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

Proceeding	91232746
Party	Plaintiff Triatomic Environmental, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

TRIATOMIC ENVIRONMENTAL, INC.

Opposer,

v.

RGF ENVIRONMENTAL GROUP, INC.

Applicant.

Opposition No. 91232746

Mark: UPCO-QR

Serial No. 87/115,085

**OPPOSER'S REPLY IN SUPPORT OF
MOTION TO COMPEL DISCOVERY RESPONSES**

McHALE & SLAVIN, P.A.

By /s/ Brian M. Taillon _____

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Attorneys for Opposer

I. INTRODUCTION

Mindful that the Board generally discourages the filing of Reply briefs, TBMP § 502.02(b), Opposer respectfully submits this Reply brief solely to address certain discovery items identified in the Motion to Compel which remain outstanding despite Applicant's service of supplemental discovery responses in tandem with its filing of its responsive brief, and to correct certain mischaracterizations of Opposer's "meet-and-confer" efforts set forth therein.

II. ARGUMENT

A. Opposer Fulfilled its "Meet and Confer" Requirement

Applicant's argument consists mainly of claiming that Opposer did not adequately meet and confer with Applicant before filing the Motion. The "Introduction" section of the Motion shows such claim to be false. Rather, it is clear that Opposer's filing of the Motion was not only justified, but necessary in order to finally obtain supplemental discovery responses that Applicant had continually promised but not delivered.

The Motion sets forth the timeline of Opposer's attempts to obtain discovery responses from Applicant. Most notably, on July 31, 2017 Opposer advised Applicant that, with several discovery items still outstanding after weeks of delay, Opposer would seek Board intervention if these items were not resolved by August 7, 2017. Applicant waited until the afternoon of that deadline date to advise that it was working on and looking into the items, much like it had indicated nearly a month earlier during the parties' telephone conference of July 11, 2017. Applicant then waited until the response deadline for this Motion to concurrently serve the supplemental discovery responses referenced throughout its brief, which for the first time included answering the interrogatories identified in the Motion and correlating documents to the

requests for which they are responsive, as well as producing one additional document, when it could have done so at any time after the Motion's filing.

Applicant's mischaracterization of Opposer's meet and confer efforts is further belied by the fact that, despite the service of supplemental responses in tandem with its brief, Applicant still has not provided full and complete responses to all of the items set forth in the Motion. Though most of the deficient items set forth in the Motion have been rectified through Applicant's supplemental responses, certain items remain outstanding.

B. Remaining Outstanding Discovery Responses

1. Document Request No. 1

Applicant's brief does not address its deficient response to Document Request No. 1, in which Opposer requests production of the documents identified in Applicant's Initial Rule 26 Disclosures.¹ Applicant's response to this Document Request has not changed. Applicant maintains objections that the Request is overbroad, unduly burdensome, vague and ambiguous, despite the fact that the Request merely seeks production of the documents Applicant identified as supporting its claims and defenses in this case. Presumably, these documents are known to Applicant, contain information relevant to this proceeding, and are proportional to the needs of this case since Applicant identified them.

2. Document Request No. 2

Applicant's brief does not address its deficient response to Document Request No. 2, in which Opposer requests production of documents pertaining to its selection and adoption of the UPCO-QR Mark. The relevance of these documents is set forth in the Motion. The scope of the Document Request is clearly proportional to the needs of the case, as it is directed only to the

¹ Opposer inadvertently failed to provide a copy of Applicant's Initial Disclosures as an Exhibit to the Motion. Opposer apologizes for the oversight and attaches the Initial Disclosures as Exhibit "A" hereto.

selection and adoption of the applied-for mark that is the subject of this proceeding. Nevertheless, Applicant's response to this Document Request has not changed. It consists of boilerplate objections that the Request is overbroad and unduly burdensome, vague and ambiguous, and irrelevant, without explaining how such is the case. It also asserts attorney-client privilege or work product protections, without a privilege log.

3. Document Request No. 18

Applicant's brief does not address its response to Document Request No. 18, in which Opposer requests production of documents sufficient to identify each medium, by name and type (e.g., newspaper – Palm Beach Post) in which Applicant's UPCO-QR product has been advertised. Advertisement of goods bearing the applied-for mark is clearly relevant. In fact, as set forth in the Motion, this Request was one of the items for which Applicant had promised to provide responsive documents, but had failed to do so.

Applicant's supplemental response to this Request is deficient. Whereas the original response indicated that representative samples would be produced, the supplemental response refers only to the document Bates-stamped RGF0026, which is a one-page advertisement for Applicant's family of products. A copy of this document is attached as Exhibit "B" hereto. There is no indication of how this document is responsive to this Document Request. Applicant's response to Interrogatory No. 8 directed to the same subject matter, meanwhile, generally refers to "trade journals and HVAC Industry magazines only." No other documents have been provided in response to this Document Request.

Applicant should be compelled to provide full and complete responses to these Document Requests.

C. Opposer's Discovery Requests are not Overly Broad or Unduly Burdensome

Applicant's argument concerning the proportionality of Opposer's discovery requests is without merit. Applicant recites general discovery provisions about proportionality of discovery, but fails to argue how any specific discovery request propounded by Opposer is excessive. The mere presence of the word "all" or "each" does not render a request overly broad. One has to consider the request in its entirety and the context of the action in which it is propounded. The temporal scope of the requests is also not a genuine issue here. This proceeding addresses *one* trademark that has been in use for little more than *one* year and apparently on only *one* product. It is not excessive for Opposer to ask Applicant for information about items such as the selection of that one mark, sample packaging for the one product, or the trade shows and conferences at which the product has been promoted and the identification of each medium in which the product has been advertised and the geographic areas in which it has been sold during its year of existence.

D. The Motion was filed in Good Faith

Perhaps to distract from the discovery issues raised in the Motion, Applicant's brief contains a great deal of invective directed against Opposer, accusing Opposer of filing the Motion to increase the expense of this proceeding and somehow avenge itself for Applicant's baseless state-law suit against Opposer currently pending in Palm Beach County, Florida.

Opposer did not file the Motion for such purposes. It filed the Motion so it could finally obtain discovery responses in this proceeding which Applicant had continually promised but failed to deliver. The fact that Applicant did not supplement its discovery responses until the date its response to the Motion was due - seven weeks after the parties' "meet-and-confer" telephone conference, nearly ten weeks after initial service of Applicant's written responses, and eighteen

weeks after Opposer's discovery requests were propounded - proves that filing the Motion was entirely necessary.

III. CONCLUSION

Applicant has continually delayed providing full and complete responses to Opposer's discovery requests. It took the filing of this Motion to Compel to nudge Applicant into finally providing the supplemental responses it had previously promised but not delivered. The supplemental discovery responses touted in Applicant's brief were served minutes before that brief was filed. Nevertheless, Applicant's responses to Document Requests Nos. 1, 2 and 18 remain deficient. For the reasons set forth in the Motion and herein, the Board should enter an Order compelling Applicant to provide full and complete responses to these items.

Dated: September 15, 2017

Respectfully submitted,

McHALE & SLAVIN, P.A.

By /s/ Brian M. Taillon
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Attorneys for Opposer

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply in support of Motion to Compel Discovery Responses was filed electronically through the Electronic System for Trademark Trials and Appeals on September 15, 2017. Notice of this filing will be sent to counsel for all parties by operation of the ESTTA, and via email. Counsel includes:

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Attorneys for Applicant

/s/ Brian M. Taillon

Brian M. Taillon

EXHIBIT “A”

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

Triatomic Environmental, Inc.,	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91232746
	:	
RGF Environmental Group, Inc.,	:	
	:	
Applicant.	:	
	:	

APPLICANT’S INITIAL DISCLOSURES

Applicant, RGF Environmental Group, Inc., respectfully submits the following initial disclosure of information reasonably available as of this date pursuant to Fed. R. Civ. Pro. 26(a)(1) and Rule 2.210(a):

A. Individuals Likely to have Discoverable Information

The following individuals or entities are likely to have discoverable information that Applicant may use to support its claims or defenses:

- 1) Mr. Walter Ellis
Executive VP/GM
RGF Environmental Group, Inc.
1101 W 13th St.
Riviera Beach, FL 33404
(561) 848-1826

Mr. Ellis has information relating to Applicant’s development and use of the UPCO-QR product, including sales and advertising, as well as the generic use of PCO in the air purification industry.

- 2) All persons disclosed in responses to written discovery or deposition questions by any party.

Applicant reserves the right to name and identify additional individuals as their identity or information which is material becomes known.

B. Documents in Applicant's Possession, Custody or Control

Applicant may use the following categories of documents within its possession, custody or control located at the office of Applicant or Applicant's counsel to support its claims or defenses:

- 1) Miscellaneous correspondence;
- 2) Sales and advertising materials for products sold under the UPCO-QR Mark;
- 3) Products offered under the UPCO-QR Mark;
- 4) Third party use of PCO, Advanced PCO, AHPCO, and APCO; and
- 5) All documents marked or identified as deposition exhibits.

Respectfully submitted,

RGF Environmental Group, Inc.

By:



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Leo M. Loughlin
Attorneys for Applicant
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8th Floor
Washington, DC 20005
Phone: 202-783-6040

Date: May 25, 2017

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Applicant's Initial Disclosures have been served by electronic mail on counsel for Opposer to:

Brian M. Taillon
Mchale & Slavin PA
ustrademarks@mchaleslavin.com
litigation@mchaleslavin.com
btaillon@mchaleslavin.com

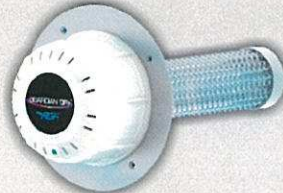
On this 25th day of May, 2017.



Leo M. Loughlin

EXHIBIT “B”

The Leader in IAQ



Guardian Air QR+™
In-duct Air Purification System
PHI Technology



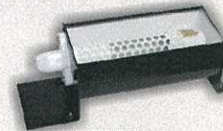
UPCO-QR™
Ultimate PCO



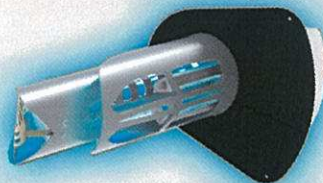
Pan Saver™
Condensate Pan
Slime Eliminator



REME · HALO
In-duct Air Purification System



PTAC Unit
ETAC and PTAC Units
PHI Technology



PHI + Bi-Polar Ionization + PCO
All 3 Technologies Combined Into 1 Superior Unit



QUAD-MS®
Mini-Split
Bi-polar Ionization



QUAD-DM®
In-duct
Bi-polar Ionization



**DEALER DESIGN
AWARD WINNER**
Winner of The News Dealer Design Award
2013, 2014, 2015 and 2016



Mini Split Unit
PHI Technology



BLU QR®
Quick Release
UV Treatment System



Magnetic Package Unit
Air Purification for Package Units
PHI Technology



Commercial Unit
Large In-duct System
PHI Technology



RRU
Rapid Recovery Unit
High Output Remediation Unit
PHI Technology



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