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

Mailed: July 26, 2013

Cancellation No. 92055426

Run It Consulting, LLC

v.

Leander Lodi

Ann Linnehan, Attorney

This case now comes up for consideration of respondent's motion (filed March 14, 2013) to strike, in part, petitioner's first notice of reliance submitted on March 8, 2013 [Entry No. 11 in TTABVUE]. The motion is fully briefed.

Although the Board has not repeated the parties' complete arguments, it has carefully reviewed all of the respective arguments in support of and against the pending motion.

In support of its motion, respondent argues that Exhibit B (bearing Bates Nos. LODI-001 through LODI-0234) of petitioner's first notice of reliance should be stricken to the extent it purports to introduce documents produced by respondent during discovery in response to petitioner's First Set of Requests for Production of Documents. Specifically, respondent argues that the notice of reliance

is not a proper method for introducing the type of evidence presented by petitioner as Exhibit B and should be accordingly stricken pursuant to Trademark Rule 2.120(j)(3)(ii).

The present motion centers around one request made petitioner during discovery. Interrogatory No. 23 of petitioner's First Request for Production of Documents requested that respondent identify and describe all the documents respondent expected to use, introduce, or rely upon at the time of trial in this matter. Respondent responded by saying, *inter alia*, that the interrogatory was "premature insofar as this proceeding has only recently began" and the proceeding is still "in the early stages of discovery and investigation." Similarly, respondent also stated that he reserves the right to make the disclosures at the time set by the Board and not before and that he "cannot presently identify what documents, if any, that he expects to use, introduce or rely upon at the time of trial." Finally, in the concluding sentence, respondent states the following: "Registrant refers Petitioner to the document [sic] produced in connection with Registrant's response to Petitioner's First Requests for the Production of Documents."

Documents produced in response to document production requests generally cannot be made of record via a notice of

reliance. Trademark Rule 2.120(j)(3)(11) and TBMP Section 704.11 (3d ed rev 2012). In this instance, the Board notes that respondent could have responded to Interrogatory No. 23 by indicating that under TBMP Section 414(7) he was not required, in advance of trial, to disclose each document or other exhibit he planned to introduce.¹ The first portion of his response seems to indicate as such. However, respondent included the final sentence in the response which, again, reads: "Registrant refers Petitioner to the document [sic] produced in connection with Registrant's response to Petitioner's First Requests for the Production of Documents." By this sentence respondent included the documents in its production as part of its answer to the interrogatory to the same extent as if they had been attached as exhibits to the response. While it is true that respondent did not specifically state that it was relying on Fed. R. Civ. P. 33(d), there is no requirement within the rule that the rule be cited or that the responding party use any specific words to invoke it. Respondent argues that Fed. R. Civ. P. 33(d) was not invoked because its reference to previously-produced documents was only intended to point to documents which *may* be introduced at trial, and not documents which respondent "expects" to "use, introduce or

¹ Of course, a potential objection of this type can clearly be waived by responding instead of standing on the objection.

rely upon." But respondent did not qualify its answer that way, and its position amounts to an argument that its own response to petitioner's interrogatory was non-responsive. Petitioner asked what documents respondent expected to use and respondent responded by essentially indicating that it was not certain yet, but referred petitioner to documents it had already produced. If respondent did not intend the reference to the documents to be part of the answer to the interrogatory, it should have said so, or better yet, not included the reference in the response at all.

In view of the foregoing, the motion to strike is denied. Dates remain as previously set.