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

Proceeding	91225271
Party	Defendant Chengdu Westhouse Interactive Entertainment Co., Ltd.
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Attachments	ROG Applicants Opposition to Motion for Reconsideration.pdf(866369 bytes )

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

Asustek Computer Incorporation, )  
 )  
 Opposer, )  
 )  
 v. )  
 )  
 Chengdu Westhouse Interactive Entertainment )  
 Co., Ltd., )  
 )  
 Applicant. )  
 \_\_\_\_\_ )

Opposition No. 91225271  
Serial No. 86/217,642  
Mark: ROG (& Design)



**APPLICANT’S BRIEF IN OPPOSITION TO OPPOSER’S MOTION FOR  
RECONSIDERATION OF ORDER DENYING MOTION TO COMPEL**

Chengdu Westhouse Interactive Entertainment Co., Ltd. (“Applicant”) hereby submits its brief in opposition to Opposer, Asustek Computer Incorporation’s (“Opposer”) motion for reconsideration of the Board’s January 16, 2018 Order denying Opposer’s Motion to Compel Discovery. Opposer waited until the very last minute to file a motion to compel and missed the deadline. It now complains it did not understand the rules and asks for the Board to reverse its own decision applying a very simple rule: a motion to compel must be filed *prior to*, not *on the day of* the deadline to serve pretrial disclosures. **The Board should not reverse its own decision properly applying this clear procedural rule.** Moreover, there are other reasons why the motion to compel should not be considered, all of which are detailed in Applicant’s brief in opposition to the motion, attached hereto as *Exhibit A* and incorporated by reference herein. For these reasons and the additional reasons set forth below, Opposer’s motion for reconsideration should be denied and this case should finally proceed to trial.

## I. FACTUAL BACKGROUND

On September 25, 2017, *on the day its pretrial disclosures were due*, Opposer filed a motion to compel Applicant's discovery responses. TTABVUE Dkt. No. 30.<sup>1</sup> Applicant opposed the motion because (1) Opposer failed to meet and confer with Applicant in good faith regarding its discovery responses prior to filing the motion, and (2) Applicant's discovery responses were sufficient and the motion was baseless. *See* TTAVBUE Dkt. No. 31. *See* Exhibit A (Applicant's opposition brief detailing all of the reasons why the motion to compel should be denied).

On January 16, 2018, the Board denied Opposer's motion to compel, explaining, "Opposer's motion filed on the due date for its pretrial disclosures is not filed prior to the due date and is therefore untimely." TTABVUE Dkt. No. 34, at p. 2. The Board noted the 2017 changes to the rules, which require a motion to compel to be filed *prior to* the deadline to serve pretrial disclosures:

Under the Board's revised rules, effective January 14, 2017, the due date for a motion to compel was shifted from prior to the opening of trial to prior to the deadline for the plaintiff's pretrial disclosures. See "Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice," 81 Fed. Reg. 69950, 69951 (Oct. 7, 2016). Under the Rule, once the deadline for pretrial disclosures for the first testimony period has been reached, a motion to compel is untimely. Trademark Rule 2.120(f), 37 C.F.R. § 2.201(f). There is no provision in the rule for Board discretion to consider an untimely motion to compel. See, e.g., *Estudi Moline Dissey, S.L. v. BioUrn, Inc.*, 123 USPQ2d 1268, 1271 (TTAB 2017) (under Board's revised rules, discovery requests served fewer than 31 days prior to close of discovery were untimely). See also TBMP § 523.03 (June 2017). Compare *La Maur, Inc. v. Bagwells Ents., Inc.*, 193 USPQ 234, 234-36 (Comm'r 1976) (motion for summary judgment filed during the period for taking testimony untimely).

*Id.*, at p. 1.

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<sup>1</sup> By its Order of June 26, 2017, the Board granted the parties' stipulation to reset dates, setting the due date for Opposer's pretrial disclosures as September 25, 2017. TTABVUE Dkt. No. 29.

On February 8, 2018, Opposer filed the instant motion requesting reconsideration of the Board's Order denying the motion to compel. At the outset, Opposer concedes that under 37 C.F.R. § 2.120(f) (the revised motion to compel cutoff rule), the deadline fell on a Sunday, September 24, 2017. Nevertheless, Opposer contends it "reasonably believed" it could file the motion one day *later*, on Monday, September 25, 2017 (i.e., on the day of the deadline for serving pretrial disclosures). Opposer cites 37 CFR § 2.196 – a different, older rule which *sometimes* allows a party to take a required action on a Monday following a weekend deadline. Opposer's reliance on 37 CFR § 2.196 was risky, unreasonable, and incorrect for three simple reasons:

- First, 37 C.F.R. § 2.120(f) is clear on its face and does not permit the filing of a motion to compel after the cutoff. A motion to compel must be filed prior to the deadline to serve pretrial disclosures, and there are no exceptions to this rule.
- Second, 37 C.F.R. § 2.120(f) is a *strict cutoff* and there is no "weekend" exception under 37 CFR § 2.196 (allowing parties to sometimes take action on the Monday following a weekend deadline). 37 C.F.R. § 2.120(f) is similar to other strict discovery cutoff rules, such as 37 CFR § 2.120(a)(3) (written discovery must be served at least 30 days before the close of discovery, and no party can expect to take a discovery deposition after the close of discovery). None of these discovery cutoff rules permits a "weekend" exception.
- Opposer has engaged in a pattern of misconduct demonstrating reckless disregard for the discovery rules. For example, in addition to filing an untimely motion, Opposer waited until the tail-end of discovery to serve its first written requests; failed to meet and confer with Applicant in good faith before filing the motion; continues to demand discovery materials Applicant has already confirmed do not

exist; and “dumped” excessive document production on Applicant after discovery cutoff and even during the pendency of the motion. This conduct demonstrates Opposer’s reliance on the “weekend” rule was not in “good faith.” The Board should not extend “flexibility” of the rules to accommodate Opposer’s late, baseless motion.

As explained in more detail below, the Board did not err in denying Opposer’s motion and is not required to reverse its decision.

## **II. THE BOARD DID NOT ERR IN DENYING OPPOSER’S MOTION TO COMPEL**

Opposer essentially argues the Board erred in denying the motion because it was not filed *prior to* the deadline to serve pretrial disclosures under 37 C.F.R. § 2.120(f). Opposer argues the deadline should have been pushed to the next Monday under the “weekend” rule (37 CFR § 2.196), even though 37 C.F.R. § 2.120(f) creates a *strict motion cutoff* and does not permit application of the “weekend” rule. Moreover, there are other *strict cutoff* discovery rules which do not permit a “weekend” rule exception, such as the deadline to serve discovery requests (at least 30 days before the close of discovery) and the rule requiring discovery depositions to be taken before the close of discovery. 37 CFR § 2.120(a)(3). None of these rules allow a party to conduct “late” discovery after the cutoff, even if the last day falls on a Sunday. Opposer has known about the 2017 rule changes for over one year and consulted the rules before filing its motion to compel. Yet, it chose to ignore the *strict cutoff* of 37 C.F.R. § 2.120(f) and filed an untimely motion.

Opposer’s “interpretation” of 37 C.F.R. § 2.120(f) as including a “weekend” exception was risky, unreasonable, and incorrect. The Board did not err in applying this simple procedural rule. Moreover, Opposer’s pattern of discovery misconduct demonstrates it has not acted in “good faith” and “flexibility” should not be extended to accommodate Opposer. In addition to filing an

untimely motion, Opposer served excessive discovery late in the discovery period; failed to meet and confer with Applicant before filing its motion; continues to demand discovery materials that Applicant has stated do not exist; and “dumped” voluminous document production on Applicant after discovery cutoff and during the pendency of the Motion. *See* Exhibit A. For all of these reasons, Opposer’s motion for reconsideration should be denied.

**A. Legal Standard for a Motion for Reconsideration**

Generally, the premise underlying a motion for reconsideration is that, based on the facts before it and the prevailing authorities, the Board *erred* in reaching the order or decision it issued. TBMP § 518 (emphasis added). Such a motion may not be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. Rather, the motion should be limited to a demonstration that based on the facts before it and the applicable law, the Board’s ruling is *in error* and *requires* appropriate change. *Id.* (emphasis added).

Thus, a motion for reconsideration must clearly demonstrate *error* by the Board. The Board should not reverse its Order merely because Opposer did not understand the rules or believes it should be entitled to “flexibility.” Rather, Opposer must demonstrate ***Board error*** in applying 37 C.F.R. § 2.120(f), and that reversing the decision to deny the motion is ***required***. As explained below, the Board properly applied 37 C.F.R. § 2.120(f) – a very straightforward procedural rule with *no exceptions* — and correctly denied Opposer’s motion as untimely. There was no “error” and the Board is not “required” to reverse its decision.

**B. 37 C.F.R. § 2.120(f) is a Clear Procedural Rule With No Exceptions**

37 C.F.R. § 2.120(f) is a clear procedural rule which provides a strict cutoff for filing a motion to compel. Under the 2017 rule changes, a motion to compel must now be filed *prior to* (not *on the day of*, or *after*) the deadline for serving pretrial disclosures:

A motion to compel discovery must be filed ***before the day of the deadline for pretrial disclosures*** for the first testimony period as originally set or as reset.

37 C.F.R. § 2.120(f) (emphasis added). The rule is clear on its face and there are no exceptions. There is no “weekend” exception, and no party should reasonably believe it can engage in further discovery activity (i.e., filing a motion to compel) on the day its pretrial disclosures are due. At this point in the trial schedule, a party should expect discovery is complete and the case is ready for trial. ***Simply put, Opposer ignored the plain language of this clearly-stated rule and filed its motion on September 25, 2017, the day its pretrial disclosures were due.*** This Board correctly found this was untimely under a plain reading of 37 C.F.R. § 2.120(f), and its decision should not be reversed.

**C. The “Weekend” Rule of 37 CFR § 2.196 Does Not Apply**

Opposer argues 37 CFR § 2.196 (the “weekend” rule) applies to motions to compel. It essentially argues for a “weekend” exception to the strict cutoff of 37 C.F.R. § 2.120(f) where the motion deadline falls on a Sunday. However, the “weekend” rule does not apply to motions to compel. No reasonable reading of the TMEP or regulations supports this interpretation. 37 C.F.R. § 2.120(f) is a *strict cutoff* and does not contain *any* exceptions allowing a party to file a “late” motion to compel under the “weekend” rule.

A reading of other revised 2017 rules is instructive here. The Board revised other discovery cutoff rules but never made them subject to the “weekend” rule of 37 CFR § 2.196. For example,

under 37 CFR § 2.120(a)(3), discovery must now be served at least 30 days before the close of discovery, and no party can expect to take a discovery deposition after the close of discovery:

Please Note: Discovery requests now must be served early enough in the discovery period so that responses are due no later than the close of discovery. Similarly, discovery depositions must be properly noticed and taken during the discovery period. 37 CFR § 2.120(a)(3).

TBMP § 112, n. 1. Under the plain language of this rule, no litigant should reasonably believe it can serve discovery on the “next Monday” if this would require responses after discovery cutoff. Nor can any party reasonably believe it may take a discovery deposition on the first Monday after the close of discovery. Similarly here, Opposer should not have assumed a “weekend” exception applies to 37 C.F.R. § 2.120(f). All of these discovery rules create strict cutoff dates that are not subject to the “weekend” rule, and it was unreasonable for Opposer to rely on a different “interpretation.” In short, like other strict cutoff discovery rules, there is no “weekend” exception to the deadline to file a motion to compel under 37 C.F.R. § 2.120(f), and the Board did not err in denying the motion as untimely.

**D. “Flexibility” is Unwarranted Due to Opposer’s Discovery Misconduct**

Opposer asks for “flexibility” of the motion cutoff rule, citing the 2017 rule changes that were adopted *over one year ago*. However, Opposer knew about the 2017 rule changes for nearly one year before filing its motion to compel. It knew about the rule changes *even before they came into effect* because the upcoming changes were widely publicized before 2017. Moreover, Opposer undoubtedly consulted the revised 37 C.F.R. § 2.120(f) *before* filing its motion to compel and calendared the deadline. Nevertheless, Opposer chose to ignore a straightforward application of that rule requiring the motion to be filed *before* (not *on* or *after*) September 25<sup>th</sup>, 2017.

This is not an isolated incident of Opposer's reckless disregard for the discovery rules. Opposer has engaged in a pattern of discovery misconduct that should preclude any lenient treatment or "flexibility" of the rules to accommodate its baseless motion. Prior to filing its untimely motion, Opposer served written discovery at the tail end of discovery and then waited until *three days* before the motion cutoff to complain for the first time about perceived deficiencies in Applicant's responses. Opposer failed to give Applicant—a foreign litigant—sufficient time to respond to its 4-page "deficiency" letter mailed just *three days* before it rushed to file the motion. Thus, Opposer failed to make a good faith effort to meet and confer with Applicant to discuss perceived discovery issues before filing the motion. TBMP § 523.02. This alone is sufficient reason to deny the motion.

Moreover, had Opposer bothered to confer with Applicant a reasonable time before rushing to file the motion, Applicant could have confirmed that it possesses no additional, discoverable materials. Applicant's responses and document production are sufficient, as it does not possess any additional, discoverable materials.

Opposer's untimely, baseless motion to compel was designed *solely* to trigger a suspension order and delay trial. This is evidenced by the fact Opposer has been unable to timely organize and produce documents in support of its case, as it attempted to "dump" additional "surprise" document production on Applicant *well after the close of discovery* and *during the pendency of the motion to compel*. Opposer is clearly unprepared for trial and filed the motion to delay the schedule so it could "dump" additional documents on Applicant as part of its last-minute trial preparation.

The foregoing pattern of discovery misconduct demonstrates Opposer did not mistakenly rely on the "weekend" rule in "good faith." Rather, Opposer continues to flout discovery rules

believing there are no consequences for its actions, and to engage in misconduct designed to harass, delay, and waste the time and resources of the parties and the Board. Under these circumstances, the Board should not extend “flexible” treatment of the motion cutoff rule to Opposer. It was incumbent upon Opposer to file a *timely* motion to compel after meeting and conferring with Applicant in good faith well before the deadline. Opposer’s untimely, procedurally-deficient motion is a textbook example of what litigants should *not* do in discovery. Accordingly, Opposer has pointed to no “error” requiring reversal of the Board’s decision, and its motion for reconsideration should be denied.

### **III. CONCLUSION**

Based on the foregoing, Applicant respectfully requests that the Board *deny* Opposer’s motion for reconsideration. The Board did not err in applying 37 C.F.R. § 2.120(f), and reversing its decision denying the motion to compel is not required.

Date: February 28, 2018

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **APPLICANT’S BRIEF IN OPPOSITION TO OPPOSER’S MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO COMPEL** has been served on Laura J Winston, counsel for Opposer, on February 28, 2018, via email to:

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By: /Paulo A. de Almeida/  
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# EXHIBIT A

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

Asustek Computer Incorporation, )  
 )  
                   Opposer, )  
 )  
                   v. )  
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 Chengdu Westhouse Interactive Entertainment )  
 Co., Ltd., )  
 )  
                   Applicant. )  
 \_\_\_\_\_ )

Opposition No. 91225271  
Serial No. 86/217,642  
Mark: ROG (& Design)



**OPPOSITION TO MOTION TO COMPEL RESPONSES TO DISCOVERY**

Opposer, Asustek Computer Incorporation (“Opposer”), has filed a motion to compel (“Motion”) the discovery responses of Applicant, Chengdu Westhouse Interactive Entertainment Co., Ltd. (“Applicant”). Opposer served discovery at the tail end of discovery and then waited until *three days* before the motion to compel deadline to complain *for the first time* about perceived deficiencies in Applicant’s responses. Opposer failed to give Applicant—a foreign litigant—sufficient time to respond to its 4-page “deficiency” letter mailed just *three days* before it rushed to file this Motion. Thus, Opposer has failed to make a good faith effort to meet and confer with Applicant to discuss perceived discovery issues before filing this Motion. TBMP § 523.02. Moreover, had Opposer bothered to confer with Applicant a reasonable time before rushing to file this Motion, Applicant could have confirmed that it possesses no additional, discoverable materials. Thus, Applicant’s responses and document production are sufficient, as it does not possess any additional, discoverable materials.

Opposer’s last-minute, baseless complaint about Applicant’s discovery is designed *solely* to trigger a suspension order and delay trial. Opposer has been unable to timely organize and produce documents in support of its case, as it is *still* attempting to “dump” additional “surprise” document production on Applicant *well after the close of discovery* and even *during the pendency of this Motion*. Opposer is clearly unprepared for trial and seeks a delay in the schedule so it can continue “dumping” documents on Applicant as part of its last-minute trial preparation. For these reasons and the additional reasons set forth below, Opposer’s motion should be denied in its entirety.

**I. STATEMENT OF FACTS**

Applicant, a limited company of China, has applied to register the mark ROG (& Design), depicted as follows (Ser. No. 86/217,642):



based on its *bona fide* intention to use the mark in connection with video game-related goods and services in classes 9 and 41. Applicant’s ROG is essentially a video game; “ROG” is an acronym for “Relic of God,” the full name of the video game. Motion, Declaration of Laura Winston (“Winston Decl.”), Ex. D (Applicant’s Interrogatory Response No. 3). The video game has not yet been released in the United States, but the ROG mark has been promoted in overseas markets. *Id.*

Opposer commenced this opposition on December 8, 2015, claiming a likelihood of confusion with its alleged prior marks IROG and ROG for “motherboards” and certain other types of computer hardware. TTABVUE Dkt. No. 1. The parties held their mandatory discovery conference and exchanged their Rule 26(a)(1) initial disclosures. According to the most recent Scheduling Order, discovery closed on August 11, 2017, and Opposer’s pretrial disclosures were

due on September 25, 2017. TTABVUE Dkt. No. 28. Opposer did not serve its pretrial disclosures, choosing instead to file this Motion on the day of its pretrial disclosures deadline on September 25, 2017.

During discovery, Opposer waited until May 25, 2017—less than two months before the close of discovery (as previously set) on July 12, 2017—to serve its first set of written discovery on Applicant. Motion, Winston Decl., Ex. A (Opposer’s interrogatories and document demands, collectively, “Requests”); *see also* TTABVUE Dkt. No. 26 (Scheduling Order in force at the time of service of the Requests). Applicant properly responded to all of Opposer’s requests by timely asserting valid objections and producing relevant and discoverable information and documents. *See, e.g.*, Motion, Exs. D, E. Inasmuch as Applicant has not yet used its mark in the U.S. and applied to register on an *intent-to-use* basis, its responsive discovery materials were relatively limited in volume, consisting primarily of information and samples of advertising/marketing materials relating to its upcoming release of ROG in the U.S. As explained further below, Opposer’s Motion is largely based on its subjective purported belief that Applicant “must” possess additional discovery materials when it does not.

Opposer did not complain about any perceived deficiencies in Applicant’s discovery responses until September 20th, 2017—long after the close of discovery and a mere *five days* before its pretrial disclosures were due on September 25, 2017. *See* Motion, p. 2 (discussing initial email and telephone calls). In these initial communications, Opposer did not bother to discuss any specific perceived deficiencies in Applicant’s discovery responses, only vaguely stating “we are preparing a letter regarding unresolved issues in your client’s responses and production.” *See* Winston Decl., Ex. F. Inasmuch as Opposer failed to identify its specific concerns, Applicant could not address them and duly waited for Opposer’s promised “letter” regarding discovery. In

these initial communications, Opposer’s counsel also asked for an unwarranted “extension” of all deadlines in this proceeding. Applicant properly denied this request on account of (1) the untimeliness of Opposer’s complaint; (2) the lack of good cause for an extension; (3) discovery was long closed and the case was clearly ready for trial, with Opposer’s pretrial disclosures immediately due; and (4) Opposer’s *real* reason for the extension request was to secure additional time to gather and produce more “late” document production (after the close of discovery) as part of its last-minute trial preparation efforts.

On September 22, 2017—just ***three days*** before Opposer’s pretrial disclosures deadline (and the deadline to file a motion to compel), Opposer’s counsel sent Applicant’s counsel a lengthy, four-page letter complaining about Applicant’s discovery responses. Motion, Winston Decl., Ex. G. This was the *first time* Opposer complained about Applicant’s discovery in any reasonable level of detail. Applicant’s undersigned U.S. counsel forwarded the letter to Applicant’s foreign counsel and explained Opposer’s numerous concerns.<sup>1</sup> **Opposer’s expectation that Applicant—a foreign litigant—must address each and every concern in a response letter within three days before the motion to compel deadline was patently unreasonable.** There is no way Applicant could possibly confer with U.S. and foreign counsel *and* provide a detailed response on such short notice. Nor was it required to grant a highly prejudicial 60-day extension to allow Opposer more time to prepare for trial (further delaying Applicant’s own registration)—particularly where Opposer has been less than diligent in serving and following up on its discovery requests. Opposer had *months* to complain about perceived deficiencies in Applicant’s discovery, but chose to wait until the eve of trial to complain for the *first time* in this litigation.

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<sup>1</sup> Applicant is based in China and requires the assistance of U.S. and foreign counsel.

Worse, on October 4, 2017—*during the pendency of this Motion*—Opposer dumped voluminous *late* document production on Applicant long after the close of discovery. *See* Exhibit A, attached hereto (emails with additional *late* document production). Opposer is *still* attempting to dump additional late document production on Applicant *even today*. *See* Exhibit B attached hereto (additional late production dated today, October 16, 2017). Applicant has objected to this continuing “late” rolling document dump on the eve of trial. ***It is clear Opposer filed this Motion for the sole purpose of delaying this proceeding in order to continue “dumping” additional documents on Applicant before the start of trial.*** Opposer has no need for any additional discovery materials. Nor does Applicant possess additional materials to produce. Opposer knows this but nevertheless seeks to delay trial by way of this Motion.

The Board should not sympathize with Opposer when it (1) delayed until the near-end of discovery before serving its first written requests; (2) waited until *three days* before the pretrial disclosures deadline to complain for the *first time* about perceived deficiencies in Applicant’s responses; (3) failed to give Applicant sufficient time to meaningfully confer with Opposer in good faith before filing this Motion; and (4) while Opposer continues to “dump” late document production on Applicant *during the pendency of this Motion*, demonstrating Opposer merely seeks to delay in bad faith while it continues to prepare for trial. In short, Opposer has failed to meet and confer with Applicant in good faith regarding its discovery responses, and moreover, Applicant’s responses are sufficient. Accordingly, Opposer’s Motion should be denied in its entirety.

## **II. OPPOSER DID NOT MAKE A GOOD FAITH EFFORT TO RESOLVE THE DISPUTE INFORMALLY**

Under CFR § 2.120(e), a motion to compel must be supported by a written statement from the moving party that such party or its attorney has made a good faith effort, by conference or

correspondence, to resolve with the other party or its attorney the issues presented in the motion, and has been unable to reach agreement. In determining whether a good faith effort to resolve the discovery dispute has been made, the Board may consider, among other things, whether the moving party has investigated the possibility of resolving the dispute, whether, depending on the circumstances, sufficient effort was made towards resolution, and whether attempts at resolution were incomplete. TMBP § 523.02.

Here, Opposer’s “deficiency” letter dated a mere *three days* before its deadline to file this motion was hardly a “good faith” effort to resolve the dispute. Opposer failed to give Applicant—a foreign litigant—a reasonable time to respond. Opposer cannot reasonably expect Applicant to respond immediately before the deadline on such short notice. Moreover, had Opposer bothered to raise the issues earlier, the parties could have worked together to resolve them well in advance of trial in order to prevent this unnecessary dispute. Instead, Opposer simply rushed to file this Motion on the day of the deadline without giving Applicant a reasonable opportunity to address the perceived deficiencies. Under these circumstances, Opposer has failed to make a good faith attempt to resolve the dispute informally, warranting a denial of its Motion in its entirety.

Opposer will argue that it requested an “extension” of deadlines which might have allowed the parties more time to discuss. But Applicant was under no obligation to extend the trial deadlines where Opposer was less than diligent in serving and following up on discovery in a timely manner; where Opposer cannot articulate any good cause whatsoever for an extension; and where Opposer has continued to “dump” documents on Applicant well past the close of discovery. Opposer’s actions demonstrate the extension request—and this Motion—were motivated by Opposer’s need for additional time to gather and produce documents for trial, even though discovery is long closed. Opposer’s continuing “rolling” document production underscores the

fact that it is unprepared for trial and merely seeks to delay this proceeding. Moreover, a 60-day extension, if granted, would have prejudiced Applicant by further delaying the registration of its mark. Under the circumstances, Applicant was justified in denying Opposer's extension request. The denial of an extension request is not an excuse to "rush" to file a motion to compel without first attempting to resolve the dispute in *good faith* and *in a timely manner well in advance of trial*. Accordingly, the Board should deny Opposer's Motion at least for the reason Opposer has failed to comply with the requirements of TMBP § 523.02.

### **III. APPLICANT'S INTERROGATORY RESPONSES WERE PROPER**

Turning to Applicant's responses to the interrogatories, Opposer argues the responses to Interrogatory Nos. 1, 2, 4, 6, 24, 26, 31, 38, and 42 were improper. Opposer speculates the information is incomplete (e.g., Interrogatory No. 1) or in "contradiction" to other responses (e.g., Interrogatory No. 2), or otherwise lacking further elaboration or context. *See* Motion at pp. 10-13. ***A motion to compel is not the proper vehicle for arguing with Applicant about the accuracy of its responses.*** If, for example, *during discovery* Opposer was dissatisfied with Applicant's representation that its IP Counsel, Huo Sufang, is the sole managing agent of Applicant, it could have sought to depose Applicant to confirm whether "Applicant has other officers" or "likely has [other] managing agents." Likewise, Opposer could have tested its theory that managing the "advertising, sales and promotion" of a video game is "not a typical function of an IP counsel." *Id.*, p. 12. ***In short, Opposer's speculation about Mr. Sufang's job duties is argumentative and improper on motion to compel.*** Applicant's answers to these interrogatories are sufficient as written. Opposer is free to attempt to dispute Applicant's representations at trial, but a motion to compel is not the proper vehicle to raise such disputes. Moreover, Applicant does not possess any other information responsive to these interrogatories—a fact Applicant could have confirmed had

Opposer raised its concerns reasonably in advance of trial. Opposer already possesses everything it reasonably needs in order to proceed to trial in this case. Accordingly, the Motion should be denied with respect to these interrogatories.

**IV. APPLICANT'S DOCUMENT PRODUCTION IS COMPLETE**

Opposer vaguely complains about Applicant's document production, asserting that for various Requests, Applicant stated it would produce documents to the extent that they exist. Motion, at p. 13. If Opposer would have made a good faith effort to confer with Applicant in a *timely manner well in advance of trial*, Applicant could have confirmed that no additional documents exist. Inasmuch as Applicant does not possess additional responsive documents, its responses were proper.

**V. CONCLUSION**

Applicant respectfully requests that the Board deny Opposer's Motion for the following reasons: (1) Opposer failed to make a good faith effort to timely resolve the dispute well in advance of trial; (2) Applicant has sufficiently responded to the Interrogatories and possess no additional discoverable information; and (3) Applicant has sufficiently responded to the Document Requests and possess no additional discoverable documents.

Respectfully submitted,

Date: October 16, 2017

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**PROOF OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **OPPOSITION TO MOTION TO COMPEL DISCOVERY** has been served on Laura J Winston, counsel for Opposer, on October 16, 2017, via email to:

tm@kimwinston.com, laurawinston@kimwinston.com

By: /Paulo A. de Almeida/  
Paulo A. de Almeida

# EXHIBIT A

## Patel & Almeida, P.C.

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**From:** Chintan Desai <chintandesai@kimwinston.com>  
**Sent:** Wednesday, October 4, 2017 3:54 PM  
**To:** paulo@paiplaw.com  
**Cc:** Laura Winston; Firouzeh Nur-Vaccaro  
**Subject:** Opposition No. 91225271 - AsusTek v. Chengdu (Email 1 of 3)  
**Attachments:** Cover Letter 10-4-17.pdf; Privilege Log.pdf; ROG - Amended Responses to Applicant's First Set of Interrogatories.pdf; OPP 483 - 485.pdf; OPP 486 - 505.pdf; OPP 506 - 509.pdf; OPP 481.pdf; OPP 482.pdf

**Importance:** High

Dear Paulo:

Please see the attached correspondence regarding the following items:

- 1) Opposer's Amended Responses to Applicant's First Set of Interrogatories
- 2) Documents OPP 481-607 responsive to Applicant's First Set of Requests for Production of Documents
- 3) Privilege Log

Due to the combined size of the attachments, the attachments will be split up into three separate emails. Please confirm receipt of the emails along with the attachments.

Best regards,  
Chintan Desai

**Chintan Desai | Kim Winston LLP | [www.kimwinston.com](http://www.kimwinston.com)**

129 W. Evesham Road | Voorhees | NJ 08043

T: 856-520-8983 | F: 914-297-6660 | E: [chintandesai@kimwinston.com](mailto:chintandesai@kimwinston.com)

The information contained in this e-mail message is intended only for the personal and confidential use of the recipient(s) named above. If you have received this communication in error, please notify us immediately by e-mail, and delete the original message.

## Patel & Almeida, P.C.

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**From:** Chintan Desai <chintandesai@kimwinston.com>  
**Sent:** Wednesday, October 4, 2017 4:01 PM  
**To:** paulo@paiplaw.com  
**Cc:** Laura Winston; Firouzeh Nur-Vaccaro  
**Subject:** Opposition No. 91225271 - AsusTek v. Chengdu (Email 2 of 3)  
**Attachments:** OPP 541 - 545.pdf; OPP 546 - 550.pdf; OPP 551 - 552.pdf; OPP 553 - 554.pdf; OPP 555 - 560.pdf; OPP 561 - 562.pdf; OPP 563 - 568.pdf; OPP 510 - 516.pdf; OPP 517 - 540.pdf

Dear Paulo:

Further to my previous email, please find enclosed the 2<sup>nd</sup> group of additional attachments. Please confirm receipt of the emails along with the attachments.

Best regards,  
Chintan Desai

**Chintan Desai** | **Kim Winston LLP** | [www.kimwinston.com](http://www.kimwinston.com)  
129 W. Evesham Road | Voorhees | NJ 08043  
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## Patel & Almeida, P.C.

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**From:** Chintan Desai <chintandesai@kimwinston.com>  
**Sent:** Wednesday, October 4, 2017 4:10 PM  
**To:** paulo@paiplaw.com  
**Cc:** Laura Winston; Firouzeh Nur-Vaccaro  
**Subject:** Opposition No. 91225271 - AsusTek v. Chengdu (Email 3 of 3)  
**Attachments:** OPP 573 - 574.pdf; OPP 575 - 578.pdf; OPP 579 - 581.pdf; OPP 582 - 594.pdf; OPP 595.pdf; OPP 596.pdf; OPP 597 - 607.pdf; OPP 569 - 570.pdf; OPP 571 - 572.pdf

**Importance:** High

Dear Paulo:

Further to my previous emails, please find enclosed the 3<sup>rd</sup> and final group of additional attachments. Please confirm receipt of the emails along with the attachments.

Best regards,  
Chintan Desai

**Chintan Desai | Kim Winston LLP | [www.kimwinston.com](http://www.kimwinston.com)**  
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# EXHIBIT B

## Patel & Almeida, P.C.

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**From:** Firouzeh Nur-Vaccaro <firouzehnurvaccaro@kimwinston.com>  
**Sent:** Monday, October 16, 2017 9:15 AM  
**To:** paulo@paiplaw.com  
**Cc:** Laura Winston; Chintan Desai  
**Subject:** ROG - Supplemental Document Production  
**Attachments:** ROG - Cover letter to P. de Almeida 10.16.17 (00060358xCF79E).pdf; OPP 614.pdf; OPP 615.pdf; OPP 616.pdf; ROG - Privilege Log 10.16.17 (00060360xCF79E).pdf

Dear Paulo,

Please see the attached correspondence and enclosures.

Best regards,

Firouzeh Nur-Vaccaro

**Please note:** Our New Jersey offices have moved. Our new address is 129 W. Evesham Road, Voorhees, NJ 08043. All other contact information remains the same.

**Firouzeh Nur-Vaccaro | Kim Winston LLP | [www.kimwinston.com](http://www.kimwinston.com)**

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