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Filing date: **05/29/2020**

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

Proceeding	91253336
Party	Plaintiff Scentsible, LLC d/b/a Poo-Pourri
Correspondence Address	MOLLY BUCK RICHARD RICHARD LAW GROUP 13355 NOEL ROAD SUITE 1350 DALLAS, TX 75240 UNITED STATES molly@richardlawgroup.com, david@richardlawgroup.com, clarissa@richardlawgroup.com 214-206-4300
Submission	Reply in Support of Motion
Filer's Name	David J. Diamond
Filer's email	david@richardlawgroup.com, molly@richardlawgroup.com, dock-et@richardlawgroup.com
Signature	/David J. Diamond/
Date	05/29/2020
Attachments	Reply in Support of Request for Board Participation in Discovery Conference.pdf(247146 bytes)

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

SCENTSIBLE, LLC d/b/a POO-POURRI,	§	
	§	
Opposer,	§	Opposition No. 91253336
	§	
v.	§	Serial No. 88/343,315
	§	
NATURE’S MARK, LLC,	§	Mark: POT POURRI
	§	
Applicant.	§	

**REPLY IN SUPPORT OF OPPOSER’S REQUEST FOR
BOARD PARTICIPATION IN DISCOVERY CONFERENCE**

Opposer Scentsible, LLC d/b/a Poo-Pourri (“Opposer”) files this Reply in Support of Opposer’s Request for Board Participation in Discovery Conference and respectfully shows the Board as follows:

I. SUMMARY

While Opposer appreciates Applicant Nature’s Mark, LLC’s (“Applicant”) willingness to agree to Board participation in the discovery conference in this proceeding, Applicant’s selective recounting of the parties’ communications precipitating Opposer’s Request for Board Participation in Discovery Conference (the “Request,” 11 TTABVUE) and the conference issues included in Applicant’s Reply of Respondent in Regard to Opposer’s Request (the “Response,” 12 TTABVUE) illustrate the prudence of Board participation to facilitate an orderly and productive conference. Opposer wishes for discovery to start on the right foot without unnecessarily taxing the parties’ or the Board’s time and resources, and Board participation would be beneficial to ensure the parties are in agreement on discovery procedure to minimize discovery disputes and related motion practice.

II. FACTUAL BACKGROUND

Opposer requested to schedule the discovery conference in this proceeding following the Board's denial of Applicant's motion to dismiss on May 5, 2020. (*See* Ex. A at 5–7.¹) On May 19, 2020, Applicant requested to exchange drafts of written discovery plans in the interest of “getting a report to file that is acceptable for both parties to sign.” (*Id.* at 4.) After Opposer pointed out that the parties are not required to file a discovery plan, Applicant responded as follows on May 20, 2020:

My question was whether, or not, you would be providing in advance of our conference any drafts.

Yes, we discuss the matters enumerated in the rule, and then when the IA [Interlocutory Attorney] has a conference with us and our report of those discussions are considered, and from that the IA issues an order & schedule with the typical topical headings.

My question remains, will you in draft form provide Scentsible's position on the matters set forth in the rules pertaining to discovery conferences.

(*Id.* at 3 (emphasis added).) Opposer reasonably interpreted Applicant's response to mean it desired Board participation in the conference, and Opposer agreed to this proposal the same day:

We do not normally provide a discovery draft in advance of the conference required by the rules and we do not file any report with the Board. However, if you prefer to conduct the discovery conference by phone with the interlocutory attorney, we can arrange for that. Please let us know the dates and times that work for you.

(*Id.* at 2.) Opposer was then puzzled when Applicant responded on May 21, 2020 that “[n]othing in my email asked, or suggested, having the IA on our call.” (*Id.*) At that point, this confusing chain of communications illustrated to Opposer that Board participation in the discovery conference may be beneficial, and Opposer timely filed its Request later that day after first notifying Applicant. (*See* Ex. B–C.)

¹ The parties' relevant communications following the Board's denial of Applicant's motion to dismiss until the filing of Opposer's Request are attached as Exhibits A–C.

Applicant then attempted to clarify that its use of the phrase “and then when the IA has a conference with us” meant “later.” (Ex. A at 1.) Applicant’s clarification nonetheless begs the question of when Applicant intended for the Interlocutory Attorney to be involved in any conference between the parties when the discovery conference is the only time such involvement is routine near the outset of discovery.

Applicant glosses over the above communications when it incorrectly speculates that its request for exchange of written discovery plans prompted Opposer’s Request. (*See* Response at 1 & n.1, 12 TTABVUE 2.) Opposer also disagrees that its Request was unnecessary, and the parties’ communications show that Opposer did in fact attempt to meet and confer with Applicant. (*See* Exs. A–C.)

III. DISCOVERY CONFERENCE

Opposer initially intended for the Board to participate in the discovery conference to ensure the full, orderly, and unambiguous discussion of the issues stated the Board’s Order of January 8, 2020. (2 TTABVUE 3–4.) However, Opposer is concerned by some of the requests included in Applicant’s Response and consequently deems it prudent to ask that certain issues be addressed in the conference as detailed below.

A. Applicant’s Requested Issues for the Discovery Conference

Opposer addresses the requests and issues included in Applicant’s Response as follows:

The Marks at Issue and Opposer’s Claims. Opposer claims likelihood of confusion between Applicant’s mark POT POURRI and Opposer’s marks POO POURRI, POO~POURRI, and POO~POURRI NO. 2. Opposer also claims that Applicant’s mark POT POURRI is merely descriptive of a feature of Applicant’s goods.²

² The Board’s Order of May 5, 2020 denying Applicant’s motion to dismiss states in footnote 2 that Opposer’s mere descriptiveness claim is not pled in the text of its notice of opposition. (*See* 10 TTABVUE

Settlement. While Opposer encourages the parties to avoid recounting excerpts of settlement communications subject to FED. R. EVID. 408 in Board filings to facilitate full and open settlement discussions, Opposer agrees with Applicant that settlement has been discussed and is unlikely at this time. Opposer welcomes any reasonable settlement proposal Applicant may have throughout the remainder of this proceeding.

Modification of Discovery Procedures. Opposer agrees with Applicant to forego in-person discovery in view of the limitations and safety concerns posed by the COVID-19 pandemic. However, Opposer requests Applicant's agreement that depositions be taken remotely via videoconference.

Standard Protective Order. Opposer agrees that the standard protective order applies in this proceeding but objects to discovery of any "secret formula" or other ingredients in Opposer's products on the basis this information is neither relevant nor proportional to the needs of this proceeding, among other objections. Opposer respectfully submits that discussion of, and rulings on, such issues is premature and better suited until after the parties have exchanged written discovery requests and responses, and Opposer reserves further discussion and objections until that time.

Expanding the Discovery Plan. In response to Applicant's requests that the Board direct Opposer to make early, limited disclosure of certain sales information, Opposer respectfully submits that these requests are better suited for written discovery and are premature at this stage. Opposer accordingly reserves objections and responses to such issues for written discovery.

1 n.2.) Opposer respectfully submits that its mere descriptiveness claim is properly pled in paragraph 6 of its notice of opposition, and Opposer intends to move for modification of the Board's Order of May 5 following the discovery conference. (*See* 1 TTABVUE 5.)

B. Additional Issues for the Discovery Conference

Opposer requests the parties' agreement on the following issues to facilitate the orderly conduct of discovery in this proceeding:

- Serving all discovery materials, correspondence, and filings by e-mail;
- Producing electronic copies of non-privileged documents responsive to discovery requests in lieu of making them available for inspection;
- Producing electronic copies of non-privileged documents responsive to discovery requests in pdf format, with spreadsheet and PowerPoint files served in native format and each side reserving the right to request electronically stored information (ESI) only for good cause;
- Bates labeling all documents produced during discovery;
- Confirming in responses to requests for production whether a party is withholding responsive documents on the basis of objections and whether a party has responsive documents within its possession, custody, or control; and
- Giving a minimum of 24 hours' notice in the event a deposition needs to be rescheduled.

Most, if not all, of the above requests are perfunctory and consistent with Board procedure. *See* TBMP §§ 110.03, 113, 406.03, 406.04, 406.04(b), & 406.04(c). However, each of these requests is made in response to issues highlighted in *SFM, LLC v. Corcamore, LLC*, where the respondent is represented by Applicant's counsel and has been sanctioned for discovery conduct. Canc. No. 92060308, 2018 WL 6929684 (T.T.A.B. Dec. 21, 2018) (awarding judgment as a form of discovery sanctions), *appeal pending*, No. 19-1526 (Fed. Cir.). Accordingly, Opposer respectfully requests that the Board representative address these issues with the parties during the discovery conference. Opposer is amenable to further conference with Applicant in advance of the discovery conference if Applicant prefers.

Opposer's counsel remain available to schedule the discovery conference telephonically with Applicant and the Board representative anytime next Tuesday and Wednesday, the 2nd and

3rd of June, between 1:00 pm to 6:00 pm Eastern Time. Opposer's counsel also are available to further discuss scheduling in the interim by phone and email.

Respectfully submitted,

/David J. Diamond/
Molly Buck Richard
David J. Diamond
Richard Law Group, Inc.
13355 Noel Road, Suite 1350
Dallas, Texas 75240
214-206-4300 (Phone)
214-206-4330 (Fax)
molly@richardlawgroup.com
david@richardlawgroup.com

Attorneys for Opposer Scentsible, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Reply in Support of Opposer's Request for Board Participation in Discovery Conference has been served on Charles Lee Thomason, counsel for Applicant, by forwarding said copy on May 29, 2020 via email to thomason@spatlaw.com.

/David J. Diamond/

Opposition No. 91253336
Scentsible, LLC v. Nature's Mark, LLC
Reply in Support of Opposer's Request for Board Participation in Discovery Conference

EXHIBIT A

David J. Diamond

From: -Lee Thomason <thomason@spatlaw.com>
Sent: Thursday, May 21, 2020 4:48 PM
To: Molly Richard; David J. Diamond
Subject: RE: 6/2 or 6/3: Discovery Conference - t/c & no tent. plan

Were you referring to this temporal phrase?

"...and then when" - meaning later than what the antecedent clause states.

On May 21, 2020 at 2:10 PM Molly Richard <molly@richardlawgroup.com> wrote:

I was referring to this part of your email:

Yes, we discuss the matters enumerated in the rule, and then when the IA has a conference with us and our report of those discussions are considered, and from that the IA issues an order & schedule with the typical topical headings.

You seem to believe that we will have a conference with the IA to discuss our conference and then an order is issued. The scheduling order is already in place. We are not opposed to having the IA on our call as it may assist in the communications.

Molly Buck Richard

Richard Law Group

One Galleria Tower

13355 Noel Road, Suite 1350

Dallas, TX 75240

214 206-4300 (main)

214-206-4301 (direct)

214-206-4330 (fax)

molly@richardlawgroup.com



From: -Lee Thomason [mailto:thomason@spatlaw.com]
Sent: Thursday, May 21, 2020 12:58 PM
To: Molly Richard <molly@richardlawgroup.com>; David J. Diamond <david@richardlawgroup.com>
Subject: 6/2 or 6/3: Discovery Conference - t/c & no tent. plan

OK. no draft of Scentsible's position/s will be provided.

Nothing in my email asked, or suggested, having the IA on our call.

What times on 6/2 or 6/3 would you prefer for our t/c discovery conference?

Thanks Lee Thomason

On May 20, 2020 at 11:26 AM Molly Richard <molly@richardlawgroup.com> wrote:

We do not normally provide a discovery draft in advance of the conference required by the rules and we do not file any report with the Board. However, if you prefer to conduct the discovery conference by phone with the interlocutory attorney, we can arrange for that. Please let us know what dates and times work for you.

Molly Buck Richard

Richard Law Group

One Galleria Tower

13355 Noel Road, Suite 1350

Dallas, TX 75240

214 206-4300 (main)

214-206-4301 (direct)

214-206-4330 (fax)

molly@richardlawgroup.com



From: -Lee Thomason [<mailto:thomason@spatlaw.com>]
Sent: Wednesday, May 20, 2020 10:10 AM
To: Molly Richard <molly@richardlawgroup.com>; David J. Diamond <david@richardlawgroup.com>
Subject: RE: Discovery Conference - t/c & tent. plan?

My question was whether, or not, you would be providing in advance of our conference any drafts.

Yes, we discuss the matters enumerated in the rule, and then when the IA has a conference with us and our report of those discussions are considered, and from that the IA issues an order & schedule with the typical topical headings.

My question remains, will you in draft form provide Scentsible's position on the matters set forth in the rules pertaining to discovery conferences.

Thanks, Lee Thomason

On May 19, 2020 at 3:23 PM Molly Richard <molly@richardlawgroup.com> wrote:

We don't actually file the discovery plan with the Board. We merely have to address the things set forth in the initial Board order including ACR, modifications to discovery, potential settlement, etc.

Molly Buck Richard

Richard Law Group

One Galleria Tower

13355 Noel Road, Suite 1350

Dallas, TX 75240

214 206-4300 (main)

214-206-4301 (direct)

214-206-4330 (fax)

molly@richardlawgroup.com



From: -Lee Thomason [<mailto:thomason@spatlaw.com>]

Sent: Tuesday, May 19, 2020 2:21 PM

To: Molly Richard <molly@richardlawgroup.com>; David J. Diamond <david@richardlawgroup.com>

Subject: Discovery Conference - t/c & tent. plan?

I am referring to other trips, to other locales for other matters. Thanks for confirming the use of the telephone for our discovery conference.

Think I'd asked early on, but if not ask now, will you be providing in advance of our conference, any drafts of a proposed discovery plan or report drawn to the matters set forth in Fed. R. Civ. Proc. 26(f)(2) or (3), which applies to TTAB proceedings per Trademark Rule 120(a)(1) ? A draft makes the conference more efficient, and getting a report to file that is acceptable for both parties to sign.

Thanks, Lee Thomason

On May 15, 2020 at 12:21 PM Molly Richard <molly@richardlawgroup.com> wrote:

The discovery conference is by phone. No travel is required.

Molly Buck Richard

Richard Law Group

One Galleria Tower

13355 Noel Road, Suite 1350

Dallas, TX 75240

214 206-4300 (main)

214-206-4301 (direct)

214-206-4330 (fax)

molly@richardlawgroup.com



From: -Lee Thomason [<mailto:thomason@spatlaw.com>]
Sent: Friday, May 15, 2020 11:12 AM
To: Molly Richard <molly@richardlawgroup.com>
Cc: David J. Diamond <david@richardlawgroup.com>
Subject: RE: Discovery Conference

I am rearranging travel plans (lots of eCredits but no refunds), and once I get that ironed out, I will suggest some dates. For now, I'm trying to reserve travel using the 'my dates are flexible' option.

Thanks, Lee Thomason

On May 14, 2020 at 3:21 PM Molly
Richard <molly@richardlawgroup.com>
wrote:

Mr. Thomason, I assume you have had a chance to review the order from the Board. Our deadline to hold the discovery conference is on June 3rd and we would like to get this on our calendars. Can you please provide us with a couple of dates and times? Please make sure you also copy my partner David on your emails. Thank you.

Molly Buck Richard

Richard Law Group

One Galleria Tower

13355 Noel Road, Suite 1350

Dallas, TX 75240

214 206-4300 (main)

214-206-4301 (direct)

214-206-4330 (fax)

molly@richardlawgroup.com



From: -Lee Thomason
[\[mailto:thomason@spatlaw.com\]](mailto:thomason@spatlaw.com)
Sent: Wednesday, May 06, 2020 8:58 PM
To: Molly Richard
<molly@richardlawgroup.com>
Subject: RE: Discovery Conference

I read the opinion briefly, and need to read it more closely. We have a month to do the discovery conf, and I will propose dates asap.

Thanks Lee Thomason

On May 5, 2020 at 3:11 PM Molly Richard <molly@richardlawgroup.com> wrote:

Mr. Thomason – as you are aware, the Board denied your Motion to Dismiss today and set a new schedule for this case. We need to schedule our discovery conference so please let us know what works for your schedule to set up a call. Thank you.

Molly Buck Richard

Richard Law Group

One Galleria Tower

13355 Noel Road, Suite
1350

Dallas, TX 75240

214 206-4300 (main)

214-206-4301 (direct)

214-206-4330 (fax)

molly@richardlawgroup.com



From: -Lee Thomason
[<mailto:thomason@spatlaw.com>]
Sent: Saturday,
February 29, 2020 6:59
PM
To: Molly Richard
<molly@richardlawgroup.com>
Subject: Re: Discovery
Conference

Correct? "The case is suspended pending decision on your motion." So, Board will re-set schedule when case resumes. Correct?

On
Februar
y 28,
2020 at
6:45
PM
Molly
Richard
<molly@richardlawgroup.com>
wrote:

We
need to
have

our
discover
y
confere
nce by
March
18th. C
an you
let me
know
what
works
for your
schedul
e for a
call?

Molly
Buck
Richard

Richard
Law
Group

One
Galleria
Tower

13355
Noel
Road,
Suite
1350

Dallas,
TX
75240

214
206-
4300
(main)

214-
206-
4301
(direct)

214-
206-
4330
(fax)

[molly@
richardl
awgrou
p.com](mailto:molly@richardlawgroup.com)



Opposition No. 91253336
Scentsible, LLC v. Nature's Mark, LLC
Reply in Support of Opposer's Request for Board Participation in Discovery Conference

EXHIBIT B

David J. Diamond

From: Molly Richard
Sent: Thursday, May 21, 2020 1:26 PM
To: -Lee Thomason; David J. Diamond
Subject: RE: 6/2 or 6/3: Discovery Conference - t/c & no tent. plan

Categories: Opposing Counsel

We are planning to request that the IA attend our discovery conference by phone as it may help the process. We are available on either afternoon of the 2nd or 3rd so please let us know what date/times work best for you and we will file the request with the Board.

Molly Buck Richard
Richard Law Group
One Galleria Tower
13355 Noel Road, Suite 1350
Dallas, TX 75240
214 206-4300 (main)
214-206-4301 (direct)
214-206-4330 (fax)
molly@richardlawgroup.com



From: -Lee Thomason [mailto:thomason@spatlaw.com]
Sent: Thursday, May 21, 2020 12:58 PM
To: Molly Richard <molly@richardlawgroup.com>; David J. Diamond <david@richardlawgroup.com>
Subject: 6/2 or 6/3: Discovery Conference - t/c & no tent. plan

OK. no draft of Scentsible's position/s will be provided.
Nothing in my email asked, or suggested, having the IA on our call.
What times on 6/2 or 6/3 would you prefer for our t/c discovery conference?
Thanks Lee Thomason

On May 20, 2020 at 11:26 AM Molly Richard <molly@richardlawgroup.com> wrote:

We do not normally provide a discovery draft in advance of the conference required by the rules and we do not file any report with the Board. However, if you prefer to conduct the discovery conference by phone with the interlocutory attorney, we can arrange for that. Please let us know what dates and times work for you.

Opposition No. 91253336
Scentsible, LLC v. Nature's Mark, LLC
Reply in Support of Opposer's Request for Board Participation in Discovery Conference

EXHIBIT C

David J. Diamond

From: Molly Richard
Sent: Thursday, May 21, 2020 4:13 PM
To: -Lee Thomason
Cc: David J. Diamond
Subject: FW: ESTTA Filing Receipt: Proceeding or Serial or Registration No. 91253336 Request for Discovery Conference Filing Receipt for ESTTA Tracking No: ESTTA1057152
Attachments: Opposers Request for Board Participation.pdf

I filed the attached with the Board a few moments ago.

Molly Buck Richard
Richard Law Group
One Galleria Tower
13355 Noel Road, Suite 1350
Dallas, TX 75240
214 206-4300 (main)
214-206-4301 (direct)
214-206-4330 (fax)
molly@richardlawgroup.com



-----Original Message-----

From: estta@uspto.gov [mailto:estta@uspto.gov]
Sent: Thursday, May 21, 2020 4:12 PM
To: Molly Richard <molly@richardlawgroup.com>; David J. Diamond <david@richardlawgroup.com>; Clarissa Arellano <Clarissa@richardlawgroup.com>
Subject: ESTTA Filing Receipt: Proceeding or Serial or Registration No. 91253336 Request for Discovery Conference Filing Receipt for ESTTA Tracking No: ESTTA1057152

ESTTA Filing Receipt

This ESTTA Filing Receipt confirms receipt of your filing associated with the above-identified ESTTA Tracking Number.

Your filing may be viewed on TTABVUE at <http://ttabvue.uspto.gov/ttabvue/> . If you don't see your filing on TTABVUE a week after you file, or if you received an error message or experienced a technical issue while submitting your filing on ESTTA, please send an email to estta@uspto.gov and provide the ESTTA Tracking Number and the Serial, Registration or Proceeding Number identified above, and a brief description of the error message or technical issue you encountered.

For non-technical status or information inquiries, please contact the TTAB Assistance Center at ttabinfo@uspto.gov or 571-272-8500 Monday through Friday from 8:30 a.m. to 5:00 p.m. Eastern Time (ET).

Tracking No.: ESTTA1057152

Filing date: 05/21/2020

Proceeding No.: 91253336

Filing Party: Plaintiff

Scentsible, LLC d/b/a Poo-Pourri

Filing Party's Correspondence Address: MOLLY BUCK RICHARD RICHARD LAW GROUP

13355 NOEL ROAD SUITE 1350

DALLAS, TX 75240

UNITED STATES

molly@richardlawgroup.com, david@richardlawgroup.com, clarissa@richardlawgroup.com

214-206-4300

Submission: Request for Discovery Conference

Filer's Name: Molly Buck Richard

Filer's email: molly@richardlawgroup.com, david@richardlawgroup.com, docket@richardlawgroup.com

Signature: /Molly Buck Richard/

Date: 05/21/2020

Attachments: Opposers Request for Board Participation.pdf