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

Proceeding	91240303
Party	Defendant Thirdlove, Inc.
Correspondence Address	KENT M WALKER LEWIS KOHN & WALKER LLP 15030 AVENUE OF SCIENCE, SUITE 201 SAN DIEGO, CA 92128 UNITED STATES kwalker@lewiskohn.com, kmoyerhenry@lewiskohn.com, jlumanlan@lewiskohn.com 858-436-1330
Submission	Motion for Sanctions (Other)
Filer's Name	Kent M. Walker
Filer's email	kwalker@lewiskohn.com
Signature	/Kent M. Walker/
Date	03/09/2020
Attachments	ThirdLove motion for sanctions.pdf(499462 bytes)

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

ERREA' SPORT S.P.A.,

Opposer,

vs.

MECOMMERCE, INC DBA THIRDLOVE

Applicant.

Opposition No. 91240303

Serial No. 87/543,806

Mark:



APPLICANT'S MOTION FOR SANCTIONS

Pursuant to Trademark Rule 2.120(h)(1), TBMP § 411.05 and Rule 37 of the Federal Rules of Civil Procedure (“FRCP”), Applicant moves for sanctions against Opposer for its failure to comply with the TTAB’s Order to produce discovery responses (Dkt. No. 24 - the “Order”). Applicant requests the sanction of dismissal of this Opposition. As explained in Applicant’s motion to compel, and below, Opposer does not intend to pursue this Opposition any further, yet it declined to simply file a notice of withdrawal - consented and without prejudice. So, Applicant seeks the final remedy of dismissal by this Motion. In support of this Motion, Applicant states as follows:

FACTUAL BACKGROUND

The Order was entered on February 10, 2020. Pursuant to the Order, “Opposer is allowed until twenty (20) days from the date of this order to serve responses or supplemental responses, as appropriate, to Applicant’s First Set of Interrogatories and Applicant’s First Requests for Production.” Opposer failed to serve responses by that time or at all. See the Declaration of Kent M. Walker (“Walker Motion for Sanctions Decl.”) submitted herewith.

The Order further provides that: “In the event that Opposer fails to serve responses as directed herein, Applicant’s remedy lies in a motion for sanctions, as appropriate. Trademark Rule

2.120(h)(1). TBMP § 411.05.” By this Motion, Applicant seeks sanctions of dismissal pursuant thereto.

Sanctions of dismissal are appropriate here, because Opposer failed to comply with the Order and has no intent to continue with this Opposition. Applicant cannot defend against the opposition without discovery from Opposer, but Opposer has no intent of continuing and Applicant would like to put an end to this proceeding and get its registration.

As explained in Applicant’s Motion to Compel (Dkt. No. 21) and briefly summarized again here, Opposer initiated this opposition in 2018. It is a weak opposition. A side by side comparison of Applicant’s and Opposer’s marks demonstrates a lack of similarity and, correspondingly, a lack of possible confusion:



Figure 1: Registration No. 3,983,137; Registration No. 1,919,896; Application No. 87/543,806.

After this Opposition was initiated, the parties pursued settlement negotiations and obtained time extensions from the TTAB, but, ultimately, those efforts wore out and the proceedings resumed in June, 2019 and discovery opened in August 2019. Applicant proceeded to propound discovery, and Opposer either did not respond to requests or responded inadequately to other requests.

In November, 2019, Opposer’s counsel informed Applicant’s counsel that Opposer intended to take no further action in this Opposition, whether with respect to discovery or trial. Opposer’s counsel noted that Opposer had instructed counsel not to take further steps in the Opposition and suggested that Applicant could move to compel and move for dismissal as it saw fit to terminate the Opposition. Despite Applicant’s requests, Opposer declined to agree to simply enter into a consented

Withdrawal of Opposition without prejudice. See Walker Motion to Compel Decl. (Dkt. No. 21) at ¶ 7 and Ex. C (email correspondence between counsel) and Ex. D (proposed withdrawal of opposition with consent that Applicant provided to Opposer).¹

So, given the circumstances, Applicant moved to compel discovery knowing Opposer had no intent to respond and for the ultimate purpose to obtain dismissal of this Opposition. Opposer failed to respond to the Order. Applicant moves for sanctions of dismissal now, which would be appropriate given Opposer's intent not to pursue this matter further, as evidenced by its representations to Opposer and failure to comply with the Order (or even oppose the Motion to Compel). Applicant would prefer to complete its application and obtain registration for its mark without continued delay. *Id.* at ¶ 8.

ARGUMENT

As provided by Trademark Rule 2.120(h)(1):

If a party fails to participate in the required discovery conference, or if a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, including a protective order, the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board will not hold any person in contempt or award expenses to any party.

As provided by FRCP Rule 37(b)(2):

If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

¹ The Walker Motion to Compel Decl. and Exhibits thereto are attached to the Walker Motion for Sanctions Decl. below as **Exhibit 1** for ease of reference.

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party;

or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Opposer failed to comply with the TTAB's Order. Opposer informed Applicant, through counsel, that it does not intend to continue to pursue this Opposition. Even if it did, Applicant cannot reasonably conduct depositions, issue follow up discovery requests, or prepare for trial since Opposer has failed to comply with its outstanding discovery obligations and the Order.

For example, as set forth in Applicant's Motion to Compel in more detail, Opposer bears the burden of proof in this Opposition, yet it refuses to provide discovery about the matters that it intends to prove and several basic topics, such as the identity of its witnesses and the evidence that supports (and undermines) its contention of likelihood of confusion, all of which Applicant requested Opposer to identify via interrogatories and documents requests (See Exs. A and B to the Walker Motion to Compel Decl.).²

² For example, as to document requests, Opposer refuses to respond to requests 6-8, 9, 22-25 and 27 regarding Opposer's use of its mark (e.g., first use, geographic use, plans for expansion of use). Opposer said it would allow inspection of documents in response to requests 9-10, 13-28, 20, 26, 28-36 and 40 regarding various likelihood of confusion factors (e.g., confusion, sales and advertising expenditures, marketing and trade channels)

As to interrogatories, Opposer refused to provide any responses, including interrogatories for identification of potential witnesses (rogs. 2, 8, 9), regarding competition between the parties and Opposer's trade and marketing channels and sales and advertising expenditures (rogs. 3-6, 12-18, 20-27) and regarding other subjects relevant to the ultimate issue of likelihood of confusion (rogs. 28-41).

Opposer further told Applicant that it does not intend to go forward with the Opposition. Consistent with that, Opposer did not oppose the motion to compel and did not comply with the Order. Opposer has gone radio silent. Accordingly, an order of sanctions to dismiss is appropriate. See, e.g., *SFM, LLC v. Corcamore, LLC*, 129 USPQ2d 1072, 1074 (TTAB 2018) (motion granted for sanctions in the form of judgment for party's misconduct including failure to comply with Board's orders related to discovery); *Benedict v. Superbakery Inc.*, 665 F.3d 1263, 101 USPQ2d 1089, 1093 (Fed. Cir. 2011) (affirming Board's entry of judgment as a discovery sanction for repeated failures to comply with Board's reasonable orders); *Caterpillar Tractor Co. v. Catfish Anglers Together, Inc.*, 194 USPQ 99, 100 (TTAB 1976) (judgment entered where applicant provided no reason for not complying with Board order compelling discovery).

REQUEST FOR RELIEF

Applicant moves this Board for an Order of sanctions dismissing this Opposition with prejudice.

Applicant further moves this Board for any other relief it deems appropriate. WHEREFORE, Applicant respectfully requests that the Trademark Trial and Appeal Board grant its Motion for Sanctions and grant all other appropriate relief.

Dated March 9, 2020.

/s/ Kent M. Walker

Kent M. Walker
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San Diego, CA 92128
Tel: 858-436-1330
Fax: 858-436-1349

Attorney for Applicant

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

ERREA' SPORT S.P.A.,

Opposer,

vs.

MECOMMERCE, INC DBA THIRDLOVE

Applicant.

Opposition No. 91240303

Serial No. 87/543,806

Mark:



DECLARATION OF KENT M. WALKER, ESO.

I, Kent M. Walker, Esq., declare as follows:

1. I represent Applicant ThirdLove in this matter. I have knowledge of the facts set forth herein and in Applicant's Motion for Sanctions.

2. As of the date of this declaration, as counsel for Applicant, we have received no responses to interrogatories or updated responses to document requests from Opposer or any other response from Opposer regarding the TTAB's Order on Applicant's Motion to Compel (Dkt. No. 24).

3. Rather than repeating the facts here, I attach hereto as Exhibit 1 my January 2, 2020 declaration and exhibits thereto in support of Applicant's Motion to Compel, which is part of Dkt. No. 21

I declare under penalty of Perjury that all of the foregoing is true and correct.

Dated: March 9, 2020

/s/ Kent M. Walker
Kent M, Walker

Exhibit 1

to Walker Decl. iso Motion for Sanctions;

this exhibit is also part of Dkt. No. 21.

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

ERREA' SPORT S.P.A.,

Opposer,

vs.

MECOMMERCE, INC DBA THIRDLOVE

Applicant.

Opposition No. 91240303

Serial No. 87/543,806

Mark:



DECLARATION OF KENT M. WALKER, ESQ.

I, Kent M. Walker, Esq., declare as follows:

1. I represent Applicant ThirdLove in this matter. I have knowledge of the facts set forth herein and in Applicant's Motion to Compel.
2. On September 13, 2019, Applicant served its initial disclosures and its first sets of interrogatories, document requests and requests for admission on Opposer.
3. Opposer failed to provide any initial disclosures, ever, despite numerous requests by Applicant, including as shown in Ex. D hereto described below.
4. On October 16, 2019, Opposer served written objections to Applicant's first sets of interrogatories and document requests and responses to Applicant's first set of requests for admission.
5. As to the interrogatories, Opposer objected that the interrogatories, including subparts, exceeded 75 and declined to provide any responses. Applicant met and conferred with Opposer, through counsel, and served an amended first set of interrogatories on Opposer on October 31, 2019. Opposer's responses were due by December 3, 2019, and Opposer failed to provide any responses or make any objections to Applicant's amended first set of interrogatories.

A true and correct copy of Applicant's first set of amended interrogatories is attached hereto as Ex. A.

6. As to the document requests, Opposer responded that it would make documents available for inspection but refused to do so despite numerous requests by Applicant. A true and correct copy of Applicant's first set of document requests and Opposer's objections and responses thereto are attached hereto as Ex. B.

7. On November 22, 2019, after Applicant had continued to seek resolution of the discovery disputes, Opposer's counsel, Mr. Golden, informed me that Opposer intended to take no further action in this Opposition, whether with respect to discovery or trial. He noted that Opposer had instructed him not to take further steps in the Opposition, which he said he was telling me as a professional courtesy, and suggested that Applicant could move to compel and move for dismissal as it saw fit to terminate the Opposition. Despite Applicant's requests, through counsel, Opposer refused to agree to enter into a consented Withdrawal of Opposition without prejudice. A true and correct copy of my email communications with Mr. Golden about these subjects is attached as Ex. C. A true and correct copy of the proposed withdrawal of opposition with consent that I provided to Mr. Golden is attached as Ex. D.

8. Given the circumstances, Applicant is moving to compel discovery now for the ultimate purpose to obtain dismissal of this Opposition. Applicant would like to complete its application and obtain registration for its mark without continued delay.

6. Pursuant to 37 C.F.R. § 2.120(e) and TBMP § 523.02, and as shown in Ex. D, I have made a good faith effort to resolve the issues presented by Opposer's objections and lack of responses to Applicant's First Set of Interrogatories and Applicant's First Requests for Production and Opposer's failure to provide initial disclosures.

I declare under penalty of Perjury that all of the foregoing is true and correct.

Dated: January 2, 2020

/s/ Kent M. Walker
Kent M, Walker

EXHIBIT A

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

In the Matter of Trademark Application
Serial No. 87/543,806
Filed July 26, 2017



For the mark
Published in the *Official Gazette* on November 28, 2017.

ERREA' SPORT S.P.A.,

Opposer,

vs.

MECOMMERCE, INC., RENAMED TO
THIRDLOVE, INC.

Applicant.

Opposition No.: 91240303

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APPLICANT'S FIRST AMENDED INTERROGATORIES TO OPPOSER

Pursuant to Trademark Rule of Practice 2.120 (37 U.S.C. § 2.120), Trademark Trial and Appeal Board Manual of Procedure § 406, and Federal Rule of Civil Procedure 33, Applicant MECOMMERCE, INC., renamed THIRDLOVE, INC., (hereafter "THIRDLOVE") requests that Opposer ERREA' SPORT S.P.A. (hereafter "ERREA") answer the following First Amended Interrogatories separately and fully, in writing, under oath within thirty (30) days after date of service.

For the purpose of these Interrogatories, the following definitions and instructions shall apply:

DEFINITIONS

1. The terms "ERREA," "you," and "your" refer to Opposer and include any persons controlled by or acting on behalf of that entity, including but not limited to all officers, directors, owners, employees, agents, representatives, and attorneys, and any predecessors, subsidiaries, parent companies, affiliated companies, or joint venturers.

2. The term "Applicant" refers to THIRDLOVE.

1 3. The term “THIRDLOVE application” means U.S. Trademark Application No.
2 87/543,806 for the mark  .

3 4. The term “THIRDLOVE mark” means the mark  that is the subject of U.S.
4 Trademark Application No. 87/543,806.

5 5. The term “ERREA mark one” means U.S. Trademark Registration No. 1,919,896
6 for the mark: 

7 6. The term “ERREA mark two” means U.S. Trademark Registration No. 35,983,137
8 for the mark: 

9 7. The term “ERREA mark three” means U.S. Trademark Registration No. 5,015,029
10 for the mark: 

11 8. The term “ERREA mark four” means U.S. Trademark Registration No. 5,015,030
12 for the mark: 

13 9. The term “ERREA marks” includes any of ERREA mark one, ERREA mark two,
14 ERREA mark three and ERREA mark four.

15 10. The term “ERREA composite marks” includes any of ERREA mark one and
16 ERREA mark two.

17 11. The term “ERREA logo marks” includes any of ERREA mark three and ERREA
18 mark four.

19 12. The term “Opposition” means this Opposition No. 91240303.

20 13. The term “person” means any natural person or any business, legal or govern
21 mental entity, or association.

22 14. The term “document” as used herein is synonymous in meaning and equal in scope
23 to the usage of this term in Federal Rule of Civil Procedure 34, any “writings and recordings” and
24 “photographs” as defined by Federal Rule of Evidence 1001, and its interpretation by the courts,
25 and includes, without limitation, all originals, drafts, and non-identical copies of any written,
26 printed, typed, recorded, electronic, magnetic, optical, punched, copied, graphic or other tangible
28 thing in, upon or from which information may be conveyed, embodied, translated, or stored
29 (including, but not limited to, papers, records, books, correspondence, contracts, minutes of

1 meetings, memoranda, notes on desk calendars and appointment books, intra-office
2 communications, canceled checks, invoices, telegrams, telexes, dictation or other audio tapes,
3 video tapes, studies, electronic mail, information stored in computer readable form, on a compact
4 disc, or any other type of data storage device or medium, computer printouts, microfilm,
5 microfiche, laser disks, diaries, calendars, photographs, charts, viewgraphs, drawings, sketches
6 and all other writings or drafts thereof), as well as all other tangible things subject to production
7 under Federal Rule of Civil Procedure 34.

8 15. The term “identify,” when referring to:

9 a. a natural person, means to give his or her full name, present or last address
10 and telephone number, last known place of employment and job title and subject of
11 knowledge or involvement of the person in response to the interrogatory;

12 b. a public or private corporation, partnership, association, agency or other
13 entity, means to give its present or last known address and telephone number, and state
14 of incorporation, if applicable, and subject of knowledge or involvement of the entity
15 in response to the interrogatory;

16 c. a document, means to state its general character, title, date, addressee or
17 recipient, author or signatory, present location, and who has possession, custody or
18 control of the document, provided, however, that answers to interrogatories requesting
19 identifications or descriptions of certain communications or documents may be
20 satisfied by attaching a true and correct copy of any written documents, as described
21 herein, containing the requested information;

22 d. a product, means to provide a description of the item which is offered for
23 sale, and the intended market for the product;

24 e. a service, means to describe the service and the intended market for the
25 service; or

26 f. another thing, such as a source, media, competitor, channel, show, product
27 or service, means to identify the thing as a person (natural person or entity), if
28 applicable, as set forth above, and to describe the thing in terms of its name, substance,
29

1 function and circumstances (e.g., location) in response to the interrogatory.

2 16. The term “communication” is defined as any transmission or exchange of
3 information between two (2) or more persons, orally or in writing, and includes, without
4 limitation, any conversation or discussion, whether face-to-face or by means of telephone, letter,
5 facsimile, electronic or other media.

6 17. The terms “relating to” and “related to” mean, without limitation, concerning,
7 containing, evidencing, describing, constituting, referring to, explaining, discussing or reflecting.

8 18. The use of a present tense shall include past tenses.

9 19. The use of the singular form of any word also includes the plural and vice versa.

10 20. The terms “all” and “each” shall each be construed to include the other.

11 **INSTRUCTIONS**

12 1. In answering these Interrogatories, furnish all information, including information
13 contained in or on any document that is known or available to you, including all information in
14 the possession of your attorneys or other persons acting on your behalf or under your attorneys’
15 employment or direction.

16 2. If you cannot answer any interrogatory fully and completely after exercising due
17 diligence to make inquiries and secure information necessary to do so, so state, and answer each
18 such interrogatory to the full extent you deem possible; specify the portion of such interrogatory
19 that you claim you are unable to answer fully and completely; state the facts on which you rely to
20 support your contention that you are unable to answer such interrogatory fully and completely;
21 and state what knowledge, information and/or belief you have concerning the unanswered portion
22 of each such interrogatory.

23 3. If there is any item of information that you refuse to disclose on grounds of privilege or
24 work-product immunity, answer so much of the interrogatory as does not request information for
25 which you claim privilege, state the nature of the privilege you claim, and provide sufficient
26 details, including the nature of the information, its source, its subject matter, and the names of all
28 persons to whom that information was disclosed, such as would enable the claim of privilege or
29 immunity to be adjudicated.

1 4. If the response to any interrogatory consists, in whole or in part, of an objection relating
2 to burdensomeness, then with respect to such response:

3 a. Provide such information as can be ascertained without undue burden;

4 b. State with particularity the basis for such objection including:

5 i. a description of the process or method required to obtain any fact
6 responsive to the interrogatory; and

7 ii. the estimated cost and time required to obtain any fact responsive to the
8 interrogatory.

9 5. These interrogatories are continuing and require further answer and supplementation, as
10 provided by Federal Rule of Civil Procedure 26(e).

11 **INTERROGATORIES**

12 Consistent with the foregoing definitions and instructions, please answer the following
13 interrogatories:

14 **Interrogatory No. 1:**

15 Describe the circumstances through which you first became aware of Applicant.

16 **Interrogatory No. 2:**

17 Identify each person who participated in the decision to oppose the THIRDLove application.

18 **Interrogatory No. 3:**

19 Describe how you compete with Applicant in the U.S.

20 **Interrogatory No. 4:**

21 Describe how you anticipate competition with Applicant in the U.S.

22 **Interrogatory No. 5:**

23 Identify any common marketing channels you share with Applicant in the U.S.

24 **Interrogatory No. 6:**

25 Identify any trade shows you have attended in the U.S.

26 **Interrogatory No. 7:**

28 Identify any communications received by you that were intended for Applicant.

29 **Interrogatory No. 8:**

1 Identify the two persons most knowledgeable about your U.S. sales of products in connection
2 with which you use the ERREA marks in U.S. interstate commerce.

3 **Interrogatory No. 9:**

4 Identify the two persons most knowledgeable about your U.S. advertising of products in
5 connection with which you use the ERREA marks in U.S. interstate commerce.

6 **Interrogatory No. 10:**

7 Identify the products in connection with which you use the ERREA composite marks in U.S.
8 interstate commerce.

9 **Interrogatory No. 11:**

10 Describe the channels of trade in U.S. interstate commerce for the products identified in response
11 to Interrogatory No. 10.

12 **Interrogatory No. 12:**

13 Describe the target markets in the U.S. for the products identified in response to Interrogatory No.
14 10.

15 **Interrogatory No. 13:**

16 Identify your major competitors in the U.S. for the products identified in response to
17 Interrogatory No. 10.

18 **Interrogatory No. 14:**

19 Identify the geographic areas in the U.S. in which the products identified in response to
20 Interrogatory No. 10 have been sold.

21 **Interrogatory No. 15:**

22 Describe the range of prices at which the products identified in response to Interrogatory No. 10
23 have been sold in U.S. interstate commerce.

24 **Interrogatory No. 16:**

25 List by calendar year the sales you have made of the products identified in response to
26 Interrogatory No. 10 in the U.S.

27 **Interrogatory No. 17:**

28
29 List by calendar year the expenditures you have made on advertising the products identified in

1 response to Interrogatory No. 10 in the U.S.

2 **Interrogatory No. 18:**

3 Identify the media in which advertisements of the products identified in response to Interrogatory
4 No. 10 have appeared in the U.S.

5 **Interrogatory No. 19:**

6 Identify the products in connection with which you use the ERREA logo marks in U.S. interstate
7 commerce.

8 **Interrogatory No. 20:**

9 Describe the channels of trade in U.S. interstate commerce for the products identified in response
10 to Interrogatory No. 19.

11 **Interrogatory No. 21:**

12 Describe the target markets in the U.S. for the products identified in response to Interrogatory No.
13 19.

14 **Interrogatory No. 22:**

15 Identify your major competitors in the U.S. for the products identified in response to
16 Interrogatory No. 19.

17 **Interrogatory No. 23:**

18 Identify the geographic areas in the U.S. in which the products identified in response to
19 Interrogatory No. 19 have been sold.

20 **Interrogatory No. 24:**

21 Describe the range of prices at which the products identified in response to Interrogatory No. 19
22 have been sold in U.S. interstate commerce.

23 **Interrogatory No. 25:**

24 List by calendar year the sales you have made of the products identified in response to
25 Interrogatory No. 19 in the U.S.

26 **Interrogatory No. 26:**

27 List by calendar year the expenditures you have made on advertising the products identified in
28 response to Interrogatory No. 19 in the U.S.
29

1 **Interrogatory No. 27:**

2 Identify the media in which all advertisements of the products identified in response to
3 Interrogatory No. 19 have appeared in the U.S.

4 **Interrogatory No. 28:**

5 Identify any of your uses of the mark  as a trademark (by itself) in U.S. interstate
6 commerce in connection with clothing where the mark is oriented vertically like this: .

8 **Interrogatory No. 29:**

9 Describe how you sell products in the U.S. in connection with the ERREA marks, including such
10 as selling via your website, via distributors, via wholesalers and by direct sales to end users.

11 **Interrogatory No. 30:**

12 Describe any plans for future expansion of your use of the ERREA marks in the U.S. for products
13 in connection with which the marks are not already in use.

14 **Interrogatory No. 31:**

15 Identify any agreements in which you have licensed the ERREA marks for use in the U.S. by any
16 other party.

17 **Interrogatory No. 32:**

18 Describe any efforts you have made in the U.S. to enforce against third parties, other than
19 Applicant, the rights you claim in the ERREA marks.

20 **Interrogatory No. 33:**

21 Describe any instances in which a third party, other than Applicant, has challenged the rights you
22 claim in the ERREA marks in the U.S.

23 **Interrogatory No. 34:**

24 State the date of first use of the ERREA composite marks in U.S. interstate commerce in
25 connection the products identified in response to Interrogatory No. 10.

26 **Interrogatory No. 35:**

28 Explain the extent to which there has been any interruption to continuous use of ERREA
29 composite marks in U.S. interstate commerce in connection with the products identified in

1 response to Interrogatory No. 10.

2 **Interrogatory No. 36:**

3 State the date of first use of the ERREA logo marks in U.S. interstate commerce in connection the
4 products identified in response to Interrogatory No. 19.

5 **Interrogatory No. 37:**

6 Explain the extent to which there has been any interruption to continuous use of ERREA logo
7 marks in U.S. interstate commerce in connection with the products identified in response to
8 Interrogatory No. 19.

9 **Interrogatory No. 38:**

10 Explain the extent to which you have used the ERREA marks as service marks in the U.S.

11 **Interrogatory No. 39:**

12 Identify any studies related to consumer recognition of the ERREA marks.

13 **Interrogatory No. 40:**

14 Identify any studies related to consumer confusion based on the THIRDLOVE mark.

15 **Interrogatory No. 41:**

16 Identify the trademark searches you have conducted relating to the THIRDLOVE mark.

17 **Interrogatory No. 42:**

18 Identify every opinion, legal or otherwise, requested or received by you, regarding the likelihood
19 of confusion based on the THIRDLOVE mark.

20 **Interrogatory No. 43:**

21 Identify each expert witness that you intend to call in this proceeding.

22 DATED: October 31, 2019

23 Respectfully submitted

24 By:


25 /s/ Kent M. Walker
KENT M. WALKER
26 LEWIS KOHN & WALKER LLP
Attorney for Applicant
27 Reg. No.: 38,649
28 15030 Avenue of Science, Ste. 201
San Diego, CA 92128
29 (858) 436-1330 (telephone)

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kwalker@lewiskohn.com

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I hereby certify the following:

On October 31, 2019, a true and correct copy of the foregoing Applicant’s First Amended Interrogatories is being served by First Class mail, postage prepaid, on Opposer via its counsel at the address below and via email at the email addresses below:

Robert B. Golden
LACKENBACH SIEGEL, LLP
One Chase Road
Lackenbach Siegel Building,
Scarsdale, NY 10583

RGolden@LSLLP.com
TMEFS@LSLLP.com

I declare under penalties of perjury under the laws of the United States that the foregoing is true and correct.

/s/ Kent M. Walker 
KENT M. WALKER
kwalker@lewiskohn.com
LEWIS KOHN & WALKER LLP
KENT M. WALKER (173700)

EXHIBIT B

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

In the Matter of Trademark Application
Serial No. 87/543,806
Filed July 26, 2017



For the mark
Published in the *Official Gazette* on November 28, 2017.

ERREA' SPORT S.P.A.,

Opposer,

vs.

MECOMMERCE, INC., RENAMED TO
THIRDLOVE, INC.

Applicant.

Opposition No.: 91240303

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APPLICANT'S DOCUMENT REQUESTS

Pursuant to Trademark Rule of Practice 2.120 (37 U.S.C. § 2.120). Trademark Trial and Appeal Board Manual of Procedure § 408, and Federal Rule of Civil Procedure 34, Applicant MECOMMERCE, INC., renamed THIRDLOVE, INC., (hereafter "THIRDLOVE") requests that Opposer ERREA' SPORT S.P.A. (hereafter "ERREA") produce for inspection and copying the documents and things listed below by delivering copies of such documents and things to Applicant's counsel at Lewis Kohn & Walker LLP, 15030 Avenue of Science, Suite 201, San Diego, CA 92128 within 30 days of service of this Request.

For the purpose of this Request, the following definitions and instructions shall apply.

DEFINITIONS

1. The terms "ERREA," "you," and "your" refer to Opposer and include any persons controlled by or acting on behalf of that entity, including but not limited to all officers, directors, owners, employees, agents, representatives, and attorneys, and any predecessors, subsidiaries, parent companies, affiliated companies, or joint venturers.

2. The term "Applicant" refers to applicant THIRDLOVE.

1 3. The term “THIRDLOVE application” means U.S. Trademark Application No.
2 86/543,806 for the mark:  .

3 4. The term “THIRDLOVE mark” means the mark  that is the subject of U.S.
4 Trademark Application No. 87/543,806.

5 5. The term “ERREA mark one” means U.S. Trademark Registration No. 1,919,896
6 for the mark: 

7 6. The term “ERREA mark two” means U.S. Trademark Registration No. 3,983,137
8 for the mark: 

9 7. The term “ERREA mark three” means U.S. Trademark Registration No. 5,015,029
10 for the mark: 

11 8. The term “ERREA mark four” means U.S. Trademark Registration No. 5,015,030
12 for the mark: 

13 9. The “ERREA marks” includes any of ERREA mark one, ERREA mark two,
14 ERREA mark three or ERREA mark four.

15 10. The “ERREA composite marks” includes any of ERREA mark one and ERREA
16 mark two.

17 11. The “ERREA logo marks” includes any of ERREA mark three and ERREA mark
18 four.

19 12. The “Opposition” means this Opposition No. 91240303.

20 13. The term “person” means any natural person or any business, legal or
21 governmental entity, or association.

22 14. The term “document” as used herein is synonymous in meaning and equal in scope
23 to the usage of this term in Federal Rule of Civil Procedure 34, any “writings and recording” and
24 “photographs” as defined by Federal Rule of Evidence 1001, and its interpretation by the courts,
25 and includes, without limitation, all originals, drafts, and non-identical copies of any written,
26 printed, typed, recorded, electronic, magnetic, optical, punched, copied, graphic or other tangible
28 thing in, upon or from which information may be conveyed, embodied, translated, or stored
29 (including, but not limited to, papers, records, books, correspondence, contracts, minutes of

1 meetings, memoranda, notes or desk calendars and appointment books, intra-office
2 communications, canceled checks, invoices, telegrams, telexes, dictation or other audio tapes,
3 video tapes, studies, electronic mail, information stored in computer readable form, on a compact
4 disc, or any other type of data storage device or medium, computer printouts, microfilm,
5 microfiche, laser disks, diaries, calendars, photographs, charts, viewgraphs, drawings, sketches
6 and all other writings or drafts thereof), as well as all other tangible things subject to production
7 under Federal Rule of Civil Procedure 34.

8 15. The term “communication” is defined as any transmission or exchange of
9 information between two (2) or more persons, orally or in writing, and includes, without
10 limitation, any conversation or discussion, whether face-to-face or by means of telephone, letter,
11 facsimile, electronic, digital or other media.

12 16. The terms “relating to” and “related to” mean concerning, containing, evidencing,
13 describing, constituting, referring to, explaining, discussing or reflecting.

14 17. The connectives “and” and “or” and the term “and/or” shall be construed either
15 disjunctively or conjunctively as necessary to bring within the scope of the request all documents
16 that might otherwise be construed to be outside its scope.

17 18. The use of a present tense shall include past tenses.

18 19. The use of the singular form of any word also includes the plural and vice versa.

19 20. The terms “all” and “each” shall each be construed to include the other.

20 **INSTRUCTIONS**

21 1. You are requested to produce for inspection and copying all responsive documents and
22 things in your possession, custody or control, including all documents and things in the custody
23 of your attorneys, consultants, agents, other representatives, and other persons or entities subject
24 to your control.

25 2. You are to produce the documents and things as they are kept in the ordinary course of
26 business, with appropriate markings or designations so that it may be determined to which request
28 they are responsive.

29 3. You are to produce the original and all non-identical copies of each requested document

1 or thing, including all copies which bear any additional file stamps, marginal notes or other
2 additional markings or writings that do not appear on the original. The production shall include
3 the file, envelope, folder, binder, or other container in which the responsive documents and things
4 are kept. If, for any reason, the container cannot be produced, you are to produce copies of all
5 labels or other identifying markings.

6 4. Documents that exist in digital format and constitute or comprise databases or other
7 tabulations or collections of data or information should be produced in a machine-readable format
8 to be mutually agreed upon by the parties. Documents that exist in digital format and constitute or
9 comprise written communications between natural persons (e.g., e-mail messages, internal
10 memos, letters, etc.) should be produced both in a machine-readable format to be mutually agreed
11 upon by the parties and in hard-copy form.

12 5. If you cannot fully respond to any request after a diligent attempt, respond to the
13 request to the extent possible and specify the portion of the request to which you are unable to
14 respond.

15 6. If you claim that any request, definition or instruction is ambiguous, state the language
16 you claim is ambiguous and the interpretation you have used to respond to the request.

17 7. If you contend that any document or thing has been lost or destroyed, set forth the
18 contents of the document or thing, the location of any copies, the date of loss or destruction, the
19 name of the person who ordered or authorized the destruction, if any, and the authority and
20 reasons for such destruction.

21 8. If you decline to produce any information, document, or thing on this basis of the
22 attorney-client, work product, or other privilege, respond to so much of the discovery request as is
23 not subject to the claimed objection, and for each document or thing, provide the following
24 information:

- 25 a. the type and title of the document or thing;
- 26 b. the general subject matter of the document or description of the thing;
- 28 c. the date of its creation;
- 29 d. the identity of the document's author(s), addressee(s) and recipient(s);

1 e. the nature of the privilege being claimed; and

2 f. in detail, all facts upon which you base your claim of privilege.

3 9. With respect to any document stored on a machine-readable medium, please make
4 available both a hard copy printout of the document and a copy of the computer or electronic
5 tape, disc or other electronic medium on which the document is stored.

6 10. Complete production is to be made on the date and at the time indicated above.

7 11. You have a duty to supplement your responses from now until the time of hearing or
8 trial, as provided by Federal Rule of Procedure 26(e).

9 **DOCUMENTS AND THINGS REQUESTED**

10 **Request No. 1:**

11 Documents sufficient to reflect the commercial success, or lack thereof, of your products sold in
12 connection with the ERREA marks in U.S. interstate commerce.

13 **Request No. 2:**

14 All documents comprising or relating to your communications, including without limitation
15 internal communications and communications with third party persons, other than your
16 communications with your counsel, concerning Applicant, the THIRDLOVE mark or this
17 Opposition.

18 **Request No. 3:**

19 All documents reflecting or relating to any incident of actual confusion between you and
20 Applicant.

21 **Request No. 4:**

22 All documents reflecting or relating to any incident of actual confusion between the ERREA
23 marks and the THIRDLOVE mark.

24 **Request No. 5:**

25 All documents reflecting or relating to any incident of actual confusion between your products or
26 services and Applicant's products or services.

28 **Request No. 6:**

29 All documents (other than documents Applicant sent to you or that you sent to Applicant)

1 reflecting or relating to any incident or proceeding in the U.S. in which any person has challenged
2 your use or registration of, or that the rights you claim, in the ERREA marks including but not
3 limited to any demand to cease and desist.

4 **Request No. 7:**

5 All documents reflecting or relating to any incident or proceeding in the U.S. in which you have
6 challenged the rights of a third-party person based on the rights you claim to the ERREA marks,
7 including but not limited to any demand to cease and desist.

8 **Request No. 8:**

9 Documents sufficient to demonstrate your selection and adoption of the ERREA marks.

10 **Request No. 9:**

11 All documents reflecting or relating to your decision to file this Opposition.

12 **Request No. 10:**

13 All documents comprising, reflecting or relating to any investigation, trademark search, and/or
14 other inquiry conducted by you, and/or on your behalf, in connection with assessing the
15 availability, registrability, or use of the ERREA marks.

16 **Request No. 11:**

17 All documents comprising, reflecting or relating to studies, tests, ratings, and/or surveys in
18 connection with your products and services and the use of the ERREA marks.

19 **Request No. 12:**

20 All documents comprising, reflecting or relating to studies, tests, ratings, and/or surveys in
21 connection with Applicant, the THIRDLOVE application or the THIRDLOVE mark.

22 **Request No. 13:**

23 Documents sufficient to demonstrate your use of the ERREA marks in connection with bras,
24 lingerie, panties and underwear in U.S. interstate commerce.

25 **Request No. 14:**

26 Documents sufficient to demonstrate your use of the ERREA marks in connection with
28 loungewear or sleepwear for women in U.S. interstate commerce.

29 **Request No. 15:**

1 Documents sufficient to demonstrate your use of the ERREA marks in connection with bottoms
2 or tops as clothing for women in U.S. interstate commerce.

3 **Request No. 16:**

4 Documents sufficient to demonstrate your use of the ERREA marks in connection with clothing
5 in U.S. interstate commerce.

6 **Request No. 17:**

7 Documents sufficient to demonstrate your use of the ERREA marks on any product or service in
8 the U.S.

9 **Request No. 18:**

10 Documents sufficient to identify every product and service on or in connection with which you
11 have used or are using the ERREA marks in U.S. interstate commerce.

12 **Request No. 19:**

13 Documents sufficient to demonstrate the first use in U.S. interstate commerce (including the
14 dates) of the ERREA marks on or in connection with each of your products and services.

15 **Request No. 20:**

16 Documents sufficient to demonstrate your past and present efforts to promote or expand public
17 awareness of the ERREA marks in the U.S.

18 **Request No. 21:**

19 All license agreements, or consents to use, that you have granted to third parties for the ERREA
20 marks in the U.S.

21 **Request No. 22:**

22 Documents sufficient to demonstrate your plans to use, or plans to license others to use, the
23 ERREA marks on or otherwise in connection with bras, lingerie, panties or underwear in the U.S.

24 **Request No. 23:**

25 Documents sufficient to demonstrate your plans to use, or plans to license others to use, the
26 ERREA marks on or otherwise in connection with loungewear or sleepwear for women in the
28 U.S.

29 **Request No. 24:**

1 Documents sufficient to demonstrate your plans to use, or plans to license others to use, the
2 ERREA marks on or otherwise in connection with bottoms or tops as clothing for women in the
3 U.S.

4 **Request No. 25:**

5 Documents sufficient to demonstrate your plans for future use of, or plans to license others in the
6 future to use, the ERREA marks in the U.S.

7 **Request No. 26:**

8 Documents sufficient to show your annual expenditures on domestic advertising and marketing
9 using the ERREA marks since first use in the United States.

10 **Request No. 27:**

11 Documents sufficient to show the geographic scope of your business and promotional activities
12 using the ERREA marks in the U.S.

13 **Request No. 28:**

14 One copy of each advertising, marketing, and promotional material showing use of the ERREA
15 marks on any goods or services in U.S. interstate commerce, including but not limited to web
16 pages, catalogs, circulars, leaflets, direct mail pieces, brochures, point of sale pieces, press
17 releases, web-based advertisements (including but not limited to banner ads), newspaper and
18 magazine advertisements and articles, transcripts and audio tapes for radio advertisements, and
19 transcripts and video tapes of television advertisements.

20 **Request No. 29:**

21 A copy of each print or online publication in which your clothing products bearing the ERREA
22 marks have appeared in the U.S.

23 **Request No. 30:**

24 All documents reflecting or relating to the target markets to which you have offered, or intended
25 to offer, products or services identified by the ERREA marks in the U.S.

26 **Request No. 31:**

27 Documents sufficient to identify trade shows or conferences in the U.S. that you have attended
28 and promoted clothing products in connection with the ERREA marks in the U.S.
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Request No. 32:

All documents reflecting or relating to the channels of trade through which you have sold or offered for sale clothing products identified with the ERREA marks in the U.S.

Request No. 33:

Documents sufficient to show the prices of all products or services you offer in connection with the ERREA marks in the U.S.

Request No. 34:

Documents sufficient to identify the persons involved in design, sales, marketing, communications, business strategy, or business planning for use of the ERREA marks and clothing sold in connection with the ERREA marks in the U.S.

Request No. 35:

Documents sufficient to identify all advertising agencies or consultants engaged by you for advertising and promoting products or services on or in connection with the ERREA marks in U.S. interstate commerce.

Request No. 36:

Documents sufficient to identify the advertising agency employees or consultants that have the most knowledge of the advertisement and promotion of products or services offered under the ERREA marks in the U.S.

Request No. 37:

All documents comprising or otherwise related to e-mail communications directed to, addressed to, or intended for, Applicant but received by you.

Request No. 38:

All documents comprising or related to communications, other than e-mail, directed to, addressed to, or intended for Applicant but received by you.

Request No. 39:

All documents reflecting or otherwise related to your knowledge of Applicant before you initiated this Opposition.

Request No. 40:

1 Documents sufficient to show your policies regarding retention, storage, filing and destruction of
2 electronic mail, documents and things.

3 **Request No. 41:**

4 All documents requested to be identified in response to Applicant's First Set of Interrogatories to
5 you.

6 DATED: September 13, 2019

7 Respectfully submitted

8 By:

/s/ Kent M. Walker 

9 KENT M. WALKER

10 LEWIS KOHN & WALKER LLP

11 Attorney for Applicant

12 Reg. No.: 38,649

13 15030 Avenue of Science, Ste. 201

14 San Diego, CA 92128

15 (858) 436-1330 (telephone)

16 (858) 436-1349 (facsimile)

17 kwalker@lewiskohn.com

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CERTIFICATE OF SERVICE

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I hereby certify the following:

On September 13, 19, a true and correct copy of the foregoing Applicant’s Document Requests is being served by First Class mail, postage prepaid, on Opposer via its counsel at the address below and via email to the email addresses below:

Robert B. Golden
LACKENBACH SIEGEL, LLP
One Chase Road
Lackenbach Siegel Building,
Scarsdale, NY 10583

RGolden@LSLLP.com
TMEFS@LSLLP.com

I declare under penalties of perjury under the laws of the United States that the foregoing is true and correct.

/s/ Kent M. Walker 
KENT M. WALKER
kwalker@lewiskohn.com
LEWIS KOHN & WALKER LLP
KENT M. WALKER (173700)

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

Application Serial No.: 87/543,806
Mark: 
International Classes: 25 & 35
Applicant: MeCommerce, Inc.
Published in *Official Gazette*: November 28, 2017

ERREA' SPORT S.P.A.,	X	
	:	
Opposer,	:	
	:	
v.	:	
	:	Opposition No. 91240303
THIRDLOVE, INC., F/K/A MECOMMERCE, INC.	:	
	:	
Applicant.	X	

**OPPOSER’S OBJECTIONS AND RESPONSES
TO APPLICANT’S DOCUMENT REQUESTS**

Pursuant to Trademark Board Manual of Procedure (“T.B.M.P.”) § 406, 37 C.F.R. § 2.120, and Fed.R.Civ.P. 26 and 34, opposer, ERREA’ SPORT S.P.A. (“Opposer”), hereby responds to applicant THIRDLOVE, INC., f/k/a MECOMMERCE, INC.’s (“Applicant”) First Set of Requests for the Production of Documents (the “Requests” or singularly a “Request”) (all collectively the “Responses” or individually a “Response”).

General Objections

Opposer’s Responses to individual Requests are all subject to the following general objections, where applicable (the “General Objections”):

1. Opposer objects to the Requests to the extent any Request(s) seek(s) documents and/or information for a time period for which such documents and/or information is not

reasonably and/or cost effectively accessible and/or available, and further to the extent any Request(s) seek(s) documents from, and/or information concerning, any period of time beyond the time period relevant to any of the allegations, defenses, and/or issues set forth in the operative pleadings in this action.

2. Opposer further objects to the Requests to the extent any Request(s) seek(s) documents and/or information beyond the scope of the allegations, defenses, and/or issues set forth in the operative pleadings in this action.

3. Opposer further objects to the Requests to the extent any Request(s) seek(s) documents and/or information related to any actions or use of the parties' respective marks outside of the United States, as it is beyond the scope of the TTAB's jurisdiction. To the extent not so limited, Opposer's Responses and documents will be limited to actions and use in the United States.

4. Opposer further objects to the Requests to the extent that they seek, or would result in, the disclosure of documents, communications, and other information protected by the attorney-client privilege, and/or materials produced by and/or for attorneys in anticipation of, and/or during litigation and/or protected from disclosure by the work-product doctrine. In the event that any privileged information is disclosed, such disclosure shall be deemed unintentional and shall not constitute a waiver of privilege.

5. Opposer further objects to the Requests to the extent that they seek confidential, sensitive, and/or proprietary trade secrets, financial, and/or other confidential business information, and/or information subject to rights of privacy and/or publicity (the "Confidential Information"). Opposer will only produce such Confidential Information pursuant to, and in accordance with, the protective order governing oppositions before the Board, and specifically

this case. Opposer further reserves the right to withhold disclosure of any documents and/or information that Opposer is bound to keep confidential pursuant to any contract or agreement with any third party from whom Opposer cannot obtain a waiver or consent.

6. Opposer further objects to the Requests to the extent that they purport to require Applicant to obtain information from unaffiliated third parties or otherwise to identify or obtain documents and/or information that are not within its possession, custody, and/or control.

7. Opposer further objects to the Requests to the extent that they seek unreasonably cumulative and/or duplicative documents and/or information. To the extent any such production would be cumulative and/or duplicative, Opposer will provide representative samples of responsive documents and/or information to satisfy adequately its burden, if any, in responding to the Requests.

8. Opposer further objects to the Requests to the extent that they seek the discovery of information that Applicant is able to obtain by less burdensome and/or costly means than formal discovery requests, whether because responsive documents and/or information can be obtained from non-parties, is publicly available, is already in Applicant's possession and/or control, and/or otherwise.

9. Opposer further objects to the Requests to the extent that they are overly broad, vague, and/or unduly burdensome to the extent that compliance with the Requests would be cost-prohibitive, impractical, and/or impossible because such Requests, including Requests calling at least in part for the production of public documents and/or electronically stored communications, documents, and/or other information (collectively, "ESI"), are not proportional to the needs of the case and the burden and expense of responding outweighs the likely benefit of the response and/or production. Opposer will nevertheless endeavor to comply reasonably with each such

Request, and reserves the right to seek an extension of time to respond accordingly and/or provide representative samples of documents.

10. Opposer further objects to the Requests to the extent that the Requests seek documents and/or information in a form not kept in the ordinary course of business. Opposer will use its best efforts, however, to respond to such Requests by providing documents and/or information that is, or has been, kept in the ordinary course of Opposer's business.

11. Opposer further objects to the instructions and definitions in, and to the Requests themselves, to the extent that they exceed and/or are inconsistent with the requirements of the Federal Rules of Civil Procedure, the T.B.M.P. and/or any other applicable rules, regulations and/or law, and to the extent that they seek information or documents beyond what can be made available from a reasonable investigation and production.

12. Opposer objects to "Definition" No. 1 to the extent that the definition defines Opposer to include persons or entities that, under applicable legal definitions of Opposer, are legally separate persons or entities. Accordingly, all Requests shall be deemed limited to Opposer.

13. Opposer objects to "Definition" Nos. 5 – 8 to the extent that conflate the "marks" referenced therein with the "Registrations" referenced therein.

14. Opposer objects to "Instruction" No. 2, which purports to require Opposer to "produce the documents and things as they are kept in the ordinary course of business, with appropriate markings or designations so that it may be determined to which request they are responsive. As provided in Fed.R.Civ.P., 34(b)(2)(E) (i), as made applicable by 37 C.F.R. § 2.120(d)(2) and as detailed in TBMP § 406.04(b), in responding to these Requests, Opposer "must produce documents as they are kept in the usual course of business or must organize and

label them to correspond to the categories in the request” (emphasis added). To the extent Instruction No. 2 purports to require Opposer to both produce the documents as they are kept in the ordinary course **and** marked or designated, Opposer objects. In responding to the Requests, Opposer will make responsive documents available for inspection and copying where and how they are kept in the ordinary course of Opposer’s business.

15. Opposer objects to “Instruction” Nos. 3 and 9 to the extent they purport to require Opposer to produce certain ESI “both in a machine-readable format . . . and in hard-copy form.” As provided in Fed.R.Civ.P., 34(b)(2)(E) (i), as made applicable by 37 C.F.R. § 2.120(d)(2) and as detailed in TBMP § 406.04(b), in responding to these Requests, Opposer “does not have to produce electronically stored information in more than one form.”

16. Opposer objects to the preamble of the Requests and to Instruction No. 10 to the extent it incorporates the preamble, to the extent they purport to require Opposer to produce copies of responsive documents to Applicant at the offices of Applicant’s counsel. As provided in Fed.R.Civ.P., 34(b)(2)(E) (i), as made applicable by 37 C.F.R. § 2.120(d)(2) and as detailed in TBMP § 406.04(b), in responding to these Requests, Opposer “is only obliged to make documents and materials available for inspection and copying, where the documents are stored.” Accordingly, unless and until the parties to this Opposition reach some other agreement, responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

SPECIFIC RESPONSES AND OBJECTIONS

As stated above, each of Opposer's General Objections is incorporated into each of the following specific Responses and objections ("Specific Objections") to Applicant's Requests as numbered below:

Request No. 1:

Response: Opposer objects to this Request to the extent the phrase "commercial success" is vague and ambiguous. In responding to this Request, Opposer has presumed that the phrase "commercial success" means sales volumes, in units and/or dollars, and media coverage.

Subject to and without waiving the foregoing General and Specific Objections, Opposer will make responsive, non-privileged documents available for inspection and copying where and how they are kept in the ordinary course.

Request No. 2

Response: No such responsive documents exist.

Request No. 3

Response: No such responsive documents exist.

Request No. 4

Response: No such responsive documents exist.

Request No. 5

Response: No such responsive documents exist.

Request No. 6

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any

counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, this Request seeks documents that would be relevant only to a counterclaim attacking the validity of Opposer's asserted Registrations. Applicant, however, elected not to assert any counterclaims attacking the asserted Registrations and thus, discovery relevant only to such an attack is precluded.

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 7

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, "incident[s] or proceeding[s] in the U.S." where Opposer challenged the rights of a third-party have no impact on the likelihood of confusion analysis involved in this Opposition, as the marks at issue in any such third-party proceedings are not the same as the marks at issue in this Opposition. Opposer further objects in that to the extent responsive

documents may exist, they would be available, in large part, to Applicant in the same manner they are available to Opposer, *e.g.*, via a TTABVue or PACER search.

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 8

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, documents "sufficient to demonstrate your selection and adoption of the ERREA marks" have no impact on the likelihood of confusion analysis involved in this Opposition. If relevant to any issues, such documents would be relevant only to Opposer's intent in originally selecting its ERREA mark, but such issues of Opposer's intent would only be relevant to the extent Applicant had asserted counterclaims for cancellation of Opposer's asserted Registrations on the ground of priority and likelihood of confusion (an accused infringer's intent being a relevant *DuPont* factor).

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 9

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, documents "relating to [Opposer's] decision to file this Opposition" have no impact on the likelihood of confusion analysis involved in this Opposition.

To the extent such documents do exist, they are protected by the attorney client privilege. Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 10

Response: Opposer objects to this Request to the extent it is duplicative of Request No. 8, and respectfully directs Applicant to Opposer's Response thereto. Opposer further objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, documents relating to Opposer's investigations, trademark searches, and/or other inquiries in connection with assessing the availability, registrability or use of the ERREA marks have no impact on the likelihood of confusion analysis involved in this Opposition. If relevant to any issues, such documents would be relevant only to Opposer's intent in originally selecting its ERREA marks, but such issues of Opposer's intent would only be relevant to the extent Applicant had asserted counterclaims for cancellation of Opposer's asserted Registrations on the ground of priority and likelihood of confusion (an accused infringer's intent being a relevant *DuPont* factor).

To the extent such documents do exist, they are protected by the attorney client privilege. Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 11

Response: No such responsive documents exist.

Request No. 12

Response: No such responsive documents exist.

Request No. 13

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties. By way of example only, representative samples can be found at: <https://erreausa.com/collections/errea-teamwear/products/dafne-top>
<https://erreausa.com/collections/errea-teamwear/products/denise-slip>
<https://www.errea.com/slip-man-rigel-ad-u675.html>

Request No. 14

Response: Opposer objects to this Request to the extent the terms “loungewear and sleepwear” are vague and ambiguous, and no definition is provided for these terms. In responding to this Request, Opposer has presumed that the terms refer to any clothing items that women can and do routinely sleep in. Responsive documents, based on Opposer’s understanding of the terms, will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties. By way of example only, a representative sample can be found at: <https://www.errea.com/sport-fusion-ss19-woman-round-neck-sweatshirt-ad-r19g0l0z.html>

Request No. 15

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties. By way of example only, representative samples can be found at: <https://erreusa.com/collections/bottom/products/premier-short>
<https://erreusa.com/collections/tops/products/glenda-shirt>

Request No. 16

Response: Opposer objects to this Request to the extent it is duplicative of Requests 13-15 and 18, and respectfully directs Applicant to Opposer’s Responses thereto. To the extent not duplicative, responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties. By way of example only, representative samples can be found at: <https://erreusa.com/collections/calf/products/recovery-socks>

Request No. 17

Response: Opposer objects to this Request to the extent it is duplicative of Requests 13-16 and 18, and respectfully directs Applicant to Opposer's Responses thereto. To the extent not duplicative, responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties. By way of example only, representative samples can be found at:

<https://erreusa.com/collections/accessories/products/shooting-arm-sleeve-artio>

<https://erreusa.com/collections/accessories/products/recovery-leg-warmer>

<https://erreusa.com/collections/accessories/products/ksi-iceland-scarf>

<https://erreusa.com/collections/bottom/products/isabel-shorts>

Request No. 18

Response: Opposer objects to this Request to the extent it is duplicative of Requests 13-17, and respectfully directs Applicant to Opposer's Responses thereto. To the extent not duplicative, responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties. By way of example only, representative samples can be found at:

<https://erreusa.com>

<https://www.errea.com>

Request No. 19

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties'

relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, documents relating to Opposer's "first use" of its marks have no impact on the likelihood of confusion analysis involved in this Opposition. If relevant to any issues, such documents would be relevant only to Opposer's priority of use – but only to the extent Applicant had asserted counterclaims for cancellation of Opposer's asserted Registrations on the ground of priority and likelihood of confusion.

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 20

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 21

Response: No such responsive documents exist.

Request No. 22

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in

resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, in light of the evidence of current use of the relevant marks on the goods specified in this Request and in the absence of a claim of abandonment, documents relating to “plans to use” or license in the future are not relevant and/or the costs and effort of production of such documents is not proportional to the needs of the case

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 23

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer’s claims or Applicant’s Defenses (especially in the absence of any counterclaims attacking any of Opposer’s asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, in light of the evidence of current use of the relevant marks on the goods specified in this Request and in the absence of a claim of abandonment, documents relating to “plans to use” or license in the future are not relevant and/or the costs and effort of production of such documents is not proportional to the needs of the case

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 24

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer’s claims or Applicant’s Defenses (especially in the absence of any counterclaims attacking any of Opposer’s asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, in light the evidence of current use of the relevant marks on the goods specified in this Request and in the absence of a claim of abandonment, documents relating to “plans to use” or license in the future are not relevant and/or the costs and effort of production of such documents is not proportional to the needs of the case

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 25

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer’s claims or Applicant’s Defenses (especially in the absence of any counterclaims attacking any of Opposer’s asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, in light the evidence of current use of the relevant marks on the goods specified in this Request and in the absence of a claim of abandonment, documents relating to

“plans to use” or license in the future are not relevant and/or costs and effort of production of such documents is not proportional to the needs of the case

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 26

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 27

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer’s claims or Applicant’s Defenses (especially in the absence of any counterclaims attacking any of Opposer’s asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, documents relating to the geographic scope of Opposer’s business and promotional activities in the U.S. have no impact on the likelihood of confusion analysis involved in this Opposition. If relevant to any issues, such documents would be relevant only to Opposer’s priority of use, or priority in a specific geographic area – but only to the extent Applicant had asserted counterclaims for cancellation of Opposer’s asserted Registrations on the ground of priority and likelihood of confusion, or had commenced a concurrent use proceeding.

Accordingly, Opposer will not make responsive documents, if any, available for inspection and copying.

Request No. 28

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, Opposer objects to the Request to the extent it seeks "one copy of **each** advertisement," etc. A request for each and every such document renders the Request unduly burdensome, cost-prohibitive, and/or impractical. Opposer further object to the extent the Request seeks production of web pages, which are available to Applicant in the same manner they are available to Opposer.

Subject to these objections, representative responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 29

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the

needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, Opposer objects to the Request to the extent it seeks "a copy of **each** print or online publication" A request for each and every such document renders the Request unduly burdensome , cost-prohibitive, and /or impractical. Opposer further object to the extent the Request seeks production of documents (publications in which Opposer's products may have appeared) that Opposer had no prior obligation to retain (prior to its knowledge that it may institute this Proceeding) and thus, may not have retained.

Subject to these objections, representative responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 30

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, Opposer objects to the Request to the extent it seeks "**all** documents reflecting or relating to target markets" A request for each and every such document

renders the Request unduly burdensome, cost-prohibitive, and /or impractical.

Subject to these objections, representative responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 31

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 32

Response: Opposer objects to this Request because it seeks documents that are not relevant to Opposer's claims or Applicant's Defenses (especially in the absence of any counterclaims attacking any of Opposer's asserted Registrations) and/or not proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

More specifically, Opposer objects to the Request to the extent it seeks "**all** documents reflecting or relating to channels of trade" A request for each and every such document renders the Request unduly burdensome, cost-prohibitive, and /or impractical.

Subject to these objections, representative responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 33

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 34

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 35

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 36

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 37

Response: No such responsive documents exist.

Request No. 38

Response: No such responsive documents exist.

Request No. 39

Response: No such responsive documents exist.

Request No. 40

Response: Responsive documents will be made available for inspection and copying where they are stored and as they are kept in the ordinary course of business, at a time to be agreed to mutually by the parties.

Request No. 41

Response: Opposer objects Opposer objects to this Request pursuant to TBMP § 405.03(e), which provides in pertinent part: “Although there are no limitations on the number of document requests that may be served, a party may properly refuse to respond to a document request seeking all documents identified or referred to in response to interrogatories if the number of interrogatories is believed to be excessive.” As explained in Opposer’s Objections and responses to Applicant’s Interrogatories, Applicant served an excessive number of interrogatories.

Without waiving any objections, based on the nature of Opposer’s objections to Applicant’s Interrogatories, no such documents exist.

Dated: Scarsdale, New York
October 15, 2019

Respectfully submitted,

LACKENBACH SIEGEL LLP

By: /s/ Robert Golden
Robert B. Golden
1 Chase Road
Scarsdale, New York 10583
Phone: (914) 723-4300
RGolden@LSLLP.com
Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served on Applicant via electronic mail, addressed to Applicant's counsel as follows:

KENT M WALKER
LEWIS KOHN & WALKER LLP
15030 AVENUE OF SCIENCE, SUITE 201
SAN DIEGO, CA 92128
UNITED STATES

kwalker@lewiskohn.com, kmoyerhenry@lewiskohn.com, jlumanlan@lewiskohn.com

Dated: Scarsdale, New York
October 15, 2019

/s/ Marlana Del Colle
Marlana Del Colle

EXHIBIT C

From: [Kent Walker](#)
To: [Robert Golden](#)
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo
Date: Tuesday, November 26, 2019 2:52:00 PM
Attachments: [withdraw_opposition_errea.doc](#)

Rob, are you willing to sign off on a dismissal. See attached proposal. It would be much more efficient for the TTAB and us. Our client would be willing reimburse for you for reasonable fees for review, approval of this. I expect we could file it since it's a consented doc.

Kent M. Walker
Lewis Kohn & Walker LLP
Direct 858.436.1333 | Cell 858.231.4713 | Fax 858.436.1349 kwalker@lewiskohn.com |
www.lewiskohn.com

From: Kent Walker
Sent: Friday, November 22, 2019 2:02 PM
To: Robert Golden <rgolden@lslp.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Rob, this follows our discussion this pm. From what you said, it is my understanding that your client has instructed you to take no further action on this opposition and to let it be in effect abandoned by nonactivity on your client's part. You suggested we could file a motion to compel, receive no response from Errea and seek an order on that and/or to wait until your client's evidentiary period is over and file a similar request for dismissal for failure to present evidence of an affirmative case. I asked if your client would be willing to file a dismissal of the opposition, which you agreed would be more efficient, but you indicated your client has instructed you to take no further action and you intend to follow that instruction. I appreciate you conveying this information so we know, although we maintain that filing a dismissal would be much more efficient. Our client will of course be pleased that the opposition will eventually be dismissed by the TTAB, so that our client can get its registration.

Kent M. Walker
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Direct 858.436.1333 | Cell 858.231.4713 | Fax 858.436.1349 kwalker@lewiskohn.com |
www.lewiskohn.com

From: Robert Golden <rgolden@lslp.com>
Sent: Friday, November 22, 2019 1:44 PM
To: Kent Walker <kwalker@lewiskohn.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

I am available now, until about 6:00 NY time, or both Monday and Tuesday.

Rob

Robert B. Golden
Lackenbach Siegel LLP
One Chase Road
Scarsdale, New York 10583
(914) 723-4394
(914) 723-4301 (fax)
rgolden@LSLLP.com <<mailto:rgolden@lsllp.com>>

From: Kent Walker [<mailto:kwalker@lewiskohn.com>]
Sent: Friday, November 22, 2019 4:43 PM
To: Robert Golden
Cc: Marlana Del Colle; Ginger Stauffer
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Are you available this pm or Monday or Tuesday?

Kent M. Walker
Lewis Kohn & Walker LLP
Direct 858.436.1333 | Cell 858.231.4713 | Fax 858.436.1349 kwalker@lewiskohn.com |
www.lewiskohn.com

From: Kent Walker
Sent: Thursday, November 21, 2019 1:47 PM
To: Robert Golden <rgolden@lsllp.com>
Cc: Marlana Del Colle <mdelcolle@lsllp.com>; Ginger Stauffer <GStauffer@lewiskohn.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Rob, this confirms receipt of your vm today, and I just left a message. Yes, I'd like to talk as well. Do you have time tomorrow? Say 10 or 11 am Pacific Time?

Kent M. Walker
Lewis Kohn & Walker LLP
Direct 858.436.1333 | Cell 858.231.4713 | Fax 858.436.1349 kwalker@lewiskohn.com |
www.lewiskohn.com

From: Kent Walker
Sent: Wednesday, November 13, 2019 5:51 PM
To: Robert Golden <rgolden@lsllp.com>
Cc: Marlana Del Colle <mdelcolle@lsllp.com>; Ginger Stauffer <GStauffer@lewiskohn.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Robert, please send your client's initial disclosures. Is your client not willing to provide them? Let me know. I have asked multiple times as you know.

Kent M. Walker
Lewis Kohn & Walker LLP
Direct 858.436.1333 | Cell 858.231.4713 | Fax 858.436.1349 kwalker@lewiskohn.com |
www.lewiskohn.com

From: Kent Walker
Sent: Thursday, November 7, 2019 3:22 PM
To: Robert Golden <rgolden@lslp.com>
Cc: Marlana Del Colle <mdelcolle@lslp.com>; Ginger Stauffer <GStauffer@lewiskohn.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Robert,

Will you send your client's initial disclosures?

I'll continue to wait to hear from you regarding the interrogatories, but please let me know as soon as you can.

As to the document requests, as shown below, for those that Errea refused to produce documents, we point to grounds for relevance for each of those, and request to meet and confer to see if we can reach agreement for Errea to provide responsive documents.

Request	Response	Relevance
Request No. 6: All documents (other than documents Applicant sent to you or that you sent to Applicant) reflecting or relating to any incident or proceeding in the U.S. in which any person has challenged your use or registration of, or that the rights you claim, in the ERREA marks including but not limited to any demand to cease and desist.	Refuse to produce responsive docs, if any.	number and nature of similar marks in use on similar goods,
Request No. 7: All documents reflecting or relating to any incident or proceeding in the U.S. in which you have challenged the rights of a third-party person based on the rights you claim to the ERREA marks, including but not limited to any demand to cease and desist.	Refuse to produce responsive docs, if any.	number and nature of similar marks in use on similar goods,
Request No. 8: Documents sufficient to demonstrate your selection and adoption of the ERREA marks.	Refuse to produce responsive docs, if any.	Connotation of the mark,
Request No. 19: Documents sufficient to demonstrate the first use in U.S. interstate commerce (including the dates) of the ERREA marks on or in connection with each of your	Refuse to produce responsive docs, if any.	length of time and conditions of concurrent use without evidence of actual confusion,

products and services.		also, Errea's registrations do not provide first use dates
Request No. 22: Documents sufficient to demonstrate your plans to use, or plans to license others to use, the ERREA marks on or otherwise in connection with bras, lingerie, panties or underwear in the U.S.	Refuse to produce responsive docs, if any.	similarity of established, likely-to-continue channels of trade, conditions under which sales are made,
Request No. 23: Documents sufficient to demonstrate your plans to use, or plans to license others to use, the ERREA marks on or otherwise in connection with loungewear or sleepwear for women in the U.S.	Refuse to produce responsive docs, if any.	" "
Request No. 24: Documents sufficient to demonstrate your plans to use, or plans to license others to use, the ERREA marks on or otherwise in connection with bottoms or tops as clothing for women in the U.S.	Refuse to produce responsive docs, if any.	" "
Request No. 25: Documents sufficient to demonstrate your plans for future use of, or plans to license others in the future to use, the ERREA marks in the U.S.	Refuse to produce responsive docs, if any.	" "
Request No. 27: Documents sufficient to show the geographic scope of your business and promotional activities using the ERREA marks in the U.S.	Refuse to produce responsive docs, if any.	similarity of established, likely-to-continue channels of trade, conditions under which sales are made, length of time and conditions of concurrent use without evidence of actual confusion,

Kent M. Walker

Lewis Kohn & Walker LLP

Direct 858.436.1333 | Cell 858.231.4713 | Fax 858.436.1349 kwalker@lewiskohn.com |

www.lewiskohn.com

From: Robert Golden <rgolden@lslp.com>

Sent: Thursday, October 31, 2019 2:04 PM

To: Kent Walker <kwalker@lewiskohn.com>

Cc: Marlana Del Colle <mdelcolle@lslp.com>

Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Kent:

We acknowledge receipt. I will get back to you on the substantive issues as soon as I can get to them.

Rob

Robert B. Golden
Lackenbach Siegel LLP
One Chase Road
Scarsdale, New York 10583
(914) 723-4394
(914) 723-4301 (fax)
rgolden@LSLLP.com <<mailto:rgolden@lslp.com>>

From: Kent Walker [<mailto:kwalker@lewiskohn.com>]
Sent: Thursday, October 31, 2019 4:47 PM
To: Robert Golden
Cc: Ginger Stauffer
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Robert,

I attach a service copy of ThirdLove's first amended set of interrogatories. We'll mail a service copy too for good measure, although please confirm we agree to email service going forward. Please also let me know as soon as possible if your client will contend these amended interrogatories exceed 75.

As to the RFP's, where does your client propose to make documents available for inspection?

Please also provide your client's initial disclosures.

Kent M. Walker
Lewis Kohn & Walker LLP
Direct 858.436.1333 | Cell 858.231.4713 | Fax 858.436.1349 kwalker@lewiskohn.com |
www.lewiskohn.com

From: Robert Golden <rgolden@lslp.com>
Sent: Thursday, October 31, 2019 12:23 PM
To: Kent Walker <kwalker@lewiskohn.com>
Cc: Ginger Stauffer <GStauffer@lewiskohn.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Kent:

We disagree with your analysis. We believe the portions of the TBMP we cited in our objection are clear on the issue.

An interrogatory asking about "trade or marketing channels" must be counted as two interrogatories. If "trade" and "marketing" refer to the identical subject, there would have been no reason for you to specify both. The only reason to include both is because they have different meanings, and you intended your interrogatory to cover both. Thus, the following TBMP explanation controls: "If an interrogatory requests information concerning more than one issue, such as information concerning both 'sales and advertising figures, or both 'adoption and use,' the Board will count each issue on which information is sought as a separate interrogatory." "Trade or marketing" is analogous to "adoption and use." Thus, Interrogatory 5 must be counted as two interrogatories.

With respect to Interrogatory 33 and those similarly phrased, the following explanation controls: "Similarly, if an interrogatory begins with a broad introductory clause ('Describe fully the facts and circumstances surrounding applicant's first use of the mark XYZ, including:') followed by several subparts ('Applicant's date of first use of the mark on the goods listed in the application,' 'Applicant's date of first use of the mark on such goods in commerce,' etc.), the Board will count the broad introductory clause and each subpart as a separate interrogatory, whether or not the subparts are separately designated." Applying this TBMP directive to Interrogatory 33, it should be counted as either 3 or 6 interrogatories, or possibly 12 interrogatories – a broad introductory clause ("Identify the nature and title"), which itself can be consider two separate interrogatories, followed by two subparts (date and geographic scope), all applied to both products and services. At the very least, the introductory clause and the two subparts add to three interrogatories. Depending upon how the Board may treat "nature and title" which are two discrete pieces of information, and "products and services," it could be as many as 12 interrogatories.

By way of further explanation, if for each advertisement, we were to provide only the title of the ad, the response would be incomplete as the interrogatory is worded, as we would not have provided. If we provided only the titles, I presume you would object to the response as being incomplete because it did not include the date, the nature of the ad, or geographic scope. Thus you Interrogatory is analogous to the above-quoted example from the TBMP – a broad introductory phrase followed by several subpart in the nature of more specific factual inquiries.

Even if Interrogatory 33 is counted as only three interrogatories, and all other similar interrogatories are treated in the same manner, it is clear that there are more than 75. I have no intention of rewriting your interrogatories for you so that they comply with the TTAB Rules.

Rob

Robert B. Golden
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One Chase Road
Scarsdale, New York 10583
(914) 723-4394
(914) 723-4301 (fax)

rgolden@LSLLP.com <<mailto:rgolden@lsllp.com>>

From: Kent Walker [<mailto:kwalker@lewiskohn.com>]
Sent: Friday, October 25, 2019 7:39 PM
To: Robert Golden
Cc: Ginger Stauffer
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Robert,

On the interrogatory issue, we think as currently written there are less than 75, but would prefer to avoid a motion to compel. Your objections are not sufficiently detailed, at least not enough for us to know how you are counting 150 interrogatories. You gave Rogs 33 and 5, and some sample phrases from other rogs, as examples of a broad introductory clause and then multiple subparts, but we submit they each ask a single question, or all relevant facts and circumstances concerning a single issue. See rogs below, and see, e.g., Jan Bell Mktg., Inc. v. Centennial Jewelers, Inc., 19 USPQ2d 1636, 1637 (TTAB 1990). For rog 33, the issue is identification of the media in which the products and services are advertised. That is a single issue. The "including" phrase does not make it multiple questions. As to rog 5, you identified the phrase "trade or marketing channels," but "common trade or marketing channels you share" seems like a single issue. Without identifying the rogs, you also identified these phrases "target markets and characteristics (presumably rog 38, which includes the phrase "target markets and characteristics of targeted consumers,") "competitors and their competing products" (rog 39 includes the phrase "your major competitors and their competing products or services in the U.S"), "sales and distribution" (rogs 19 and 43 include the phrase "Identify the persons most knowledgeable about the sales and distribution of the products and services"), and "advertising and promotion" (used in rogs 20, 31, 32, 44, 55). But, these phrases seems like single issues as well. Distribution is part of sales and promotion is part of advertising, and vice versa, for example. Competitors and their competing products are a single issue.

Rog. 33. Identify the nature and title (if applicable) of the media in which all advertisements of the products and services identified in response to Interrogatory No. 11 have appeared in the U.S., including the date of, and geographic scope (by city and state) of such advertisements.

Rog. 5. Identify any common trade or marketing channels you share with Applicant in the U.S.

I would like to resolve this short of a motion to compel, and I am willing to narrow the rogs to do that. But, I'd like to avoid doing that and getting another set of nonresponses. What are you willing to do to help avoid that, such as provide more info on how you calculate 150 rogs so we can revise in response to that, review a revised set and confirm you will not object that the number exceeds 75? I suppose I could revise and avoid the "and" phrases you pointed to in your objection. Would that resolve the dispute over the number of rogs?

As to the RFP's, where does your client propose to make documents available for inspection?

Please also provide your client's initial disclosures.

Kent M. Walker

Lewis Kohn & Walker LLP

Direct 858.436.1333 | Cell 858.231.4713 | Fax 858.436.1349 kwalker@lewiskohn.com | www.lewiskohn.com

From: Robert Golden <rgolden@lsllp.com>

Sent: Tuesday, October 22, 2019 2:39 PM

To: Kent Walker <kwalker@lewiskohn.com>

Cc: Ginger Stauffer <GStauffer@lewiskohn.com>

Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Kent:

We are happy to meet and confer at your convenience.

On the interrogatory issue, I think the ball is in your court. The TTAB rules are clear. If we think there were too many interrogatories (counting them in accordance with the TTAB rules), we are required to object generally and not answer any of them. The TBMP explicitly states that we are not to answer the first 75 interrogatories. You have the option of either reserving a new set that complies with the rules (75 or less interrogatories, including subparts), or if you think as currently written there are less than 75, you can make a motion to compel. Our objections were fairly detailed, such that I believe you can determine how we calculated the number of interrogatories, but as noted above, we are happy to discuss the issue further.

With respect to the RFP's, we reject your characterization that we have agreed to respond to only 2 Requests. On its face, the responses and objections clearly indicate that Opposer will make responsive documents available for inspection and copying in response to 18 of the Requests. We additionally responded that no responsive documents exist with respect to 10 of the Requests. The fact that Opposer does not have documents responsive to numerous of your requests is neither unusual nor inappropriate, especially considering the nature of your requests. For example, you have no less than six Requests directed to actual confusion / misdirected communications. If there are no documents evidencing actual confusion, then there will necessarily be six responses saying "no such documents exist."

There are only 13 (of 41) Requests to which we objected and refused to respond based on the objections – not 39 as your email implies. Each of the reasons for objecting is detailed as to the legal basis. The most commonly occurring basis for objecting is Applicant's lack of a counterclaim for cancellation attacking any of the Opposer's asserted rights. The absence of a counterclaim greatly reducing the nature and number of issues presented and thus, the grounds for permissible discovery. For example, in the absence of any such attack, issues such as the reason Opposer selected its mark and searches or opinions issued at the time of selection or application, are not relevant to any issues presented by the proceeding. It seems that you have used a "standard" set of discovery requests without adapting them to reflect the nature of the issues presented.

We are prepared to discuss each of the 13 Requests (actual 12, as the objection to Request 41 is undeniably appropriate in light of our position with respect to the Interrogatories) to which we responded that Opposer would not produce documents. It would be helpful if you could write, prior to our phone discussion, and explain why you believe the objections to the 12 Requests are inappropriate.

Rob

Robert B. Golden
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(914) 723-4301 (fax)
rgolden@LSLLP.com <<mailto:rgolden@lsllp.com>>

From: Kent Walker [<mailto:kwalker@lewiskohn.com>]
Sent: Friday, October 18, 2019 5:27 PM
To: Robert Golden
Cc: Ginger Stauffer
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Robert, I think we are going to need to find a time to meet and confer. As I understand it, your client has refused to answer any interrogatory and has agreed to provide documents in response to only 2 RFP's. That seems pretty inappropriate. Is your client willing to respond to any interrogatories? How about any other RFP's? Will it provide an initial disclosure?

Kent M. Walker
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From: Robert Golden <rgolden@lsllp.com>
Sent: Tuesday, October 15, 2019 5:34 PM
To: Kent Walker <kwalker@lewiskohn.com>
Cc: Ginger Stauffer <GStauffer@lewiskohn.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Kent:

Attached please find Opposer's responses to Applicant's discovery.

Rob

Robert B. Golden

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From: Kent Walker [<mailto:kwalker@lewiskohn.com>]
Sent: Friday, September 13, 2019 5:05 PM
To: Robert Golden; TMEFS
Cc: Ginger Stauffer
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Definition no. 6 in the interrogatories should refer to Errea's US tm reg. no. 3,983,137, not 35,983,137. I attach a first amended first set of interrogatories reflecting this change.

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From: Kent Walker
Sent: Friday, September 13, 2019 11:16 AM
To: Robert Golden <rgolden@lsllp.com>; tmefs@lsllp.com
Cc: Phil Spector <phil@thirdlove.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Bob, I attach service copies of ThirdLove's initial disclosures and first sets of rfps, rogs and rfas propounded on Errea.

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From: Kent Walker
Sent: Wednesday, August 14, 2019 4:13 PM
To: Robert Golden <rgolden@lsllp.com>
Cc: Phil Spector <phil@thirdlove.com>
Subject: RE: 987.302 FRE 408; Errea adv ThirdLove, US trademark opposition re logo

Ok. Let's talk at 2 pm NY time tomorrow.

Kent M. Walker
Lewis Kohn & Walker LLP

EXHIBIT D

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

ERREA' SPORT S.P.A.,)	Opposition No. 91240303
)	
)	
Opposer,)	Mark:
)	Serial No.: 87/543,806
v.)	Filing Date: July 26, 2017
)	Published: November 28, 2017
)	
MECOMMERCE, INC DBA)	
THIRDLOVE)	
)	
Applicant.)	
)	

WITHDRAWAL OF OPPOSITION

Pursuant to Rule 2.106(c) of the Trademark Rules of Practice, opposer, ERREA' SPORT S.P.A., hereby withdraws this opposition without prejudice with the consent of Applicant.

Date: January 1, 2020

Respectfully submitted,

By: _____
ROBERT B. GOLDEN

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By: _____
KENT M. WALKER

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of APPLICANT'S MOTION FOR SANCTIONS has been served on the following by delivering said copy on March 9, 2020, via email and First Class Mail, to counsel for Opposer at the following addresses:

ROBERT B. GOLDEN
LACKENBACH SIEGEL LLP
Attorney for Petitioner
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RGolden@LSLLP.com

By: /s/ Kent M. Walker

Kent M. Walker