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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
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Date	11/15/2011
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**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 BRIEF IN SUPPORT OF RESPONDENT’S MOTION TO STRIKE
PORTIONS OF PETITIONER’S NOTICES OF RELIANCE**

Defendant-respondent Product Source International, LLC (“PSI”) hereby submits this reply brief in further support of its Motion to Strike portions of the Notice of Reliance filed by plaintiff-petitioner Leonid Nahshin (“Nahshin”).

There were three bases for PSI’s Motion to Strike. First, that numerous documents attached to Nahshin’s Notice of Reliance did not qualify under the ‘printed publications’ or ‘official records’ exceptions to the general rule that documents produced in response to written discovery may not be made of record through a notice of reliance; second, that Nahshin’s own answers to PSI’s interrogatories were inadmissible through a notice of reliance; and third, that Nahshin’s identification of four witnesses was procedurally improper. Nahshin’s “Objection” to the Motion to Strike does not address any of the above three arguments, let alone refute them.

Instead, Nahshin first argues that PSI's Motion was untimely. All proceedings in this matter were suspended for more than six months – i.e., from February 2, 2011 until August 22, 2011 – and PSI's Motion was brought promptly after proceedings resumed. As the Board's Order of August 22, 2011 expressly noted (at page 7), Nahshin's testimony period had already closed by the time the proceeding was resumed. Thus, even if PSI had filed its Motion the day after this proceeding was resumed, such a motion still would have been filed after Nahshin's testimony period. The timing of the instant motion was brought about by Nahshin's own actions, including, *inter alia*, filing an improper notice of deposition on February 10, 2011 (which was later stricken by this Board). The procedural delays in this case are not the fault of PSI, and should have no bearing on the disposition of the instant motion. *See* TBMP 707.02(b) (“[I]f the ground for the objection is one that could not be cured even if raised promptly, *the adverse party may wait* and raise the procedural objection in or with its brief on the case.”) (emphasis added).

Next, Nahshin argues that PSI's Motion does not refute the relevance of Nahshin's proposed evidence. This may be correct, but is of no consequence. PSI's Motion was based on procedural objections to the Notice of Reliance; it was not a substantive objection (such arguments being reserved for PSI's forthcoming trial brief). *See* TBMP 707.02(c).

Finally, Nahshin argues that PSI's responses to requests for production of documents made pursuant to Federal Rule of Civil Procedure 34 should be made of record through Petitioner's Notice of Reliance because to deny such a request would be “prejudicial.” TBMP 704.11 and Trademark Rule 2.120 are very clear:

A party that has obtained documents from another party through disclosure or under Rule 34 of the Federal Rules of Civil Procedure may not make the documents of record by notice of reliance alone, except to the extent that they are admissible by notice of reliance under the provisions of § 2.122(e).

37 C.F.R. § 2.120(j)(3)(ii); *see also Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230, 1231 (TTAB 1992); *Osage Oil & Transp., Inc. v. Standard Oil Co.*, 226 USPQ 905, 906 n.5 (TTAB 1985).

There are no potential exceptions to the above rule other than for printed publications or official records, and there certainly is no grounds for admissibility of an opponent's documents based on prejudice to the petitioner. Further, the case cited by Nahshin in support of Petitioner's prejudice argument – *Board of Trustees of the Univ. of Ala. v. BAMA- Werke Curt Baumann*, 231 USPQ 408 (TTAB 1986) – discusses the prejudice to a party where its opponent waited to the filing of its brief before raising an objection to a notice of reliance. Here, PSI filed the instant motion before its brief on the case has been submitted.

Nahshin correctly cites to the *L.C. Licensing Inc. v. Berman* case for the proposition that a party's written responses to a request for documents may be made of record through a notice of reliance. However, PSI's narrowly tailored Motion does not seek to bar the admission of PSI's written responses. The relevant section of PSI's Motion (Section II-A) seeks to strike only Exhibits "D" and "E" to Parts A and B of Nahshin's Notice of Reliance, which consist of documents – not written responses, but documents – produced in accordance with Fed. R. Civ. P. 34 and which do not satisfy one of the exceptions in Rule 2.22(e). Footnote 5 of *L.C. Licensing* (cited by Nahshin at page 3) is not implicated by PSI's Motion.

For all the foregoing reasons, and for those stated in PSI's Motion to Strike, PSI respectfully requests that its Motion be granted and that those portions of Petitioner's Notice of Reliance relating to and/or containing Nahshin's answers to interrogatories, documents produced in discovery by PSI, and Nahshin's notice of intent to take certain witnesses' testimony be stricken.

Respectfully submitted,

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Dated: November 15, 2011

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CERTIFICATE OF SERVICE

I, Anthony J. DiMarino III, Esquire, counsel to Defendant-Respondent Product Source International, LLC, hereby certify that a true and complete copy of the foregoing Defendant-Respondent, Product Source International's, Reply Brief in Support of Motion to Strike Testimony Portions of Petitioner's Notices of Reliance, has been served on the below-named counsel for Plaintiff-Petitioner, Leonid Nahshin, on this 15th day of November, 2011, via facsimile and regular mail:

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/ Anthony J. DiMarino, III/

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