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

Proceeding	92065095
Party	Plaintiff Woodpecker Flooring Inc.
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Submission	Motion to Compel Discovery or Disclosure
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Woodpecker Flooring Inc.
(Petitioner for Cancellation)

v.

Wiston International Trade Co., Ltd.
(Registrant)

Cancellation No. 92,065,095

Registration No: 4,876,546
Mark:



**PETITIONER’S COMBINED MOTION TO
COMPEL DISCOVERY RESPONSES,
AND EXTEND DEADLINES**

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INTRODUCTION

This proceeding is for cancellation of Defendant's Registration No. 4,876,546 (the "Mark") on grounds of abandonment, lack of *bona fide* intent to use, and fraud. *Petition*, Dkt. 1. Plaintiff's discovery requests seek, *inter alia*, information and documents concerning: the Registrant's use of the Mark on the goods and services claimed, sworn statements and oaths during prosecution, and a prior infringement action.

Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, and Trademark Rule of Practice 2.120(f), Petitioner Woodpecker Flooring Inc. ("Plaintiff") respectfully moves the Board for (i) an Order striking Wiston International Trade Co., Ltd. ("Defendant")'s discovery objections and compelling Defendant to fully respond without objections to Plaintiff's discovery requests, and (ii) to extend the discovery period for Plaintiff so that Plaintiff may conduct follow-up discovery of Defendant as necessary.

The relief requested is necessary and appropriate because counsel for the Defendant have failed to meaningfully engage and cooperate regarding discovery requests outstanding for over five (5) months. Defendant's disclosures and responses are woefully deficient, non-responsive, and not in compliance with the Rules. As of the date of filing this motion, Counsel for Defendant has failed to return numerous emails and telephone calls requesting to meet and confer on these issues. Thus, with great reluctance, Petitioner is forced to bring this Motion.

FACTUAL BACKGROUND

I. PETITIONER HAS MADE GOOD FAITH EFFORTS TO RESOLVE THE DISPUTES

Petitioner has attempted in good faith, on at least fourteen (14) occasions, by granting extension of time, teleconference, and written correspondence, to work with Defendant to resolve Defendant's failure to cooperate in discovery, but the parties were unable to resolve the dispute, and Plaintiff has been unable to ascertain why Defendant refuses to participate in discovery. *See Dykema Decl.*, ¶¶6-13.

II. DISCOVERY REQUESTS AND RESPONSES MUST BE ANSWERED

1. Current Status

Defendant has made no discovery requests on Plaintiff.

Plaintiff first served its interrogatories and requests for production on 12 May 2017. Defendant requested an extension of time to respond, and then objected to the form of the requests. On the 5th and 12th of July 2017, Plaintiff served Amended Interrogatories (Ex. A) (the "Interrogatories") and Revised Requests for Production (Ex. B) (the "Requests for Production") in response to Defendant's complaints as to the form of various requests.

On 4 August 2017, Defendant served its original interrogatory responses. On 11 August 2017, Defendant served responses to the Requests for Production (the "RFP Responses," attached as Ex. C), along with a small document production. On 24

August 2017, Defendant served its most recent interrogatory Responses (the "Interrogatory Responses," attached as Ex. D.)

2. Defendant's Boilerplate Objections

Defendant's Interrogatory Responses and Requests for Production both include sections identified as "Preliminary Statement," "General Objections," and "Objections to Instructions and Definitions." In these sections, Defendant makes various boilerplate, non-specific statements and objections regarding its numbered responses, such as:

- "Registrant does not waive, and hereby expressly reserves, its right to assert any and all objections. . ." *Preliminary Statement*, ¶2, of both Interrogatory and RFP Responses. Ex. C p. 2, D p. 2.
- "Registrant objects to each request that is overly broad. . ." *General Objections*, ¶2, of both Interrogatory and RFP Responses. Ex. C p. 3, D p. 3.
- "Registrant incorporates by reference every general objection set forth above into each specific response set forth below. . ." *General Objections*, ¶6, of both Interrogatory and RFP Responses. *Id.*
- "Without waiving the specific objections set forth below, and subject to the limitations and general objections set forth above, Registrant hereby provides the following responses. . ." Unnumbered ¶, Ex. C p. 5, D p. 5.

RFP Responses

In Defendant's RFP responses, each numbered response recites the same unsupported and non-specific objection: "Registrant objects to this interrogatory[sic] on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague." *See, e.g.* Ex. C, p. 5. Defendant's response to RFP No. 5 appears to object and refuse to produce documents, and its response to RFP No. 8 refers to No. 5. Every other RFP Response includes a statement that "Registrant produces documents," or a reference to one or more other numbered RFP Response. The following table summarizes Defendant's RFP Responses with respect to statements of production and/or boilerplate objections.

RFP RESPONSE SUMMARY TABLE

RFP Response No.	Concise Summary
1-4, 6	No specific objections. "Registrant produces documents . . ."
5	Objection & Refusal to Produce
7, 9-15	No specific objections. Reference to one or more of 1, 6, 1-13, and 15.
8	Ref. to no. 5

Defendant has failed to produce anything but this handful of documents, none of which relate to key issues of this proceeding – whether Defendant has ever used the Mark on each and every one of the goods and services in its Registration, whether Defendant has abandoned the Mark, and whether Defendant has any documentary evidence to support its sworn statements during prosecution.

Interrogatory Responses

In Defendant's Interrogatory Responses, each and every Interrogatory Response likewise includes the same unsupported and non-specific objection¹: "Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague." *See, e.g.*, Ex. D, p. 5. Only two Interrogatory Responses, No. 1 and No. 2, contain any more detailed objection whatsoever. The following table summarizes Defendant's Interrogatory Responses with respect to substantive responses and/or boilerplate objections.

INTERROGATORY RESPONSE SUMMARY TABLE	
Interrogatory Response No.	Concise Description
1	Objection to form of requested information. Refusal to respond.
2	Objection to request's reference to Interrogatory No. 1. Partial response.
3-11	No specific objections. Partial responses or references to other partial response(s).

Defendant has failed to respond fully and substantively to each and every Interrogatory, other than Interrogatory No. 3.

III. ARGUMENT

Plaintiff cannot reasonably investigate the issues in this proceeding, issue follow up discovery requests, conduct depositions, evaluate the need for expert

¹ With minor variations in typography.

testimony, narrow the issues for trial, or prepare for trial until Defendant has completely complied with its outstanding discovery obligations.

Because Defendants' unsupported general objections, untimely objections, and "subject to" objections are waived per the Federal Rules of Civil Procedure; and because Defendant has failed in its duty to respond "to the extent not objected to," Defendant's objections should be struck. Since Defendant has thus far failed to voluntarily cooperate in discovery, this motion to compel Defendant's compliance should be granted.

1. General or Unsupported Objections Must be Overruled

As this Board has held, "general and boilerplate objections to the discovery requests do not state with any specificity the grounds for the objections to each interrogatory, the objections are overruled." *Major League Baseball Properties, Inc. v Christopher Webb*, 2017 TTAB LEXIS 263 at p. 8, Cancellation No. 92,060,903 (TTAB 2017) (emphasis in Lexis.) It is well established that "general, generic objections violate the Federal Rules and are invalid." *Heller v. City of Dallas*, 303 F.R.D. 466, 484 (N.D.T.X. 2014.) "[I]t is incumbent upon a party who has been served with interrogatories to respond by articulating his objections (with particularity) to those interrogatories which he believes to be objectionable, and by providing the information sought in those interrogatories which he believes to be proper." *Medtronic, Inc. v. Pacesetter Systems, Inc.*, 222 USPQ 80, 83 (TTAB 1984) *See also* Fed. R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived . .

.”) Similarly, Fed. R. Civ. P. 34(b)(2)(B-C) provides: “For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.”

Here, Defendant’s objections were anything but specific. Defendant’s “General Objections” and similar prefatory sections to its discovery responses do not relate at all to the individual requests. *See* Ex. C, pp. 2-4; Ex. D, pp. 2-5. The identical objections copied-and-pasted into each of Defendant’s discovery responses have no specificity to any request or any specific basis for an objection. *See, e.g.* Ex. C, p. 5; Ex. D, p. 5. As to the majority of Defendant’s discovery responses—specifically Defendant’s Responses to RFPs 1-4, 6-7, and 9-15 (Ex. C), and Responses to Interrogatories 3-11 (Ex. D)—these unsupported and non-specific “shotgun style” objections *are the only objections raised*. Thus, they must be overruled and these requests stand without objection. Having raised no valid, timely, and specific objection, Defendant should be ordered to fully respond to these requests without further objection.

2. Untimely Objections are Waived

Pursuant to Fed. R. Civ. P. 33(b)(4), “The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived. . .” “[B]oth Rule 33 and 34 responses must state objections with

particularity, on pain of waiver.” *Heller v. City of Dallas*, 303 F.R.D. 466, 490-491 (N.D.T.X. 2014.) (citing *Mancia v Mayflower Textile Services Co.*, 253 F.R.D. 354, 359 (D. Md. 2008.)) TBMP §405.04(a) provides: “A party which fails to respond to interrogatories during the time allowed therefore, and which is unable to show that its failure was the result of excusable neglect, may be found, on motion to compel filed by the propounding party, to have forfeited its right to object to the interrogatories on their merits.”

Here, Defendant’s responses to Plaintiff’s Interrogatories and Requests for Production were due months ago. As such, any objections not already raised are or would be untimely and thus waived under the Rules (e.g. Rule 33 and 34.) Defendant should be compelled to respond to Plaintiff’s discovery requests without further objection on the merits.

3. Responding “subject to” Objections Waives Those Objections

“[T]he practice of responding to interrogatories and document requests "subject to" and/or "without waiving" objections is "manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure." *Heller*, 303 F.R.D. at 485, citing *Sprint Commn. Co. v. Comcast Cable Commn. LLC*, 2014 WL 545544, at *2 (D. Kan. Feb. 11, 2014). “Thus, a responding party is given only two choices: to answer or to object. Objecting but answering subject to the objection is not one of the allowed choices.” *Mann v. Island Resorts Dev. Inc.*, 2009 WL 6409113, at *3 (N.D. Fla. Feb. 27, 2009). “[W]henver an answer accompanies an objection, the objection is deemed waived, and the answer,

if responsive, stands.” *Id.*, citing *Meese v. Eaton Mfg. Co.*, 35 F.R.D. 162, 166 (N.D. Ohio 1964) “Consequently, as to the responses that are made "subject to" and "without waiving the foregoing objections," they are improper, the objections are deemed waived, and the response to the discovery request stands.” *Sherwin-Williams Co. v. JB Collision Servs.*, 2014 U.S. Dist. LEXIS 93368, 7-8 (S.D.Cal. 2014.)

Here, most of Defendant’s responses to Plaintiff’s Interrogatories and Requests for Production purport to respond to the request. Specifically, Defendant has both interposed boilerplate objections, and also made responses, to Requests for Production 1-4, 6-7, and 9-15; and to Interrogatories 2-11. *See, e.g.* Ex. C, p. 5; Ex. D, p. 7. As the District Court held in *Mann v Island Resorts*, this is “not one of the allowed choices.” As to these requests, Defendant’s objections should be deemed waived and Defendant should be compelled to fully respond to the requests without further objection.

4. Interrogatory No. 1 Must be Answered “to the extent not objected to”

Rule 33(b)(3) provides “Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.” Trademark Trial and Appeal Board Manual of Procedure (TBMP) §408.01 provides that each party (and their attorney) has a duty to “make a good faith effort to satisfy the discovery needs of its adversary,” and that the Board “looks with extreme disfavor on those who do not” cooperate in the discovery process.

Defendant’s response to Interrogatory No. 1 is reproduced below: (Ex. D, p. 5)

AMENDED INTERROGATORY NO. 1

Provide a chart identifying uses of the mark "WOODPECKER", by you or your licensees, on a monthly basis (or on a quarterly/yearly basis if monthly figures do not exist) beginning with October 2011 and ending July 1, 2017, for each period including:

1. The product/service category,
2. The number of units sold or imported into the United States bearing the mark WOODPECKER.
3. The identity of the largest purchaser or customer of these goods or services sold or imported into the United States for this period,
4. The number of units sold or imported into British Columbia, Canada, bearing the mark WOODPECKER.
5. The identity of the largest purchaser or customer of these products sold or imported into British Columbia for this period.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information,, vague, and on the grounds that it is improper because it calls for the production of a document.

ANSWER: This interrogatory request calls for the product of a document. As such, no response is required.

Defendant's sole *timely and specific* objection is that the interrogatory "calls for the production of a document." In other words, Defendant objected to the form of the requested information in Interrogatory No. 1 and, on that basis, refused to respond to the Interrogatory in its entirety. Such a refusal is a violation of both Rule 33(b)(3) as well as TBMP ¶408.01: "Each party and its attorney or other authorized representative has a duty not only to make a good faith effort to satisfy the discovery needs of its adversary. . ."

Even if, *arguendo*, Defendant's objection were valid and well taken, Defendant is still obligated by the Rule 33(b)(3) to respond "to the extent it is not objected to." As Defendant's sole specific objection is to requested form of response—

not the substance—Defendant's objection should be overruled and it should be compelled to respond to the substance of the Interrogatory.

Plaintiff's counsel discussed this objection with Defendant's counsel Ms. Lupino via teleconference on 10 August, and followed up with a letter and a teleconference on 16 August. *See* Ex. E, pp. 3-4. During each teleconference, Plaintiff's counsel explained that if Defendant's counsel objected to the term "chart," she could respond to the remainder of the interrogatory in prose, paragraphs, lists, or any other format she wished. Plaintiff's letter of 15 August 2017 to Defendant likewise requested: *"If Wiston is committed to its refusal and rejection of the 'chart' format, a series of lists, paragraphs, or any other complete format would be sufficient. Please provide the requested information . . ."* *See* Ex. E, p. 3-4. Neither in teleconference, nor via return correspondence, did Defendant's counsel object to Plaintiff's request to respond to the interrogatory in this fashion.

Separately, although Defendant did not raise this objection in its Interrogatory Responses, during a meet and confer Defendant indicated that it objected to the production of information related to Defendant's use of the mark in British Columbia. This objection was neither timely, nor in writing and was thus waived. Nonetheless, in Plaintiff's letter of 15 August 2017 to Defendant, Plaintiff requested that Defendant respond to the extent not objected to: *"If Wiston maintains its refusal to provide information for British Columbia, please so inform us and provide the information for the United States."* Ex. E, p. 4. Neither in

teleconference, nor via return correspondence, did Defendant's counsel object to Plaintiff's request to respond to the interrogatory in this fashion.

The information sought respecting Defendant's operations in British Columbia are relevant in this case because, as discussed below with respect to RFP No. 5 and 8, one of the theories of Plaintiff's case is that Defendant has abandoned the Mark due to the injunction in British Columbia. As Plaintiff explained in its letter to Defendant on 16 August 2017:

As an initial matter, it is one of Petitioner's contentions that Wiston discontinued use of the WOODPECKER Mark in 2013 in response to an injunction. See Petition ¶6. Wiston appears to be headquartered in British Columbia and does not appear to maintain an office in the United States. Based on the information it has available thus far, Petitioner does not believe that Wiston's business is sufficiently large to maintain separate product lines, marketing, and/or branding efforts simultaneously for British Columbia and the United States. Petitioner believes that Wiston maintains one marketing and branding across its products. Wiston's compliance with the injunction bears directly on one of Petitioner's theories of the case. Further, facts and circumstances concerning Wiston's use or non-use of the WOODPECKER Mark in British Columbia are therefore relevant to, and likely to lead to the discovery of admissible evidence concerning, the claims and defenses in the Petition. As provided by Rule 26: [block-quote from Rule 26 excluded]

Everything that Petitioner has requested discovery on relating to British Columbia, it has also requested discovery on relating to the United States. There can be no serious contention by Wiston that Petitioner is not entitled to the discovery it seeks on use in the United States—Wiston is clearly obligated to provide such Discovery. The marginal extra burden is minimal, at most, to providing such information for the one extra province where Wiston's headquarters are located. The benefit of such information—including potentially confirming one of the claims and themes of Petitioner's complaint—is comparatively large and outweighs any minimal burden to Wiston.

Ex. E, pp. 1-2.

5. Interrogatory No. 2 Must be Answered “to the extent not objected to”

Defendant's response to Interrogatory No. 2 is reproduced below: (Ex. D, p. 5-6.)

AMENDED INTERROGATORY NO. 2

Provide all relevant facts and circumstances, not already provided in response to Interrogatory 1, concerning use in commerce of the WOODPECKER MARK within the United States, by You or Your licensees, on a monthly basis (or on a quarterly/yearly basis if monthly figures do not exist) beginning with October 2011 and ending July 1, 2017.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague, as well as based on an improper interrogatory. See Response to Interrogatory No. 1.

ANSWER: Registrant has used the WOODPECKER MARK in US commerce. Such use includes but is not limited to the sale of hardwood flooring in the US in 2016 (March, April, June, and December 2016) with the WOODPECKER MARK on the packaging and on marketing materials. The total value of the hardwood flooring sold in the U.S. in 2016 was approximately \$200,000.

These goods were shipped to the U.S. by boat and entered the U.S. at the Port of Seattle, Washington.

Registrant decided to enter the U.S. market because it believed that its products were suitable for the U.S. market.

Registrant took steps to start selling the goods the U.S. under the WOODPECKER MARK, including but not limited to: conducting U.S. market research, attending a US tradeshow, setting up a U.S. corporation (Wiston Building Materials Corp. a Washington corporation with offices at 33530 1st Way S, Suite 29, Federal Way, Washington 98003), opening a U.S. bank account, importing goods, locating a warehouse, and hiring and training sales persons who worked in the U.S. The Registrant's U.S. warehouse is located Pacific Coast Distributors (PCD) Seattle, 1139 Andover Park W, Tukwila, Washington 98188.

Defendant's sole specific objection to this interrogatory appears to be that it refers to the other Interrogatory (No. 1) that Defendant objected to. Defendant's objection is improper for several reasons. First, it is simply incorrect – No. 1 is not “improper.” Second, No. 2 is not “*based on*” No. 1. The information requested in No. 2 stands on its own - the reference in No. 2 *limits* the requested scope of Defendant's response by permitting that response to exclude information which is provided in

response to No. 1. Thus, to the extent Defendant stands on its objection to No. 1, its response to No. 2 should be more comprehensive. Defendant seeks to have it both ways – first to refuse to respond to Interrogatory No. 1, and then to fail to substantively and fully respond to Interrogatory No. 2.

Pursuant to Rule 33, Defendant is under a duty to respond to this Interrogatory “to the extent not objected to.” Defendant styles itself as multi-national corporation and claims to be—in its sworn statements to the USPTO—engaged in the sale of at least sixteen (16) different categories of goods and services in the United States of America. Yet Defendant’s response to this interrogatory failed to include any of the requested periodic sales information for each category of goods and services claimed.

Since Defendant has refused Plaintiff’s many reasonable requests to produce this information voluntarily, its compliance should be compelled, without further objection.

6. RFPs No. 5 and 8 Seek Relevant Documents

Defendant's responses to Plaintiff's Request for Production No. 5 and 8 is reproduced below: (Ex. C, p. 6.)

REVISED REQUEST NO. 5

All documents concerning the dispute between You and Woodpecker Hardwood Floors (2000) Inc.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: This request seeks irrelevant documents that are related to a Canadian trademark that is not subject to this US trademark matter. Hard and electronic copies of documents regarding this Canadian trademark matter are available at the Supreme Court of British Columbia, Vancouver Registry or at British Columbia's electronic court registry "Court Services Online", accessible at <https://justice.gov.bc.ca/cso/index.do>, respectively.

REVISED REQUEST NO. 8

All documents relevant to Your compliance with the Injunction referred to in ¶6 of the Petition.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See response to request no. 5.

Here, Petitioner seeks information about the dispute *Woodpecker Hardwood Floors (2000) Inc. v Wiston International Trade Co., Ltd. And Wiston Building Materials Co.*, in the Supreme Court of British Columbia on 13 September 2013, from which an injunction issued concerning Defendant's use of the Mark in its home territory (British Columbia, Canada).

Plaintiff acknowledges the guideline in TBMP §414.13 regarding foreign use information being "usually irrelevant." However, as Plaintiff stated in its petition initiating this proceeding, one of the theories of this case is that Defendant has abandoned the mark and has no intent to resume use *because it is currently enjoined from using the mark in its home territory*. Petitioner further explained the

relevancy of this request to Defendant in its letter of 15 August 2017: (reproduced below)

Request for Production #5 - As discussed above, Wiston's British Columbia activities are relevant to one of Plaintiff's theories of this matter. Specifically, it is one of Petitioner's contentions that Wiston ceased use and rebranded subsequent to the injunction. Thus, these documents are relevant. Further, Wiston admits that it *participated in the litigation*. Thus, Wiston already has at least some of these documents in its possession, custody, or control (i.e. in the possession of its counsel), and could easily obtain them and produce them to Petitioner more cheaply and simply than Petitioner may obtain them by paying the Court fees for each document, particularly when Wiston and its attorneys are familiar with the British Columbia Court system and Petitioner is not. Lastly, Petitioner's request encompasses *all documents concerning the dispute*, some of which may not be available on the Court website. This may include, for example, email communications between persons at Wiston comprising discussions concerning decision(s) to rebrand and/or cease use of the WOODPECKER Mark in the United States, Canada, or both; and discovery requests and responses between the parties of that dispute which were not filed.

Thus, in this instance, Plaintiff believes that the information is properly discoverable and proportional to the needs of this case. As such, Plaintiff respectfully requests that Defendant be compelled to fully respond to this request without objection, other than as to privilege.

IV. PLAINTIFF'S DISCOVERY PERIOD SHOULD BE EXTENDED

As Plaintiff explained in correspondence to Defendant, when Plaintiff initially sent its original discovery requests in May, if Defendant had responded timely *as required by the Federal Rules*, Plaintiff would have had approximately four months to review the materials, take depositions, and if necessary take follow up written discovery and depositions; as well as time to consider the need for an expert witness and prepare a report if necessary. *See, Ex. G.*

The Expert Disclosure deadline is now less than one month away. Defendant's dilatory tactics and lack of responsiveness and good faith should not be rewarded by

allowing Defendant to withhold the information needed to prepare for depositions and potentially expert reports and thereby “squeeze” Plaintiff against the schedule. Likewise, Plaintiff should not be penalized for its good faith efforts to work with Defendant to avoid motion practice except as a last resort. Plaintiff respectfully requests that the discovery deadlines for Plaintiff only should be extended by up to four months to compensate for Defendant’s dilatory tactics.

V. CONCLUSION

As discussed herein, the facts of this case and the relevant rules and case-law compel the conclusion that Plaintiff is entitled to the discovery it seeks; that Defendant’s dilatory and abusive discovery tactics should not be rewarded, and that the discovery period should be extended for Plaintiff’s benefit. Plaintiff respectfully requests that the Board enter an order directing Defendant to fully respond to Plaintiff’s discovery requests, without further objection; and that the discovery deadlines be extended, for Plaintiff only, for up to four months.

Respectfully Submitted,

Date: 18 Oct. 2017

By: /Erik Dykema/

Erik Dykema
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Attorney for Petitioner,
Woodpecker Flooring Inc.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document upon Respondent's counsel via email, on consent, to:

Gina Lupino (gina@ascendionlaw.com, gina@lupinolaw.com)
Kelly McCafferey (kelly@ascendionlaw.com)
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Date: 18 Oct. 2017

By: /Erik Dykema/

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

Woodpecker Flooring Inc.
(Petitioner for Cancellation)

v.

Wiston International Trade Co., Ltd.
(Registrant)

Cancellation No. 92,065,095

Registration No: 4,876,546
Mark:



**DECLARATION OF ERIK DYKEMA IN SUPPORT OF
PETITIONER'S MOTION TO COMPEL**

I, Erik Dykema, declare under penalty of perjury as follows:

1. I am over the age of eighteen years and competent to make this Declaration.
2. The facts stated in this Declaration are true and correct to the best of my knowledge and belief.
3. I am counsel for the Petitioner Woodpecker Flooring Inc. ("Plaintiff") in this proceeding.
4. The below Table of Requests and Responses summarizes the Interrogatories and Requests for Production that I served on counsel for Wiston International Trade Co., Ltd. (the Defendant) in this proceeding; as well as the Defendant's most recent responses.

TABLE OF REQUESTS & RESPONSES

Date	Paper	Exhibit
12 May 2017	Plaintiff's initial Interrogatories and Requests for Production	
5 Jul 2017	Plaintiff's Amended First Interrogatories	A
12 Jul 2017	Plaintiff's First Revised Requests for Production	B
11 Aug 2017	Defendant's Responses to Requests for Production	C
11 Aug 2017	Defendant's document production – 192 pages	
24 Aug 2017	Defendant's Revised Interrogatory Responses	D

5. On August 2, 2017, I notified Defendant that their discovery responses were insufficient and began the process of attempting to meet and confer with Defendant to resolve our discovery disputes.
6. The following table summarizes my good faith attempts to communicate, negotiate, and/or meet and confer with counsel for Defendant regarding their discovery obligations.

TABLE OF ATTEMPTS TO RESOLVE DISCOVERY DISPUTES

Date	Event	Exhibit
9 June 2017	Plaintiff granted Defendant an extension of time to respond to the discovery requests.	
12 July 2017	Plaintiff requested a meet and confer on 17 July, and responses or specific objections.	
17 July 2017	Defendant failed to attend scheduled meet and confer. Plaintiff requested availability for the next day. Defendant did not respond.	
9 Aug. 2017	Defendant failed to attend scheduled meet and confer.	
10 Aug. 2017	Meet and Confer with Defendant.	
16 Aug. 2017	Plaintiff Letter to Defendant Regarding Discovery Deficiencies. No response to letter. Requests production by 22 August.	E
16 Aug. 2017	Meet and Confer with Defendant.	
22 Aug. 2017	Defendant failed to produce documents as requested.	

Date	Event	Exhibit
24 Aug. 2017	Defendant emails it will provide supplemental responses and receive additional documents from client within “approximately one week.”	F
24 Aug. 2017	Plaintiff Email to Defendant requesting cooperation on discovery and notifying of Rule 33 requirement to answer “to the extent not objected to.”	
5 Sep. 2017	Plaintiff email to Defendant requesting RFP responses and documents. Requested meet and confer on 6 Sep. 2017.	
6 Sep. 2017	Plaintiff email to Defendant repeating request for meet and confer.	
6 Sep. 2017	Response from Defendant co-counsel proposing to “set up something.” Received no response.	
12 Sep. 2017	Plaintiff email to Defendant requesting meet and confer.	
12 Sep. 2017	Defendant email to Plaintiff rescheduling to 13 Sep. Defendant failed to attend requested meet and confer.	G
15 Sep. 2017	Call with Defendant co-counsel. Plaintiff email to Defendant requesting discovery period extension in view of Defendant’s failure to participate in discovery, providing, <i>inter alia</i> , a summary of requested documents. Requested meet and confer for 19 Sep. 2017.	
18 Sep. 2017	Email to Defendant confirming meet and confer for 19 Sep. No response.	
19 Sep. 2017	Defendant failed to attend requested meet and confer. Plaintiff called Defendant co-counsel’s cell phone and was informed that primary counsel was unavailable, rescheduling meet and confer to 22 Sep. 2017.	
22 Sep. 2017	Defendant failed to attend requested meet and confer. Defendant co-counsel states that counsel is meeting with their client “early next week” and “should be responding shortly thereafter.” No response was provided to Plaintiff.	
3 Oct. 2017	Plaintiff email to Defendant requesting discovery compliance, requesting a date for a meet and confer, and indicating that a Motion to Compel would be filed without a productive meet and confer. Received no response.	H

7. On multiple occasions, as detailed in the table above, counsel for Defendant failed to attend a requested or scheduled meet and confer.
8. On those occasions where I was able to reach counsel for Defendant, the parties typically had what seemed to be a respectful and productive conversation discussing the issues. Unfortunately, subsequent to these conversations, typically the Defendant failed to appear for a follow up conversation, or to respond to follow up emails, or to produce documents, and progress promised by the defendant did not materialize.
9. I reviewed the document production Defendant made in this proceeding. It consisted of 192 pages total, consisting solely of documents that appear to be:

- Concept artwork (pp. 1-3)
- Brochures (pp. 4-11, 15, 18-33)
- Two emails, one of them blank (pp. 12-14)
- Images of leather goods (p. 16), unidentified product packaging and labeling (pp. 17, 34), and sticky notes (p. 35).
- A letter (p. 36)
- A blank page (p. 37)
- Printout from an internet service provider (p. 38)
- Trademark prosecution file wrapper (39-192)

10. In my letter of 15 Aug. 2017, I explained to Defendant that Petitioner believed responsive documents would include: “at least one document evidencing use” of the mark on each of the categories of goods and services claimed in the application for the Mark:

- a. Solid hardwood strips and planks
- b. Engineered hardwood flooring
- c. Glue-laminated wood flooring

- d. Parquet hardwood flooring
- e. Engineered bamboo flooring
- f. Wooden doors
- g. Wood window frames
- h. Furniture, namely, wood cabinets
- i. Wholesale and retail store services featuring flooring material
- j. Wholesale and retail store services featuring doors
- k. Wholesale and retail store services featuring window frames
- l. Wholesale and retail store services featuring furniture
- m. Installation and maintenance of flooring materials
- n. Installation and maintenance of doors
- o. Installation and maintenance of window frames
- p. Installation and maintenance of furniture

11. I never received a response to the aforementioned letter.

12. In my last communication with Defendant, I noted that they had failed to get back to me for two weeks, informed Defendant that their delays and failure to engage in the discovery process were prejudicing my client, and proposed dates for a meet and confer to avoid a motion to compel. I received no response.

13. I have made a good faith effort, by conference and correspondence, to resolve the discovery dispute, and to determine why no response has been made, prior to seeking Board intervention. Unfortunately, I have been unable to resolve the dispute, and likewise unable to ascertain why Defendant refuses to cooperate in discovery.

/Erik Dykema/

Date: 18 Oct. 2017

Erik Dykema

EXHIBIT A

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

Woodpecker Flooring Inc.
(Petitioner)

v.

Wiston International Trade Co., Ltd.
(Registrant)

Cancellation No. 92,065,095

Registration No: 4,876,546
Mark:



**PETITIONER'S AMENDED FIRST SET OF INTERROGATORIES
TO REGISTRANT WISTON INTERNATIONAL TRADE CO. LTD.**

Pursuant to Trademark Rule §2.116 and Federal Rules of Civil Procedure 26 and 33, Petitioner Woodpecker Flooring Inc. hereby requests that Registrant Wiston International Trade Co., Ltd. ("Registrant") respond to the following interrogatories ("Interrogatories") in writing, under oath, and within thirty (30) days of the date of service.

DEFINITIONS

The following definitions shall apply to these requests, regardless of whether used in capitalized form:

1. "Wiston," "Respondent," "Registrant," "Defendant," "You," and/or "Your(s)" means the party to this action Wiston International Trade Co., Ltd. and all past or present, foreign or domestic, and/or direct or indirect

subsidiaries, affiliates, joint ventures, divisions, business units, and predecessors in interest, including, without limitation, their respective officers, directors, agents, engineers, scientists, researchers, developers, employees, members, representatives, and all other persons acting on behalf of any such individual or individuals and/or entity or entities.

2. "Petitioner" or "Plaintiff" means Woodpecker Flooring Inc.
3. "WOODPECKER MARK" means U.S. Trademark Registration No. 4,876,546 and the word ("Woodpecker") or design (stylized woodpecker appearing above) claimed therein.
4. "CO-OWNED MARKS" means U.S. Trademark Registration Nos. 4,996,815, Canadian trademark registration numbers TMA840290, TMA840289, TMA836079, TMA836081, TMA779544 and any other trademark registrations or applications owned by You, in the United States, Canada, United Kingdom, Europe, or anywhere else in the world containing the word "Woodpecker," the word "Wiston," or the stylized image of a Woodpecker.
5. "CLAIMED GOODS/SERVICES" means any of the goods and/or services listed in the registration for the WOODPECKER MARK, including but not limited to: "Wood flooring, namely, solid hardwood strips and planks, engineered hardwood flooring, glue-laminated wood flooring, parquet hardwood flooring, engineered bamboo flooring, wooden doors and wood window frames," "Furniture, namely, wood cabinets," "Wholesale and

retail store services featuring flooring materials, doors, window frames and furniture,” and “Installation and maintenance of flooring materials, doors, window frames and furniture.”

6. The term “document” is synonymous in meaning and equal in scope to the usage of the term “documents or electronically stored information” in Fed. R. Civ. P. 34(a)(1)(A). A draft or non-identical copy, whether by mark, alteration, writing, or other change from the original, is a separate document within the meaning of this term. The term “document” shall include any communication (as defined below).
7. The term “communication” shall include the transmittal of information (in the form of facts, ideas, inquiries, or otherwise), whether written or oral, including any conversation in person, by telephone, or by any other means. A document or thing transferred, whether temporarily or permanently, from one person or entity to another shall be deemed a communication between such persons or entities whether or not such document or thing was prepared or created by the transferor or addressed to the transferee.
8. “Person” or “Persons” means any natural person, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission, or other entity.
9. To “identify” or provide the “identity” or “identification” of a natural person means to state for that person: the person’s full name, job title,

and if not employed by You, that person's last known address, and last known telephone number.

10. To "identify" any document or thing or to provide the "identity" or "identification" of any document or thing means:
 - a. To provide a brief description of such document or thing sufficient to support a request for production;
 - b. To specify the place where the document or thing may be inspected; and
 - c. If a copy of the document or thing has been previously supplied, to so state and specifically identify the previously supplied copy by reference to Bates number(s) or other identifying information such as litigation control number.
11. The phrases "relate(s) to," "relating to," "refer(s) to," "referring to," "regard(s)," "regarding," "concern(s)," or "concerning" mean embodying, identifying, confirming, containing, showing, or pertaining to in any way, directly or indirectly, or having any logical or factual connection with the subject matter in question.
12. The terms "and," "or," and "and/or" shall be construed in the conjunctive and the disjunctive, whichever makes the request more inclusive.
13. The singular shall be construed to include the plural, and vice versa.

INSTRUCTIONS

1. You are to provide full and complete responses to the following interrogatories after conducting a diligent and thorough investigation into all information, documents, and things in your possession, custody, or control.
2. You are to quote each request in full immediately preceding the statement of any answer, response, or objection.
3. If You withhold from production any information, documents, or things requested herein on grounds of attorney-client privilege, work-product immunity, or otherwise, You shall provide a list, identifying the specific grounds upon which the objection is based and the particular request(s) objected to, and identifying any withheld documents, things, or portions thereof as follows:
 - a. its date of creation;
 - b. the identity of all persons who prepared and/or signed the document or thing;
 - c. the general nature of the document or thing (i.e., whether it is a letter, chart, pamphlet, memorandum, etc.);
 - d. a summary of its contents, or the general subject matter of the document or thing,
 - e. a listing of all persons, including but not limited to the addressees, to whom copies of the document or thing have been disclosed, and if any such persons are a licensed attorney, said attorney's state and date of admission and bar or other attorney identification number,

- f. the nature of the privilege or other rule of law relied upon to withhold the document or thing, and
- g. any other information relevant or useful in an assessment of the claim of privilege.

4. If You object to any part of an Interrogatory and refuses to answer that part, You shall state your objection and answer all remaining portions of the Interrogatory.

5. These requests shall be deemed continuing so as to require You to provide modified or supplemental answers if you obtain additional information or documents after the time of your response.

6. If any of the following Interrogatories cannot be answered in full after exercising due diligence to secure the information, please so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information you have concerning the unanswered portion. If your answer is qualified in any way, set forth the details of such qualification.

7. Any response made by reference to one or more documents or things shall identify by Bates number or other litigation document control number for each responsive document or thing.

INTERROGATORIES

AMENDED INTERROGATORY 1

Provide a chart identifying uses of the mark “WOODPECKER”, by you or your licensees, on a monthly basis (or on a quarterly/yearly basis if monthly figures do not exist) beginning with October 2011 and ending July 1, 2017, for each period including:

1. The product/service category,
2. The number of units sold or imported into the United States bearing the mark WOODPECKER.
3. The identity of the largest purchaser or customer of these goods or services sold or imported into the United States for this period,
4. The number of units sold or imported into British Columbia, Canada, bearing the mark WOODPECKER.
5. The identity of the largest purchaser or customer of these products sold or imported into British Columbia for this period.

AMENDED INTERROGATORY 2

Provide all relevant facts and circumstances, not already provided in response to Interrogatory 1, concerning use in commerce of the WOODPECKER MARK within the United States, by You or Your licensees, on a monthly basis (or on a quarterly/yearly basis if monthly figures do not exist) beginning with October 2011 and ending July 1, 2017.

AMENDED INTERROGATORY 3

Identify all relevant facts and circumstances of persons having personal knowledge of facts or circumstances identified in response to these interrogatories, said “all relevant facts and circumstances” including a brief, fair summary of each person’s connection with the Registrant and the substance of the information known by any such person.

AMENDED INTERROGATORY 4

Describe in detail all relevant facts and circumstances of Huigang Sun’s relationship with the Registrant, including that individual’s knowledge of the WOODPECKER MARK.

AMENDED INTERROGATORY 5

Describe in detail all relevant facts and circumstances underlying Registrant’s so called “First Affirmative Defense (Laches).”

AMENDED INTERROGATORY 6

Describe in detail all relevant facts and circumstances underlying Registrant’s so called “Second Affirmative Defense (Acquiescence).”

AMENDED INTERROGATORY 7

Describe in detail all relevant facts and circumstances concerning Registrant’s bona fide intent to use in commerce in the United States the WOODPECKER MARK in connection with each of the goods and services recited therein.

AMENDED INTERROGATORY 8

Describe in detail all relevant facts and circumstances relating to marketing activities (e.g. advertising) for products bearing the WOODPECKER MARK, in the United States, for each year beginning with 2011 and ending with 2017.

AMENDED INTERROGATORY 9

Describe in detail all relevant facts and circumstances of any actions taken by Registrant to comply with the injunction described in ¶6 of the Petition.

AMENDED INTERROGATORY 10

Describe in detail all relevant facts and circumstances relating to Registrant's denial of "each and every allegation of" Paragraphs 6-11 of the Petition.

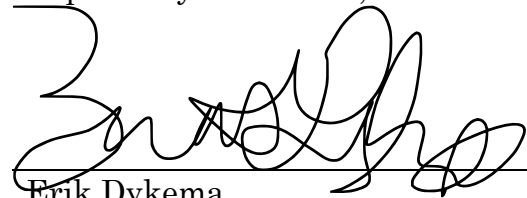
AMENDED INTERROGATORY 11

Describe in detail all relevant facts and circumstances relating to Registrant's denial of "each and every allegation of" Paragraphs 15-17 of the Petition.

AMENDED INTERROGATORY 12, 13, 14

[Reserved]

Respectfully Submitted,



Erik Dykema
Zeller IP Group PLLC
erik@zellerip.com
105 Grove Street
Suite 16-3
Montclair, New Jersey 07042
972-920-8002
*Attorney for Petitioner,
Woodpecker Flooring Inc.*

5 July 2017

Date

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document upon Respondent's counsel via email, on consent, to:

Gina Lupino (gina@ascendionlaw.com)
Kelly McCafferey (kelly@ascendionlaw.com)

Date: 2017 07 05

By: /Erik Dykema/

Erik Dykema
erik@zellerip.com
105 Grove Street
Suite 16-3
Montclair, New Jersey 07042
972-920-8002

*Attorney for Petitioner,
Woodpecker Flooring Inc.*

EXHIBIT B

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

Woodpecker Flooring Inc.
(Petitioner)

v.

Wiston International Trade Co., Ltd.
(Registrant)

Cancellation No. 92,065,095

Registration No: 4,876,546
Mark:



**PETITIONER'S FIRST REVISED SET OF REQUESTS FOR PRODUCTION
TO REGISTRANT WISTON INTERNATIONAL TRADE CO. LTD.**

Pursuant to Trademark Rule §2.116 and Federal Rules of Civil Procedure 26 and 34, Petitioner Woodpecker Flooring Inc. hereby requests that Registrant Wiston International Trade Co., Ltd. ("Registrant") produce documents and things in response to the following Requests for Production ("RFPs") in writing, under oath, and within thirty (30) days of the date of service.

DEFINITIONS

The following definitions shall apply to these requests, regardless of whether used in capitalized form:

1. "Wiston," "Respondent," "Registrant," "Defendant," "You," and/or "Your(s)" means the party to this action Wiston International Trade Co., Ltd. and all past or present, foreign or domestic, and/or direct or indirect

subsidiaries, affiliates, joint ventures, divisions, business units, and predecessors in interest, including, without limitation, their respective officers, directors, agents, engineers, scientists, researchers, developers, employees, members, representatives, and all other persons acting on behalf of any such individual or individuals and/or entity or entities.

2. "Petitioner" or "Plaintiff" means Woodpecker Flooring Inc.
3. "WOODPECKER MARK" means U.S. Trademark Registration No. 4,876,546 and the word ("Woodpecker") or design (stylized woodpecker appearing above) claimed therein.
4. "CO-OWNED MARKS" means U.S. Trademark Registration Nos. 4,996,815, Canadian trademark registration numbers TMA840290, TMA840289, TMA836079, TMA836081, TMA779544 and any other trademark registrations or applications owned by You, in the United States, Canada, United Kingdom, Europe, or anywhere else in the world containing the word "Woodpecker," the word "Wiston," or the stylized image of a Woodpecker.
5. "CLAIMED GOODS/SERVICES" means any of the goods and/or services listed in the registration for the WOODPECKER MARK, including but not limited to: "Wood flooring, namely, solid hardwood strips and planks, engineered hardwood flooring, glue-laminated wood flooring, parquet hardwood flooring, engineered bamboo flooring, wooden doors and wood window frames," "Furniture, namely, wood cabinets," "Wholesale and

retail store services featuring flooring materials, doors, window frames and furniture,” and “Installation and maintenance of flooring materials, doors, window frames and furniture.”

6. The term “document” is synonymous in meaning and equal in scope to the usage of the term “documents or electronically stored information” in Fed. R. Civ. P. 34(a)(1)(A). A draft or non-identical copy, whether by mark, alteration, writing, or other change from the original, is a separate document within the meaning of this term. The term “document” shall include any communication (as defined below).
7. The term “communication” shall include the transmittal of information (in the form of facts, ideas, inquiries, or otherwise), whether written or oral, including any conversation in person, by telephone, or by any other means. A document or thing transferred, whether temporarily or permanently, from one person or entity to another shall be deemed a communication between such persons or entities whether or not such document or thing was prepared or created by the transferor or addressed to the transferee.
8. “Person” or “Persons” means any natural person, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission, or other entity.
9. To “identify” or provide the “identity” or “identification” of a natural person means to state for that person: the person’s full name, job title,

and if not employed by You, that person's last known address, and last known telephone number.

10. To "identify" any document or thing or to provide the "identity" or "identification" of any document or thing means:
 - a. To provide a brief description of such document or thing sufficient to support a request for production;
 - b. To specify the place where the document or thing may be inspected; and
 - c. If a copy of the document or thing has been previously supplied, to so state and specifically identify the previously supplied copy by reference to Bates number(s) or other identifying information such as litigation control number.
11. The phrases "relate(s) to," "relating to," "refer(s) to," "referring to," "regard(s)," "regarding," "concern(s)," or "concerning" mean embodying, identifying, confirming, containing, showing, or pertaining to in any way, directly or indirectly, or having any logical or factual connection with the subject matter in question.
12. The terms "and," "or," and "and/or" shall be construed in the conjunctive and the disjunctive, whichever makes the request more inclusive.
13. The singular shall be construed to include the plural, and vice versa.

INSTRUCTIONS

1. If You withhold from production any information, documents, or things requested herein on grounds of attorney-client privilege, work-product immunity, or otherwise, You shall provide a list, identifying the specific grounds upon which the objection is based and the particular request(s) objected to, and identifying any withheld documents, things, or portions thereof as follows:
 - a. its date of creation;
 - b. the identity of all persons who prepared and/or signed the document or thing;
 - c. the general nature of the document or thing (i.e., whether it is a letter, chart, pamphlet, memorandum, etc.);
 - d. a summary of its contents, or the general subject matter of the document or thing;
 - e. a listing of all persons, including but not limited to the addressees, to whom copies of the document or thing have been disclosed, and if any such persons are a licensed attorney, said attorney's state and date of admission and bar or other attorney identification number,
 - f. the nature of the privilege or other rule of law relied upon to withhold the document or thing, and
 - g. any other information relevant or useful in an assessment of the claim of privilege.

2. If You object to any part of a Request and withhold documents on that basis, You shall state your objection and produce documents responsive to all remaining portions of the Request.
3. These requests shall be deemed continuing so as to require You to provide modified or supplemental responses if you obtain additional information or documents after the time of your response.
4. If any of the following Requests cannot be responded to in full after exercising due diligence to secure the information, please so state and respond to the extent possible, specifying your inability to respond to the remainder and stating whatever information you have concerning the unanswered portion.
5. Any response made by reference to one or more documents or things shall identify by Bates number or other litigation document control number for each responsive document or thing.

REQUESTS FOR PRODUCTION

REVISED REQUEST 1

All documents relevant to any facts or circumstances alleged in the Petition.

REVISED REQUEST 2

All documents relevant to any facts or circumstances alleged in Registrant's Answer.

REVISED REQUEST 3

All documents relevant to Your response(s) to any Interrogatories propounded in this Proceeding.

REVISED REQUEST 4

All documents relevant to the facts and circumstances alleged in your Initial Disclosures.

REVISED REQUEST 5

All documents concerning the dispute between You and Woodpecker Hardwood Floors (2000) Inc.

REVISED REQUEST 6

All documents relating to Your prosecution of the WOODPECKER REGISTRATION (Registration No: 4,876,546).

REVISED REQUEST 7

All documents relevant to the WOODPECKER REGISTRATION (Registration No: 4,876,546) concerning any statement under oath.

REVISED REQUEST 8

All documents relevant to Your compliance with the Injunction referred to in ¶6 of the Petition.

REVISED REQUEST 9

All documents relevant to Your “continued bona fide intention” to use the WOODPECKER MARK in commerce on the goods and services listed in the registration.

REVISED REQUEST 10

All documents relevant to Your entitlement to use the WOODPECKER MARK in commerce.

REVISED REQUEST 11

All documents relevant to the WOODPECKER REGISTRATION
(Registration No: 4,876,546) concerning Your *Petition to Amend Basis Post-Publication*.

REVISED REQUEST 12

All documents relevant to the WOODPECKER REGISTRATION
(Registration No: 4,876,546) concerning Your *Petition to Revive*.

REVISED REQUEST 13

All documents relevant to the WOODPECKER REGISTRATION
(Registration No: 4,876,546) concerning Your *Statement of Use Extension Request(s)*.

REVISED REQUEST 14

All documents relevant to the facts and circumstances alleged in the Petition
and in the possession, custody, or control of any person identified in response
to any of Petitioner's Interrogatories.

REVISED REQUEST 15

All documents relevant to the facts and circumstances alleged in the Petition
and in the possession, custody, or control of any person identified in
Registrant's Initial Disclosures.

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Respectfully Submitted,

/Erik Dykema/

12 July 2017

Erik Dykema
Zeller IP Group PLLC
erik@zellerip.com
105 Grove Street
Suite 16-3
Montclair, New Jersey 07042
972-920-8002

Date

Attorney for Petitioner,
Woodpecker Flooring Inc.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document upon Respondent's counsel via email, on consent, to:

Gina Lupino (gina@ascendionlaw.com)
Kelly McCafferey (kelly@ascendionlaw.com)

Date: 2017 07 12

By: /Erik Dykema/

Erik Dykema
erik@zellerip.com
105 Grove Street
Suite 16-3
Montclair, New Jersey 07042
972-920-8002

Attorney for Petitioner,
Woodpecker Flooring Inc.

EXHIBIT C

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

Woodpecker Flooring Inc.)
)
Petitioner,)
)
)
v.)
)
Wiston International Trade Co., Ltd.)
)
)
Registrant.)

Cancellation No. 92,065,095
Registration No.: 4,876,546
Mark:



Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451
U.S.A.

REGISTRANT'S RESPONSES AND OBJECTIONS

TO PETITIONER'S REVISED FIRST SET OF REQUESTS FOR PRODUCTION

Registrant Wiston International Trade Co., Ltd. (the "Registrant") hereby responds to
Petitioner's Revised First Set of Requests for Production, with objections, pursuant to
Trademark Trial and Appeal Board Manual of Procedure § 406.04.

Respectfully submitted,

By: /Gina M. Lupino/
Gina M. Lupino
Attorney for Registrant
New York State Bar ID No. 4504312
Ascension Law
Suite 2300 - 1066 West Hastings Street
Vancouver, British Columbia, V6E 3X2 Canada
Office: 604.639.2565 ext. 503
Cell: 778.708.0119
Fax: 604.639.2585
Email: gina@ascensionlaw.ca

PRELIMINARY STATEMENT

1. Registrant's investigation and development of all facts and circumstances relating to this action is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, Registrant's right to rely on other facts or documents at trial.
2. By making the accompanying responses and objections to Petitioner's requests for documents, Registrant does not waive, and hereby expressly reserves, its right to assert any and all objections as to the admissibility of such responses into evidence in this action, or in any other proceedings, on any and all grounds including, but not limited to, competency, relevancy, materiality, and privilege. Further, Registrant makes the responses and objections herein without in any way implying that it considers the requests and interrogatory, and responses to the requests and interrogatory, to be relevant or material to the subject matter of this action.
3. Registrant will produce responsive documents only to the extent that such documents are in the possession, custody, or control of the Registrant, as set forth in the Federal Rules of Civil Procedure. Registrant's possession, custody, or control does not include any constructive possession that may be conferred by Registrant's right or power to compel the production of documents or information from third parties.
4. A response to a document request stating that objections and/or indicating that documents will be produced shall not be deemed or construed that there are, in fact, responsive documents, that Registrant performed any of the acts described in the document request or definitions and/or instructions applicable to the document request or interrogatory, or that Registrant acquiesces in the characterization of the conduct or activities contained in the document request, interrogatory, or definitions and/or instructions applicable to the document request or interrogatory.
5. Registrant expressly reserves the right to supplement, clarify, revise, or correct any or all of the responses and objections herein, and to assert additional objections or privileges, in one or more subsequent supplemental response(s).
6. Registrant will make available for inspection at Registrant's offices responsive documents. Alternatively, Registrant will produce copies of the documents.
7. Publicly available documents including, but not limited to, newspaper clippings, court papers, and documents available on the Internet, will not be produced.

GENERAL OBJECTIONS

1. Registrant objects to each instruction, definition and request to the extent that it purports to impose any requirement or discovery obligation greater than or different from those under the Federal Rules of Civil Procedure and the applicable Trademark Trial and Appeal Board Rules.

2. Registrant objects to each request that is overly broad, seeks irrelevant information, unduly burdensome, or not reasonably calculated to lead to the discovery of admissible evidence.

3. Registrant objects to each instruction, definition and request to the extent that it seeks information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege. Should any such disclosure by Registrant occur, it is inadvertent and shall not constitute a waiver of any privilege.

4. Registrant objects to each instruction, definition and request as overbroad and unduly burdensome to the extent it seeks documents or information that are readily or more accessible to Petitioner from Petitioner's own files, from documents or information in Petitioner's possession, or from documents or information that Petitioner previously produced to Registrant. Responding to such requests would be oppressive, unduly burdensome, and unnecessarily expensive, and the burden of responding to such requests and interrogatory is substantially the same or less for Petitioner as for Registrant. All such documents and information will not be produced.

5. To the extent any of Petitioner's requests seek answers that include expert material, including but not limited to survey materials, Registrant objects to any such interrogatories as premature and expressly reserves the right to supplement, clarify, revise, or correct any or all responses to such requests, and to assert additional objections or privileges, in one or more subsequent supplemental response(s).

6. Registrant incorporates by reference every general objection set forth above into each specific response set forth below. A specific response may repeat a general objection for emphasis or some other reason. The failure to include any general objection in any specific response does not waive any general objection to that request. Moreover, Registrant does not waive its right to amend its responses.

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

1. Registrant objects to Definition No. 1 regarding "Wiston," "Respondent," "Registrant," "Defendant," "You," and/or "Your(s)." The Definition is overbroad and unduly burdensome to the extent it attempts to extend the scope of these interrogatory requests to responses in the possession, custody, or control of individuals, agencies, or entities other than the Registrant and its present employees, principals, officials and agents.

2. Registrant objects to Definition No. 5 regarding "Claimed Goods/Services." The Definition attempts to extend the definition of goods and services beyond the registration at issue in this matter.

3. Registrant objects to Definition No. 6 regarding "document" to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 6 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

4. Registrant objects to Definition No. 7 regarding “communication” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 7 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

5. Registrant objects to Definition No. 8 regarding “person” or “persons” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 8 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

6. Registrant objects to Definition No. 9 regarding “identify” and “identification” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 9 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

7. Registrant objects to Definition No. 10 regarding “identify” and “identification” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 10 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

8. Registrant objects to Definition No. 11 regarding the phrases “relate(s) to,” “relating to,” “refer(s) to,” “referring to,” “regard(s),” “regarding,” “concern(s),” or “concerning” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 11 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

9. Registrant objects to Instruction Nos. 1-5 to the extent that they purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Instructions Nos. 1-5 on the grounds that they are vague and ambiguous, overly broad, seek irrelevant information to this action and are not reasonably calculated to lead to the discovery of admissible evidence, and are unduly burdensome. Registrant further objects to Instructions Nos. 1-5 to the extent that they call for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

Without waiving the specific objections set forth below, and subject to the limitations and general objections set forth above, Registrant hereby provides the following responses to the requests for production contained in Petitioner’s Revised First Set of Requests for Production (Nos. 1-15):

REVISED REQUEST NO. 1

All documents relevant to any facts or circumstances alleged in the Petition.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: Registrant produces documents showing evidence of Registrant's use of the WOODPECKER REGISTRATION (Registration No: 4,876,546) in U.S. commerce.

REVISED REQUEST NO. 2

All documents relevant to any facts or circumstances alleged in Registrant's Answer.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: Registrant produces documents showing evidence of Registrant's use of the WOODPECKER REGISTRATION (Registration No: 4,876,546) in U.S. commerce.

REVISED REQUEST NO. 3

All documents relevant to Your response(s) to any Interrogatories propounded in this Proceeding.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: Registrant produces documents showing evidence of Registrant's use of the WOODPECKER REGISTRATION (Registration No: 4,876,546) in U.S. commerce.

REVISED REQUEST NO. 4

All documents relevant to the facts and circumstances alleged in your Initial Disclosures.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: Registrant produces documents showing evidence of Registrant's use of the WOODPECKER REGISTRATION (Registration No: 4,876,546) in U.S. commerce.

REVISED REQUEST NO. 5

All documents concerning the dispute between You and Woodpecker Hardwood Floors (2000) Inc.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: This request seeks irrelevant documents that are related to a Canadian trademark that is not subject to this US trademark matter. Hard and electronic copies of documents regarding this Canadian trademark matter are available at the Supreme Court of British Columbia, Vancouver Registry or at British Columbia's electronic court registry "Court Services Online", accessible at <https://justice.gov.bc.ca/cso/index.do>, respectively.

REVISED REQUEST NO. 6

All documents relating to Your prosecution of the WOODPECKER REGISTRATION (Registration No: 4,876,546).

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: Registrant produces a copy of the prosecution history of the WOODPECKER REGISTRATION (Registration No. 4,876,546).

REVISED REQUEST NO. 7

All documents relevant to the WOODPECKER REGISTRATION (Registration No: 4,876,546) concerning any statement under oath.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See response to request no. 6.

REVISED REQUEST NO. 8

All documents relevant to Your compliance with the Injunction referred to in ¶6 of the Petition.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See response to request no. 5.

REVISED REQUEST NO. 9

All documents relevant to Your “continued bona fide intention” to use the WOODPECKER MARK in commerce on the goods and services listed in the registration.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See response to request no. 6.

REVISED REQUEST NO. 10

All documents relevant to Your entitlement to use the WOODPECKER MARK in commerce.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See response to request nos. 1 and 6.

REVISED REQUEST NO. 11

All documents relevant to the WOODPECKER REGISTRATION (Registration No: 4,876,546) concerning Your Petition to Amend Basis Post-Publication.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See response to request no. 6.

REVISED REQUEST NO. 12

All documents relevant to the WOODPECKER REGISTRATION (Registration No: 4,876,546) concerning Your Petition to Revive.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See response to request no. 6.

REVISED REQUEST NO. 13

All documents relevant to the WOODPECKER REGISTRATION (Registration No: 4,876,546) concerning Your Statement of Use Extension Request(s).

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See response to request no. 6.

REVISED REQUEST NO. 14

All documents relevant to the facts and circumstances alleged in the Petition and in the possession, custody, or control of any person identified in response to any of Petitioner's Interrogatories.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See responses to request nos. 1-13 and 15.

REVISED REQUEST NO. 15

All documents relevant to the facts and circumstances alleged in the Petition and in the possession, custody, or control of any person identified in Registrant's Initial Disclosures.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, seeks privileged information, and is vague.

RESPONSE: See responses to request nos. 1-13 and 15.

By: /Gina M. Lupino/
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CERTIFICATE OF SERVICE

On August 11, 2017, I served a copy of the Respondent's REGISTRANT'S OBJECTIONS AND ANSWERS TO PETITIONER'S AMENDED FIRST SET OF INTERROGATORIES on the Petitioner's counsel via email pursuant to §406.04(b) to:

Erik Dykema (erik@zellerip.com)
cc: Kyle Zeller (kyle@zellerip.com)
Attorneys for Petitioner
Zeller IP
105 Grove Street
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Montclair, New Jersey 07042
USA

Respectfully submitted,

Date: August 11, 2017

By: /Gina M. Lupino/
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EXHIBIT D

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

Woodpecker Flooring Inc.)
)
 Petitioner,)
)
 v.)
)
 Wiston International Trade Co., Ltd.)
)
 Registrant.)
_____)

Cancellation No. 92,065,095
Registration No.: 4,876,546
Mark:



Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451
U.S.A.

REGISTRANT'S OBJECTIONS AND SUPPLEMENTAL ANSWERS

TO PETITIONER'S AMENDED FIRST SET OF INTERROGATORIES

Registrant Wiston International Trade Co., Ltd. (the "Registrant") hereby answers
Petitioner's Amended First Set of Interrogatories, with objections, pursuant to Trademark Trial
and Appeal Board Manual of Procedure § 408.03.

Respectfully submitted,

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PRELIMINARY STATEMENT

1. Registrant's investigation and development of all facts and circumstances relating to this action is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, Registrant's right to rely on other facts or documents at trial.
2. By making the accompanying responses and objections to Petitioner's requests for documents and interrogatory, Registrant does not waive, and hereby expressly reserves, its right to assert any and all objections as to the admissibility of such responses into evidence in this action, or in any other proceedings, on any and all grounds including, but not limited to, competency, relevancy, materiality, and privilege. Further, Registrant makes the responses and objections herein without in any way implying that it considers the requests and interrogatory, and responses to the requests and interrogatory, to be relevant or material to the subject matter of this action.
3. Registrant will produce responsive documents only to the extent that such documents are in the possession, custody, or control of the Registrant, as set forth in the Federal Rules of Civil Procedure. Registrant's possession, custody, or control does not include any constructive possession that may be conferred by Registrant's right or power to compel the production of documents or information from third parties.
4. A response to a document request or interrogatory stating that objections and/or indicating that documents will be produced shall not be deemed or construed that there are, in fact, responsive documents, that Registrant performed any of the acts described in the document request, interrogatory, or definitions and/or instructions applicable to the document request or interrogatory, or that Registrant acquiesces in the characterization of the conduct or activities contained in the document request, interrogatory, or definitions and/or instructions applicable to the document request or interrogatory.
5. Registrant expressly reserves the right to supplement, clarify, revise, or correct any or all of the responses and objections herein, and to assert additional objections or privileges, in one or more subsequent supplemental response(s).
6. Registrant will make available for inspection at Registrant's offices responsive documents. Alternatively, Registrant will produce copies of the documents.
7. Publicly available documents including, but not limited to, newspaper clippings, court papers, and documents available on the Internet, will not be produced.

GENERAL OBJECTIONS

1. Registrant objects to each instruction, definition and interrogatories to the extent that it purports to impose any requirement or discovery obligation greater than or different from those

under the Federal Rules of Civil Procedure and the applicable Trademark Trial and Appeal Board Rules.

2. Registrant objects to each interrogatory that is overly broad, seeks irrelevant information,, unduly burdensome, or not reasonably calculated to lead to the discovery of admissible evidence.

3. Registrant objects to each instruction, definition and interrogatories to the extent that it seeks information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege. Should any such disclosure by Registrant occur, it is inadvertent and shall not constitute a waiver of any privilege.

4. Registrant objects to each instruction, definition and interrogatories as overbroad and unduly burdensome to the extent it seeks documents or information that are readily or more accessible to Petitioner from Petitioner's own files, from documents or information in Petitioner's possession, or from documents or information that Petitioner previously produced to Registrant. Responding to such requests and interrogatory would be oppressive, unduly burdensome, and unnecessarily expensive, and the burden of responding to such requests and interrogatory is substantially the same or less for Petitioner as for Registrant. All such documents and information will not be produced.

5. To the extent any of Petitioner's interrogatories seek answers that include expert material, including but not limited to survey materials, Registrant objects to any such interrogatories as premature and expressly reserves the right to supplement, clarify, revise, or correct any or all responses to such requests, and to assert additional objections or privileges, in one or more subsequent supplemental response(s).

6. Registrant incorporates by reference every general objection set forth above into each specific response set forth below. A specific response may repeat a general objection for emphasis or some other reason. The failure to include any general objection in any specific response does not waive any general objection to that request. Moreover, Registrant does not waive its right to amend its responses.

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

1. Registrant objects to Definition No. 1 regarding "Wiston," "Respondent," "Registrant," "Defendant," "You," and/or "Your(s)." The Definition is overbroad and unduly burdensome to the extent it attempts to extend the scope of these interrogatory requests to responses in the possession, custody, or control of individuals, agencies, or entities other than the Registrant and its present employees, principals, officials and agents.

2. Registrant objects to Definition No. 5 regarding "Claimed Goods/Services." The Definition attempts to extend the definition of goods and services beyond the registration at issue in this matter.

3. Registrant objects to Definition No. 6 regarding “document” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 6 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

4. Registrant objects to Definition No. 7 regarding “communication” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 7 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

5. Registrant objects to Definition No. 8 regarding “person” or “persons” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 8 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

6. Registrant objects to Definition No. 9 regarding “identify” and “identification” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 9 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

7. Registrant objects to Definition No. 10 regarding “identify” and “identification” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 10 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

8. Registrant objects to Definition No. 11 regarding the phrases “relate(s) to,” “relating to,” “refer(s) to,” “referring to,” “regard(s),” “regarding,” “concern(s),” or “concerning” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Definition No. 11 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

9. Registrant objects to Instructions Nos. 1-7 to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Registrant further objects to Instructions Nos. 1-7 on the grounds that they are vague and ambiguous, that they call for information that is seeks irrelevant information to this action and not reasonably calculated to lead to the discovery of admissible evidence, and that it is overly broad, seeks irrelevant information, and unduly burdensome. Registrant further objects to Instructions Nos. 1-7 to the extent that it calls for information protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege.

Without waiving the specific objections set forth below, and subject to the limitations and general objections set forth above, Registrant hereby provides the following supplemental responses to the interrogatories contained in Petitioner's Amended First Set of Interrogatories (Nos. 1-14) with supplemental subject matter underlined:

AMENDED INTERROGATORY NO. 1

Provide a chart identifying uses of the mark "WOODPECKER", by you or your licensees, on a monthly basis (or on a quarterly/yearly basis if monthly figures do not exist) beginning with October 2011 and ending July 1, 2017, for each period including:

1. The product/service category,
2. The number of units sold or imported into the United States bearing the mark WOODPECKER.
3. The identity of the largest purchaser or customer of these goods or services sold or imported into the United States for this period,
4. The number of units sold or imported into British Columbia, Canada, bearing the mark WOODPECKER.
5. The identity of the largest purchaser or customer of these products sold or imported into British Columbia for this period.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information,, vague, and on the grounds that it is improper because it calls for the production of a document.

ANSWER: This interrogatory request calls for the product of a document. As such, no response is required.

AMENDED INTERROGATORY NO. 2

Provide all relevant facts and circumstances, not already provided in response to Interrogatory 1, concerning use in commerce of the WOODPECKER MARK within the United States, by You or Your licensees, on a monthly basis (or on a quarterly/yearly basis if monthly figures do not exist) beginning with October 2011 and ending July 1, 2017.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague, as well as based on an improper interrogatory. See Response to Interrogatory No. 1.

ANSWER: Registrant has used the WOODPECKER MARK in US commerce. Such use includes but is not limited to the sale of hardwood flooring in the US in 2016 (March, April, June,

and December 2016) with the WOODPECKER MARK on the packaging and on marketing materials. The total value of the hardwood flooring sold in the U.S. in 2016 was approximately \$200,000.

These goods were shipped to the U.S. by boat and entered the U.S. at the Port of Seattle, Washington.

Registrant decided to enter the U.S. market because it believed that its products were suitable for the U.S. market.

Registrant took steps to start selling the goods the U.S. under the WOODPECKER MARK, including but not limited to: conducting U.S. market research, attending a US tradeshow, setting up a U.S. corporation (Wiston Building Materials Corp. a Washington corporation with offices at 33530 1st Way S, Suite 29, Federal Way, Washington 98003), opening a U.S. bank account, importing goods, locating a warehouse, and hiring and training sales persons who worked in the U.S. The Registrant's U.S. warehouse is located Pacific Coast Distributors (PCD) Seattle, 1139 Andover Park W, Tukwila, Washington 98188.

AMENDED INTERROGATORY NO. 3

Identify all relevant facts and circumstances of persons having personal knowledge of facts or circumstances identified in response to these interrogatories, said "all relevant facts and circumstances" including a brief, fair summary of each person's connection with the Registrant and the substance of the information known by any such person.

OBJECTION(S): Registrant objects to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague.

ANSWER: The following persons may have relevant information regarding issues in this matter:

1. Nikki Zhang, Accountant, who may have knowledge of Registrant's accounting affairs and some of its administrative matters, including but not limited to Registrant's use in the U.S. of the WOODPECKER MARK on packages of wood flooring.
2. Jamie Slogan, Director of Operations, who may have knowledge of Registrant's operations and some of its administrative affairs, including but not limited to Registrant's use in the U.S. of the WOODPECKER MARK on packages of wood flooring.
3. Richard Sisk, Vice President, who may have knowledge of Registrant's marketing activities including but not limited to Registrant's attendance at trade shows in the U.S. in 2014 and 2015, and Registrant's use of the WOODPECKER MARK on marketing materials.
4. Huigang Sun, Director, President, Owner, and Shareholder of Registrant, who may have knowledge of Registrant's overall operational, financial and administrative matters.

5. Utako Warren, Marketing Manager, who may have knowledge of Registrant's marketing activities in the U.S.
6. Victor Tsao, litigation lawyer in British Columbia, Canada, who may have knowledge of facts and circumstances regarding actions taken by Registrant to comply with an injunction issued in British Columbia, Canada.
7. Yunwei a/k/a "Edmund" Xi, Canadian trademark lawyer in British Columbia, Canada, who may have knowledge of facts and circumstances regarding actions taken by Registrant to comply with an injunction issued in British Columbia, Canada.
8. Iris Han, previous employee, may have knowledge of some of Registrant's administrative affairs regarding Registrant's activities in the U.S. that occurred during the period of her tenure at the Registrant.
9. Eric Han, previously Sales Representative, may have knowledge of some of Registrant's sales activities in the U.S. that occurred during the period of his tenure at the Registrant.
10. Paul Wickswat, previous Director of Business Development, may have knowledge of some of Registrant's marketing and business development activities that occurred in the U.S. during the period of his tenure at the Registrant.
11. Maggie Huang, previous Manager and Secretary, who may have knowledge of some of Registrant's administrative matters that occurred in the U.S. during the period of her tenure at the Registrant.
12. Mandy Fung, previous Manager and Secretary, who may have knowledge of some of Registrant's administrative matters that occurred in the U.S. during the period of her tenure at the Registrant.

AMENDED INTERROGATORY NO. 4

Describe in detail all relevant facts and circumstances of Huigang Sun's relationship with the Registrant, including that individual's knowledge of the WOODPECKER MARK.

OBJECTION(S): Registrant object to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague.

ANSWER: Huigang Sun is a Director, President, Owner, and Shareholder of Registrant.

AMENDED INTERROGATORY NO. 5

Describe in detail all relevant facts and circumstances underlying Registrant's so called "First Affirmative Defense (Laches)."

OBJECTION(S): Registrant object to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague.

ANSWER: Petitioner has unreasonable delayed in bringing its claims. The application for the WOODPECKER MARK was published for opposition in the Trademark Official Gazette on October 13, 2015. Petitioner should have filed a notice of opposition (or extension of time therefor) with the Trademark Trial and Appeal Board on or before this date if it believed it would have been injured by registration of the WOODPECKER MARK to the Registrant.

AMENDED INTERROGATORY NO. 6

Describe in detail all relevant facts and circumstances underlying Registrant's so called "Second Affirmative Defense (Acquiescence)."

OBJECTION(S): Registrant object to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague.

ANSWER: Petitioner failed to timely object to registration of the WOODPECKER MARK to the Registrant during the opposition period. The application for the WOODPECKER MARK was published for opposition in the Trademark Official Gazette on October 13, 2015. Petitioner should have filed a notice of opposition (or extension of time therefor) with the Trademark Trial and Appeal Board on or before this date if it believed it would have been injured by registration of the WOODPECKER MARK to the Registrant.

AMENDED INTERROGATORY NO. 7

Describe in detail all relevant facts and circumstances concerning Registrant's bona fide intent to use in commerce in the United States the WOODPECKER MARK in connection with each of the goods and services recited therein.

OBJECTION(S): Registrant object to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague.

ANSWER: As of the filing date of the application to register the WOODPECKER MARK, the Registrant had a bona fide intention to use the mark in U.S. commerce in connection with the identified goods and/or services as of the filing date of the application, and used the WOODPECKER MARK in U.S. commerce at least as early as March, April, and June, which precedes the Petitioner's filing date of September 21, 2016.

See also Response to Interrogatory No. 2.

AMENDED INTERROGATORY NO. 8

Describe in detail all relevant facts and circumstances relating to marketing activities (e.g. advertising) for products bearing the WOODPECKER MARK, in the United States, for each year beginning with 2011 and ending with 2017.

OBJECTION(S): Registrant object to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague.

ANSWER: Registrant has engaged in marketing activities in the U.S. under the WOODPECKER MARK, including but not limited to attending trade shows in the U.S., including but not limited to SURFACES at The International Surface Event (TISE) in 2014 and 2015. Registrant has also used the WOODPECKER MARK on its marketing materials, including but not limited to on publications, on its website "www.wpfloors.com", on promotional items provided to its customers.

AMENDED INTERROGATORY NO. 9

Describe in detail all relevant facts and circumstances of any actions taken by Registrant to comply with the injunction described in ¶6 of the Petition.

OBJECTION(S): Registrant object to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague, and on the grounds of relevance.

ANSWER: See Response to Interrogatory No. 3.

AMENDED INTERROGATORY NO. 10

Describe in detail all relevant facts and circumstances relating to Registrant's denial of "each and every allegation of" Paragraphs 6-11 of the Petition.

OBJECTION(S): Registrant object to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague.

ANSWER: See Responses to Interrogatory Nos. 1-9.

AMENDED INTERROGATORY NO. 11

Describe in detail all relevant facts and circumstances relating to Registrant's denial of "each and every allegation of" Paragraphs 15-17 of the Petition.

OBJECTION(S): Registrant object to this interrogatory on the grounds that it is overly broad, seeks irrelevant information, and is vague.

ANSWER: See Responses to Interrogatory Nos. 1-9.

AMENDED INTERROGATORY NO. 12

[Reserved]

ANSWER: No response is required.

AMENDED INTERROGATORY NO. 13

[Reserved]

ANSWER: No response is required.

AMENDED INTERROGATORY NO. 14

[Reserved]

ANSWER: No response is required.

By: /Gina M. Lupino/
Gina M. Lupino
Attorney for Registrant
New York State Bar ID No. 4504312

By: /Nikki Zhang/
Nikki Zhang

CERTIFICATE OF SERVICE

On August 24, 2017, I served a copy of the Respondent's REGISTRANT'S OBJECTIONS AND SUPPLEMENTAL ANSWERS TO PETITIONER'S AMENDED FIRST SET OF INTERROGATORIES on the Petitioner's counsel via email pursuant to §405.04(a) to:

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cc: Kyle Zeller (kyle@zellerip.com)
Attorneys for Petitioner
Zeller IP
105 Grove Street
Suite 16-3
Montclair, New Jersey 07042
USA

Respectfully submitted,

Date: August 24, 2017

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EXHIBIT E



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August 15, 2017

VIA E-Mail

Gina Lupino
gina@lupinolaw.com
gina@ascendionlaw.com

Brent Capehart
brent@lupinolaw.com

Ascendion Law / Lupino Law Firm

Re: Wiston Discovery Deficiencies - TTAB Cancellation No. 92,065,095

Dear Gina-

I'm writing to you concerning your client Wiston's deficient discovery responses in the above referenced matter. Petitioner is still reviewing and investigating your discovery responses and may supplement this list of deficiencies as more information comes to light or is understood.

As an initial matter, it is one of Petitioner's contentions that Wiston discontinued use of the WOODPECKER Mark in 2013 in response to an injunction. *See* Petition ¶16. Wiston appears to be headquartered in British Columbia and does not appear to maintain an office in the United States. Based on the information it has available thus far, Petitioner does not believe that Wiston's business is sufficiently large to maintain separate product lines, marketing, and/or branding efforts simultaneously for British Columbia and the United States. Petitioner believes that Wiston maintains one marketing and branding across its products. Wiston's compliance with the injunction bears directly on one of Petitioner's theories of the case. Further, facts and circumstances concerning Wiston's use or non-use of the WOODPECKER Mark in British

Columbia are therefore relevant to, and likely to lead to the discovery of admissible evidence concerning, the claims and defenses in the *Petition*. As provided by *Rule 26*:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Everything that Petitioner has requested discovery on relating to British Columbia, it has also requested discovery on relating to the United States. There can be no serious contention by Wiston that Petitioner is not entitled to the discovery it seeks on use in the United States—Wiston is clearly obligated to provide such Discovery. The marginal extra burden is minimal, at most, to providing such information for the one extra province where Wiston's headquarters are located. The benefit of such information—including potentially confirming one of the claims and themes of Petitioner's complaint—is comparatively large and outweighs any minimal burden to Wiston.

Wiston's Late and Deficient Initial Disclosures

You initially served initial disclosures on April 17. Pursuant to FRCP 26(a)(1), and TBMP 401.02, you are obligated to provide, ***without awaiting a discovery request***:

(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment,

Wiston failed to serve any documents whatsoever, or any descriptions of documents, with its initial disclosures.

On August 12, four months after the deadline for initial disclosures, you served 192 pages of documents. Of these, 154 pages appear to be portions of the file wrapper for Wiston's trademark registration(s). The remaining 38 pages appear to be of little relevance to Wiston's defenses.

Specifically, Wiston's registration appears to claim the following goods and services (the "Claimed Goods and Services"):

- a. Solid hardwood strips and planks
- b. Engineered hardwood flooring
- c. Glue-laminated wood flooring
- d. Parquet hardwood flooring
- e. Engineered bamboo flooring
- f. Wooden doors
- g. Wood window frames
- h. Furniture, namely, wood cabinets
- i. Wholesale and retail store services featuring flooring materials

- j. Wholesale and retail store services featuring doors
- k. Wholesale and retail store services featuring window frames
- l. Wholesale and retail store services featuring furniture
- m. Installation and maintenance of flooring materials
- n. Installation and maintenance of doors
- o. Installation and maintenance of window frames
- p. Installation and maintenance of furniture

Wiston has failed to at least disclose documents relevant to Wiston's defenses regarding Petitioner's claim(s) that Wiston:

- 1. Has never used,
- 2. Has no intent to use,
- 3. Has discontinued and has no intent to use,
- 4. Is not currently using,
- 5. Has not used for three years,
- 6. Had no *bona fide* intent to use, at the time of filing, and/or
- 7. Has no *bona fide* intent to use at present

the mark in commerce on each and every one of the Claimed Goods and Services; and that it made knowingly false statements to the United States Patent and Trademark Office during its prosecution of the WOODPECKER registration.

If it is Wiston's contention that the documents produced evidence Wiston's use in commerce in the above categories a-p, please identify one or more documents corresponding to each category. For example, please identify at least one document supporting Wiston's contention that it used the mark in commerce on "solid hardwood strips and planks," and similarly at least one document evidencing use on each of the other categories.

Wiston's Deficient Responses to Interrogatories

On August 9, you served Wiston's responses to Petitioner's Interrogatories. For various reasons, Wiston's responses to the Interrogatories are sorely deficient.

As an initial matter, Wiston produced non-specific, form objections to each interrogatory. Petitioner is entitled to know whether Wiston is withholding information on the basis of such objections, or whether Wiston has produced all available information. For each interrogatory that Wiston objected to, please: (i) confirm that Wiston has provided all available information responsive to the interrogatory, (ii) confirm that Wiston is withholding information on the basis of an objection, and describe the nature of the information sufficiently that Petitioner can independently judge the appropriateness of the failure to respond, or (iii) provide the missing information by 22 August 2017.

Regarding individual requests, Wiston's deficiencies include, but are not limited to, the following Interrogatories:

Interrogatory #1 - FRCP 33(b)(3) requires that: *Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.* As we discussed on our phone call Thursday, August 10; notwithstanding Petitioner's disagreement with Wiston's objection that the interrogatory "calls for the product of a document," Wiston is still obligated to

respond to the interrogatory and answer the question. If Wiston is committed to its refusal and rejection of the "chart" format, a series of lists, paragraphs, or any other complete format would be sufficient. Please provide the requested information:

[U]ses of the mark "WOODPECKER", by you or your licensees, on a monthly basis (or on a quarterly/yearly basis if monthly figures do not exist) beginning with October 2011 and ending July 1, 2017, for each period including: 1. The product/service category, 2. The number of units sold or imported into the United States bearing the mark WOODPECKER, 3. The identity of the largest purchaser or customer of these goods or services sold or imported into the United States for this period, 4. The number of units sold or imported into British Columbia, Canada, bearing the mark WOODPECKER, 5. The identity of the largest purchaser or customer of these products sold or imported into British Columbia for this period.

To be clear, by "product/service category" Petitioner is requesting the category of Claimed Goods and Services above, i.e. one of a-p.

If Wiston maintains its refusal to provide information for British Columbia, please so inform us and provide the information for the United States.

Interrogatory #2 - This interrogatory requested information on a monthly basis from October 2011 to July 2017. In its response Wiston alleged that it sold "hardwood flooring" in the US in March, April, June, and December 2016, for approximately \$200,000. Please (i) Confirm that Wiston has never used the WOODPECKER Mark in commerce in the United States other than in March, April, June, and December 2016; (ii) Confirm that Wiston has never used the WOODPECKER Mark on any of the Claimed Goods and Services identified in the list above as f, g, h, i, j, k, l, m, n, o and p; and (iii) Identify which of the Claimed Goods and Services categories a, b, c, d, or e, with specificity, the sales of "hardwood flooring" relate to.

Alternately, please provide all of the requested information and explain the reason for Wiston's deficient response.

Interrogatory #3 - Please identify which, if any, of these individuals are attorneys; their state / province / nation of bar admittance, bar id numbers, and current status (active, inactive, disbarred, etc.)

Interrogatory #4 - Please describe Mr. Sun's knowledge of the Woodpecker Mark, particularly his knowledge of the prosecution of the mark, and whether he or some other person acting at his direction undertook the sworn statements comprising the prosecution of the WOODPECKER Registration, and with what factual basis.

Interrogatory #7 - Please describe all facts and circumstances concerning Wiston's bona fide intent to use, with specificity, including: Wiston's activities, actions, concrete steps taken to enter the market(s), corporations formed, contracts signed, distributors engaged, manufacturing and supply chain established, product imported, warehouses rented, advertising or marketing purchased, personnel hired, and any other facts and/or circumstances evidencing Wiston's bona fide intent to use the WOODPECKER mark in commerce in connection with each of the goods and services recited therein.

Interrogatory #9 - Please describe, in detail and providing all relevant facts and circumstances, whether Woodpecker has continued to manufacture, import, export, cross-ship, label, market, distribute, transport or otherwise handle or deal in product(s) bearing the WOODPECKER mark in British Columbia. Please describe the impact of the Injunction on Woodpecker's US activities; including any decisions considered, made, or implemented by management or ownership of Wiston, to modify its branding or marketing strategy either in the United States, or Canada, or both, in response to the interrogatory. Please describe any plans, efforts, or implementations of rebranding.

Interrogatory #10 - Please confirm that Wiston has no relevant facts or circumstances to offer in support of its denials of each and every allegation of ¶16-11 of the *Petition*, other than Wiston's responses to Interrogatories 1-9.

Interrogatory #11 - Please confirm that Wiston has no relevant facts or circumstances to offer in support of its denials of each and every allegation of ¶15-17 of the *Petition*, other than Wiston's responses to Interrogatories 1-9.

Wiston's Deficient Responses to Requests for Production

On August 12, you served Wiston's responses to Petitioner's Requests for Production. For many of the same reasons as discussed above with respect to *Initial Disclosures* and *Interrogatories*, Wiston's responses to the RFP's are sorely deficient.

As with Wiston's responses to Interrogatories, Wiston produced non-specific, form objections to each request for production. Pursuant to F.R.C.P. 34(b)(2)(c):

An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

Petitioner is entitled to know whether Wiston is withholding information and/or documents on the basis of its objections, or whether Wiston has produced all available information and/or documents. For each interrogatory that Wiston objected to, please: (i) confirm that Wiston has provided all available information responsive to the request, (ii) confirm that Wiston is withholding information or documents on the basis of an objection, and describe the nature of the information sufficiently that Petitioner can independently judge the appropriateness of the failure to respond, or (iii) provide the missing information by 22 August 2017.

These deficiencies include, but are not limited to, the following RFP's:

Request for Production #1 - Wiston failed to produce documents relevant to Petitioner's claims, as discussed above with respect to *Initial Disclosures*.

Request for Production #2 - Wiston failed to produce documents relevant to Wiston's answer, as discussed above with respect to *Initial Disclosures*. Please produce one or more documents supporting Wiston's denials of each and every numbered paragraph, or portion thereof.

Request for Production #3 - Wiston failed to produce documents evidencing any responses to Petitioner's Interrogatories, specifically documents evidencing alleged sales into the United States (i.e. invoices, cancelled checks, shipping receipts, emails establishing knowledge, &c.)

Request for Production #4 - Wiston failed to produce any documents or emails concerning the knowledge of the persons identified. If the identified persons have knowledge concerning the areas indicated, please produce documents, communications, emails, or otherwise from them so that Petitioner can review such materials in advance of noticing depositions.

Request for Production #5 - As discussed above, Wiston's British Columbia activities are relevant to one of Plaintiff's theories of this matter. Specifically, it is one of Petitioner's contentions that Wiston ceased use and rebranded subsequent to the injunction. Thus, these documents are relevant. Further, Wiston admits that it *participated in the litigation*. Thus, Wiston already has at least some of these documents in its possession, custody, or control (i.e. in the possession of its counsel), and could easily obtain them and produce them to Petitioner more cheaply and simply than Petitioner may obtain them by paying the Court fees for each document, particularly when Wiston and its attorneys are familiar with the British Columbia Court system and Petitioner is not. Lastly, Petitioner's request encompasses *all documents concerning the dispute*, some of which may not be available on the Court website. This may include, for example, email communications between persons at Wiston comprising discussions concerning decision(s) to rebrand and/or cease use of the WOODPECKER Mark in the United States, Canada, or both; and discovery requests and responses between the parties of that dispute which were not filed.

Request for Production #6 - Wiston failed to produce nonpublic documents relating to the prosecution of the registration, for example email communications between Maggie Huang, Mandy Fung, Fei Han, Iris Han, Yunwei Xie, and/or any other person(s) giving or receiving instruction on how to respond to the questions in the TEAS form(s); documents evidencing discussions of Wiston's *bona fide intent* to use, documents confirming the facts alleged in the application, documents discussing or explaining Wiston's inability to produce a specimen, and other relevant topics.

Request for Production #7 - Wiston failed to produce any documentary evidence supporting any statements made under oath. See #6, above.

Request for Production #8 - Wiston failed to produce any documentary evidence relating to its compliance with the injunction.

Request for Production #9 - Please provide documents evidencing at least all things mentioned in Wiston's response to Interrogatory #7, including but not limited to Wiston's activities, actions, concrete steps taken to enter the market(s), corporations formed, contracts signed, distributors engaged, manufacturing and supply chain established, product imported, warehouses rented, advertising or marketing purchased, personnel hired, and any other facts and/or circumstances evidencing Wiston's *bona fide intent* to use the WOODPECKER mark in commerce in connection with each of the goods and services recited therein.

Request for Production #10 - Please confirm you have no documents to produce other than those produced in response to RFPs 1 and 6.

Request for Production #11 - Please produce documents, emails, communications, instructions, decisions, orders, or otherwise explaining and evidencing Wiston's *Petition to Amend Basis Post-Publication*, and supporting the sworn statements made therein, including that: (1) Yunwei Xie is an attorney in any country, (2) the source of knowledge that Wiston had a continued bona fide intention to use the mark in commerce on or in connection with all of the goods/services listed in the Notice of Allowance.

Request for Production #12 - Please produce documents, emails, communications, instructions, decisions, orders, or otherwise explaining and evidencing Wiston's *Petition to Revive* and supporting the sworn statements made therein, including that "Applicant has firsthand knowledge that the failure to file an SOU or Extension Request by the specific deadline was unintentional, and requests the USPTO to revive the abandoned application," and "The applicant has a continued bona fide intention, and is entitled, to use the mark in commerce on or in connection with all of the goods/services listed in the Notice of Allowance."

Request for Production #13 - Please produce documents, emails, communications, instructions, decisions, orders, or otherwise explaining and evidencing Wiston's *Statement of Use Extension Request(s)* and supporting the sworn statements made therein, including "The applicant has a continued bona fide intention, and is entitled, to use the mark in commerce on or in connection with all of the goods/services listed in the Notice of Allowance."

Request for Production #14 - Please produce all documents in the possession, custody or control of any person named in response to Interrogatory #3 and relevant to this proceeding, including documents which support or evidence Petitioner's claims or Wiston's defenses.

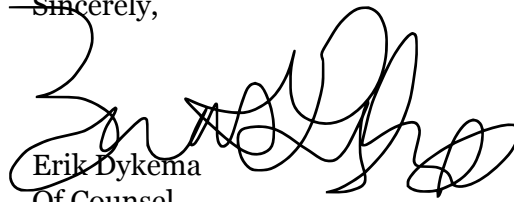
Request for Production #15 - See #14.

Conclusion

As we discussed on our call Thursday, August 10, Petitioner is entitled to any information or documents that you or your client have in your possession, custody, or control and relating to the claims of the *Petition*, your defenses to the claims, and/or responsive to any of Petitioner's discovery requests. Further, pursuant to Rule 34(b)(2)(c), Petitioner is entitled to know if you are withholding information on the basis of one or more of your objections. If you will not produce such material voluntarily, Petitioner will move to compel its production. Please confirm that you will produce any responsive information or documents by 22 August 2017.

Alternately, if Wiston has no additional information or documents to produce, Petitioner will accept your stipulation in writing to that effect, avoiding the need for a motion to compel. In this case, Petitioner respectfully suggests that there may be issues ripe for an agreed *Motion for Summary Judgment* which may significantly narrow the issues for trial.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik Dykema", written over the printed name.

Erik Dykema
Of Counsel
Zeller IP Group, PLLC

EXHIBIT F

From: Erik Dykema erik@zellerip.com
Subject: Re: WOODPECKER Cancellation
Date: August 24, 2017 at 6:17 PM
To: Gina Lupino gina@lupinolaw.com, Gina Lupino gina@ascendionlaw.com
Cc: Brent Capehart brent@lupinolaw.com, Kyle Zeller kyle@zellerip.com

Gina-

Your email raises a number of issues that I want to respond to in turn.

First, thank you for agreeing to the extension of time. I just submitted it and attached the filing receipt. Please let me know if you have any questions or concerns.

Second, I'm not sure I understand your reference to "amended pleadings." Is there any way in which you believe Petitioner's pleading is insufficient? If so, please let me know.

Third, I would thank you for accommodating my "informal requests," but I'm not sure exactly what you mean by that. My correspondence concerns Petitioner's interrogatories and requests for production, Respondent's duty to respond, and Respondent's duty to make and supplement initial disclosures. These are all obviously "formal" requests or duties, in case an adjective is needed.

To the extent you are characterizing my correspondence as "informal requests," you are mistaken - Petitioner has made formal requests, and Respondent has independent and affirmative duties to disclose and respond, and has failed to do so. My correspondence is intended to, and has, put you on notice that your discovery responses and disclosures are deficient, suggest ways to cure the deficiencies and cooperate with you to avoid motion practice. To the extent that you may label or consider such notices "informal requests" and believe on that basis that you are not under a duty to cooperate and disclose or provide the requested discovery, you are likewise mistaken. All of the information or documents sought in my letter of August 16, 2017 is responsive to your affirmative duty to make initial disclosures, and/or Petitioner's interrogatories or requests for production.

As you know, Rule 33 provides that "Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath," and "The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the Court, for good cause, excuses the failure." Rule 37(a)(4) provides that "[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond."

To illustrate merely one example, Petitioner has requested and provided examples of the information sought by the Interrogatory Requests multiple times by the service of Petitioner's original and amended set of interrogatories, by at least one letter and multiple emails, and on at least three teleconferences; beginning over three months ago. Yet, regarding for example Rogs. 1 and 2, Petitioner has completely failed to respond to Interrogatory No. 1, and likewise has provided barely any of the information requested by Interrogatory No. 2. Respondent's responses to the other interrogatories and requests for production are likewise, and similarly, deficient. For more details, please review my last letter.

Fourth, as I made clear during our teleconferences, and in writing on at least two occasions, our discovery requests are not limited to the information or documents that I identified to you, as a courtesy, as examples. Petitioner is entitled to comprehensive initial disclosures, interrogatory responses and document productions.

Sincerely,

Erik J. Dykema
Counsel

Zeller IP Group PLLC
155 Water Street
Suite 6/6
Brooklyn, NY 11201

t: (917) 670-9843
e: erik@zellerip.com
w: www.zellerip.com



2017.08.24 -
Conse...ery.pdf

On Aug 24, 2017, at 4:03 PM, Gina Lupino <gina@lupinolaw.com> wrote:

Hi Erik,

We are pleased to continue accommodating Petitioner's informal requests without requiring Petitioner engage in service of amended pleadings and appreciate your continued patience with Respondent's efforts at providing supplemental information and documentation. **Therefore, we consent to a 30 day extension of the discovery period** in order to give the Petitioner time to seek follow up discovery upon receipt of this documents. Please file the consent motion and send us a copy at your earliest convenience. We will consider extending this further, if reasonable and necessary.

Further to my earlier emails and our teleconference on Wednesday August 16 in which I assured a response within a week:

Interrogatories: please see supplemental responses to Petitioner's Amended First Set of Interrogatories at: <https://ascendionlaw.box.com/s/keipl3fnukh0d4k7zwp4c6oi9b4kjl6o>. We have underlined the supplemental information, for your convenience and as a courtesy. We are pleased to provide these supplemental responses without requiring Petitioner to go through the effort of drafting and serving amended interrogatories that specify this information, as a courtesy and in the interest of efficiency.

Document Requests: We will do the same with respect to the documentation. For clarity, this means that we will provide supplemental responses to Petitioner's RFPs based on the list of documents that you provided during our teleconference on August 16, without requiring Petitioner to exert the effort of drafting and serving amended RFPs that specify these documents, as a courtesy. Our client is still working to locate some of the additional documents you requested during our teleconference. We anticipate serving supplemental documentation within approximately one week.

Please consider this email as a substantive response to *some* of the items raised in your letter. Since we are in the midst of providing supplemental information and responses that you requested in your letter, a full substantive response would be premature at this time, as many of the issues raised in your letter may be moot in light of the responses. Therefore, we appreciate your continued patience and we will provide a full substantive response at a later date.

We will keep you posted on our progress. Please feel free to let me know if you have any follow-up questions about the information in the supplemental responses.

Gina

From: Erik Dykema <erik@zellerip.com>
Sent: August 24, 2017 11:23:07 AM
To: Gina Lupino
Cc: Gina Lupino; Brent Capehart; Kelly McCafferey; Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Gina-

Thanks, I'm looking forward to it. Two questions:

- 1 - Do you agree to my filing a consent motion to extend the discovery period by 60 days?
- 2 - Will what you provide today be a comprehensive response to the issues raised in my letter?

Thanks,
Erik

On Aug 24, 2017, at 2:12 PM, Gina Lupino <gina@lupinolaw.com> wrote:

Hi Erik,

I received some responses from my client 2 days ago with some additional details that you requested. I sent her follow up questions requesting more details. She provide them yesterday at 9:00 AM. I am reviewing them shortly and I will send them to you today.

Gina

From: Erik Dykema <erik@zellerip.com>
Sent: August 24, 2017 10:21:17 AM
To: Gina Lupino; Gina Lupino; Brent Capehart; Kelly McCafferey
Cc: Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Gina & Brent-

Following my letter of last week, I was expecting to receive an additional document production, and amended interrogatory + RFP responses on August 22. I then spoke with Gina on August 16 (Wednesday) and understood from that conversation that we'd receive a substantial amount of additional discovery in "a week." A week from August 16 was yesterday.

I don't know or understand, yet, the cause of your client's failure to cooperate in discovery - whether it is intentional, negligent, or otherwise. But regardless, it is prejudicial to my client and obstructing our ability to gather the needed information to either narrow the issues for trial, or proceed to a trial of the facts. Your client's failure to timely provide information and documents *that were required to be provided without request months ago*, as well as its failure to adequately and completely respond to Petitioner's discovery requests, served more than two months ago, prevent our evaluation of the relevant materials and evidence, and work to use the proceeding's schedule and deadlines as a weapon against Petitioner.

I respectfully request:

1. Your agreement and consent to my filing a consent motion to extend the current discovery period by 60 days to cure the prejudice that your delays and failure to produce discovery has caused,
2. The courtesy of a response to my letter, and
3. The requested discovery.

Please give me a call if you have any questions @ 972.920.8002.

Sincerely,
Erik

Erik J. Dykema
Counsel

Zeller IP Group PLLC
155 Water Street
Suite 616
Brooklyn, NY 11201

t: (917) 670-9843
e: erik@zellerip.com
w: www.zellerip.com

On Aug 16, 2017, at 12:07 AM, Erik Dykema <erik@zellerip.com> wrote:

Counsel-

Please see the attached correspondence.

Regards,
Erik Dykema

Erik J. Dykema
Counsel

Zeller IP Group PLLC
155 Water Street
Suite 6/6
Brooklyn, NY 11201

t: (917) 670-9843
e: erik@zellerip.com
w: www.zellerip.com

<2017.08.15 - Ltr. to Wiston re Discovery.pdf>

EXHIBIT G

From: Erik Dykema erik@zellerip.com
Subject: Re: WOODPECKER Cancellation
Date: September 15, 2017 at 4:00 PM
To: Brent Capehart brent@lupinolaw.com
Cc: Gina Lupino gina@lupinolaw.com, Gina Lupino gina@ascendionlaw.com, Kyle Zeller kyle@zellerip.com

Hi Gina & Brent-

Brent, nice speaking with you this morning. I'm going to recap some of our conversation here, don't want to put words in your mouth so if you think I've gotten something wrong or assumed too much, please let me know.

I'd like to schedule a follow-up call for next week Tuesday, I'm going to send a calendar invite. Please let me know if this time doesn't work and we can pick a new one.

First — Regarding the schedule, discovery period, and extensions, because we have received neither the requested discovery or responses to my letter or emails, I think we need to move to extend the discovery period by another 60 days so that we don't get squeezed against the Expert deadline. You expressed that we don't need to worry about it because you won't hold the deadlines against us in the future because of discovery delays. If I understand you correctly, I'm happy to accept this as a handshake agreement and proceed on that basis, though I think it would still be simpler to just file the consent motion to extend discovery.

That said, I just want to make clear—so there are no misunderstandings—that when I initially sent the discovery requests (in May), had Wiston responded promptly (in June), we would have had four months to review the materials and to give us time to retain an expert and prepare an expert report (if necessary). We're now less than 2 months from the expert disclosure due date; and the reason we need the extension is the same reason the TTAB gave so much time in the schedule to begin with - after we receive all the discovery we need time to evaluate it in preparation for retention of experts & preparation of reports, if necessary. Otherwise, these late productions prejudice my client by squeezing us against the schedule, and likewise reward the delays in production.

Thus, my understanding of our agreement here (assuming we have one) is that you're agreeing to extend the Expert Disclosure deadline (and any subsequent deadlines accordingly) as needed in the future so that, after Wiston finishes its productions, disclosures, and discovery responses, we will have at least two months until Expert Disclosures are due. Again, if I'm getting this wrong or you're not in agreement, please let me know and we can figure it out. Or, please confirm, and we're all set on this point.

Second - Regarding the discovery we're looking for, I've attached my letter from a month ago detailing what's missing. Nothing has been produced since then, and I haven't received a response to the letter, so that's still what we're seeking. Here is a brief summary of the key items that we're looking for, without reference to interrogatory or RFP numbers as you requested:

1. Information and documentary evidence showing Wiston's use of the Mark, on a monthly basis since 2011, on each of the claimed goods and services.
 - a. For example, what sales of goods/services bearing the mark has occurred, since 2011, of furniture? Window Frames? Doors? Wood Cabinets? Installation of Window Frames?
 - b. I prepared the attached spreadsheet as an example / worksheet to fill in what we're looking for.
 - c. It has four tabs: US Units by month, US Largest Purchasers by Year, BC Units by Month, BC Largest Purchasers by Year.
 - d. If you fill out that spreadsheet, and provide documents to evidence it, so that I know how many of which products/services you sold in each month, that's most of what we want. If you want to provide it in some other form, that's OK too. But that's the information we're looking for.
2. Description + Documentation of any other "use in commerce" of the mark, categorized for each of the claimed goods & services, not otherwise provided (e.g. in the spreadsheet), by month, since 2011.
 - a. Including but not limited to Advertising
 - b. For example, what (if any) advertising or other non-sales use-in-commerce has occurred, since 2011, in relation to, for example, furniture? Window Frames? Doors? Installation of Window Frames?
3. Description + documentation of Wiston's factual bases for the sworn statements it made during prosecution of the Woodpecker Registration (e.g. bona fide intention, etc.), for each of the claimed goods and services.
 - a. For example, what facts underly Wiston's sworn statement that it had a bona fide intention to use the mark in commerce on, for example, furniture? Window Frames? Doors? Installation of Window Frames?

Thanks,
Erik

Erik J. Dykema
Counsel

Zeller IP Group PLLC
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e: erik@zellerip.com
w: www.zellerip.com



2017.08.15 - Ltr. Wiston
to Wist...ery.pdf Discov...art.xlsx

On Sep 15, 2017, at 11:30 AM, Brent Capehart <brent@lupinolaw.com> wrote:

Hi Erik,

I just saw your email. I'm just leaving for a noon meeting, but if you can call me, I can talk while driving to the meeting. My number is 613-407-9700.

Thanks,
Brent

From: Erik Dykema <erik@zellerip.com>
Sent: Friday, September 15, 2017 7:30:27 AM
To: Brent Capehart
Cc: Gina Lupino; Gina Lupino; Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Hi Brent & Gina-

Can we jump on the phone today to talk through these discovery issues?

Thanks,
Erik

On Sep 13, 2017, at 3:48 PM, Brent Capehart <brent@lupinolaw.com> wrote:

Hi Erik,

Sorry about today. I got caught in a meeting that ran late. I let me check with Gina about resetting the conversation

Sorry about today. I got caught in a meeting that ran late. Let me check with Gina about resetting the conversation.

Thanks,
Brent

From: Erik Dykema <erik@zellerip.com>
Sent: Wednesday, September 13, 2017 10:04 AM
To: Brent Capehart
Cc: Gina Lupino; Gina Lupino; Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Hi Gina & Brent-

I'm standing by, please feel free to call my cell phone at 917-670-9843; or if you call my office as indicated in the calendar invitation it will ring through to my phone.

Thanks,
Erik

On Sep 12, 2017, at 12:44 PM, Brent Capehart <brent@lupinolaw.com> wrote:

Hi Erik,

I have a matter this afternoon. Let's reset for tomorrow same time.

Thanks,
Brent

From: Erik Dykema <erik@zellerip.com>
Sent: Tuesday, September 12, 2017 6:16:28 AM
To: Brent Capehart
Cc: Gina Lupino; Gina Lupino; Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Hi Brent & Gina-

I never heard back from you on this. Could we get on the phone this afternoon to discuss Wiston's discovery? How about 1 PM New York / 10 AM Vancouver?

Thanks,
Erik

On Sep 6, 2017, at 2:05 PM, Brent Capehart <brent@lupinolaw.com> wrote:

Hi Erik,

Gina is a bit out of pocket until Sept. 10. I know she would like to have a discussion with you. Let me see if I can set up something.

Thanks for your patience.

Brent

From: Erik Dykema <erik@zellerip.com>
Sent: Wednesday, September 6, 2017 8:44:30 AM
To: Gina Lupino; Brent Capehart; Gina Lupino
Cc: Kyle Zeller
Subject: Re: WOODPECKER Cancellation

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I didn't receive a response to the below email requesting a meet and confer today. Are either of you available to talk?

Thanks,
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On Sep 5, 2017, at 4:07 PM, Erik Dykema <erik@zellerip.com> wrote:

Hi Gina & Brent-

I didn't receive any additional discovery from you last week. Could you please let me know when I should expect to receive it?

Also, could we have a call tomorrow (Wednesday September 6th) on discovery? I propose 1 PM Eastern but I am pretty flexible.

Thanks,
Erik

On Aug 24, 2017, at 4:03 PM, Gina Lupino <gina@lupinolaw.com> wrote:

Hi Erik,

We are pleased to continue accommodating Petitioner's informal requests without requiring Petitioner engage in service of amended pleadings and appreciate your continued patience with Respondent's efforts at providing supplemental information and documentation. **Therefore, we consent to a 30 day extension of the discovery period** in order to give the Petitioner time to seek follow up discovery upon receipt of this documents. Please file the consent motion and send us a copy at your earliest convenience. We will consider extending this further, if reasonable and necessary.

Further to my earlier emails and our teleconference on Wednesday August 16 in which I assured a response within a week:

Interrogatories: please see supplemental responses to Petitioner's Amended First Set of Interrogatories at: <https://ascendionlaw.box.com/s/keipl3fnukh0d4k7zwp4c6oi9b4kjl6o>. We have underlined the supplemental information, for your convenience and as a courtesy. We are pleased to provide these supplemental responses without requiring Petitioner to go through the effort of drafting and serving amended interrogatories that specify this information, as a courtesy and in the interest of efficiency.

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Please consider this email as a substantive response to *some* of the items raised in your letter. Since we are in the midst of providing supplemental information and responses that you requested in your letter, a full substantive response would be premature at this time, as many of the issues raised in your letter may be moot in light of the responses. Therefore, we appreciate your continued patience and we will provide a full substantive response at a later date.

We will keep you posted on our progress. Please feel free to let me know if you have any follow-up questions about the information in the supplemental responses.

Gina

From: Erik Dykema <erik@zellerip.com>
Sent: August 24, 2017 11:23:07 AM
To: Gina Lupino
Cc: Gina Lupino; Brent Capehart; Kelly McCafferey; Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Gina-

Thanks, I'm looking forward to it. Two questions:

- 1 - Do you agree to my filing a consent motion to extend the discovery period by 60 days?
- 2 - Will what you provide today be a comprehensive response to the issues raised in my letter?

Thanks,
Erik

On Aug 24, 2017, at 2:12 PM, Gina Lupino <gina@lupinolaw.com> wrote:

Hi Erik,

I received some responses from my client 2 days ago with some additional details that you requested. I sent her follow up questions requesting more details. She provide them yesterday at 9:00 AM. I am reviewing them shortly and I will send them to you today.

Gina

From: Erik Dykema <erik@zellerip.com>
Sent: August 24, 2017 10:21:17 AM
To: Gina Lupino; Gina Lupino; Brent Capehart; Kelly McCafferey
Cc: Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Gina & Brent-

Following my letter of last week, I was expecting to receive an additional document production, and amended interrogatory + RFP responses on August 22. I then spoke with Gina on August 16 (Wednesday) and understood from that conversation that we'd receive a substantial amount of additional discovery in "a week." A week from August 16 was yesterday.

I don't know or understand, yet, the cause of your client's failure to cooperate in discovery - whether it is intentional, negligent, or otherwise. But regardless, it is prejudicial to my client and obstructing our ability to gather the needed information to either narrow the issues for trial, or proceed to a trial of the facts. Your client's failure to timely provide information and documents *that were required to be provided without request months ago*, as well as its failure to adequately and completely respond to Petitioner's discovery requests, served more than two months ago, prevent our evaluation of the relevant materials and evidence, and work to use the proceeding's schedule and deadlines as a weapon against Petitioner.

I respectfully request:

I respectfully request.

1. Your agreement and consent to my filing a consent motion to extend the current discovery period by 60 days to cure the prejudice that your delays and failure to produce discovery has caused,
2. The courtesy of a response to my letter, and
3. The requested discovery.

Please give me a call if you have any questions @ 972.920.8002.

Sincerely,
Erik

Erik J. Dykema
Counsel

Zeller IP Group PLLC
155 Water Street
Suite 6/6
Brooklyn, NY 11201

t: (917) 670-9843
e: erik@zellerip.com
w: www.zellerip.com

On Aug 16, 2017, at 12:07 AM, Erik Dykema <erik@zellerip.com> wrote:

Counsel-

Please see the attached correspondence.

Regards,
Erik Dykema

Erik J. Dykema
Counsel

Zeller IP Group PLLC
155 Water Street
Suite 6/6
Brooklyn, NY 11201

t: (917) 670-9843
e: erik@zellerip.com
w: www.zellerip.com

<2017.08.15 - Ltr. to Wiston re Discovery.pdf>

EXHIBIT H

From: Erik Dykema erik@zellerip.com
Subject: Re: WOODPECKER Cancellation
Date: October 3, 2017 at 12:39 PM
To: Brent Capehart brent@lupinolaw.com
Cc: Gina Lupino gina@lupinolaw.com, Gina Lupino gina@ascendionlaw.com, Kyle Zeller kyle@zellerip.com

Gina & Brent-

Its been almost two weeks since you promised to get back to me. These discovery requests have been outstanding for months.

Please let me know your availability for a meet and confer Wednesday or Friday of this week, to discuss your failure to:

1. Serve sufficient initial disclosures,
2. Supplement initial disclosures to cure the defects,
3. Serve sufficient responses to Petitioner's interrogatories,
4. Serve sufficient responses to Petitioner's requests for production,
5. Supplement its discovery responses to cure the defects,
6. Respond to Petitioner's numerous correspondence including emails, letters, requests for telephone conferences, and the like.
7. Attend scheduled teleconferences setup for your benefit, to attempt to negotiate a solution to your lack of cooperating in discovery.

I've informed you that these delays prejudice my client - without your cooperation in discovery; the parties are impeded in narrowing the factual issues for trial; we are unable to evaluate the evidence to determine whether expert testimony is necessary given upcoming deadlines, and so on. Your refusal to either cure the deficiencies, engage in good faith on any substantive issue(s), respond to my requests, or stipulate that there is no information to produce amounts to an intentional obstruction of these proceedings.

If you will not engage, cooperate, or explain yourselves; I will have no option but to file a motion to compel.

Thank you,
Erik

~
Erik J. Dykema
Counsel

Zeller IP Group PLLC
155 Water Street
Suite 606
Brooklyn, NY 11201

t: (917) 670-9843
e: erik@zellerip.com
w: www.zellerip.com

[Email Confidentiality Notice](#)

On Sep 22, 2017, at 2:54 PM, Brent Capehart <brent@lupinolaw.com> wrote:

Hi Erik,

Sorry about the delay. I was caught up in a meeting that ran long. Gina is meeting with the client early next week to review your email and should be responding shortly thereafter. I'm out of the office next Weds - Fri. Let's plan on touching base early the following week to check on status and progress.

Thanks,
Brent

From: Erik Dykema <erik@zellerip.com>
Sent: Friday, September 22, 2017 10:06:41 AM
To: Brent Capehart
Cc: Gina Lupino; Gina Lupino; Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Hello-

Per our discussion on Tuesday, my follow up email, and my calendar invite, I'm standing by at 972-920-8002.

Thanks,
Erik

On Sep 19, 2017, at 1:58 PM, Erik Dykema <erik@zellerip.com> wrote:

Just sent the calendar invite. To clarify, that's 1pm Eastern.

Thanks,
Erik

On Sep 19, 2017, at 1:52 PM, Erik Dykema <erik@zellerip.com> wrote:

Hi Gina & Brent-

I spoke with Brent a little while ago, he informed me that the two of you would get together and review the discovery issues and that we would speak again on Friday. I'm going to send a calendar invite for 1 PM on Friday.

Please take a look at Petitioner's discovery requests, my letters, and my emails explaining and clarifying what we're looking for. If you have any questions, please let me know ahead of time and I'll try to address them.

Thanks,
Erik

On Sep 18, 2017, at 12:44 PM, Erik Dykema <erik@zellerip.com> wrote:

Hello Gina & Brent-

Could you please confirm that we're on to talk tomorrow at 10AM Vancouver time, 1 PM EST?

thanks,
Erik

Erik J. Dykema

Counsel

Zeller IP Group PLLC
155 Water Street
Suite 6/6
Brooklyn, NY 11201

t: (917) 670-9843
e: erik@zellerip.com
w: www.zellerip.com

On 15 Sep, 2017, at 4:00 PM, Erik Dykema <erik@zellerip.com> wrote:

Hi Gina & Brent-

Brent, nice speaking with you this morning. I'm going to recap some of our conversation here, don't want to put words in your mouth so if you think I've gotten something wrong or assumed too much, please let me know.

I'd like to schedule a follow-up call for next week Tuesday, I'm going to send a calendar invite. Please let me know if this time doesn't work and we can pick a new one.

First — Regarding the schedule, discovery period, and extensions, because we have received neither the requested discovery or responses to my letter or emails, I think we need to move to extend the discovery period by another 60 days so that we don't get squeezed against the Expert deadline. You expressed that we don't need to worry about it because you won't hold the deadlines against us in the future because of discovery delays. If I understand you correctly, I'm happy to accept this as a handshake agreement and proceed on that basis, though I think it would still be simpler to just file the consent motion to extend discovery.

That said, I just want to make clear—so there are no misunderstandings—that when I initially sent the discovery requests (in May), had Wiston responded promptly (in June), we would have had four months to review the materials and to give us time to retain an expert and prepare an expert report (if necessary). We're now less than 2 months from the expert disclosure due date; and the reason we need the extension is the same reason the TTAB gave so much time in the schedule to begin with - after we receive all the discovery we need time to evaluate it in preparation for retention of experts & preparation of reports, if necessary. Otherwise, these late productions prejudice my client by squeezing us against the schedule, and likewise reward the delays in production.

Thus, my understanding of our agreement here (assuming we have one) is that you're agreeing to extend the Expert Disclosure deadline (and any subsequent deadlines accordingly) as needed in the future so that, after Wiston finishes its productions, disclosures, and discovery responses, we will have at least two months until Expert Disclosures are due. Again, if I'm getting this wrong or you're not in agreement, please let me know and we can figure it out. Or, please confirm, and we're all set on this point.

Second - Regarding the discovery we're looking for, I've attached my letter from a month ago detailing what's missing. Nothing has been produced since then, and I haven't received a response to the letter, so that's still what we're seeking. Here is a brief summary of the key items that we're looking for, without reference to interrogatory or RFP numbers as you requested:

1. Information and documentary evidence showing Wiston's use of the Mark, on a monthly basis since 2011, on each of the claimed goods and services.
 - a. For example, what sales of goods/services bearing the mark has occurred, since 2011, of furniture? Window Frames? Doors? Wood Cabinets? Installation of Window Frames?
 - b. I prepared the attached spreadsheet as an example / worksheet to fill in what we're looking for.
 - c. It has four tabs: US Units by month, US Largest Purchasers by Year, BC Units by Month, BC Largest Purchasers by Year.
 - d. If you fill out that spreadsheet, and provide documents to evidence it, so that I know how many of which products/services you sold in each month, that's most of what we want. If you want to provide it in some other form, that's OK too. But that's the information we're looking for.
2. Description + Documentation of any other "use in commerce" of the mark, categorized for each of the claimed goods & services, not otherwise provided (e.g. in the spreadsheet), by month, since 2011.
 - a. Including but not limited to Advertising
 - b. For example, what (if any) advertising or other non-sales use-in-commerce has occurred, since 2011, in relation to, for example, furniture? Window Frames? Doors? Installation of Window Frames?
3. Description + documentation of Wiston's factual bases for the sworn statements it made during prosecution of the Woodpecker Registration (e.g. bona fide intention, etc.), for each of the claimed goods and services.
 - a. For example, what facts underly Wiston's sworn statement that it had a bona fide intention to use the mark in commerce on, for example, furniture? Window Frames? Doors? Installation of Window Frames?

Thanks,
Erik

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<2017.08.15 - Ltr. to Wiston re Discovery.pdf>
<Wiston Discovery Chart.xlsx>

On Sep 15, 2017, at 11:30 AM, Brent Capehart <brent@lupinolaw.com> wrote:

Hi Erik,

I just saw your email. I'm just leaving for a noon meeting, but if you can call me, I can talk while driving to the meeting. My number is 613-407-9700.

Thanks,
Brent

From: Erik Dykema <erik@zellerip.com>
Sent: Friday, September 15, 2017 7:30:27 AM
To: Brent Capehart
Cc: Gina Lupino; Gina Lupino; Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Hi Brent & Gina-

Can we jump on the phone today to talk through these discovery issues?

Thanks,
Erik

On Sep 13, 2017, at 3:48 PM, Brent Capehart <brent@lupinolaw.com> wrote:

Hi Erik,

Sorry about today. I got caught in a meeting that ran late. Let me check with Gina about resetting the conversation.

Thanks,
Brent

From: Erik Dykema <erik@zellerip.com>
Sent: Wednesday, September 13, 2017 10:04 AM
To: Brent Capehart
Cc: Gina Lupino; Gina Lupino; Kyle Zeller
Subject: Re: WOODPECKER Cancellation

Hi Gina & Brent-

I'm standing by, please feel free to call my cell phone at 917-670-9843; or if you call my office as indicated in the calendar invitation it will ring through to my phone.

Thanks,
Erik

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Counsel

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Counsel-

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Regards,
Erik Dykema

Erik J. Dykema
Counsel

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<2017.08.15 - Ltr. to Wiston re Discovery.pdf>