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

Proceeding no.	92070823
Party	Plaintiff Dinesh Patel and BatchTest Corporation
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Attachments	92070823 - BatchTest mark - Petition To Director.pdf(224391 bytes)

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

Dinesh Patel and BatchTest Corporation)	Cancellation No.:	92070823
)		
Petitioners,)	Registration No.:	4499170
)		
v.)	Mark:	BATCHTEST
)		
Ikonix USA LLC)	International Class:	9
)		
Registrant.)		
)		

PETITION TO THE DIRECTOR

Dinesh Patel (“Mr. Patel”) and BatchTest Corporation (“BatchTest”)(collectively “Petitioner”) respectfully submits this Petition To the Director (the “Director”) pursuant to 37 CFR § 2.146(e)(2) and TBMP §§ 581 and 905 for review of the Board’s interlocutory decision entered on November 1, 2022 (the “Order”; 68 TTABVUE), which refused to consider Petitioner’s Motion to Compel (the “Motion”; 51 TTABVUE). Instead, the Order has rewarded Ikonix USA LLC’s (“Respondent”) deliberate violation of Trademark Rule 2.120(a)(3) with generous unsought and improper reliefs.

I. POINTS TO BE REVIEWED BY THE DIRECTOR

A. Whether the Order abused discretion in denying Petitioner due process while granting unsought and improper reliefs to Respondent.

B. Whether the Order erred and abused its discretion in requiring Petitioner to provide discovery responses to Respondent who did not serve initial disclosures prior to seeking discovery.

C. Whether the Order abused discretion in deciding that Petitioner lacked good faith effort, held *Pro Se* Petitioner to a significantly higher standard than Respondent, and turned a blind eye to Respondent’s repeated noncooperation with Petitioner’s discovery.

II. STATEMENT OF RELEVANT FACTS

1. This proceeding was instituted by BatchTest, acting *Pro Se* through its President Mr. Patel on March 12, 2019. BatchTest assigned the BATCHTEST trademark, along with the goodwill associated

with it, to Mr. Patel on April 2, 2022; 61 TTABVUE 6-7. Mr. Patel was joined in the current proceeding by the Order.

2. Petitioner's claim of likelihood of confusion and Respondent's affirmative defense of laches are at issue; *see* 68 TTABVUE footnote 11.

3. Discovery opened on October 2, 2020; *see* 31 TTABVUE 10.

4. Petitioner timely and properly served initial disclosures, interrogatories, and request for production to Respondent on October 2, 2020; 34 TTABVUE Ex 1.

5. Respondent served discovery requests on October 2, 2020 without serving its initial disclosures; Ex. 34 TTABVUE 71.

6. Petitioner voluntarily corrected a minor non-critical typographical error in his requests for production and re-served it to Respondent on October 5, 2020; 34 TTABVUE 40; Petitioner also served his requests for admissions at the same time; *Id.*

7. Upon noticing on October 9, 2020 that Respondent had not yet served its initial disclosures, Petitioner immediately notified Respondent with specificity that Petitioner would not respond to Respondent's discovery requests due to its failure to serve initial disclosures; 34 TTABVUE 71.

8. Despite Petitioner's above recited prompt notification within seven days of discovery opening, Respondent did not take any action to cure its issue of improperly sought discovery.

9. Even though Respondent had not yet served its initial disclosures, on October 30, 2020 Respondent's attorney Mr. Thomas Moore emailed *Pro Se* Petitioner and started peddling false insinuations that Respondent was entitled to discovery before serving its initial disclosures (the "Cockamamie Theory"; 34 TTABVUE 94).

10. On October 30, 2020, Petitioner once again provided Respondent with a clear and specific objection for his refusal to respond to Respondent's improper discovery request. 34 TTABVUE 93.

11. On November 2, 2020, Respondent timely served its initial disclosures.

12. November 2, 2020 was also the deadline for Respondent to respond to Petitioner's interrogatories, but Respondent categorically **refused** to respond to any of Petitioner's discovery requests without intervention of the Board (34 TTABVUE 97) and instead filed a motion for amending the Standard Protective Order ("SPO"); 33 TTABVUE.

13. Petitioner made several efforts for Respondent to withdraw its motion to amend the SPO and to resolve discovery issues, but Respondent again **refused** to cooperate in Petitioner's discovery or to withdraw its frivolous motion; 34 TTABVUE 97-98 and 51 TTABVUE 3.

14. The Board's order dated February 10, 2021 (the "Feb10-Order"; 37 TTABVUE), issued by the Board's honorable senior interlocutory attorney Mr. Andrew Baxley found that "Respondent failed to make a good faith effort to resolve issues," but considered the motion "in the interest of moving this proceeding further." 37 TTABVUE 3. The Feb10-Order **admonished** Respondent's attorney for his Cockamamie Theory; 37 TTABVUE Footnote 3; and allowed Respondent until March 12, 2021 to respond to Petitioner's discovery.

15. On March 12, 2021 Respondent served significantly deficient discovery responses to Petitioner while improperly designating the entirety of its responses as "Confidential"; details are presented in the Motion, see 51 TTABVUE 3-5; the Motion also presents details of Petitioner's several discovery attempts to get a response from Respondent over ten days between March 21 and 31, 2021, which were **ignored** by Respondent. The Motion also includes Petitioner's email dated March 21, 2021 (the "Mar21-Requests"; 51 TTABVUE 131-136) containing specific requests to Respondent to cure significant deficiencies in its discovery responses.

16. Respondent eventually replied on March 31, 2021 in an email (the "Mar31-Reply"; 51 TTABVUE 139) which entirely **ignored** the last five pages of the six-page Mar21-Requests; the Mar31-Reply also conclusively **refused** to cure any deficiency in Respondent's discovery responses and provided several nonresponsive copy/paste of Respondent's indifferent position.

17. Due to Respondent's conclusive refusal to cure any deficiency whatsoever in its discovery responses, Petitioner had no other choice but to file the Motion. However, even after filing the Motion, Petitioner still continued efforts to resolve this case through a settlement but that was unsuccessful after Respondent rejected Petitioner's proposals; 61 TTABVUE 14.

18. In fact Petitioner also requested Respondent to discuss discovery, the scope of trial, and ACR with Respondent on April 12, 2022 and on April 19, 2022 (61 TTABVUE 9 and 64 TTABVUE 6; see also Exhibit A), whether through email or through phone call, but Respondent again **ignored** Petitioner and did not respond; instead, Respondent used Petitioner's confidential settlement information to gain advantage in preemptively filing a highly unusual motion to substitute an adversary to buy more time on April 25, 2022;¹ 59 TTABVUE. Due to Respondent very frequently **ignoring** Petitioner's discovery communications, and then immediately filing frivolous non-germane motions while the proceeding was suspended pending outcome of the Motion, Petitioner reasonably understood that Respondent had no interest in cooperating with Petitioner's discovery.

III. ARGUMENT

Petitioner respectfully petitions the Director for review of the Board's interlocutory Order pursuant to 37 CFR § 2.146(e)(2), TBMP §§ 905 and 906.02. "In reviewing non-final rulings of the Board, the Director will exercise supervisory authority under 37 CFR § 2.146(a)(3) and reverse the Board's ruling only where there is a clear error or abuse of discretion"; TBMP § 906.02.

¹ Petitioner's clearly labelled April 12, 2022 email (64 TTABVUE 5-8) contained FRE 408 settlement communications and drafted proposal documents, in which Petitioner had confidentially shared with Respondent that BatchTest had assigned its BATCHTEST mark to Mr. Patel and that Mr. Patel intended to request the Board to join him in the current proceeding. 64 TTABVUE 5. The said information was also part of Petitioner's draft proposal documents, as such Petitioner had included a copy of his trademark assignment letter with his email. Respondent used the said confidential information along with Petitioner's trademark assignment document which Respondent extracted from Petitioner's email, and modified Petitioner's document in adding a header and a label to it, and submitted it as an exhibit in its motion to substitute; 59 TTABVUE 4. Petitioner's trademark assignment document was confidential at the time it was shared, and it was not public on the USPTO site, which is why Respondent only had access to Petitioner's trademark assignment document from Petitioner's April 12, 2022 email; Respondent has admitted to using Petitioner's assignment document from Petitioner's April 12, 2022 email at the bottom of 59 TTABVUE 1.

A. The Order Denied Petitioner Due Process While Granting Reliefs To Respondent

While the current proceeding was suspended pending disposition of the Motion, Respondent filed several non-germane motions, including its motion to compel, which moved the Board to compel discovery responses from Petitioner and requested an enlargement of time; 62 TTABVUE 1 and 5. Upon Petitioner's request to clarify (64 TTABVUE) on Respondent's motion to compel, the Board ordered that "[t]here should be no further briefing on the 'request' to clarify", and that "Respondent's motion to compel is denied without prejudice." 65 TTABVUE 2.

Yet, the Order *sua sponte* grants Respondent all reliefs sought by Respondent's motion to compel. In fact, the Order even accepts allegations from Respondent's motion to compel as true in making false accusations against Petitioner (68 TTABVUE 5; detailed below under subsection "The Order Misrepresents Petitioner"), and labels Respondent's discovery as "the current discovery dispute" even though the Motion relates to Petitioner's discovery; 68 TTABVUE 6. Petitioner's Reply Brief to the Motion objects to efforts by Respondent to "buy even more time" to stall this proceeding; 67 TTABVUE 2-3; and Petitioner's opposition to Registrant's motion to substitute also objects in detail to any extension of time to Respondent; 61 TTABVUE 3; neither of which were considered by the Order.

Since the Board had forbidden Petitioner from responding to Respondent's non-germane motion to compel and denied the said motion, and yet the Order *sua sponte* accepted Respondent's allegations as true while granting all reliefs requested by that motion, quite evidently the Order abused the Board's discretion in denying Petitioner due process. The Order also shows clear bias against Petitioner because while it refused to consider the Motion despite of Petitioner's numerous discovery efforts, it rewards Respondent with significant discovery reliefs even though Respondent has not made any effort to seek discovery in compliance of Trademark Rule 2.120(a)(3); there is no showing of any good cause whatsoever for granting Respondent such reliefs. Petitioner requests that

the above referenced portions of the Order be reversed.

B. The Order erred in ordering Petitioner to serve discovery responses

Trademark Rule 2.120(a)(3) states “A party **must** make its initial disclosures prior to seeking discovery, absent modification of this requirement by a stipulation of the parties approved by the Board, or a motion granted by the Board, or by order of the Board.” Emphasis added. *Also see Dating DNA, LLC v. Imagini Holdings, LLC*, 94 USPQ2d 1889, 1893 (TTAB 2010) (“service of initial disclosures is a **prerequisite** to taking discovery”); emphasis added.

Service of documents is governed by TBMP § 113, **requiring** that a proof of service include “a statement signed by the filing party, or by its attorney or other authorized representative, clearly stating the **date** and manner in which service was made” and that “[t]he statement must appear on, or be securely attached to, the document being filed.” Emphasis added; *see* TBMP § 113.02.

There is no stipulation between the parties or any previous Board order excusing Respondent from mandatory requirement of Trademark Rule 2.120(a)(3); in fact, both parties were **required** to **serve** initial disclosures prior to seeking discovery per the Board’s order dated October 3, 2019 which had also recited the text of Trademark Rule 2.120(a)(3); 12 TTABVUE 6.

Even though Petitioner had notified Respondent with specificity within seven days of discovery opening that Petitioner would not respond to discovery requests because Respondent had not served initial disclosures (34 TTABVUE 71), Respondent has not served any discovery request concurrently with or after serving its initial disclosures. Instead, Respondent has been deliberately peddling the Cockamamie Theory to stall this proceeding even though the Feb10-Order had admonished Respondent’s attorney for it; Respondent’s motion to compel was entirely based on its Cockamamie Theory; 62 TTABVUE.

The Order Misrepresents Petitioner:

The Order makes false accusations that “[f]or instance, Petitioner has insisted that because

Respondent served its initial disclosures after serving its discovery requests, Respondent must re-serve its discovery.” 68 TTABVUE 5. Petitioner has never made any such insistence or asked Respondent to “re-serve its discovery”; Petitioner’s refusal to respond was clearly an “objection” which the Order admits in the very next line “...once the **objection** has been overcome...”; emphasis added; *Id.* An objection is not an insistence. The Order has used allegations from Respondent’s motion to compel (see last paragraph of 62 TTABVUE 4) as true to deliberately portray Petitioner as an unreasonably defiant party while entirely ignoring that Respondent has not complied with Trademark Rule 2.120(a)(3) and the guidance provided by *Dating DNA*. Petitioner is not prosecuting this case for Respondent who has the benefit of trademark attorneys; whether or not Respondent properly and timely secures its discovery is entirely up to Respondent, who is certainly not under any obligation to re-serve its discovery requests.

The Order Clearly Erred:

The Order erred in deciding that:

“[w]hile a party is not obliged to respond to the merits of discovery when initial disclosures have not been served, once the objection has been overcome by the service of initial disclosures, the time for response to those discovery requests begins to run and Respondent is obligated to respond to the discovery that was served. *See, e.g., Luster Prods., Inc. v. Van Zandt*, 104 USPQ2d 1877, 1879 n.2 (TTAB 2012) (initial disclosures may be served concurrently with discovery requests). While the Board does not condone the late service of initial disclosures, the time for Petitioner to file a motion to compel initial disclosures is past, and in any event Respondent served its initial disclosures on November 2, 2020, well before the current discovery dispute.” 68 TTABVUE 5-6; footnotes omitted.

Initially, the Order fails to note that Respondent had **timely served** its initial disclosures on Monday, November 2, 2020 pursuant to FRCP 6(a), because the deadline for the parties to serve initial disclosures was **Sunday**, November 1, 2020; 31 TTABVUE 10. Naturally, Petitioner had no reason to file a motion to compel initial disclosures, and it is pointless for the Order to decide that “the time for Petitioner to file a motion to compel initial disclosures is past.”

It is also pointless for the Order to cite *Luster Prods* because Respondent did not serve any

discovery request **concurrently** with or after serving initial disclosures, and *Luster Prods* does not discuss any automatic overcoming of objection to a previous improperly sought discovery by a later service of initial disclosures. On the contrary, *Luster Prods* states “[w]ritten discovery may be **served** concurrently with initial disclosures” (emphasis added), which quite clearly disproves the Order’s decision that “once the objection has been overcome by the service of initial disclosures, the time for response to [previous improperly served] discovery requests begins to run and Respondent is obligated to respond to the discovery that was served” (the “Error-Decision.”) *Luster Prods* is consistent with the guidance in *Dating DNA* (“**serv**ing initial disclosures ... is a **prerequisite** to **serv**ing discovery”; emphasis added) and Trademark Rule 2.120(a)(3), that discovery may be **served** concurrently with or after a party **serves** its initial disclosures; neither of the said precedential orders support the Error-Decision. *See also, Kairos Institute of Sound Healing, LLC v. Doolittle Gardens, LLC*, 88 USPQ2d 1541 (TTAB 2008)(“under Trademark Rule 2.120(a)(3) a party cannot seek discovery until it has made its initial disclosures.”)

The *Dating DNA* decision was issued on February 22, 2010, almost seven months after opposer had served initial disclosures on July 29, 2009; in fact, the Board had also noted that “Applicant also points out that: (1) after serving its untimely initial disclosures, opposer has not re-served its discovery requests”; *Id.* Even though opposer had first served discovery requests and then served its initial disclosures, *Dating DNA* **denied** opposer’s motion to compel:

“Turning next to opposer’s motion to compel, Trademark Rule 2.120(a)(3) provides that “[a] party must make its initial disclosures prior to seeking discovery” Opposer failed to comply with this Rule, and accordingly its motion to compel also is **DENIED.**”
Emphasis in original.

The above two lines from *Dating DNA* are diametrically opposed to the Error-Decision. The relevant sequence of events in the current case is **identical** to that of *Dating DNA*: 1) Respondent served discovery requests without serving initial disclosures; 2) Petitioner timely objected to Respondent’s discovery with a notice that provided detailed and specific reason for Petitioner’s refusal to respond;

3) Respondent served initial disclosures a month after seeking discovery; and 4) Respondent did not serve any discovery request concurrently with or after serving its initial disclosures.

Even though the Feb10-Order was issued on February 10, 2021, three months after Respondent had served initial disclosures on November 2, 2020, the Feb10-Order had **admonished** Respondent for its Cockamamie Theory (37 TTABVUE footnote 3) rather than deciding that “the objection has been overcome by the service of [Respondent’s] initial disclosures.” The Order does not explain why it took the Board almost two years to *sua sponte* issue the Error-Decision even though the Board clearly knew about this matter since at least as early as the Feb10-Order, or why it addressed Respondent’s discovery which is not related to Petitioner’s Motion. The Order shows that the interlocutory attorney misrepresented Petitioner, deliberately turned a blind eye to Respondent’s bad behaviors for the past two years, and now *sua sponte* rewarded Respondents in erring that Petitioner “is obligated to respond to the discovery that was served.” In fact, the Order also orders:

“Prior to conducting any conference to resolve discovery disputes, Petitioner should serve its discovery responses on Respondent”; and that

“No motion to compel may be filed unless the parties are truly unable, after making their best efforts, to work out mutually acceptable solutions.”

which leaves no doubt that in addition to all of the above, the Order not only prejudices *Pro Se* Petitioner with having to respond to improperly sought discovery, but that it is now also a prerequisite to Petitioner securing his own discovery in contrast to TBMP § 403.03 and Fed. R. Civ. P. 26(d)(3), because the Order forbids Petitioner from filing any motion to compel before serving discovery responses to Respondent. Quite evidently the Order is biased because it does not have “interests of justice”; it rewards Respondent despite its deliberate violation of Trademark Rule 2.120(a)(3) while severely prejudicing Petitioner for diligently following the guidance in *Dating DNA*.

Petitioner should not be held at a significantly higher standard than Respondent while Respondent gets rewarded for its bad behaviors; “Strict compliance with the Trademark Rules of

Practice and, where applicable, the Federal Rules of Civil Procedure, is expected of all parties before the Board. *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, 1212 (TTAB 2006).” See 12 TTABVUE 2 and 50 TTABVUE 12, issued by the same interlocutory attorney who issued the Order. Even though Respondent could have easily complied with Trademark Rule 2.120(a)(3) in minutes at any time in the past more than two years, Respondent deliberately chose to ignore it to create a dispute and use it as a basis to file frivolous motions to stall this proceeding; 62 TTABVUE. Yet, instead of Respondent facing consequences for its actions, the biased Order quite evidently goes to great lengths of erring in the Error-Decision to reward Respondent.

If the Board’s precedential orders are thoroughly reviewed for content then *Dating DNA* must outweigh the Error-Decision. If the Director finds that the Order has erred in the Error-Decision, Petitioner respectfully asserts that the Director must reverse the relevant portions of the Order, in finding that Petitioner’s objection in response to Respondent’s improperly served discovery was valid, and that Petitioner is not obligated to respond to Respondent’s any discovery request that was served before Respondent served its initial disclosures; otherwise *Dating DNA* should be reversed since it had decided what is diametrically opposed to the Error-Decision.

C. The Order Abused Discretion In Deciding That Petitioner’s Efforts Lacked Good Faith

Discovery requires cooperation of **both** parties. See *Panda Travel, Inc. v. Resort Option Enterprises, Inc.*, 94 USPQ2d 1789 (TTAB 2009)(“The Board expects parties to cooperate during discovery. **Each party** has a duty to make a good faith effort to satisfy the reasonable and appropriate discovery needs of its adversary.”) Emphasis added. Trademark Rule 2.120(f)(1) requires a motion to compel discovery to “be supported by a showing from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion but the parties were unable to resolve their differences.” See, e.g., *Hot Tamale Mama...and More, LLC v. SF Invs., Inc.*, 110

USPQ2d 1080, 1081 (TTAB 2014); *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP)§ 523.02 (2021).

A party may move the Board to compel discovery from “a defiant adversary who simply refused to engage in discovery or to provide applicant with any answer regarding the failure to serve discovery responses.” *See Hot Tamale*. A party which fails to respond to interrogatories or document requests during the time allowed therefore, and which is unable to show that its failure was the result of excusable neglect, may be found, upon motion to compel filed by the propounding party, to have forfeited its right to object to the discovery request on its merits. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1554 (TTAB 2000).

Abuse Of The Board’s Discretion:

All evidences and allegations of Petitioner’s first **two rounds of efforts** to secure his discovery, and repeated defiance of Respondent in ignoring and refusing to cooperate in discovery were presented with the Motion and also prior to it; see 51 TTABVUE 3-5 and 25-30. The Order had also noted Petitioner’s Status Report which clearly lists Petitioner’s **third round of** efforts in repeatedly requesting Respondent to discuss discovery or limiting the scope of trial or ACR (see 61 TTABVUE 9) which were ignored by Respondent, who instead went on to file motions to stall the proceeding.

And yet, the Order grossly trivializes Petitioner’s rounds of sincere efforts to secure his discovery, in finding “that Petitioner has not satisfied its obligation under Trademark Rule 2.120(e) to make a good faith effort to resolve the discovery dispute”² in refusing to consider the Motion. Not only the above, the Order showers Respondent’s clearly evident refusals to cooperate with false praise in a categorically false representation of Respondent’s March 31, 2021 reply (the “Mar31-Reply”), and *sua sponte* decides on an unrelated matter to award substantial and improper reliefs to

² Petitioner notes that Trademark Rule 2.120(f) relates to good faith efforts.

Respondent. In fact, the Order also ignores Petitioner's efforts to settle this case (61 TTABVUE 14), and turns a blind eye to Respondent's several frivolous motions to keep stalling discovery; see 33 TTABVUE, 54 TTABVUE, 59 TTABVUE, and 62 TTABVUE (collectively, "Respondent's Stalling Motions.") Respondent has yet to make **first** attempt at securing its own discovery after it served initial disclosures.

Initially, the Order entirely ignores the **first round** of Petitioner's discovery efforts (34 TTABVUE 1-2 and 93-99, 44 TTABVUE 1-2, and 51 TTABVUE 3), which were made prior to the Feb10-Order; the Order does not explain why Petitioner's first round of discovery efforts do not count towards Petitioner's good faith efforts in securing his discovery prior to seeking the Board's intervention, even though the Motion is Petitioner's first motion to compel; the Board has not previously considered any motion by Petitioner related to his discovery.. The Order also ignores that even though the Feb10-Order had ordered that "Respondent should have provided **responsive**, non-trade secret/commercially sensitive information, leaving responsive trade secret/commercially sensitive information for supplementation, if necessary" and that "Respondent is allowed until thirty days from the date of this order to serve responses to Petitioner's discovery requests" (emphasis added), Respondent has conclusively **refused** to do any of that; 51 TTABVUE 139.

In relation to Petitioner's **second round** of discovery efforts, the Order first trivializes and ignores **ten days** of several efforts by Petitioner using emails, USPS mail, and phone call, to get a response from Respondent, who deliberately ignored all of them to cause anxiety for *Pro Se* Petitioner. The Order then misrepresents Respondent's Mar31-Reply in stating "Respondent sent a reply email on March 31, 2021, apologizing for the slow response, but providing detailed responses for each point." Respondent's statement of a third person "regret" is not an apology to Petitioner, it only shows Respondent's indifference; see 51 TTABVUE 139. Petitioner requests the Director to note that Respondent's attorneys' schedules were allegedly too "full" for ten days to acknowledge

any of Petitioner's numerous communications even though all of Petitioner's emails were also sent to their address which was "monitored every business day" (see 33 TTABVUE 25), and yet they were lightning fast upon issuance of the Order in sending an unsolicited email the very next morning to Petitioner to take a victory lap; see Exhibit B.

More importantly, the Order stating that Respondent's Mar31-Reply "provid[ed] detailed responses for each point" is **categorically false**. Respondent's Mar31-Reply entirely skips past all of list-items **6a-q, 7a-v, and 8a-f** in Petitioner's Mar21-Requests, which span over the last **five** out of **six-pages** and form the crux of Petitioner's requests for Respondent to cure significant deficiencies in its discovery responses; see 51 TTABVUE 131-136. The Mar31-Reply does not at all address the said list-items, and instead contains a few seemingly random copy/paste of Respondent's indifferent and final position that "all responses were provided"; 51 TTABVUE 139-140. Given the above, a person of common prudence or a competent court would not describe Respondent's Mar31-Reply as "detailed", when in fact it was quite evidently the opposite. Further, even though Petitioner had provided extra time and offered various methods to communicate, Respondent's conclusive statements and final refusals to cure **any** deficiency in its responses in the Mar31-Reply quite evidently shows Respondent's absolute lack of interest in cooperating with Petitioner's discovery.

While the Order showers Respondent's Mar31-Reply with false praise, on the other hand it wordsmiths a misrepresentation of several rounds of Petitioner's good faith efforts into a short, insignificant, insincere, and insufficient effort prior to seeking the Board's intervention. In doing so, the Order also ignores that even though Petitioner had provided until March 26, 2021 at first for Respondent to respond, which was already ten days past the Board's deadline, Petitioner had also extended the time further to **March 29, 2021** (see 51 TTABVUE 142), and in fact Petitioner was quite evidently still attempting to get a response from Respondent using emails, mail, and call until **March 31, 2021**; see 51 TTABVUE 27-28. Importantly, Respondent actually had almost three

months until **June 27, 2021** to cooperate because until then Petitioner had not taken any action related to his discovery, or in fact Respondent even had over eight months to cooperate until **December 3, 2021** when the Motion was filed. In fact, Respondent is still not relieved from its duty to cooperate. Discovery requires cooperation of **both** parties. *See Panda Travel.*

The Order misrepresents Petitioner in stating out of context that “[t]hese exchanges must be viewed against the background of Petitioner’s insistence that issues must be discussed between the parties via email rather than telephone, and providing very limited times consisting of only two very short windows within less than 48 hours, when Petitioner would make himself available to meet and confer.” The Order entirely ignores the actual context of Petitioner’s request for Respondent to communicate through emails instead of phone calls; see 51 TTABVUE 141; and it also ignores that Petitioner did not actually take any action related to his discovery until almost three months later on June 27, 2021, so Respondent actually had a few months of time to cooperate but Respondent didn’t.

The Order further states “[n]or did Petitioner provide the name and contact information for its outside counsel to receive discovery responses identified as “Confidential – Attorney’s Eyes Only” (AEO) until the filing and service of its reply brief to the motion to compel, despite clear instructions by the Board’s order of February 10, 2021.” However, the Feb10-Order had stated “[**if** an attorney appears on behalf of Petitioner herein, Respondent will be expected to supplement its discovery responses to produce documents designated as “Confidential - Attorneys’ Eyes Only” (emphasis added), which *Pro Se* Petitioner reasonably understood to be up to Petitioner’s own discretion to hire an outside counsel; in any case, Petitioner very promptly provided the name and contact of his outside counsel to Respondent within a day of securing such services. Further, this cannot be a reason to ignore Petitioner’s all discovery attempts and deny to consider his Motion which covers discovery material that is **not** AEO-designated.

Most importantly, the Order also ignores the nature of both parties' discovery related communication exchanges; Petitioner's Mar21-Requests email spanned over six-pages and it was quite specific, whereas Respondent's Mar31-Reply was a little over one page and peppered with same copy/paste text. In fact, the following sums up the nature of Respondent's Mar31-Reply which conclusively: 1) **refused** to supplement any responses in stating that "we will not supplement these responses"; 2) **refused** to cure Respondent's over-designation of "Confidential" on the entirety of Respondent's responses; 3) **ignored** the entirety of Petitioner's detailed requests for Respondent to cure its responses to Petitioner's requests for admissions while conclusively stating "we have provided the necessary responses as allowed"; 4) **ignored** the majority of Petitioner's detailed requests for Respondent to cure significant deficiencies in its production responses; and, 4) **indifferently** and **randomly** asserted Respondent's position that "documents ... have been provided" or "have provided the necessary responses as allowed", which were not responsive to Petitioner's requests. For instance, Respondent produced a promotional brochure named "Autoware_II_low" which does not at all contain any mark or term "BATCHTEST" (51 TTABVUE 91), as response to Petitioner's production requests nos. 15, 16, and 20, even though all of the said requests pertain to Respondent's alleged use of the "BATCHTEST" mark; see 51 TTABVUE 74. Quite evidently, Petitioner was facing a defiant adversary who repeatedly **refused** to provide **responsive** discovery responses despite Petitioner's numerous efforts, which left Petitioner with no other choice than to seek the Board's intervention. A party may move the Board to compel discovery from "a defiant adversary who simply refused to engage in discovery or to provide applicant with any answer regarding the failure to serve discovery responses." *See Hot Tamale*.

The Order also entirely ignores that Respondent was obligated to cooperate and equally participate in Petitioner's efforts to secure discovery. *See Amazon Technologies, Inc. v. Jeffrey S. Wax*, 95 USPQ2d 1865 (TTAB 2010)("When applicant tried to address the objections specifically,

opposer “merely restated Opposer’s position,” but again failed to mention ... This was improper. *See, e.g., Sentrol, Inc. v. Sentex Systems, Inc.*, 231 USPQ 666, 667 (TTAB 1986) (addressing parties’ duties during meet and confer process).”) Also, in order for the meet and confer process to be meaningful and serve its intended purpose, “the **parties** must present to **each other** the merits of their respective positions **with the same candor, specificity, and support** during informal negotiations as during the briefing of discovery motions.” *Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 120 (D. Nev. 1993); emphasis added. “Each party has a duty to make a good faith effort to satisfy the reasonable and appropriate discovery needs of its adversary”; *see Panda Travel*.

And yet, instead of cooperating with Petitioner’s discovery efforts, the docket history of this proceeding clearly shows that Respondent’s interest remained focused on filing some of Respondent’s Stalling Motions in this almost four-years-old proceeding; see 54 TTABVUE, 59 TTABVUE, and 62 TTABVUE.

Despite noting Petitioner’s Status Report (68 TTABUE 1), the Order falsely states that “there is no evidence or allegation of any further attempts beyond the initial one in March to discuss, resolve or narrow the disputed discovery issues.” Petitioner’s Status Report clearly stated his **third round** of discovery efforts, that he attempted to discuss discovery, the scope of trial, and ACR with Respondent on April 12, 2022 and on April 19, 2022 but Respondent did not respond to it at all, and instead used Petitioner’s confidential settlement information to gain advantage in preemptively filing a highly unusual motion to substitute adversary; see ¶ 18 above in the Statement of Relevant Facts.

Importantly, Petitioner’s above referenced several rounds of discovery efforts were presented to the Board prior to issuance of the Order, and also presented were clear evidences of Respondent’s continued non-cooperation. And yet the interlocutory attorney has turned the Order into a Board-sanctioned harassment of *Pro Se* Petitioner, because not only the Order refused to consider the Motion on its merits, it once again deliberately subjects Petitioner to baboonery of Respondent’s

harassments and refusals to provide responsive discovery responses in ordering “Respondent should update and amend its discovery responses **to conform with its March 31, 2021** email and **its response to the motion to compel discovery.**” Since the first item on the Mar31-Reply states:

“1. Our responses are properly designed “**Confidential**” since the responses are confidential between the parties and should be shielded “from public access.” **Accordingly, we will not supplement these responses removing such designation.**”

the Order has now authorized Respondent to entirely repeat the gamesmanship of entirely designating its responses as “confidential”, despite knowing that Respondent has filed almost the entirety of its responses to interrogatories and production requests in its own public filing; see 66 TTABVUE. Also, since the Mar31-Reply entirely ignored the crux of Petitioner’s Mar21-Requests to cure deficiencies, the Order has now officially authorized Respondent to once again ignore practically the entirety of Petitioner’s discovery requests in its future responses.

Apparently “[t]he Board expects parties (and their attorneys or other authorized representatives) to cooperate with one another in the discovery process, and **looks with extreme disfavor on those who do not**”; emphasis added; TBMP § 408.01; yet, so far it remains a mystery if Respondent will ever escape the interlocutory attorney’s praises to actually face any consequence for any of its bad behaviors in the past more than two years since discovery opened, and if *Pro Se* Petitioner will get impartial evaluation based on the merits of his case. For instance, the Order pointlessly states that “the Board is troubled by Respondent’s characterization of the facts in this proceeding” in reference to Respondent not responding at all to the portion of Petitioner’s Motion which pertains to test of sufficiency of Respondent’s responses to requests for admissions, and yet in the very next paragraph it orders “[i]n view of the foregoing, Petitioner’s motion to compel is denied”; see 68 TTABVUE 7.

The Order Holds Petitioner To A Significantly Higher Standard Than Respondent:

Petitioner had found the Feb10-Order by honorable Mr. Baxley as impartial and just. Even though the Feb10-Order had noted that Respondent had not made a good faith effort prior to seeking

the Board's intervention, and that Respondent had not attached a redlined copy of its proposed amendments which was required with its motion, the Feb10-Order still showed generosity in considering Respondent's motion "in the interest of moving this proceeding forward." See 37 TTABVUE 3. Whereas here, the Order not only **refused** to consider the Motion despite an overwhelming amount of presented efforts by Petitioner and absolute noncooperation of clearly defiant Respondent, but also issued the Error-Decision to unjustly reward Respondent, while resetting discovery timeline which serves no other purpose than to unnecessarily prolong this proceeding, especially given that Respondent has not made any attempt to properly secure its discovery in the past more than two years since discovery opened. The above shows that Petitioner is held to a significantly higher standard than Respondent, which is clearly biased and an abuse of the Board's discretion by the currently assigned interlocutory attorney.

Petitioner respectfully requests the Director to collectively and impartially evaluate all of the above facts in their proper context and against Respondent's behavior, to determine that Petitioner made several good faith discovery efforts and only sought the Board's intervention after Respondent twice conclusively refused to cooperate and provide any supplemental discovery responses. And for the reasons as recited above, Petitioner respectfully requests that the Director reverse the Order's decision of refusing to consider the Motion, and that the Motion be considered.

A Pattern Of Bias Against Petitioner:

Petitioner also requests the Director to note a pattern of bias against Petitioner in the Board's previous orders:

1. Upon determining that Respondent "filed four motions/stipulations for further suspension/enlargement of time" in several "piecemeal filings", the Board's order dated January 5, 2022 then immediately turned against Petitioner in warning that "the **parties** are straining the Board's patience and resources"; 58 TTABVUE 1; emphasis added. In fact, the said order then went as far as

threatening Petitioner that “the Board may issue an order to show cause why this proceeding should not be dismissed for lack of interest” (58 TTABVUE 3) despite the fact that Petitioner was attempting to settle this case at that time; 58 TTABVUE 1. “One generally only seeks settlement of a case in which one has an interest”; *see Luster Prods* which was cited by the Order. On the other hand, the said order does not at all warn Respondent of a default judgment even though it was Respondent who had made “piecemeal” filings that irked the Board. The clear bias evidenced by the Board’s January 5, 2022 order caused a significant amount of distress for *Pro Se* Petitioner, who then desperately attempted to resolve this case due to the Board’s said threat of case dismissal, which clearly targeted Petitioner even if Respondent were to ignore the said order.

2. Even though Petitioner had presented his sworn statement in support of a Fictitious Business Name filing record to show “BatchTest Corporation” as his trade name which predated Respondent’s trademark application date for its “BATCHTEST” trademark registration or any date Respondent could assert as its date of first use of the BATCHTEST mark, the Board’s order dated November 19, 2021 (the “Nov19-Order”) entirely ignored the common law priority of Petitioner’s trade name while deciding that genuine issue of priority existed, based solely on Respondent’s attorney’s bald assertions; 50 TTABVUE 10. Despite having a clear evidence of Petitioner’s priority of use of BATCHTEST as his trade name in form of a Fictitious Business Name Statement that was filed with the county clerk-recorder of Santa Clara County in California (39 TTABVUE 68), which was accompanied by Petitioner’s sworn statement (39 TTABVUE ¶ 11), the Board deliberately ignored it instead of issuing a partial summary judgment on priority to limit the scope of the trial and for judicial economy. The Board also ignored presented evidences of Petitioner’s BATCHTEST.COM website that has continuously advertised goods identical to that of Respondent’s software since before Respondent’s first use date of November 21, 2012 of the BATCHTEST mark; 39 TTABVUE ¶ 10. Even though one of the goods in Petitioner’s trademark application no. 88723304 is recited as:

“computer hardware and downloadable and recorded software for automation of tests and processes, enabling a user to author, edit, secure, locally manage, remotely manage, execute, evaluate, verify, monitor, collect data, store data, report, react to, one or more sequences of commands and queries in order to automate tests and processes, and user's manuals and instructional manuals sold as a unit therewith”; 51 TTABVUE 178;

which Petitioner had clearly pointed out in his motion for summary judgment (38 TTABVUE 21), and even though Petitioner presented numerous photographs, invoices, and sworn statements which clearly showed Petitioner's use of the BATCHTEST trademark on the above recited goods, the Nov19-Order used Petitioner's entirely different “software for creating Human-Machine-Interface, graphics, and industrial automation animations, and downloadable website plugin to facilitate automated data and content management updates and website publishing from its SKYNET automation platform” for goods comparison (*see* 50 TTABVUE 10) in issuing its three-paragraph decision that:

“Petitioner has not made clear which mark or what goods and services it uses the unspecified mark with, nor has it clearly established a priority date for use of its unspecified mark with goods and services that are related to Respondent's goods.”

Similar to the Nov19-Order, the latest interlocutory Order uses the same tactic of ignoring the crux of Petitioner's Motion, and instead goes on to make several misrepresentations and false accusations against Petitioner, to justify refusing to consider the Motion.

The Order and the above instances of past orders show a pattern of bias against Petitioner in abuse of the Board's power and discretion; nothing else explains the currently assigned interlocutory attorney frequently turning a blind eye to Respondent's bad behaviors, issuing an interlocutory order compelling Petitioner to respond to improperly sought discovery that is unrelated to the Motion, rewarding Respondent with unsought and improper discovery reliefs, holding *Pro Se* Petitioner to a significantly higher standard than Respondent, and refusing to recognize that Petitioner has so far made several rounds of discovery efforts and that he only sought the Board's intervention after Respondent's conclusory refusals to cure any deficiency in its discovery responses.

The interlocutory attorney's bias against Petitioner has turned this proceeding into an uphill battle for *Pro Se* Mr. Patel, not only against a defiant adversary who continually ignores Petitioner's communications and refuses to cooperate, but also against the interlocutory Attorney's unrelenting bias and pressure in this almost four-years long proceeding. For all of the reasons above, Petitioner respectfully requests the Director to assign a new interlocutory attorney going forward in this proceeding who is as impartial as honorable Mr. Andrew Baxley who had issued the Feb10-Order.

IV. CONCLUSION

The November 1, 2022 interlocutory order illustrates the Board's failure to properly apply the guidance of the Board's precedential order in *Dating DNA* regarding the mandatory Trademark Rule 2.120(a)(3), which must be REVERSED. Further, an impartial review of Petitioner's discovery efforts to secure his discovery against a defiant Respondent's noncooperation will show that the Petitioner made numerous good faith efforts prior to seeking the Board's interventions, and that Board's refusal to consider Petitioner's Motion to Compel is biased, unsupportable, holds *Pro Se* Petitioner to a significantly elevated standard than Respondent or others in a similar situation, and constitutes an abuse of discretion that must be REVERSED.

Respectfully submitted,

Dated: November 30, 2022

/Dinesh Patel/

Dinesh Patel

2118 Walsh Ave, Suite 240

Santa Clara, CA 95050

Exhibit A

Dinesh Patel

From: Dinesh Patel <btcroot@gmail.com>
Sent: Tuesday, April 19, 2022 8:48 AM
To: 'Thomas J. Moore'
Cc: 'BatchTest Corp Trademark Admin'
Subject: RE: BatchTest v. Ikonix; U.S. Cancellation No. 92070823; Our Ref: ICWA7001/TJM

Hello Mr. Moore:

I am emailing again since it's been more than a week since I sent you my settlement offer and I still have not heard back from you regarding your client's decision on it. Please let me know either way by tomorrow, I need a couple of days to accordingly prepare for the case. As I had also offered, I remain open to discussing/stipulating matters to reduce the scope of the trial, or if your client has changed its mind about ACR, in the event we have no settlement agreement.

I look forward to hearing back from you.

Sincerely,

Dinesh Patel
2118 Walsh Ave, Suite 240
Santa Clara, CA 95050
Phone: 408-454-8378
Email: btcroot@gmail.com

Exhibit B

Dinesh Patel

From: Thomas J. Moore <TJMoore@baconthomas.com>
Sent: Wednesday, November 2, 2022 12:28 PM
To: batchtest_tm@batchtest.com
Cc: Dinesh Patel; Jonathan C. Miller
Subject: Dinesh Patel and BatchTest Corporation v. Ikonix USA, LLC - Cancellation No. 92070823
- B&T Ref: ICWA7001/TJM

Dinesh Patel
BatchTest Corporation
Formerly known as ICware Systems, Inc.
2118 Walsh Ave, Suite 150
Santa Clara, CA 95050

Re: Dinesh Patel and BatchTest Corporation v. Ikonix USA, LLC
U.S. Cancellation No. 92070823 to Reg. No. 4499170 (BatchTEST)
Our Ref: ICWA7001/TJM

Dear Mr. Patel:

I assume that you received the order dated November 1, 2022, from the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, which was emailed late yesterday.

Later today, I expect to email my client about a meeting to discuss the order, and the case going forward. You should expect to hear from me by November 9, 2022.

Regards,

Thomas J. Moore, Attorney
Bar of the Commonwealth of Virginia
Bacon & Thomas, PLLC
201 N. Union St., Suite 320
Alexandria, VA 22314-2650
Phone: 703-683-0500 x137
Fax: 703-683-1080

NOTICE: Please cc mail@baconthomas.com on any emails that require docketing or immediate attention because that mailbox is monitored every business day and I may be unable to access email every business day. If you believe that you received this e-mail in error, then please advise me by reply e-mail; thank you.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document "PETITION TO THE DIRECTOR" was served upon the attorney for the other party by email on November 30, 2022 at the following email address(es):

BARRY HORWITZ
Greenberg Traurig, LLP
77 W. Wacker Drive, Suite 3100
Chicago, IL 60601
UNITED STATES
Email(s): chiipmail@gtlaw.com, horwitzb@gtlaw.com, matthewsk@gtlaw.com
Phone: 312-456-8400

By:

Signature: /Dinesh Patel/

Name: Dinesh Patel

Date: November 30, 2022

Email: btcroot@gmail.com

CC: BatchTest_TM@BatchTest.com