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

Proceeding	91215114
Party	Plaintiff Upper Shirley Vineyards, LLC and Shirley Plantation LLC
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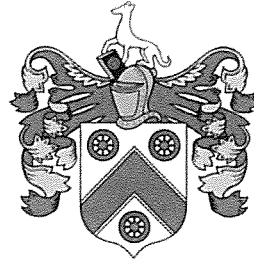
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SHIRLEY PLANTATION, LLC,
UPPER SHIRLEY VINEYARDS, LLC,
and
CHARLES H. CARTER,
Opposers,
v.
STILLHOUSE VINEYARDS, LLC
Applicant.

Opposition No.: 91215114 (parent)
91216395
91218094

Application Nos.: 85/947562
85/121979
86/129686

Marks: SHIRLEY PLANTATION
SHIRLEY



OPPOSERS' REPLY IN SUPPORT OF ITS OBJECTIONS TO CERTAIN EXHIBITS

Opposers hereby submit a short reply brief in support of its evidentiary challenge to certain of Applicant's proffered trial exhibits submitted as an Appendix to Opposers' Main Trial Brief.

Exhibits 1 and 17 are Inadmissible

Applicant's argument that it was "under the impression that all discovery had been stipulated to be part of the record" in this proceeding is pure fiction. There was no stipulation of any sort, or even any discussion of that ilk.

Applicant's argument grounded on a purposeful misread of the term "discovery testimony" in the IA's order confirms Applicant's grasping at straws. There is no other way to read that order except as the IA's effort to differentiate "discovery depositions" from "testimony depositions." Discovery depositions (governed by TMBP §400) are plainly differentiated in the rules from testimony depositions (governed by TMBP §700 *et seq.*). Nowhere in the rules concerning discovery depositions are a parties' own written discovery answers treated like deposition testimony, and Applicant's efforts in this regard falls flat.

Applicant's argument and proffer of a belated notice of reliance is likewise a complete fabrication. This is an ACR procedure, not the full trial procedure in an opposition. There was no separate "deposition period" and "testimony period" in this matter. There was never even any discussion for the need for any notice of reliance in this abbreviated procedure. The IA's order as to what was, and what was not permissible in the summary judgment briefing was unambiguously clear. The untimely notice of reliance is improper and should be struck. TMBP §532. The use of a notice of reliance does not cure an underlying evidentiary issue. (*Id.*) In other words, all documents listed in a notice of reliance must still meet separate and independent evidentiary rules. And Applicant's untimely proffer of a notice of reliance does not repair this underlying problem.

The underlying problem is that a party may not use its own interrogatory answer to prove its case. Trademark Rule 2.123(j)(5). This case does not fall in the *sole* exception to that rule either—there is no claim that Applicant *needs* the answer to complete the record proffered by Opposer.¹ Nor can it. Opposer used no interrogatory answers in its opening brief. And nothing in the IA's order suggests that a party could rely upon its own interrogatory answers in contravention to Trademark Rule 2.123(j)(5). Finally, even in its response to the objection, Applicant still has not provided the explanation required by the rule—explaining to the TTAB its *need* for reliance on its own interrogatory answer.²

The *Bass Pro* situation relied upon by Applicant is quite unlike the current situation. *Bass Pro Trademarks, L.L.C. v. Sportsman's Warehouse, Inc.*, 89 U.S.P.Q.2d 1844, 2008 TTAB LEXIS 16 (TTAB, 2008). In *Bass Pro*, the Board recognized the general rule under Trademark Rule 2.123(j)(5) which provides "an answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record only by the receiving or inquiring party."

¹ Applicant suggests there are many exceptions to Trademark Rule 2.123(j)(5), citing. TMBP §704.10. The only exception in the rule is the rule of completeness. While there is some suggestion about the possible use of stipulations in the TMBP, stipulations themselves are not exceptions to the Rule, but a way the parties can circumvent the rule. That was not done here.

² The text included with the belated and improper notice of reliance suggests that the Interrogatory answers are being used to rebut some of Mr. Strother's testimony adduced in deposition and used by Opposers. That too is nonsense and a complete fabrication. No specific reference is made to the portion of the Interrogatory answer in support of this statement or to the purported testimony being rebutted. Rather these self-serving interrogatory answers are being used to establish facts where no facts exist in the record, e.g., Applicant's claim that a portion of the Stillhouse Vineyards was named "Shirley" at some point.

The Board went on to say at page 1848, n. 6:

However, because the parties stipulated to the use of discovery depositions as evidence, **because petitioner did not object to respondent's reliance on respondent's answers to petitioner's written discovery, and because the discovery responses were used as exhibits during depositions, we consider the responses as having been properly made of record.** TBMP §704.10 (2nd ed. rev. 2004). Respondent's responses to petitioner's document requests were incorporated as part of its responses to the interrogatories and, therefore the responses were verified under oath, however, no documents were included in the notice of reliance.

Unlike the petitioner in *Bass Pro*, Opposer here *has objected* to Applicant's reliance on its own interrogatory answers. Moreover, the discovery responses Applicant seeks to have admitted were *never used as deposition exhibits in this case*, so they are not part of the discovery deposition record, as was the case in *Bass Pro*. Finally, *Bass Pro* was not an ACR procedure as is this case. In short, *Bass Pro* supports Opposers' claim, not Applicant's.

Exhibit 18 is Inadmissible

Exhibit 18 on its face is dated outside the discovery period in this matter. It was not produced in discovery and Applicant makes no effort to compare it to the documents it claims it produced to establish it is the same (or different) from pages from its website it produced. These pages are not equally available to Opposers when Opposers filed their main trial brief 30 days prior to the website access by Applicant as reflected on the face of this exhibit.

Exhibit 22 is Inadmissible

Similarly, Applicant makes no attempt to defend Exhibit 22 based on a claim that it was produced during discovery. Rather, Applicant somehow believes that its burden of production for documents that it intended to rely upon was somehow discharged when "Opposers were aware" of a particular website. That is astonishing position given Applicant's argument about Opposer's Exhibit 41, the entirety of which was in Applicant's hands in October 2017 (with the exception of the signed signature page). Moreover, the failure to make discovery is not alleviated simply because a document may be publicly available. *See e.g., Martino v. Kiewit N.M. Corp.*, 600 Fed. Appx. 908, 910-11, 2015 U.S. App. LEXIS 1457, 2015 WL 366455 (5th Cir. 2015); *Shott v. Rush Univ. Med. Ctr.*, 2014 U.S. Dist. LEXIS 179667 at *14-15, 2014 WL 7665075 (N.D. Ill. 2014).

Exhibit 24—First two pages—Are Inadmissible

While Applicant now discloses for the first time that the second page of Exhibit 24 is a ‘retype’ of the information appearing in page one, that had never been disclosed previously. And Opposer did not have a clear version of the first page or the retyped version in discovery in this case. (Since Applicant did not use a control numbering system in its production, there is no proof of this.) Applicant also *now* advises Opposers, for the first time, that there is a public website where Opposer can access this information. Opposers were unaware of the public site, but more importantly, even if the information sought in discovery is publicly available, that fact does not discharge Applicant’s discovery burden, particularly when discovery requests it. *See e.g., Martino v. Kiewit N.M. Corp.*, 600 Fed. Appx. 908, 910-11, 2015 U.S. App. LEXIS 1457, 2015 WL 366455 (5th Cir. 2015); *Shott v. Rush Univ. Med. Ctr.*, 2014 U.S. Dist. LEXIS 179667 at *14-15, 2014 WL 7665075 (N.D. Ill. 2014);.

Moreover, the first two pages of Exhibit 24 (and the pages 2-7 of new Exhibit 27) *still* do not satisfy the requirements of admissibility. Under 37 CFR § 2.122(e) (2) “Internet materials may be admitted into evidence under a notice of reliance in accordance with paragraph (g) of this section, in the same manner as a printed publication in general circulation, so long as the date the internet materials were accessed and their source (e.g., URL) are provided.”; TBMP § 704.08(b); *Calypso Technology Inc. v. Calypso Capital Management*, 100 U.S.P.Q.2d 1213, 1217 (Trademark Trial & App. Bd. August 29, 2011). These pages have “jpeg” designations which indicates they may be screenshots, but the URL and date access is not provided. Finally, page 1 of that Exhibit is still illegible.

For all these reasons and the reasons set forth in Opposers' Appendix to its Main Brief, Opposers respectfully submit these certain exhibits are inadmissible.

Respectfully Submitted,

Date: April 24, 2018

/s/ Michael W. Vary

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of April 2018, the foregoing *Opposers' Reply in Support of its Objections to Certain Exhibits* was served upon Applicant by delivering a true and correct copy of same to counsel for Applicant via electronic mail only as agreed as follows:

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Date: April 24, 2018

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