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

Proceeding	92053501
Party	Defendant Del Taco, LLC
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INTHEUNITEDSTATESPATENTANDTRADEMARKOFFICE
TRADEMARKTRIALANDAPPEALBOARD

CHRISTIANM.ZIEBARTH,

Petitioner,

vs.

DELTACOLLC

Respondent.

Reg.No.1,043,729

CancellationNo.92053501

RESPONDENTDELTACOLLC'SREPLYBRIEF
INSUPPORTOFITSMOTIONFORSANCTIONS

Petitioner's Opposition to Del Taco's Second Motion for Sanctions (hereinafter "Opposition") constitutes an unequivocal **admission** that Petitioner has withheld information and documents throughout over two years of discovery that was directly requested by Del Taco and in violation of **the clear wording of the Compel Order and Sanctions Order** (as defined in Del Taco's Motion for Sanctions). Petitioner brazenly attempts to deflect this in his Opposition and blame Del Taco for his own failings in discovery, but the hard truth of Petitioner's willful withholding of relevant documents and information remains ¹.

From the beginning, Petitioner has made clear that he does not believe he has a duty or need to provide the information originally requested by Del Taco regarding his *bona fide* intent to use and standing. That is still evident today. Petitioner evengoes so far as to

¹ Petitioner further attempts to argue that Del Taco's instant Motion for Sanctions is premature under 37 C.F.R. § 2.123(e)(3). See TTABVue Filing #46, pgs. 5-6. Petitioner would have the Board require Del Taco to endure numerous trial depositions and a brief filed with information and documentation he purposefully withheld from discovery, **despite a Compel Order and Sanctions Order requiring such disclosure**. See TTABVue Filing #41. Given that Petitioner's actions directly violate 527.01(a) of the Trademark Rules, Del Taco's instant Motion for Sanctions is not premature and is, in fact, necessitated given the gravity of Petitioner's conduct.

attempt to argue the merits of the Motion to Dismiss in his Opposition, a Motion that was expressly granted by the Board two years ago². See Compel Order TTABVue Filing #16.

Petitioner's arguments in defense of his admitted withholding of information from discovery are disingenuous at best and another demonstration of Petitioner's disregard for this proceeding and Del Taco. Petitioner now astoundingly claims that Del Taco did not "specifically" request the information he has included in his Pretrial Disclosures and therefore, Petitioner didn't "technically" have to produce it. See TTABVue Filing #46. Such an argument completely disregards the clear wording of Del Taco's requests and is a bald admission that Petitioner held in his possession information and witnesses he chosen to produce despite Motion to Compel, a Motion for Sanctions, and numerous Board Orders telling him to produce this information. This is an admission that he has deliberately and willfully withheld this information from the beginning in violation of both the Compel and Sanctions Orders.

Del Taco clearly requested the very information Petitioner has withheld until the Pretrial Disclosures. For example, as Petitioner admits in his Opposition, Del Taco requested disclosure of every person with "information concerning Petitioner's selection of Petitioner's NAUGLES Mark." It can be no clearer from that request and the very wording of Petitioner's Opposition that Mr. Odell, a witness never before disclosed until Petitioner's Pretrial Disclosures, falls within that class of person. Petitioner's own Opposition admits

²Petitioner further attempts to engage in revisionist history and portray himself as cooperative and merely wanting to get to the "merits" of the case. What Petitioner truly means though is he wants to get the "merits" of the part of the case he is interested in, completely ignoring anything he considers irrelevant or inapplicable, despite anything the Trademark Rules or the Board may say across two years of Motions and decisions. For example, Petitioner tries to portray his September 2012 supplementation of the deficient discovery responses as somehow evidence of his compliance and cooperativeness. Yet this action against him merely serves to demonstrate Petitioner's consistent disregard for this proceeding. At the time of this supplemental production, discovery had already closed and the proceeding itself had been suspended pending the disposition of Del Taco's first Motion for Sanctions. See TTABVue Filing #30. Despite this and without seeking leave from the Board, Petitioner self-servingly ignored the suspension and close of discovery and served his supplemental responses upon Del Taco. Later recognizing that his actions had been improper, Petitioner again served his supplemental responses upon Del Taco in compliance with the Sanctions Order in December 2012, the date cited by Del Taco in this instant Motion for Sanctions.

that Mr. Odell was involved in the selection of Petitioner's NAUGLES Mark based on the calendar entries mentioning Bill and a supposed meeting to "talk about reviving the old Naugles fast food chain".³ See TTABVue Filing #40, pg. 10. It is indeed curious that Petitioner would disclose several other individuals but not Mr. Odell when Petitioner's own Opposition makes clear he was involved in the very selection of Petitioner's NAUGLES Mark, as much if not more so than Mr. Hallstrom (who was properly disclosed in response to Del Taco's discovery requests).⁴ The remaining excuses provided throughout Petitioner's Opposition are equally as thin and disingenuous and cannot excuse Petitioner's deceptive, willful and deliberate violation of the Compel Order and Sanctions Order.

Del Taco has only had one goal in this proceeding: insuring discovery on Petitioner over two years ago: the fair and just receipt of the information and documents requested in the discovery so it can properly evaluate the merit of Petitioner's standing and *bonafide* intent to use the NAUGLES mark as applied for in Petitioner's application. Every motion Del Taco has been forced to file to obtain this information and documentation has been the direct result of Petitioner's deliberate, willful, and now **admitted** withholding of documents, information, and witnesses for over two years. It is now evidently clear that no amount of orders, requests, or rules could induce Petitioner to comply and that dismissal of this proceeding in its entirety is warranted. See *Baron Philippe de Rothchild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1854 (TTAB2000) (holding that a pattern of delays

³ Petitioner's claim that the disclosure of a man named "Bill" is a sufficient identification of Mr. Odell is truly disingenuous and again reveals the depth of Petitioner's willful withholding of information from discovery in the face of the Board Order. See TTABVue Filing #40, pgs. 10-11. This information was clearly in his possession and Petitioner simply chose **not** to disclose it to Del Taco.

⁴ Similarly, Petitioner makes another brazen argument to attempt to justify the inclusion of Mr. Annis in the Pretrial Disclosures without any prior mention throughout the course of discovery. Petitioner here claims that Mr. Annis's signature on filings made by Del Taco years before the filing of this Action demonstrates that Del Taco should somehow have been aware he would be called to testify in this proceeding. Del Taco has not produced a single discovery response or disclosure identifying Mr. Annis as having anything to do with this proceeding. If Petitioner is genuine in his admission that he has not brought a claim for fraud and is not now attempting to assert such a claim, then the signature of a former employee on an old renewal has nothing to do with Petitioner's allegation of abandonment. See TTABVue Filing #40, pg. 20.

and dilatory conduct indicated willful disregard of Board order justifying dismissal); *HighBeam Marketing LLC v. Highbeam Research LLC*, 85 U.S.P.Q.2d 1902, 1904-05 (TTAB 2008) (holding that production of previously undisclosed pages in response to motion for sanctions demonstrates a failure to produce additional documents until faced with sanctions and an **intent to obstruct the requesting parties receipt of discoverable information**). Not only has Petitioner admittedly withheld documents, information and witnesses from disclosure in discovery, but he has engaged in a deliberate and willful pattern of delay and dilatory conduct consistently across three separate counsel to avoid complying with **not only** the Compel Order but also the Sanctions Order across two years of discovery. Such brazen behavior justifies dismissal of this action in its entirety.

Therefore, based on Petitioner's own admission in the Opposition to his willful withholding of information, witnesses, and documents throughout the course of this entire proceeding and over a Motion to Compel, Motion for Sanctions, and over two years of discovery, Del Taco respectfully requests that the Board issue an order dismissing this action in its entirety due to Petitioner's willful and deliberate decision not to produce witnesses, documents and information throughout the course of discovery that were clearly available when requested by Del Taco in discovery, and now identified for the first time in Petitioner's Pretrial Disclosures. In the alternative, Del Taco requests that the Board issue an order precluding Petitioner from introducing at trial the witnesses, testimony and documents identified for the very first time, in Petitioner's Pretrial Disclosures, as further set forth in Del Taco's Motion for Sanctions. See TTABVue Filing #42.

Dated: April 15, 2013

/ April L Besl /

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by certified first-class mail, on this 15th day of April, 2013, to Kelly K. Pfeiffer, Amezcu - Moll Associations PC, Lincoln Professional Center, 1122 E. Lincoln Ave. Suite 203, Orange, CA 92865.

/ April L Besl /