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

EJW

June 17, 2022

Opposition No. 91267937

Alpha Kappa Alpha Sorority

v.

Stroll to the Polls, Inc.

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

This case now comes up for consideration of Opposer's fully briefed combined motion (filed April 25, 2022) to quash the Notice of Deposition for Dr. Glenda Glover and for a protective order prohibiting that deposition from taking place. 25 TTABVUE.[1]

The Board has considered the parties' briefs and materials or evidence 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,

[1] Citations to the record or briefs in this order include citations to the publicly available documents on the Trademark Trial and Appeal Board Inquiry System (TTABVUE), the Board's electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry. All citations to documents contained in the TTABVUE database are to the downloadable .pdf versions of the documents in the USPTO TTABVUE Case Viewer.

2019 (TTAB 2015). For purposes of this order, the Board presumes the parties' familiarity with the pleadings, and the arguments and materials submitted in connection with the subject motion.

I. Motion to Quash is Moot

A party to be deposed may file a motion, prior to the taking of a noticed discovery deposition, to quash the notice of deposition. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 521 (2022). Alternatively, under appropriate circumstances, the party may file a motion for a protective order. *See* TBMP § 410. A motion to quash may be filed on various grounds, including timeliness, harassment, failure to take in the Federal judicial district where deponent resides, or failure to provide adequate notice in relevant disclosures. *See, e.g., Spier Wines (PTY) Ltd. v. Shepher,* 105 USPQ2d 1239, 1242-43 (TTAB 2012); *Nat'l Football League v. DNH Mgmt. LLC,* 85 USPQ2d 1852, 1855 (TTAB 2008); *Marshall Field & Co. v. Mrs. Field's Cookies*, 17 USPQ2d 1652 (TTAB 1990); *Smith Int'l, Inc. v. Olin Corp.*, 201 USPQ 250 (TTAB 1978); *Rhone-Poulenc Indus. v. Gulf Oil Corp.*, 198 USPQ 372, 373 (TTAB 1978).

The discovery deposition of Dr. Glover was noticed by Applicant on April 11, 2022, to be conducted on April 28, 2022, at 9:30 a.m. at the office of Applicant's counsel in Trenton, New Jersey.[2] 25 TTABVUE 15. To the extent Opposer seeks to quash the notice of deposition, said motion is moot because the time has passed for taking the

[2] Alternatively, the notice stated that the deposition would be taken "at such time and place as may be agreed to by the parties." 25 TTABVUE 15.

noticed deposition on the identified date and the deposition did not take place. *Ate My Heart, Inc. v. Ga Ga Jeans Ltd.*, 111 USPQ2d 1564, 1565-66 (TTAB 2014).

Nonetheless, the Board turns to Opposer's for a protective order prohibiting the discovery deposition of Dr. Glover. 25 TTABVUE 2.

II. Opposer's Motion for Protective Order

A. Good Faith Effort

As a threshold matter, Fed. R. Civ. P. 26(c)(1), applicable to this proceeding under Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a), requires that a party that moves for a protective order include a certificate that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without Board action. *Flanders v. DiMarzio, Inc.*, 2020 USPQ2d 10671, at *3 (TTAB 2020); *Emilio Pucci Int'l BV v. Sachdev*, 118 USPQ2d at 1386 (a good faith effort requirement set forth in Fed. R. Civ. P. 26(c)(1) applies to a motion for a protective order).

Opposer's motion includes the requisite statement. 25 TTABVUE 4. Opposer explains that its counsel conducted a meet and confer by telephone with Applicant's counsel on April 18, 2022, i.e., prior to the noticed deposition date and before the submission of the motion for protective order. *Id.* During that conversation, Opposer explained that Dr. Glover did not have unique knowledge about this matter and that travelling to New Jersey from Tennessee, where she resides, would be exceedingly burdensome. *See* declaration of Opposer's counsel, Jessica Ekhoff, ¶ 8, *id.* at 13.

Opposer also objected to the taking of Dr. Glover's deposition by remote means,[3] as requested by Applicant's counsel. Ekhoff dec., ¶ 9, 25 TTABVUE 13. Nonetheless, Applicant would not agree to withdraw the notice of deposition. In view thereof, the Board finds that Opposer made a good faith attempt to confer to resolve the dispute

[3] During the parties' meet and confer. Applicant's counsel sought to take the deposition of Dr. Glover by video deposition and Opposer's did not consent to the taking of the deposition by remote means. 25 TTABVUE 8, note 1; Ekhoff dec. ¶ 9, *id.* at 13.

In order to avoid any future dispute on the taking of depositions by remote means, the Board hastens to point out that the Trademark Rules of Practice allow oral discovery and testimonial depositions to be conducted by telephone or videoconference, as long as the parties stipulate thereto or the Board allows the parties to use such remote means. *See, e.g., Mahender Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, *5 n.8 (TTAB 2021) ("Both [discovery] depositions in this case were taken remotely due to the Covid-19 pandemic. We commend the parties and their counsel for their cooperation in conducting the depositions in this manner despite some technical difficulties."); *Salutare S.A. de C.V. v. Remedy Drinks Pty Ltd.*, 2021 USPQ2d 16, *16 (TTAB 2021) (granting motion to allow oral depositions of Applicant's foreign-party affiliated witnesses via videoconference "[g]iven the unpredictable nature of the current pandemic and the principle that 'leave to take ... depositions [via remote means] should be liberally granted'") (citing *Hewlett-Packard Co. v. Healthcare Personnel, Inc.*, 21 USPQ2d 1552, 1553 (TTAB 1991)); *Spliethoff's Bevrachtingskantoor B.V. v. United Yacht Transp. LLC*, 2020 USPQ2d 10605, *10 (TTAB 2020) ("The Board is cognizant of the difficulties created by the COVID-19 pandemic and understands that scheduling depositions during the pandemic may be problematic. The parties are encouraged to consider taking any further depositions by telephonic or electronic means."); *Andrusiek v. Cosmic Crusaders LLC,* 2019 USPQ2d 222984, at *3 (TTAB 2019) (granting petitioner's alternate motion to take oral cross-examination by telephone or remotely by other means, due to concern about travel and accommodation expense); *USPS v. RPost Commc'n Ltd.*, 124 USPQ2d 1045 (TTAB 2017) (notice of election of oral cross-examination of declarants quashed because not noticed for reasonable place, but applicant may accept opposer's offer to make witnesses available for oral cross-examination by videoconference or telephone, thus alleviating some concern about travel and attorney expenses); *see also Faford v. Grand Trunk W. R.R. Co.*, 335 F.R.D. 503, 505 (E.D. Mich. 2020) (denying motion for protective order against depositions by video teleconferencing, stating "depositions by videoconference have emerged as the preferred method of coping with the complications and perils this pandemic has wrought") (citing *Wilkens v. ValueHealth, LLC*, No. 19-1193-EFM-KGG, 2020 WL 2496001, at *2 (D. Kan. May 14, 2020) (noting that "[v]ideo or teleconference depositions and preparation are the 'new normal' and most likely will be for some time")); *Rouviere v. DePuy Orthopaedics, Inc.*, 471 F.Supp.3d 571, 574 (S.D.N.Y. 2020) ("since the advent of the public health emergency created by the spread of the coronavirus and COVID-19 … conducting depositions remotely is becoming the 'new normal'"); TBMP § 702.03.

prior to its submission of the subject motion for a protective order. *See* Fed. R. Civ. P. 26(c)(1).

B. Parties' Arguments

Opposer asserts that Dr. Glover is an "apex witness" that is entitled to special protection. In particular, Opposer explains that Dr. Glover is responsible for leading 1,026 chapters of the AKA sorority, comprised of over 300,000 members located all over the world; she manages the overall operations of AKA, including budget, strategic fundraising, programming and communications; and Dr. Glover is also the President of Tennessee State University, travels on average 20 days per month, and resides in Tennessee. 25 TTABVUE 2-3; *see also* Ekhoff dec., ¶¶ 8-9, *id.* at 13; declaration of Dr. Glenda Glover, ¶¶ 2-6, *id.* at 24. Opposer also explains that Applicant has not yet conducted any discovery, and Opposer has not produced any documents, much less documents showing that Dr. Glover has knowledge relevant to the claims and defenses in this proceeding. Additionally, Dr. Glover avers in her declaration, "I have no unique knowledge relevant to this case. I have not been involved with AKA's use of the phrase 'stroll to the polls.'" Glover dec. ¶ 5, *id.* Opposer states further that Dr. Glover is not identified in Opposer's initial disclosures as a person having knowledge of the issues involved in this proceeding. Rather, in its disclosures, Opposer identifies its Executive Director, Cynthia D. Howell, as the person having discoverable information that AKA may use to support its claims or defenses. 25 TTABVUE 20.

Contrary to Opposer's position, Applicant argues that Dr. Glover has non-repetitive and "unique personal knowledge" regarding several topics relevant to this matter, including AKA's use of the applied-for mark. In particular, Applicant asserts, inter alia, the following:

- Dr. Glover is the only spokesperson for the sorority, *see* 29 TTABVUE 6 and declaration of Ramona Prioleau, ¶ 17, 28 TTABVUE 15 and Exh. G thereto, *id.* at 35;
- the AKA Constitution provides that the Directorate has the power to conduct the business of AKA; and the Bylaws provide that the Directorate deliberates on all policies and problems of the organization, and administers the business of the sorority when the Boule is not in session, *see* 29 TTABVUE 5, 21 and Prioleau dec. ¶¶ 11-12, 29 TTABVUE 14;
- the AKA Bylaws provide that the Supreme Tamiouchos (or Treasurer), a position once held by Dr. Glover, monitors all receipts and expenditures of the Sorority, *see* Prioleau dec. ¶ 14, *id.* at 5, 15;
- The constitution of the National Pan-Hellenic Council ("NPHC") (also referred to as the "Divine Nine"), to which Opposer belongs provides that its Council of Presidents ("COP") is responsible for instructing the executive board regarding activities to be executed on behalf of the NPHC, *see* 28 TTABVUE 7 and Prioleau dec. ¶ 22, *id.* at 16; and

- Only Dr. Glover is a member of both Opposer and of the COP of the NPHC, *see* 29 TTABVUE 6-7 and Prioleau dec. ¶ 30, 28 TTABVUE 17, therefore, unlike Ms. Howell, Dr. Glover can testify as to the proceedings of both AKA and the COP of the NPHC, including the internal procedures and initiatives of the NPHC and any alleged current or prior use of Applicant's Mark by the "Divine Nine," as alleged by AKA its Amended Notice of Opposition. *Id.* at 17; *see* Amended Notice of Opp., ¶ 3, 23 TTABVUE 3.[4]

In view of the foregoing, Applicant contends that Dr. Glover would have a greater quality or quantity of knowledge pertaining to the sorority's involvement in the procedures and programs of the "Divine Nine." Further, "due to the public disclosure of certain documents and procedures by AKA and the NPHC, conducting other means of discovery prior to noticing the deposition of Dr. Glover was not necessary in order to determine that Dr. Glover has unique first-hand, non-repetitive knowledge of facts critical to this case." 29 TTABVUE 8. Additionally, Applicant asserts, based on information belief, that Dr. Glover will be concluding her service as CEO and International President of AKA after the AKA meeting scheduled for July 10-15, 2022. *Id.* In view thereof, Applicant contends it was necessary to depose Dr. Glover prior to propounding other discovery requests.

[4] Opposer alleges the following in paragraph 3 of the Amended Notice of Opposition:

> For many years prior to Applicant's 2018 alleged dates of first use, AKA has been using the phrase "STROLL TO THE POLLS" in an effort to get people to the polls to vote. Other members of the Divine Nine also have used the tagline in connection with voter engagement and registration prior to 2018.

C. Legal Standard for a Protective Order

Trademark Rule 2.120(g), 37 C.F.R. § 2.120(g), provides, in pertinent part:

> Upon motion by a party … from whom discovery is sought, and for good cause, the Trademark Trial and Appeal Board may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the types of orders provided by clauses (1) through (8), inclusive, of Rule 26(c) of the Federal Rules of Civil Procedure.

A movant must establish good cause for the issuance of a protective order by providing "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Emilio Pucci Int'l BV v. Sachdev*, 118 USPQ2d 1383, 1386 (TTAB 2016) (citing *The Phillies v. Philadelphia Consol. Holding Corp.*, 107 USPQ2d 2149, 2152 (TTAB 2013) (citing *FMR Corp. v. Alliant Partners*, 51 USPQ2d 1759, 1761 (TTAB 1999)); *Pioneer Kabushiki Kaisha v. Hitachi High Tech. Am., Inc.*, 74 USPQ2d 1672, 1674-77 (TTAB 2005) (protective order granted to prevent the taking of additional depositions as to three of six employees). With respect to a motion for protective order related to a high-level official, the Board has described the parties' respective burdens as follows:

> [W]hen a party seeks to depose a very high-level official of a large corporation, and that official (or corporation) files a motion for protective order to prohibit the deposition, the movant must demonstrate through an affidavit or other evidence that the official has no direct knowledge of the relevant facts or that there are other persons with equal or greater knowledge of the relevant facts.[5] If the movant meets this initial burden, then the burden shifts to the party seeking the deposition to show that the official has unique or superior personal knowledge of relevant facts.

[5] Other evidence which may show that the official has no direct knowledge of the relevant facts or that there are other persons with equal or greater knowledge of the relevant facts may include the affidavit or declaration of an employee of the corporation, discovery responses on behalf of the corporation, or corporate publications. *FMR Corp.* 51 USPQ2d at 1763 n.5.

> If the party seeking the deposition does not satisfy this showing, then the Board will grant the motion for protective order and require the party seeking the deposition to attempt to obtain discovery through less intrusive methods.

FMR Corp., 51 USPQ2d at 1763.

A protective order that prohibits the taking of a deposition altogether is rarely granted in the absence of extraordinary circumstances. *FMR Corp.,* 51 USPQ2d at 1761.

D. Analysis and Order

Initially, the Board finds that Opposer has established specific facts which demonstrate that Dr. Glover is a high-ranking official, currently holding the most senior officer position of the AKA sorority, i.e., International President and CEO. *See* Glover dec. ¶ 2, 25 TTABVUE 24. Similarly, the record shows that in said position, Dr. Glover's "primary duties include continuing the sorority's illustrious legacy of service, propelling the membership onto the global stage, and implementing an array of programs to educate and empower children, women, and families." 28 TTABVUE 29. The record shows that the foregoing duties involve, inter alia, implementing various programs such as the #CAPSM (College Admission Process) program, promoting Historically Black Colleges and Universities, raising critical health care issues of African American women, supporting African American businesses and personal finance, fostering exposure visual and performing arts, and providing assistance to international areas populated with people of color. *Id.*

None of the high-level sorority goals or functions described in the record in connection with Dr. Glover refer to programs related to voters, voting or voter

registration. *See also* Glover dec. ¶ 2, 25 TTABVUE 24 ("I manage overall operations of AKA, including budgeting, strategic fundraising, programming, and communications."). Instead, the record shows specifically that Dr. Glover "has not been involved with AKA's use of the phrase 'stroll to the polls.'" Glover dec. ¶ 5, 25 TTABVUE 25. In view of the foregoing, and given Dr. Glover's additional occupation as President of Tennessee State University, Glover dec. ¶ 3, *id.* at 24, 28 TTABVUE 23, and her frequent monthly travel schedule, Glover dec. ¶ 4, 25 TTABVUE 24-25, the Board concludes that Opposer has shown good cause for the issuance of a protective order to shield Dr. Glover from the undue burden the noticed deposition would cause.

Further, the Board is not persuaded by Applicant's arguments and supporting materials that Dr. Glover has unique or superior personal knowledge of facts that are actually relevant to the claims and defenses pleaded in this proceeding. Applicant focuses in particular on Opposer's allegation of priority insofar as Applicant argues that Dr. Glover has historical and current knowledge of both Opposer and the "Divine Nine's" alleged prior use of the phrase "stroll to the polls." *See* 28 TTABVUE 6 and Prioleau dec. ¶ 30, 28 TTABVUE 17.

But Applicant has not shown why Dr. Glover, as a high-level official, actually has knowledge of Opposer's use, much less the Divine Nine's use, of that phrase. In particular, although Dr. Glover's has held several officer positions with AKA, and is concurrently a member of the Council of Presidents of the National Pan-Hellenic Council, the record does not show that she has specific knowledge about any programs

related to voting, much less any use by either organization of the applied-for mark. *See FMR Corp.*, 51 UPSQ2d at 1764 ("the mere fact that [the proposed witnesses] are named in the MAGELLAN fund prospectus or other "public statements" as investment managers does not mean that they hold unique or superior knowledge of the information sought."). The Board also disagrees with Applicant's interpretation of the news article pertaining to the 2020 election, i.e., the reference to Dr. Glover as Opposer's "spokesperson about Sen. Harris." The statement was made by the person who wrote the article, not the sorority itself and, as mentioned by Opposer in its reply brief, 30 TTABVUE 5, that statement was part of a larger discussion relating to why the non-profit organization could not endanger its tax-exempt status by issuing political statements. *See* 28 TTABVUE 35. In view thereof, there is no reasonable basis for concluding that Dr. Glover is Opposer's only spokesperson for any purpose.

Finally, Opposer has identified its Executive Director, Cynthia Howell, as a person having discoverable information. The Board is troubled by the fact that Applicant noticed the deposition of Dr. Glover in the first instance, before pursuing the deposition of Ms. Howell. *See FMR Corp.*, 51 UPSQ2d at 1764. The record shows that Ms. Howell has held her position with the sorority since February 2013, well before the parties' respective alleged first use of "stroll to the polls" in or before 2018. 28 TTABVUE 12. Therefore, Applicant should have noticed a deposition for Ms. Howell initially, even though Dr. Glover's term as International President and CEO is ending soon. Further, should it be necessary to depose an individual who represents the NPHC, the Trademark Rules of Practice allow for depositions of third parties

under Rule 30(b)(6) of the Federal Rules of Civil Procedure.[6] *See* Trademark Rule 2.120(b), 37 C.F.R. § 2.120(b).

Accordingly, Opposer's motion for protective order is **GRANTED**. *See, e.g., FMR Corp.,* 51 USPQ2d at 1764 (protective order against taking deposition of high-level executive granted).[7]

III. Proceedings Resumed; Trial Dates Reset

This proceeding is resumed. Trial dates are reset as shown in the following schedule:

Expert Disclosures Due	**8/24/2022**
Discovery Closes	**9/23/2022**
Plaintiff's Pretrial Disclosures Due	**11/7/2022**
Plaintiff's 30-day Trial Period Ends	**12/22/2022**
Defendant's Pretrial Disclosures Due	**1/6/2023**
Defendant's 30-day Trial Period Ends	**2/20/2023**
Plaintiff's Rebuttal Disclosures Due	**3/7/2023**
Plaintiff's 15-day Rebuttal Period Ends	**4/6/2023**
Plaintiff's Opening Brief Due	**6/5/2023**
Defendant's Brief Due	**7/5/2023**

[6] If the proposed non-party deponent is not willing to appear voluntarily, the deposing party must secure the non-party deponent's attendance by subpoena, pursuant to 35 U.S.C. § 24 and Fed. R. Civ. P. 45. *See* Fed. R. Civ. P. 30(a)(1) and Fed. R. Civ. P. 45; *Kellogg Co. v. New Generation Foods Inc.,* 6 USPQ2d 2045, 2048-49 (TTAB 1988) (deposition of former employee can only be taken by voluntary appearance or by subpoena).

[7] Nonetheless, if a good faith effort to obtain the discovery through less intrusive means fails, then Applicant may file a motion to modify this protective order. *FMR Corp.*, 51 USPQ2d at 1764.

Plaintiff's Reply Brief Due	**7/20/2023**
Request for Oral Hearing (optional) Due	**7/30/2023**

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 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).

☼☼☼