Lederhouse, par. 8, Exhibit 2 June 7, 2016 email from Applicant's counsel to Opposer's counsel).

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<sup>1</sup> The Declaration of Rebecca B. Lederhouse in Support of Applicant's Motion to Compel Discovery ("Declaration of Rebecca Lederhouse") is attached as Exhibit A. The numbered exhibits are attached to the Declaration of Rebecca Lederhouse.

On the morning of June 15, 2016, Applicant's counsel called Opposer's counsel and left a voicemail message asking him to call Applicant's counsel to discuss the overdue responses. Opposer's counsel did not respond to the voicemail message. (Declaration of Rebecca Lederhouse, par. 9).

On the afternoon of June 15, 2016, Applicant's counsel sent another email to Opposer's counsel, confirming the voicemail message from earlier that day and again attempting to resolve the discovery dispute:

I am following up on my June 7 email to you about Lytx's failure to respond to Liberty Mutual's Request for Production of Documents, failure to produce responsive documents, and failure to answer the interrogatories served on April 11. In an effort to resolve this discovery dispute, in my June 7 email below, I asked for the overdue responses, answers and documents by June 14. I am also following up on the voicemail message I left for you earlier this morning about this overdue discovery.

Because of the current trial and testimony schedule and Lytx's failure to respond to the requests, produce documents, answer interrogatories or offer any explanation for Lytx's failure to do so, you are leaving Liberty Mutual with no option except to bring a motion to compel.

This email is my third attempt to resolve this discovery dispute resulting from Lytx' failure to respond to discovery and satisfies Liberty Mutual's obligations under 37 CFR § 2.120(e) and TBMP § 523.02.

Opposer did not respond. (Declaration of Rebecca Lederhouse, par. 10, Exhibit 3, June 15, 2016 email from Applicant's counsel to Opposer's counsel).

### **III. LEGAL STANDARD**

A motion to compel discovery in a Board proceeding must meet the following standard under TBMP § 523.02 and 37 CFR § 2.120(e):

A motion to compel must include a copy of the request for discovery and the response thereto, as specified in 37 CFR § 2.120(e).

In addition, the motion to compel disclosures or discovery must be supported by a written statement from the moving party that such party or its attorney has made a good faith effort, by conference or correspondence, to resolve with the other party or its attorney the issues presented in the motion, and has been unable to reach agreement.

The statement should contain a recitation of the communications conducted including dates, a summary of telephone conversations, and where applicable, copies of any correspondence exchanged such as email and letters, or notes to the file.

TBMP § 523.02 (notes omitted).

Applicant has complied with these requirements by attaching Applicant's Discovery Requests at Exhibit 1 to the Declaration of Rebecca Lederhouse in Support of Motion to Compel Discovery, noting that Opposer had not provided any objections, answers, responses or documents in response to Applicant's Discovery Requests. Applicant made a good faith effort to resolve the discovery dispute but has been unable to reach an agreement because Opposer has not responded or cooperated with Applicant's attempts to reach an agreement. (Declaration of Rebecca Lederhouse, par. 7-10). Applicant listed its communications with dates and has attached copies of the communications to this motion at Exhibits 2-3 to the Declaration of Rebecca Lederhouse.

#### **IV. ARGUMENT**

Applicant has made a good faith effort to resolve this discovery dispute. Opposer has not made any objections or provided any explanation for its failure to respond to the Applicant's Discovery Requests. Opposer has not produced any documents or answers. In *Envirotech Corp. v. Compagnie Des Lampes*, a telephone call was sufficient to show a good faith effort to resolve a discovery dispute. Here, Applicant has made two written attempts and a telephone call and has received no response from Opposer. *Envirotech Corp. v. Compagnie Des Lampes*, 219 USPQ 448, 450 (TTAB 1979) (where there has been a complete failure to respond to discovery; telephone call to counsel sufficient).

Although Opposer brought this opposition, it has failed to answer Applicant's Discovery Requests. Applicant's Motion to Compel Discovery should be granted.

#### **V. CONCLUSION**

Applicant's Motion to Compel Discovery should be granted. Opposer did not provide any responses, answers or documents in response to Applicant's Discovery Requests. Opposer should be

compelled to respond to Applicant's First Set of Requests for the Production of Documents and Things, produce responsive documents and answer Applicant's First Set of Interrogatories.



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One of the Attorneys for Applicant,  
Liberty Mutual Insurance Company

Date: June 21, 2016

BAKER & MCKENZIE LLP  
Lisa Parker Gates  
Rebecca Lederhouse  
300 E. Randolph Drive, Suite 5000  
Chicago, IL 60601  
Tel. (312) 861-8949  
[Lisa.Gates@bakermckenzie.com](mailto:Lisa.Gates@bakermckenzie.com)  
[Rebecca.Lederhouse@bakermckenzie.com](mailto:Rebecca.Lederhouse@bakermckenzie.com)

**CERTIFICATE OF MAILING AND SERVICE**

The undersigned certifies that **APPLICANT'S MOTION TO COMPEL DISCOVERY** was filed electronically via the Electronic System for Trademark Trial and Appeal (ESTTA) with a copy sent by First Class Mail to:

Karl M. Steins  
Steins & Associates, P.C.  
2333 Camino de Rio South, Suite 120  
San Diego, CA 92108

on June 21, 2016

A handwritten signature in black ink, appearing to read 'R. Lederhouse', written over a horizontal line.

Rebecca B. Lederhouse

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

In the matter of Application No. 86496558

Lytx, Inc.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91223088
	)	
Liberty Mutual Insurance Company	)	
	)	
Applicant.	)	
_____	)	

**DECLARATION OF REBECCA B. LEDERHOUSE**  
**IN SUPPORT OF APPLICANT'S MOTION TO COMPEL DISCOVERY**

I, Rebecca B. Lederhouse, declare as follows:

1. I am an attorney with the law firm of Baker & McKenzie, LLP, counsel for Applicant, Liberty Mutual Insurance Company.
2. I am a member in good standing of the Bar of Illinois.
3. I submit this Declaration in support of Applicant's Motion to Compel Discovery.
4. On Monday, April 11, 2016, Applicant served its discovery requests on Opposer (Applicant's First Set of Requests for the Production of Documents and Things and Applicant's First Set of Interrogatories, collectively, "Applicant's Discovery Requests"). These were timely because they were served on the first business day after the Saturday, April 9, 2016 close of the initial discovery period. Attached as **Exhibit 1** is a copy of Applicant's Discovery Requests.

5. During the initial discovery period, Opposer did not serve any Discovery Requests on Applicant, but instead filed an unconsented Motion to Extend the Discovery and Trial Periods on April 8, 2016. (5 TTABVUE).

6. The Board granted Opposer's Motion to Extend Discovery, until June 5, 2016. (7 TTABVUE). Opposer did not serve any discovery requests on Applicant during the extended discovery period and has to this date, still not served any discovery requests on Applicant.

7. Opposer's answers to the Discovery Requests were due May 16, 2016. Opposer did not provide any responses, answers or documents in response to Applicant's Discovery Requests before the deadline of May 16, 2016, and has to this date still not provided any responses, answers or documents, nor has it explained its failure to do so.

8. On June 7, I sent an email to Opposer's counsel asking him to provide the responses, responsive documents and answers no later than June 14, 2016. Attached as **Exhibit 2** is a copy of the June 7, 2016 email from Applicant's counsel to Opposer's counsel. Opposer's counsel did not respond.

9. On June 15, 2016, at approximately 9:30 a.m. Central time, I left a voicemail message for Opposer's counsel asking him to call me to discuss the overdue discovery responses. Opposer's counsel did not respond.

10. Later in the day, on June 15, 2016, I sent an email to Opposer's counsel confirming the voicemail message and explaining that Opposer's failure to respond to my attempts to resolve the discovery dispute was leaving Applicant with no option but to bring a motion to compel. Attached as **Exhibit 3** is a copy of the June 15, 2016 email from Applicant's counsel to Opposer's counsel. Opposer's counsel did not respond.

Pursuant to 28 U.S.C. 1746, the undersigned declares under penalty of perjury that the foregoing is true and accurate.

Dated: June 21, 2016

A handwritten signature in black ink, appearing to read 'R. Lederhouse', is written over a horizontal line.

Rebecca B. Lederhouse

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

In the matter of Application No. 86496558

Lytix, Inc.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91223088
	)	
Liberty Mutual Insurance Company	)	
	)	
Applicant.	)	
_____	)	

**EXHIBIT 1**  
**TO DECLARATION IN SUPPORT OF**  
**APPLICANT'S MOTION TO COMPEL DISCOVERY**

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

In the matter of Application No. 86496558

Lytx, Inc.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91223088
	)	
Liberty Mutual Insurance Company	)	
	)	
Applicant.	)	
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**APPLICANT'S FIRST SET OF INTERROGATORIES**

Pursuant to 37 C.F.R. § 2.120(d) and Federal Rule of Civil Procedure 33, Applicant Liberty Mutual Insurance Company ("Applicant") requests that Opposer Lytx, Inc., answer this First Set of Interrogatories, fully and separately, in writing and under oath, and serve such answers upon the undersigned within thirty (30) days of service hereof, the time prescribed by the Federal Rules of Civil Procedure, in accordance with the Definitions and Instructions set forth hereinafter.

**DEFINITIONS**

Notwithstanding any definition set forth below, each word, term or phrase used in these discovery requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. As used in these requests, the following terms are to be interpreted in accordance with these definitions.

1. The term "you," "your" or "Opposer," as used herein, shall refer to Lytx, Inc., as well as its predecessors, predecessors-in-interest, subsidiaries, licensees, directors, officers, employees, agents, representatives, attorneys and all other persons in privity with Opposer with respect to the matters herein inquired about.

2. The term "Applicant," as used herein, shall refer to Applicant Liberty Mutual Insurance Company, as well as its predecessors, predecessors-in-interest, subsidiaries, licensees, directors, officers, employees, agents, representatives, attorneys and all other persons in privity with Applicant with respect to the matters herein inquired about.

3. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in the Federal Rules of Civil Procedure, Rule 34(a), including, without limitation, electronic or computerized data compilations. Any copy of a document other than the exact duplicate of that document is a separate document. Likewise, foreign language documents, English language equivalents and English translations are separate documents.

4. The term "concerning" means relating to, referring to, describing, evidencing or constituting.

5. The term "communication" means an oral, graphic, demonstrative, telephonic, verbal, electronic, written or like conveyance of information, including documents.

6. The term "person" means natural person(s), private or public corporation(s), partnerships(s), sole proprietorship(s), union(s), association(s), federation(s), governmental agency(ies), or any other kind of entities.

7. "Identify" used with reference to an individual means to state his or her full name and title and, if not currently employed by you, his or her present or last known address, telephone number, present or last known position and business affiliation, and employer, title, position and job description. "Identify" used with reference to a person other than an individual means to state that person's name, office address, telephone number, and the employee or representative of that person who was your principal contact.

8. "Identify" used with reference to a document means to state the date, author, recipient(s), type of document, letter, memorandum, telegram, chart, note, etc.), its present location or custodian, and all numbers or letters added to that document for the purposes of this litigation. If any such document is no longer in your possession or subject to your control, state what disposition was made of it.

9. "Identify" used with reference to a communication means to state the date of the communication, whether the communication was written or oral, the identity of all parties and witnesses to the communication, the substance of what was said and/or transpired and, if written, the document(s) containing or referring to the communication.

10. "Applicant's Mark" means the mark identified in Application No. 86496558.

11. Opposer's "Pled Trademarks" means the marks identified in the following:

<u>Registration/Serial No.</u>	<u>Trademark</u>
2,440,136	DRIVECAM
3,945,407	DRIVECAM ONLINE
3,945,408	DRIVECAM ONLINE
3,941,571	DRIVECAM ONLINE

3,279,967	DRIVECAM
3,258,763	DRIVECAM
3,258,766	DRIVECAM
3,376,104	DRIVECAM
4,454,419	DRIVECAM (and design)
4,238,376	ONBOARD COACH
86/326,814	FLEXCOACH

12. The terms "all" and "each" shall be construed as all and each.

13. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside of its scope.

14. The use of the singular form of any word includes the plural and vice versa.

**INSTRUCTIONS**

1. You should answer each interrogatory separately and fully, unless it is objected to, in which event the reasons for the objections should be specifically and separately stated, and you should answer to the extent the interrogatory is not objectionable. Opposer is to sign the answers under oath; objections, if any, are to be signed by the attorney making them. If a complete answer to a particular interrogatory is not possible, the interrogatory should be answered to the extent possible and a statement should be made indicating why only a partial answer is given.

2. The fact that investigation is continuing or that discovery is not complete shall not be used as an excuse or failure to answer each Interrogatory as fully as possible. The

omission of any name, fact, or other item of information from the answers shall be deemed a representation that such name, fact, or item of information is not known to the answering party, their counsel, or other representative at the time of the answers.

3. If in responding to any of these Interrogatories you do not maintain the information in the format in which it has been requested, answer the Interrogatory in as detailed a manner as possible.

4. If you respond to any of these Interrogatories by specifying business records pursuant to Rule 33(d) of the Federal Rules of Civil Procedure, identify each business record by the document number identifying the record.

5. If you contend that any of the information demanded by any of these Interrogatories is privileged, set forth, with regard to all such information, the following:

- (a) The nature of the privilege asserted;
- (b) The subject matter to which the claim of privilege relates;
- (c) In the case of information other than documents, the name(s) of the person(s) from whom such information was obtained and the name(s) of any person(s) to whom such information was communicated;
- (d) In the case of an allegedly privileged document:
  - (i) The date(s) on which it was produced and, if different, the date(s) on which it was transmitted, distributed, or otherwise provided to each person to whom it was transmitted, distributed, or otherwise produced;
  - (ii) The full name(s), address(es) and title(s) of the document's author(s) and addressee(s);

(iii) The full name(s), address(es) and title(s) of all persons who received a copy of the document including, without limitations, all persons who received a blind copy of the document;

(iv) The nature of the document i.e., whether it is a letter, memorandum, tape, disk, etc.);

(v) The content of the document;

and

(vi) The title of the document, if any.

6. If any documents referred to in your response to these Interrogatories were, but are no longer in your possession, custody, or control, state what disposition was made of them and when. If any documents referred to in response to these Interrogatories have been lost or destroyed, describe in detail the circumstances of such loss or destruction and identify each lost or destroyed document (and all files that contained such documents).

7. In answering these Interrogatories, furnish such information as is available to you, not merely such information as is of your personal knowledge. This means that you are to furnish information which is known by you or in the possession of your employees, representatives, or agents, including, without limitation, your attorney(s).

8. Do not incorporate by reference facts contained in documents or publications. Specify the precise facts, allegations, names, etc., called for by the Interrogatories, regardless of whether the same are set forth elsewhere.

9. In answering any of the Interrogatories, for any ambiguity in construing either the Interrogatory or a definition or instruction relevant to the inquiry contained in the

Interrogatory encountered, identify the matter deemed ambiguous and set forth the construction chosen or used in answering the Interrogatory.

10. The interrogatories contained herein shall be construed in accordance with Fed. R. Civ. P. 26(e) to include any supplemental responsive information discovered or coming into your possession, custody or control after the time of initial response. To the extent that the answer to any of these interrogatories may at any time be enlarged or diminished by information acquired by you subsequent to the filing of your answer, Registrant requests that you promptly thereafter serve and file Supplemental Answers reflecting such changes pursuant to Rule 26(e) of the Federal Rules of Civil Procedure.

#### **INTERROGATORIES**

1. Please state all facts on which Opposer is relying to show a likelihood of confusion between Opposer's Pled Trademarks and Applicant's Mark.
2. Please state all facts on which Opposer is relying to show dilution of Opposer's Pled Trademarks by Applicant's Mark.
3. Please state all facts on which Opposer is relying to show the similarity or dissimilarity of the Opposer's Pled Trademarks and the Applicant's Mark in their entireties as to appearance, sound, connotation and commercial impressions.
4. Please state all facts on which Opposer is relying to show the similarity or dissimilarity and nature of the products and services sold or offered under Opposer's Pled Trademarks and Applicant's Mark.
5. Please state all facts on which Opposer is relying to show the similarity or dissimilarity of established, likely-to-continue, channels of trade for the products and services sold or offered under Opposer's Pled Trademarks and the Applicant's Mark.

6. Please state all facts on which Opposer is relying to show the similarity or dissimilarity of the conditions under which and buyers to whom products and services sold or offered under Opposer's Pled Trademarks and the Applicant's Mark.

7. Please state all facts on which Opposer is relying to show the fame of Opposer's Pled Trademarks.

8. Please state all facts on which Opposer is relying to show the number and nature of similar marks in use for goods and services similar to those goods and services sold or offered under Opposer's Pled Trademarks and the Applicant's Mark.

9. Please state all facts on which Opposer is relying to show actual confusion between Opposer's Pled Trademarks and Applicant's Mark.

10. Please state all facts on which Opposer is relying to show the length of time and conditions under which there has been concurrent use without evidence of actual confusion.

11. Please state all facts on which Opposer is relying to show the variety of goods and services on which the Pled Trademarks are used.

12. Please state all facts on which Opposer is relying to show the market interface between Opposer and Applicant.

13. Please state all facts on which Opposer is relying to show its right to exclude others from use of Opposer's Pled Trademarks on its goods and services.

14. Please state all facts on which Opposer is relying to show the extent of potential confusion, i.e., whether de minimis or substantial.

15. Please state all facts on which Opposer is relying regarding any other established fact probative of the effect of use.

16. Please state all facts on which Opposer is relying to show the degree of similarity between Applicant's Mark and Opposer's Pled Trademarks.

17. Please state all facts on which Opposer is relying to show the degree of inherent or acquired distinctiveness of Opposer's Pled Trademarks.

18. Please state all facts on which Opposer is relying to show the extent to which Opposer is engaging in substantially exclusive use of the Pled Trademarks.

19. Please state all facts on which Opposer is relying to show the degree of recognition of the Pled Trademarks.

20. Please state all facts on which Opposer is relying to show whether or not Applicant intended to create an association with the Pled Trademarks.

21. Please state all facts on which Opposer is relying to show any actual association between Applicant's Mark and Opposer's Pled Trademarks.

22. Identify, by common commercial descriptive name, each item of goods or type of service actually offered for sale, advertised, or promoted by or on behalf of Opposer bearing Opposer's Pled Trademarks.

23. For each good or service identified in Interrogatory 22, state the date of first use in United States commerce, and describe the circumstances surrounding such first use in commerce.

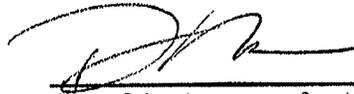
24. Identify any oral, written or other agreements, including, but not limited to, assignments, licenses, authorizations, permissions, or consents, entered into by Opposer regarding Opposer's Pled Trademarks.

25. For each item of goods or services identified in answer to Interrogatory 22, state the total sales in the United States in terms of the income derived by year from the date of first use of Opposer's Pled Trademarks to the present.

26. For each item identified in answer to Interrogatory 22, state the total marketing, advertising and promotional expenditures in the United States by year from the date of first use of Opposer's Pled Trademarks to the present.

27. For each item identified in response to Interrogatory 22, state the price(s) charged for such good(s) or services and describe the manner in which such goods or services are provided to consumers.

Date: April 11, 2016



\_\_\_\_\_  
One of the Attorneys for Applicant,  
Liberty Mutual Insurance Company

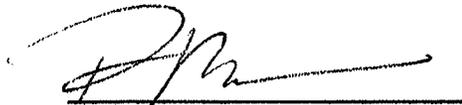
BAKER & MCKENZIE LLP  
Lisa P. Gates  
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300 E. Randolph Drive, Suite 5000  
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Tel. (312) 861-8949  
[Lisa.Gates@bakermckenzie.com](mailto:Lisa.Gates@bakermckenzie.com)  
[Rebecca.Lederhouse@bakermckenzie.com](mailto:Rebecca.Lederhouse@bakermckenzie.com)

**CERTIFICATE OF MAILING AND SERVICE**

The undersigned certifies that a copy of the foregoing **APPLICANT'S FIRST SET OF REQUESTS FOR INTERROGATORIES** was served upon Opposer's attorneys of record by depositing a copy of same via First Class Mail to:

Karl M. Steins  
Steins & Associates, P.C.  
2333 Camino de Rio South, Suite 120  
San Diego, CA 92108

on April 11, 2016



Rebecca B. Lederhouse

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

In the matter of Application No. 86496558

Lytx, Inc.	)	
	)	
Opposer,	)	
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v.	)	Opposition No. 91223088
	)	
Liberty Mutual Insurance Company	)	
	)	
Applicant.	)	
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**APPLICANT'S FIRST SET OF REQUESTS FOR  
THE PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to 37 C.F.R. § 2.120(d) and Fed. R. Civ. P. 34, Applicant Liberty Mutual Insurance Company, by its undersigned attorneys request that Opposer Lytx, Inc. produce for inspection and copying all of the following documents and other tangible things in its possession, custody and control. Production shall take place within thirty (30) days of service at the offices of BAKER & McKENZIE LLP 300 E. Randolph Drive, Suite 5000, Chicago, IL 60601 or at such other time as may be agreed upon by the parties.

**DEFINITIONS**

Notwithstanding any definition set forth below, each word, term or phrase used in these discovery requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. As used in these requests, the following terms are to be interpreted in accordance with these definitions.

1. The terms "you," "your," and "Opposer," as used herein, shall refer to Lytx, Inc., as well as its predecessors, predecessors-in-interest, subsidiaries, licensees, directors, officers, employees, agents, representatives, attorneys and all other persons in privity with Opposer with respect to the matters herein inquired about.

2. "Applicant," as used herein, shall refer to Applicant Liberty Mutual Insurance Company, as well as its predecessors, predecessors-in-interest, subsidiaries, licensees, directors, officers, employees, agents, representatives, attorneys and all other persons in privity with Applicant with respect to the matters herein inquired about.

3. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in the Federal Rules of Civil Procedure, Rule 34(a), including, without limitation, electronic or computerized data compilations. Any copy of a document other than the exact duplicate of that document is a separate document. Likewise, foreign language documents, English language equivalents and English translations are separate documents.

4. The term "concerning" means relating to, referring to, describing, evidencing or constituting.

5. The term "communication" means an oral, graphic, demonstrative, telephonic, verbal, electronic, written or like conveyance of information, including documents.

6. The term "person" means natural person(s), private or public corporation(s), partnerships(s), sole proprietorship(s), union(s), association(s), federation(s), governmental agency(ies), or any other kind of entities.

7. "Identify" used with reference to an individual means to state his or her full name and title and, if not currently employed by you, his or her present or last known address,

telephone number, present or last known position and business affiliation, and employer, title, position and job description. "Identify" used with reference to a person other than an individual means to state that person's name, office address, telephone number, and the employee or representative of that person who was your principal contact.

8. "Identify" used with reference to a document means to state the date, author, recipient(s), type of document (*e.g.*, letter, memorandum, telegram, chart, note, etc.), its present location or custodian, and all numbers or letters added to that document for the purposes of this litigation. If any such document is no longer in your possession or subject to your control, state what disposition was made of it.

9. "Identify" used with reference to a communication means to state the date of the communication, whether the communication was written or oral, the identity of all parties and witnesses to the communication, the substance of what was said and/or transpired and, if written, the document(s) containing or referring to the communication.

10. "Applicant's Mark" means the mark identified in Application No. 86496558.

11. Opposer's "Pled Trademarks" means the marks identified in the following:

<u>Registration/Serial No.</u>	<u>Trademark</u>
2,440,136	DRIVECAM
3,945,407	DRIVECAM ONLINE
3,945,408	DRIVECAM ONLINE
3,941,571	DRIVECAM ONLINE
3,279,967	DRIVECAM
3,258,763	DRIVECAM

3,258,766	DRIVECAM
3,376,104	DRIVECAM
4,454,419	DRIVECAM (and design)
4,238,376	ONBOARD COACH
86/326,814	FLEXCOACH

12. The terms "all" and "each" shall be construed as all and each.

13. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside of its scope.

14. The use of the singular form of any word includes the plural and vice versa.

#### INSTRUCTIONS

1. All documents and things produced should be produced in the same form and same order as they are kept in the usual course of business or organized and labeled to correspond to the particular requests set forth below. If you choose the former method, the documents are to be produced in the boxes, file folders, bindings or other containers in which the documents are kept in the usual course of business. The titles, labels or other descriptions on the boxes, file folders, bindings or other containers are to be left intact.

2. A response to a request for production shall not be deemed complete until documents and things are produced or a date certain is provided as to when the requested documents and things will be produced.

3. If Opposer objects to any request herein or part thereof, Opposer shall fully state with specificity the grounds of its objection and respond to the fullest extent that such production would not be subject to its objection.

4. All documents that respond, in whole, or in part, to any portion of any request shall be produced in their entity, including all attachments and enclosures thereto.

5. If Opposer objects to the production of any document or thing on the ground that the document or thing is protected from discovery under the attorney-client privilege, work product immunity or is otherwise not discoverable, Opposer shall produce a privilege log to Applicant. The privilege log shall set forth, for each document or thing, sufficient information so as to enable the document or thing to be properly identified, including without limitation, the following information: (i) the request for production to which the document pertains; (ii) the document type (letter, memorandum, report, etc.); (iii) the document title; (iv) the document date; (v) the names or names and job titles of the author(s) of the documents; (vi) the names and job titles of each recipient of the document; (vii) a summary of the documents general subject matter; and (viii) an explanation of the claim of privilege or immunity. If Opposer is withholding a document for any reason other than an objection that it is beyond the scope of discovery or that a request is unduly burdensome, identify each document and, in addition to the information requested above, please state the reason for withholding the document.

6. In response to each request, Opposer shall state whether any material has been or will be redacted from documents. Opposer shall also state the basis for the redaction. Redactions should be clearly indicated on a document from which material has been redacted at the location where the redaction has been made.

7. If any document or thing identified in response to an interrogatory or request for production has been destroyed, in addition to identifying the document, provide with regard to such destruction the following: (i) the contents of each destroyed document; (ii) the

date of destruction; (iii) the identity of any individuals who authorized the destruction or carried out such destruction; (iv) other circumstances related to such destruction.

8. If, in responding to a request for production, Opposer encounters any ambiguities in construing a request or definition, Opposer's response shall set forth the matter deemed ambiguous and the construction used by Opposer in responding.

9. These discovery requests are deemed continuing in nature so as to require amended and supplemental productions to the extent called for by Fed. R. Civ. P. 26(e). If Opposer acquires additional knowledge or information with respect to any of these requests after service of its responses, Opposer shall serve a supplemental and/or amended response to each such discovery request within thirty (30) days after acquiring the additional knowledge or information.

#### **REQUESTS FOR PRODUCTION**

1. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show a likelihood of confusion between Opposer's Pled Trademarks and Applicant's Mark.

2. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show dilution of Opposer's Pled Trademarks by Applicant's Mark.

3. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the similarity or dissimilarity of the Opposer's Pled Trademarks and the Applicant's Mark in their entireties as to appearance, sound, connotation and commercial impressions.

4. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the similarity or dissimilarity and nature of the products and services sold or offered under Opposer's Pled Trademarks and Applicant's Mark.

5. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the similarity or dissimilarity of established, likely-to-continue, channels of trade for the products and services sold or offered under Opposer's Pled Trademarks and the Applicant's Mark.

6. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the similarity or dissimilarity of the conditions under which and buyers to whom products and services sold or offered under Opposer's Pled Trademarks and the Applicant's Mark.

7. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the fame of Opposer's Pled Trademarks, including, but not limited to any surveys, marketing studies, polls, or focus group studies, awards.

8. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the number and nature of similar marks in use for goods and services similar to those goods and services sold or offered under Opposer's Pled Trademarks and the Applicant's Mark.

9. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show actual confusion between Opposer's Pled Trademarks and Applicant's Mark.

10. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the length of time and conditions under which there has been concurrent use without evidence of actual confusion.

11. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the variety of goods and services on which the Pled Trademarks are used.

12. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the market interface between Opposer and Applicant.

13. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show its right to exclude others from use of Opposer's Pled Trademarks on its goods and services.

14. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the extent of potential confusion, i.e., whether de minimis or substantial.

15. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying regarding any other established fact probative of the effect of use.

16. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the degree of similarity between Applicant's Mark and Opposer's Pled Trademarks.

17. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the degree of inherent or acquired distinctiveness of Opposer's Pled Trademarks.

18. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the extent to which Opposer is engaging in substantially exclusive use of the Pled Trademarks.

19. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the degree of recognition of the Pled Trademarks.

20. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show whether or not Applicant intended to create an association with the Pled Trademarks.

21. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show any actual association between Applicant's Mark and Opposer's Pled Trademarks.

22. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show each item of goods or type of service actually offered for sale, advertised, or promoted by or on behalf of Opposer bearing Opposer's Pled Trademarks.

23. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the date of first use in United States commerce, and the circumstances surrounding such first use in commerce.

24. For each of Opposer's Pled Trademarks, produce all documents relating to any oral, written or other agreements, including, but not limited to, assignments, licenses, authorizations, permissions, or consents, entered into by Opposer regarding Opposer's Pled Trademarks.

25. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the total sales in the United States in terms of the income derived by year from the date of first use of Opposer's Pled Trademarks to the present.

26. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying to show the total marketing, advertising and promotional expenditures in the United States by year from the date of first use of Opposer's Pled Trademarks to the present.

27. For each of Opposer's Pled Trademarks, produce all documents on which Opposer is relying in order to show the price(s) charged for such good(s) or services and describe the manner in which such goods or services are provided to consumers.

28. All documents and things regarding the earliest use in United States commerce of Opposer's Pled Trademarks by or on behalf of Opposer with respect to each and every of the listed goods and services per trademark.

29. Representative specimens of each different item of Opposer's products or services bearing Opposer's Pled Trademarks, including the prototypes, drafts and sketches for said products and services and those documents regarding the design and/or creation of said products.

30. All documents regarding the types of customers with whom Opposer does business in connection with Opposer's Pled Trademarks, and the ultimate purchasers to whom Opposer offers products or services bearing Opposer's Pled Trademarks.

31. All documents regarding the dollar value of actual sales of Opposer's products or services bearing Opposer's Pled Trademarks since the date of first use of each mark.

32. All documents regarding the amount of money expended to promote Opposer's products or services bearing Opposer's Pled Trademarks since the date of first use of each mark.

33. All documents regarding the date and circumstances under which Opposer became aware of Applicant's mark.

34. All documents regarding any action taken by Opposer in response to its knowledge of Applicant's mark.

35. All documents constituting or relating to any comparison studies, surveys, market research tests, and those documents regarding thereto, including the results thereof, concerning the products or services advertised, promoted, distributed and sold in commerce in connection with Opposer's Pled Trademarks and the products or services advertised, promoted, distributed and sold in connection with Applicant's mark or those of any other third party, including, but not limited to, those relating to confusion or likelihood of confusion or dilution.

36. All documents regarding any instance in which a person has been confused, mistaken, or deceived as to the source of Opposer's products or services advertised, promoted, offered for sale, or sold in connection with Opposer's Pled Trademarks, and the source of Applicant's products or services advertised, promoted, offered for sale, or sold in connection with Applicant's mark or that of any third party.

37. All documents, not otherwise requested herein, referred to by Opposer in responding to the interrogatories.

38. All correspondence and/or inquiries from consumers concerning Opposer's use of Opposer's Pled Trademarks and/or the goods or services provided by Opposer under Opposer's Pled Trademarks.

39. All documents upon which Opposer may rely or use at trial to support any claim, position, or defense.

40. All documents identified in Opposer's answers to Applicant's First Set of Interrogatories.

41. All documents the identity of which is requested in Applicant's First Set of Interrogatories.

42. All documents relied on, referred to or consulted in responding to Applicant's First Set of Interrogatories.

43. All documents which relate to any objection, litigation, proceeding or dispute relating to Opposer's use of Opposer's Pled Trademarks.

44. All documents relating to present or former third party use of any name, mark or term comprised in whole or in part of Opposer's Pled Trademarks or any variation thereof.

45. All nonprivileged documents prepared by Opposer for use in this proceeding, including any communication with expert witnesses or research firms.

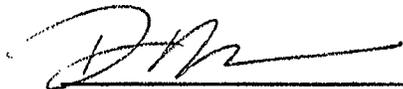
46. All documents Opposer intends to offer into evidence, rely upon or otherwise use in the course of this opposition proceeding.

47. If your response to any of Applicant's Request for Admission is anything other than an unequivocal admission, produce all documents that support your response.

48. Produce all documents and things concerning Opposer's Pled Trademarks' alleged reputation, quality and popularity, including, but not limited to, awards, investigations, recalls, complaints.

49. Produce all documents and things concerning Opposer's advertising of the Pled Trademarks, including, but not limited to advertising contracts, published advertisements, and amount of dollars spent advertising Opposer's Pled Trademarks on a yearly basis per trademark.

Date: April 11, 2016

  
\_\_\_\_\_  
One of the Attorneys for Applicant,  
Liberty Mutual Insurance Company

BAKER & McKENZIE LLP  
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Rebecca Lederhouse  
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**CERTIFICATE OF MAILING AND SERVICE**

The undersigned certifies that a copy of the foregoing **APPLICANT'S FIRST SET OF REQUESTS FOR THE PRODUCTION OF DOCUMENTS AND THINGS** was served upon Opposer's attorneys of record by depositing a copy of same via First Class Mail to:

Karl M. Steins  
Steins & Associates, P.C.  
2333 Camino de Rio South, Suite 120  
San Diego, CA 92108

on April 11, 2016

A handwritten signature in black ink, appearing to read 'Rebecca B. Lederhouse', written over a horizontal line.

Rebecca B. Lederhouse

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

In the matter of Application No. 86496558

Lytx, Inc.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91223088
	)	
Liberty Mutual Insurance Company	)	
	)	
Applicant.	)	
_____	)	

**EXHIBIT 2**  
**TO DECLARATION IN SUPPORT OF**  
**APPLICANT'S MOTION TO COMPEL DISCOVERY**

## Lederhouse, Rebecca B

---

**From:** Lederhouse, Rebecca B  
**Sent:** Tuesday, June 07, 2016 3:13 PM  
**To:** karl@steins-patents.com; gringoksteins@gmail.com  
**Subject:** Opposition No. 91223088 Lytx, Inc. v. Liberty Mutual Insurance Company

Dear Karl:

Lytx has not responded to Liberty Mutual's Request for Production of Documents or produced responsive documents or answered the Interrogatories served on April 11. They are now overdue and objections have been waived. Please provide the responses, the responsive documents, and the answers so that I receive them no later than June 14, 2016.

This email is an attempt to resolve a discovery dispute resulting from Lytx' failure to respond to discovery and satisfies Liberty Mutual's obligations under 37 CFR § 2.120(e) and TBMP § 523.02.

Rebecca B. Lederhouse  
Attorney at Law  
Baker & McKenzie LLP  
300 E. Randolph Street, Suite 5000  
Chicago, Illinois 60601

312-861-8949  
fax 312-698-2710  
[Rebecca.Lederhouse@BakerMcKenzie.com](mailto:Rebecca.Lederhouse@BakerMcKenzie.com)

**BAKER & MCKENZIE**

**RANKED BAND 1: 2009-2016 • CHAMBERS GLOBAL  
2015 GLOBAL LAW FIRM OF THE YEAR • MANAGING IP**



**Lederhouse, Rebecca B**

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**From:** Lederhouse, Rebecca B  
**Sent:** Wednesday, June 15, 2016 1:58 PM  
**To:** karl@steins-patents.com; gringoksteins@gmail.com  
**Subject:** Opposition No. 91223088 Lytx, Inc. v. Liberty Mutual Insurance Company  
**Importance:** High

Dear Karl:

I am following up on my June 7 email to you about Lytx's failure to respond to Liberty Mutual's Request for Production of Documents, failure to produce responsive documents, and failure to answer the interrogatories served on April 11. In an effort to resolve this discovery dispute, in my June 7 email below, I asked for the overdue responses, answers and documents by June 14. I am also following up on the voicemail message I left for you earlier this morning about this overdue discovery.

Because of the current trial and testimony schedule and Lytx's failure to respond to the requests, produce documents, answer interrogatories or offer any explanation for Lytx's failure to do so, you are leaving Liberty Mutual with no option except to bring a motion to compel.

This email is my third attempt to resolve this discovery dispute resulting from Lytx' failure to respond to discovery and satisfies Liberty Mutual's obligations under 37 CFR § 2.120(e) and TBMP § 523.02.

Best regards,

Rebecca

---

**From:** Lederhouse, Rebecca B  
**Sent:** Tuesday, June 07, 2016 3:13 PM  
**To:** karl@steins-patents.com; gringoksteins@gmail.com  
**Subject:** Opposition No. 91223088 Lytx, Inc. v. Liberty Mutual Insurance Company

Dear Karl:

Lytx has not responded to Liberty Mutual's Request for Production of Documents or produced responsive documents or answered the Interrogatories served on April 11. They are now overdue and objections have been waived. Please provide the responses, the responsive documents, and the answers so that I receive them no later than June 14, 2016.

This email is an attempt to resolve a discovery dispute resulting from Lytx' failure to respond to discovery and satisfies Liberty Mutual's obligations under 37 CFR § 2.120(e) and TBMP § 523.02.

Rebecca B. Lederhouse  
Attorney at Law  
Baker & McKenzie LLP  
300 E. Randolph Street, Suite 5000  
Chicago, Illinois 60601

312-861-8949  
fax 312-698-2710  
[Rebecca.Lederhouse@BakerMcKenzie.com](mailto:Rebecca.Lederhouse@BakerMcKenzie.com)

**BLANKEN & BOEKHOFF**

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2015 GLOBAL LAW FIRM OF THE YEAR • MANAGING IP**