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

Proceeding	91201968
Party	Defendant TT WoodCare A/S
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Attachments	Opposition to Motion to Compel and Reply in Support of Motion to De-Designate.pdf (7 pages)(32584 bytes) Opposition to Motion to Compel and Reply in Support of Motion to De-Designate_Exhibit 1.pdf (2 pages)(33545 bytes)

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

Thomas Flynn, **Opposer,** **v.** **TT WoodCare A/S,** **Applicant.**	**Opposition No. 91201968**

WOODCARE'S OPPOSITION TO FLYNN'S MOTION TO COMPEL
AND REPLY IN SUPPORT OF ITS OWN MOTION TO DE-DESIGNATE

WoodCare hereby opposes Flynn's motion to compel, and replies in support of its own motion to de-designate Flynn000001-Flynn000002, Flynn000007-Flynn000014, Flynn000016-Flynn000021, and Flynn000024-Flynn000026 (hereinafter "the Documents"), attached to WoodCare's motion as Exhibit 1.[1]

I. Correction of Flynn's Incorrect Assertions of Fact

WoodCare first wishes to correct certain incorrect assertions of fact made by Flynn in his motion to compel.

Flynn asserts, as if fact, that "In 2006…Flynn had a business relationship with Applicant, and with Applicant's then managing Director, Mr. Bruno Sidsner, in particular." Flynn Mot. to Compel, 2. WoodCare denies that Flynn had any business relationship with WoodCare in 2006. Upon information and belief, Mr. Bruno Sidsner also did not have any business relationship with Flynn in 2006. Flynn did not become a customer of WoodCare until about January 2008.

[1] Flynn's Opposition to Motion to De-Designate and Motion to Compel Production will hereinafter be referred to as Flynn's motion to compel. WoodCare's Motion to De-Designate Certain Documents Produced by Flynn from "CONFIDENTIAL OUTSIDE ATTORNEY'S EYES ONLY" Designation will hereinafter be referred to as WoodCare's motion to de-designate.

Flynn further asserts, as if fact, that "Flynn began using the name WOCA in the United States in association with the relevant goods in 2006, prior to any use in the United States by Applicant." Flynn Mot. to Compel, 2. WoodCare denies this assertion in its entirety.

Flynn also asserts that WoodCare implies an affiliation with itself and Mr. Sidsner. Though WoodCare remains in contact with Mr. Sidsner, Mr. Sidsner is no longer an employee of WoodCare, and is, in fact, involved in litigation with WoodCare.[2]

II. WoodCare Opposes Flynn's Motion to Compel Information Regarding WoodCare's Email Service Provider

Information about WoodCare's email service provider is irrelevant to this dispute. WoodCare owns, controls and possesses its emails – not WoodCare's email service provider. Thus, WoodCare -- and WoodCare alone -- controls the discoverable information at issue and is obligated to produce all emails.

Flynn argues that information about WoodCare's email service provider is relevant to this dispute because, according to Flynn, WoodCare challenges the authenticity of emails produced by Flynn. This is simply untrue. Although WoodCare currently doubts the authenticity of emails produced by Flynn during discovery, authenticity of emails is not at dispute in this case. Authenticity of emails was mentioned in neither Flynn's Notice of Opposition, nor WoodCare's Answer. WoodCare does not, at this time, intend to bring the authenticity of emails produced by Flynn into dispute. Doing so would be premature, as WoodCare has not been permitted, in due diligence, to inspect such emails (because they have been designated as "for outside attorney's eyes only"). Even if, after WoodCare has done its due diligence in inspecting these documents,

[2] Mr. Sidsner resigned from his position as Managing Director of WoodCare on March 31, 2009. He had been asked to resign by WoodCare's Board of Directors because, under his leadership, WoodCare's revenues and earnings had dropped. The Directors wished to employ Sidsner as a sales manager instead, but the Directors and Sidsner were unable to reach a new employment agreement. Currently, the only relationship between WoodCare and Sidsner (other than the litigation) is that WoodCare continues to compensate Sidsner and will continue to compensate Sidsner until April 30, 2012, per Danish law requiring employer compensation of former employees.

WoodCare challenges the authenticity of emails produced by Flynn, information regarding WoodCare's email service provider would still be irrelevant. WoodCare's email service provider does not have any connection to Flynn or Flynn's emails. And, as far as WoodCare is aware, Flynn does not presently challenge the authenticity of emails produced by WoodCare.

Instead, Flynn suggests that, because WoodCare has not found any relevant emails from the time period between 2006 and 2007, Flynn believes that WoodCare is shirking its discovery obligations. But there is no good faith reason to doubt that WoodCare has upheld and will continue to uphold its obligations during discovery. WoodCare has, to date, produced 1975 pages of documents (many of which are emails), and is continuing to search for any other relevant documents. Further, as WoodCare's counsel has mentioned to Flynn's counsel, the reason that WoodCare is yet to find any relevant emails from between 2006 and 2007 could be that no such emails exist, as Flynn was not a customer of WoodCare until about January 2008. *See* WoodCare Mot. to De-Designate, Ex. 9.

Even if information about WoodCare's email service provider is relevant, it is not discoverable. "The right to discovery is not unlimited. Even if the discovery sought by a party is relevant, it will be limited, or not permitted, where, inter alia, it is unreasonably cumulative or duplicative; or is unduly burdensome or obtainable from some other source that is more convenient, less burdensome, or less expensive; or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information." Trademark Trial and Appeal Board Manual of Practice, §402.02, n.1 (internal citations omitted). Any emails that Flynn might obtain from WoodCare's email service provider would be duplicative of WoodCare's document production to Flynn. Further, if Flynn has questions or concerns about WoodCare's search of its emails, Flynn should direct such questions, by

interrogatory or otherwise, to WoodCare. Flynn simply has no need for the sought information regarding WoodCare's email service provider. Moreover, disclosure of such information could result in harm to WoodCare.[3] Such harm, even if small, would outweigh Flynn's need for the information, which is nonexistent.

Information regarding WoodCare's email service provider is irrelevant and undiscoverable. For all the foregoing reasons, WoodCare respectfully requests that the Board deny Flynn's motion to compel.

III. WoodCare's Reply in Support of its Own Motion to De-Designate

The burden is on Flynn to show that, by a preponderance of the evidence, there is good cause for protection under the Protective Order. *See* Protective Order, ¶12.1. For "outside attorney's eyes only" designation, Flynn must show that the Documents contain highly-sensitive technical, financial and/or business information that, if disclosed to persons other than WoodCare's outside counsel, would pose a reasonable risk of harm to Flynn. *See* Protective Order, ¶2.1. Flynn has not come close to meeting this burden. Flynn has neither stated any good faith reason for the designation, nor pointed to even one sentence of any Document that contains any highly-sensitive information, either in his opposition or in his many communications to WoodCare through counsel. *See* Flynn Mot. to Compel, Ex. B; WoodCare Mot. to De-designate, Exs. 3-9.

Instead, in his opposition to WoodCare's motion to de-designate, Flynn attempts to shift the Board's attention to arguments that are completely irrelevant to the question of the Documents' purported sensitivity. Flynn argues that WoodCare's motion to de-designate should be denied because (1) WoodCare incorrectly argues that Mr. Sidsner is affiliated with

[3] As WoodCare noted in its motion to de-Designate, Flynn may have knowledge of and/or means to duplicate a forgery scheme involving forged emails. *See* WoodCare Mot. to De-Designate, 8.

WoodCare; (2) WoodCare incorrectly assumes that these emails are the only evidence; and (3) WoodCare recklessly asserts that Flynn may be a part of a far-fetched forgery scheme. Flynn's arguments, even if taken as true, do not at all address the question of whether the documents contain highly-sensitive, technical, financial and/or business information that, if disclosed, pose a reasonable risk of harm to Flynn. Flynn has not met his burden under the Stipulated Protective Order, and the Documents should be de-designated.

Finally, Flynn argues that the documents should not be de-designated because WoodCare has needlessly protracted discovery issues. Again, even if taken as true, this argument does not address the question of the documents' purportedly sensitive content. Further, it is clear from email communications between Parties' counsels, submitted as exhibits by both Parties, that WoodCare has attempted in good faith to resolve discovery issues, whereas Flynn (by counsel) failed to attend a scheduled conference call to discuss discovery issues, refused to discuss redaction of the documents in question, and continuously evaded WoodCare's direct questions about what content of the Documents are considered highly-sensitive by Flynn. *See* WoodCare Mot. to De-Designate, Exs. 4-9. Flynn – not WoodCare – has caused this discovery dispute by designating each and every page of his scant 26 page document production "for outside attorney's eyes only" with no good faith reason for such designation. As of today, Flynn has still not produced *any* new documents, despite WoodCare's reminder that it is well past February 20, the date to which Flynn requested an extension for producing documents.[4] *See* Sengupta email of February 27, 2012, attached hereto as Exhibit 1.

Flynn has identified no good faith reason to designate the Documents "for outside attorney's eyes only", and has not met his burden under the Stipulated Protective Order by a

[4] Flynn's counsel did, at least, respond to WoodCare's counsel's reminder, writing, "My understanding is that we have received additional documents from our client and are processing for production next week."

preponderance of the evidence. WoodCare repeatedly attempted, in good faith, to resolve all discovery issues. For these, and all the foregoing reasons, WoodCare respectfully requests that the Board grant WoodCare's motion to de-designate.

Dated: Washington, D.C.
March 5, 2012

BERLINER, CORCORAN & ROWE, L.L.P

By: /Clemens Kochinke/
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Counsels for WoodCare

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2012, a true and correct copy of the foregoing "Woodcare's Opposition to Flynn's Motion to Compel and Reply in Support of its Own Motion to De-Designate" was served by electronic mail to the following:

Robert B. Dulaney III
SMITH RISLEY TEMPEL SANTOS LLC
rdulaney@srtslaw.com

Lawrence Maxwell
SMITH RISLEY TEMPEL SANTOS LLC
lmaxwell@srtslaw.com

/Clemens Kochinke/
Clemens Kochinke
BERLINER, CORCORAN & ROWE, LLP

Exhibit 1

-------- Original Message --------
Subject: Re: Discovery responses
Date: Mon, 27 Feb 2012 12:15:37 -0500
From: Ankhi Sengupta <asengupta@bcr-dc.com>
To: Robert Dulaney <rdulaney@srtslaw.com>
CC:'Clemens Kochinke' <ck@bcr-dc.com>, 'Larry Maxwell' <lmaxwell@srtslaw.com>

Robert,

We have been working with our client to respond to your various requests.

The information contained in the redacted portions of the Sidsner statement is not relevant to this case and not discoverable. Please refer to paragraph 9.1 of the stipulated protective order. WoodCare is not claiming attorney-client or attorney work product privilege for this document. Please reread WoodCare's amended privilege log.

We believe all evidence given in the Thai litigation is publicly available.

WoodCare received Flynn's motion and opposition, and will respond.

It is now well past February 20, and Flynn has not supplemented his responses. Flynn mentions in his motion to compel that Flynn continues to search for relevant information. Can we expect to see anything more than the 26 pages of documents -- designated confidential outside attorney's eyes only -- that Flynn has already produced?

Thank you.

Ankhi