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

Proceeding	92051140
Party	Defendant Product Source International, LLC
Correspondence Address	ANTHONY J DIMARINO AJ DIMARINO PC 57 EUCLID STREET, SUITE A WOODBURY, NJ 08096 UNITED STATES ajd@dimarinolaw.com
Submission	Reply in Support of Motion
Filer's Name	Anthony J. DiMarino, III
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Signature	/Anthony J. DiMarino, III/
Date	04/15/2011
Attachments	Reply brief and supplemental affidavit.pdf (7 pages)(286393 bytes)

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

Leonid Nahshin, 153/36 Beer-Sheva Beer-Sheva, 84746 ISRAEL Plaintiff-Petitioner vs. **Product Source International, LLC** 13 Coleman Road Berlin, NJ 08009 UNITED STATES Defendant-Respondent	**Opposition No.:** 92/051,140 **Registration No.:** 3,350,041 **Mark:** NIC-OUT **Interlocutory Attorney:** Ann Linnehan, Esq.

REPLY IN SUPPORT OF RESPONDENT'S
MOTION TO STRIKE TESTIMONY OF YAEL MENKIN

I. INTRODUCTION

Petitioner did not identify Yael Menkin as a witness with knowledge during the discovery phase, and Petitioner improperly seeks to introduce the affidavit of Yael Menkin as trial testimony.

Forth these reasons, Yael Menkin's affidavit should be excluded from this proceeding.

II. FACTUAL BACKGROUND

Petitioner's initial disclosures, although due on June 18, 2010, were not mailed until October 19, 2010. Petitioner admits that its disclosures do not identify Yael Menkin. Exhibit F to Petitioner's Response.[1]

[1] Respondent shall refer to Petitioner's Response to Defendant's Motion to Strike the Testimony of Yael Menkin as "Petitioner's Response."

Respondent's first set of Interrogatories was served on Petitioner on May 20, 2010. Interrogatory No. 6 sought, among other items, the identification of individuals with evidence demonstrating Petitioner's alleged priority of use. Yael Menkin is not identified in the answer to Interrogatory No. 6. See Petitioner's Answers to Respondent's First Set of Interrogatories, No. 6, Exhibit B to Petitioner's Response.

Interrogatory No. 10 sought the names and addresses of all parties having any knowledge regarding the facts pertaining to the dispute. Yael Menkin was not identified in Petitioner's Answer to Interrogatory No. 10. See Petitioner's Answers to Respondent's First Set of Interrogatories, No. 10, Exhibit B to Petitioner's Response.

Petitioner never amended his answers to Interrogatory Nos. 6 or 10.

Although Plaintiff's Pretrial Disclosures were due on December 30, 2010, Plaintiff's Pre-trial Disclosures were not forwarded until February 9, 2011, only 4 days before Plaintiff's 30 day trial period ended. See Petitioner's Pretrial Disclosures, attached as Exhibit D to Petitioner's Response.

Petitioner did reference Yael Menkin in his Answers to Respondent's First Set of Interrogatories, but did not identify Yael Menkin in response to Answers to Interrogatories Nos. 6 or 10. See Petitioner's answer to Respondent's First Set of Interrogatories, Exhibit B to Petitioner's Response.

Petitioner also referenced Yael Menkin in his Answers to Respondent's second set of Interrogatories, but, again, Petitioner did not amend his previous answers to Interrogatories Nos. 6 or 10. Further, the answers to second set of interrogatories were served on December 13, 2010, one month after the discovery end date of November 15, 2010. Exhibit C to Petitioner's Response.

Petition did serve a "Notice of Reliance" on January 12, 2011, indicating the intent to take the testimony of, among others, Yael Menkin. This is not, however, the proper use of a Notice of Reliance, nor is it a substitute for the required Pretrial Disclosures. Finally, it does not cure Petitioner's failure to identify Yael Menkin in his Initial Disclosures or in Answers to Interrogatories Nos. 6 and 10.

III. ARGUMENT

Yael Menkin was never identified as a witness with knowledge by Petitioner in this action, although she was referenced in answers to certain interrogatories. Respondent did not have the opportunity to conduct the discovery deposition of Yael Menkin and, as a result, has suffered prejudice.

Even if the prejudice caused by the lack of the opportunity to conduct the discovery deposition could have been cured, respondent was precluded from cross-examining Yael Menkin at the "oral deposition" which occurred on February 16, 2011. Although Petitioner issued a notice indicating that the "oral deposition of Yael Menkin" would occur on February 16, 2011, no such deposition occurred.

Instead, after counsel prepared for cross examination, and after counsel travelled approximately 2 hours to the location of that deposition, counsel learned that no deposition would occur, nor was a court reporter present.

Instead, Yael Menkin appeared and produced an affidavit which was then signed and notarized. Counsel for Respondent was not provided with the opportunity to conduct cross-examination on the record of Yael Menkin.

IV. CONCLUSION

Respondent was entitled to rely upon Petitioner's Initial Disclosures and Answers to Interrogatories, all of which clearly indicate that Petition would not be calling Yael Menkin as a witness in this action. The last minute identification of Yael Menkin as a witness who will provide testimony, and the production of an affidavit of Yael Menkin, as opposed to deposition testimony, is improper. As a result, the "testimony" of Yael Menkin should be stricken from this proceeding.

To the extent, however, that the Board is inclined to accept the Affidavit of Yael Menkin, Respondent respectfully requests leave to conduct the discovery deposition of Yael Menkin, that Petitioner be required to produce Yael Menkin's trial testimony by deposition on a date and time to be agreed upon by counsel for the parties and that Petitioner be required to reimburse Respondent for the costs and fees in connection with Respondent's counsel's attendance at the "deposition" which did not occur on February 16, 2011 and for the Motion to Strike the Menkin Testimony of Yael Menkin in the amount of $4,738.00. See Paragraph 6 of the Supplemental Affidavit of Anthony J. DiMarino, III, filed contemporaneously and incorporated as if set forth at length herein.

Date: April 15, 2011

Respectfully Submitted:

Anthony J. DiMarino III, Esq.
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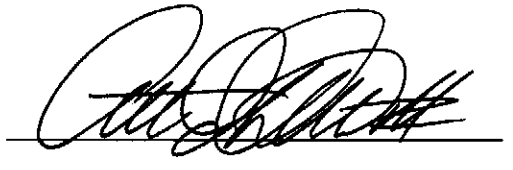
CERTIFICATE OF SERVICE

I, Anthony J. DiMarino III, Esquire, counsel to Defendant-Respondent Product Source International, LLC, hereby certify that the foregoing Defendant-Respondent, Product Source International's, Reply in Support of Respondent's Motion to Strike Testimony Of Yael Menkin and Supplemental Affidavit of Anthony J. DiMarino, III, Esquire, was sent this 15th day of April, 2011, via regular mail to the below-named counsel for Plaintiff-Petitioner, Leonid Nahshin:

Vera Chernobylsky, Esquire
Law Offices of Vera Chernobylsky
4623 Dunman Avenue
Woodland Hills, CA 91364



Anthony J. DiMarino III, Esq.

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Leonid Nahshin, 153/36 Beer-Sheva Beer-Sheva, 84746 ISRAEL Plaintiff-Petitioner vs. **Product Source International, LLC** 13 Coleman Road Berlin, NJ 08009 UNITED STATES Defendant-Respondent	**Opposition No.:** 92/051,140 **Registration No.:** 3,350,041 **Mark:** NIC-OUT **Interlocutory Attorney:** Ann Linnehan, Esq.

SUPPLEMENTAL AFFIDAVIT OF ANTHONY J. DIMARINO, III
IN SUPPORT OF DEFENDANT-RESPONDENT'S
MOTION TO STRIKE TESTIMONY OF YAEL MENKIN

I, Anthony J. DiMarino, III, being of full age, declare the following upon my personal knowledge:

1. I am a member of this bar and an attorney with the law firm of A.J. DiMarino, P.C., 57 Euclid Street, Suite A., Woodbury, New Jersey 08096. I am counsel for Defendant-Respondent, Product Source International, Inc., and do submit this Supplemental Affidavit in support of Defendant-Respondent's Motion to Strike the Testimony of Yael Menkin.

2. I take exception to the facts stated in Paragraph II(B)(10) in Petitioner's Response to Respondent's Motion to Strike the testimony of Yael Menkin.

3. Vera Chernobylsky, Esquire, contacted me on the afternoon of February 8, 2011 indicating that a deposition of Yael Menkin would occur on the morning of Thursday, February 10, 2011.

4. As I already had obligations for other clients on February 10, 2011, including conference calls, submission deadlines and a court conference, I advised Ms. Chernobylsky that I would not be able to attend the deposition on February 10, 2011.

5. Contrary to the statements made by Ms. Chernobylsky, at no time did I ever try to take advantage of Ms. Chernobylsky or the fact that Mrs. Menkin had recently given birth.

6. The fees incurred by myself, other attorneys in my office, and staff concerning the preparation for and attendance at the deposition, as well as the preparation and filing of the Motion to Strike Testimony of Yael Menkin, are $4,738.00.

I declare under penalty of perjury that the foregoing is true and correct.

Date: April 15, 2011

Respectfully Submitted:

Anthony J. DiMarino III, Esq.
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