

THIS ORDER IS A
PRECEDENT OF THE
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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McKnight

September 10, 2019

Cancellation No. 92069340

Busy Beauty, Inc.

v.

JPB Group, LLC

By the Trademark Trial and Appeal Board:

Now before the Board is Respondent's motion (filed February 27, 2019) for sanctions in the form of judgment or, alternatively, for an adverse inference to be drawn against Petitioner, for spoliation of evidence. Because Respondent's motion involves the loss of electronically stored information ("ESI"), the Board construes Respondent's motion for sanctions as one under Fed. R. Civ. P 37(e) ("Rule 37(e)").¹ The motion is fully briefed.

¹ See Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment) ("[37(e)] applies only to electronically stored information"); STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK, 987 (2016) ("Rule 37(e) is the court's only sanctioning authority for spoliation of ESI"). In its motion, Respondent generally references Fed. R. Civ. P. 34, 37, 37(b)(2)(A) and 37(e), and requests the Board to apply the three-part test applied in *Singleton v. Kernan*, No. 3:16-cv-2462-BAS-NLS, 2018 WL 5761688 (S.D. Cal. Nov. 1, 2018). 12 TTABVUE 2-3, 5-6, 9. However, courts only use such three-part tests pursuant to their inherent authority where the evidence lost or destroyed is *not* ESI. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 104 (E.D. Va. 2018). Inasmuch as the parties agree that the evidence at issue consists of ESI (*see* 12 TTABVUE 5; 14 TTABVUE 10), Rule 37(e) applies and the *Singleton* test is not available. *See Singleton*, 2018 WL 5761688 at *2

Background

On August 21, 2018, Petitioner filed a petition to cancel Respondent's Registration No. 5531857 for the mark BUSY BEAUTIES, in standard characters, for "hair care preparations; non-medicated skin care preparations" in International Class 3.² As grounds for cancellation of the registration with a constructive use date of October 4, 2017, Petitioner alleges likelihood of confusion based on its prior common law use since July 2016 of the mark BUSY BEAUTY in connection with women's shaving gel.³ In support of its standing, Petitioner maintains that the application underlying Respondent's involved registration was cited as a potential bar to Petitioner's pleaded application Serial No. 87753316 for the mark BUSY BEAUTY,⁴ and now that Respondent's mark has registered, it might be cited as a basis for refusing registration to Petitioner.⁵ Respondent filed an answer denying the salient allegations of the petition to cancel.⁶

(court specifically declined to apply Rule 37(e) because the records in question were not electronically stored).

² Issued July 31, 2018.

³ Petition at ¶¶ 1, 4, 6-7, 1 TTABVUE 3-4. Inasmuch as Petitioner refers to prior use of its pleaded BUSY BEAUTY mark in connection with "its goods," but only identifies "women's shaving gel," as recited in its pleaded application Serial No. 87753316, the Board construes the petition as only alleging prior use of the pleaded mark in connection with women's shaving gel. 6 TTABVUE 1-2; 11 TTABVUE 2.

⁴ Filed January 12, 2018 for "women's shaving gel" in International Class 3, based on an assertion of use of the mark in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging July 17, 2016 as the date of first use of the mark and May 10, 2017 as the date of first use of the mark in commerce.

⁵ Petition at ¶ 6, 1 TTABVUE 4.

⁶ 4 TTABVUE.

On October 1, 2018, Petitioner re-launched its Instagram account and removed all prior posts.⁷ On October 9, 2018, at Petitioner's request, the parties conducted their discovery conference with Board participation.⁸ Although both parties market and sell their goods online, the parties did not discuss the discovery of electronically stored information and documents.⁹ *See Frito-Lay North America, Inc. v. Princeton Vanguard, LLC*, 100 USPQ2d 1904, 1907 (TTAB 2011). The parties did not discuss removal of the pre-October 2018 Instagram posts.¹⁰

Discovery opened on October 30, 2018. That same day, Respondent served its first sets of requests for admission, document requests, and interrogatories on Petitioner.¹¹ On November 1, 2018, Respondent filed a motion to amend its answer to replead affirmative defenses.¹² Proceedings were then suspended, except for the need to respond to outstanding discovery.¹³

On November 29, 2018, Petitioner served discovery responses, several of which are relevant to our analysis herein:

REQUEST FOR ADMISSION NO. 6: Admit that prior to October 1, 2018, the Busy Beauty Instagram account (@busy.beauty) had zero (0) posts to that account.

⁷ 14 TTABVUE 5.

⁸ 6 TTABVUE.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 12 TTABVUE 4.

¹² 7 TTABVUE.

¹³ 8 TTABVUE.

RESPONSE: Denied. Instagram account was overhauled on October 1, 2018. All prior posts were deleted.¹⁴

REQUEST FOR PRODUCTION NO. 16: All Instagram posts from the @busy.beauty page or profile uploaded or dated prior to October 1, 2018.

RESPONSE: ... All Instagram posts prior to October 1, 2018 were deleted when new Instagram profile launched.¹⁵

INTERROGATORY NO. 7: Describe with specificity all of Your uses of the term “Busy Beauty” in commerce and elsewhere in the United States.

RESPONSE: BUSY BEAUTY trademark is used across all of our marketing materials (pamphlets, sample products, competition materials, trade[] show materials, wholesale materials, social media); physically printed on all of our products; used on our e-commerce website and on our product pages on Amazon.com.¹⁶

By order dated February 27, 2019, the Board determined that each of Respondent’s proposed affirmative defenses remained insufficiently pleaded and, moreover, were futile, and denied Respondent’s motion to amend.¹⁷ Respondent’s original answer filed on September 26, 2018 is the operative pleading in this case.¹⁸

Respondent filed the present motion on February 27, 2019. On March 11, 2019, Petitioner notified Respondent that, in response to the motion for sanctions, Petitioner was making electronic copies available to Respondent of all original pictures posted to the Instagram account before October 1, 2018.¹⁹ In an effort to

¹⁴ 12 TTABVUE 23.

¹⁵ *Id.* at 36.

¹⁶ *Id.* at 13-14.

¹⁷ 11 TTABVUE 10.

¹⁸ *Id.*

¹⁹ 14 TTABVUE 14.

resolve the dispute, on March 14, 2019, Petitioner supplemented its responses to include Instagram content data prior to October 2018.²⁰

Respondent's Motion for Sanctions

Respondent seeks sanctions under Rule 37 on the basis that Petitioner has destroyed relevant evidence by “knowingly and willfully” deleting all posts to its @busy.beauty Instagram account that predate October 1, 2018.²¹ To the extent that Petitioner argues that Respondent was required to make a good faith effort to resolve the parties’ dispute and prevail on a motion to compel before filing the present motion for sanctions,²² Petitioner is incorrect. Respondent does not contend that Petitioner failed to provide requested discovery or otherwise challenge the sufficiency of Petitioner’s discovery responses, issues that would be the subject of a motion to compel. Trademark Rule 2.120(f)(1). Rather, Respondent argues that to the extent Petitioner’s discovery responses revealed that the Instagram posts have been deleted, the responses also indicate that Petitioner failed to preserve information relevant to Respondent’s defenses in this proceeding.²³ Because Respondent is not seeking to compel discovery responses or requested information, but rather is invoking Rule 37(e), which does not require the parties to confer before a motion is filed, Respondent was not required to make a good faith effort to resolve the parties’ dispute prior to

²⁰ *Id.* at 16.

²¹ 12 TTABVUE 2.

²² 14 TTABVUE 5.

²³ 12 TTABVUE 5-7.

filing its motion. Accordingly, Respondent's motion for sanctions under Rule 37 is properly before the Board.²⁴

Applicable Legal Principles

As noted above, Rule 37(e) governs the spoliation analysis for ESI. *Regeneron Pharm., Inc. v. Merus N.V.*, 864 F.3d 1343, 123 USPQ2d 1469, 1484 n.7 (Fed. Cir. 2017); *Steves & Sons*, 327 F.R.D. at 103-04. That rule provides as follows:

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) Upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) Only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - (a) Presume that the lost information was unfavorable to the party;
 - (b) Instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (c) Dismiss the action or enter a default judgment.

Effectively, Rule 37(e) as amended specifies findings that a court must make before determining whether sanctions are appropriate,²⁵ and the sanctions that may

²⁴ *Cf. Frito-Lay*, 100 USPQ2d at 1907 (“ESI must be produced in Board proceedings where appropriate, notwithstanding the Board’s limited jurisdiction and the traditional, i.e. narrow, view of discovery in Board proceedings”).

²⁵ The Federal Rules of Civil Procedure Advisory Committee states that Rule 37(e) as amended is intended to foreclose “reliance on inherent authority or state law to determine when certain measures should be used.” Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment). It is not clear whether a tribunal retains its discretion to impose lesser sanctions even if a party cannot establish all the Rule 37(e) prerequisites. *Steves & Sons*, 327

be imposed in the exercise of the court's broad discretion based on those findings. Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment) ("Much is entrusted to the court's discretion"); *Steves & Sons*, 327 F.R.D. at 103 ("Courts have broad discretion when deciding whether to impose spoliation sanctions"). The amendment was intended to address concerns that circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve ESI, and as a result, parties were over-preserving data at great cost for fear of facing severe spoliation sanctions. Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment); *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 495 (S.D.N.Y. 2016). The Advisory Committee notes also recognize the serious problems faced by litigants confronted with vast amounts of ESI, and the need to tailor discovery and introduce proportionality into the equation to avoid discovery abuse and overuse. Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment); *accord Small v. Univ. Med. Ctr.*, No. 2:13-cv-0298, 2018 WL 3795238, *67 (D. Nev. Aug. 9, 2018) (Rule 37(e) as amended "reinforce[s] the necessity that a trial court evaluate proportionality in ... considering sanctions for the loss of relevant or potentially relevant ESI"); *Frito-Lay*, 100 USPQ2d at 1908 (recognizing that electronic discovery burdens should be proportional to the amount in controversy and nature of the case; otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly). "The days of imposing severe, punitive sanctions for loss of ESI that

F.R.D. at 104 n.4. Because we determine that the Rule 37(e) prerequisites have been met in this case, we need not address our ability to impose lesser sanctions.

can be restored or replaced by other discovery, especially ESI that is marginally relevant or duplicative of information from other sources should be over.” *Small*, 2018 WL at *69.

I. Did Spoliation Occur Under Rule 37(e)?

Spoliation is “the destruction or material alteration of evidence or ... the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 98 USPQ2d 1693, 1699 (Fed. Cir. 2011) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). In order to prevail on its motion for sanctions in the form of judgment predicated on spoliation of ESI, Respondent must prove spoliation by clear and convincing evidence. *See, e.g., Micron Tech.*, 98 USPQ2d at 1706 (dismissal requires proof by clear and convincing evidence); *Steves & Sons*, 327 F.R.D. at 104 (clear and convincing evidence standard is applied where a relatively harsh sanction like an adverse inference is sought); *Cat3*, 164 F. Supp. 3d at 499 (because defendants seek terminating sanctions and plaintiffs’ state of mind is at issue, court applied the clear and convincing standard with respect to disputed issues concerning plaintiffs’ conduct).

A movant must satisfy four threshold requirements before a tribunal decides if spoliation sanctions are appropriate: (1) the ESI should have been preserved; (2) the ESI was lost; (3) the loss was due to a party’s failure to take reasonable steps to preserve the ESI; and (4) the ESI cannot be restored or replaced through additional discovery. Fed. R. Civ. P. 37(e); *see also Steves & Sons*, 327 F.R.D. at 104.

With respect to the first factor, “[c]ourts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant.” Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment). Inasmuch as Petitioner filed this cancellation action on August 21, 2018, Petitioner clearly had notice of the proceeding and had a duty to preserve evidence as of October 1, 2018, when it deleted all of its prior Instagram posts. *See Micron Tech.*, 98 USPQ2d at 1699 (duty to preserve evidence begins when litigation is pending or reasonably foreseeable); *see also Silvestri*, 271 F.3d at 590; *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); *Steves & Sons*, 327 F.R.D. at 106 (“[g]enerally, it is the filing of a lawsuit that triggers the duty to preserve evidence”) (citing *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013)).

Once a party reasonably anticipates litigation, it must preserve information that falls within the scope of discovery as articulated in Rule 26(b)(1), namely “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1); *Al Otro Lado, Inc. v. Nielsen*, 382 F.R.D. 408, 416 (S.D. Cal. 2018). We find that the Instagram posts are relevant to a claim or defense in a Section 2(d) case because evidence of use of a mark in social media, in connection with testimony and other evidence showing the context of use and the extent of consumer exposure and advertising expenditures, may be relevant to prove or rebut priority, the relatedness of goods, or the strength of a mark, for example. *Cf. Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1467 n.30 (TTAB 2014) (party may increase the weight the Board gives website

evidence by submitting testimony and proof of the extent to which a particular website has been viewed).

Turning to the second factor, information is lost when it is beyond the possession and custody of its owner and not locatable by diligent search. *Steves & Sons*, 327 F.R.D. at 107. Here, neither party disputes that Petitioner’s pre-October 2018 Instagram posts themselves are lost.²⁶

Under the third factor, Rule 37(e) only applies if the loss of this information was due to a party’s failure to take reasonable steps to preserve the ESI. Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment). The Advisory Committee recognizes that due to the ever-increasing volume of ESI, perfection in preserving all ESI is often impossible; rather, reasonable steps to preserve may suffice. *Id.* The Advisory Committee specifically advises counsel to “become familiar with their clients’ information systems and digital data – including social media – to address information preservation issues.” *Id.* Although Petitioner details its efforts to produce copies of the photos used in the pre-October 2018 Instagram posts and the content data of those posts after the fact, nothing in the record indicates that Petitioner took any reasonable steps to preserve the information at the outset, such as by implementing a litigation hold. *See Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 233 (D. Minn. 2019); *Steves & Sons*, 327 F.R.D. at 108; *cf. Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 505-06 (D. Md. 2010) (defendants did not take

²⁶ In its discovery responses, Petitioner admits that “[a]ll prior posts were deleted” and “[a]ll Instagram posts prior to October 1, 2018 were deleted.” 12 TTABVUE 23, 36.

reasonable measures to preserve data where they failed to implement an effective litigation hold).

If the duty to preserve has been triggered, a party has failed to take reasonable steps to preserve, and information has been lost as a result, the inquiry focuses on the fourth factor: Whether the lost information can be restored or replaced through additional discovery. Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment); Charles A. Wright, Arthur R. Miller et al., 5C FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2284.22015 (3d ed. Apr. 2019). “Because [ESI] often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere,” such as where one custodian deletes an email, but the email remains available in the records of another custodian. Fed. R. Civ. P. 37(e) Advisory Committee notes (2015 amendment); *accord Cat3*, 164 F. Supp. 3d at 497. Although Petitioner attempted to recreate the pre-October 2018 Instagram posts by producing copies of the photos appearing in the posts and the content data associated with the posts, which consists of a block of code listing comments, user names, and timestamps, this additional discovery does not provide the full context of the Instagram posts, including “all captions, the hashtags thereto, ... the dates posted to Instagram, the geo-tags, etc.”²⁷ and does not show what comments and captions are associated with each photo. Inasmuch as a complete record of the pre-October 2018 Instagram posts is no longer available from other sources, including Instagram technical support, the lost ESI cannot be restored or replaced through additional

²⁷ 15 TTABVUE 3.

discovery. *See Paisley Park Enters.*, 330 F.R.D. at 235-36 (where certain text messages were deleted and a complete record of the text conversations was no longer available, the court found the missing text messages could not be restored or replaced by other sources); *Cat3*, 164 F. Supp. 3d at 495, 497 (different version of the same email is not an adequate substitute); *Jenkins v. Woody*, No. 3:15-cv-355, 2017 WL 362475, *16-17 (E.D. Va. Jan. 21, 2017) (where video data was deleted and attempts to mirror the hard drive of the video surveillance cameras failed, ESI could not be restored or replaced through additional discovery).

The threshold requirements for application of Rule 37(e) having been met, the Board determines that under the circumstances of this case, Petitioner's conduct amounts to spoliation of ESI.

II. Are Sanctions Appropriate Under Rule 37(e)?

As set forth in the rule itself, once the threshold requirement of Rule 37(e) is established, the Board must find either prejudice to Respondent, or that Petitioner acted with the intent to deprive Respondent of the ESI's use in the cancellation action, before determining the appropriate sanctions to be imposed. *See Steves & Sons*, 327 F.R.D. at 104.

A. Intent to Deprive

Respondent seeks sanctions in the form of judgment or, in the alternative, for an adverse inference to be drawn regarding the content of Petitioner's deleted Instagram posts.²⁸ Rule 37(e)(2) authorizes these "very severe measures" only when there is a

²⁸ 12 TTABVUE 8.

finding that “the party that lost the information acted with the intent to deprive another party of the information’s use in the litigation.”²⁹ Fed. R. Civ. P. 37(e)(2) Advisory Committee notes (2015 amendment). A finding of negligence or gross negligence does not support an adverse inference under Rule 37(e)(2):³⁰ “Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.” *Id.*

Respondent argues, without support, that Petitioner has “knowingly and willfully deleted evidence that directly relates to [Respondent’s] key factual claims and legal defenses.”³¹ Respondent asserts that Petitioner’s decision to delete the pre-October 2018 Instagram posts by itself “implicitly suggests nefarious intent by Petitioner.”³² In contrast, Petitioner argues that “the picture posts were removed as part of an overhaul and update of the Petitioner’s Instagram account. The Busy Beauty company wished to overhaul, upgrade and re-launch its Instagram account to coincide with the launch of new products. They made a decision to start fresh with

²⁹ Rule 37(e)(2) “does not include a requirement that the court find prejudice to the party deprived of the information ... because the finding of intent ... can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.” Fed. R. Civ. P. 37(e)(2) Advisory Committee notes (2015 amendment).

³⁰ See *Regeneron Pharm.*, 123 USPQ2d at 1484 n.7 (finding that Rule 37(e) as amended rejects negligence or gross negligence as a basis for adverse-inference instructions); *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016) (Rule 37(e)(2) requires a showing of intent to deprive; “[a] showing of negligence or even gross negligence will not do the trick”).

³¹ 12 TTABVUE 2.

³² 15 TTABVUE 9.

new and more professional picture posts. The Petitioner did not willfully delete, nor did they intend to deprive [Respondent] of any evidence.”³³ Petitioner also points out its efforts to supply Respondent with the deleted material.³⁴ The record does not establish by clear and convincing evidence that Petitioner deleted the pre-October 2018 Instagram posts with the intent to prevent Respondent from using this information in support of its defenses to Petitioner’s likelihood of confusion claim. Accordingly, Respondent’s motion for sanctions is **denied in part** as to the requested sanctions of dismissal or for an adverse inference to be drawn regarding the content of Petitioner’s deleted Instagram posts.

B. Prejudice

Inasmuch as Respondent requests that the Board “award appropriate sanctions for which it determines to be reasonable and just,” the Board will also determine whether and to what extent sanctions are appropriate under Fed. R. Civ. P. 37(e)(1).³⁵ A court may order measures no greater than necessary to cure any prejudice only “upon finding prejudice to another party from the loss of information.” Fed. R. Civ. P. 37(e)(1). “An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information’s importance in the litigation.” Fed. R. Civ. P. 37(e)(1) Advisory Committee notes (2015 amendment). This subsection of the rule does not place the burden of proving or disproving prejudice on any particular party.

³³ 14 TTABVUE 5.

³⁴ *Id.* at 3, 5.

³⁵ 12 TTABVUE 9.

Id. However, where the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties, it may be reasonable to require the party seeking curative measures to prove it has suffered prejudice as a result. *Id.* This subsection of the rule leaves judges with discretion to determine how best to assess prejudice in particular cases, and what curative measures are necessary.³⁶ *Id.*; see also *Barbera v. Pearson Educ., Inc.*, 906 F.3d 621, 628 (7th Cir. 2018).

Any prejudice to Respondent is minimal. As set forth above, Petitioner's Instagram account is only one of several ways in which it uses its mark. Respondent claims that its ability to present its defense to Petitioner's likelihood of confusion claim, particularly with respect to the strength of the Petitioner's mark, the dissimilarity of channels of trade, and the conditions under which and buyers to whom sales are made, will be adversely affected in view of Petitioner's deletion of the pre-October 2018 Instagram posts.³⁷ Respondent does not explain why this information cannot be derived from Petitioner's other uses of the mark, i.e., Petitioner's marketing materials, products, e-commerce website and product pages on Amazon.com.

³⁶ "There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect." Fed. R. Civ. P. 37(e)(1) Advisory Committee notes (2015 amendment).

³⁷ 12 TTABVUE 7-8; 15 TTABVUE 5-7.

Moreover, because the subject registration contains no restrictions on the channels of trade or classes of customers, Respondent's goods are presumed to be sold in all normal trade channels and to all the normal classes of purchasers for goods of the type identified. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787-88 (Fed. Cir. 1990); *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). Respondent does not argue that Petitioner's previous channels of trade are not normal or explain what impact, if any, evidence of Petitioner's particular channels of trade or classes of purchasers may have on the analysis of these *DuPont* factors in view of Respondent's unrestricted identification of goods. *Octocom Sys., Inc.*, 16 USPQ2d at 1787 (identification of goods cannot be restricted or expanded based on extrinsic evidence).

Given that Petitioner has identified several other outlets and websites as channels of trade and marketing channels, and Respondent's identification of goods is unrestricted in those respects,³⁸ information regarding Petitioner's Instagram posts may ultimately be of minimal importance. Any additional benefit to Respondent from Petitioner's deleted Instagram posts is purely speculative. With that said, the Board also recognizes that Petitioner and its counsel were at least careless in their data preservation. In view thereof, Respondent's motion is **granted in part** only to the extent that Petitioner is precluded from relying for any purpose on the pre-October

³⁸ See Petitioner's response to Interrogatory Nos. 3, 13, 12 TTABVUE 13, 15.

2018 Instagram photos and the Instagram content data it claims to have produced in counsel's letters of March 11, 2019 and March 14, 2019.³⁹

Schedule

Proceedings are **resumed**. Disclosure, discovery, and trial dates are reset as follows:

Initial Disclosures Due	October 14, 2019
Expert Disclosures Due	February 11, 2020
Discovery Closes	March 12, 2020
Plaintiff's Pretrial Disclosures Due	April 26, 2020
Plaintiff's 30-day Trial Period Ends	June 10, 2020
Defendant's Pretrial Disclosures Due	June 25, 2020
Defendant's 30-day Trial Period Ends	August 9, 2020
Plaintiff's Rebuttal Disclosures Due	August 24, 2020
Plaintiff's 15-day Rebuttal Period Ends	September 23, 2020
BRIEFS ARE DUE AS FOLLOWS:	
Plaintiff's Main Brief Due	November 22, 2020
Defendant's Main Brief Due	December 22, 2020
Plaintiff's Reply Brief Due	January 6, 2021

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 37 C.F.R. §§ 2.121 - 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence,

³⁹ 14 TTABVUE 14, 16. The parties are also reminded that a party that responds to a request for discovery by indicating that it does not have the information sought, or by stating objections thereto, may be barred by its own action from later introducing the information sought in the request as part of its evidence on the case. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 527.01(e) (2019).

and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a), 37 C.F.R. § 2.129(a).