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

Proceeding	92068467
Party	Defendant Maple Mountain Group, Inc.
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Date	12/09/2020
Attachments	Maple Mountain Reply in Support of Motion to Compel.pdf(449482 bytes)

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

In the matter of Trademark Registration Serial No. 2,693,218
Registered: March 4, 2003
Mark: CARDIOL

<p>U.G.A. NUTRACEUTICALS SRL, Petitioner, v. MAPLE MOUNTAIN GROUP, INC., f/k/a NEWAYS, INC. Registrant.</p>	<p>Cancellation No. 92068467 REGISTRANT’S REPLY IN SUPPORT OF ITS MOTION TO COMPEL PETITIONER’S SUPPLEMENTAL RESPONSES AND MOTION FOR SANCTIONS</p>
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Registrant, Maple Mountain Group, Inc., fka Neways, Inc. (“Maple Mountain”) hereby submits the following reply to Petitioner U.G.A. Nutraceuticals SRL’s (“Petitioner”) Response to the Motion to Compel Supplemental Responses filed by Maple Mountain. Similar to its approach in responding to Maple Mountain’s first motion to compel granted by the Board, Petitioner again attempts to divert the attention away from its conduct by raising allegations against Maple Mountain that have no relevance to Petitioner’s dilatory discovery responses.

Petitioner already has been ordered to provide full responses to discovery requests. Since that order was issued on February 3, 2020, Petitioner has not provided a single supplemental response despite at least three written requests, at least two telephone conferences to meet and confer on the issue, and over nine months to do so. Sanctions preventing Petitioner from entering

the evidence sought by the discovery requests to which its responses continue to be deficient is warranted.

I. ARGUMENT

A. Petitioner’s Complaints Concerning Registrant’s Use of the Contested Mark and Registrant’s Discovery Responses Are Irrelevant to Petitioner’s Discovery Failures

Throughout the Response Petitioner attempts to detract from its own dilatory discovery responses in the face of the Board’s Order compelling complete responses by arguing that “to the extent Registrant, in fact, is using or has used the CARDIOL mark, information and documents regarding any such use are exclusively in Registrant’s possession and Petitioner cannot provide information regarding the absence of information.” (Response, p. 6; *see also id.* p. 1 (“The information relevant to this inquiry [of abandonment] is necessarily within Registrant’s possession, *i.e.*, if Registrant, in fact, used the mark (or had an intention to resume use), Registrant would have documents.”), p. 7 (“Petitioner’s investigation are, at best, tangential to the primary issue in this case—Registrant’s total failure to provide any evidence of continued use of the CARDIOL mark.”), p. 8 (“...Registrant’s complete failure to produce any evidence of continued use of the CARDIOL mark to the Board.”), p. 10 (“Registrant’s own dilatory actions and failure to produce any supporting evidence of use of the CARDIOL [mark] cannot support a finding of sanctions in this case.”), p. 11 (“And, given that Registrant has failed to produce a single document evidencing its own use of the CARDIOL mark...”).) This diversionary tactic should be disregarded as Registrant’s “actual use” of the CARDIOL mark has nothing to do with Petitioner’s discovery obligations and failure to comply with the Board’s prior order.

B. Registrant's Motion Based on Petitioner's Failure to Supplement Its Responses to Document Requests to Comply with the Board's Order Is Proper

Petitioner attempts to sidestep its failure to provide full response to Registrant's requests for documents because Registrant purportedly failed to meet and confer regarding these deficiencies. (Response, pp. 4-5.) Petitioner's argument is misplaced and is inconsistent with the rules governing a motion for sanctions.

The Board's February 2, 2020 Order expressly required Petitioner's responses to requests for documents to "address each item or category of documents or things identified in the request *and state, as to each, whether there are any responsive documents. If none, the responding party must state as such.*" (Dkt. No. 23, p. 3 (emphasis added).) Petitioner's responses served prior to the Board's Order do not meet these requirements. Petitioner continues to hide the ball with the quibbling statement "Petitioner will produce relevant, non-privileged documents, *to the extent such documents exist*, that are relevant to this request." (See Exh. E, Response to Request for Production Nos. 1-3, 7, 9-14, 20-26 and 28 (emphasis added).) Indeed, Petitioner does not even argue that its responses meet this requirement. Instead, Petitioner complains that Registrant should have met and conferred with Petitioner's counsel to point out that Petitioner ignored the Board's Order before bringing the present motion.

However, Petitioner's argument is wrong and inconsistent with the rules of this Board which clearly state that "[u]nlike a motion to compel discovery, there is no requirement to make a good faith effort to resolve the parties' dispute prior to filing a motion for discovery sanctions." TBMP 527.01(a). It is clear the Board's order of February 2, 2020, was a discovery order and Petitioner's delinquent responses to the document requests fail to comply with the express terms of that order. As such, Registrant's motion is entirely proper.

Further, because the responses are clearly deficient, which Petitioner's silence on the issue tacitly acknowledges, Registrant is not obligated to further meet and confer with Petitioner on this issue. In addition, even if such a meet and confer were required, which it is not, it was satisfied by the multiple meet and confers held in connection with Registrant's first motion to compel, which the Board found sufficient. Registrant should not be required to confer with Petitioner about deficient responses that it never supplemented or amended after the Board's Order issued.

Petitioner also attempts to argue that "Registrant does not object to Petitioner's actual document production." (Response, p. 5.) This argument is a red herring that places the cart before the horse. Registrant does not know whether Petitioner's actual document production is deficient because Petitioner has not stated whether documents responsive to the requests actually exist. Without that knowledge, Registrant is not in a position to determine whether the "actual document production" continues to be deficient. The Board should require Petitioner to comply with the requirements of the Board's February 2, 2020 order.

C. Petitioner's Responses to Interrogatory Nos. 21-25 and 27 Are Deficient

Petitioner initially argues that "[a]t all times, Petitioner has maintained that its answers to Interrogatories are complete." (Response, p. 3.) It is clear from the summary correspondence of April 30, 2020, that Registrant expected Petitioner to consider supplementing the deficient responses. (Phillips Decl., Exh. G.) Petitioner never provided any subsequent correspondence to Registrant stating it would *not* be supplementing the responses as was shown by the multiple correspondence from Registrant asking when it would be receiving the supplemental responses. Further, Petitioner's belated and untimely email correspondence of October 29, 2020 stating that

“I will have the amended responses to you by Thursday, November 5th” belies any alleged belief that the responses were complete.¹ (*See* Exh. 1, attached hereto.)

Notwithstanding having sent the October 29 correspondence, Petitioner now still attempts to argue that its responses to Interrogatory Nos. 19, 21, 23 and 24 are sufficient. (Response, pp. 6-7.) While these interrogatories are all related to Petitioner’s abandonment argument, they each seek specific information concerning particular contentions Petitioner makes in the Petition. Registrant’s Motion points out the specific reasons Petitioner’s responses are deficient. (Motion, pp. 6-7.) Yet in arguing that the responses are “sufficient,” Petitioner does not address any of the specific deficiencies pointed out by Registrant. Instead, Petitioner generalizes all the interrogatories as all “regarding Registrant’s own abandonment of the CARDIOL mark and lack of an intent to resume use” and asserts that its cut-and-paste response of “To the best of our knowledge we do not know any product that has been marketed or is currently marketed in the U.S. under the mark Cardiol. Our investigation has produced zero evidence of Registrant’s use” is complete. Petitioner does not explain why this answer sufficiently identifies who “contacted a supplier” and which supplier was contacted (Interrogatory No. 21), who conducted “extensive internet research to find evidence of...Registrant’s CARDIOL products (Interrogatory No. 19), what “different name” under which “Registrant has been selling the product formally known as CARDIOL” (Interrogatory No. 23), or the basis for Petitioner’s contention that “Registrant has no intent to resume use of the CARDIOL mark...” (Interrogatory No. 24). As a result, Petitioner’s responses are clearly not “sufficient.” Moreover, because these interrogatories go to the very heart of Petitioner’s claim of abandonment, Petitioner’s refusal to provide specific

¹ Notably, November 5th was less than 30 days before discovery was to close, leaving Registrant without the ability to serve follow up written discovery.

responses to these interrogatories severely prejudices Registrant's ability to investigate and defend against these (what now appear to be unsupported) contentions.

Registrant's Interrogatory Nos. 22, 25 and 27 each request Petitioner to identify documents that "refer to or relate to" certain of Petitioner's contentions. Instead of either identifying the documents or stating that it had no such documents as it should have done, Petitioner provides the same cookie-cutter response used for Interrogatory Nos. 19, 21, 23 and 24 quoted above. It then appends the statement, "These documents are in the custody of and control of Registrant and are being sought in discovery." It appears that Petitioner had no documents to support its contentions in the Petition, but refuses to so state in response to the interrogatories requesting that information. That it hopes to obtain documents from Registrant during discovery to support its contentions is not a valid excuse for refusing to respond to the interrogatories now. It can supplement its responses later in the event it obtains additional responsive information. The responses are deficient, and do not comply with the Board's prior order to provide "full" responses to the interrogatories.

D. Petitioner's Refusal to Comply with the Board's Order Warrants Sanctions

Petitioner's arguments that it should not be sanctioned for refusing to comply with the Board's Order basically fall into two categories. The first is that sanctions are not warranted because it allegedly "fully responded" to the requests and Registrant's current complaint is limited to "two issues and six interrogatories." (Response, p. 7.) The second is that its conduct is not as egregious as those sanctioned in the cases Registrant cites in the Motion. Neither argument has merit.

As to the first category, Petitioner faults Registrant for not providing an analysis on the four factors for determining sanctions set forth in *Mut. Fed. Sav. & Loan Ass'n v. Richards &*

Assocs., 872 F.2d 88, 92 (4th Cir. 1989). (Response, p. 8.) Ironically, after stating the factors and faulting Registrant for not addressing them, Petitioner provides no analysis of those factors. Rather, Petitioner just concludes that the sanction of precluding Petitioner from submitting evidence on the disputed issues is not warranted. As to the first factor, Petitioner has acted in bad faith, as demonstrated by Petitioner's prior refusal to provide any response until faced with Registrant's first motion to compel, and then this time refusing to supplement its deficient responses to the written discovery even after the Board issued its Order expressly requiring full responses. Petitioner clearly does not want to comply with its discovery obligations and will not do so until it is faced with motions to compel or motions for sanctions, and even then, it tried to use the purposeful delay as a way to prejudice Registrant.

Given that the information and documents requested were explicitly based on Petitioner's contentions in the Petition, indeed the requests quoted the contentions from the Petition, the requested information and documents should be at Petitioner's fingertips and easily produced. Nevertheless, Petitioner chose to withhold the information and documents. The second factor, prejudice to Registrant, weighs heavily in favor of exclusion. The information and evidence sought in the challenged discovery requests concerns the factual basis for Petitioner's contentions concerning abandonment of the CARDIOL mark by Registrant. Refusal to provide full response to the requests severely prejudices Registrant's ability to defend against those contentions. Third, there is a need to deter parties from hiding the information and evidence that supports the contentions set forth in a petition. This information is not ancillary to the issues of the case. Indeed, it is central to the dispute. Thus, there is a strong incentive to deter parties from refusing to produce information and documents central to the dispute. Last, Petitioner has not identified any less drastic sanction that would be effective. In view of the foregoing, the four

factors weigh in favor of sanctions precluding Petitioner from introducing evidence on the issues of abandonment and no intent to resume use.

To the extent the Board is disinclined to issue such case determinative sanctions, Registrant's requested sanction precluding Petitioner from introducing evidence beyond what it has produced to date is an appropriate sanction that Petitioner has not challenged. This sanction would not be "case determinative." (Response, p. 8.) Petitioner could potentially prove abandonment without evidence it has not produced concerning (1) its internet searches in which it found "no evidence of use of the mark" (Interrogatory No. 19), (2) a "supplier of Registrant's products" "inform[ing Petitioner] that the CARDIOL product had been discontinued" (Interrogatory Nos. 21 and 22), (3) "Registrant has been selling the product formally known as CARDIOL under a different name" (Interrogatory No. 23), and (4) documents and evidence in Petitioner's possession and control that "Registrant has abandoned the mark" and "has no intent to resume use of the CARDIOL mark" (Interrogatory Nos. 24, 25 and 27). This sanction would not preclude Petitioner from using evidence and information outside its possession and control, such as that obtained from Registrant during discovery. Indeed, to the extent Petitioner has "fully responded" to the requests as it contends, this sanction would have no effect whatsoever on Petitioner's ability to prove its claims because no evidence would be precluded as has all been produced.

Petitioner brought this proceeding and has the burden of proof to demonstrate abandonment. Yet Petitioner has refused to participate in the process that it initiated and to provide the information and evidence supporting the contentions Petitioner asserts in the Petition. Instead, Petitioner attempts to excuse its dilatory discovery responses by repeatedly arguing that documents concerning abandonment are "in the possession of Registrant" and

implying that it is Registrant's burden to prove no abandonment. (*See* Response, pp. 1, 3, 6, and 7.) Regardless of whether Registrant has evidence that would disprove abandonment, Petitioner must provide the information and evidence it possesses to support its contentions of abandonment set forth in the Petition. Petitioner has refused to do so. Precluding Petitioner from entering evidence that it should have produced in response to Registrant's discovery requests is an appropriate sanction as set forth above and in the Motion.

Second, Petitioner argues that it should not be sanctioned because the facts of this case are not on all fours with those of *MHW, Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 U.S.P.Q.2D (BNA) 1477, 1478 (T.T.A.B. 2000) and *Baron Philippe de Rothschild, S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2D (BNA) 1848 (T.T.A.B. June 23, 2000). (Response, pp. 9-10.) In so arguing, Petitioner draws a distinction between its conduct and that of the sanctioned parties in the cited cases because in *MHW* the discovery responses were six years late, and there was an "overall pattern of delay" of nearly two years" in *Barron Philippe*. (Response, p. 9.) But the delay in this case is similar as Registrant served its discovery requests April 5, 2019, twenty months ago. (Phillips Decl., Exhs. B and C.) Petitioner then curiously attempts to distinguish the case *Highbeam Mktg., LLC v. Highbeam Research, LLC*, 85 U.S.P.Q.2D (BNA) 1902, 1904 (T.T.A.B. 2008) by arguing that Registrant has not been diligent in seeking the deficient discovery because it "brings this motion over a year after Petitioner provided discovery responses...." (Response, p. 10.) Yet, by Petitioner's own admissions, Registrant raised the deficiencies "6, 9 and 12 months" after Petitioner provided its deficient responses in October 2019. (Response, p. 8.) In addition to raising Petitioner's deficient response on those three occasions, Registrant also sought responses on at least May 9, June 24, August 2, 2019. (Dkt. No. 19, Declaration of Robyn L. Phillips in Support of Registrant's Motion to Compel, Exhs. E,

K, and L.) So on the one hand, Petitioner argues that its 20-month delay to provide full discovery responses is not long enough to warrant sanctions, then turns around and argues that Registrant has not been diligent because of the amount of time that has passed, despite raising the issue in written correspondence six different times, plus being granted a prior motion to compel. Petitioner's inconsistent arguments are simply unpersuasive.

II. CONCLUSION

Petitioner's responses to Interrogatory Nos. 19-25 and 27, and Document Request Nos. 1-3, 7, 9-14, 20-26, and 28 are deficient, despite the Court's prior Order requiring that full responses be provided. Consequently, Registrant requests that the Board grant Registrant's Motion for Sanctions, and issue sanctions it sees fit including precluding Petitioner from supporting its claims of abandonment and that Registrant had no intent to resume use of the CARDIOL mark, or at a minimum, that Petitioner be precluded from introducing any evidence or information in its possession that would be responsive to Interrogatory Nos. 19-25 and 27, and Document Request Nos. 1-3, 7, 9-14, 20-26, and 28 that has not been produced as of the filing of the Motion. Additionally, in the event the Board does not preclude Petitioner from introducing any evidence or information in its possession that would be responsive to Interrogatory Nos. 19-25 and 27, and Document Request Nos. 1-3, 7, 9-14, 20-26, and 28 that has not been produced as of the filing of the Motion, Registrant requests that the Board order Petitioner to supplement its responses to remedy the deficiencies identified by Registrant and to serve any privilege log on Registrant.

DATED this 9th day of December, 2020.

Respectfully submitted,

/Robyn L. Phillips/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **REGISTRANT'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL PETITIONER'S SUPPLEMENTAL RESPONSES AND MOTION FOR SANCTIONS** has been served on this 9th day of December, 2020, via email to the following counsel of record for Petitioner:

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/Robyn L. Phillips/_____
Robyn L. Phillips

EXHIBIT 1

From: [Daniel Tyler](#)
To: [Robyn L. Phillips](#)
Cc: [John C. Stringham](#); [Shellie C. Courdy](#)
Subject: RE: U.G.A. Nutraceuticals SRL v. Maple Mountain Group, Inc. fka Neways, Inc re the mark CARDIOL [WNDMS-DMS1-DMS1.FID1959308]
Date: Thursday, October 29, 2020 8:35:39 AM
Attachments: [ATT00002.png](#)
[ATT00004.png](#)

Robyn,

I will have the amended responses to you by Thursday, November 5th.

On the other side of the coin, while I appreciate you producing the publically available documents concerning your application and subsequent assignment of your mark, you have produced virtually zero documents requested on the issue of current or recent use. We requested the same on the calls this summer. Please confirm that these documents don't exist, or a date certain on which we can expect to receive them.

ATW_LogoUpate2019_COLOR



Daniel S. Tyler

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From: Robyn L. Phillips [mailto:rphillips@wnlaw.com]

Sent: Monday, October 26, 2020 2:11 PM

To: Daniel Tyler <daniel@amintalati.com>

Cc: jstringham@wnlaw.com; scourdy@wnlaw.com

Subject: RE: U.G.A. Nutraceuticals SRL v. Maple Mountain Group, Inc. fka Neways, Inc re the mark CARDIOL [WNDMS-DMS1-DMS1.FID1959308]

Daniel-

It as been a few months since I have heard from you and we had our call this summer. We saw that you updated your correspondence address with the TTAB as required, but otherwise it does not appear your client intends to participate in this case. Is your client still interested in this matter?

If so, we **must insist that you immediately supplement your responses to Interrogatories 21-25 and 27**. We have discussed this issue on multiple occasions and had a meet and confer regarding the same. Your client has an obligation to participate in the discovery process if it intends to move forward with this case. You have had months to prepare these supplemental responses. Please let me know by Wednesday, October 28, 2020, cob a date certain within the next week that I will receive these supplemental responses.

I look forward to your response. Regards. Robyn

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Final



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