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

In the matter of trademark Registration No. 2,136,776  
Registration Date: February 17, 1998  
For the mark: THE WELLNESS RESOURCE

WELLNESS RESOURCES, INC.,

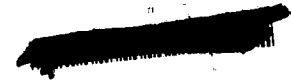
Cancellation No. 92041697

Petitioner,

v.

GRIFFIN, NANCY M.

Registrant



02-12-2004  
U.S. Patent & TMOtc/TM Mail RcptDt. #78

NOTICE OF MOTION; MOTION TO COMPEL RESPONSES; REQUEST FOR  
PROTECTIVE ORDER; REQUEST FOR SANCTIONS

TO: WELLNESS RESOURCES, INC. and its attorneys of record:

NOTICE IS HEREBY GIVEN that Registrant NANCY M. GRIFFIN hereby moves for an order compelling Petitioner WELLNESS RESOURCES, INC. ("WRI") to furnish responses to the Interrogatories and Requests for Production of Documents. This Motion is made on the ground that Petitioner has failed to provide responses within the time mandated by statute or as provided by mutually agreed extensions.

Registrant also hereby moves for a Protective Order as to the discovery propounded by Petitioner to Registrant. This Motion is made on the ground that Petitioner requested, and received, extensions of time to provide responses to Registrant's discovery. Rather than responding, Petitioner has used the additional time to propound discovery to Registrant.

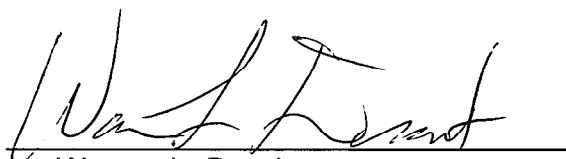
Registrant also hereby moves for an Order that discovery sanctions be awarded against Petitioner because of the manner in which it conducted discovery.

Pursuant to the requests for sanctions and the protective order, Petitioner requests that the Board order the following: (1) Ms. Griffin does not need to respond to WRI's pending discovery requests, (2) WRI is forbidden from conducting discovery until it has responded to Ms. Griffin's discovery, (3) WRI has waived its right to object to Ms. Griffin's discovery, and (4) such other sanctions as the Board deems just and proper.

This Motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of Warren L. Dranit, the complete files and records in this matter, and such oral and documentary evidence submitted by the parties.

Dated: February 12, 2004

Spaulding McCullough & Tansil LLP

By 

Warren L. Dranit  
Attorneys for Registrant  
Nancy M. Griffin

## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

Registrant Nancy M. Griffin seeks an Order compelling Petitioner Wellness Resources, Inc. ("WRI") to provide responses to the discovery she propounded to WRI on October 2, 2003. After granting Petitioner extensions of time to provide responses, no responses have been served. Instead, Petitioner has taken advantage of the professional courtesy granted to it and has used the additional time to propound discovery to Ms. Griffin. Accordingly, in addition to seeking an order compelling responses, Ms. Griffin seeks an order protecting her from having to respond to WRI's current and future discovery until it has provided responses to her discovery. Finally, Ms. Griffin requests appropriate discovery sanctions.

### RELEVANT HISTORY

On February 14, 2003, WRI file its petition to cancel Ms. Griffin's registration for WELLNESS RESOURCE (Registration No. 2,136,776). WRI was represented by Stephanie J. James of Beck &Tysver of Minneapolis, Minnesota. On October 2, 2003, after settlement discussions had proven unsuccessful, Ms. Griffin propounded Interrogatories and a Request for Production of Documents to WRI. A true and correct copy of the discovery is attached as Exhibits A and B to the Declaration of Warren L. Dranit ("Dranit Decl"). The discovery was served by first class mail. Based on 30 days to respond plus five days for mailing, WRI's responses were due on November 6, 2003.

On November 12, 2003, Warren L. Dranit, attorney for Ms. Griffin, received a voicemail message from Ms. James advising that WRI should be able to provide responses in about three to four weeks. Ms. James explained that Byron Richards, President of WRI, was spending an extended time in Arizona where he did not have access to documents. A true and correct copy of a transcription of the voicemail is attached as Exhibit C to the Dranit Decl. Although WRI had not previously requested an

extension, but consistent with the professional courtesies previously extended between the parties, Ms. Griffin agreed to wait the additional time for responses.

In a telephone conversation of December 2, 2003, Ms. James advised that Michael S. Sherrill of White Bear Lake, Minnesota, would be taking over as counsel for WRI. (Dranit Decl. ¶8.) She explained that Mr. Sherrill would be providing responses to the pending discovery. (Dranit Decl. ¶8.) In Mr. Dranit's initial telephone conversation with Mr. Sherrill, Mr. Sherrill explained that he would be reviewing the file but also would require additional time due to a busy calendar. (Dranit Decl. ¶9.) On December 5, 2003, Mr. Sherrill sent correspondence with a proposed settlement offer which was unacceptable to Ms. Griffin. (Dranit Decl. ¶10.) In correspondence dated December 12, 2003, Ms. Griffin's attorney rejected the settlement offer, set forth a proposed structure for a different settlement, and agreed to the discovery deadlines proposed by WRI. (Dranit Decl. ¶10.) In that correspondence, Ms. Griffin's attorney requested that WRI provide its discovery responses by December 24, 2003. (Dranit Decl. ¶10.) Although responses were not received by December 24, 2003, it continued to be Ms. Griffin's understanding that responses would be provided by WRI. (Dranit Decl. ¶11.) As a continued professional courtesy to Mr. Sherrill, because of the holiday season and his recently taking over the action, Ms. Griffin decided to wait an additional period of time before making a follow up demand to the discovery due. (Dranit Decl. ¶11.)

On January 22, 2004, WRI propounded Interrogatories, Requests for Production of Documents, and Requests for Admissions to Ms. Griffin. (Dranit Decl. ¶12.) This discovery was propounded despite having not provided responses to Ms. Griffin's discovery and the prior agreement that discovery responses would be provided. (Dranit Decl. ¶12.) Having not received the discovery responses, this Motion to Compel has become necessary. (Dranit Decl. ¶12.) One final attempt was made to avoid the Motion to Compel by correspondence dated February 5, 2004. (Dranit Decl. ¶13.) In

addition to expressing surprise at receiving WRI's discovery, Ms. Griffin proposed extending the time for her to respond to WRI's discovery pending WRI providing responses to Ms. Griffin's discovery. (Dranit Decl. ¶13.) No response has been received to that letter. (Dranit Decl. ¶13.)

### LEGAL DISCUSSION

Responses to interrogatories and document product requests are to be served within 30 days after the date of service. TBMP 407.01, 409.01. If service of the discovery is made by First Class Mail, an extra five days are allowed for responding to the Interrogatories. *Id.*

If a party fails to respond to Interrogatories or a Request for Production of Documents, the propounding party may file a Motion to Compel Responses. TBMP 523.01. The Motion should be filed within a reasonable time after the failure to respond to a request for discovery or after service of the response believed to be inadequate. TBMP 523.03. On a Motion to Compel, a party which fails to respond during the time allowed may be found to have forfeited its right to object to the merits of the discovery. TBMP 407.01, 409.01, 527.03. In addition, the propounding party may seek discovery sanctions against the non-responsive party. TBMP 527.01, 527.03.


Here, Petitioner has failed to respond to the Interrogatories and Request for Production of Documents propounded to WRI. Accordingly, an order should be issued compelling responses. The order should also find that WRI has forfeited its right to object to the merits of the discovery.

On a showing of good cause, the Board may issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense arising from the discovery process. TBMP 416.01, 526. In general, however, there is no specified order to discovery and the failure of one party to respond does not automatically entitle another party to protection from subsequent discovery. TBMP 403.03. Here, WRI has

propounded discovery while having failed to provide discovery responses it had expressly agreed to provide. WRI has taken unfair advantage of the professional courtesies granted to it and should not be rewarded for its conduct. Accordingly, the Board should issue an order that Ms. Griffin does not need to respond to WRI's pending discovery requests and that WRI be forbidden from conducting discovery until it has responded to Ms. Griffin's discovery. Finally, the Board should order such other discovery sanctions against WRI as it deems just and proper.

Dated: February 12, 2004

Spaulding McCullough & Tansil LLP

By 

Warren L. Dranit  
Attorneys for Registrant  
Nancy M. Griffin

CERTIFICATE OF MAILING BY "EXPRESS MAIL"

\*Express Mail" mailing label number EV 089409482 US

I hereby certify that this NOTICE OF MOTION; MOTION TO COMPEL RESPONSES; REQUEST FOR PROTECTIVE ORDER; REQUEST FOR SANCTIONS is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service in an envelope addressed to:

Trademark Trial and Appeal Board  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

on February 12, 2004

  
Rishell E. Peretson

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of NOTICE OF MOTION; MOTION TO COMPEL RESPONSES; REQUEST FOR PROTECTIVE ORDER; REQUEST FOR SANCTIONS is being deposited this day with the United States Postal Service, first class postage prepaid, addressed to Applicant's counsel of record as follows:

Michael S. Sherrill, Esq.  
Sherrill Law Offices PLLC  
4756 Banning Avenue, Suite 212  
White Bear Lake, MN 55110-3205

this 12<sup>th</sup> day of February, 2004

  
Rishell E. Peretson