

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

Hayes/EJW

October 22, 2020

Opposition No. 91249751

NAADE, Inc.

v.

Rhino Hitch, Inc.

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

Applicant seeks registration of the mark RH RHINO HITCH INC and design, shown below,



for “[t]railer hitches; trailer hitches for vehicles; trailer hitch covers; trailer hitch ball covers; metal locking devices for trailer hitch couplers; vehicle tow bars; tow bars for trailers; vehicle tow bar connector covers; ball mounts for attaching trailers for towing” in International Class 12.¹ Opposer opposes

¹ Application No. 88324066, filed March 4, 2019, based on use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting a date of first use anywhere and in commerce of December 2, 2016. The mark is described as

registration of Applicant's mark based on a claim of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), and in support thereof alleges, ownership of the registered marks, GO RHINO in standard characters,² and Go RHINO and design,³ both for a variety of automotive vehicle aftermarket parts and accessories in International Class 12.

This case now comes up for consideration of Applicant's motion for summary judgment (filed May 13, 2020) on Opposer's claim of likelihood of confusion, 5 TTABVUE,⁴ and Opposer's contested cross-motion (filed June 12, 2020) to withdraw its deemed admissions. 7 TTABVUE. The Board first addresses Opposer's motion, which will affect the Board's consideration of Applicant's motion for summary judgment.

The Board has considered the parties' briefs and materials submitted therewith, but addresses the record only to the extent necessary to support the Board's analysis and findings, and does not repeat or address all of the parties' arguments or materials. *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015). For purposes of this order, the Board presumes the

"consist[ing] of the terms 'RHINO HITCH' in capital letters, with the letters 'RH' enclosed in a circle above the terms and the word 'INC' below the terms and encased between dashes." The wording "HITCH INC" is disclaimed.

² Registration No. 4554591, issued June 24, 2014, with dates of first use anywhere and in commerce of 1978.

³ Registration No. 5367747 for GO RHINO and design in the following form, **GORHINO**, issued January 2, 2018, with dates of first use anywhere and in commerce of November 30, 2016.

⁴ The Board apologizes for the delay in attending to this matter.

parties' familiarity with the pleadings, and the arguments and materials submitted in connection with the subject motions.

I. Cross-Motion to Withdraw Deemed Admissions

In support of its motion for summary judgment, Applicant relies entirely on Opposer's failure to answer any of Applicant's discovery requests served on March 1, 2020, including requests for admission.⁵ 5 TTABVUE 2-6, 8-11. In response to the motion for summary judgment, Opposer does not dispute that it has not responded to Applicant's outstanding requests, but argues that the motion for summary judgment should be denied because: Applicant has engaged in improper gamesmanship related to its discovery, 7 TTABVUE 2-3; Opposer "understood the parties' respective discovery obligations as being mutually suspended" due in part to "the fact that the ongoing COVID-19 pandemic made discovery impractical or impossible," *id.* at 2; as revised, Applicant's requests for admission were untimely, *id.* at 8; and the case should be decided on the merits rather than as a result of a procedural technicality. *Id.* at 3. Opposer requests that the Board reopen discovery "to permit the parties to adequately conduct discovery and to resolve what is plainly a discovery dispute," *id.* at 5, and to allow Opposer time to withdraw or amend

⁵ The Board notes that Applicant served all of its discovery as a single document entitled "Applicant's First Set of Written Discovery on Opposer," 5 TTABVUE 24, which included Applicant's First Set of Requests for Production of Documents and Things to Opposer, 5 TTABVUE 31, Applicant's First Set of Interrogatories to Opposer, 5 TTABVUE 40, and Applicant's First Set of Requests for Admission to Opposer, 5 TTABVUE 47. This practice is improper. Insofar as different rules apply to each type of discovery, each type of discovery should be served as a separate document.

its admissions under Fed. R. Civ. P. 36(b) or reopen its time to respond to the requests for admission. *Id.* at 5, 9.

In its reply brief in support of its motion for summary judgment, Applicant first argues that summary judgment should be granted in its favor in view of, inter alia, Opposer's lack of response to Applicant's motion and its admission that it did not respond to Applicant's requests for admission. 8 TTABVUE 6. Additionally, Applicant responds to Opposer's cross-motion, arguing that Applicant's revisions to its requests for admission did not affect the timeliness of its requests and that Opposer was obligated to either respond to the amended requests or object on the basis of the excessive number originally served. *Id.* at 8. Applicant also asserts essentially that Opposer has not shown good cause for extending the discovery period.

Initially, we note that on March 2, 2020 (the day after Applicant served its discovery requests), in an email to Opposer's counsel, Applicant prospectively deleted 11 requests for admission in order to avoid receiving an objection based on the number of such requests exceeding the limit set forth under Trademark Rule 2.120(i). 5 TTABVUE 57. Further, Applicant did not serve revised requests for admission; it only advised Opposer that requests for admission nos. 30, 75-77, and 79-85 had been withdrawn. *Id.* The record shows that Opposer neither complied with the procedure in 37 C.F.R. § 2.120(i), requiring that the responding party serve a general objection to the excessive number of requests, nor responded to Applicant's requests for admission in any other

manner. In view thereof, the Board finds (i) that Opposer waived its objections to the number of requests for admission, and (ii) that Opposer's responses were due on March 31, 2020, on the last day of the previously set close of the discovery period. 2 TTABVUE 3.

Turning to the merits of Opposer's cross-motion, the Board construes the motion to allow Opposer time to withdraw or amend its admissions as a motion to withdraw its admissions. Although neither party argues the appropriate standard under Rule 36(b) with respect to Opposer's cross-motion, the Board, pursuant to its inherent authority to manage its docket, *see Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1071 (TTAB 2000), and for judicial efficiency, will address the motion under the appropriate standard.

Under Rule 36(b) of the Federal Rules of Civil Procedure, applicable to this proceeding under Trademark Rule 2.116(a), the Board may permit withdrawal or amendment of admissions when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining or defending the action on the merits. *Sarl Corexco v. Webid Consulting Ltd.*, 110 USPQ2d 1587, 1589 (TTAB 2014). As this Board stated in *Hobie Designs Inc. v. Fred Hayman Beverly Hills Inc.*, 14 USPQ2d 2064, 2065 (TTAB 1990):

Rule 36(a) is designed to facilitate proofs and speed trial, but where the failure to timely respond to a request for admissions has a harsh result, Rule 36(b) provides a method for obtaining relief (internal citation omitted).

The notes of the Advisory Committee on Rules state that Rule 36(b) emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on the admission in preparation for trial will not operate to its prejudice. Fed. R. Civ. P. 36 Advisory Committee notes (1970 amendment). Courts have substantial discretion in deciding whether to allow withdrawal of an admission. *Sarl Corexco*, 110 USPQ2d at 1589 (citing *Giersch v. Scripps Networks, Inc.*, 85 USPQ2d 1306 (TTAB 2007)).

With respect to the first prong of the test, the Board finds that the merits of this case will be subserved by allowing withdrawal of the admissions. Specifically, should Applicant's requests remain admitted, Opposer will have admitted the following:⁶

- That third parties use the word "rhino" in connection with aftermarket automotive parts (request nos. 30, 70), 5 TTABVUE 49, 52;
- That Opposer does not sell trailer hitches or trailer hitch products (request nos. 31 and 32), 5 TTABVUE 50;
- That Applicant's goods and related services are different from Opposer's goods and related services (request no. 40), *id*;

⁶ Compare Applicant's list of Opposer's deemed admissions in Applicant's motion for summary judgment, ¶ 13, subparagraphs a-j, 5 TTABVUE 6-7.

- That Opposer's goods are sold through channels of trade that are different from the channels of trade through which Applicant's goods are sold (request no. 42), 5 TTABVUE 50;
- That Applicant adopted its mark without any intent to trade on the goodwill, if any, of Opposer (request no. 44), *id*;
- That consumers of Applicant's goods are careful in their buying decisions (request no. 45), *id*;
- That the price point of Applicant's goods results in a high degree of consumer care in purchasing Applicant's goods (request no. 47), *id*. at 51;
- That Opposer's alleged marks and Applicant's mark, when considered in their entireties, are different (request no. 57), *id*;
- That the parties' goods and their typical consumers are different (request nos. 56 and 58), *id*;
- That Opposer's claims are barred by the doctrines of laches, waiver, acquiescence, estoppel, and unclean hands (request nos. 51, 53, 54, 59 and 60), *id*;
- That Opposer filed the opposition in order to interfere with the development of Applicant's business (request no. 62), *id*.
- That Opposer has not enforced its alleged marks against one or more third parties that use the word "rhino" in connection with aftermarket automotive parts in the U.S. (request no. 71), *id*. at 52.

In view of the foregoing, if Opposer is not permitted to withdraw its effective admissions, it will be held to have essentially admitted that the appearance of the parties' marks is different, that the parties' goods are different, that the purchasers of the parties' respective goods are different, that the opposition is barred by a variety of equitable defenses, and that the term "rhino" is used by third parties in connection with aftermarket automotive parts. Such admissions could directly affect the Board's determination as to whether there is a genuine dispute as to any material fact that there is a likelihood of confusion with respect to the parties' marks. Accordingly, the Board concludes that the merits of the action will be subserved by allowing amendment of the admissions.

As for the second prong, prejudice to the non-moving party, the Board finds that Applicant will not be prejudiced by withdrawal of the effective admissions and allowing the substitution of different responses. As contemplated under Rule 36(b), "prejudice is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth, but rather, relates to the special difficulties a party may face caused by the sudden need to obtain evidence upon withdrawal or amendment of admission." *Giersch*, 85 USPQ2d at 1308 (quoting *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147 (6th Cir. 1997)). Any potential prejudice to Applicant can be mitigated by reopening the discovery period as necessary for purposes of allowing Applicant to take any follow-up discovery it deems necessary. In addition, there is no

evidence of record pointing to particular prejudice in the form of special difficulties Applicant could potentially face, caused by the need to obtain evidence. Further, while the Board recognizes that Applicant relied on the admissions in filing its motion for summary judgment, such reliance does not rise to the level of “prejudice” as contemplated under Rule 36(b). *See FDIC v. Prusia*, 18 F.3d 637 (8th Cir. 1994) (holding that the preparation of “a summary judgment motion in reliance upon an erroneous admission does not constitute prejudice.”).

Accordingly, Opposer’s motion to withdraw the effective admissions is **GRANTED**. In view thereof, Opposer is **ORDERED** to serve responses to Applicant’s requests for admission within **FIFTEEN (15) DAYS** of the mailing date of this order. However, because Opposer did not timely respond with proper responses to Applicant’s requests for admission, Opposer is reminded that it has forfeited the right to object to Applicant’s requests for admission and must respond to those previously served requests in full and without objection as to the merits.⁷ *Cf. No Fear*, 54 USPQ2d at 1554 (the Board generally will order discovery responses to be provided without objection when

⁷ “Objections going to the merits of a discovery request include those which challenge the request as overly broad, unduly vague and ambiguous, burdensome and oppressive . . . or as not calculated to lead to the discovery of admissible evidence.” *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1554 (TTAB 2000). In contrast, objections based on claims such as privilege or attorney work product go not to the merits of the request, but instead to a characteristic of the information sought. *Id.* If any responsive information is privileged, Opposer must provide Applicant with a privilege log within the same 15-day period set above. *See Fed. R. Civ. P. 26(b)(5)(A)(ii); Cadbury UK Ltd. v. Meenaxi Enter., Inc.*, 115 USPQ2d 1404, 1408 n.7 (TTAB 2015).

non-movant on motion to compel cannot show that its neglect of discovery obligations was excusable). Moreover, if Opposer fails to serve its responses to Applicant's requests for admission by the deadline set forth in this order, all admission requests to which Opposer does not respond will be deemed admitted pursuant to Fed. R. Civ. P. 36(b). The Board will not entertain any further motions from Opposer to withdraw any deemed admissions. Additionally, if Opposer fails to timely respond in full to Applicant's requests for admission, without objection, Opposer may move for sanctions, including judgment, under Trademark Rule 2.120(h), 37 C.F.R. § 2.120(h).

II. Applicant's Motion for Summary Judgment

In view of the Board's foregoing order allowing Opposer to withdraw its effective admissions and serve responses to Applicant's requests for admission, which served as Applicant's only basis for summary judgment, Applicant's motion for summary judgment is moot and will be given no further consideration.

III. Duty to Cooperate and Discovery Requirements

The Board is troubled by Applicant's conduct, as demonstrated by the content of parties' submissions. In particular, the Board notes that Applicant agreed to a mutual 30-day extension for each party to respond to the other's outstanding discovery requests, 5 TTABVUE 95, yet refused to agree to an extension of discovery period, *id.* at 95-96, which closed on March 31, 2020. 2 TTABVUE 3. As an initial matter, Applicant's refusal to agree to an

extension of the discovery period resulted in both parties' responses to the outstanding discovery requests of the other party being due **after** the discovery period closed,⁸ in direct violation of Trademark Rule 2.120(a)(3).⁹ Moreover, at the time Applicant refused to extend the discovery period, Opposer's offices were closed due to the COVID-19 pandemic.¹⁰ 5 TTABVUE 96-97. In view thereof, Opposer's request for an extension of the proceeding deadlines was reasonable and warranted. Applicant is reminded that the Board expects the parties and their attorneys to cooperate with one another in the discovery process, and **looks with extreme disfavor on those who do not.** TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 408.01 (2020) (emphasis supplied). Additionally, the Board does not condone Applicant's failure to notify Opposer that it deemed Opposer's discovery requests untimely in its March 27, 2020 email agreeing to a mutual 30-day

⁸ Applicant contends that its responses to Opposer's discovery requests were originally due on or before April 1, 2020, and that Opposer's responses to Applicant's demands were originally due on March 31, 2020. 5 TTABVUE 95. Accordingly, a mutual 30-day extension of time to respond would have resulted in both responses being due after the March 31, 2020 close of discovery, in violation of Trademark Rule 2.120(a)(3).

⁹ Trademark Rule 2.120(a)(3) expressly states that "[t]he time to respond [to discovery requests] may be extended upon stipulation of the parties, or upon motion granted by the Board, or by order of the Board, **but the response may not be due later than the close of discovery**"(emphasis supplied).

¹⁰ The Board expressly recognized the difficulties posed by the COVID-19 pandemic during the period of March 27, 2020 through May 31, 2020. *See* the USPTO's "Notice of Extended Waiver of Trademark-Related Timing Deadlines under the Coronavirus Aid, Relief and Economic Security Act," issued on April 28, 2020, <https://www.uspto.gov/sites/default/files/documents/TM-Notice-CARES-Act-2020-04.pdf> ("Among other things, the spread of the virus has significantly disrupted the operations of numerous business and law firms.")

extension of time to respond to the parties' outstanding requests, while refusing to extend the discovery period, 5 TTABUE 95, and then waiting until the end of the 30-day extension (well after the close of discovery) to serve objections refusing to respond to Opposer's requests on the basis that they were untimely, 7 TTABVUE 6-7, 31-63. Such conduct does not comport with the duty to cooperate required by TBMP § 408.01.

Additionally, in view of discovery being reopened, *see* Section IV, *supra*, the parties are reminded of the following discovery guidelines. In responding to document requests and interrogatories, boilerplate "general objections" are improper. Objections, if any, must be specifically asserted in response to each interrogatory or document request and the ground for objecting must be stated with specificity.¹¹ Fed. R. Civ. P. 33(b)(4) and 34(b)(2)(C); *see also Medtronic, Inc. v. Pacesetter Sys., Inc.*, 222 USPQ 80, 83 (TTAB 1984) (answering party must articulate objections with particularity); *Amazon Techs. v. Wax*, 93 USPQ2d 1702, 1705-06 (TTAB 2009) ("general objections" to interrogatories and document requests found to be "anything but specific").

Additionally, responses to specific discovery requests that refer to and incorporate all of the responding party's general objections are improper because they fail to specify which of the general objections, if any, are being

¹¹ For example, with respect to objections contending that ordinary terms are vague or ambiguous, the responding party should give reasonable construction to such terms and attribute to them their ordinary definitions, rather than manufacturing ambiguity where none exists.

asserted in response to a specific interrogatory or document request, or why each general objection is applicable to each request. *Medtronic*, 222 USPQ at 83; *Amazon Techs., Inc.*, 93 USPQ2d at 1705-06.

In responding to each document request, a party **must** state whether or not it has responsive documents in its possession, custody or control and, if so, state that such documents will be produced or that such documents are being withheld, based on a claim of privilege or a specified objection. *See* Fed. R. Civ. P. 34(b)(2)(B); *No Fear v. Rule*, 54 USPQ2d at 1555. It therefore is improper to respond in a manner that is ambiguous as to whether or not responsive documents exist, such as by stating “responsive documents, if any will be produced,” or that the party “will produce documents responsive to the request that it may have.” A proper response requires clearly and affirmatively stating: (1) that responsive documents exist and either will be produced, or will be withheld on the basis of a specific objection or claim privilege,¹² or (2) that no responsive documents exist. *Id.* “The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.” Fed. R. Civ. P. 34(b)(2)(B)–(C). When producing documents, a responding party must produce responsive documents as they

¹² A party withholding responsive documents on the basis of a claim of privilege must “(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A)(i)–(ii); TBMP § 406.04(c).

are kept in the usual course of business¹³ **or** must organize and label them to correspond with each document request. *See* Fed. R. Civ. P. 34(b)(2)(E)(i) (emphasis added); TBMP § 406.04(c).

Further, the parties are under an **equal** obligation to participate in good faith to resolve any discovery disputes or to at least narrow and focus the matters in controversy before Board resolution is sought. *See, e.g., Amazon Techs., Inc.*, 93 USPQ2d at 1705 (quoting *Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 120 (D. Nev. 1993)). To the extent a discovery dispute arises, the parties should review TBMP §§ 402 (scope of discovery); 405.04(b) (nature of responses to interrogatories), 406.04(c) (nature of responses to requests for documents), 408 (duties to cooperate, search records, and supplement), and 414 (selected discovery guidelines).

The parties are reminded of their ongoing duty to supplement or correct their discovery responses in a timely manner. *See* Fed. R. Civ. P. 26(e)(1). When a party fails to disclose information or amend or supplement a prior response, as required, it may, upon timely objection from the other party, be precluded from relying at trial upon information or documents that were properly sought, but not disclosed, during discovery, unless such failure to disclose “was substantially justified or is harmless.” *See* Fed. R. Civ. P. 37(c)(1); *Panda Travel, Inc. v. Resort Option Enter., Inc.*, 94 USPQ2d 1789, 1792 (TTAB 2009).

¹³ The Board will presume that a document dump comprised of a stack of unorganized documents is not the manner in which documents are kept in the usual course of business.

Finally, if a party provides an incomplete response to a discovery request, that party, upon a timely raised objection by an adverse party, may not thereafter rely at trial on information from its records which was properly sought in the discovery request, but which was not included in the response thereto, unless the response is supplemented in a timely fashion pursuant to Fed. R. Civ. P. 26(e). *See Bison Corp. v. Perfecta Chemie B.V.*, 4 USPQ2d 1718 (TTAB 1987); TBMP § 408.02. Additionally, should a party be later found to have willfully withheld discovery responses, introduction of such withheld evidence may be precluded upon a motion to strike.

IV. Proceeding Resumed; Trial Dates Reset

The proceeding is resumed. All outstanding responses to previously-served discovery, except for Opposer's responses to Applicant's requests for admission which must be served within **FIFTEEN (15) DAYS** of the mailing date of this order, must be served on the propounding party within **THIRTY (30) DAYS** from the mailing date of this order.¹⁴

¹⁴ Opposer is reminded that, as with the requests for admission, because Opposer did not timely respond with proper responses to Applicant's first set of requests for production of documents and things or first set of interrogatories, Opposer has forfeited the right to object to Applicant's document requests and interrogatories and must respond to the previously served requests in full and without objection as to the merits. *Cf. No Fear*, 54 USPQ2d at 1554.

In view of the reopened discovery period, Opposer's first set of interrogatories and first requests for documents and things were timely served. *See Studi Moline Dissey, S.L. v. BioUrn Inc.*, 123 USPQ2d 1268, 1271 (TTAB 2017) (reopening of discovery rendered previously-served written discovery requests timely). Accordingly, Applicant may no longer object to Opposer's discovery on the basis that they were not timely served. Additionally, the Board notes that Applicant served its objections to Opposer's requests as a single document. 7 TTABVue 31-63. This practice is improper. Applicant should serve its supplemental responses to Opposer's first set of requests

In view of the fact that Opposer’s offices were closed during part of the discovery period, pursuant to the Board’s inherent authority to manage its docket, *see Carrini Inc.*, 57 USPQ2d at 1071, the Board reopens the discovery period for both parties.¹⁵ No further extension of the discovery period will be allowed barring extraordinary circumstances supported by a declaration. Trial dates are reset as shown in the following schedule:

Discovery Closes	12/23/2020
Plaintiff's Pretrial Disclosures Due	2/6/2021
Plaintiff's 30-day Trial Period Ends	3/23/2021
Defendant's Pretrial Disclosures Due	4/7/2021
Defendant's 30-day Trial Period Ends	5/22/2021
Plaintiff's Rebuttal Disclosures Due	6/6/2021
Plaintiff's 15-day Rebuttal Period Ends	7/6/2021
Plaintiff's Opening Brief Due	9/4/2021
Defendant's Brief Due	10/4/2021
Plaintiff's Reply Brief Due	10/19/2021
Request for Oral Hearing (optional) Due	10/29/2021

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the

for production of documents and things and first set of interrogatories as separate documents.

¹⁵ The extension allowed to Applicant, as discussed, is to mitigate the consequences of Opposer’s failure to respond in a timely manner to Applicant’s discovery requests.

assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 37 C.F.R. §§ 2.121-2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a), 37 C.F.R. § 2.129(a).

