

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

ACM Enterprises, Inc.,

Petitioner,

- against -

Martello, Jeannette, M.D.,

Respondent.

Cancellation No.:92044697

Filed: March 5, 2009

U.S. PATENT
AND
TRADEMARK
OFFICE
MAR 5 2009
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Certificate of Facsimile Transmission

I hereby certify that this correspondence (Pages 1-10, excluding cover page) of the Opposition of the Motion to Compel, Motion for a Protective Order and Motion to Stay as well as Exhibit (pages 1 through 57) is being transmitted by facsimile to the United States Patent and Trademark Office on the date shown below.

On March 5, 2009.

Sincerely,

Jeannette Martello
M.D.

Jeannette Martello, M.D.
Respondent In Pro Per

1 JEANNETTE MARTELLO
PRESIDENT OF JEANNETTE MARTELLO, M.D., A PROFESSIONAL CORPORATION
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5

6 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
7 THE TRADEMARK TRIAL AND APPEAL BOARD
8

9	ACM Enterprises, Inc.)	Cancel No. 92044697
10	Petitioner)	Filed: March 5, 2009
11)	RESPONDENT'S OPPOSITION TO
12	Against)	MOTION TO COMPEL
)	MOTION FOR A PROTECTIVE ORDER
13)	MOTION TO STAY DISCOVERY
14	Martello, Jeannette, M.D.)	
15	Respondent)	

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Cancellation No. 92044697
Opp. to Motion to Compel
Motion for a Protective Order
Motion to Stay Discovery
COVER PAGE

1 Déjà vu. Petitioner's attorney has used the exact same bad faith, dilatory
2 tactics at the last minute on three separate occasions. Delay tactic number 1: On
3 December 22, 2005, an extension of time was granted. Plaintiff's trial testimony period was to
4 start on April 22, 2006. A Motion to Compel Discovery was filed by Petitioner on
5 April 21, 2006 after a single last-minute phone call was made to Respondent's attorney on
6 April 20, 2006. Delay tactic number 2: Over a year later, an extension of time was requested
7 on June 30, 2007. Plaintiff's trial testimony period was set to start on August 4, 2007. Plaintiff
8 filed a Motion for Summary Judgment on Friday, August 3, 2007 with exhibits that were
9 mailed separately on Saturday August 4, 2007 replete with a Certificate of Mailing signed by
10 attorney David Hong in accordance with 37 CFR § 2.197(a)(1)(A)(ii) that "the person signing
11 the certificate should have reasonable basis to expect that the correspondence would be mailed
12 or transmitted on or before the date indicated." This is incredible considering the fact that
13 page 12 of Hong's 216 pages of exhibits was printed off from the TARR web server at
14 19:03:12 ET 4:03 p.m. PST) on Friday, August 3, 2007 whilst the mailing post office closed
15 at 4:30 p.m. on August 3, 2007. The exhibits for the Motion for Summary Judgment were
16 received in Virginia on Monday, August 6, 2007 at 11:28 a.m. Delay tactic number 3: On
17 September 17, 2008, a three month extension of time was granted. The Plaintiff's trial
18 testimony period was set to start on February 15, 2009. On February 14, 2009, Petitioner filed
19 this Motion to Compel.

20 This Second Motion to Compel presents yet another refrain in Petitioner's ongoing effort to
21 engage Respondent in frivolous motion practice over irrelevant time-consuming discovery
22 disputes. Petitioner has attempted to divert resources and attention away from the fact that
23 Petitioner ACM has absolutely no standing. This Motion for a Protective Order and for a Motion
24 to Stay Discovery to review a dispositive Motion for Summary Judgment is germane to the
25 present Motion to Compel. Respondent has recently discovered that Petitioner had no standing
26 to bring this Petition for Cancellation to the Trademark Trial and Appeal Board in the first place
27 and Petitioner still has no standing to this day. This newly discovered evidence will render the
28

1 Motion to Compel as well as all other proceedings moot once the Trademark Trial and Appeal
2 Board has had a chance to review the evidence submitted with the dispositive Motion for
3 Summary Judgment.

4 Petitioner's Motion to Compel should be denied because further discovery would be
5 unduly burdensome and oppressive. Furthermore, Respondent believes that the discovery
6 requested is unreasonably cumulative, irrelevant or duplicative [Fed.R.Civ.P. 26].
7 See *Red Wing Co. v. J.M. Smucker Co.*, 59 USPQ2d 1861 (TTAB 2001). Respondent
8 respectfully requests a Motion for a Protective Order and for a Motion to Stay Discovery since
9 Respondent has discovered through newly revealed evidence that Petitioner lacked standing to
10 file the initial Petition for Cancellation in 2005. Petitioner lacks standing to this day. Therefore,
11 all Discovery that Petitioner seeks is the fruit of the same ill-begotten tree of deceit and fraud in
12 its initial filing of the Petition for Cancellation with the Trademark Trial and Appeal Board.

13 The Trademark Trial and Appeal Board has been more than patient in granting numerous
14 extensions of time. In order to prevent further waste of the Trademark Trial and Appeal Board's
15 time, Respondent respectfully requests a Motion for a Protective Order as well as a Motion to
16 Stay Discovery so that the Trademark Trial and Appeal Board may have a chance to review and
17 decide upon a dispositive Motion for Summary Judgment. The fact that the discovery period
18 would have ended within mere hours if Petitioner had not filed this Motion to Compel argues
19 that this stay would not be prejudicial to the Petitioner. This Motion for Summary Judgment is
20 germane to the present Motion to Compel since Respondent has recently discovered that
21 Petitioner had no standing to bring this Petition for Cancellation to the Trademark Trial and
22 Appeal Board in the first place. This newly discovered evidence will render the Motion to
23 Compel as well as all other proceedings moot once the Trademark Trial and Appeal Board has
24 had a chance to review the evidence submitted with the Motion for Summary Judgment.

25 Petitioner has forced Respondent to go on a wild goose chase to ferret out a sham Berger
26 Medical Corporation by failing to produce complete documentation regarding the business
27 relationship between Petitioner and Dr. Saul Berger. This illegal business relationship was
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1 documented in a Facilities and Management Services Agreement that was 14 pages in length.
2 Pages 1 and 14 were provided to Respondent with a redacted page 4 that was produced after
3 much prodding. (Exhibit, pages 1 through 9). This bogus Berger Medical Corporation was
4 formed to break California law, specifically the Moscone Knox Act that governs professional
5 corporations. Respondent has had to independently hire agencies to obtain California Secretary
6 of State documents on a rush basis so as to unveil the extent to which Petitioner has broken laws
7 as well as to unveil the fact that Petitioner had absolutely no standing to have brought forth this
8 Petition for Cancellation in the first place. Respondent has expended in excess of \$ 30,000 on
9 attorney's fees in this case in order to defend Respondent's Registration. It would be prejudicial
10 to Respondent if this Motion for Summary Judgment were not reviewed. Furthermore, it is in
11 the interest of justice and in the interest of the economics of time that the Trademark Trial and
12 Appeal Board stay discovery and review this dispositive Motion for Summary Judgment.

13 MOTIVE FOR BAD FAITH AND DILATORY TACTICS

14 The motives and reasons for Petitioner's conduct via these bad faith dilatory actions
15 became apparent only after Respondent completed arduous discovery which revealed that
16 Petitioner has never had standing to file a Petition for Cancellation. Petitioner's counsel had
17 been uncooperative in producing information that would have allowed this discovery to have
18 occurred at an earlier point in the proceeding. (Exhibit, pages 1 through 9). Petitioner ACM is
19 not a professional corporation. Petitioner ACM is not a licensed practitioner. Therefore,
20 according to California Business and Professions Code Sections 2285 and 2415, Petitioner has
21 been illegally using the name Skin Deep Laser Med Spa in violation of these codes. (Exhibit,
22 pages 10 through 13). It follows that Petitioner had no standing and continues to not have
23 standing to this day. According to the Medical Board of California, a lay person can not be a
24 partial owner of a fictitious name permit (question 17). Fictitious name permits can only be
25 issued to professional medical corporations (question 18) and physicians may only be partners
26 with other physicians (question 20). Additionally, fictitious name permits are not transferrable
27 (question 14). (Exhibit, pages 34 through 44)

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Cancellation No. 92044697
Opp. to Motion to Compel
Motion for a Protective Order
Motion to Stay Discovery
Page 3

1 manipulated the wording of his questions so that an interrogatory could instead be viewed as an
2 admission instead (since there is no statutory limitation on the number of requests for admissions
3 a party can pose to another). Since the Trademark Trial and Appeal Board has proposed the
4 limitation of interrogatories to 25; limitation of admissions to 25 and document production to 15
5 items (although these limitations are not in effect at this time), it appears that these are the
6 numbers that the Trademark Trial and Appeal Board appear to be reasonable to accomplish
7 discovery. Needless to say, Respondent has a good faith belief that the discovery requested is
8 unreasonably cumulative, irrelevant or duplicative, etc. [Fed.R.Civ.P. 26]. *See Red Wing Co. v.*
9 *J.M. Smucker Co.*, 59 USPQ2d 1861 (TTAB 2001).

10 The burden is on the party seeking the information to establish why it is relevant.
11 *See Red Wing Co. v. J.M. Smucker Co.*, 59 USPQ2d 1861, 1863(TTAB 2001). Petitioner's
12 attorney David Hong has never been able to adequately explain why the answers to the
13 interrogatories and admissions that he compels in this Motion to Compel are relevant. On page
14 three of his February 28, 2007 letter addressed to Respondent's attorney Brandon Tesser, he
15 wrote, "I will need to follow up on our reasons why these questions deal with discoverable
16 topics for this instant proceeding and require a response." (Exhibit, pages 45 through 47).
17 If attorney Hong needed to get back to Respondent's attorney Tesser on "our reasons why these
18 questions deal with discoverable topics", there is no good faith legal basis for this discovery.
19 Over one month later, on March 21, 2007, Petitioner's counsel answered Respondent's counsel's
20 question regarding the relevancy of the discovery material. In his long-winded ten page letter
21 replete with circular reasoning and voluminous citations, Petitioner's attorney Hong answered
22 what he believed the relevancy was for the discovery sought. (Exhibit, pages 48 through 57).

23 Petitioner has never met his burden to show the relevancy of the discovery sought.
24 Nevertheless, Respondent, in good faith, admitted to requests for admissions numbers 50 and 63.

25 MOTION TO COMPEL ANSWERS TO INTERROGATORIES

26 For over three years, Petitioner's attorney David Hong has known the identity and
27 location of Sara Herrick. Attorney David Hong has contacted Sara Herrick via telephone at her
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1 place of business in the past. The Interrogatories that Petitioner's attorney has requested involve
2 information that is available and "obtainable from some other source that is more convenient",
3 namely from Sara Herrick. See TBMP 402.02. Over these three long years, Petitioner could
4 have easily noticed and deposed Sara Herrick for a discovery deposition. Not once has Petitioner
5 done so or even attempted to do so. Nevertheless, the requests for answers to interrogatories 21
6 to 23 are irrelevant and moot since Respondent's first legal use anywhere and first legal use in
7 interstate commerce predates Petitioner's alleged date of illegal first use anywhere and illegal
8 first use in interstate commerce, regardless of the assignment of Sara Herrick's common law
9 rights in Skin Deep Skin Care.

10 **MOTION TO COMPEL ADMISSIONS**

11 Discovery is limited to obtaining discovery regarding any matter that is relevant to the
12 claim or defense of any party. The following admissions are not reasonably calculated to lead to
13 the discovery of admissible evidence.

14
15 Request for Admissions 21 through 23 ask for admissions regarding whether or not
16 Respondent believes that microdermabrasion, treatment of acne and cleansing and exfoliation of
17 the skin are categorized as health spa services. These requests for admissions are irrelevant and
18 are not reasonably calculated to lead to the discovery of admissible evidence. The requests are
19 overbroad and improperly seek expert opinions and conclusions. The requests constitute
20 incomplete and/or improper hypothetical questions. The requests call for speculation to the
21 extent they seek information outside Respondent's personal knowledge.

22 RFA 21. Admit that healthspa services include microdermabrasion.

23 RFA 22. Admit that healthspa services include treatment for acne.

24 RFA 23. Admit that healthspa services include cleansing and exfoliation
25 of the skin.

1 Request for Admission 50. This request for admission is irrelevant and is not reasonably
2 calculated to lead to the discovery of admissible evidence. Additionally, the request is vague and
3 ambiguous as to the phrase "type of entertainment service."

4 RFA 50. Admit that the "Skin Deep" radio program is a type of entertainment service.
5

6 Request for Admission 51: This request for admission is irrelevant and is not reasonably
7 calculated to lead to the discovery of admissible evidence. The request is overbroad and
8 improperly seeks expert opinions and conclusions. The request is vague, ambiguous and non-
9 specific as to which "patient" is being referred to.

10 RFA 51: "Admit that Respondent Jeannette Martello as a licensed California physician
11 must perform a good faith in-person examination of a patient or of the patient's records before
12 providing medical or physician services to the patient."
13

14 Request for Admission 52: This request for admission is irrelevant and is not reasonably
15 calculated to lead to the discovery of admissible evidence. The request is overbroad and
16 constitutes an incomplete and/or improper hypothetical question. The request is vague,
17 ambiguous and non-specific as to which "caller" is being referred to.

18 RFA 52: "Admit during Respondent Jeannette Martello's "Skin Deep" radio program,
19 the Respondent cannot confirm whether a caller to her program is reporting accurate or truthful
20 information during the radio show."
21

22 Request for Admission 53: This request for admission is irrelevant and is not reasonably
23 calculated to lead to the discovery of admissible evidence. The request is overbroad and
24 constitutes an incomplete and/or improper hypothetical question. Additionally, the request
25 improperly seeks expert opinions and conclusions. The request is vague, ambiguous and non-
26 specific as to which "patient" is being referred to.
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1 RFA 53: "Admit that a good faith in-person examination of a patient enhances the
2 opportunity for a physician to confirm if a patient needs a certain medication or treatment."
3

4 Request for Admission 54: This request for admission is irrelevant and is not reasonably
5 calculated to lead to the discovery of admissible evidence. The request is overbroad and
6 constitutes an incomplete and/or improper hypothetical question. Additionally, the request
7 improperly seeks expert opinions and conclusions. The request is vague, ambiguous and non-
8 specific as to which "patient" is being referred to.

9 RFA 54: "Admit that a good faith in-person examination of a patient enhances the
10 opportunity for a physician to confirm the suspected medical conditions."
11

12 Request for Admission 55: This request for admission is irrelevant and is not reasonably
13 calculated to lead to the discovery of admissible evidence. The request is overbroad and
14 constitutes an incomplete and/or improper hypothetical question. Additionally, the request
15 improperly seeks expert opinions and conclusions. The request is vague, ambiguous and non-
16 specific as to which "patient" is being referred to.

17 RFA 55: "Admit that a good faith in-person examination of a patient enhances the
18 opportunity for a physician to advise the patient of alternative treatment options and to determine
19 if the patient is aware of potential side effects."
20

21 Request for Admission 56: This request for admission is irrelevant and is not reasonably
22 calculated to lead to the discovery of admissible evidence. The request is overbroad and
23 constitutes an incomplete and/or improper hypothetical question. Additionally, the request
24 improperly seeks expert opinions and conclusions. The request is vague, ambiguous and non-
25 specific as to which "patient" is being referred to.

26 RFA 56: "Admit that a good faith in-person examination of a patient enhances the
27 opportunity to rule out other medical conditions."
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1 Request for Admission 71: This request for admission is irrelevant and is not reasonably
2 calculated to lead to the discovery of admissible evidence. The request is overbroad and
3 constitutes an incomplete and/or improper hypothetical question. Additionally, the request
4 improperly seeks expert opinions and conclusions. The request is vague and ambiguous as to the
5 phrase "look for". This request calls for speculation in that it seeks matters outside of
6 Respondent's personal knowledge.

7 RFA 71: Admit that listeners of the radio show SKIN DEEP look for Dr. Jeannette
8 Martello, M.D., in So. Pasadena, CA.

9
10 Request for Admission 72: This request for admission is irrelevant and is not reasonably
11 calculated to lead to the discovery of admissible evidence. The request is overbroad and calls for
12 speculation in that it seeks matters outside of Respondent's personal knowledge.

13 RFA 72: "Admit that looking up the terms "Skin Deep" on the Yahoo.com Yellow Pages
14 for the Pasadena, CA location, the search results list "Skin Deep Lazor [id] Med Spa," 425 South
15 Fair Oaks Avenue, Pasadena, CA 91105.

16 17 CONCLUSION

18 Respondent therefore respectfully requests a Motion for a Protective Order and for a
19 Motion to Stay Discovery since Respondent believes that the discovery requested is
20 unreasonably cumulative, irrelevant or duplicative [Fed.R.Civ.P. 26]. See *Red Wing Co. v. J.M.*
21 *Smucker Co.*, 59 USPQ2d 1861 (TTAB 2001).

22 Furthermore, Petitioner's attorney has filed this Motion to Compel without good faith
23 legal basis. Petitioner's attorney has filed this Motion to Compel for improper purposes such as
24 to harass Respondent and cause unnecessary delay and needlessly increase the cost of litigation
25 as he has done on two prior eleventh hour occasions.

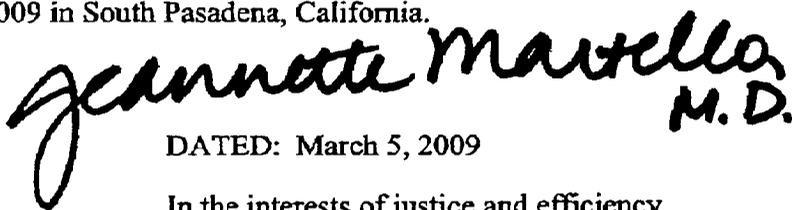
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Cancellation No. 92044697
Opp. to Motion to Compel
Motion for a Protective Order
Motion to Stay Discovery
Page 9

1 Respondent shall transmit said dispositive Motion for Summary Judgment. Respondent
2 respectfully requests that the Trademark Trial and Appeal Board review said Motion for
3 Summary Judgment since it has a valid basis of disposing of the case at hand and to do so would
4 not be prejudicial to the Petitioner.

5 The undersigned being warned that willful false statements and the like are
6 punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful
7 false statements and the like may jeopardize the validity of the application or document or
8 any registration resulting therefrom, declares that all statements made of her own knowledge
9 are true; and all statements made on information and belief are believed to be true.

10 I declare under penalty of perjury under the laws of the State of California
11 and the laws of the United States of America that the above is true and correct.

12 Executed on March 5, 2009 in South Pasadena, California.

13  M.D.

14 DATED: March 5, 2009

15 In the interests of justice and efficiency.

16 Respectfully,

17 By:/jeannette martello, m.d./
18 Jeannette Martello, M.D.
19 Respondent
20 In Pro Per

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