

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

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Mailed: August 17, 2009

Cancellation No. 92047661

Live Ventures Inc.

v.

Saroj International, Inc.

Rogers, Administrative Trademark Judge:

On April 14, 2009, petitioner filed its second motion for a protective order. In particular, petitioner seeks an order from the Board excusing petitioner from having to respond to discovery requests which respondent previously asserted it had served but which petitioner reports have not been received. Petitioner provided evidence of several unanswered letters sent to the respondent asking for copies of the discovery requests that respondent claims to have served. Petitioner asks for an order from the Board excusing it from what otherwise might be found to be a failure by petitioner to respond to respondent's reported discovery requests.

Subsequent to the filing of this motion, the Board suspended the proceedings pending disposition of the

motion.¹ As with previous motions filed by petitioner, respondent did not respond to petitioner's motion for a protective order. The Board notes that of the five motions made by petitioner over the course of the proceeding, respondent has replied to only one.²

The Board has the discretion to treat a motion as conceded when the non-moving party fails to file a brief in response to the motion. Trademark Rule 2.127(a). In view thereof, petitioner's second motion for protective order (filed April 14, 2009) is hereby granted as conceded. See Trademark Rules 2.120(g) and 2.127(a).

As a result, petitioner is excused from having to respond to any discovery requests which respondent claims, or may yet claim, to have already served. Petitioner need only respond to discovery requests, if any, which respondent may serve after the date of this order.

In a previous order (dated May 19, 2008), the Board had ordered respondent to show cause why its apparent loss of interest in this case should not be considered as a concession of the case. While a subsequent order found

¹The Board notes that as of the date of suspension (May 21, 2009), there were 25 days left in the discovery period.

² Respondent responded to petitioner's second motion for sanctions filed on January 15, 2009.

respondent's response to the order to show cause sufficient to avoid entry of judgment granting the petition,³ the Board separately sanctioned respondent for its failure to comply with an earlier order (dated February 21, 2008) compelling proper discovery responses by respondent. The Board found unpersuasive respondent's arguments, included in its response to the order to show cause, that respondent had complied with the order compelling proper discovery responses.

Notwithstanding its clearly lax approach to the defense of this case, respondent has repeatedly stated that it understands its discovery obligations and will supplement its discovery responses as additional information or documents may be discovered. The Board reminds respondent that it has a continuing obligation to comply with the rules of discovery and to supplement its responses as necessary throughout the course of this proceeding. Respondent's latitude to present evidence at trial countering petitioner's claims, or supporting its defenses, has already been limited because of the sanctions entered by the Board on December 12, 2008. Respondent may yet be further limited if it fails to supplement its discovery responses, and then attempts to introduce at trial evidence that should have been disclosed to petitioner, upon filing of an appropriate

³ Board's order dated March 13, 2009.

objection or motion by petitioner. See TBMP § 527.01(e) ("Estoppel Sanction").

This order, *infra*, resets the remaining 25 days of discovery and other trial dates. The closing date for discovery will not be reset, as the discovery period has already been delayed for too long, mostly as a consequence of respondent's dilatory actions and inaction. Proceedings shall resume without further notice or order from the Board, upon the schedule set out below.

If either party finds it necessary to file any additional motions relating to discovery matters, the deadline for such motions is prior to the opening of the first testimony period. The Board will make every effort to have trial open on schedule. No motion relating to discovery may be filed without the prospective movant calling the Board to request a telephone conference to explain why a motion may be necessary. If the Board finds the filing of, or oral presentation of, a motion appropriate, the Board will then provide further instructions to the parties regarding such motion. The parties are reminded that while many discovery disputes may be decided in the context of a phone conference, the Board has discretion to require the parties to appear before the

Board for an in-person conference. See Trademark Rule 2.120(i)(2).

In regard to service issues, the Board notes that both parties have claimed non-receipt of papers that were purportedly served. Additionally, responses have not been signed, papers have not been served via email as was previously ordered, and other responses have not been provided in a timely fashion. In view thereof, the Board requires both parties to promptly provide confirmation to the Board, in writing, filed via ESTTA, of the respective email addresses, telephone numbers and mailing addresses to be used during the remainder of this proceeding. If there are any more reports of service difficulties, the parties will be barred from filing any papers with the Board without first serving the proposed filing on the adverse party, and obtaining confirmation of receipt from the adverse party. Only then will the party be able to file the paper, with a copy of the confirmation of receipt of the service copy, with the Board.

Respondent is reminded that the Board has already imposed sanctions on respondent because of its repeated failures to comply with its discovery obligations. The Board recaps those sanctions that pertain to trial herein:

- (1) Respondent is estopped from claiming a date of first use prior to the dates of use shown in the registrations at issue in this proceeding.
- (2) The Board will accept any documents produced by respondent, if filed during trial by petitioner, as authentic and admissible.⁴
- (3) Respondent is prohibited from relying at trial on any documents requested by petitioner during discovery but not produced by respondent within the time set for complying with the Board's February 21, 2008 order.⁵

As explained by the Board in its order of December 12, 2008, respondent may not introduce documents requested by petitioner during discovery as an exhibit to a testimonial deposition or by notice of reliance. Petitioner may rely on any and all documents produced by respondent. Respondent is not precluded from relying on documents which were reasonably not part of a document production request by petitioner during trial.⁶

⁴ This means that petitioner, at trial, is permitted to introduce by notice of reliance any documents produced by respondent prior to trial, whether or not such documents would normally be admissible under cover of a notice of reliance.

⁵ To be absolutely clear, while respondent has a duty to supplement its discovery responses, and while supplementation by a party would normally be sufficient to avoid application of the estoppel sanction, in the case at hand, respondent will only be able to introduce at trial information and documents produced by March 24, 2008, i.e., the period for complying with the Board's February 21, 2008 order compelling particular discovery responses. Documents produced after that deadline may be introduced by petitioner by notice of reliance, as already discussed, if petitioner chooses to introduce them, but if petitioner does not introduce them, respondent cannot itself introduce them.

⁶ See Board's order dated December 12, 2008.

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Finally, each attorney is ordered to promptly serve on the party he represents a copy of this order and to obtain and file with the Board proof of receipt of the copy by the party.

PROCEEDINGS RESUME:	08/21/09
DISCOVERY PERIOD TO CLOSE:	09/15/09
30-day testimony period for party in position of plaintiff to close:	12/14/09
30-day testimony period for party in position of defendant to close:	02/12/10
15-day rebuttal testimony period to close:	03/29/10

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 taking of testimony. Trademark Rule 2.125.

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