

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

LEGEND PICTURES, LLC)
)
 Petitioner)
)
 v.)
)
 QUENTIN DAVIS)
)
 Defendant)

Cancellation No. 92056168
 Registration No. 4,106,459

85147849

**LEGEND PICTURES, LLC's RESPONSE TO DAVIS' PETITION TO DIRECTOR
 SEEKING REVERSAL OF TTAB ORDER ON MOTION TO COMPEL
 DEFENDANT'S ANSWERS TO PETITIONER'S FIRST AND SECOND SET OF
 INTERROGATORIES AND REQUESTS FOR PRODUCTION; AND TO
 PETITIONER'S MOTION TO AMEND**

Under 37 CFR 2.146, Petitioner, Legend Pictures, LLC, requests that the Director deny Davis' petition. As interpreted by the U.S. Patent and Trademark Office, 37 CFR 2.146 (a) (3) provides that an interlocutory order of the Board may be overruled only for "clear error or abuse of discretion." See, TBMP Section 906.02 and TMEP 1706.

The TTAB order here was neither erroneous, nor an abuse of discretion, nor a result of "subjective favoritism." Instead, it was well reasoned and fully consistent with precedent cited by Petitioner in its briefs and relied upon by the Board. For the convenience of the Director, true and accurate copies of these briefs are attached as Exhibits A and B hereto, and the undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting



therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Davis knows that the precedent the Petitioner and the Board cited exists as it has been repeatedly drawn to his attention. He simply ignores it, as his petition is intended to further delay these proceedings and evade answering Petitioner's long-standing discovery. The petition should be denied and Davis ordered to comply with the Board order, failing which sanctions will be entered against him.

Respectfully submitted,

Legend Pictures, LLC

Dated: October 21, 2013

By__ /Carla C. Calcagno/____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 2013 a true and accurate copy of **LEGEND PICTURES, LLC's RESPONSE TO DAVIS' PETITION TO DIRECTOR SEEKING REVERSAL OF TTAB ORDER ON MOTION TO COMPEL DEFENDANT'S ANSWERS TO PETITIONER'S FIRST AND SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION; AND TO PETITIONER'S MOTION TO AMEND; and EXHIBITS A AND B THERETO** was served by agreement of the parties on Defendant by emailing a copy of the same to nevisbaby@hotmail.com and tharilest@yahoo.com.

/Carla Calcagno/

CERTIFICATE OF MAILING

The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451 on October 21, 2013:

/Carla Calcagno/

EXHIBIT A

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

LEGEND PICTURES, LLC)	
)	
Petitioner)	
)	
v.)	Cancellation No. 92056168
)	
QUENTIN DAVIS)	
)	
Defendant)	

**BRIEF IN SUPPORT OF LEGEND PICTURES, LLC’s MOTION TO COMPEL
DEFENDANT’S ANSWERS TO PETITIONER’S FIRST AND SECOND SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION; TO SUSPEND
FURTHER PROCEEDINGS PENDING DISPOSITION OF THE MOTION; AND TO
EXTEND DISCOVERY SOLELY FOR PETITIONER’S BENEFIT**

Pursuant to Trademark Rule 2.120(d)(1) Petitioner submits this memorandum in support of its Motion For an Order to Compel. Petitioner respectfully seeks an order compelling Defendant (Defendant or Davis) to email the following documents and written responses to Petitioner within 30 days of the Board’s order.¹

(1) Answers to Petitioner’s First and Second Set of Interrogatories;

(2) Answers without objection to Petitioner’s First Set of Production Requests Nos., 2-5, 6(a), 7, 12-29, 31-39 and production of all documents sought therein; and

¹ The parties have stipulated to service of all papers, including discovery requests, discovery answers and document production via email. Therefore, Petitioner respectfully requests that the Board order Defendant to answer the interrogatories and production requests and produce the documents via email, as stipulated by the parties.

(3) Answers to Petitioner's First Set of Production Request Nos. 1, 6(b), 8-11, 30 and 40-42, and the documents requested therein.

As cause for this motion, on March 14, 2013, Petitioner timely served 61 interrogatories on Defendant. Exhibit A. Davis has failed and refused to answer any of these interrogatories.

On March 14, 2013, Petitioner timely also served on Davis Petitioner's First Set of Production Requests. Exhibit B. Davis has failed and refused to answer any of Petitioner's document requests.

PETITIONER'S GOOD FAITH EFFORT TO RESOLVE THIS DISPUTE

Three times, Petitioner made a good a faith effort to resolve the issues presented by this motion, to no avail. Exhibits C-E.²

In light of his alleged pro se status, before Davis' responses were due, Petitioner initiated a teleconference with Davis to address any procedural concerns about Petitioner's First or Second Set of Interrogatories and Production Requests he may have had. This conference was held on April 10, 2013, three days before his responses were due. See, Exhibit C, summarizing Petitioner's April 10, 2013 teleconference.

On April 10, 2013, Davis expressed no questions whatsoever about the interrogatories and production requests, other than he lacked the address of one witness in order to respond substantively to Interrogatory No. 19. *Id.* We discussed the duty to cooperate, by which Davis

² Exhibit E is Petitioner's Interrogatory Count, which was attached to Petitioner's Exhibit D, Petitioner's second letter attempting to resolve the dispute. Both were forwarded together to Mr. Davis, as shown by the email attachments to Exhibit D.

could pose individual objections and the parties would discuss those objections before motions were filed. *Id.*

He also agreed to exchange production documents electronically, by email. In the case of production documents too large for pdf, he and I expressly agreed on April 10, 2013 to production by cd-rom. *Id.*

Three days later, however, Davis served a General Objection to the First and Second Set of Interrogatories (and refused to answer any of Petitioner's Document Requests) See, TTAB Docket No. 9, Exhibit F. Davis also filed this at the Board in direct violation of the Board's rules. *Id.*

Petitioner sent two letters to Davis, on April 29, 2013 and May 2, 2013 to explain Davis' duties in discovery and pointing out relevant precedent. Exhibits C-E. Finally, Davis appeared to agree to produce some of the documents that were requested, before the close of discovery. Exhibit G, letter date May 3, 2013, p. 5.

Despite these exchanges, however, no documents were produced. Davis continued to refuse to answer any of Petitioner's interrogatories, failed to answer any of Petitioner's production requests. Further, Davis has failed to produce any documents before the close of discovery, despite his apparent concession that he was under a duty to do so. *Id.* Thus, Petitioner is forced to seek an order from the Board compelling Davis to provide the information and documents sought in Petitioner's discovery requests.

Petitioner also seeks an order extending the discovery period by sixty days, solely for Petitioner's benefit. As cause for this motion, Petitioner served its discovery early in the

discovery period, to allow sufficient time for follow-up discovery. Petitioner served its discovery requests on Defendant on March 14, 2013, two months and one week before the May 22, 2013 scheduled close of discovery.

By failing to answer discovery, Defendant not only denied Petitioner of its right to its initial discovery responses, but also its right to take follow up discovery. Petitioner is entitled to follow up discovery, including depositions to test the veracity of any statements made in the interrogatory answers and the authenticity of any documents produced.

As Defendant will be permitted 30 days to produce documents and answer interrogatories from the date of the Board's order, Petitioner will require a total of 30 days for discovery after receipt of Defendant's responses to analyze Defendant's discovery answers and documents and to take additional discovery, including depositions, if needed. Therefore, Petitioner respectfully requests that the Board issue an order extending the discovery period by sixty days solely for Petitioner's benefit.

ARGUMENT

I. INTRODUCTION

This cancellation proceeding involves Petitioner's claim that Davis, an individual who allegedly makes \$12,000 per year, has not used its alleged LEGENDARY mark and name on the wide variety of expensive entertainment services listed in his registration.

Petitioner, Legend Pictures LLC, has standing to bring this claim. Petitioner is one of the most prestigious and renowned entertainment companies in the United States. For many years, Petitioner and its predecessors have continuously used the LEGENDARY mark in the

United States for a wide variety of entertainment services and film production, including BATMAN BEGINS, 300, THE DARK KNIGHT, CLASH OF THE TITANS and THE HANGOVER, among others. Petitioner's LEGENDARY name and mark is the subject of several registrations, including an incontestable registration, pleaded in the Cancellation proceeding for:

Motion picture films, prerecorded videocassettes, digital versatile disks (DVDs), compact discs, and other recordable media, namely computer disks, CD-ROMs, audio discs, and audio tapes, featuring live action, computer generated, and animated motion pictures or combinations thereof; pre-recorded audio tapes, audio compact discs, and video tapes featuring musical entertainment in Class 9

Entertainment services, namely, production, development and distribution of motion picture films, television programs, television program specials, music video programs, documentary television programs and motion pictures, animated television programs and motion pictures in Class 41

Well after the issuance of Petitioner's registrations, Davis filed an application for and ultimately received a registration for the mark LEGENDARY for a wide variety of entertainment services. These are:

Entertainment in the nature of a live musical performances;
Entertainment in the nature of live performances by a musical artist;
Entertainment, namely, live music concerts; Live performances featuring

prerecorded vocal and instrumental performances viewed on a big screen; Record production; Music production; Audio recording and production; Videotape production; Motion picture song production; Production of video discs for others; Recording studios; Entertainment services, namely, production and distribution of musical audio and video programs; Production and distribution of musical audio and video recordings for broadcast; Music composition and transcription for others; Song writing services; Music publishing services; Entertainment, namely, personal appearances by a musician or entertainer; Entertainment services, namely, live, televised and movie appearances by a professional entertainer; Entertainment services, namely, providing a web site featuring non-downloadable musical performances, musical videos, and photographs; Entertainment services, namely, providing non-downloadable prerecorded music, and providing information, commentary and articles about music, all online via a global computer network; Entertainment in the nature of live traveling tour performances by a professional entertainer featuring music.

On May 26, 2011, Petitioner filed additional applications (Serial Nos. 85-331782 and 85-331756) to register the mark LEGENDARY & Design for:

Pre-recorded audio cassettes, audio books and compact discs featuring music and stories in the fields of fantasy, fiction, science fiction, horror, humor, adventure, and nonfiction in the fields of historical drama, biography, memoir, autobiography, and travelogue; Pre-recorded digital video discs, video cassettes

and digital versatile discs featuring TV shows and motion pictures in the fields of fantasy, fiction, science fiction, horror, humor, adventure, and nonfiction in the fields of historical drama, biography, memoir, autobiography, and travelogue in Class 9.

Entertainment services, namely, development of concepts for and production and distribution of motion pictures, television programs, Internet programs, videogames, multimedia entertainment content and live stage productions; publication of books, magazines and other printed matter in Class 41.

(Class 41 since deleted from 85-331782)

On September 23, 2011, an Examiner refused to register Petitioner's applications in light of Davis' prior registration for the following services:

Entertainment in the nature of a live musical performances;
Entertainment in the nature of live performances by a musical artist;
Entertainment, namely, live music concerts; Live performances featuring prerecorded vocal and instrumental performances viewed on a big screen;
Record production; Music production; Audio recording and production;
Videotape production; Motion picture song production; Production of video discs for others; Recording studios; Entertainment services, namely, production and distribution of musical audio and video programs; Production and distribution of musical audio and video recordings for broadcast; Music composition and transcription for others; Song writing services; Music

publishing services; Entertainment, namely, personal appearances by a musician or entertainer; Entertainment services, namely, live, televised and movie appearances by a professional entertainer; Entertainment services, namely, providing a web site featuring non-downloadable musical performances, musical videos, and photographs; Entertainment services, namely, providing non-downloadable prerecorded music, and providing information, commentary and articles about music, all online via a global computer network; Entertainment in the nature of live traveling tour performances by a professional entertainer featuring music.

In discovery, Petitioner asked Defendant to provide *evidence* to back up its claimed use of the LEGENDARY mark on entertainment services. Specifically, Petitioner asked Defendant to provide a list of the services on which he actually uses his mark, to provide specific dates of first use for each of the services he will claim, to answer questions and provide documents proving continuous use of the mark LEGENDARY on each claimed service, or to confess any types or periods of non-use, and to produce information and documents proving any alleged sales and advertising figures. The information sought is fully relevant and material to Petitioner's rights.

Davis has willfully and in bad faith refused all attempts to obtain such information and documents.

II. THE BOARD SHOULD OVERRULE DAVIS' OBJECTIONS AS UNSUPPORTED BY LAW AND INVALID

Davis contends that it may refuse to answer Petitioner's interrogatories on the ground that they exceed 75. This ground appears to have one basis. Davis contends that where an interrogatory requests information concerning "each product or service upon which Defendant may rely," or where an interrogatory requests information as to the first date Davis either "promoted, offered, or sold" a product, the interrogatory becomes multiplied by the number of product and services which the answering party might list in its answer. Exhibit F.

A. DAVIS' OBJECTION VIOLATES RULE 2.120(d)(1)

Davis argues that where an interrogatory requests information concerning "each product or service upon which Defendant may rely," or where an interrogatory requests information as to the first date Davis "promoted, offered, or sold" its products, this counts as multiple interrogatories.

Essentially, Davis argues that in determining the number of interrogatories that have been served, the TTAB should count the number of answers provided, and not the number of questions propounded. The Board should reject Davis's bizarre numbering system.

1. Trademark Rule 2.120 (d)(1) and TBMP 405.03(d) Mandate that the Board Reject Davis Numbering System.

In determining the number of interrogatories that have been served, the TTAB counts the number of *questions propounded*, not the number of answers provided.

At the time the Board was considering adopting Rule 2.120(d)(1), the Board expressly considered the impact multiple marks, multiple products and events would have on the rule's

implementation. Calcagno, *Tips From The TTAB, Discovery Practice Under Trademark Rule 2.120(d)(1)*, 80 TMR 285 (1990). If the Board adopted a rule requiring that a motion be filed each and every ~~time~~ a Defendant had pled more than one product, the Board would be inundated with discovery motions, rendering the rule ineffective as a tool to reduce discovery burdens. *Id.* Thus, the Board adopted a rule that interrogatories seeking a single piece of information as to multiple products or multiple marks, is considered as a single interrogatory. *Id.*

As TBMP 405.03(d) states:

If an interrogatory requests “all relevant facts and circumstances” concerning a single issue, event, or matter; or asks that a particular piece of information, such as, for example, annual sales figures under a mark, be given for multiple years, and/or for each of the responding party's involved marks, it will be counted as a single interrogatory.

(Emphasis added.)

Fully aware of this rule, Davis nonetheless argues that this TBMP section applies only to situations where the propounding party asks for information about marks, not goods. In effect, Davis asks the Board to read out the phrase “for example” from the TBMP illustration. He seeks to convert that illustration into a holding that the rule cited applies to interrogatories about multiple marks *only*, and not multiple goods. Similarly, he seeks to convert the illustrations of “all relevant facts and circumstances” into a holding applying only to that phrase. This defies the plain meaning and logic of the TBMP section cited.

Petitioner's attorney pointed out the fallacy in Davis's logic and directed him to appropriate precedent. See, Exhibit C-E. Davis has willfully refused to review or follow any precedent that would require him to answer discovery.

2. Precedent Mandates that the Board Sustain Petitioner's Discovery

In numerous cases, the Board has consistently counted interrogatories requesting a particular piece of information as to "each of a party's products or services" or the first date a party has "offered promoted or sold" its products as a single interrogatory. In fact, Petitioner's interrogatories are a standard set similar to those served by numerous other counsel in similar proceedings.

In *Columbia Insurance Company v Delfyette*, Opposition No. 9117903, a combined three judge panel of the Board upheld Interrogatory Nos. 1-6. As here, these interrogatories requested a listing of "each product or service intended to be used in connection with an involved mark." See, Exhibit H. The Board counted this question as a single interrogatory.

Further, in *QMT Associated Inc. v Sara Neal Eskew*, Opposition No. 91165753, again citing *Calcagno, Tips from the TTAB, Discovery Practice Under Trademark Rule 2.120d0(1)*, the Board upheld QMT's Interrogatories, which included Interrogatory No.8. This interrogatory requested that Eskew: "(1) state all facts and (2) identify all documents upon which Eskew relies to deny each request for admission that [is] not categorically admitted." The Board overruled Eskew's objection which counted this question as multiple interrogatories. See, Exhibit I.

Moreover, in *South Cone v Swimwear Anywhere*, Opposition No. 9115911 and 91198725, the undersigned attorney on behalf of the propounding party, served a materially similar set of interrogatories – including the same language of which Davis complains --on the Opposer, South Cone. See, Exhibit J, Interrogatories 1-4. Overruling similar objections, the Board sustained the interrogatories. See Exhibit J. As the Board stated:

Applicant’s interrogatories do not exceed seventy-five. Opposer’s proposed counting methodology, calling for multiplication of certain interrogatories by the number of goods and services in the application or registration, and concluding that each good and service should be treated as a separate “issue’ for purposes of counting subparts, is incorrect and inconsistent with the purpose and scope of discovery. Additionally, Opposer’s arguments that the requirement to respond with the date of first use of each of its goods poses an “excessive burden”... is unpersuasive...

So too here.

Consistent with these cases, Petitioner respectfully invites the Board’s attention to Petitioner’s count of its interrogatories, at Exhibit E, and Petitioner respectfully submits that Davis’ objection to Petitioner’s First and Second Set of Interrogatories must be overruled. Whether an interrogatory counts as more than one question, depends on the discovering party’s question, not the disclosing party’s answer. A single question does not magically convert into multiple questions, depending on the disclosing party’s answers.

III. DEFENDANT MUST ANSWER PETITIONER'S PRODUCTION REQUEST

NOS, 2-5, 6(a), 7, 12-29, 31-39 WITHOUT OBJECTION

A. DEFENDANT has refused to produce documents in response to Document Requests Nos. 2-5, 6(a), 7, 12-29, 31-39.

As recited above, on March 14, 2013, Petitioner timely served Requests to Produce Nos. 2-5, 6(a), 7, 12-29, 31-39 on Davis. These document requests are set forth in Petitioner's Exhibit B.

As the Board will note, as they did not depend on answers to any interrogatories, these requests to produce were completely independent of Davis' responses to the interrogatories.

Davis has failed and refused to answer these discovery requests or produce the requested documents for any reason whatsoever. These documents are needed to support Petitioner's claims.

Further, the Board should order Davis to answer these requests and produce the requested documents without objection. Davis interposed no response permitted to these production requests. The Trademark Rules of Practice and the Federal Rules of Civil Procedure permit only two forms of responses to document requests. A party may either answer each request or enter specific objections to each and every request. Fed. R. Civ. P. 34(b). An objection to interrogatories on the ground that they exceed 75 does not constitute an objection to unrelated requests for production.

Indeed, Davis appeared to have conceded as much in the last page of his May 3, 2013, letter attached as Exhibit G. ("I am willing to serve answers to these specific discovery requests

[those unconnected to specific interrogatories] ...”). Yet he still failed to produce the requested documents.

Whatever lack of diligence Davis displayed prior to initially refusing to produce these documents, Davis’s behavior after Petitioner’s April 29, 2013 and May 2, 2013 letters make clear he is not acting in good faith. Davis knows full well he is required to produce these documents and to answer these document requests. Therefore, Davis’ initial and continuing failure and refusal to respond to these document requests and produce the documents as required under the Trademark Rules of Practice or the Federal Rules of Civil Procedure was and is inexcusable.

Where, as here, a party has inexcusably failed to respond as provided for under the Trademark Rules of Practice or Federal Rules of Civil Procedure, the Board has consistently held that the party should be ordered to answer those requests without objection. See, *No Fear v. Rule*, 54 USPQ2d 1551, 1554 (TTAB 2000).

The Board should not condone Davis’ actions. Davis is playing fast and loose with counsel for Petitioner and the Board. As the Board clearly will note from Davis’ Answer to the petition to cancel, he has legal assistance in this proceeding. No pro se without legal training or assistance could have drafted the Answer filed – or other papers served - in this case. Davis is willfully ignoring the TTAB rules, and pleading his pro se status to avoid those actions’ rightful consequences. Meanwhile, Petitioner is being prejudiced by Davis’ delays, which have increased the costs and length of this case, and frustrate Petitioner’s timely and legitimate efforts to obtain the truth from Davis during discovery.

IV. DEFENDANT MUST ANSWER PETITIONER'S PRODUCTION REQUEST

NOS 1, 6(b), 8-11, 30 and 40-42

When Davis refused to answer Petitioner's Interrogatories on the ground that they exceeded 75 in number, Defendant also refused to answer or produce documents in response to any document requests referring to those interrogatories. See, Exhibit F. These are Request to Produce Nos. 1, 6(b), 8-11, 30 and 40-42. See, Exhibit B. This was the sole objection Davis proffered as to these requests.

As Davis' objection to the interrogatories is invalid, the Board must order Davis to answer these productions requests and produce the requested documents.

V. DEFENDANT MUST PRODUCE A PRIVILEGED DOCUMENT LOG

As Defendant has not produced a single document, Davis has not produced a privileged document log. To avoid further disputes, the Board should instruct Defendant to produce a privileged document log with his documents, or to waive any objections based on the attorney client or work product privileges.

VI. THE BOARD SHOULD EXTEND OR REOPEN DISCOVERY

Defendant's failure to respond appropriately to Petitioner's discovery requests constitutes cause to extend or reopen discovery solely for Petitioner's benefit.³

³ On May 22, 2013, the last scheduled day of discovery, Petitioner filed a "Motion to Compel Defendant's Identification of Expert Witness and Production of Expert Report". Pursuant to case law, see e.g., *Ortho Matrix vs. Wright Medical Technology, Inc.*, 2001 WL 754818 (TTAB July 3, 2001), the Board considers a case to have been suspended as of the date of filing of a Motion to Compel regardless of whether the scheduling order has issued. Defendant has now mooted that Motion, and Petitioner has requested the TTAB to lift the suspension to consider this motion and Petitioner's Motion to Amend.

As stated by the Board in **Miss America Pageant v. Petite Productions, Inc.**, 17 USPQ2d

1067 (TTAB 1990):

“...the parties should note that the Board will, upon motion, reopen or extend discovery solely for the benefit of a party whose opponent, by wrongfully refusing to answer, or delaying its responses to, discovery, has unfairly deprived the propounding party of the right to take follow-up”.

For over twenty years, the Board has consistently followed this rule. See, e.g., *Neville Chemical Company v. The Lubrizol Corporation*, 184 U.S.P.Q. (BNA) 689, (TTAB 1975), where the TTAB extended the discovery period to allow follow-up discovery denied by the respondent’s failure to respond.

Indeed, because of the extreme prejudice to the propounding party, the Board, in precedential decisions, has followed this rule, even where a motion to compel was filed months after the close of discovery. For example, in *Pioneer Kabushiki Kaisha dba Pioneer Corporation v. Hitachi High Technologies America, Inc.*, 2005 TTAB LEXIS 182 (TTAB 2005), Judge Seeherman, granted the propounding’s motion to compel and *sua sponte* reopened discovery due to the prejudice to the propounding party.

Here, under established Board precedent, Defendant’s failure to respond constitutes cause for the extension or reopening of discovery solely for the benefit of Petitioner. 37 CFR 1.120(e)(2), TMBP 403.03. Petitioner timely served its discovery early in the discovery period with sufficient time to take follow up. By delaying his responses and responding

inappropriately, Defendant has deprived Petitioner of any discovery responses, and of the right to take follow up discovery.

VII. CONCLUSION

Thus, for the foregoing reasons, Petitioner requests that the Board grant Petitioner's Motion for Leave to Compel, To Suspend and To Extend, since doing so is consistent with settled law, since the request is timely, since not doing so will prejudice the rights of Petitioner, and since justice so requires.

Respectfully submitted,

Legend Pictures, LLC

Dated: May 30, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 30, 2013 a true and accurate copy of the foregoing

LEGEND PICTURES, LLC's MOTION TO COMPEL DEFENDANT'S ANSWERS TO PETITIONER'S FIRST AND SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION; TO SUSPEND FURTHER PROCEEDINGS PENDING DISPOSITION OF THE MOTION; AND TO EXTEND DISCOVERY SOLELY FOR PETITIONER'S BENEFIT AND BRIEF AND EXHIBITS A-J IN SUPPORT THEREOF

was served by agreement of the parties on Defendant by emailing a copy of the same to nevisbaby@hotmail.com and tharilest@yahoo.com.

/Carla Calcagno/

EXHIBIT B

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

LEGEND PICTURES, LLC,)	
)	
Petitioner)	
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v.)	Cancellation No. 92056168
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QUENTIN DAVIS,)	
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Defendant)	

PETITIONER’S MOTION FOR LEAVE TO AMEND THE PETITION TO CANCEL

Pursuant to Trademark Rule 2.107 (37 CFR. § 2.107) and Rule 15(a) of the Federal Rules of Civil Procedure, Petitioner Legend Pictures, LLC ("Petitioner") moves the Board for Leave to Amend its Petition to Cancel to plead that: (1) Registration No. 3,412,677 has become incontestable; 2) Petitioner’s Registrations, Nos. 3,656,926 and 3,621,043 have been amended; and 3) Petitioner has used the terms LEGENDARY and LEGENDARY PICTURES as and as part of its trade names.

The proposed Amended Notice of Cancellation is attached hereto.

I. BACKGROUND: MOTIONS FOR LEAVE TO AMEND SHALL BE GRANTED FREELY

Federal Rule 15(a) states as follows: "[A] party may amend the party's pleading.. .by leave of court ...; and leave shall be freely given when justice so requires." See TBMP § 507.02.

In interpreting this provision, the Board has been liberal in granting leave to amend pleadings at any stage of the proceedings, but especially pretrial, when justice so requires, provided the proposed amendment would not violate settled law or be prejudicial to the rights of the adverse party. See e.g., *Commodore Electronics Ltd. v. CMB Kabushiki Kaisha*, 26 USPQ2d 1503 (TTAB 1993) (motion to amend granted and no prejudice where non-moving party already had taken discovery on the newly plead issues). See e.g. *United States Olympic Committee v. O-M Bread, Inc.*, 26 USPQ2d 1221 (TTAB 1993) (motion granted where proceeding was still in pre-trial stage); *Focus 21 International, Inc. v. Pola Kasei Kogyo Kabushiki Kaisha*, 22 USPQ2d 1316 (TTAB 1992) (motion granted where motion was filed prior to the opening of plaintiffs testimony period); and *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216 (TTAB 1990) (motion granted where in the interest of justice).

Here, the motion is filed pre-trial. And justice would be served by permitting all the parties claims to be considered in one case. Further, Defendant will not be unduly prejudiced by this motion.

As all the conditions of Rule 15 are met, this Motion should be granted.

A) AT THE TIME OF FILING THE PETITION TO CANCEL, PETITIONER'S REGISTRATION NO. 3,412,677 HAD NOT YET BECOME INCONTESTABLE AND REGISTRATION NOS. 3,656,926 AND 3,621,043 HAD NOT YET BEEN AMENDED BY THE USPTO AND THE REMAINING ALLEGATIONS CONFORM THE PETITION TO DISCOVERY

1. Registration No. 3,412,677

On September 13, 2012, Petitioner filed a Petition to Cancel, containing three claims. One of these claims is for likelihood of confusion. At the time the Petition to Cancel was filed, Registration No. 3,412,677 was not incontestable. Thus, Petitioner plead this mark as a valid and subsisting registration only.

On April 23, 2013, Petitioner filed a Section 8 and 15 Declaration as to Registration No. 3,412,677. On May 15, 2013, this registration became incontestable.

Promptly after the registration became incontestable, Petitioner is moving to amend the Cancellation. This motion is being filed within two weeks of the USPTO's decision accepting the Declarations of Use and Incontestability and therefore is timely.

2. Registration Nos. 3,656,926 and 3,621,043

Justice also requires that the Board grant leave to amend the Cancellation to plead Petitioner's Amendment of its pleaded Registrations identified above. On August 29, 2012, Petitioner filed Section 7(e) Requests to Amend these registrations from LEGENDARY PICTURES & Design to LEGENDARY & Design. On September 13, 2012, Petitioner filed the Petition to Cancel. As the Section 7(e) Requests to Amend had not yet been approved, Petitioner and ESSTA both properly identified the marks in these registrations as LEGENDARY PICTURES & Design.

On October 22, 2013, Defendant Answered the Petition for Cancellation. Defendant knew of the pending Section 7(e) Requests to Amend when Defendant filed his Answer. Specifically, Defendant, in his Answer to paragraph Nos. 3 and 5 of the Petition to Cancel pled as follows:

3. Petitioner, ... voluntarily requested Registration No. 3656926 for amendment on Aug. 29, 2012. The amended drawing removed the word "PICTURES" from Registration No. 3656926 and left only the word "LEGENDARY" (including medallion) remaining.

5. Petitioner, ... voluntarily requested Registration No. 3621043 for amendment on Aug. 29, 2012. The amended drawing removed the word "PICTURES" from Registration No. 3656926 (sic) and left only the word "LEGENDARY" (including medallion) remaining.

Further, on May 28, 2013,¹ Petitioner timely and without extension responded to Defendant's First Set of Interrogatories and Requests for Production of Documents, which had been served on April 27, 2013.

Defendant's Interrogatory No. 10 and Request for Production No.10 sought a description of the reason for Petitioner's Voluntary Amendments. See, Exhibit A. Petitioner answered these discovery requests. *Id.* Thus, for seven months, Defendant has known of the Amendments of Petitioner's Registrations. Further, Defendant has taken discovery on this issue.

Nonetheless, to clarify the case, to avoid any claim of "surprise" at trial, and to avoid any possible arguments regarding prejudice to Defendant, Petitioner seeks to amend the Cancellation. Petitioner seeks to expressly plead the Amendments to Petitioner's Registrations.

As indicated above, precedent mandates that leave to amend pleadings should be freely granted, when justice so requires, provided the proposed amendment would not violate settled law or be prejudicial to the rights of the adverse party. *Supra, at p.2.*

¹ May 27, 2013 was a federal holiday.

As it will conform the pleadings to the evidence and permit the Board to hear all facts pertinent to likelihood of confusion, justice clearly will be served by permitting the amendments. As he has been aware of these Amendments since at least as early as October 22, 2013, and has taken discovery on the Amendments, Defendant cannot be prejudiced by allowance of this amendment.

The Board regularly grants leave to amend to plead a registration issued to the Plaintiff after the original complaint's filing. *VanDyne Cotty Inc. v. Wear-guard Corp*, 926 F2d 1156, 17 USPQ2d 1866, 1867 (Fed Cir 1991); *Cudahy Co v August Packing Co*. 206 USPQ 759 (TTAB 1979) [Petitioner permitted to plead ownership of registrations acquired after the filing of the Notice of Opposition]. Petitioner respectfully submits that this case is similar to these cases in that Petitioner is simply updating the status of its pled marks, and requests that the Board act consistently with these precedents.

B) PETITIONER'S USE OF THE TERM "LEGENDARY" AS AND AS PART OF ITS TRADE NAMES

Justice also requires that the Board grant leave to amend the Cancellation to amplify allegations already included in Petitioner's pleading of the use of the term LEGENDARY and LEGENDARY PICTURES as or as part of a trade name. On September 13, 2012, Petitioner filed its Petition to Cancel. The Petition's Paragraph 9 read as follows:

9. The entirety of Registrant's mark LEGENDARY is incorporated within Petitioner's LEGENDARY PICTURES marks. Consequently, Registrant's mark LEGENDARY would appear to consumers to be a shortened form of Petitioner's LEGENDARY PICTURES marks. *In fact, media reports have commonly referred to Petitioner using the shortened mark LEGENDARY.* Consumers are

therefore likely to mistakenly believe that Registrant's mark is associated or affiliated with Petitioner's mark.

On October 22, 2013, Defendant answered the Petition to Cancel. Defendant plead as follows:

9....Registrant also denies claims that media reports *commonly* refer to Petitioner using the shortened mark "LEGENDARY", as extensive searches have been made to locate evidence in support of this claim. No evidence to validate this claim has been found. Findings in media outlets have referred to Petitioner as: "LEGENDARY PICTURES" or "LEGENDARY ENTERTAINMENT" or "LEGENDARY FILMS" or "LEGENDARY COMICS" or "LEGEND PICTURES". *No evidence could be found of the Petitioner even to refer to itself as LEGENDARY without the inclusion of its identifying medallion.*

Thus, since at least as early as October 22, 2013, the parties have joined issue on the degree to which Petitioner uses and is known by the term "LEGENDARY"

For over six months, Defendant has known of this basis for Petitioner's claim of likelihood of confusion. Where, as here, a party seeks leave to amend the Cancellation to amplify its allegations so that the Board may decide a case based on "the fullest exposure of all pertinent circumstances," the Board has consistently granted such amendments. See, *Avedis Zildjian Co. v. D.H. Baldwin Co.* 180 USPQ 539 (TTAB 1973).

Further, Defendant already has extensively taken discovery on this issue. On May 28, 2013, Petitioner responded to Defendant's First Set of Interrogatories and Requests for Production of Documents.

Well over *half* of Defendant's discovery requests, as numbered by Defendant, were directed to Petitioner's use of the terms LEGENDARY and LEGENDARY PICTURES as a trade name. Specifically, Interrogatory Nos. 1, 2, 3, 4 and 5 sought a description of when Petitioner first began advertising itself as LEGENDARY or LEGENDARY PICTURES. Exhibit A. Interrogatory Nos. 6 and 7 sought a description of all "media outlets" and all documents from such "media outlets" in which Petitioner refers to itself as LEGENDARY or LEGENDARY PICTURES. *Id.* Similarly, Request for Production Nos. 1-5 seek documents reflecting Petitioner's first use of LEGENDARY or LEGENDARY PICTURES as a trade name. *Id.* Request for Production Nos. 6-7 seek documents reflecting all "media outlets" use of LEGENDARY and LEGENDARY PICTURES to refer to Petitioner. *Id.*

These discovery requests and Petitioner's answers to these discovery requests confirm that Defendant understood that Petitioner alleges to have used the terms LEGENDARY and LEGENDARY PICTURES as or as part of its trade names. These uses were adequately plead and issues joined thereon in this case. *Id.*

Nonetheless, simply to amplify the Cancellation, to avoid any claim of "surprise" at trial, and to avoid any possible prejudice to Defendant, Petitioner seeks to amend the Cancellation. Petitioner seeks to amplify its pleading of its use of LEGENDARY and LEGENDARY PICTURES as and as part of its trade names as a basis for its claim of likelihood of confusion as set forth in the Original Petition for Cancellation and joined in Defendant's Answer.

As indicated above, precedent mandates that leave to amend pleadings should be freely granted, when justice so requires, provided the proposed amendment would not violate settled law or be prejudicial to the rights of the adverse party. See e.g., See, *Avedis Zildjian Co. v. D.H. Baldwin Co.* 180 USPQ 539 (TTAB 1973).

As it will permit the Board to hear all facts pertinent to likelihood of confusion, justice clearly will be served by permitting the amendment. And as he has been aware of these issues by Petitioner since he filed his Answer, and has taken discovery on these issues, Defendant cannot be prejudiced by allowance of this amendment.

D. CONCLUSION

Thus, for the foregoing reasons, Petitioner's Motion for Leave to Amend the Petition to Cancel should be granted since doing so does not violate any settled law, since the request is timely, since it will not prejudice the rights of the Defendant, and since justice so requires.

Respectfully submitted,

Legend Pictures, LLC

Date May 30, 2013

By /*Carla C. Calcagno*/
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Calcagno Law PLLC
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Suite 800
Washington, DC 20037
Telephone: (202) 973-2880
Attorneys for Legend Pictures, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 30, 2013 a true and accurate copy of the foregoing:

**PETITIONER'S MOTION FOR LEAVE TO AMEND THE PETITION TO CANCEL,
EXHIBIT A, AND AMENDED PETITION TO CANCEL**

was served by agreement of the parties on Defendant by emailing a copy of the same to nevisbaby@hotmail.com and tharilest@yahoo.com.

/Carla Calcagno/

EXHIBIT A

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

IN THE MATTER OF REGISTRATION NO.: **4,106,459**
for the mark **LEGENDARY**
Date of Issue: February 28, 2012

LEGEND PICTURES, LLC,)	
)	
Petitioners,)	
)	
v.)	Proceeding No. <u>92056168</u>
)	
QUENTIN DAVIS)	
Registrant.)	
)	

REGISTRANT'S FIRST SET OF INTERROGATORIES

In accordance with Rule 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, Registrant requests that Petitioner serve sworn answers to the following interrogatories. Answers are to be served via electronic mail to:

NevisBaby@hotmail.com

&

ThaRilest@yahoo.com

DEFINITIONS AND INSTRUCTIONS

For the purposes of this interrogatory, the term “document” shall constitute;

- (a) anything which is not itself a location, and
- (b) anything which does not have a pulse.

For the purposes of this interrogatory, the term “person” (also people) shall constitute;

- (a) any human or group of humans capable of comprehension (i.e. individuals, organizations, groups, etc.)

For the purposes of this interrogatory, the term “identify” shall constitute the thorough revelation of;

- (a) the name, specific subject matter, medium of existence (pamphlet, film, magazine, etc.), source, author, publisher, date of publication (and any other applicable dates), duration (time length, page length, word count, etc.), location, geographic region of circulation.

- (b) In addition to subsection “(a)”, include full URL (website address) for documents which are online.

- (c) **NOTE:** the currently applied conditions for the term “identify” are intended as a means of discovery and are not to be misconstrued or taken out of context in relation to the term “identifying” (i.e... how long has Petitioner been identifying itself as...). The term “identifying” shall be understood to be unaltered from reasonable definition throughout this document.

The term “Registrant” refers to Quentin Davis who is the legal owner of registration # 4106459 for the mark “Legendary”.

The term “Petitioner” refers to Legend Pictures, LLC and any person hired or performing on their behalf.

Interrogatories including terms “Legendary” and “Legendary Pictures” are to be applied to all instances involving the terms within the scope of the interrogatory whether or not an identifying mark (i.e. medallion) is or was also present in those instances.

INTERROGATORIES

Interrogatory No. 1

List the release date of the first motion picture in which Petitioner began advertising itself as “Legendary Pictures”.

Interrogatory No. 2

Identify the motion picture that pertains to Interrogatory No. 1.

Interrogatory No. 3

List the release date of the first motion picture in which Petitioner began advertising itself as only “Legendary”.

Interrogatory No. 4

Identify the motion picture that pertains to Interrogatory No. 3.

Interrogatory No. 5

Identify the first document in which Petitioner began advertising itself as only “Legendary”.

Interrogatory No. 6

Identify all media outlets that have referred to Petitioner as only “Legendary”.

Interrogatory No. 7

Identify all documents in media outlets referring to Petitioner as only “Legendary”.

Interrogatory No. 8

Explain why Petitioner altered counsel during the discovery phase of proceeding # 92056168.

Interrogatory No. 9

Explain why Registrant's trademark was unopposed by Petitioner during the opposition period of registration # 4106459.

Interrogatory No. 10

Explain why Petitioner's registrations #3656926 & #3621043 were altered from "Legendary Pictures" to "Legendary" after Petitioner was made aware of Registrant's established mark.

Interrogatory No. 11

Identify any actual confusion concerning the Petitioner's marks and registration #4106459.

Interrogatory No. 12

Identify any proof of fraud concerning the Registrant.

Respectfully Submitted,

/Quentin Davis/
Quentin Davis – Registrant
P.O. Box 47893
Tampa, Fl. 33646

4/27/2013
Date

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

IN THE MATTER OF REGISTRATION NO.: **4,106,459**
for the mark **LEGENDARY**
Date of Issue: February 28, 2012

LEGEND PICTURES, LLC,)	
)	
Petitioners,)	
)	
v.)	Proceeding No. <u>92056168</u>
)	
)	
QUENTIN DAVIS)	
Registrant.)	
)	

**REGISTRANT'S FIRST REQUESTS FOR
PRODUCTION OF DOCUMENTS**

In accordance with Rule 34 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, Registrant requests that Petitioner produce the following documents. Documents are to be served via electronic mail to:

NevisBaby@hotmail.com
&
ThaRilest@yahoo.com

Documents which are unable to be sent via electronic mail shall be mailed to:

Quentin Davis
P.O. Box 47893
Tampa, Fl. 33646

DOCUMENT REQUESTS

Document Request 1

Send all documents evidencing and relating to Interrogatory No.1

Document Request 2

Send all documents evidencing and relating to Interrogatory No.2

Document Request 3

Send all documents evidencing and relating to Interrogatory No.3

Document Request 4

Send all documents evidencing and relating to Interrogatory No.4

Document Request 5

Send all documents evidencing and relating to Interrogatory No.5

Document Request 6

Send all documents evidencing and relating to Interrogatory No.6

Document Request 7

Send all documents evidencing and relating to Interrogatory No.7

Document Request 8

Send all documents evidencing and relating to Interrogatory No.8

Document Request 9

Send all documents evidencing and relating to Interrogatory No.9

Document Request 10

Send all documents evidencing and relating to Interrogatory No.10

Document Request 11

Send all documents evidencing and relating to Interrogatory No.11

Document Request 12

Send all documents evidencing and relating to Interrogatory No.12

Respectfully Submitted,

/Quentin Davis/
Quentin Davis – Registrant
P.O. Box 47893
Tampa, Fl. 33646

4/27/2013
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2013, a true and complete copy of the foregoing REGISTRANT'S FIRST SET OF INTERROGATORIES & REGISTRANT'S FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS (Proceeding No. 92056168) was served to Petitioner via electronic mail to:

Carla Calcagno at e-mail addresses:

carla.calcagno@calcagnolaw.com

and

cccagno@gmail.com

Calcagno Law
2300 M Street, N.W., Suite 800
Washington, D.C. 20037

/Gloria Walters/

Gloria Walters
Administrative Assistant to the Registrant
P.O.Box 47893
Tampa, Florida 33646