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

Proceeding	92054629
Party	Plaintiff Sheltered Wings, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No. 3,904,929 SHELTERED WINGS, INC., Petitioner, v. WOHALI OUTDOORS, LLC, Respondent.	)	Cancellation No. 92054629

Opposition to Wohali Outdoors, LLC's Motion to Limit the Scope of Testimony

The Board should deny Wohali Outdoors, LLC's ("Wohali") motion to limit the scope of testimony from Ben Lizdas because Wohali has known about Lizdas' role as a potential witness since August 2012—approximately 7 months before the close of discovery in this proceeding. *See* Wohali's Objection/Motion Papers, Dkt. Nos. 33, 36, and 37. Lizdas is the sales manager for the Eagle Optics division of Petitioner, Sheltered Wings, Inc. ("Eagle Optics") and is responsible for coordinating the marketing activities of Eagle Optics and for budgeting and tracking the company's marketing expenses and efforts. Declaration of Ben Lizdas ("Lizdas Decl."), Dkt. 20 at ¶ 1. Because Wohali had ample knowledge of Lizdas and ample opportunity to depose or otherwise take discovery concerning Lizdas, Wohali cannot now complain that Lizdas was not identified in Eagle Optics' initial disclosures. Eagle Optics should not be penalized for Wohali's failure to take discovery that it apparently now wished it would have taken.

Wohali learned about Lizdas in connection with its early (and ultimately unsuccessful) summary judgment motion in this proceeding. In response to Wohali's summary judgment

motion, Eagle Optics filed a declaration from Lizdas with its opposition brief, in which Lizdas specifically stated: "if called upon, I could and would *testify* to these facts." *Id.* (emphasis added). Lizdas' declaration, filed on August 24, 2012, contained detailed facts concerning Eagle Optics' marketing activities and products, and a discussion of several attached exhibits. *See* Dkt. 20. The Board denied Wohali's motion for summary judgment on November 8, 2012. Dkt. 26. Discovery closed on March 19, 2013. The only new discovery that Wohali served after its summary judgment motion was denied was one set of document requests served on March 19, 2013—the last day of discovery.

Wohali's complaint about the sufficiency of Eagle Optics' initial disclosures and pretrial disclosures is not supported by the law. It is well settled that there is "no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process." Advisory Committee Notes to 1993 Amendment to Fed. R. Civ. P. 26. The Board, the federal courts, and leading treatises have all followed this practical approach to supplementing initial disclosures and discovery responses. *Galaxy Metal Gear, Inc. v. Direct Access Technology, Inc.*, 91 U.S.P.Q.2d 1859, 1862 (T.T.A.B. 2009); *see also* 8A Charles Alan Wright et al., Federal Practice and Procedure § 2049.1 (3d ed. 2013); 3 J. Thomas McCarthy, McCarthy on Trademarks § 20:107 (4th ed. 2013); *Guzman v. Abbott Laboratories*, 59 F. Supp. 2d 747, 755 (N.D. Ill. 1999); *Harding v. Cianbro Corp.*, 436 F. Supp. 2d 153, 164 (D. Me. 2006). Lizdas' role in this case has been clear for many months. Not only did Wohali learn Lizdas' identity and his role at Eagle Optics during discovery, Wohali also knew the details of Lizdas' potential testimony because it was set out in his declaration.

Wohali's complaint that Lizdas' declaration is "vague" is belied by the declaration itself. Wohali's complaint that Eagle Optics should have identified Lizdas in response to Wohali's

objectionable interrogatory number 18 is also unfounded. That interrogatory prematurely sought Eagle Optics' pretrial disclosures, to which Eagle Optics appropriately objected. Wohali never challenged this objection or sought to compel a response. Ultimately all this is immaterial: any supplemental disclosure of Lizdas or his role in this case would be been redundant of information already disclosed to Wohali.

Even if the Board determines that Eagle Optics should have supplemented its initial disclosures, the Board must then also determine whether this omission should result in precluding Lizdas from testifying to the topics identified in Eagle Optics' pretrial disclosures. If the failure to disclose a witness was "substantially justified or harmless," preclusion of the witness is unwarranted. *See Great Seats, Inc. v. Great Seats, Ltd.*, 100 U.S.P.Q.2d 1323 (T.T.A.B. 2011). For the reasons explained above, it was both harmless and justified that Lizdas was not disclosed in petitioner's initial disclosures. Wohali knew about Lizdas early in this case. Because Eagle Optics disclosed Lizdas during summary judgment, Wohali had ample time and opportunity to take Lizdas' deposition or to seek further written discovery. But Wohali did nothing until now. Wohali's early knowledge of Lizdas, and its strategic choice to hold its objection until now, weigh in favor of permitting his testimony. *See Byer California v. Clothing for Modern Times Ltd.*, 95 U.S.P.Q.2d 1175, 1779 (T.T.A.B. 2010). Wohali has not identified any prejudice it has suffered because of Lizdas not being identified in petitioner's initial disclosures.

Wohali has the information it reasonably needs. The topics on which petitioner expects to seek testimony from Lizdas are either expressly stated in his declaration or clearly implicit. Lizdas' declaration provides direct facts concerning: advertising and promotion; use of the EAGLE marks; notoriety and strength of the EAGLE marks; and the relevant market and

channels of trade—these are all topics identified in petitioner's pretrial disclosures as well. And it should be readily understood from Lizdas' declaration that, as the sales manager of Eagle Optics, he would also be able to speak to the goods sold and offered for sale by the company, the level of sophistication of relevant consumers, and issues concerning the similarity of the marks at issue in this proceeding and the likelihood of confusion.

Accordingly, the Board should allow Eagle Optics to provide testimony from Lizdas on the topics identified in Eagle Optics' pretrial disclosures, and should deny Wohali's motion to limit his testimony.

Dated: June 3, 2013

Respectfully submitted,

SHELTERED WINGS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing document was served by First Class Mail, postage prepaid, and email this 3rd day of June 2013 upon the following:

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