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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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Signature	/Erik Dykema/
Date	07/10/2018
Attachments	2018 07 10 - Petitioners Motion to Compel.pdf(110683 bytes) 2018 07 10 - Dykema Decl.pdf(58857 bytes) A - 2018 04 30 - Petitioners Second Interrogatories.pdf(99402 bytes) B - 2018 04 30 - Petitioners Second RFPs.pdf(103596 bytes) C - 2018 06 02 - Lupino Email to Dykema I.pdf(75298 bytes) D - 2018 06 02 - Dykema Email to Lupino.pdf(78762 bytes) E - 2018 06 02 - Lupino Email to Dykema II.pdf(74670 bytes) F - 2018 06 22 - Dykema Email to Lupino.pdf(62760 bytes) G - 2018 06 22 - Lupino Email to Dykema.pdf(49549 bytes)

**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 SECOND MOTION TO
COMPEL DISCOVERY RESPONSES**

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INTRODUCTION

This proceeding is for cancellation of Respondent's Registration No. 4,876,546 (the "Mark") on grounds of abandonment, lack of *bona fide* intent to use, and fraud. *Petition*, Dkt. 1. Petitioner has timely served discovery requests on Respondent.¹ *See* Ex. A, B. Respondent has acknowledged its obligation to respond to the discovery requests and yet failed to respond. *See* Ex. C.

Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Trademark Rule of Practice 2.120(f), Petitioner Woodpecker Flooring Inc. ("Petitioner") respectfully moves the Board for (i) an Order compelling Respondent to fully respond without objections to Petitioner's discovery requests, and (ii) to extend the discovery period for Petitioner.

The relief requested is necessary and appropriate because Respondent has failed to respond to Petitioner's timely served discovery requests outstanding for over two (2) months, has failed to meet and confer regarding the same, and has indicated in correspondence that it will provide no details on when the information will be produced. Thus, Petitioner is forced to bring this Motion.

¹ Petitioner's discovery requests seek, *inter alia*, information and documents concerning: the natural persons likely to be the Respondent's principal witness, Respondent's corporate structure, Respondent's sales of goods and/or services in the United States, Respondent's non-use of the mark on each and every one of the goods and services claimed in the Registration, and further information concerning Respondent's contentions as to its purported bona fide intent to use the registered Mark and denial of abandonment, Respondent's marketing communications, agreements to rebrand, and customer / supplier orders.

This motion is brought contemporaneously with Petitioner's *Motion for Discovery Sanctions* because the two motions are germane to the same issues and relate to partially overlapping facts, yet seek non-overlapping relief. If the *Motion for Sanctions* is granted and the Board sanctions Respondent with Judgment, this motion is moot. However, even if the Respondent produces all of the discovery requested by this *Motion to Compel*, the *Motion for Sanctions* is not moot.

FACTUAL BACKGROUND

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

Petitioner has attempted in good faith, on several occasions, by allowing Respondent additional time, proposing teleconferences, and through written correspondence, to work with Respondent to resolve Respondent's failure to cooperate in discovery, but the parties were unable to resolve the dispute. *See Dykema Decl.*

II. DISCOVERY REQUESTS AND RESPONSES MUST BE ANSWERED

1. Current Status

Respondent has made no discovery requests on Petitioner.

Petitioner served the discovery requests in question on 30 April 2018. Ex. A, B. On 1 June 2018, after the response deadline, Respondent unilaterally informed Petitioner that its responses would be *at least 2 weeks* late and proposed a meet and confer to discuss potential responses 3 weeks past the deadline. Ex. C. Petitioner accepted Respondent's proposed meet and confer date. Ex. D. Counsel

for Respondent indicated that Respondent was in possession of the requests and aware of the response deadline, and suggested that Petitioner could file a *Motion to Compel*. On the date of Respondent’s proposed meet-and-confer, Respondent skipped the meet and confer and later informed Petitioner, via email, that Respondent was aware of the late discovery requests and indicated that Respondent “understand[s] if your client wants to move to compel responses at this point.” Ex. G.

2. Requests Made

The requests that are the subject of this motion include Interrogatories 15 – 22 (Ex. A) and Requests for Production 15-28 (Ex. B).

3. Answers, Objections, Proffers of Production

Respondent has made no answer, objection, or proffer of Production, of any kind, to any of the Interrogatories or Requests for Production.

4. List and Brief Description of the Documents Not Produced

For a full listing of the documents not produced, please see Ex. B. A listing and brief description of the subject matter of the documents not produced appears here:

1. Documents evidencing inventory levels of goods bearing the Mark (relevant at least to Petitioner’s abandonment and lack of bona fide intent to use theories) and not bearing the Mark (relevant to Petitioner’s rebranding theory),

2. Documents evidencing sales of goods bearing the Mark (relevant at least to Petitioner's abandonment and lack of bona fide intent to use theories) and not bearing the Mark (relevant to Petitioner's rebranding theory),
3. Documents evidencing marketing communications of goods bearing the Mark (relevant at least to Petitioner's abandonment and lack of bona fide intent to use theories) and not bearing the Mark (relevant to Petitioner's rebranding theory),
4. Documents evidencing agreements between Respondent and 3rd parties concerning Respondent's use of the Mark (relevant to Petitioner's rebranding theory),
5. Documents relating to natural persons associated with Respondent who may be witnesses, their residency, and their duties,
6. Documents evidencing orders, from Respondent to Respondent's suppliers, for goods bearing the Mark,
7. Documents evidencing orders, from Respondent's customers to Respondent, for goods bearing the Mark.
8. Documents relating to Respondent's response to Petitioner's Interrogatories.

III. ARGUMENT

Petitioner cannot reasonably investigate the issues in this proceeding, conduct depositions, narrow the issues for trial, or prepare for trial until Respondent has completely complied with its outstanding discovery obligations.

Respondent has conceded that it is not in compliance, yet refuses to do so. Since Respondent has thus far failed to comply voluntarily, this motion to compel Respondent's compliance should be granted.

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, Respondent's responses to Petitioner's Interrogatories and Requests for Production were due over a month ago. As such, any objections would be untimely and thus waived under both Rule 33 and 34. Respondent should be compelled to fully respond to Petitioner's discovery requests, under oath, without further objection on the merits.

IV. CONCLUSION

As discussed herein, the facts of this case and the relevant rules and case-law compel the conclusion that Petitioner is entitled to the discovery it seeks, and that Respondent's dilatory conduct should not be rewarded. Petitioner respectfully

requests that the Board enter an order directing Respondent to fully respond to Petitioner's discovery requests, under oath, without further objection.

Respectfully Submitted,

Date: 10 July 2018

By: /Erik Dykema/

Erik Dykema
erik@zellerip.com

155 Water Street
Suite 6/6
Brooklyn, New York 11201

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@lupinolaw.com)
Brent Capehart (brent@lupinolaw.com)

Date: 10 July 2018

By: /Erik Dykema/

Erik Dykema
erik@zellerip.com

155 Water Street
Suite 6/6
Brooklyn, New York 11201

Attorney for Petitioner,
Woodpecker Flooring Inc.

**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.
(Respondent)

Cancellation No. 92,065,095

Registration No: 4,876,546
Mark:



**DECLARATION OF ERIK DYKEMA IN SUPPORT OF
PETITIONER'S SECOND 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. ("Petitioner") in this proceeding.
4. The below Table of Requests and Responses summarizes the relevant Interrogatories and Requests for Production served on counsel for Wiston International Trade Co., Ltd. (the Respondent) in this proceeding.

TABLE OF REQUESTS & RESPONSES

Date	Paper	Exhibit
30 Apr 2018	Petitioner’s Second Interrogatories	A
30 Apr 2018	Petitioner’s Second Requests for Production	B

5. The following table summarizes my good faith attempts to communicate, negotiate, and/or meet and confer with counsel for Respondent regarding their discovery obligations.

TABLE OF ATTEMPTS TO RESOLVE DISCOVERY DISPUTES

Date	Event	Exhibit
30 May 2018	Respondent failed to timely serve responses to Petitioner’s Second Interrogatories and Second Requests for Production.	
1 June 2018	Email from Respondent to Petitioner notifying that responses would be 3 weeks late and proposing meet and confer on June 22	C
1 June 2018	Email to Respondent confirming meet and confer on June 22	D
2 June 2018	Email from Respondent to Petitioner suggesting Petitioner file a <i>Motion to Compel</i>	E
22 June 2018	Respondent failed to attend meet and confer	
22 June 2018	Email from Petitioner to Respondent regarding skipped meet and confer	F
22 June 2018	Email from Respondent to Petitioner acknowledging failure to produce discovery, inability to provide further details	G

6. As detailed in the table above, Respondent missed the deadline to timely serve responses to Petitioner’s discovery requests. Petitioner notified Respondent of the default; which Respondent acknowledged and proposed a meet and confer to discuss on June 22. Respondent failed to attend the June 22 meet and confer.

7. On the occasions where I was able to reach counsel for Respondent, the parties typically had a respectful conversation discussing the issues. Unfortunately, subsequent to these conversations, the Respondent failed to appear for a scheduled follow up conversation, or to respond to the discovery requests, and progress promised by the Respondent did not materialize.
8. As of the date of this Declaration, the discovery requests in question have been outstanding for 70 days. In the above series of communications with Respondent, Respondent acknowledged its obligation to respond to the discovery requests, skipped a meet and confer, proposed that *Petitioner* file a motion to compel if it is unhappy with Respondent's failure to provide discovery, and acknowledged that Petitioner would be within its rights to make such a motion. *See* Ex. C, E and G.
9. I have made a good faith effort, by correspondence, conference, and attempts, to resolve the discovery dispute prior to seeking Board intervention.

/Erik Dykema/

Date: 10 July 2018

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 SECOND 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

INTERROGATORY 15

Describe in detail all relevant facts and circumstances concerning the residency of Huigang Sun.

INTERROGATORY 16

Describe in detail all relevant facts and circumstances concerning the identity, duties, and residency of natural persons acting on behalf of Respondent. Respondent may limit its response to Respondent's employees, directors, officers, owners, shareholders, and independent contractors. Respondent may further limit its response to the time period from October 2011 to the present.

INTERROGATORY 17

Describe in detail all relevant facts and circumstances concerning Respondent's corporate structure. Respondent may limit its response to those entities dealing in the goods and services claimed in the registration for the WOODPECKER MARK. Respondent may further limit its response to the time period from October 2011 to the present.

INTERROGATORY 18

Describe in detail any sales of the goods or services claimed in the registration for the WOODPECKER MARK sold in the United States bearing the WOODPECKER MARK between July 1, 2017 and the present.

INTERROGATORY 19

Describe in detail any sales of the goods or services claimed in the registration for the WOODPECKER MARK sold in the United States not bearing the WOODPECKER MARK between July 1, 2017 and the present.

INTERROGATORY 20

Describe in detail all relevant facts and circumstances concerning Respondent's nonuse of the WOODPECKER MARK on any goods other than "engineered hardwood flooring."

INTERROGATORY 21

Describe in detail all relevant facts and circumstances concerning Respondent's purported bona fide intent to use the WOODPECKER MARK on the goods and services claimed in the registration for the WOODPECKER MARK, given Respondent's response to Interrogatory No. 1.

INTERROGATORY 22

Describe in detail Respondent's legal contentions, and all relevant supporting facts and circumstances, for Respondent's denial of abandonment of the WOODPECKER MARK on the goods and services claimed in the registration for the WOODPECKER MARK, given Respondent's response to Interrogatory No. 1.

Respectfully Submitted,

/Erik Dykema/

30 April 2018

Erik Dykema
Zeller IP Group PLLC
erik@zellerip.com
155 Water Street
Suite 6 – 6
Brooklyn, New York 11201
972-920-8002
*Attorney for Petitioner,
Woodpecker Flooring Inc.*

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@lupinolaw.com
Brent Capehart - brent@lupinolaw.com

Date: 2018 04 30

By: /Erik Dykema/

Erik Dykema
erik@zellerip.com

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 SECOND 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

REQUEST 15

All documents evidencing inventory levels of goods bearing the WOODPECKER MARK. Respondent may limit its response to the goods and services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 16

All documents evidencing inventory levels of goods **not** bearing the WOODPECKER MARK. Respondent may limit its response to the goods and

services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 17

All documents evidencing sales of goods bearing the WOODPECKER MARK. Respondent may limit its response to the goods and services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 18

All documents evidencing sales of goods not bearing the WOODPECKER MARK. Respondent may limit its response to the goods and services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 19

All documents evidencing marketing communications to United States entities bearing the WOODPECKER MARK. Respondent may limit its response to the goods and services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 20

All documents evidencing marketing communications to United States entities not bearing the WOODPECKER MARK. Respondent may limit its response to the goods and services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 21

All documents evidencing any agreement(s) between Respondent and *Woodpecker Hardwood Floors (2000) Inc.* concerning Respondent's use of the term "WOODPECKER."

REQUEST 22

Documents sufficient to establish the identity of all natural persons acting on behalf of Respondent. Respondent may limit its response to past and present employees, owners, officers, shareholders, contractors, agents, or other natural persons whose duties related to products or services in connection with WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 23

Documents sufficient to establish the residency of the persons identified in Request 22.

REQUEST 24

Documents sufficient to establish the duties of the persons identified in Request 22.

REQUEST 25

All documents evidencing orders, from Respondent to Respondent's suppliers, for goods bearing the WOODPECKER MARK. Respondent may limit its response to the goods and services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 26

All documents evidencing orders, from Respondent's customers to Respondent, for goods bearing the WOODPECKER MARK. Respondent may limit its response to the goods and services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 27

All documents evidencing orders, from Respondent's customers to Respondent, for goods bearing the WOODPECKER MARK. Respondent may limit its response to the goods and services claimed in the WOODPECKER MARK; and also may limit to the time period from October 2011 to the present.

REQUEST 28

All documents identified, referred to, or relied upon in responding to Petitioner's Interrogatories No. 15-22.

//

//

//

Respectfully Submitted,

/Erik Dykema/

30 Aril 2018

Erik Dykema
Zeller IP Group PLLC
erik@zellerip.com
155 Water Street
Suite 6 – 6
Brooklyn, New York 11201
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@lupinolaw.com
Brent Capehart - brent@lupinolaw.com

Date: 2018 04 30

By: /Erik Dykema/

Erik Dykema
erik@zellerip.com

EXHIBIT C

From: Gina Lupino gina@lupinolaw.com
Subject: Re: Wiston - Discovery
Date: June 1, 2018 at 8:42 PM
To: Erik Dykema erik@zellerip.com
Cc: 4243a4e2e+matter1049283088@maildrop.clio.com



Hi Erik,

I just spoke with my client about the status of the verified discovery requests. Mr. Sun is away and not returning to Vancouver until June 15th. I anticipate receiving these items the following week.

Regarding the US company, our position is that it is a separate company but, if the content sought in a discovery request is relevant to this proceeding, not privileged, and within our client's possession, custody or control, then it would be discoverable. I don't think we disagree here. Having said that, due to Mr. Sun's absence, we will be delayed in serving responses to the second set of discovery requests until at least the week after June 15th.

I recognize that you are considering filing a motion to compel responses to these requests. If you file it now, and we produce sufficient responses within a few weeks, the issues might be moot, and you could withdraw the motion then. Otherwise, we could wait until Mr. Sun returns to Vancouver, provide responses, see if there are any outstanding issues, and you could file the motion then if need be. The requests were served within the discovery period so Wiston has an obligation to respond to them. We do not dispute this.

Either way, feel free to schedule a meet and confer teleconference with me on Friday June 22 for a status update on this.

Best,
Gina

From: Erik Dykema <erik@zellerip.com>
Sent: May 29, 2018 9:57:38 AM
To: Gina Lupino
Cc: Brent Capehart; 4243a4e2e+matter1049283088@maildrop.clio.com
Subject: Re: Wiston - Discovery

Hi Gina-

Thanks for your note. I'll consider your offer re: additional discovery requests and will revert back.

We've been waiting for about a month on the verified discovery responses. Could you give me a date certain when we'll get them verified? End of this week? At some point I have to take action—probably a motion to strike—so just let me know what the timeline is.

I understand your position regarding service on the subsidiary. But, could you help me to clarify your position regarding possession, custody or control? Specifically, has your client failed to search for, or produce, documents, emails, etc. held by any subsidiary or related company (e.g. the US company previously discussed, or any other related entity, foreign or domestic) on the basis that it is not obligated to produce those documents?

FRCP 34 provides that your client must produce items in your client's "possession, custody, or control," and the relevant caselaw makes clear that includes information held by related, but non-party entities, such as a US subsidiary or sister company. (some citations and summaries in the numbered points below.) If you disagree on what is required, we can work that out, I just need to know we have a disagreement.

Thanks,
Erik

1. "the legal right to obtain the documents on demand," In re Bankers Trust, 61 F.3d 465, 469 (6th Cir. 1995), cert. dismissed, 517 US 1205 (1996),
2. When the information is stored by a third party service provider. Flagg v. City of Detroit, 252 F.R.D. at 352
3. When your client has the "practical ability" to obtain the documents from a non-party to the action. Bank of New York v. Meridian BIAO Bank Tanzania, 171 F.R.D. 135, 146 (S.D.N.Y. 1997); see also Tomlinson v. El Paso, 245 F.R.D. 474, 477 (D. Colo. 2007) (documents are within a party's control "if such party has retained any right or ability to influence the person in whose possession the documents lie")
4. For example, when a third party received a majority of its revenues from an organization, one court found that the organization likely had the ability to influence the third party into producing documents, as in Jacoby v. Hartford Life and Accident Insurance, 254 F.R.D. 477, 479 (S.D.N.Y. 2009).
5. Courts have found control by a parent corporation over documents held by its subsidiary and vice-versa, as well as control by one sister corporation over documents held by another sister corporation. See Securities & Exchange Commission v. Credit Bancorp, 194 F.R.D. 469, 472 (S.D.N.Y. 2000); In re NTL, 244 F.R.D. at 195-197 (defendant had a duty to preserve documents held by a spin-off corporation, as documents were within its control); International Union of Petroleum & Industry Workers, AFL-CIO, 870 F.2d at 1452 (party must produce subsidiary's files); In re Hallmark Capital, 534 F. Supp. 2d 981, 983 (D. Minn. 2008) (partner in partnership required to produce partnership documents within partner's control); Starlight International v. Herlihy, 186 F.R.D. 626, 635 (D. Kan. 1999) (joint venture had legal right to obtain documents from members).

On May 29, 2018, at 12:08 PM, Gina Lupino <gina@lupinolaw.com> wrote:

Hi Erik,

We have notified our client and instructed them to verify the discovery responses but we have not received a response yet. We will keep following up with them on this even after the close of discovery.

As discussed, feel free to serve our client, the registrant, discovery requests about the US entity. If the documents are in our client's possession, custody, or control, it will serve them. To be clear, we are not authorized to accept service on behalf of the subsidiary - just the registrant.

Best,
Gina

From: Erik Dykema <erik@zellerip.com>
Sent: May 29, 2018 7:12:41 AM
To: Gina Lupino
Cc: Brent Capehart
Subject: Wiston - Discovery

Hi Gina-

Just following up on my letter of 4/30 requesting that you provide (i) verified discovery responses under oath pursuant to 28 USC §1746: <https://www.law.cornell.edu/uscode/text/28/1746>, (ii) corrected RFP responses indicating whether any responsive material has been withheld under the rules, and (iii) any supplemental discovery responses, disclosures, and document production.

Also following up on my email from May 10 requesting additional information on your US subsidiary and acknowledgment of Wiston's duty to respond to discovery requests with information that may be in the possession, custody or control of its subsidiary.

Thank you,
Erik

EXHIBIT D

From: Erik Dykema erik@zellerip.com
Subject: Re: Wiston - Discovery
Date: June 2, 2018 at 9:08 AM
To: Gina Lupino gina@lupinolaw.com
Cc: 4243a4e2e+matter1049283088@maildrop.clio.com

ED

Hi Gina-

We're on for a meet and confer for June 22, I propose 1pm EST. The topics will be all of the outstanding discovery issues and our upcoming motion for relief (to the extent any are unresolved on June 22.) At this point in the schedule, if outstanding discovery issues remain we'll most likely be moving for discovery sanctions against your client.

I note that you refused to agree to an extension of the discovery period when I asked for it a few weeks ago when all of the same issues were outstanding. Now, the day after the discovery period closes, with many outstanding issues, you unilaterally decide to delay your responses for three weeks.

-e

On Jun 1, 2018, at 8:42 PM, Gina Lupino <gina@lupinolaw.com> wrote:

Hi Erik,

I just spoke with my client about the status of the verified discovery requests. Mr. Sun is away and not returning to Vancouver until June 15th. I anticipate receiving these items the following week.

Regarding the US company, our position is that it is a separate company but, if the content sought in a discovery request is relevant to this proceeding, not privileged, and within our client's possession, custody or control, then it would be discoverable. I don't think we disagree here. Having said that, due to Mr. Sun's absence, we will be delayed in serving responses to the second set of discovery requests until at least the week after June 15th.

I recognize that you are considering filing a motion to compel responses to these requests. If you file it now, and we produce sufficient responses within a few weeks, the issues might be moot, and you could withdraw the motion then. Otherwise, we could wait until Mr. Sun returns to Vancouver, provide responses, see if there are any outstanding issues, and you could file the motion then if need be. The requests were served within the discovery period so Wiston has an obligation to respond to them. We do not dispute this.

Either way, feel free to schedule a meet and confer teleconference with me on Friday June 22 for a status update on this.

Best,
Gina

From: Erik Dykema <erik@zellerip.com>
Sent: May 29, 2018 9:57:38 AM
To: Gina Lupino
Cc: Brent Capehart; 4243a4e2e+matter1049283088@maildrop.clio.com
Subject: Re: Wiston - Discovery

Hi Gina-

Thanks for your note. I'll consider your offer re: additional discovery requests and will revert back.

We've been waiting for about a month on the verified discovery responses. Could you give me a date certain when we'll get them verified? End of this week? At some point I have to take action—probably a motion to strike—so just let me know what the timeline is.

I understand your position regarding service on the subsidiary. But, could you help me to clarify your position regarding possession, custody or control? Specifically, has your client failed to search for, or produce, documents, emails, etc. held by any subsidiary or related company (e.g. the US company previously discussed, or any other related entity, foreign or domestic) on the basis that it is not obligated to produce those documents?

FRCP 34 provides that your client must produce items in your client's "possession, custody, or control," and the relevant caselaw makes clear that includes information held by related, but non-party entities, such as a US subsidiary or sister company. (some citations and summaries in the numbered points below.) If you disagree on what is required, we can work that out, I just need to know we have a disagreement.

Thanks,
Erik

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2. When the information is stored by a third party service provider. Flagg v. City of Detroit, 252 F.R.D. at 352
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5. Courts have found control by a parent corporation over documents held by its subsidiary and vice-versa, as well as control by one sister corporation over documents held by another sister corporation. See Securities & Exchange Commission v. Credit Bancorp, 194 F.R.D. 469, 472 (S.D.N.Y. 2000); In re NTL, 244 F.R.D. at 195-197 (defendant had a duty to preserve documents held by a spin-off corporation, as documents were within its control); International Union of Petroleum & Industry Workers, AFL-CIO, 870 F.2d at 1452 (party must produce subsidiary's files); In re Hallmark Capital, 534 F. Supp. 2d 981, 983 (D. Minn. 2008) (partner in partnership required to produce partnership documents within partner's control); Starlight International v. Herlihy, 186 F.R.D. 626, 635 (D. Kan. 1999) (joint venture had legal right to obtain documents from members).

On May 29, 2018, at 12:08 PM, Gina Lupino <gina@lupinolaw.com> wrote:

Hi Erik,

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As discussed, feel free to serve our client, the registrant, discovery requests about the US entity. If the documents are in our client's possession, custody, or control, it will serve them. To be clear, we are not authorized to accept service on behalf of the subsidiary - just the registrant.

Best,
Gina

From: Erik Dykema <erik@zellerip.com>
Sent: May 29, 2018 7:12:41 AM
To: Gina Lupino
Cc: Brent Capehart
Subject: Wiston - Discovery

Hi Gina-

Just following up on my letter of 4/30 requesting that you provide (i) verified discovery responses under oath pursuant to 28 USC §1746: <https://www.law.cornell.edu/uscode/text/28/1746> , (ii) corrected RFP responses indicating whether any responsive material has been withheld under the rules, and (iii) any supplemental discovery responses, disclosures, and document production.

Also following up on my email from May 10 requesting additional information on your US subsidiary and acknowledgment of Wiston's duty to respond to discovery requests with information that may be in the possession, custody or control of its subsidiary.

Thank you,
Erik

EXHIBIT E

From: Gina Lupino gina@lupinolaw.com
Subject: Re: Wiston - Discovery
Date: June 2, 2018 at 2:00 PM
To: Erik Dykema erik@zellerip.com
Cc: 4243a4e2e+matter1049283088@maildrop.clio.com



Erik,

I recognize your frustration with my client. As I stated in my email, I learned that Mr. Sun was out of town and not returning for 2 weeks. There is no "unilateral decision to delay my responses for 3 weeks". The person most knowledgeable about the content sought, Mr. Sun, does not speak English and (as I just learned) is out of town. The best I can do is forward your discovery requests to my client, indicate the response deadline, and request a response. If they do not respond, I have nothing to produce.

The best I can do is forward your discovery requests to my client, indicate the response deadline, and request a response. If you want to file the motion, file it.

Best,
Gina

From: Erik Dykema <erik@zellerip.com>
Sent: June 2, 2018 6:08:53 AM
To: Gina Lupino
Cc: 4243a4e2e+matter1049283088@maildrop.clio.com
Subject: Re: Wiston - Discovery

Hi Gina-

We're on for a meet and confer for June 22, I propose 1pm EST. The topics will be all of the outstanding discovery issues and our upcoming motion for relief (to the extent any are unresolved on June 22.) At this point in the schedule, if outstanding discovery issues remain we'll most likely be moving for discovery sanctions against your client.

I note that you refused to agree to an extension of the discovery period when I asked for it a few weeks ago when all of the same issues were outstanding. Now, the day after the discovery period closes, with many outstanding issues, you unilaterally decide to delay your responses for three weeks.

-e

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Either way, feel free to schedule a meet and confer teleconference with me on Friday June 22 for a status update on this.

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Gina

From: Erik Dykema <erik@zellerip.com>
Sent: May 29, 2018 9:57:38 AM
To: Gina Lupino
Cc: Brent Capehart; 4243a4e2e+matter1049283088@maildrop.clio.com
Subject: Re: Wiston - Discovery

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2. When the information is stored by a third party service provider. Flagg v. City of Detroit, 252 F.R.D. at 352
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4. For example, when a third party received a majority of its revenues from an organization, one court found that the organization likely had the ability to influence the third party into producing documents, as in Jacoby v. Hartford Life and Accident Insurance, 254 F.R.D. 477, 479 (S.D.N.Y. 2009).
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Sent: May 29, 2018 7:12:41 AM
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Cc: Brent Capehart
Subject: Wiston - Discovery

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Also following up on my email from May 10 requesting additional information on your US subsidiary and acknowledgment of Wiston's duty to respond to discovery requests with information that may be in the possession, custody or control of its subsidiary.

Thank you,
Erik

EXHIBIT F

From: Erik Dykema erik@zellerip.com
Subject: Re: Wiston TM Cancellation Call
Date: June 22, 2018 at 1:13 PM
To: Gina Lupino gina@lupinolaw.com, Brent Capehart brent@lupinolaw.com



Hi Gina & Brent-

I saw that you accepted my calendar invite yesterday and I'm standing by the phone; are we still on for this call?

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

[Email Confidentiality Notice](#)

On Jun 21, 2018, at 12:47 PM, Erik Dykema <erik@zellerip.com> wrote:

Hi Gina & Brent-

I just sent a calendar invite for the June 22 call you proposed. Let me know if that will work, and if not please select another item. Agenda items include:

1. Woodpecker's settlement offer,
2. Late discovery requests
3. Missing verified discovery responses
4. Supplemental ROG and/or RFP responses

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

[Email Confidentiality Notice](#)

EXHIBIT G

From: Gina Lupino g na@ up no aw.com
Subject: Re: W ston TM Cance at on Ca
Date: June 22, 2018 at 9:36 PM
To: Er k Dykema er k@ze er p.com
Cc: 4243a4e2e+matter1049283088@ma drop.c o.com



Hi Erik,

I spoke with my client contact (her name is Kathy) and I have a few updates.

1. Woodpecker's settlement offer: [REDACTED]

[REDACTED]

2. Discovery Items:

- Late discovery requests: I have reiterated to my client contact (Kathy) the importance of serving responses to the second set of interrogatories and document requests ASAP and the consequences for failing to do so. She indicated that she conveyed this message to Mr. Sun. Unfortunately I have no further details on this. I recognize the predicament that you are in and I have warned them that you will likely move to compel responses if there is any further delay. I will continue seeking an update on my end but I understand if your client wishes to move to compel responses at this point.

- Missing verified discovery responses: The substance of these responses was prepared by a woman named Nikki who (Kathy indicated today) is no longer working at the company. Since Mr. Sun does not speak English, I have asked Kathy to get Mr. Sun to sign the responses before a Mandarin speaking notary (there are many in Vancouver) or his BC lawyer, Victor (who I have mentioned before and who also speaks Mandarin).

Feel free to let me know if you have any questions.

Best,
Gina

From: Gina Lupino
Sent: June 22, 2018 1:24:45 PM
To: Erik Dykema
Subject: Re: Wiston TM Cancellation Call

Hi Erik,

I have called my contact at the client twice today. The receptionist just told me that she is out for lunch and errands and due back after 2 PM (5 PM EDT). I will provide

an update as soon as I reach her.

Gina

From: Gina Lupino
Sent: June 22, 2018 11:02:28 AM
To: Erik Dykema; Brent Capehart
Subject: Re: Wiston TM Cancellation Call

Hi Erik,

Pardon the delay - I stepped away from my desk until now. I spoke with my client yesterday and requested an update about the status of the discovery responses but haven't heard back from her. I will reach out to her again now and get back to you.

Gina

From: Erik Dykema <erik@zellerip.com>
Sent: June 22, 2018 10:13:27 AM
To: Gina Lupino; Brent Capehart
Subject: Re: Wiston TM Cancellation Call

Hi Gina & Brent-

I saw that you accepted my calendar invite yesterday and I'm standing by the phone; are we still on for this call?

Thanks,
Erik

Erik J. Dykema
Counsel

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

t: (917) 670 9843
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Thanks,
Erik

Erik J. Dykema
Counsel

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155 Water Street

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