

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

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Mailed: March 19, 2015

Cancellation No. **92055558**

*Economy Rent-A-Car, Inc.*

*v.*

*Emmmanouil Kokologiannis and  
Sons, Societe Anonyme of Trade,  
Hotels and Tourism S.A.*

**Yong Oh (Richard) Kim, Interlocutory Attorney:**

On March 12, 2015, the Board held a telephone conference to resolve a dispute between the parties concerning Respondent's amendment to its pretrial disclosures. Samuel D. Littlepage, Esq., of Dickinson Wright PLLC appeared on behalf of Petitioner and Peter S. Sloane, Esq., of Leason Ellis LLP appeared on behalf of Respondent.<sup>1</sup>

As reset by the Board's order of October 15, 2014, Respondent's pretrial disclosures were due on December 20, 2014. Respondent timely served Petitioner with its pretrial disclosures on December 20, 2014. On February

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<sup>1</sup> In view of the new appearance entered by counsel on February 17, 2015, Respondent's correspondence has been accordingly updated and counsel is recognized. Prior counsel's request to withdraw (filed February 18, 2015) is noted but superfluous. *See* TBMP § 114.03 (2014) (when prior representation was established by the filing of a document, a new notice of appearance is sufficient to change the attorney of record).

17, 2015, an appearance was filed by Respondent's new counsel and on February 18, 2015, Respondent served and filed an amended set of pretrial disclosures newly identifying two additional witnesses.<sup>2</sup>

Petitioner has objected to the amended set of disclosures asserting that "the parties entered into an agreement whereby Respondent's testimony period would be extended two months if there was no extension of the then-scheduled Pretrial Disclosure statement." *Petitioner's Opposition*, p. 5 (emphasis in original). In support thereof, Petitioner provided copies of the putative agreement in the form of email correspondences between Petitioner's counsel and Respondent's former counsel.

While Respondent concedes that its "previous counsel entered into an agreement with Petitioner's counsel on December 12, 2014 which provided that, Petitioner's counsel would consent to a two-month extension of Respondent's trial period only if Respondent agreed to serve its pretrial disclosures under the existing discovery schedule, the deadline for which was December 20, 2014," see *Declaration of Victoria T. Polidoro* ("*Polidoro Declaration*"), ¶ 2, the correspondences fall short of demonstrating that "Respondent agreed not to seek any time extension for serving its Pretrial Disclosure statement" or to otherwise refrain from amending its pretrial disclosures. *Petitioner's Opposition*, p. 1. Respondent met its obligation by timely serving its pretrial disclosures on December 20, 2014, and the parties proceeded under the trial schedule, as extended.

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<sup>2</sup> Ioanna Myridaki and Micael Waxby.

Indeed, as Respondent rightly points out, a party is under an “ongoing duty” to seasonably supplement its disclosures under Fed. R. Civ. P. 26(e)(1)(A) if the party learns that the disclosure is incomplete or incorrect in some material respect. *Respondent’s Motion*, p. 3. A failure to timely disclose or supplement under Fed. R. Civ. P. 26(e) may, upon motion or objection by its adversary, preclude a party from using that information or witness at trial, “unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). As Petitioner has objected to Respondent’s supplemental disclosure, the proper inquiry in determining whether to permit the disclosure and, thus, the testimony of the additional witnesses is whether Respondent’s failure to disclose them in its original pretrial disclosures was substantially justified or is harmless rather than whether such failure was due to excusable neglect. Such an inquiry requires consideration of five factors: 1) the surprise to the party against whom the evidence would be offered; 2) the ability of that party to cure the surprise; 3) the extent to which allowing the testimony would disrupt the trial; 4) importance of the evidence; and 5) the nondisclosing party’s explanation for its failure to disclose the evidence. *See Great Seats, Inc. v. Great Seats, Ltd.*, 100 USPQ2d 1323, 1327 (TTAB 2011).

Under the circumstances herein, the Board finds the supplemental disclosure substantially justified and harmless. The Board sees no unfair surprise to Petitioner in the disclosure as the topics of the proposed

testimony of the newly identified witnesses were previously provided in discovery and, in the case of Mr. Waxby, he was specifically identified in Respondent's discovery responses. *Polidoro Declaration*, ¶¶ 4-5. Further, to the extent that there is any surprise, Petitioner has requested and Respondent has agreed to provide Petitioner with the affidavit of each individual as to their proposed testimony no later than **MARCH 26, 2015**, with the understanding that such testimony will be allowed into evidence, absent any objection from Petitioner to be made no later than **APRIL 3, 2015**. In any event, the parties agreed to reset Respondent's testimony period to open on **APRIL 17, 2015**. Thus, in view of the proposed schedule, the Board does not find that allowing the additional testimony will meaningfully disrupt the trial.

As to the import of the testimony, they bear on Petitioner's claims and therefore merit consideration. And while the Board does not find persuasive Respondent's explanation concerning the time constraints it faced in meeting its pretrial disclosure deadline and the complications encountered in obtaining the testimony of overseas individuals, the factors, on balance, demonstrate that Respondent's failure to disclose the two additional witnesses was substantially justified and harmless.

Dates are **RESET** as follows:<sup>3</sup>

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<sup>3</sup> In view of the reset schedule, Respondent's motion for extension (filed February 18, 2015) is moot.

Defendant's 30-day Trial Period Ends	<b>5/16/2015</b>
Plaintiff's Rebuttal Disclosures Due	<b>5/31/2015</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>6/30/2015</b>

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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