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

Proceeding	91214178
Party	Defendant Schoolhouse Outfitters, LLC
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Submission	Motion to Strike
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Signature	/Amanda J. Penick/
Date	03/17/2015
Attachments	Applicant's Motion to Strike Expert Testimony.pdf(833813 bytes)

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

In the matter of Trademark Application Serial Nos. 85817135 / 85831791
For the marks: EGGHEAD / EGGHEAD ELECTRONICS FOR LEARNING & Design
ESTTA
Published in the *Official Gazette* on Sept. 3, 2013 / Aug. 27, 2013

NEWEGG INC., Opposer, v. **SCHOOLHOUSE OUTFITTERS, LLC,** Applicant.	**Opposition No. 91214178**

APPLICANT'S MEMORANDUM IN OPPOSITION TO OPPOSER'S MOTION FOR LEAVE TO DISCLOSE THE EXPERT TESTIMONY OF DR. LEON KAPLAN AND COMBINED MOTION TO STRIKE OPPOSER'S EXPERT DISCLOSURES AND REFERENCES TO EXPERT TESTIMONY OF DR. KAPLAN

For the very first time, on March 2, 2015, to the prejudice of Applicant, and in connection with its Brief in Opposition to Applicant's Motion for Summary Judgment, Opposer Newegg, Inc. ("Newegg") seeks to introduce expert testimony which has never before been disclosed to Applicant Schoolhouse Outfitters, LLC ("Applicant") or identified in the mandatory initial or expert disclosures due September 29, 2014. The case schedule set by the Trademark Trial and Appeal Board ("TTAB") should be respected and followed. Opposer fails to justify its inexcusable delay. Accordingly, Applicant submits this Memorandum in Opposition to Opposer's Motion for Leave to Disclose the Expert Testimony of Dr. Leon Kaplan, and Applicant's Motion to Strike Opposer's Expert Disclosures and References to Expert Testimony of Dr. Kaplan to disclose the new expert testimony four months after the deadline. This Motion is supported by the attached Memorandum in Support.

MEMORANDUM IN SUPPORT

Pursuant to 37 C.F.R. §§ 2.116, 2.120 and Federal Rules of Civil Procedure 26 and 37, Applicant Schoolhouse Outfitters, LLC ("Applicant"), opposes the Motion for Leave to Disclose the Expert Testimony of Dr. Leon Kaplan ("Motion for Leave") filed by Opposer on the grounds that the belated introduction of such evidence is prejudicial to Applicant and such evidence should be excluded as a sanction on the basis of the *Southern States* factors. Because the Motion for Leave should be denied, Applicant also seeks to strike Opposer's Expert Disclosures and Update to Pretrial Disclosures ("Updated Disclosures"), and any other references to Dr. Kaplan's belated filings in any present or future filings.

I. BACKGROUND AND PROCEDURAL HISTORY

Applicant applied for registration of the marks at issue, EGGHEAD and EGGHEAD ELECTRONICS FOR LEARNING & Design, on January 7, and January 24, 2013, respectively. The applications were both approved for publication by the USPTO examiner on July 3, 2013, and the marks were published on August 27, and September 23, 2013. After seeking an extension to do so, Opposer filed its Notice of Opposition on December 23, 2013, nearly 15 months ago. On that day, the TTAB set the deadline for expert disclosure as July 31, 2014.[1] Applicant complied with this deadline, but Opposer did not disclose any experts in compliance with the deadline.[2] Then, on August 28, 2014, Opposer filed a Motion for Extension of Answer or Discovery or Trial Periods with Consent, seeking to extend the expert disclosure deadline to September 29, 2014.[3] The Motion for Extension was granted. Opposer did not disclose any experts by the September 29, 2014 deadline.

[1] *See* the TTAB notice regarding notice of opposition and trial dates, issued December 23, 2013, a true and accurate copy is attached hereto as Exhibit A.
[2] *See* Notice of Applicant's Expert Witness Disclosures, a true and accurate copy is attached hereto as Exhibit B.
[3] *See* Opposer's Motion for Extension of Answer or Discovery or Trial Periods With Consent, a true and accurate copy is attached hereto as Exhibit C.

Then, on October 29, 2014, the discovery close date, Opposer filed another Motion for Extension of Discovery Close Date and Trial Dates.[4] This Motion for Extension only sought to extend the Discovery Cut-Off and Trial date by 30 days to enable Opposer to take a deposition on November 4, 2014, despite repeated efforts by Applicant's counsel to calendar depositions in September and October. This Motion did not seek to extend the time for expert disclosures. This Motion was granted, extending the close of discovery to November 28, 2014 and setting the due date for Opposer's Pretrial Disclosures as January 12, 2015.[5] Opposer filed those Pretrial Disclosures on January 12, 2015, listing two witnesses, Soren Mills and James Wu —with no mention of Dr. Leon Kaplan.[6] These have been the only witnesses disclosed by Opposer during the course of this matter.

The extended expert disclosure date was September 29, 2014—and that date has remained unchanged since August 28, 2014, over six months ago.

On January 26, 2015, almost two months after the close of discovery, Applicant filed its Motion for Summary Judgment. Then, on March 2, 2015, Opposer filed its Motion for Leave, Brief in Opposition to Applicant's Motion for Summary Judgment ("MSJ Opposition"), and Updated Disclosures. In those documents, and for the very first time, Opposer revealed and relied upon the report of expert, Dr. Leon Kaplan.

The inexcusably late introduction of this expert witness, well past the expert disclosure deadline, and after Applicant has filed a dispositive motion, is unduly prejudicial to Applicant. Opposer's expert should be excluded, its Motion for Leave should be denied, and any reference

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[4] *See* Opposer's Motion for an Extension of Discovery Close Date and Trial Dates, a true and accurate copy is attached hereto as Exhibit D.
[5] *See* the TTAB notice granting the extension of time, a true and accurate copy is attached hereto as Exhibit E.
[6] *See* Opposer's Pretrial Disclosures, a true and accurate copy is attached hereto as Exhibit F.

to Dr. Kaplan in the MSJ Opposition or the Updated Disclosures, or any future proceedings or filings, should be stricken.

II. APPLICABLE LAW AND ARGUMENT

Fed. R. Civ. P. 26 specifically requires that in addition to its initial disclosures, a party must disclose its expert witnesses (including a written report) "at the time and in the **sequence that the court orders**," and "must supplement these disclosures when required under Rule 26(e)."[7] Fed. R. Civ. P. 26(e) states with respect to expert witnesses, "[a]ny additions or changes to this information must be disclosed **by the time the party's pretrial disclosures under Rule 26(a)(3) are due**."[8] 37 C.F.R. § 2.120 further provides "Disclosure of expert testimony must occur in the manner and sequence provided in the Federal Rule of Civil Procedure 26(a)(2)."

A. "Delay" Factors

Failure to identify a witness pursuant to Fed. R. Civ. P. 26(a) or (e) necessarily requires the exclusion of that witness to supply evidence on a motion, at a hearing, or at a trial unless "the failure was substantially justified or is harmless."[9] To determine if the failure was substantially justified or is harmless, the TTAB is guided by the following five-factor test: "(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.[10] Every one of these factors weighs heavily in favor of Applicant, and against Opposer.

[7] Fed. R. Civ. P. 26(a)(2)(emphasis added).
[8] Fed. R. Civ. P. 26(e)(emphasis added).
[9] Fed. R. Civ. P. 37(c).
[10] *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F. 3d 592, 597 (4th Cir. 2003).

1. *Surprise*

Applicant has not only been surprised by Opposer's late disclosure, but if unchecked, this surprise witness will cause untold prejudice to Applicant. Opposer should have identified its expert witnesses by September 29, 2014, the extended expert disclosure date.[11] Opposer even waited until after the discovery deadline and after pretrial disclosures to first disclose an expert.[12] Applicant is now faced with responding to Opposer's MSJ Opposition, which relies on novel opinions without any prior notice. The factor of surprise must weigh heavily in favor of Applicant.

2. *Ability to Cure the Surprise*

It would be incredibly burdensome for Applicant to cure the surprise and overcome the prejudice related to this surprise expert witness. Applicant has already taken the time, at great expense, to analyze the merits of the dispute, and to file its Motion for Summary Judgment. Applicant rightfully assumed that Opposer had submitted all pertinent evidence in accordance with the deadlines prior to moving for summary judgment. In order to fairly respond to this new evidence, the TTAB would have to reopen discovery, allow the Applicant to review and analyze this new report, depose Dr. Kaplan, search for and obtain a rebuttal expert, and allow for that expert's deposition, all while the Motion for Summary Judgment is pending. Applicant has a very small window (15 days) to respond to Opposer's MSJ Opposition. Applicant cannot and should not be expected to respond to this new evidence. Moreover, courts have held that when the surprise of a new witness can only be cured by the reopening of discovery, the factor weighs in favor of Applicant.[13]

[11] *See* Exhibit C.
[12] *See* Exhibit E and F.
[13] See *Great Seats, Inc. v. Great Seats, Ltd.*, 100 U.S.P.Q.2d 1323, *14 (TTAB 2011).

3. *Extent of Disruption*

As noted above, the disruption to Applicant's case is significant. Applicant cannot fairly respond to the MSJ Opposition if forced to consider such new evidence. Furthermore, Applicant's Motion for Summary Judgment was built upon the understanding that Opposer provided all relevant information to Opposer's case. Had Applicant been afforded the full understanding of Opposer's position, Applicant would have conducted discovery differently and drafted its Motion for Summary Judgment to address the eleventh hour opinions. The cost and effort expended in filing its Motion for Summary Judgment cannot be recouped. Accordingly, the disruption to Applicant would be significant. This factor must weigh in favor of Applicant as well.

4. *Importance of the Evidence*

Opposer has the burden of proving its case against Applicant.[14] Certainly, Opposer was aware of its burden when it chose to prosecute this action in December of 2013. Opposer made the effort to extend the expert disclosure deadline from July to September of 2014.[15] And still Opposer failed to even seek this evidence until February of 2015.[16] Surely, these opinions cannot be very crucial to Opposer's case if sought and submitted so belatedly. Accordingly, this factor must also weigh in favor of Applicant.

5. *Opposer's Explanation*

Opposer's explanation for this inexcusable delay is without merit (text copied directly from the Motion for Leave):

[14] *Great Seats, Inc. v. Great Seats, Ltd*., 100 U.S.P.Q.2d 1323, *14 (TTAB 2011).
[15] *See* Exhibit C.
[16] *See* Motion for Leave, p. 4.

> Finally, Newegg has a good explanation for its late disclosure. Newegg did not contact Dr. Kaplan until February 2015, after the initial expert disclosure deadline had already passed. Golla Decl. ¶3. Dr. Kaplan completed the survey on February 23, 2015 and completed his expert report on March 2, 2015. . Golla Decl. ¶3; Kaplan Report. Newegg has acted diligently—it served Dr. Kaplan's expert report and filed this Motion on the day Dr. Kaplan's completed his report. There has been no delay.

Opposer concludes that there was no delay because it simply failed to make any attempt to secure or contact an expert until February of 2015, months after any pertinent deadlines had passed and only in an effort to provide some factual basis for the instant Opposition. Perhaps that is an explanation for why Mr. Kaplan could not render a decision until March 2, 2015, but it is certainly not an explanation for why Opposer failed to *even contact* Dr. Kaplan until well after the expert disclosure deadline, discovery cut-off, and until after Applicant filed its Motion for Summary Judgment. Subscribing to Opposer's reasoning, enforceable deadlines would never exist. Opposer has not presented any legitimate excuse for its failure to identify an expert within the parameters set by the TTAB, and this factor weighs in favor of Applicant.

B. Precedent Favors Applicant

In addition to the weight of all five factors, precedent dictates that Opposer's Motion for Leave should be denied, and that all references to Dr. Kaplan be stricken from the record. In *Great Seats, Inc. v. Great Seats, Ltd.*, the opposer sought to introduced new witnesses after the deadline for its pretrial disclosures by supplementing its pretrial disclosures five days after they were due, and after the close of discovery.[17] The opposer defended the late disclosure of the witnesses by arguing that it had referred to testimony from these new witnesses in previously-filed documents, and the delay was justified by the fact that the parties were previously engaged

[17] *Great Seats, Inc. v. Great Seats, Ltd*., 100 U.S.P.Q.2d 1323 (TTAB 2011).

in settlement discussions.[18] Even in the *Great Seats* case, where the delay was five days beyond the pretrial disclosure deadline (versus 124 days late in this instant case) and Applicant may have had constructive notice (versus no notice in this instant case), the interlocutory attorney still ruled in favor of the Applicant by excluding those witnesses and striking their testimony, based upon the five-factor test.[19]

The TTAB has also excluded an applicant's supplemental expert reports where an expert was previously disclosed but the supplemental report was submitted after the deadline to disclose such information, and without stipulation by the opposer.[20] The applicant argued that the supplemental report was submitted pursuant to Fed. R. Civ. P. 26(e)(1)(A) which requires the parties to "supplement or correct its disclosure or response… in a timely manner if the party learns that in some material respect the disclosure of response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."[21] In its decision, the TTAB rejected this reason offered by applicant, stating "[a] supplemental report which seeks to clarify an expert's earlier opinions or provides **new** examples and illustrations to bolster them is not proper supplementation."[22] The TTAB further found that "a party may not utilize Rule 26(e)(1)(A) '**to sandbag one's opponent**' or to 'deepen' or 'strengthen' the party's case where the information should have been included in the expert report."[23]

Finally, in *Pepsico, Inc. v. Jay Pirincci*, the opposer moved to strike witnesses who were revealed for the first time after the close of discovery and in the applicant's pretrial disclosures,

[18] *Id.* at *6-7.
[19] *Id.* at *17-18.
[20] *Gemological Institute of America, Inc. v. Gemology Headquarters International, LLC*, 111 U.S.P.Q.2d 1559 (TTAB 2014).
[21] *Id.* at 1561.
[22] *Id.* at 1562 (emphasis added).
[23] *Id.* (emphasis added).

arguing that the expert witnesses were not previously identified in the expert disclosures, the witnesses were never before identified in the initial disclosures or discovery responses, and that it would pose a hardship on opposer who did not have the opportunity to take discovery related to the witnesses.[24] The TTAB summarily excluded the witnesses that applicant intended to serve as expert witnesses because they were disclosed after the expert deadline.[25] Then, applying the five-factor test to the fact witnesses, the TTAB granted opposer's to strike and exclude all of the witnesses disclosed by the applicant for the first time in its pretrial disclosures, finding that the late disclosure was "neither harmless nor substantially justified."[26]

Here, Dr. Kaplan's name was revealed after the close of discovery and was never provided in Opposer's pretrial disclosures. He was only sought, engaged, and disclosed after Applicant's Motion for Summary Judgment was filed, which is more prejudicial to Applicant than the circumstances in any of the cases cited above. Accordingly, the interests of fairness and justice demand that all reference or reliance upon Dr. Kaplan and his testimony be excluded from these proceedings.

III. CONCLUSION

For the aforementioned reason, the TTAB should DENY Opposer's Motion for Leave, and GRANT Applicant's Motion to Strike Opposer's Expert Disclosures and References to Expert Testimony of Dr. Kaplan. A proposed Order is attached.

[24] *Pepsico, Inc. v. Jay Pirincci*, 2013 TTAB LEXIS 633, Opposition No. 91187023, *4 (January 7, 2013).
[25] *Id.*, at *5.
[26] *Id.*, at **6-12.

DATED this 17th day of March, 2015

Respectfully Submitted,

Of Counsel:

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CERTIFICATE OF TRANSMISSION

I hereby certify that this correspondence is being transmitted to the USPTO Trademark Trial and Appeal Board through ESTTA for filing in the following proceeding:

Opposition No. 91214178
Newegg Inc. v. Schoolhouse Outfitters, LLC
For the marks: EGGHEAD / EGGHEAD ELECTRONICS FOR LEARNING & Design
Serial Nos. 85817135 / 85831791

Dated: March 17, 2015

Amanda J. Penick (OH 0085876)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing ***APPLICANT'S MEMORANDUM IN OPPOSITION TO OPPOSER'S MOTION FOR LEAVE TO DISCLOSE THE EXPERT TESTIMONY OF DR. LEON KAPLAN AND COMBINED MOTION TO STRIKE OPPOSER'S EXPERT DISCLOSURES AND REFERENCES TO EXPERT TESTIMONY OF DR. KAPLAN,*** **Opposition No. 91214178,** was served by email and regular U.S. Mail, postage prepaid, this 17th day of March, 2015, upon the following:

Scott W. Johnston, Esq.
Greg Golla, Esq.
MERCHANT & GOULD P.C.
80 South Eighth Street, Suite 3200
Minneapolis, MN 55402

Amanda J. Penick (OH 0085876)

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

In the matter of Trademark Application Serial Nos. 85817135 / 85831791
For the marks: EGGHEAD / EGGHEAD ELECTRONICS FOR LEARNING & Design
ESTTA
Published in the *Official Gazette* on Sept. 3, 2013 / Aug. 27, 2013

NEWEGG INC., Opposer, v. **SCHOOLHOUSE OUTFITTERS, LLC,** Applicant.	**Opposition No. 91214178**

ORDER DENYING OPPOSER'S MOTION FOR LEAVE TO DISCLOSE THE EXPERT TESTIMONY OF DR. LEON KAPLAN AND GRANTING APPLICANT'S MOTION TO STRIKE OPPOSER'S EXPERT DISCLOSURES AND REFERENCES TO EXPERT TESTIMONY OF DR. KAPLAN

AND NOW, this ___ day of _____, 2015, upon consideration of Defendant Newegg, Inc.'s Motion for Leave to Disclose the Expert Testimony of Dr. Leon Kaplan ("Defendant's Motion"), and Plaintiff Schoolhouse Outfitter, LLC's Motion to Strike Opposer's Expert Disclosures and References to Expert Testimony of Dr. Kaplan ("Plaintiff's Motion"), it is hereby ORDERED that upon consideration and for good cause the Defendant's Motion shall be DENIED, and Plaintiff's Motion shall be GRANTED and that all references to or evidence of any opinions or testimony from Dr. Leon Kaplan shall be stricken from the record.

IT IS SO ORDERED.

_____

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

Mailed: December 23, 2013

Opposition No. 91214178
Serial No. 85817135, 85831791

AMANDA J. PENICK
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Newegg Inc.

v.

Schoolhouse Outfitters, LLC

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ESTTA578579

A notice of opposition to the registration sought by the above-identified application has been filed. A service copy of the notice of opposition was forwarded to applicant (defendant) by the opposer (plaintiff). An electronic version of the notice of opposition is viewable in the electronic file for this proceeding via the Board's TTABVUE system: http://ttabvue.uspto.gov/ttabvue/v?qs=91214178.

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations ("Trademark Rules"). These rules may be viewed at the USPTO's trademarks page: http://www.uspto.gov/trademarks/index.jsp. The Board's main webpage (http://www.uspto.gov/trademarks/process/appeal/index.jsp) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).

Plaintiff must notify the Board when service has been ineffective, within 10 days of the date of receipt of a returned service copy or the date on which plaintiff learns that service has been ineffective. Plaintiff has no subsequent duty to investigate the defendant's whereabouts, but if plaintiff by its own voluntary investigation or

EXHIBIT A

through any other means discovers a newer correspondence address for the defendant, then such address must be provided to the Board. Likewise, if by voluntary investigation or other means the plaintiff discovers information indicating that a different party may have an interest in defending the case, such information must be provided to the Board. The Board will then effect service, by publication in the Official Gazette if necessary. *See* Trademark Rule 2.118. In circumstances involving ineffective service or return of defendant's copy of the Board's institution order, the Board may issue an order noting the proper defendant and address to be used for serving that party.

Defendant's ANSWER IS DUE FORTY DAYS after the mailing date of this order. (*See* Patent and Trademark Rule 1.7 for expiration of this or any deadline falling on a Saturday, Sunday or federal holiday.) **Other deadlines the parties must docket or calendar are either set forth below (if you are reading a mailed paper copy of this order) or are included in the electronic copy of this institution order viewable in the Board's TTABVUE system at the following web address: http://ttabvue.uspto.gov/ttabvue/.**

Defendant's answer and any other filing made by any party must include proof of service. *See* Trademark Rule 2.119. **If they agree to, the parties may utilize electronic means, e.g., e-mail or fax, during the proceeding for forwarding of service copies.** *See* Trademark Rule 2.119(b)(6).

The parties also are referred in particular to Trademark Rule 2.126, which pertains to the form of submissions. **Paper submissions, including but not limited to exhibits and transcripts of depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.**

Time to Answer	2/1/2014
Deadline for Discovery Conference	3/3/2014
Discovery Opens	3/3/2014
Initial Disclosures Due	4/2/2014
Expert Disclosures Due	7/31/2014
Discovery Closes	8/30/2014
Plaintiff's Pretrial Disclosures	10/14/2014
Plaintiff's 30-day Trial Period Ends	11/28/2014
Defendant's Pretrial Disclosures	12/13/2014
Defendant's 30-day Trial Period Ends	1/27/2015
Plaintiff's Rebuttal Disclosures	2/11/2015
Plaintiff's 15-day Rebuttal Period Ends	3/13/2015

As noted in the schedule of dates for this case, the parties are required to have a conference to discuss: (1) the nature of and basis for their respective claims and defenses, (2) the possibility of settling the case or at least narrowing the scope of claims or

defenses, and (3) arrangements relating to disclosures, discovery and introduction of evidence at trial, should the parties not agree to settle the case. *See* Trademark Rule 2.120(a)(2). Discussion of the first two of these three subjects should include a discussion of whether the parties wish to seek mediation, arbitration or some other means for resolving their dispute. Discussion of the third subject should include a discussion of whether the Board's Accelerated Case Resolution (ACR) process may be a more efficient and economical means of trying the involved claims and defenses. Information on the ACR process is available at the Board's main webpage. Finally, if the parties choose to proceed with the disclosure, discovery and trial procedures that govern this case and which are set out in the Trademark Rules and Federal Rules of Civil Procedure, then they must discuss whether to alter or amend any such procedures, and whether to alter or amend the Standard Protective Order (further discussed below). Discussion of alterations or amendments of otherwise prescribed procedures can include discussion of limitations on disclosures or discovery, willingness to enter into stipulations of fact, and willingness to enter into stipulations regarding more efficient options for introducing at trial information or material obtained through disclosures or discovery.

The parties are required to conference in person, by telephone, or by any other means on which they may agree. A Board interlocutory attorney or administrative trademark judge will participate in the conference, upon request of any party, provided that such participation is requested no later than ten (10) days prior to the deadline for the conference. *See* Trademark Rule 2.120(a)(2). The request for Board participation must be made through the Electronic System for Trademark Trials and Appeals (ESTTA) or by telephone call to the interlocutory attorney assigned to the case, whose name can be found by referencing the TTABVUE record for this case at **http://ttabvue.uspto.gov/ttabvue/**. The parties should contact the assigned interlocutory attorney or file a request for Board participation through ESTTA only after the parties have agreed on possible dates and times for their conference. Subsequent participation of a Board attorney or judge in the conference will be by telephone and the parties shall place the call at the agreed date and time, in the absence of other arrangements made with the assigned interlocutory attorney.

The Board's Standard Protective Order is applicable to this case, but the parties may agree to supplement that standard order or substitute a protective agreement of their choosing, subject to approval by the Board. The standard order is available for viewing at: **http://www.uspto.gov/trademarks/process/appeal/guidelines/stndagmnt.jsp**. Any party without access to the web may request a hard copy of the standard order from the Board. The standard order does not automatically protect a party's confidential information and its provisions must be utilized as needed by the parties. *See* Trademark Rule 2.116(g).

Information about the discovery phase of the Board proceeding is available in chapter 400 of the TBMP. By virtue of amendments to the Trademark Rules effective November 1, 2007, the initial disclosures and expert disclosures scheduled during the discovery phase are required only in cases commenced on or after that date. The TBMP has not yet been amended to include information on these disclosures and the parties are referred to the August 1, 2007 Notice of Final Rulemaking

(72 Fed. Reg. 42242) posted on the Board's webpage. The deadlines for pretrial disclosures included in the trial phase of the schedule for this case also resulted from the referenced amendments to the Trademark Rules, and also are discussed in the Notice of Final Rulemaking.

The parties must note that the Board allows them to utilize telephone conferences to discuss or resolve a wide range of interlocutory matters that may arise during this case. In addition, the assigned interlocutory attorney has discretion to require the parties to participate in a telephone conference to resolve matters of concern to the Board. *See* TBMP § 502.06(a) (2d ed. rev. 2004).

The TBMP includes information on the introduction of evidence during the trial phase of the case, including by notice of reliance and by taking of testimony from witnesses. *See* TBMP §§ 703 and 704. Any notice of reliance must be filed during the filing party's assigned testimony period, with a copy served on all other parties. Any testimony of a witness must be both noticed and taken during the party's testimony period. A party that has taken testimony must serve on any adverse party a copy of the transcript of such testimony, together with copies of any exhibits introduced during the testimony, within thirty (30) days after the completion of the testimony deposition. *See* Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing after briefing is not required but will be scheduled upon request of any party, as provided by Trademark Rule 2.129.

If the parties to this proceeding are (or during the pendency of this proceeding become) parties in another Board proceeding or a civil action involving related marks or other issues of law or fact which overlap with this case, they shall notify the Board immediately, so that the Board can consider whether consolidation or suspension of proceedings is appropriate.

ESTTA NOTE: For faster handling of all papers the parties need to file with the Board, the Board strongly encourages use of electronic filing through the Electronic System for Trademark Trials and Appeals (ESTTA). Various electronic filing forms, some of which may be used as is, and others which may require attachments, are available at **http://estta.uspto.gov.**

ESTTA Tracking number: **ESTTA618828**

Filing date: **07/31/2014**

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

Proceeding	91214178
Party	Defendant Schoolhouse Outfitters, LLC
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Submission	Other Motions/Papers
Filer's Name	Stacy A. Cole
Filer's e-mail	scole@graydon.com
Signature	/s/ Stacy A. Cole
Date	07/31/2014
Attachments	7-31-14 Notice of Applicant_s Expert Witness Disclosure.PDF(76434 bytes)

EXHIBIT B

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

In the matter of Trademark Application Serial Nos. 85817135 / 85831791
For the marks: EGGHEAD / EGGHEAD ELECTRONICS FOR LEARNING & Design
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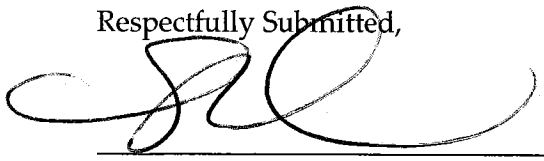
Published in the *Official Gazette* on Sept. 3, 2013 / Aug. 27, 2013

NEWEGG INC., Opposer, v. **SCHOOLHOUSE OUTFITTERS, LLC,** Applicant.	**Opposition No. 91214178**

NOTICE OF APPLICANT'S EXPERT WITNESS DISCLOSURE

Pursuant to the TTAB's Scheduling Order, Applicant Schoolhouse Outfitters, LLC ("Applicant") submits the following expert witness disclosure. Applicant does not anticipate calling any expert witnesses in support of its defenses. However, as Applicant's and Opposer's expert disclosure deadline is the same date, July 31, 2014, Applicant reserves its right to designate a rebuttal expert witness(es) solely in response to any expert witness(es) identified by Opposer in support of Opposer's claims, in accordance with Fed. R. Civ. P. 26(a)(2)(D)(ii).

Respectfully Submitted,



Of Counsel:

Stacy A. Cole (OH 0080075)
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GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
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GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

CERTIFICATE OF TRANSMISSION

I hereby certify that this correspondence is being transmitted to the USPTO Trademark Trial and Appeal Board through ESTTA for filing in the following proceeding:

Opposition No. 91214178
Newegg Inc. v. Schoolhouse Outfitters, LLC
For the marks: EGGHEAD / EGGHEAD ELECTRONICS FOR LEARNING & Design
Serial Nos. 85817135 / 85831791

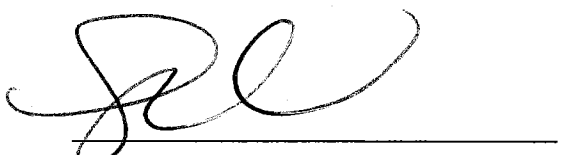
Dated: July 31, 2014

Stacy A. Cole (OH 0080075)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing ***Notice of Expert Witness Disclosure*, Opposition No. 91214178,** was served by e-mail and regular U.S. Mail, postage prepaid, this 31st day of July, 2014, upon the following:

Scott W. Johnston, Esq.
Gregory Golla, Esq.
MERCHANT & GOULD P.C.
80 South Eighth Street, Suite 3200
Minneapolis, MN 55402
SJohnston@merchantgould.com
GGolla@merchantgould.com



Stacy A. Cole (OH 0080075)

5067972.1

ESTTA Tracking number: **ESTTA623971**

Filing date: **08/28/2014**

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

Proceeding.	91214178
Applicant	Plaintiff Newegg Inc.
Other Party	Defendant Schoolhouse Outfitters, LLC
Have the parties held their discovery conference as required under Trademark Rules 2.120(a)(1) and (a)(2)?	Yes

Motion for an Extension of Answer or Discovery or Trial Periods With Consent

The Close of Discovery is currently set to close on 08/30/2014. Newegg Inc. requests that such date be extended for 60 days, or until 10/29/2014, and that all subsequent dates be reset accordingly.

Time to Answer :	CLOSED
Deadline for Discovery Conference :	CLOSED
Discovery Opens :	CLOSED
Initial Disclosures Due :	CLOSED
Expert Disclosure Due :	09/29/2014
Discovery Closes :	10/29/2014
Plaintiff's Pretrial Disclosures :	12/13/2014
Plaintiff's 30-day Trial Period Ends :	01/27/2015
Defendant's Pretrial Disclosures :	02/11/2015
Defendant's 30-day Trial Period Ends :	03/28/2015
Plaintiff's Rebuttal Disclosures :	04/12/2015
Plaintiff's 15-day Rebuttal Period Ends :	05/12/2015

The grounds for this request are as follows:

- *Parties are unable to complete discovery/testimony during assigned period*

Newegg Inc. has secured the express consent of all other parties to this proceeding for the extension and resetting of dates requested herein.

Newegg Inc. has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Facsimile or email (by agreement only) on this date.

Respectfully submitted,
/gcg/

EXHIBIT C

Gregory C. Golla
ggolla@merchantgould.com, electronictm@merchantgould.com,
16539.0001USTR.active@ef.merchantgould.com
scole@graydon.com
08/28/2014

ESTTA Tracking number: **ESTTA635878**

Filing date: **10/29/2014**

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

Proceeding	91214178
Party	Plaintiff Newegg Inc.
Correspondence Address	SCOTT W JOHNSTON MERCHANT & GOULD PC PO BOX 2910 MINNEAPOLIS, MN 55402-0910 UNITED STATES ggolla@merchantgould.com, electronictm@merchantgould.com, 16539.0001USTR.active@ef.merchantgould.com
Submission	Motion to Extend
Filer's Name	Gregory C. Golla
Filer's e-mail	ggolla@merchantgould.com, electronictm@merchantgould.com, 16539.0001USTR.active@ef.merchantgould.com
Signature	/gcg/
Date	10/29/2014
Attachments	gcg_20141029133910.pdf(66274 bytes)

EXHIBIT D

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

Newegg Inc.,	Opposition No. 91214178
Opposer,	Mark: **EGGHEAD** Serial No.: 85/817,135 Filing Date: January 7, 2013
v.	Published: September 3, 2013
Schoolhouse Outfitters, LLC,	Mark: **EGGHEAD ELECTRONICS FOR LEARNING & Design**
Applicant.	Serial No.: 85/831,791 Filing Date: January 24, 2013 Published: August 27, 2013

MOTION FOR AN EXTENSION OF DISCOVERY CLOSE DATE AND TRIAL DATES

Opposer hereby requests that the discovery close date currently set for October 29, 2014 be extended 30 days, as well as the remaining trial dates in order for the deposition of Applicant to take place on November 4, 2014 as noticed and agreed to by the parties. This is only the second extension request in this case, the parties have been working diligently to complete discovery and Applicant already deposed Opposer. The undersigned has spoken to counsel for Applicant regarding this request but does not have consent for the extension. However, due to scheduling difficulties for Applicant's deposition, the deposition could not take place until November 4, 2014, which is outside of the discovery period. Applicant's witness was only available on two days during the discovery period and Opposer's counsel had conflicts with both of those days. The next available date Applicant's witness was available is outside the discovery period. Opposer therefore requests a 30 day extension of trial dates.

In view of the foregoing, Applicant respectfully requests that the Board extend the discovery cut-off and trial dates thirty (30) days to enable the parties sufficient time for Applicant's deposition.

NEWEGG INC.

By its Attorneys,

Date: 10-29-2014

Gregory C. Golla
MERCHANT & GOULD P.C.
80 South Eighth Street, Suite 3200
Minneapolis, MN 55402-2215
(612) 332-5300

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR AN EXTENSION OF DISCOVERY CLOSE DATE AND TRIAL DATES was served upon Applicant's Counsel by First Class Mail, postage prepaid (with a courtesy copy sent via email this October 29, 2014:

Gregory C. Golla

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

em

Mailed: December 12, 2014

Opposition No. 91214178

Newegg Inc.

v.

Schoolhouse Outfitters, LLC

Eric McWilliams, Supervisory Paralegal:

Opposer's motion filed October 29, 2014 to extend discovery and trial dates is granted as conceded. Trademark Rule 2.127(a).

The discovery and trial dates are reset below.

Discovery Closes	**11/28/2014**
Plaintiff's Pretrial Disclosures	**1/12/2015**
Plaintiff's 30-day Trial Period Ends	**2/26/2015**
Defendant's Pretrial Disclosures	**3/13/2015**
Defendant's 30-day Trial Period Ends	**4/27/2015**
Plaintiff's Rebuttal Disclosures	**5/12/2015**
Plaintiff's 15-day Rebuttal Period Ends	**6/11/2015**

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 Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

EXHIBIT E

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

Newegg Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91214178
	)	
Schoolhouse Outfitters, LLC,	)	
	)	
Applicant.	)	
	)	

OPPOSER'S PRETRIAL DISCLOSURES

Pursuant to 37 C.F.R. § 2.121(e) and Fed. R. Civ. P. 26(a)(3), counsel for Opposer, Newegg Inc. ("Newegg"), hereby makes the following pretrial disclosures to Applicant, Schoolhouse Outfitters, LLC.

INTRODUCTORY STATEMENT

The following disclosures are made based on the information reasonably available to Opposer as of this date regarding the witnesses from whom Opposer may take testimony during its testimony period, the likely testimony of each witness, and the likely evidence that may be introduced as exhibits during the testimony of such witnesses. By making these disclosures, Opposer does not represent that it is identifying every document, tangible thing, or witness possibly relevant to this proceeding. Nor does Opposer waive its rights to object to the production of any document or tangible thing disclosed herein on the basis of privilege, the work product doctrine, relevancy, undue burden or any other valid objection. Rather, Opposer's disclosures represent a good faith effort to identify information it reasonably believes may support its claims or defenses as required by Rule 26(a)(3). Accordingly, Opposer reserves the right to supplement these disclosures.

EXHIBIT F

A) WITNESSES FROM WHOM OPPOSER MAY TAKE TESTIMONY:

Opposer intends to take testimony if the need arises, from the following witnesses:

Soren Mills, CMO Newegg Inc. 16839 E. Gale Avenue City of Industry, CA 91745	Mr. Mills may testify about Opposer's family of EGG marks. Mr. Mills may testify about Opposer's use of its family of EGG marks in connection with a variety of goods and services, including the promotion and sale of electronic equipment, namely, headphones, microphones, public address systems and instruments, protective covers and cases for public address systems, personal computers, tablet computers, computer peripherals, protective covers and cases for tablet computers, document cameras, classroom audio systems comprising audio speakers, audio amplifiers, microphone stands, speaker stands, speaker boxes, sound mixers, microphone cables, speaker cables, audio cables, computer cables, and video cables. Mr. Mills may testify about the channels of trade through which Opposer's family of EGG marks are used. Mr. Mills may testify regarding Opposer's development and protection of its trademarks and its use of such marks as part of its marketing and advertising efforts. Mr. Mills may testify regarding current sales of services and products under Opposer's family of EGG marks, the goods historically sold under Opposer's family of EGG marks, sales and advertising data, the parties' products, confusion with EGGHEAD SOFTWARE and the likelihood of confusion between the parties.

James Wu, COO Newegg Inc. 16839 E. Gale Avenue City of Industry, CA 91745	Mr. Wu may testify about Opposer's family of EGG marks. Mr. Wu may testify about Opposer's use of its family of EGG marks in connection with a variety of goods and services, including the promotion and sale of electronic equipment, namely, headphones, microphones, public address systems and instruments, protective covers and cases for public address systems, personal computers, tablet computers, computer peripherals, protective covers and cases for tablet computers, document cameras, classroom audio systems comprising audio speakers, audio amplifiers, microphone stands, speaker stands, speaker boxes, sound mixers, microphone cables, speaker cables, audio cables, computer cables, and video cables. Mr. Wu may testify about the channels of trade through which Opposer's family of EGG marks are used. Mr. Wu may testify regarding Opposer's development and protection of its trademarks and its use of such marks as part of its marketing and advertising efforts. Mr. Wu may testify regarding current sales of services and products under Opposer's family of EGG marks, sales and advertising data, the goods historically sold under Opposer's family of EGG marks, the parties' products, confusion with EGGHEAD SOFTWARE and the likelihood of confusion between the parties.

B) TYPES OF DOCUMENTS AND THINGS THAT MAY BE INTRODUCED DURING TESTIMONY:

Certain documents and things may be introduced as exhibits during the testimony of each witness, including: (1) documents and things concerning Newegg's applications for its marks; (2) documents and things demonstrating the historic and current use of its marks; (3) documents and things demonstrating the types of products marketed under the Newegg marks; (4) documents and things concerning consumers and potential consumers; (5) documents and things concerning promotional and advertising materials relating to Newegg's marks; (6) documents and things comprised of promotional, instructional, and advertising materials relating to

Newegg's products; (7) documents and things relating to the sales of Newegg; (8) documents and things relating to the expenses associated with the advertising and promotion of Newegg; (9) documents and things relating to the parties' customers and sales channels; (10) documents and things relating to how the parties' products are typically promoted and sold; and (11) other relevant information regarding the likelihood of confusion with Applicant's marks.

Newegg does not consent to or authorize any other party or its counsel to communicate with any of its current or former employees. Any contact with Newegg should be made through Newegg's counsel.

Respectfully submitted,

NEWEGG INC.

By its Attorneys,

Date: January 12, 2015

Gregory Gotha
Danielle I. Mattessich
MERCHANT & GOULD P.C.
80 South Eighth Street, Suite 3200
Minneapolis, Minnesota 55402-2215
(612) 332-5300

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSER'S PRETRIAL DISCLOSURES was served by e-mail and regular U.S. Mail, postage prepaid, this 12th day of January, 2015 upon the following:

Stacy A. Cole
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
scole@graydon.com

Gregory C. Golla