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

Proceeding	92062805
Party	Defendant The Vibrant Media Group LLC
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Date	04/20/2016
Attachments	Objection re Untimely Initial Disclosures.pdf(39151 bytes)

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

PARIKH WORLDWIDE MEDIA, LLC

Petitioner/ Opposer,

v.

THE VIBRANT MEDIA GROUP LLC

Registrant/ Applicant.

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Cancellation No.: 92062805

Registration No.: 4,417,409

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OBJECTION TO PETITIONER'S RULE 26 (A)(1) INITIAL DISCLOSURES

Applicant, The Vibrant Media Group LLC (“Applicant”), hereby objects to Petitioner Parikh Worldwide Media, LLC’s (“Petitioner”) Rule 26(A)(1) Initial Disclosures (the “Initial Disclosures”) in the above-captioned matter on the grounds that Petitioner failed to timely comply under Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) § 26(a)(1)(A), 37 C.F.R. 2.120(a)(3) and T.B.M.P § 401.02.

OBJECTION

Fed. R. Civ. P. 26(A)(1) requires the simultaneous exchange of initial disclosure information on or before “...the deadlines...for making initial disclosures...” set by the Trademark Trial and Appeal Board (“TTAB”) pursuant to 37 CFR 2.120. Pursuant to the December 29, 2015 Notice from the TTAB to all parties (the “TTAB Notice”) regarding the above-referenced matter, the initial disclosure deadline was set for **April 7, 2016**. On that date, Applicant served its Initial Disclosures as required. Petitioner did not. Petitioner served its Initial Disclosures on **April 13, 2016**, almost one full week after the applicable deadline.

Petitioner’s failure to timely serve its Initial Disclosures substantially and unfairly prejudices Applicant in the preparation of its case. Therefore, Applicant objects to Petitioner’s UNTIMELY Fed. R. Civ. P. 26(A)(1) Initial Disclosures for failing to comply with the requirements of 37 CFR 2.120 and the TTAB Notice. Petitioner reserves any and all rights, including the right to exclude any evidence introduced by the Initial Disclosures, as permitted under Fed. R. Civ. P. 37(c). In addition to the exclusion of evidence, Fed. R. Civ. P. 37(c)(1) allows a court to impose the full range of sanctions enumerated under Fed. R. Civ. P. 37(b)(2) short of contempt and specifically authorizes the court to impose other penalties, including the payment of reasonable expenses and attorney fees caused by the failure to disclose. (See, e.g. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).)

Courts have enforced Fed. R. Civ. P. 26(a) strictly, granting motions to exclude evidence even where the failure to disclose was inadvertent and not in bad faith and even where the sanction results in preclusion of an entire cause of action. (See, e.g., *Grajales-Romero v. Am. Airlines, Inc.*, 194 F.3d 288, 297 (1st Cir. 1999).) Fed. R. Civ. P. 37(c), which explains the remedies available for a violation of Federal Rule of Civil Procedure 26(a) states, in relevant part:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”

Fed. R. Civ. P 37(c)(1); see also *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (affirming district court’s order excluding undisclosed damages evidence); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

The Ninth Circuit has consistently upheld district court decisions to exclude untimely disclosed evidence where the failure to disclose resulted in prejudice. The Ninth Circuit gives “particularly wide latitude to the district court’s discretion to issue sanctions under Rule 37(c)(1).” *Id.* Furthermore, the Ninth Circuit has held that the burden is on the party who failed to comply with its discovery obligations to demonstrate that it meets one of the two exceptions to mandatory sanctions. *Id.* at 1107 (“Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness.”). Thus, the burden is on the proponent of the evidence – in this case, Petitioner – to demonstrate that the failure to disclose was either substantially justified or harmless. Moreover, the Ninth Circuit has held that a district court is not required to make a finding of willfulness or bad faith to exclude the undisclosed evidence. *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (noting that Rule 37 has been described as “a self-executing, automatic sanction to provide a strong inducement for disclosure of material”) (internal citation omitted). Finally, the

Ninth Circuit has held that the sanction may be imposed “even when a litigant’s entire cause of action . . . [will be] precluded.” *Id.* (internal citation omitted).

Dated this 20th day of April, 2016.

/s/ Omar A. Siddiqui, Esq.

Omar A. Siddiqui, Esq.

Attorney for Applicant

THE VIBRANT MEDIA GROUP LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Initial Disclosures has been duly served on the Opposer by mailing a copy via First Class Mail, postage prepaid, on this 20th day of April, 2016 to:

Kurt D. Olender, Esq.
OLENDER FELDMAN LLP
422 Morris Avenue
Summit, NJ 07901

By: /s/ Allyson Edge
Allyson Edge