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

Proceeding	91181945
Party	Plaintiff Kairos Institute of Sound Healing, LLC
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Submission	Opposition/Response to Motion
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Date	06/02/2008
Attachments	Opposer's Response to Motion to Dismiss 060108.pdf (5 pages)(51754 bytes)

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

Kairos Institute of Sound Healing, LLC,	)	Opposition No. 91181945
	)	
Opposer,	)	
	)	Serial No. 78/882,509
v.	)	Filed: May 12, 2006
	)	Mark: THERE'S NO PLACE LIKE OHM
Doolittle Gardens, LLC,	)	(block form)
	)	
Applicant.	)	

OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SANCTIONS, FOR OPPOSER'S FAILURE TO MAKE INITIAL DISCLOSURES

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

Kairos Institute of Sound Healing, LLC ("Opposer"), by and through its attorneys, hereby moves the Trademark Trial and Appeal Board ("TTAB") for an Order dismissing Applicant's Motion to Dismiss, or in the Alternative for Sanctions, for Opposer's Failure to Make Initial Disclosures. Opposer's Response to Applicant's Motion is submitted within 20 days from the mailing date of Applicant's Motion.

Applicant, by and through its representative, served its initial disclosures on Opposer on April 25, 2008, pursuant to 37 C.F.R. § 2.120 (a)(2). Opposer's representative inadvertently and unintentionally did not provide its initial disclosures on April 25, 2008. To cure the oversight, Opposer's representative provided its initial disclosures to Applicant's representative on May 30, 2008. Opposer's representative also filed its initial disclosure on May 30, 2008 with the TTAB.

37 C.F.R § 2.120 (g)(1) states: "If a party fails to comply with an order of the Trademark Trial and Appeal Board relating to discovery, including a protective order, the Board may make any appropriate order, including any of the orders provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board will not hold any person in contempt or award any expenses to any party. The Board may impose against a party any of the sanctions provided by

this subsection in the event that said party or any attorney, agent, or designated witness of that party fails to comply with a protective order made pursuant to Rule 26(c) of the Federal Rules of Civil Procedure."

As stated by Applicant in its Motion dated May 12, 2008, the determination and imposition of an appropriate sanction is a fact-specific inquiry. *Ehrenhaus v. Reynolds*, 965 F. 2d 916, 920 (10th Cir. 1992). Dismissal of a party's case is appropriate only in instances of willful misconduct. *Id.*; *Meade v. Grubbs*, 841 F.2d 1512, 1520-21 (10th Cir. 1988).

Pursuant to *Ehrenhaus*, the Court gave a number of factors prior to choosing dismissal as an appropriate sanction. Some of those factors are: (1) the degree of actual prejudice to the opposing party; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; and (4) the efficacy of lesser sanctions. *Ehrenhaus*, 965 F.2d at 921.

According to *Ehrenhaus,* dismissal of a party's case is appropriate only in instances of *willful misconduct*. As stated above, through Opposer's representative's inadvertent and unintentional oversight, Opposer's initial disclosures were not provided to Applicant's representative on April 25, 2008. To cure the oversight, Opposer's representative provided its initial disclosures to Applicant's representative on May 30, 2008. Opposer respectfully submits that there is no willful misconduct here.

Although Opposer's initial disclosures were provided to Applicant's representative on May 30, 2008, there is no *actual* prejudice to Applicant. Actual prejudice would be present if Opposer refuses to provide its initial disclosures, or if it provides its initial disclosures so late that it would not give Applicant the reasonable time to formulate an adequate discovery plan. According to the Trial Dates set by the TTAB for the subject opposition proceeding, Discovery closes on September 22, 2008. Although Opposer's Initial Disclosures were provided late (May 30, 2008), Applicant still has at least three (3) months to formulate an adequate discovery plan. In addition, Opposer and Applicant still have ample time to discuss an amicable settlement plan before the close of Discovery. Opposer respectfully submits that Applicant suffers no *actual* prejudice here.

After Initial Disclosure are provided, it is normal and customary for both Opposer and Applicant to spend additional time and expenses in pursuit of discovery by serving each party interrogatories, request for admission, and/or request to produce additional things and information useful for the opposition. TTAB's new rules were established to urge parties in

opposition proceedings to initiate communications, promote settlement, and reduce the number of discovery disputes. Here, Opposer and Applicant have begun communications via the Discovery Conference and the provision of the Initial Disclosures. As a matter of fact, Opposer's representative initialed the Discovery Conference. TTAB's new rules were *not* established to eliminate the discovery process, such as interrogatories, request for admission, and/or request to produce additional things and information useful for the opposition. The changes to TTAB rules were intended to facilitate early settlements, particularly in those cases where the parties would not otherwise communicate about settlement at the beginning of the proceeding.

Opposer respectfully submits and declares that it did not willfully fail to provide its Initial Disclosures, and it certainly did not willfully interfere with the judicial process. The subject opposition can now be assessed and moved toward a meaningful disposition since both parties have provided the Initial Disclosures.

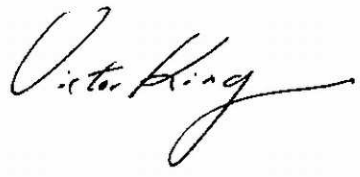
Opposer further submits that it has met its culpability by providing its Initial Disclosures on May 30, 2008, so that Applicant still has at least three (3) months to formulate an adequate discovery plan.

Opposer must disagree with Applicant that "Opposer has acknowledged its failure to comply with the rule for making initial disclosures, which means it has willfully failed to respond", and that "Opposer is "gaming" the system". Opposer's Initial Disclosures have now bee properly provided pursuant to Rule 26 (a)(1) of the Federal rules of Civil Procedures, and the subject opposition proceeding can now continue without any *undue or actual* prejudice to Applicant.

WHEREFORE, Opposer prays that the Board dismisses Applicant's Motion to Dismiss, or in the Alternative for Sanctions, for Opposer's Failure to Make Initial Disclosures. Opposer additionally prays that the Board dismisses Applicant's request for Opposer to pay Applicant's "reasonable expenses, including attorney's fees, caused by the failure. . . Fed. R. Civ. P 37 (b)(2)".

Dated: June 1, 2008

Respectfully submitted,



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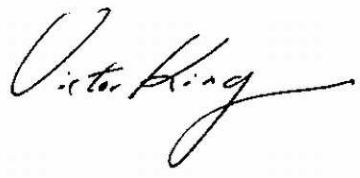
CERTIFICATE OF USPTO ELECTRONIC FILING SYSTEM SUBMISSION

I hereby certify that this correspondence is being transmitted herewith via the USPTO's ESTTA system on June 1, 2008 and is addressed to: UNITED STATES PATENT AND TRADEMARK OFFICE, Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313-1451.



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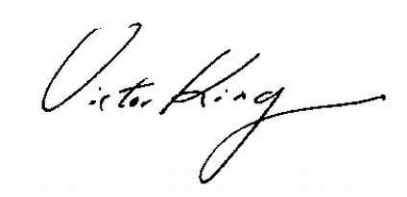
CERTIFICATE OF SERVICE

I hereby certify that on this 1st of June, 2008, the foregoing OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SANCTIONS, FOR OPPOSER'S FAILURE TO MAKE INITIAL DISCLOSURES was served upon Applicant by depositing same with

the U.S. Postal Service, first-class postage prepaid, addressed as follows:

Roger E. Michener
Peacock Myers, P.C.
Post Office Box 26927
Albuquerque, NM 87125-6927



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