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

Proceeding no.	91284805
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Attachments	MOTION TO CHALLENGE CONFIDENTIALITY DESIGNATIONS.pdf(324891 bytes)

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

CANDLE SCIENCE, LLC, Opposer,)	Opposition No. 91284805 Application Ser. No.: 97336471
v.)	Mark: CANDLE LAB (and design)
GRACE TINGTING FU Applicant)	
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**APPLICANT’S MOTION TO CHALLENGE THE CONFIDENTIALITY
DESIGNATIONS OF OPPOSER’S DISCOVERY RESPONSES**

Applicant, Grace Tingting Fu, (“Applicant”), hereby submits this motion to challenge the confidential designation of Opposer’s Candle Science LLC (“Opposer”)’s written responses to Applicant’s first set of discovery requests (the “Motion”) pursuant to TBMP 412.01(b).

INTRODUCTION

Applicant respectfully seeks Board intervention and respectfully requests that the Board redesignate as non-confidential: Opposer’s Responses to Applicant’s: (a) First Set of: Interrogatories (Nos. 1-25); (b) First Set Of Requests For Production (Nos. 1-32); and (c) Responses To Applicant’s First Set Of Requests For Admissions (Nos. 1-32), true copies of which respectively are filed separately (under seal) as Exhibits “A”, “B”, and “C”.

There is nothing in the Opposer’s written responses that qualifies as “Confidential” under the Board’s Standard Protective Order. Similarly, there is nothing in the Opposer’s written responses that could reasonably be considered “a trade secret or other confidential research, development, or commercial information” under FRCP Rule 26(c)(1)(g) or

Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g).

Opposer's blanket designations of "confidentiality" as to all of its responses to Applicant's discovery requests are plainly inappropriate¹, unreasonable², violate the express terms of the TTAB Standard Protective Order³ and further undermine and contravene all applicable law and public policy.⁴ Because there is nothing in the responses that qualifies as "Confidential" under the Protective Order, pursuant to Trademark Rule 2.116(g) and the express terms of the Protective Order, the Board must redesignate Opposer's responses to Applicant's discovery requests as non-confidential.

¹ Notes to F.R.C.P. Rule 26 "...[C]ourts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, e.g., *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y. 1964). Notes of Advisory Committee on Rules—1970 Amendment

² When addressing a party's claim of confidentiality in *Azalea Health Innovations, Inc. v. Rural Health Care, Inc.*, 125 USPQ2d at 1239, the Board stated: "A rule of reasonableness dictates what information should be redacted, and **only in very rare instances should an entire submission be deemed confidential**. See, e.g., *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1460-61 (TTAB 2014); *Swiss Watch Int'l Inc. v. Fed. of the Swiss Watch Indus.*, 101 USPQ2d 1731, 1736 (TTAB 2012). In addition, '[t]he Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.' Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g)."

³ The TTAB Standard Protective Order provides, in relevant part: TERMS OF ORDER

1) Classes of Protected Information.

The Rules of Practice in Trademark Cases provide that all inter partes proceeding files, as well as the involved registration and application files, are open to public inspection. **The terms of this Order are not to be used to undermine public access to such files.** When appropriate, however, a party or witness, on its own or through its attorney, may seek to protect the confidentiality of information by employing one of the following designations. ...

⁴ It is the "Board's general policy that all papers in a proceeding be public." See *Ayoub, Inc. v. ACS Ayoub Carpet Serv.*, 118 USPQ2d 1392, 1398 n.39 (TTAB 2016); See also e.g., *Azalea Health Innovations, Inc. v. Rural Health Care, Inc.*, 125 USPQ2d 1236 at 1238-1239 (TTAB 2017).

Applicant further submits that Opposer's blanket designations of confidentiality as to all of its written responses were made without any substantial justification and were improperly certified, having been made for an improper purpose in violation of FRCP Rule 26 (g)(1) and (g)(3), namely including to harass, cause unnecessary delay, or needlessly increase the cost of this proceeding and were further made in bad faith and in direct dereliction of TBMP Sections 412.01(a)⁵ and 408.01(c).

⁵ Because a confidential designation of discovery or deposition testimony or other information limits what an opposing party can do with the materials and is one step removed from filing documents under seal, **producing parties or their counsel are expected to act in good faith in designating information as "Confidential" or "Confidential – For Attorneys' Eyes Only (Trade Secret/Commercially Sensitive)"** under the terms of the Board's standard protective order. [*Citing* Fed. R. Civ. P. 26(g)(1) (requiring discovery responses to be "not interposed for any improper purpose"). *See Blackhorse v. Pro Football Inc.*, 98 USPQ2d 1633, 1635 (TTAB 2011) (**party to be circumspect and to limit the "confidential" designation only to information that is truly confidential or commercially sensitive**); *Bass Pro Trademarks LLC v. Sportsman's Warehouse Inc.*, 89 USPQ2d 1844, 1848 (TTAB 2008) (**urging counsel to exercise discretion and designate as confidential only such information that is truly confidential when appearing before the Board in future proceedings**); *THK America Inc. v. NSK Co. Ltd.*, 157 F.R.D. 637, 33 USPQ2d 1248, 1255, 1253 (N.D. Ill. 1993) (**it is counsel's "place and responsibility" to ensure that the proper confidential designations are assigned to documents produced**); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988) (**party to blanket protective order must invoke confidential designation in good faith**). *See also Mancina v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (discussing Fed. R. Civ. P. 26(g) generally)]. ... The fact that the Board's standard protective order is automatically entered upon commencement in a Board proceeding does not give a party unbridled authority to designate its discovery responses and production as protected. [*Citing Hunter Industries, Inc. v. Toro Co.*, 110 USPQ2d 1651, 1656 n.12 (TTAB 2014) ("the mere assertion that information is confidential does not make such designation proper."), *dismissed per stipulation*, No. 14-CV-4463 (D. Minn. Jan. 20, 2016); *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1591 n.4 (TTAB 2011) (excessive markings of various information as confidential often indicates that matter is improperly designated or not useful to case), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014) (non-precedential). ... **the party seeking to designate information as "Confidential" or "Confidential – For Attorneys' Eyes Only (Trade Secret/Commercially Sensitive)" has a duty to make a meaningful good faith effort to**

It is plainly improper for Opposer to have designated all of its written discovery responses and objections as “confidential” under the Board’s standard protective order. “Producing parties should designate only those particular discovery responses, documents, deposition exhibits, and depositions transcript pages as confidential within the scope of and consistent with the protective order entered in the proceeding.” TBMP § 412.01(a). *See also* TBMP Section 408.01(c).⁶

Adding harmful insult to injury, although Opposer’s counsel was repeatedly advised of Applicant’s significant and legitimate concerns regarding Opposer’s improper designations, and

designate; 37 C.F.R. § 2.116(g)(“The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.”)

⁶ The signature of a party or attorney constitutes a certification as to a discovery request, response, or objection and disclosure as set forth in Fed. R. Civ. P. 26(g)(1).] Provision is made, in Fed. R. Civ. P. 26(g), for the imposition of appropriate sanctions if a certification is made in violation of the rule. *See also* TBMP § 106.02 (Signature of Submissions). "The certification duty requires the party or attorney to make a reasonable inquiry into the factual basis of his response, request or objection."

Because the signature of a party or its attorney to a request for discovery constitutes a certification by the party or its attorney that, inter alia, the request is warranted, consistent with the Federal Rules of Civil Procedure, and not unreasonable or unduly burdensome, a party ordinarily will not be heard to contend that a request for discovery is proper when propounded by the party itself but improper when propounded by its adversary. . . . Similarly, the signature of a party or its attorney to a discovery response (i.e., response to interrogatory, request to admit, or request for production) or objection is a certification by the party or its attorney that, inter alia, the response or objection is warranted, consistent with the Federal Rules of Civil Procedure, and not interposed for any improper purpose such as to cause unnecessary delay or needlessly increase the cost of litigation.

The certification requirement is distinguishable from the signature requirements in rules such as Fed. R. Civ. P. 33 and certifies that the party or attorney has made a reasonable effort to assure that all available information and documents responsive to the discovery demand have been provided. [*Citing No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1556 (TTAB 2000).]

Under Fed. R. Civ. P. 26(g)(1)(A), a signature with respect to a disclosure constitutes certification that the disclosure is complete and correct at the time it was made. . . .”

despite that the undersigned counsel made substantial and repeated attempts to resolve, narrow and address Opposer’s confidentiality designations⁷, Opposer’s counsel knowingly and intentionally added to the costs and delays associated therewith and simply ignored, flouted their duty to “negotiate in good faith regarding the designation(s)” in direct violation of Paragraph 14 of the Board’s standard Protective Order herein, which particularly provides:

14) Challenges to Designations of Information as Protected.

If the parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing party. If the parties are unable to resolve their differences, the party challenging the designation may make a motion before the Board seeking a determination of the status of the information.

A challenge to the designation of information as protected must be made substantially contemporaneous with the designation, or as soon as practicable after the basis for challenge is known. When a challenge is made long after a designation of information as protected, the challenging party will be expected to show why it could not have made the challenge at an earlier time. The party designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.

Accordingly, FRCP Rules 11, 26(g), several distinct sections of the TBMP, the USPTO Rules of Professional Conduct set forth in 37 C.F.R. §§ 11.101 et. seq., particularly including, without limitation 37 CFR § 11.18(b)(1) and (b)(2), 37 CFR §11.301; 37 CFR §11.304(a), (b), and (d)) as well as 37 C.F.R. §2.193, and the express terms of the Board’s Protective Order strongly suggest, if not require, that in addition to redesignating Opposer’s written discovery responses as “non-confidential”, the Board should issue a stern warning and an appropriate sanction against Opposer and it’s counsel.

⁷ (See Declaration of Stephen L. Anderson “Anderson Decl.”; Exhibits A-H filed separately, under seal)

FACTS

On February 14, 2024, Opposer Candle Science LLC served its written responses to Applicant first set of discovery, namely its written responses and objections to Applicant's First Set of Interrogatories, First Set of Requests for Production of Documents and First Requests For Admissions. True copies of Opposer's corresponding responses are being filed separately under seal herewith as Exhibits "A", "B" and "C" respectively. All such documents had been designated as "CONFIDENTIAL" pursuant to the TTAB's standard Protective Order.

After reviewing Opposer's responses to Applicant's First sets of Requests for Production of Documents and Interrogatories, in an effort to resolve the apparent issues and serious deficiencies therewith, "including unwarranted, unspecified and fallacious claims of confidentiality and purported privilege" on February 22, 2024, the undersigned counsel sent the letter attached to the Anderson Decl. as Exhibit "D", requesting that Opposer's counsel meet and confer on the issues as soon as possible.

Approximately 24 hours later, in view of additional serious issues, deficiencies and obvious, irreconcilable factual inconsistencies involving Opposer's Responses to Applicant's First Set of Requests for Admissions, in an effort to resolve those concerns, on February 23, 2024, the undersigned sent the letter attached to the Anderson Decl., as Exhibit "E" which further requested that Opposer's counsel agree to schedule and conduct a conference on all the issues as soon as possible.

As Opposer's counsel failed to respond to (or apparently understand) Applicant's concerns, further good faith efforts were made by the undersigned seeking in particular to address Applicant's disagreement as to Opposer's designations, including, by email sent February 27,

2024, that explicitly outlined in detail, Applicant's particular concerns and intention to challenge Opposer's confidentiality designations. Therein the undersigned specifically challenged the propriety of Opposer's blanket designation of each of its written discovery responses as CONFIDENTIAL as being "plainly improper," further truthfully noting as follows:

"Indeed, I cannot conceive of any manner in which your client's (boilerplate objections and incomplete) discovery responses contain or refer to any information that could reasonably be deemed to be CONFIDENTIAL.

Certainly, your client has failed and continues to fail to identify or produce any responsive documents whatsoever, and the written responses themselves are completely devoid of any proffered or purported categories of material that could reasonably be deemed as CONFIDENTIAL in accord with the Standard Protective Order applicable herein.

In sum, your client's written responses lack any information or items that could reasonably be considered as either:

- (1) sensitive technical information, including current research, development and manufacturing information;
- (2) sensitive business information, including highly sensitive financial or marketing information;
- (3) competitive technical information, including technical analyses or comparisons of competitor's products or services;
- (4) competitive business information, including non-public financial and marketing analyses, media scheduling, comparisons of competitor's products or services, and strategic product/service expansion plans;
- (5) personal health or medical information;
- (6) an individual's personal credit, banking or other financial information; or
- (7) any other commercially sensitive information ..., whatsoever.

As such, pursuant to Paragraph 14 of the Board's Standard Protective Order, I hereby request that you either immediately serve amended (and complete) written responses to Ms. Fu's discovery which do not contain the (inappropriate and invalid) CONFIDENTIALITY DESIGNATION, or otherwise please write back promptly with any authority or explanation as to your client's position and disagreement regarding same. Please note that I hereby request your prompt response, and I am happy to meet and confer with you regarding my disagreement with your confidentiality designations.

In such regard, I remind you that under the applicable rules and the express terms of the Standard Protective Order (Paragraph 14) that you "are obligated to negotiate in good faith regarding the designation by the disclosing party." Of course, if we are

unable to resolve our differences, my client will soon be forced to challenge the designations by Motion before the Board seeking a determination of the status of the information. *Id.*

With the above in mind, I look forward to hearing from you very, very soon.”

Attached to the Anderson Decl. as Exhibit “F” is a true and correct copy of that email.

On February 28, 2024, Opposer’s counsel replied by email stating, as follows:

We are in receipt of your email below. We disagree with your mischaracterizations.

It appears that what you are trying to ask us about (once your unnecessary mischaracterizations and attacking comments are set aside) is that your client is requesting that Candle Science not designate its February 14, 2024 discovery responses as “Confidential” under the Protective Order.

Assuming that’s right, we’re considering your client’s request with our client, and we’ll get back to you.

In the meantime, please let us know the bases for your client’s request. For example, under the Protective Order, you and Ms. Fu have access to Candle Science’s discovery responses that are designated “Confidential.” Who do you and/or Ms. Fu want to share them with who does not have access under the Protective Order?

That same day the undersigned left voice mail messages for two of Opposer’s attorneys, then sent another e-mail restating Applicant’s position, noting:

“I have advised you of my position that your designation of Candle Science's woefully insufficient and incomplete responses as CONFIDENTIAL is improper, overbroad and meaningless under the circumstances inasmuch as the documents do not actually appear to contain any information which could reasonably be deemed as confidential, proprietary or secret.

As stated previously "I cannot conceive of any manner in which your client's (boilerplate objections and incomplete) discovery responses contain or refer to any information that could reasonably be deemed to be CONFIDENTIAL.

Certainly, your client has failed and continues to fail to identify or produce any responsive documents whatsoever, and the written responses themselves are completely devoid of any proffered or purported categories of material that could reasonably be deemed as CONFIDENTIAL in accord with the Standard Protective Order applicable herein. ...

Inasmuch as the Standard Protective Order requires that we address this issue promptly and "contemporaneously", your vague promise to "get back to me" is insufficient and not well taken.

As for your remaining comments, I hereby direct you to the language of the SPO herein, particularly including paragraphs 1-4, 6, 12, 14 and 15, [including the language of Paragraphs 14, and 15 and further inquiring, as follows:]

DO YOU OR YOUR CLIENT reasonably believe any of the written responses to contain protected information?

If so, please identify the confidential materials forthwith, and provide me with any authority for your position as well as a CONTEMPORANEOUS date certain when I can expect to receive your complete and unequivocal response in such regard.”

A true copy of that email exchange is attached as Exhibit “G” to the Anderson declaration.

On March 01, 2024, Opposer’s counsel replied by email, again only stating:

We disagree with your mischaracterizations. In any event, and so that we can try to resolve Ms. Fu’s concerns, please answer the question we asked below: who do you and/or Ms. Fu want to share Candle Science’s February 14, 2024 discovery responses with who does not have access to them under the Protective Order?

On March 4, 2024, the undersigned wrote back.

Please address the substantive issues so I will not be forced to file a motion to challenge your client's designations.

With all due respect, having reviewed all of the relevant authorities, in my humble opinion, your question has no relevance to any factor at issue.

In short, by designating materials as confidential, (WHICH PLAINLY ARE NOT CONFIDENTIAL) --- inasmuch and because, as I have noted several times- your client's written responses (and inappropriate objections) "lack any information or items that could reasonably be considered as either:

- (1) sensitive technical information, including current research, development and manufacturing information;
- (2) sensitive business information, including highly sensitive financial or marketing information;
- (3) competitive technical information, including technical analyses or comparisons of competitor’s products or services;

(4) competitive business information, including non-public financial and marketing analyses, media scheduling, comparisons of competitor's products or services, and strategic product/service expansion plans;

(5) personal health or medical information;

(6) an individual's personal credit, banking or other financial information; or

(7) any other commercially sensitive information ..., whatsoever" ---

you are unreasonably causing (and have caused) significant long-term additional costs and obligations on the Applicant, her counsel, potential witnesses and experts in the case, and the Board, which are wholly unwarranted and unjustified and which have already and most certainly will increase the costs and complexity of this case.

As you should be aware, TTAB trademark Board proceedings are generally considered PUBLIC matters. However, under Federal Rule of Procedure 26(c) a party responding to discovery, is permitted to reasonably shield from disclosure "a trade secret or other confidential research, development, or commercial information."

As you know, confidential materials are treated differently and require that any such documents (in this case, namely, the Opposer's written discovery responses), be filed with the Board under seal, (now, immediately herein adding to the costs and complexity of Applicant's imminent Motions to Compel further responses - the grounds and substance of which, although outlined in my correspondence of February 22 and 23, you have totally and unreasonably failed and refused to address) and [must] be further protected from public disclosure by the terms of the Board's Standard Protective Order.

As you also know, failure to abide by the terms of the Protective Order can result to serious sanctions and other potential consequences. (See e.g., *United States Polo Association v. David McLane Enterprises, Inc.*, 2019 USPQ2d 108442 (TTAB 2019) *ARSA Distributing, Inc. v. Salud Natural Mexicana S.A. de C.V.*, 2022 USPQ2d 887 (TTAB 2022) and *Revolution Jewelry Works, Inc. v. Stonebrook Jewelry LLC d/b/a Revolution Jewelry*, 2022 USPQ2d 229 (TTAB 2022))

Due to such potential issues that can and often do occur as the result of a party unreasonably over-designating materials as confidential, the Standard Protective Order in Board matters allows a receiving party to challenge the other party's confidentiality designations - thus requiring the party seeking to maintain secrecy to establish their burden of showing that the materials warrant protection.

'The party designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.'

Here, your client has unilaterally and improperly imposed and implicated the protective order by designating all of its (woefully incomplete) discovery responses as CONFIDENTIAL.

Accordingly, under the terms thereof, you must promptly meet and confer with me and demonstrate your client's burden of justifying the nature and extent of its designations pursuant to Paragraph 14 of the Protective Order or risk a motion.

HAVING SAID THAT, in response to your (red-herring) inquiry, I respond thusly,

I Now seek to share your client's respective written responses to Ms. Fu's discovery requests with the Board via one or more (PUBLICLY-FILED) imminent Motions to Compel ... moreover, due to the costs and procedures that you have unilaterally imposed and now failed to reasonably defend, as a matter of law, these materials should be available for PUBLIC VIEWING -

Thus, it is not incumbent upon Ms. Fu to name every conceivable person who she or counsel might someday wish "to share Candle Science's February 14, 2024 discovery responses with who does not have access to them under the Protective Order" - rather, as noted and repeatedly requested, it IS INCUMBENT UPON YOU to meet and confer with me regarding these issues (which you have acknowledged yet failed to substantively reply to for more than one week.

Inasmuch as I plan to file a motion with the Board in this regard quite shortly, I would sincerely appreciate your reply to the substance of my repeated requests without further delay."

On March 5, 2024, the undersigned received two letters from Opposing counsel, neither of which addressed Opposer's confidentiality designations nor were germane to any issue implicated by this Motion. Out of an abundance of caution and in furtherance of Applicant's efforts to resolve the issues presented, the undersigned sent two more emails to counsel, the first stating:

Unless I am mistaken, you have completely failed and refused to meet your obligations with regard to the "Confidentiality" designations raised on and within Opposer's discovery responses. As I have repeatedly advised you the FRCP, the Rules of Practice, the terms of the Protective Order and TBMP Sections 408.01(c) and 412.01(a) require in such regard that "If the parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing party."

Please confirm that you will reserve responses without said designations forthwith.”

The latter correspondence of March 5, similarly advised counsel that (their):

“letter of this even date fails to adequately address many of the issues and concerns that I have continued to attempt to resolve” inasmuch as “it fails to address your client's improper blanket designations of confidentiality and more generally, it simply fails to resolve the overwhelming majority of our reasonable concerns set forth in my prior correspondence ... that result from Opposer's Feb 14 responses.”

In short, if you would like to avoid the otherwise imminent filing of Applicant's Motions (to compel) and its anticipated Motion to otherwise challenge the responses and seek to redesignate the initial responses as non-confidential, and would like an opportunity to engage in further discussions and potential give-and-take via a telephone call, I would be willing to conduct one tomorrow, March 6.

Otherwise, because I am afraid that you have either misunderstood, ignored and only exacerbated the issues raised, unless we are able to fully discuss these issues and/or unless I receive your client's complete, amended and supplemented responses to all three sets of discovery forthwith and by 6pm EST tomorrow -- served without the unwarranted confidentiality designations, spurious objections and evasive non-sequiturs (made and certified as having been made and responsive to the particular interrogatories and requests (after and pursuant to a reasonable and diligent search for the information sought), it appears that the best and most likely, if not only path of resolving these issues will be through assistance from the Board.

Please let me know your availability accordingly.”

True copies of said correspondence are attached as Exhibit “H” to the Anderson decl.

On March 6, 2024 Opposer’s counsel finally responded. Their e-mail, prefaced with their usual greeting “[w]e disagree with your additional mischaracterizations” was followed by a flat-out rejection, unequivocally stating:

In any event, we believe that Candle Science’s designation of its February 14 discovery responses as “Confidential” is proper. The Trademark Trial and Appeal Board’s Standard Protective Order allows for documents to be designated as “Confidential” to shield them from public access. Candle Science’s discovery responses include confidential information, including, for example, sales and marketing information, and information about Candle Science’s enforcement efforts,

which is not already public knowledge and thus the information should be shielded from public access. *See, e.g.*, T.B.M.P. § 412.01(a).

If, after considering Candle Science's position with your client further, Ms. Fu continues to disagree, we're available for a telephonic meet and confer to discuss these issues on Monday between 3 p.m. and 5 p.m. central and on Tuesday between 11 a.m. and 1 p.m. central. If these times don't work for you, please let us know some times next week that do.

After discussing the matter with Ms. Fu, the undersigned responded by email and telephone, requesting that Opposer's counsel "clarify what 'mischaracterizations' you assert that I have made"; that they "please set forth why you maintain that the written responses are subject to blanket protection" and that they "[p]lease identify specifically any material contained in any of the numbered responses that you claim is subject to protection." Further advising of his availability to discuss the issues at any time that day, or at any time before noon, the following day, March 7, in view of Opposer's continual delay, having knowingly failed and refused to meet and confer or negotiate in good faith regarding Opposer's confidentiality designations first raised in their February 14 discovery responses at any time sooner than March 11 after repeatedly refusing even a five minute phone call to discuss the parties' concerns or otherwise communicate in any manner that could reasonably be deemed to be substantially contemporaneous to Applicant's repeated and detailed requests commencing nearly three weeks prior thereto. See Anderson decl. and Exhibit "I".

Since February 22, while Opposer's counsel has found time to reply with substantial unrelated correspondence that has no bearing on the issues presented, to date Opposer has totally and completely failed to address, attempt to justify, or reasonably agreed to negotiate in good faith regarding any of issues raised with regard to Applicant's challenge to Opposer's February 14, 2024 confidentiality designations that are the subject of this Motion.

ARGUMENT

Incorporating the authorities set forth hereinabove, Applicant maintains that Opposer's blanket designations of Confidentiality as to all of its written responses and objections served in response to Applicant's discovery requests is plainly improper and unwarranted and Opposer's further dilatory acts including its failure to reasonably negotiate or justify any reasonable grounds for their overbroad, boilerplate designations of confidentiality now requires immediate action by the Board in reclassifying all of Opposer's written discovery responses.

Once information is designated as protected, its use and dissemination are circumscribed as provided in the Board's standard protective order. A party who disagrees with another party's designation of protected information under the Board's standard protective order may challenge the designation (i.e., "Confidential" or "Confidential – For Attorneys' Eyes Only (trade secret/commercially sensitive)". Standard Protective Order ¶ 14; TBMP 412.01(b); *Georgia Pacific Corp. v. Solo Cup Co.*, 80 USPQ2d 1950, 1954 (TTAB 2006) (Board ordered re-designation of portions of expert report and deposition transcript as non-confidential based on party's challenge to designation); *United States Polo Association v. David McLane Enterprises, Inc.*, 2019 USPQ2d 108442 (TTAB 2019) (Granting in part motion to challenge confidentiality designations, the Board ordered redesignation of certain documents and deemed certain documents, including discovery responses as non-confidential, ordering that the written responses and certain documents be reproduced without any confidentiality designations.

Parties may challenge the level of classification as well as whether material is

confidential at all. *Id.* TBMP 412.01(b); *THK America Inc. v. NSK Co. Ltd.*, 157 F.R.D. 637, 33 USPQ2d 1248, 1255-56 (N.D. Ill. 1993). The Board has wide discretion under Rule 26(c) to "decide when a protective order is appropriate and what degree of protection is required." Although a party may mark material as confidential, Fed. R. Civ. P. 26(c)(1) "does not furnish an absolute privilege against disclosure of material that a party might wish to mark confidential." TBMP 412.01(b). When a designation has been challenged, it is the party seeking protection that bears the burden of demonstrating that its confidentiality designations are appropriate. *Id.*; Fed. R. Civ. P. 26(c)(1); *FMR Corp. v. Alliant Partners*, 51 USPQ2d 1759, 1761 (TTAB 1999).

As the designating party, Opposer bears the burden of demonstrating that its confidentiality designations are appropriate. See Standard Protective Order ¶ 14; TBMP § 412.01(b). "To successfully carry the burden of establishing good cause, the producing party must demonstrate a particular need for protection and that a clearly defined and serious injury will result otherwise. TBMP 412.01(b); Fed. R. Civ. P. 26(c)(1). See e.g., *Deford v. Schmid Products Co.*, 120 F.R.D. 648, 653 (D. Md. 1987) (collecting cases); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1476 n.19 (TTAB 2017); *United States Polo Association v. David McLane Enterprises, Inc. supra*; See also *ARSA Distributing, Inc. v. Salud Natural Mexicana S.A. de C.V.*, 2022 USPQ2d 887 (TTAB 2022)(Ordering Opposer to remove certain confidentiality designations, providing that certain designated materials be redesignated as public and further finding Opposer's various filings including responses to motion, having been improperly designated as confidential). Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g).

To show good cause, the party must provide particular and specific demonstrations of fact, as distinguished from stereotyped and conclusory statements. TBMP 412.01(b); *FMR Corp.*, 51 USPQ2d at 1762. In each case, the need for privacy and protection of confidential information must be weighed against the need for disclosure. *Edwards Lifesciences Corporation v. VigiLanz Corporation*, 94 U.S.P.Q.2d 1399, 1402 (TTAB 2001). To establish that a document or other information is entitled to protection from disclosure under Fed. R. Civ. P. 26(c)(1)(G), the producing party has the burden to show that the information is trade secret or other confidential information and that the disclosure would cause identifiable and serious harm. TBMP 412.01(b); *Deford*, 120 F.R.D. at 653; *Waelde v. Merck Sharpe, & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981); *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975).

Where the producing party seeking protection under Fed. R. Civ. P. 26(c)(1)(G) is a business that seeks to maintain designations related to confidential business information, the producing party must show that disclosure would cause a clearly defined serious injury to its business, such as harm to its competitive and financial position. TBMP 412.01(b); *Deford*, 120 F.R.D. at 653 (business will have to show disclosure would cause harm to competitive and financial position); *Waelde*, 94 F.R.D. at 28; *Baxter International Inc. v. Abbott Laboratories*, 297 F.3d 544, 63 USPQ2d 1859 (7th Cir. 2002) (denying motion to place documents under seal because the parties failed to explain why disclosure would harm their competitive position). Such a showing of harm to a party's business requires support, where possible, by affidavits or declarations and concrete, specific examples. TBMP 412.01(b).

Here, soon after Opposer failed to produce any documents, yet designated its (insufficient and evasive) written responses to Applicant's discovery as "confidential", Applicant's counsel tried repeatedly to amicably resolve the matter in at a time somewhat contemporaneous to Opposer's designations; however, to date the parties have been unable to resolve any of their differences, thereby unfairly requiring that all Motions and references concerning each said document be filed separately under seal, and further severely prejudicing Applicant's ability to work with outside counsel to prepare this case. This designation severely prejudices Petitioner and will become increasingly burdensome as the matter progresses. As another example, witnesses and parties in depositions may likely be forced to step out of while questions about certain documents are discussed, creating an undue burden when such documents are not clearly not commercially sensitive as is the case here.

A review of the Opposer's discovery responses shows that such documents consisting mainly of spurious objections, insufficient and non-sequitur argument, and future promises to conduct a search and inquiry for responsive materials, are themselves wholly devoid of any trade secrets, private information or protectible information whatsoever. Accordingly, the materials should not be designated "Confidential" at all and there is simply no conceivable rationale for such designation.

While Opposer has not and cannot reasonably justify its position that any of its written discovery responses attached as Exhibits A, B and C to the Anderson declaration contain any information or data that could reasonably be considered private or worthy of protection, let alone capable of causing any actual harm to Opposer; by unfairly imposing

blanket claims of confidentiality, Opposer is causing continuing harm to Applicant by undermining, flouting and ignoring the very same rules and orders that Applicant as a direct result, must pointlessly now take additional steps to avoid sanctions for potentially violating. *See e.g., Revolution Jewelry Works, Inc. v. Stonebrook Jewelry LLC d/b/a Revolution Jewelry*, 2022 USPQ2d 229 (TTAB 2022)(the Board has ample authority and discretion to consider and grant sanctions for violation of the Board’s Standard Protective Order.)

CONCLUSION

Based on the foregoing, and upon the more detailed arguments shown in the respective Exhibits to the Anderson Decl., Applicant respectfully requests that Board re-designate all of Opposer’s documents produced in discovery herein as non-confidential; that it otherwise Order Opposer’s Counsel to strictly comply with the Rules of Professional Conduct and the express terms of the Board’s Standard Protective Order in regard to any future designations of confidentiality; that the Opposer and its counsel be Ordered not to further undermine and delay the reasonable discovery herein but rather that it reasonably cooperate therewith; and that the Board impose other appropriate sanctions upon Opposer and its counsel as determined within the Board’s reasonable discretion .

Dated: March 7, 2024

ANDERSON LAW – WE PROTECT IMAGINATION®

By: /StephenLAnderson/

Stephen L. Anderson
Attorney for Applicant
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing

**APPLICANT'S MOTION TO CHALLENGE THE CONFIDENTIALITY
DESIGNATIONS OF OPPOSER'S DISCOVERY RESPONSES**

has been served on Opposer's counsel via e-mail directed to

Michael L. Krashin
Anna King and
Heather Smith-Carra of
BANNER & WITCOFF, LTD.
871 South Wacker Drive, Suite 3600
Chicago, Illinois 60606

via e-mail successfully transmitted and sent on March 7, 2024 to
mkrashin@bannerwitcoff.com
aking@bannerwitcoff.com
hsmith@bannerwitcoff.com

I declare under the penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct and that this declaration was executed in the City of Temecula, CA on March 7, 2024

/StephenLAnderson/ _____
Stephen L. Anderson