

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Mailed: April 7, 2011

Cancellation No. 92053518

Baron Nahmias Inc.

v.

Atlantic Bottling, LLC

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

On April 6, 2011, petitioner, Baron Nahmias Inc. (represented by Adam Kotok), respondent, Atlantic Bottling, LLC (represented by Joseph Sutton¹ of the Law Offices of Ezra Sutton P.A.), and Elizabeth Winter, the assigned Interlocutory Attorney, conducted a discovery conference regarding this proceeding pursuant to Trademark Rule 2.120(a). This order summarizes the significant points discussed and the parties' agreements made during the conference.

The parties advised the Board that they had previously discussed settlement and that they were considering whether to use the Board's Accelerated Case Resolution procedure (ACR) in this proceeding. Both parties had several questions regarding

¹ Counsel is reminded that in order to have his email used for receiving documents issued by the Board, counsel's correspondence information should be updated using ESTTA.

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ACR and the filing of summary judgment motions. The Board responded thereto and directed the parties to the information on ACR that can be accessed via the Board's website. The parties agreed to advise the Board within thirty days after service of initial disclosures whether they will use or are still considering whether to use the Board's ACR procedure.

The Board mentioned various stipulations that could be agreed to by the parties, either during the course of the conference or during the pendency of the proceeding. By way of example, the parties may agree or stipulate *in writing* to the following measures to facilitate the progress of this proceeding:

- Discovery depositions may be taken by telephone and/or video conference;
- Discovery depositions may be submitted in lieu of testimony depositions;
- That the parties may have additional time to respond to discovery requests;²
- Matter that is otherwise improperly submitted by a notice of reliance may be introduced by a notice of reliance;
- That a party may rely on its own discovery responses;

² A stipulation to extend time to respond to a discovery request need not be filed with the Board. See TBMP §§ 403.04 and 501.02 (2d ed. rev. 2004).

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- Testimony affidavits of witnesses may be submitted instead of testimony depositions;
- That documents are deemed authenticated; and/or
- That a notice of reliance can be filed after the testimony periods are closed.

See TBMP §§ 501, 704.03(b)(1) and 705 (2d ed. rev. 2004).

The parties discussed the possibility of limiting the discovery period, but ultimately agreed for the present time (i) to serve initial disclosures by Monday, May 2, 2011, one week earlier than designated on the trial schedule set forth in the Board's institution order, and (ii) to serve documents in this proceeding by electronic mail.

The Board also reminded the parties that the Board's standard protective order applies to this proceeding and may be modified by the parties in writing; that a motion for summary judgment may be not be filed nor may any discovery be served until the parties' initial disclosures are served; and that, should the parties seek to engage in settlement negotiations, a consented motion to suspend should be filed in order to stop the trial schedule from moving forward.

The Board discussed briefly the purpose of initial disclosures. The parties may obtain additional information regarding initial disclosures at the following sources:

http://www.uspto.gov/trademarks/process/appeal/RULES08_01_07.pdf

and to <http://edocket.access.gpo.gov/2006/pdf/06-197.pdf> or to

http://www.uspto.gov/trademarks/process/appeal/RULES01_17_06.pdf.

See Notice of Final Rulemaking ("Miscellaneous Changes to Trademark Trial and Appeal Board Rules") in the Federal Register, 72 Fed. Reg. 147 (August 1, 2007) and 71 Fed. Reg. 10, 2501 (January 17, 2006) (pages 2498 and 2501).

Should either party during this proceeding contemplate filing a motion to compel discovery, the parties are required to request a conference with the assigned Interlocutory Attorney for review of the parties' conduct during the discovery period, including whether the potential movant's conduct constitutes a good faith effort to resolve the issues that would be presented by such a motion. See Trademark Rule 2.120(e).

Additionally, the parties are requested to inform the Board if there are any related proceedings (in federal court or at the Board) between the parties or between third parties concerning the marks involved in this proceeding.

The parties are reminded that each party has a duty to preserve material evidence and to avoid spoliation of evidence.³

³ "While a litigant is under no duty to keep or retain every document in its possession ... it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, et al.*, 497 F.Supp.2d 627, 639 (E.D.Pa. 2007) (addressing law firm's failure to preserve temporary electronic files).

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Trial dates remain as set in the Board's institution order mailed on January 18, 2011.

