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ESTTA Tracking number: **ESTTA473824**

Filing date: **05/22/2012**

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

Proceeding	92052150
Party	Plaintiff Wonderbread 5
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Submission	Motion for Sanctions
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Date	05/22/2012
Attachments	Motion for Sanctions.pdf (14 pages)(378150 bytes) CAC dec iso Sanctions motion.pdf (46 pages)(864554 bytes)

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

In re Registration No. 3691948 for the Word Mark WONDERBREAD 5
(Registered on October 6, 2009)

WONDERBREAD 5, Petitioner, v. PATRICK GILLES, Registrant.	Cancellation No. 92052150

PETITIONER'S MOTION FOR SANCTIONS

This cancellation proceeding arises out of the surreptitious and fraudulent registration of Petitioner Wonderbread 5's ("Petitioner" or the "Band"), Word Mark WONDERBREAD 5 (the "mark"). Patrick Gilles ("Registrant"), applied for the mark just days after he left the Band (a partnership) and without the knowledge or consent of the Band, which – as Registrant knew – continued using the name "Wonderbread 5" in commerce. As such, the Band seeks cancellation on the grounds that (1) the mark is likely to be confused with a mark previously used and not abandoned by Petitioner; and (2) the Registration was fraudulently procured.

To obtain evidence necessary to prove its contentions – and to disprove Registrant's assertion that he is the rightful owner of the mark – Petitioner has twice noticed Registrant's deposition. Registrant has twice failed to appear.[1] As such, Petitioner now seeks sanctions against Registrant.

This motion is brought pursuant to Federal Rule of Civil Procedure 37(d), Trademark Trial and Appeal Board Manual of Procedure ("TBMP") section 527, and 37 C.F.R. section 2.120(g)(2), each of which provides that a motion for sanctions lies where a party fails to attend a properly noticed deposition. The Board may enter sanctions including but not limited to: "striking all or part of the pleadings of the disobedient party; refusing to allow the disobedient party to support or oppose designated claims or defenses; prohibiting the disobedient party from introducing designated matters in evidence; and entering judgment against the disobedient party." TBMP § 527.01(b).

[1] This is not the first time Registrant has failed to comply with discovery obligations. As detailed in previous filings in this proceeding (*see* Petitioner's Motion for Judgment on the Pleadings and the supporting Declaration of Counsel, both filed in this proceeding on July 30, 2010, and Petitioner's Opposition to Registrant's Rule 56(f) Motion for Discovery and the supporting Declaration of Counsel, both filed September 22, 2010) in previous litigation between Registrant and Petitioner, **Registrant concealed the fact that he had registered the mark – despite both written discovery and deposition questioning on the subject.** *See Smith v. Smith*, 145 F.3d 335, 344 (5th Cir. 1998) (in ruling on motion for sanctions, it is appropriate to consider the non-compliant party's "dilatory and obstructive" discovery conduct in a related case).

In this case, severe sanctions are warranted.[2] Petitioner respectfully requests that the Board cancel the Registration. In the alternative, the Board should impose the evidentiary sanction of excluding Registrant's testimony at trial and/or issue preclusion sanctions prohibiting Registrant from opposing Petitioner's claims, including but not limited to claims that Petitioner owns the Mark due prior use in commerce, that Petitioner never abandoned the Mark, and that Registrant obtained the Registration by fraud or, alternatively, preclude Registrant from opposing Petitioner's claims that Petitioner owns the Mark due to prior use in commerce, that Petitioner never abandoned the Mark, and that Registrant obtained the Registration by fraud.

I. FACTS AND PROCEDURAL HISTORY

On April 5, 2012, Petitioner's counsel attempted to call Registrant's counsel to discuss, *inter alia*, outstanding discovery issues in this matter. (Declaration of Cari A. Cohorn ("Cohorn Dec."), filed herewith, ¶ 2.) The same day, Petitioner's counsel served a Notice of Deposition, setting Registrant's deposition for April 20, 2012. (*Id.* at ¶ 2, Ex. A.) Petitioner's counsel's attempts during the following weeks to contact Registrant's counsel to determine whether Registrant was available for deposition on April 20 and to obtain alternate dates were ignored. (*Id.* at ¶¶ 4-6, Exs. B, C, D.)

Less than 24 hours before the noticed deposition was scheduled to begin, Petitioner's counsel finally reached Registrant's counsel. (Cohorn Dec., ¶ 7.) Registrant's counsel stated that he had been out of the office and had been unaware that Registrant's deposition had been noticed. (*Id.* at ¶ 8.) He represented that he would, within the "next couple of days," provide

[2] Although Petitioner had the option of filing a motion to compel Registrant's deposition rather than filing the instant Motion for Sanctions, it had no obligation to do so. *E.g., Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) (no motion to compel is required before a motion for sanctions against a party who fails to appear for his deposition); *compare* 37 C.F.R. § 2.120(e) *and* (g)(1) *with* 37 C.F.R. § 2.120(g)(2). Here, Registrant's conduct demonstrates that he has no intention of submitting to a deposition, and a motion to compel would lead only to further delay in the resolution of this matter, which has already been pending for over two years.

dates in early May 2012 on which Registrant would be available for deposition. As a professional courtesy, and in reliance on Registrant's counsel's representation, Registrant's deposition was taken off calendar. (*Id.* at ¶ 8, Ex. E.)

Registrant's counsel failed to provide deposition dates, as promised, and he did not respond to further requests for available dates. (Cohorn Dec. at ¶ 9, Ex. F.) As such, on April 30, 2012, Petitioner's counsel served an Amended Notice of Deposition, setting Registrant's deposition for May 16, 2012. (*Id* at ¶ 10, Ex. G.)

On May 8, 2012, Registrant's counsel communicated with Petitioner's counsel for the first time since agreeing on April 19, 2012 to promptly provide dates for Registrant's deposition. Contrary to that agreement, Registrant's counsel suggested – for the first time – that Registrant would not appear for a deposition until a separate discovery dispute was resolved. (*Id.* at ¶ 11, Ex. H.) Petitioner's counsel immediately responded by email, pointing out that Registrant's counsel had never before raised the issue of (and there was no legal basis for) conditioning Registrant's appearance for a properly noticed deposition on Petitioner's providing further discovery responses. Petitioner's counsel asked Registrant's counsel to advise as soon as possible whether Registrant would appear for his deposition as noticed on May 16, 2012. (*Id.* at ¶ 12, Ex. I.)

Registrant's counsel failed to respond until May 15, 2012, one day before the deposition, when he stated that Registrant would not appear. (Cohorn Dec., ¶ 13, Ex. J.) Registrant did not attend the deposition; nor did he offer any explanation for his failure to appear, other than his purported entitlement to first receive further responses to written discovery from petitioner. (*Id.* at ¶ 14.) This motion followed.

II. REGISTRANT HAS TWICE FAILED TO APPEAR FOR DEPOSITION, AND SEVERE SANCTIONS ARE NECESSARY

Sanctions are available in an *inter partes* proceeding against a party who fails to appear for a properly noticed deposition. F.R.C.P. 37(d); 37 C.F.R. § 2.120(g); TBMP § 527. The Board has broad discretion in determining which sanctions are appropriate, including but not limited to striking pleadings of the noncompliant party, precluding that party from introducing specific evidence, finding certain facts and issues to be established, and entering judgment against the noncompliant party.[3] *Id.* The Board need not impose the "least onerous" sanction available but rather has inherent authority to fashion whatever relief is appropriate under the circumstances. *Chrysler Corp. v. Carey* (8th Cir. 1999) 186 F.3d 1016, 1022; TBMP § 527.03.

A. Registrant Has Engaged in a Pattern of Evasion Without Justification

The applicable rules provide for sanctions against a party who fails to appear for his own deposition. Sanctions are unquestionably warranted in this case, based upon Registrant's pattern of evading his discovery obligations and the absence of justification for his conduct. *See, e.g., Adriana Int'l v. Thoeren*, 913 F.2d 1406, 1411 (9th Cir. 1990) ("In evaluating the propriety of sanctions, we look at all incidents of a party's misconduct"), *cert denied*, 498 U.S. 1109 (1991).

As an initial matter, a repeated failure to appear for deposition is sanctionable misconduct, even where the party noticing the deposition acceded in the noncompliant party's request to vacate the deposition date and where the noncompliant party agreed to submit to deposition on some later date. *Henry v. Gill Industs., Inc.*, 983 F.2d 943 (9th Cir. 1993). In *Henry*, the Ninth Circuit expressly rejected the noncompliant party's assertion that he had not technically "failed to appear" for his deposition, and therefore should not be sanctioned, because the depositions had been vacated by agreement of the parties – only after the noncompliant party

[3] The Board cannot, however, issue monetary sanctions. 37 C.F.R. § 2.120(g)(1).

notified the noticing party the day before the deposition that he would not attend. *Id.* at 947. *See also Phillips v. Healthcare Recoveries, Inc.*, 238 F.3d 423 (6th Cir. 2000) (table case) (sanction determining that plaintiff had been fully compensated for his injuries was within court's discretion where plaintiff had twice failed to appear for deposition). Likewise, a noncompliant party cannot avoid otherwise appropriate sanctions by eventually submitting to deposition. *Henry*, 983 F.2d at 947 ("[b]elated compliance ... does not preclude the imposition of sanctions").

Moreover, Registrant has never offered any valid justification for his refusal to appear for properly noticed depositions. Rather – only after many weeks of repeated requests for dates on which Registrant was available, and after repeated representations that such dates would be provided – Registrant's counsel finally asserted that Registrant would not appear for deposition **at all** until a separate discovery dispute was resolved.[4]

The existence of a separate dispute does not, as a matter of law, excuse Registrant from appearing for deposition; nor can it protect him from sanctions. *HighBeam Marketing, LLC v. Highbeam Research, LLC*, 85 USPQ2d 1902 (TTAB 2008) (refusal to produce expert witness for properly noticed deposition due to fee dispute grounds for excluding expert's testimony and report); *Nat'l Academy of Recording Arts & Sciences, Inc. v. On Point Events, LP*, 256 F.R.D. 678, 680 (C.D. Cal. 2009) (discovery "rules do not authorize one party to withhold discoverable material in retaliation" for another party's purportedly inadequate discovery responses); *Acushnet Co. v. Birdie Golf Ball Co., Inc.*, 166 F.R.D. 42, 43 (S.D. Fla. 1996) (discovery does not proceed on a "tit-for-tat" basis whereby one violation can be justified by another alleged

[4] Notably, in the last communication with Registrant's counsel before he asserted for the first time that a separate discovery dispute excused Registrant from appearing for deposition, counsel for both parties agreed that they would meet and confer about the separate discovery dispute. There was no further communication on the subject, despite Petitioner's counsel's repeated offers to discuss it and the meet and confer never took place. Nonetheless, Petitioner agreed to provide further discovery responses on or before May 31, 2012. (Cohorn Dec., ¶ 15, Ex. J.)

violation); *Criterion 508 Solutions, Inc. v. Lockheed Martin Services, Inc.*, 255 F.R.D. 489 (S.D. Iowa 2008) (improper for party to "**hold the deposition ... hostage**" until other party provided supplemental discovery responses) (emphasis added).

Thus, sanctions are warranted. The only question is which sanctions should be imposed. As discussed below, Registrant's repeated and willful violations have prejudiced Petitioner by preventing it from discovering information uniquely in Registrant's possession. Petitioner therefore respectfully requests that the Board issue severe sanctions.

B. Registrant's Willful Violations Warrant Terminating Sanctions

To enter judgment against Registrant as a sanction for discovery abuse, the Board must only find that Registrant's actions "displayed willfulness, bad faith, or fault." *Henry*, 983 F.2d at 948; *REFAC Internat'l, Ltd. v. Hitachi, Ltd.*, 921 F.2d 1247, 1254 (Fed. Cir. 1990). All that is required to show the requisite "willfulness, bad faith, or fault" is "disobedient conduct not shown to be outside the control of the litigant." *Henry* at 948; *United Artists Corp. v. La Cage Aux Folles*, 771 F.2d 1265, 1270 (9th Cir. 1985) (dismissal affirmed; that plaintiff's "travel schedule" purportedly prevented him from answering interrogatories "indicated a lack of diligence in keeping abreast of the status of his case" and did not excuse failure to answer). *See also HighBeam*, 85 USPQ2d 1902 (sanctions appropriate even where failure to appear for deposition was on advice of counsel).

Here, Registrant has made no showing whatsoever that his failure to appear was due to factors outside his control. To the contrary, willfulness is readily apparent where, as here, the noncompliant party's conduct demonstrates that the party is "simply looking for a way to avoid being deposed." *Collins v. Illinois*, 554 F.3d 693, 695 (7th Cir. 2009) (terminating sanctions appropriate for refusal to submit for deposition based on groundless objections; party "had no intention of proceeding with the deposition"). Registrant's bad faith is apparent from his

counsel's pattern of delay and failure to provide dates as promised. *See, e.g., REFAC Internat'l*, 921 F.2d at 1255 (counsel's failure to "keep[] promises" to opposing counsel was evidence of willfulness; terminating sanction in the form of cancellation of registration affirmed). Not until Petitioner noticed Registrant's deposition for a second time – having concluded that continued efforts to work with Registrant to arrange a mutually agreeable schedule were futile – did Registrant first concoct the excuse based on the separate discovery dispute. Registrant's refusal to cooperate with Petitioner's legitimate efforts to conduct discovery were willful and in bad faith.

Once a noncompliant party's willfulness has been established, the Board weighs the following factors in determining whether to impose terminating sanctions: (1) the public interest in expeditious resolution of litigation; (2) the Board's need to manage its docket; (3) prejudice to other parties from the discovery violations (which includes an inquiry into the materiality of the evidence withheld); (4) the public policy favoring disposition of cases on their merits;[5] and (5) whether less drastic sanctions are available and would provide effective deterrence for the particular violation. *REFAC Internat'l*, 921 F.2d at1254. Because the first two factors favor terminating sanctions, and the fourth cuts against such sanctions, the third and fifth factors are usually dispositive. *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills* (9th Cir. 2007) 482 F.3d 1091, 1096; *FDIC v. Conner* (5th Cir. 1994) 20 F.3d 1376, 1380-81.

The third factor, prejudice to Petitioner, weighs heavily in favor of terminating sanctions. Such sanctions are appropriate – even where no less severe sanctions have previously been imposed – where the noncompliant party's conduct has prejudiced the other party's ability to fully investigate and prove its case by withholding material information. *E.g., Valley Engineers*

[5] This factor does not control where the other factors favor terminating sanctions. *E.g., Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills* (9th Cir. 2007) 482 F.3d 1091, 1096.

Inc. v. Electric Engineering Co., 158 F.3d 1051, 1057-58 (9th Cir. 1998). This is particularly true where, as here, the material information is in the exclusive possession of the noncompliant party. Id. ("[s]ometimes ... a party's discovery violations make it impossible for a court to be confident that the parties will ever have access to the true facts;" terminating sanctions appropriate").

Here, because many facts material to Petitioner's claims are within Registrant's exclusive possession, Petitioner has been severely prejudiced by Registrant's refusal to appear for deposition. Petitioner has been unable to obtain Registrant's testimony concerning, for example, Registrant's knowledge with regard to whether Petitioner had a right to use the mark and whether Registrant intended to deceive the USPTO. Likewise, Petitioner has been unable to obtain Registrant's testimony as to such topics as why he applied for the Registration only after having been terminated from the Band, why he did not disclose the Registration during his deposition in prior litigation, and why he did not produce relevant documents in response to a legitimate discovery demand in the prior litigation. These facts are central to Petitioner's contention that the Registration should be cancelled, and Registrant's refusal to provide evidence as to as to his conduct and his state of mind – evidence to which Petitioner is indisputably entitled – is improper and highly prejudicial.[6]

The fifth factor, whether lesser sanctions will cure the harm done by Registrant's violations and deter future violations, likewise cuts in favor of terminating sanctions. Sanctions short of termination are insufficient where, as here, there is "no reason to assume that, given additional opportunities [the noncompliant party] will fulfill his obligations as a party to the proceeding." *Benedict v. Super Bakery, Inc.*, 665 F.3d 1263, 1268 (Fed. Cir. 2011) (affirming

[6] In addition, Registrant has prevented Petitioner from identifying and locating other witnesses who would be helpful in proving Petitioners claims by preventing Petitioner from questioning him about, *inter alia*, individuals with whom he discussed his application for the Registration, including attorneys (such information being available per the crime-fraud exception).

cancellation of registration as sanction for discovery violation). Here, Registrant has ignored good faith efforts to conduct discovery and has willfully and in bad faith refused to submit to a deposition. He has agreed to appear for deposition and to provide agreeable dates, and he has repeatedly failed to honor such agreements. There is no reason to believe that lesser sanctions will change this pattern of delay and evasion.

C. If Terminating Sanctions are Not Issued, Severe Evidentiary and/or Issue Sanctions are Required

If the Board concludes that sanctions short of cancellation of the Registration are warranted, it should severe evidentiary and/or issue preclusion sanctions should be issued. Such sanctions are authorized by the relevant rules and are within the Board's authority. E.g., F.R.C.P. 37(b). That is, the Board may order that Registrant is precluded from opposing designated claims, or from introducing his own testimony into evidence at trial. *Von Brimer v. Whirlpool Corp.* (9th Cir. 1976) 536 F.2d 838, 844; *Reilly v. NatWest Markets Group Inc.* (2d Cir. 1999) 181 F.3d 253, 269 (failure to comply with order requiring corporate representatives to be produced for deposition warranted exclusion of their testimony at trial).

Factors considered in assessing whether to exclude testimony include the noncompliant party's explanation for failure to comply, the importance of the testimony of the precluded witness, and prejudice to party seeking discovery. *Reilly at 269. See also Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer Corp.* (N.D. Cal. 2000) 190 F.R.D. 644, 648 (exclusion generally improper if no undue prejudice to the other side). *Black Horse Lane Assoc., LP v. Dow Chemical Corp.*, 228 F.3d 275 (3rd Cir. 2000) (repeated failures to appear for properly noticed deposition are grounds for exclusion of testimony).

The exclusion of Registrant's testimony at trial is an appropriate sanction here. As discussed above, Registrant's "explanation" for his failure to comply is meritless; the existence of another discovery-related dispute cannot justify his refusal to appear for deposition. *E.g., HighBeam Marketing*, 85 USPQ2d 1902. Petitioner's ability to prove its case has been severely prejudiced by Registrant's violations. Severe sanctions – including the exclusion of Registrant's testimony – are warranted on these facts.

In addition, or as an alternative, to excluding Registrant's testimony from trial, the Board may order certain facts "established" for purposes of the action. F.R.C.P. 37(b)(2)(A)(i); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee* (1982) 456 U.S. 694, 695. The only limitation on the imposition of such issue preclusion sanctions is that the sanction must be "just" and must relate to the subject matter of the evidence sought through discovery. *Compagnie des Bauxites,* 456 U.S. at 695.

Here, Registrant's conduct in evading his discovery obligations makes issue preclusion sanctions just. The Board should order as "established" those facts that Petitioner sought to discover through Registrant's deposition. Specifically, the following facts should be established, and Registrant should be precluded from seeking to contradict them:

1. At no time prior to Petitioner's use of the mark in commerce did Registrant use the mark in commerce.
2. At no time did Registrant use the mark in commerce separate from his activities as a member of Petitioner.
3. Registrant had no rights in the mark except in his capacity as a member of Petitioner.

4. To the extent that Registrant had any rights in the mark, he released such rights in connection with the settlement of his California state-court action against Petitioner.

5. When Registrant was terminated from his membership in Petitioner, he knew Petitioner intended to continue using the mark in commerce.

6. After Registrant was terminated from his membership in Petitioner, he knew Petitioner continued using the mark in commerce.

7. Registrant knew when he filed his application to register the mark that Petitioner was using the mark in commerce and that it had the right to do so.

8. Registrant intended to deceive the USPTO through statements he made on his application to register the mark.

III. CONCLUSION

For all of the reasons set forth above, Petitioner respectfully requests that the Board issue terminating sanctions against Registrant and grant the Petition for Cancellation of Registration No. 3691948 for the Word Mark WONDERBREAD 5. In the alternative, the Board should

impose the evidentiary sanction of excluding Registrant's testimony at trial and/or issue preclusion sanctions prohibiting Registrant from opposing Petitioner's claims.

Respectfully submitted,

WONDERBREAD 5

Dated: May 22, 2012

PHILLIPS, ERLEWINE & GIVEN LLP

By: /s/ Cari A. Cohorn

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CERTIFICATE OF SERVICE

I, Cari A. Cohorn, Esq. certify that on this 22nd day of May, 2012, a true and correct copy of the foregoing document was filed with the Trademark Trial and Appeal Board via the Electronic System for Trademark Trials and Appeals and was set by U.S. Mail to:

Matthew H. Swyers, Esq.
The Trademark Company
344 Maple Avenue West, Suite 151
Vienna, VA 22180

Dated: May 22, 2012

PHILLIPS, ERLEWINE & GIVEN LLP

By: /s/ Cari A. Cohorn

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

In re Registration No. 3691948 for the Word Mark WONDERBREAD 5
(Registered on October 6, 2009)

WONDERBREAD 5, Petitioner, v. PATRICK GILLES, Registrant.	Cancellation No. 92052150

DECLARATION OF CARI A. COHORN IN SUPPORT OF PETITIONER'S MOTION FOR SANCTIONS

1. I am an attorney with the law firm Phillips, Erlewine & Given LLP, counsel of record for Wonderbread 5 ("Petitioner") in this matter. Unless otherwise stated, I have personal knowledge of the facts set forth in this declaration, and, if called to testify as a witness, could and would testify competently thereto.

2. On April 5, 2012, I called counsel for Registrant Patrick Gilles ("Registrant"), Matthew Swyers, Esq. ("Registrant's counsel"), to discuss this matter, and specifically to discuss outstanding discovery issues. I did not speak with Registrant's counsel, but I left a

voicemail message requesting a return call. The same day, I noticed Registrant's deposition for April 20, 2012. A true and correct copy of the Notice of Deposition is attached hereto as Exhibit A.

3. The evidence to be obtained through Registrant's deposition is material to this proceeding, and much of that evidence is exclusively possessed by Registrant. For example, and without limitation, I intended to obtain Registrant's testimony concerning the basis for his contention that he has rights to the mark (including his use of the mark in commerce – if any – separate from and/or prior to use by Petitioner); his understanding as to whether Petitioner intended to continue using the mark in commerce after he was terminated from the band; his knowledge as to whether Petitioner continued using the mark after his termination; and whether he intended to deceive the USPTO in applying for the registration of the mark. I also intended to inquire into subjects such as why Registrant applied for the Registration only after having been terminated from Petitioner, why he did not disclose the Registration during his deposition in prior litigation between Petitioner and Registrant, why he did not produce documents relevant to the Registration in response to discovery demands in the prior litigation, and whom he has talked with about the Registration.

4. On April 9, 2012, having received no communication from Registrant's counsel, I emailed him and inquired whether Registrant was available for deposition as noticed on April 20. I also asked for Registrant's availability during the week of April 23. A true and correct copy of the email to Registrant's counsel is attached hereto as Exhibit B.

5. On April 16, 2012, having still received no communication from Registrant's counsel, I again emailed him, asking about Registrant's availability on April 20, as well as on alternative dates. A true and correct copy of the email is attached hereto as Exhibit C.
6. Registrant's counsel did not respond to any of my prior communications. As such, I again emailed him on April 18, 2012, stating that Registrant's deposition would go forward as noticed on April 20. A true and correct copy of the email is attached hereto as Exhibit D.
7. On April 19, 2012, a paralegal in my office called Registrant's counsel's office in a further attempt to determine whether Registrant would appear his noticed deposition. She eventually was able to reach Registrant's counsel, and she transferred the call to me.
8. Registrant's counsel stated that he had been out of the office and that he had not been aware that I had noticed Registrant's deposition. Registrant's counsel's represented that he would, within the "next couple of days" (*i.e.*, by the close of business on April 24, 2012), provide dates in early May on which Registrant would be available for deposition. As a professional courtesy, and in reliance on this representation, I agreed to take the deposition off calendar. A true and correct copy of an email string dated April 19, 2012, in which I memorialized our agreement, confirmed by Registrant's counsel, is attached hereto as Exhibit E.
9. Having received no response from Registrant's counsel, I emailed him on April 25, 2012, again requesting dates on which Registrant would be available for deposition. A true and correct copy of the email is attached hereto as Exhibit F.

10. I received no response to any of my attempts to confirm Registrant's availability for deposition. As such, on April 30, 2012, I re-noticed his deposition for May 16. A true and correct copy of the Amended Notice of Deposition is attached hereto as Exhibit G.

11. A true and correct copy of an email from Registrant's counsel to me, dated May 8, 2012, is attached hereto as Exhibit H. This was the first communication I received from him since he agreed, on April 19, 2012, to promptly provide dates for Registrant's deposition. Contrary to that agreement, this email suggested – for the first time – that Registrant would not appear for a deposition until a separate discovery dispute was resolved.

12. A true and correct copy of an email from me to Registrant's counsel, dated May 8, 2012, is attached hereto as Exhibit I. In the email, I pointed out that we had never discussed (and there was no legal basis for) conditioning Registrant's appearance for deposition on Petitioner's providing further discovery responses. I again inquired whether Registrant would appear for his deposition as noticed on May 16.

13. I received no further communications from Registrant's counsel until May 15, 2012, just one day before the scheduled deposition. A true and correct copy of an email from Registrant's counsel to me, dated May 15, 2012, in which Registrant's counsel stated "we are not prepared to [and will not] attend the deposition" is attached hereto as Exhibit J.

14. Registrant did not appear for his deposition as noticed on May 16, 2012. At no time has Registrant's counsel offered any grounds or excuse for Registrant's failure to appear, other than his purported entitlement to first receive further responses to written discovery from Petitioner.

15. Although Registrant's counsel did not respond to my repeated offers to meet and confer concerning the dispute over Petitioner's written discovery responses, I agreed to provide

further responses on or before May 31, 2012. A true and correct copy an email from me to Registrant's counsel is attached hereto as Exhibit K.

I declare under penalty of perjury of the laws of the United States of America that the foregoing statements are true and correct.

Dated: May 22, 2012

/s/ Cari A. Cohorn

Cari A. Cohorn

EXHIBIT A

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

In re Registration No. 3691948 for the Word Mark WONDERBREAD 5
(Registered on October 6, 2009)

WONDERBREAD 5, Petitioner, v. PATRICK GILLES, Registrant.	Cancellation No. 92052150

NOTICE OF DEPOSITION OF PATRICK GILLES

TO REGISTRANT AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Petitioner Wonderbread 5 will take the deposition of Registrant Patrick Gilles on April 20, 2012, commencing at 9:00 a.m. The deposition will be taken at the offices of Phillips, Erlewine & Given LLP, located at 50 California Street, 34th

Floor, San Francisco, California 94111, (415) 398-0900. The deposition will be recorded both stenographically and by videographic recording.

Dated: April 5, 2012

PHILLIPS, ERLEWINE & GIVEN LLP

By: /s/ Cari A. Cohorn

David M. Given
Cari A. Cohorn
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cac@phillaw.com
Attorneys for Petitioner

PROOF OF SERVICE

I declare that I am over the age of eighteen and not a party to this action. My business address is Phillips, Erlewine & Given LLP, 50 California Street, 35th Floor, San Francisco, California 94111, which is located in the City and County of San Francisco where the service described below took place.

On the date below, at my place of business at San Francisco, California, a copy of the following document(s):

NOTICE OF DEPOSITION OF PATRICK GILLES

was addressed to:

Matthew H. Swyers, Esq.
The Trademark Company
344 Maple Avenue West, Suite 151
Vienna, VA 22180

[X] BY FIRST CLASS MAIL: I placed the above documents in a sealed envelope for deposit in the United States Postal Service, with first class postage fully prepaid, and that envelope was placed for collection and mailing on that date following ordinary business practices as indicated above.

[ ] BY FACSIMILE TRANSMISSION: I transmitted the above documents by facsimile transmission to the FAX telephone number listed for each party above and obtained confirmation of complete transmittal thereof.

[ ] BY CAUSING PERSONAL SERVICE: I placed the above documents in a sealed envelope. I caused such envelope(s) to be handed to our messenger service to be delivered as indicated above.

[ ] BY OVERNIGHT EXPRESS: I placed the above documents in a sealed envelope. I caused such envelope(s) to be delivered to the above address(es) by overnight express.

[ ] BY PERSONAL SERVICE: I placed the above documents in a sealed envelope. I delivered each of said envelopes by hand to the person(s) listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 5, 2012 at San Francisco, California.

Roesmary A. Comisky Culiver

EXHIBIT B

Subject: Wonderbread 5 v. Gilles
From: "Cari A. Cohorn" <cac@phillaw.com>
Date: 4/9/2012 2:42 PM
To: mswyers@TheTrademarkCompany.com
CC: "David M. Given" <dmg@phillaw.com>

Matthew,

We are in receipt of your letter concerning this matter. As I said in my voicemail last week, we are available to discuss the case (including the discovery issues raised in your letter) with you. We disagree with your contentions that your client has any right to the trademark and that he has any viable claims against our client. In addition, your letter asserts that the band is using your client's likeness in its advertising. We are unaware of any such use, and, in fact, this issue was resolved as part of the settlement of your client's state court lawsuit against the band. If you have any evidence that your client's likeness is being used, please provide it, and we will look into the issue.

We have noticed your client's deposition for Friday, April 20. However, we just learned that no conference rooms are available at our office on that date, so we may need to change the date or the location. Please advise us of your client's availability on April 20, as well as during the week of April 23.

Thank you,

--
Cari A. Cohorn

Phillips, Erlewine& Given LLP
50 California Street, 35th Floor
San Francisco, California 94111
v. 415.398.0900
f. 415.398.0911
cac@phillaw.com
www.phillaw.com

EXHIBIT C

Subject: Re: Wonderbread 5 v. Gilles
From: "Cari A. Cohorn" <cac@phillaw.com>
Date: 4/16/2012 9:51 AM
To: mswyers@TheTrademarkCompany.com
CC: "David M. Given" <dmg@phillaw.com>

Matthew,

Would you please let us know as soon as possible whether your client is available for deposition as noticed on Friday, April 20? If he is not available on Friday, please provide alternative dates, preferably during the week of April 23.

Thank you,
Cari

On 4/9/2012 2:42 PM, Cari A. Cohorn wrote:

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www.phillaw.com

EXHIBIT D

Subject: Re: Wonderbread 5 v. Gilles
From: "Cari A. Cohorn" <cac@phillaw.com>
Date: 4/18/2012 10:22 AM
To: mswyers@TheTrademarkCompany.com
CC: "David M. Given" <dmg@phillaw.com>

Matthew,

Since you have not contacted us to indicate your client is unavailable for his noticed deposition on Friday, April 20, the deposition is going forward. A conference room at our offices (at the address on the deposition notice) will be available, but not until 10:30, so the deposition will begin at 10:30, instead of 9:00. Please advise your client of this change.

Thank you,
Cari

On 4/16/2012 9:51 AM, Cari A. Cohorn wrote:

> Matthew,
>
> Would you please let us know as soon as possible whether your client is available for deposition as noticed on Friday, April 20? If he is not available on Friday, please provide alternative dates, preferably during the week of April 23.
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EXHIBIT E

Subject: RE: Wonderbread 5 v. Gilles
From: "Matthew H. Swyers" <mswyers@thetrademarkcompany.com>
Date: 4/19/2012 6:03 PM
To: "'Cari A. Cohorn'" <cac@phillaw.com>

Cari:

Please allow this email to confirm your recitation below. Thank you for your cooperation in this matter and I will be in touch next week to re-schedule the deposition.

Thank you,

Matthew H. Swyers
The Trademark Company, PLLC
344 Maple Avenue West, Suite 151
Vienna, VA 22180 USA
Phone (800) 906-8626 x100
Facsimile (270) 477-4574
www.TheTrademarkCompany.com

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Sent: Thursday, April 19, 2012 3:17 PM
To: mswyers@TheTrademarkCompany.com
Cc: David M. Given
Subject: Re: Wonderbread 5 v. Gilles

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(2) You will follow up with your client concerning his claim that Wonderbread 5 continues to use his likeness in its advertising, as well as

about a possible settlement demand.

(3) I will review your client's discovery demands that remain outstanding and will be prepared to discuss what additional responses may be warranted.

I am aware you will be out of the office on Monday, so please get back to me no later than the close of business on Tuesday, April 24. Thank you very much, Cari

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EXHIBIT F

Subject: Re: Wonderbread 5 v. Gilles
From: "Cari A. Cohorn" <cac@phillaw.com>
Date: 4/25/2012 5:50 PM
To: "Matthew H. Swyers" <mswyers@thetrademarkcompany.com>

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EXHIBIT G

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

In re Registration No. 3691948 for the Word Mark WONDERBREAD 5
(Registered on October 6, 2009)

WONDERBREAD 5, Petitioner, v. PATRICK GILLES, Registrant.	Cancellation No. 92052150

<u>*AMENDED* NOTICE OF DEPOSITION OF PATRICK GILLES</u>

TO REGISTRANT AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Petitioner Wonderbread 5 will take the deposition of Registrant Patrick Gilles on May 16, 2012, commencing at 9:30 a.m. The deposition will be taken at the offices of Phillips, Erlewine & Given LLP, located at 50 California Street, 34th

Floor, San Francisco, California 94111, (415) 398-0900. The deposition will be recorded both stenographically and by videographic recording.

Dated: April 30, 2012

PHILLIPS, ERLEWINE & GIVEN LLP

By: /s/ Cari A. Cohorn

David M. Given
Cari A. Cohorn
Phillips, Erlewine & Given LLP
50 California Street, 35th Floor
San Francisco, CA 94111
Telephone: (415) 398-0900
Facsimile: (415) 398-0911
Email: dmg@phillaw.com
cac@phillaw.com
Attorneys for Petitioner

PROOF OF SERVICE

I declare that I am over the age of eighteen and not a party to this action. My business address is Phillips, Erlewine & Given LLP, 50 California Street, 35th Floor, San Francisco, California 94111, which is located in the City and County of San Francisco where the service described below took place.

On the date below, at my place of business at San Francisco, California, a copy of the following document(s):

AMENDED NOTICE OF DEPOSITION OF PATRICK GILLES

was addressed to:

Matthew H. Swyers, Esq.
The Trademark Company
344 Maple Avenue West, Suite 151
Vienna, VA 22180

[ ] BY FIRST CLASS MAIL: I placed the above documents in a sealed envelope for deposit in the United States Postal Service, with first class postage fully prepaid, and that envelope was placed for collection and mailing on that date following ordinary business practices as indicated above.

[ ] BY FACSIMILE TRANSMISSION: I transmitted the above documents by facsimile transmission to the FAX telephone number listed for each party above and obtained confirmation of complete transmittal thereof.

[ ] BY CAUSING PERSONAL SERVICE: I placed the above documents in a sealed envelope. I caused such envelope(s) to be handed to our messenger service to be delivered as indicated above.

[X] BY OVERNIGHT EXPRESS: I placed the above documents in a sealed envelope. I caused such envelope(s) to be delivered to the above address(es) by overnight express.

[ ] BY PERSONAL SERVICE: I placed the above documents in a sealed envelope. I delivered each of said envelopes by hand to the person(s) listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 30, 2012 at San Francisco, California.

Roesmary A. Comisky Culiver

EXHIBIT H

Subject: RE: Wonderbread 5 v. Gilles
From: "Matthew H. Swyers" <mswyers@thetrademarkcompany.com>
Date: 5/8/2012 1:53 PM
To: "'Cari A. Cohorn'" <cac@phillaw.com>

Cari:

I apologize for the delay in responding to your email.

Of note, I had put a tickler in my schedule to respond when we received your supplemental responses to our discovery. Any word on when we will receive those responses?

Once we receive the same let's then schedule the deposition. I note that you have again noted the deposition for May 16, 2012. I also note that you did so on April 30th a few days after you were kind enough to email me asking for dates once again. To this end, I understand. However, prior to scheduling his deposition I would like to receive full responses to our discovery submitted at the onset of this case.

Once received, we will gladly present for the deposition.

Just let me know the status of your client's full responses.

Lastly, in previous correspondence we had discussed the removal of likenesses, etc. from current advertising. I am now compiling that list and will forward it to you in the next day or so.

Thank you and I look forward to the pleasure of your reply.

Matthew H. Swyers
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Vienna, VA 22180 USA
Phone (800) 906-8626 x100
Facsimile (270) 477-4574
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From: Cari A. Cohorn [mailto:cac@phillaw.com]
Sent: Wednesday, April 25, 2012 8:50 PM

To: Matthew H. Swyers
Subject: Re: Wonderbread 5 v. Gilles

Matthew,

We are still waiting on dates for your client's deposition. Please advise as soon as possible.

Thanks,
Cari

On 4/19/2012 6:03 PM, Matthew H. Swyers wrote:

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To: mswyers@TheTrademarkCompany.com
Cc: David M. Given
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(3) I will review your client's discovery demands that remain outstanding and will be prepared to discuss what additional responses may be warranted.

I am aware you will be out of the office on Monday, so please get back to me no later than the close of business on Tuesday, April 24. Thank you very much, Cari

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EXHIBIT I

Subject: Re: Wonderbread 5 v. Gilles
From: "Cari A. Cohorn" <cac@phillaw.com>
Date: 5/8/2012 3:01 PM
To: "Matthew H. Swyers" <mswyers@thetrademarkcompany.com>
CC: "David M. Given" <dmg@phillaw.com>

Matthew,

I am somewhat surprised by your email, since we had not discussed providing written discovery responses prior to your client's deposition. As you confirmed in your email of April 19, I agreed to review the outstanding discovery and be prepared to meet and confer, and you agreed to provide me dates in early May on which your client was available for deposition. Not only had we not discussed conditioning your client's appearance for deposition on my client providing further discovery responses, but I fail to see what one has to do with the other.

Are you saying that your client will not appear for his deposition, as noticed for May 16? Please advise as soon as possible.

Thank you,
Cari

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50 California Street, 35th Floor
San Francisco, California 94111
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EXHIBIT J

Subject: RE: Wonderbread 5 v. Gilles
From: "Matthew H. Swyers" <mswyers@thetrademarkcompany.com>
Date: 5/15/2012 7:04 AM
To: "'Cari A. Cohorn'" <cac@phillaw.com>
CC: "'David M. Given'" <dmg@phillaw.com>

Cari:

I apologize for the delay in my response as following our exchange last week I was called out of the office on a family matter and have only returned recently.

In regard to the discovery responses, we have always been of the opinion that you exchange discovery first and then attend depositions after all discovery has been exchanged. We did agree to provide amended dates for Mr. Gilles's deposition and I remain grateful for the spirit of cooperation that has begun to take place in this case. However, complete discovery responses to our requests for production of documents is now long past due. As such, we need to receive your client's responses first so that we can prepare for any deposition and, accordingly, preclude a deposition by ambush which we will not permit to happen.

All that we are doing is asking that your office comply with Rule 34. It's that simple. Then, as also required, we will present for the deposition.

Hopefully we can avoid cross motions to compel on this so as not to waste the TTAB's time with any further needless motions. However, if your client is unwilling to participate in the discovery process and only demands that ours do so we will begrudging allow the TTAB to decide on this issue as well.

As such, as we never heard back from you regarding your past-due responses we are not prepared to attend the deposition.

On a separate note, in a few minutes I will be forwarding to you another email concerning our mutual respective efforts to bridge the divide in a global resolution in this matter.

Accordingly, at your convenience kindly let me know the status of the full document production. Once we have received the same we will reschedule the deposition.

Thank you,

Matthew H. Swyers
The Trademark Company, PLLC
344 Maple Avenue West, Suite 151
Vienna, VA 22180 USA
Phone (800) 906-8626 x100
Facsimile (270) 477-4574
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Make sure to follow us for important tips and information relevant to the protection of your trademarks as well as for promotions and contests involving our services.

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-----Original Message-----
From: Cari A. Cohorn [mailto:cac@phillaw.com]
Sent: Tuesday, May 08, 2012 6:01 PM
To: Matthew H. Swyers
Cc: David M. Given
Subject: Re: Wonderbread 5 v. Gilles

Matthew,

I am somewhat surprised by your email, since we had not discussed providing written discovery responses prior to your client's deposition. As you confirmed in your email of April 19, I agreed to review the outstanding discovery and be prepared to meet and confer, and you agreed to provide me dates in early May on which your client was available for deposition. Not only had we not discussed conditioning your client's appearance for deposition on my client providing further discovery responses, but I fail to see what one has to do with the other.

Are you saying that your client will not appear for his deposition, as noticed for May 16? Please advise as soon as possible.

Thank you,
Cari

On 5/8/2012 1:53 PM, Matthew H. Swyers wrote:

Cari:

I apologize for the delay in responding to your email.

Of note, I had put a tickler in my schedule to respond when we received your supplemental responses to our discovery. Any word on when we will receive those responses?

Once we receive the same let's then schedule the deposition. I note that you have again noted the deposition for May 16, 2012. I also note that you did so on April 30th a few days after you were kind enough to email me asking for dates once again. To this end, I understand. However, prior to scheduling his deposition I would like to receive full responses to our discovery submitted at the onset of this case.

Once received, we will gladly present for the deposition.

Just let me know the status of your client's full responses.

Lastly, in previous correspondence we had discussed the removal of likenesses, etc. from current advertising. I am now compiling that list and will forward it to you in the next day or so.

Thank you and I look forward to the pleasure of your reply.

Matthew H. Swyers
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-----Original Message-----
From: Cari A. Cohorn [mailto:cac@phillaw.com]
Sent: Wednesday, April 25, 2012 8:50 PM
To: Matthew H. Swyers
Subject: Re: Wonderbread 5 v. Gilles

Matthew,

We are still waiting on dates for your client's deposition. Please advise as soon as possible.

Thanks,
Cari

On 4/19/2012 6:03 PM, Matthew H. Swyers wrote:

Cari:

Please allow this email to confirm your recitation below. Thank you for your cooperation in this matter and I will be in touch next week to re-schedule the deposition.

Thank you,

Matthew H. Swyers
The Trademark Company, PLLC
344 Maple Avenue West, Suite 151
Vienna, VA 22180 USA
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please delete it from your computer.

-----Original Message-----
From: Cari A. Cohorn [mailto:cac@phillaw.com]
Sent: Thursday, April 19, 2012 3:17 PM
To: mswyers@TheTrademarkCompany.com
Cc: David M. Given
Subject: Re: Wonderbread 5 v. Gilles

Matthew,

I'm glad we were able to connect this morning to discuss the Wonderbread
5 matter. This will confirm our agreement that:

(1) Because you had been unavailable, the deposition of Patrick Gilles (which had been noticed for tomorrow), will be taken off calendar and rescheduled. Within the next couple of days, you will provide dates in early May on which Mr. Gilles is available; as I mentioned, I am unavailable May 8, 10, and 11.

(2) You will follow up with your client concerning his claim that Wonderbread 5 continues to use his likeness in its advertising, as well as about a possible settlement demand.

(3) I will review your client's discovery demands that remain outstanding and will be prepared to discuss what additional responses may
be warranted.

I am aware you will be out of the office on Monday, so please get back to me no later than the close of business on Tuesday, April 24. Thank you very much, Cari

On 4/16/2012 9:51 AM, Cari A. Cohorn wrote:
Matthew,

Would you please let us know as soon as possible whether your client is available for deposition as noticed on Friday, April 20? If he is not available on Friday, please provide alternative dates, preferably during the week of April 23.

Thank you,
Cari

On 4/9/2012 2:42 PM, Cari A. Cohorn wrote:
Matthew,

We are in receipt of your letter concerning this matter. As I said in my voicemail last week, we are available to discuss the case (including the discovery issues raised in your letter) with you. We disagree with your contentions that your client has any right to the trademark and that he has any viable claims against our client. In addition, your letter asserts that the band is using your client's likeness in its advertising. We are unaware of any such use, and, in fact, this issue was resolved as part of the settlement of your client's state court lawsuit against the band. If you have any evidence that your client's likeness is being used, please provide it, and we will look into the issue.

We have noticed your client's deposition for Friday, April 20. However, we just learned that no conference rooms are available at our office on that date, so we may need to change the date or the location. Please advise us of your client's availability on April 20, as well as during the week of April 23.

Thank you,

--
Cari A. Cohorn

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EXHIBIT K

Subject: Wonderbread 5 v. Gilles discovery
From: "Cari A. Cohorn" <cac@phillaw.com>
Date: 5/18/2012 4:43 PM
To: "Matthew H. Swyers" <mswyers@thetrademarkcompany.com>
CC: "David M. Given" <dmg@phillaw.com>

Matthew,

We will provide responses to the interrogatories and document requests that we had not previously responded to, and will produce additional documents, on or before May 31.

Yours truly,

--
Cari A. Cohorn

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CERTIFICATE OF SERVICE

I, Cari A. Cohorn, Esq. certify that on this 22nd day of May, 2012, a true and correct copy of the foregoing document was filed with the Trademark Trial and Appeal Board via the Electronic System for Trademark Trials and Appeals and was set by U.S. Mail to:

Matthew H. Swyers, Esq.
The Trademark Company
344 Maple Avenue West, Suite 151
Vienna, VA 22180

Dated: May 22, 2012

PHILLIPS, ERLEWINE & GIVEN LLP

By: /s/ Cari A. Cohorn

David M. Given
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