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

EJW

Mailed: August 28, 2013

Cancellation No. 92057387

Yoga Smoga, Inc.

v.

Nikia S White

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

On August 28, 2013, petitioner, Yoga Smoga, Inc. (represented by Douglas Wolf and Anderson Duff of Wolf Greenfield & Sacks P.C.), respondent, Nikia White, (represented by John Welch of Lando & Anastasi LLP), and Elizabeth Winter, the assigned Interlocutory Attorney, participated in a discovery conference regarding this proceeding pursuant to Trademark Rule 2.120(a). This order summarizes the significant points addressed during the conference, and the parties' stipulation agreed to during the conference.

Conference Summary

At the outset, the Board discussed the purpose of the discovery conference under Fed. R. Civ. P. 26(f). The parties then informed the Board that they had not yet engaged in any settlement discussions and that there is no related Federal court case or Board proceeding. The parties

are **ORDERED** to promptly advise the Board should a civil action between the parties be instituted (or a related Board proceeding) so that the Board can determine whether suspension or consolidation is appropriate.

Accelerated Case Resolution (ACR)

In view of the single abandonment claim before the Board in this proceeding, the Board recommended to the parties that they consider the Board's ACR procedure. Both parties stated that they may be amenable to ACR. In view thereof, the Board requested that the parties contact the assigned Interlocutory Attorney by telephone should the parties file an ACR stipulation. The parties are referred to the Board's website regarding ACR (see http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution__ACR__notice_from_TTAB_webpage_12_22_11.pdf). By way of example only, the parties may also view ACR related orders in the following cases: 92054446 (see no. 20 in case history); and 91199733 (see nos. 12 and 18 in case history).

Parties' Stipulations

The parties agreed that they would serve by electronic mail *courtesy copies only* of documents filed with the Board or otherwise on the adverse party.

There are various other stipulations to which the parties may agree 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;
- The parties may agree to allow additional time to respond to discovery requests;[1]
- 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;
- 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 §§ 403.01, 501, 704.03(b) and 705 (3d ed. rev.2 2013).

[1] Parties must inform the Board, by stipulation or motion, any time they agree to modify their obligations under the rules governing disclosures and discovery, as well as when they agree to modify deadlines or schedules that involve disclosures, discovery, trial or briefing. *See* TBMP §§ 403.01 and 501.02 (3d ed. rev. 2012).

Initial Disclosures

The next deadline in this proceeding is the due date for initial disclosures. Should the parties seek additional information on initial disclosures, they may obtain additional information 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. 2498, 2501 (January 17, 2006). As a reminder, the parties are obligated to provide "core information", that is, identify the names of individuals who might who have extensive knowledge and might testify to support claims or defenses, and the location and type of documents that the disclosing party may use to support its claims or defenses.

Initial disclosures **SHOULD NOT** be filed with the Board. Initial disclosures have to be in writing and signed and served on the other party.

Electronic and Other Evidence Issues

The parties were reminded that each party has a duty to preserve material evidence and to avoid spoilation of

evidence.[2] Additionally, the Board has held that electronically-stored information (ESI) must be produced unless the data is not reasonably accessible because of undue burden or cost.[3]

Other Important Issues

The parties were reminded that the Board's standard protective order applies to this proceeding and may be modified by the parties in writing; and that a motion for summary judgment may not be filed, nor may any discovery be served until the party seeking to serve discovery has served its initial disclosures.

Additionally, ***should the parties seek to engage in settlement negotiations, a consented motion to suspend or to extend the trial schedule should be filed in order to keep the trial schedule from moving forward***.

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[2] "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).

[3] *See Frito-Lay North America, Inc. v. Princeton Vanguard, LLC*, 100 USPQ2d 1904 (TTAB 2011) ("ESI must be produced in Board proceedings where appropriate, notwithstanding the Board's limited jurisdiction and the traditional, *i.e.*, narrow, view of discovery in Board proceedings" (internal citations omitted). However, a "party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost." *See* TBMP § 404.02 (October 2012).

Summary; Trial Dates Remain the Same

As discussed, trial dates remain as set forth in the Board's institution order mailed on June 22, 2013.

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