

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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mbm/jmw

April 17, 2019

Opposition No. 91239464

Oakley, Inc.

v.

*Eric R Washington, Deric J Washington,
LaSonya D Green-Washington, Lee R Chew,
Lawrence M Chew*

Mary Beth Myles, Interlocutory Attorney:

On November 27, 2018, Opposer filed a motion to compel discovery and on October 18, 2018, filed a motion to take depositions outside the discovery period. Applicant did not file a brief in response to either motion within the time provided under Trademark Rule 2.127(a).¹

Opposer seeks an order directing Applicants to: (1) respond to Opposer's first set of interrogatories and document requests without objecting on the merits; (2) produce documents and things responsive to Opposer's first set of document requests; and (3) appear for depositions by oral examination.²

¹ The Board considers proceedings suspended as of the filing date of Opposer's motion to take discovery depositions outside of the discovery period. The Board regrets the delay in acting upon Opposer's motions.

² Although Opposer also moves to have Applicant's responses to requests for admission deemed admitted, it is not necessary for the propounding party to file a motion to deem requests for admissions admitted when no response is served, since the admissions are

The motion to compel discovery is hereby granted as conceded. *See* Trademark Rule 2.127(a); TBMP § 502.04.

A party that fails to respond to interrogatories or document requests during the time allowed therefor, and that is unable to show that its failure was the result of excusable neglect, may be found, upon motion to compel filed by the propounding party, to have forfeited its right to object to the discovery request on its merits. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000); TBMP § 403.03.

Accordingly, Applicants are directed to serve, within **thirty days** of the date of this order, responses to Opposer's first set of interrogatories and document requests and to produce documents responsive to Opposer's first set of document requests. Applicants must respond in full and without objection on the merits thereof inasmuch as Applicants failed either to timely respond or to object to said discovery requests. *Id.*

If Applicants have no responsive documents in their possession, custody or control that are responsive to a particular request, Applicants must so state affirmatively in their response. To the extent the production of documents to any particular request is voluminous, Applicants may produce a representative sampling of documents. Such representative sampling, however, must be sufficient to meet Opposer's discovery needs.

deemed admitted by operation of Fed. R. Civ. P. 36(a). *See* TBMP § 407.03(a). Accordingly, to the extent Opposer's motion seeks to have requests for admission deemed admitted, the request is given no consideration.

Additionally, to the extent Applicants withhold any documents on the basis of privilege, Applicants are required to provide Opposer with a privilege log within the same **thirty days** of the date of this order.

Additionally, Applicants are ordered to appear for discovery depositions within **fifteen days** of the date of service of Applicants' discovery responses and production of documents. Moreover, Opposer's motion to take Applicants' discovery depositions outside the discovery period is **granted** as conceded.

In the event that Applicants fail to serve full responses and/or appear for discovery depositions as ordered herein, Opposer's remedy may lie in a motion for sanctions, as appropriate. *See* Trademark Rule 2.120(h)(1); TBMP § 411.05.

Proceedings are resumed. Discovery, disclosure, and trial dates are reset as indicated below:

Discovery Closes	4/22/2019
Plaintiff's Pretrial Disclosures Due	6/6/2019
Plaintiff's 30-day Trial Period Ends	7/21/2019
Defendant's Pretrial Disclosures Due	8/5/2019
Defendant's 30-day Trial Period Ends	9/19/2019
Plaintiff's Rebuttal Disclosures Due	10/4/2019
Plaintiff's 15-day Rebuttal Period Ends	11/3/2019
Plaintiff's Opening Brief Due	1/2/2020
Defendant's Brief Due	2/1/2020
Plaintiff's Reply Brief Due	2/16/2020
Request for Oral Hearing (optional) Due	2/26/2020

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many

requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).