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

Proceeding no.	91252169
Party	Plaintiff Gage Specialties LLC
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Submission	Motion to Strike Testimony
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Ser. No. 87695693
Applicant: Gage Growth Corp.
Mark: GAGE

Gage Specialties LLC,	)	
	)	
Opposer,	)	
	)	
vs.	)	Opposition No. 91252169
	)	
Gage Growth Corp.,	)	
	)	
Applicant.	)	
	)	

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

OPPOSER'S REPLY IN SUPPORT OF MOTION TO STRIKE TESTIMONY

On October 23, 2023, Applicant Gage Growth Corp. ("Applicant") filed an opposition to Opposer Gage Specialties LLC's ("Opposer's"), motion to strike. In furtherance of Opposer's motion to strike the testimony of expert witness Robert A. Leonard, Ph.D., Opposer respectfully submits this reply in support of the motion to strike, urging the Board to strike the testimony in accordance with Trademark Trial and Appeal Board Manual of Procedure § 533 without granting leave to cure. Furthermore, Opposer expressly requests the Board suspend the ongoing opposition proceeding until the resolution of this Motion to Strike Testimony.

A. Applicant is Required by Law to Notify the Board that is Has Made the Required

Disclosure

"Any party disclosing plans to use an expert must notify the Board that it has made the required disclosure (but should not file with the Board copies of the materials provided to adverse parties) to comply with Fed. R. Civ. P. 26(a)(2)." TBMP § 401.03.

Opposer disputes that though the TBMP provides for notice of expert disclosures with the Board, this is not mandatory because the TBMP is not binding legal authority. However, though the guidelines of the TBMP itself "do not have the force and effect of law", the laws that the manual describes are quite binding. "The manual describes current practice and procedure under the applicable authority and incorporates amendments to the Trademark Act, Trademark Rules of Practice, Federal Rules, and updates in case law, where applicable." TBMP Introduction.

When a testifying expert is utilized in a Board proceeding, the party's planned use of the expert witness is largely governed by Fed. R. Civ. P. 26(a)(2). Trademark Rule 2.120(a)(2). Rule 26(a)(2)(D) states: "Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence *that the court orders*." Fed. R. Civ. P. 26(a)(2)(D) (emphasis added).

Applicant's assertion that the TBMP lacks binding authority is farcical. The Trademark Trial and Appeal Board Manual of Procedure ("TBMP") is a compilation of statutory, regulatory, and decisional authority relevant to Board practice and procedure. It is written as a guide for the Board, practitioners and parties before the Board. TBMP § 101.05. The TBMP is replete with language emphasizing its binding nature and to suggest otherwise requires a strained reading of the text and an overlooking of the well-established legal principles surrounding administrative procedures. Throughout the course of this proceeding, Applicant has simply failed to comply with established procedural rules and requirements.

Specifically, Applicant filed a Declaration and Expert Testimony report for Dr. Leonard,

asserting his "expert" status without fulfilling the required Expert Disclosures or filing them with the Board, as mandated by T.B.M.P. § 401.03; 37 C.F.R. 2.120(a)(2)(iii). In *RTX Scientific Inc. v. Nu-Calgon Wholesaler Inc.,* 106 USPQ2d 1492, 1493 n.3 (TTAB 2013), a party must notify the Board of its plan to use an expert (without including copies of expert disclosures), and that it has made required expert disclosures to adversary; the best practice is to notify the Board concurrently with the expert disclosures to adverse party). Additionally, in *Monster Energy Co. v. Martin*, 125 USPQ2d 1774, 1777-78 (TTAB 2018) ("Trademark Rule 2.120(a)(2)(iii) provides the Board wide latitude in managing a proceeding following any party's disclosure of plans to use expert testimony, including but not limited to, suspending proceedings to allow for discovery of the expert and for any other party to disclose plans to use a rebuttal expert."

Opposer contends that the absence of Expert Disclosures has deprived Opposer of the opportunity for proper cross-examination during both the Discovery Period and at this advanced stage of the proceeding. While Opposer was made aware of Dr. Leonard's existence through a notification that accompanied the service copy of his report, this notification fell short of serving as a proper disclosure, as required by the pertinent rules. The Applicant’s failure to timely disclosure Dr. Leonard’s purpose has unjustly hindered the Opposer from conducting essential discovery, and Opposer, at minimum, should be granted extra time to conduct discovery into the expert.

Furthermore, Opposer argues that Dr. Leonard’s report itself is insufficient to act as a disclosure, as it lacks required details such as financial recompense and provides only summaries of Dr. Leonard's qualifications, publications, and prior testimony. This lack of transparency hinders Opposer's ability to conduct a thorough investigation. Opposer argues “Had I been properly notified of Applicant’s intent to rely on Expert testimony, I would have conducted more

discovery into the Expert and the nature of his testimony, including deposing Dr. Leonard and possibly hiring my own Expert for rebuttal purposes." 60 TTABVUE 11, Fong Declaration ¶10. Applicant argues that the included summaries somehow go further than the statutorily required lists, which contradicts the very definition of the term summary: to cover the main points succinctly.[1] A summary covers the *main* points but does not list every item over the past ten years, which is the requirement under Rule 26. Any omitted article or trial might be a point of contention, which is what the rule is designed to uncover, and which is subverted by the presentation of qualifications in summary form. Again, Opposer does not deny that Dr. Leonard's qualifications appear impressive. However, by both providing less than a full catalogue and failing to do so upon request, Applicant appears intent more on obfuscating the doctor's background than on saving a few pages. Moreover, while Applicant argues that its failure to include Dr. Leonard's compensation was inadvertent, the payment received by an expert goes to the issue of bias.

In accordance with Fed. R. Civ. P. 37(c), Opposer asserts that the failure to properly disclose a witness under Rule 26 should result in preventing the use of the information or witness unless harmless or justified. The Board typically considers a five-factor test to make this determination, as outlined in *Great Seats Inc. v. Great Seats Ltd., 100 USPQ2d 1323, 1327* (TTAB 2011).

Regarding the first factor, Opposer, being a lay person representing himself pro se, argues that the service of an Expert Report did not serve as clear disclosure, especially given Applicant's failure to specify its purpose. Applicant is aware that Opposer is proceeding pro se and is thus not legally sophisticated; Applicant is obligated to consider this imbalance in its interactions with Opposer. Indeed, in its Motion in Opposition, 62 TTABVUE 2-3, Applicant notes that Opposer

[1] The Board may take judicial notice of dictionary definitions. See, e.g., *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1767-1768 (TTAB 2016). TBMP § 1208.04.

frequently invokes its pro se status to seek "mulligans" from the Board, and moreover, that Applicant was aware that Opposer had not accessed the Expert report from Applicant's server. The Opposer asserts that any misunderstanding on their part regarding the significance of expert report's service is due to the Applicant's lack of clarity. The Board treats, and encourages counsel to treat, pro se litigants with an additional level of care. That Opposer has frequently sought do-overs shows that, historically, Applicant has failed to extend this courtesy to Opposer, who is quite obviously not sophisticated with TTAB matters. Applicant asserts that, as Opposer has the assistance of legal counsel, such latitude is unnecessary. However, the firm of T-Rex Law, P.C. is not retained or specifically representing Opposer, but consults from the sidelines *when requested by the Opposer's principal*. Attorneys from T-Rex Law are not on the service list and do not receive copies of each document in the case, but only those documents which are publicly filed or deemed important enough for Opposer to share. Additionally, Applicant did not disclose its Expert to the Board, and in doing so prevented the Board from providing additional time to Opposer for the purpose of rebuttal discovery. Indeed, public filing of the Expert Disclosures would also have alerted Opposer's external counsel and enabled them to better advise Opposer, which also would have prevented the current predicament.

Furthermore, given Applicant's understanding of Opposer's lack of sophistication, and Applicant's awareness that Opposer had not accessed the Expert report, such knowledge should have indicated to Applicant that its disclosure did not serve its intended purpose; that Opposer had not recognized the significance of Applicant's email nor forwarded it towards his outside legal advisors who would have.

The ability to cure (second factor) and the extent of disruption (third factor) are entwined. For Opposer to overcome the surprise and prejudice it is experiencing, it would need to gather new

evidence, consult and retain a new witness, depose Dr. Leonard, and take other timely and expensive steps that would delay the proceeding. 60 TTABVUE 11, Fong Declaration ¶ 10. Although Applicant is correct that Opposer may still cross-examine the witness, this is insufficient. As Opposer has previously noted, a cross-examination deposition is far more limited than a testimony deposition and would hardly afford Opposer the opportunity to conduct all necessary discovery. *See* 35 U.S.C. § 24; 37 C.F.R. § 2.120(b); 37 C.F.R. § 2.123(a); Fed. R. Civ. P. 30(b) and Fed. R. Civ. P. 45; *Consolidated Foods Corp. v. Ferro Corp.*, 189 USPQ 582, 583 (TTAB 1976); TBMP § 404.09.

Again, Opposer emphasizes that Applicant did not disclose its intended Expert to the Board, preventing the suspension of the discovery period for the purpose of allowing Opposer to depose the Expert and consult their own. The purpose of the expert disclosure rules is to facilitate the orderly administration of the proceeding. See *Gen. Council of the Assemblies of God dba Gospel Publ'g House v. Heritage Music Found.*, 97 USPQ2d 1890, 1892 (TTAB 2011).

Regarding the fourth factor, importance of the evidence, Dr. Leonard's report concerns the etymology of the mark GAGE as it relates to the cannabis industry. While the Board is highly capable of determining the relevance and weight of testimony, unrebutted testimony is frequently considered admitted by waiver or omission, and Opposer's lack of rebuttal evidence, which could only be attained through the retention and reporting of an equally qualified expert, will cause Dr. Leonard's testimony to be accorded greater weight than it might otherwise deserve.

Lastly, regarding the fifth factor, Opposer challenges Applicant's claim that it did disclose Dr. Leonard, stating that such disclosures were insufficient, both in form and function, to provide proper notice of the report's intended purpose to Opposer. Again, it is important to note that Applicant is aware that Opposer is proceeding pro se and is thus not legally sophisticated;

Applicant is obligated to consider this imbalance in its interactions with Opposer. Again, it must also be stated that Applicant did not disclose its Expert to the Board, and in doing so prevented the Board from providing additional time to Opposer for the purpose of rebuttal discovery.

CONCLUSION

Opposer hereby submits this reply to Applicant's opposition and urges the Board to strike the entirety of Dr. Leonard's testimony without leave to cure. Additionally, Opposer requests the Board to suspend the proceedings pending the disposition of this Motion. Opposer specifically reserves the right to object to Applicant's evidence and testimony on additional substantive grounds, including relevance, at the time Applicant files its Trial Brief. *See, e.g., FUJIFILM* at 1236; *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc*., 107 USPQ2d 1750, 1755 (TTAB 2013

November 13, 2023

Respectfully submitted,

/s/ Michael Fong

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing OPPOSER'S REPLY IN SUPPORT OF OPPOSER'S MOTION TO STRIKE is being electronically mailed to the following address:

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November 13, 2023