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

Proceeding	92051140
Party	Plaintiff Leonid Nahshin
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Submission	Opposition/Response to Motion
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Date	10/31/2011
Attachments	Objection to Motion to Strike.pdf (5 pages)(1420634 bytes)

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

Leonid Nahshin,
HAZVI st. 153/36
Beer-Sheva, 84746 ISRAEL

Plaintiff-Petitioner

vs.

Product Source International, LLC
13 Coleman Road
Berlin, NJ 08009
UNITED STATES
Defendant-Respondent

Petition No.: 92/051,140
Registration No.: 3,350,041
Mark: NIC-OUT
Interlocutory Attorney:
Ann Linnechan, Esq.

PETITIONER OBJECTION TO RESPONDENT MOTION TO STRIKE

COMES NOW the Petitioner, Leonid Nahshin and objects to Respondent's Product Source International, LLC ("PSI") Motion to Strike and moves this Honorable Court to dismiss the Respondent's Motion to Strike and waive Respondent's objections in their entirety as being untimely and as being nonresponsive to Petitioner's Notice of Reliance.

I. The Motion to Strike on Procedural Grounds is Untimely

As a general matter, objections which can be cured must be raised when the evidence is offered. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1264 (TTAB 2003). "If a party objects on procedural grounds to testimony or a notice of reliance ..., the objecting party should promptly file a motion to strike the testimony or notice of reliance; and failure to do so will generally result in a waiver of the procedural objection."

In the present case, Plaintiff-Petitioner timely filed with the Board the subject Notices of Reliance during its trial period on January 11, 2011. This Notice of Reliance contained a clear

list of documents and a clearly written preamble titled “Relevant Facts” that explained how these particular documents were important and relevant.

Defendant-Respondent’s Motion to Strike was filed on October 17, 2011, with no discussion of why it was timely, well after the close of the trial period in which Plaintiff-Petitioner could have responded and cured any procedural deficiencies had they existed.

In addition to being untimely, Respondent’s Motion to Strike is unresponsive to the Notice of Reliance and never even mentions or makes any attempt to refute why the “Relevant Facts” preamble does not adequately support the introduction of these documents. Respondent merely cites the general rules from TBMP 704.10 as reason for objection but does not actually address the specific reasons that Petitioner gives for Noticing these documents as being inadequate.

II. Petitioner’s Specific Objections to the Motion to Strike as Being Nonresponsive

Petitioner provides a clear list of documents and six statements giving a clear explanation to why these documents are relevant in “Relevant Facts,” the preamble to the Notice of Reliance.

These Relevant Facts are never discussed as being defective or inadequate or unclear in purpose by Respondent. These Relevant Facts are never refuted as being unacceptable exceptions to the general rules that are cited. Respondent’s motion should be dismissed as being completely unresponsive and irrelevant to the very Notice of Reliance that it is objecting to.

But, even if Respondent had been responsive and effectively objected to the Relevant Facts in a timely manner, any procedural defects could have been cured by Petitioner. See *Board of Trustees of the University of Alabama v. BAMA-Werke Curt Baumann*, 231 USPQ 408, 409 n.3 (TTAB 1986). It would be prejudicial to Petitioner to strike the Notices of Reliance on a procedural basis without allowing a time to cure any defects if they existed.

III. Petitioner’s Additional Specific Objection to the Granting of the Motion to Strike as Being Prejudicial

The first Relevant Fact from the Preamble--Respondent’s First Use of Trademark--should logically have been supported by Respondent’s Responses to Interrogatories and Documents. However, Petitioner’s Notices of Reliance Parts A and B show pages and pages of both Respondent’s refusals to respond and Respondent’s responses to document requests reading

“Subject to these objections PSI attaches the following documents:” where there are no supporting documents listed.

This lack of listed supporting documents is the case for the first thirteen out of twenty one responses given by Respondent. This lack of supporting documents is highly relevant to Petitioner’s case in point and timely presented in Petitioner’s Notice of Reliance during Petitioner’s trial period. The new revision of the TBMP clearly makes this particular exception to the general rule by which documents obtained through disclosure or produced in response to a request for production of documents may be made of record where they show the lack of documents. See TBMP 704.11 Produced Documents and *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, n.5 (TTAB 2008).

Additionally, even if the Notice of Reliance were not allowed for any other reason, the Responses provided by Respondent showing no supporting documents and those giving no answers to the interrogatories should be admitted as statements against interest by Respondent and should be admissible even if the evidence were not normally admissible some other way. Relevant Facts are at issue here and Respondent was asked to provide them. Having no answers is an admission against interest to Respondent. Petitioner would be greatly prejudiced if not able to use these facts or lack thereof in a timely manner in Brief rather than have to wait to see if Respondent is eventually going to produce them and have to rebut the facts when untimely produced.

IV. Conclusion

In conclusion, Petitioner asks this Honorable Court that the Motion to Strike be dismissed in its entirety because it is untimely, unresponsive, and would be unfairly prejudicial to Petitioner.

DATED: October 31, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "V. Chernobylsky". The signature is written in a cursive style with a large initial "V" and a long horizontal stroke at the end.

By:

Vera Chernobylsky, Esq.

Attorney of Record for Leonid Nahshin

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CERTIFICATE OF SERVICE

I HERBEY CERTIFY that a true and accurate copy of the foregoing Proceedings was submitted, this 31 day of October, 2011, to the following via fax and first-class U.S. Mail, postage pre-paid:

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