

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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July 11, 2023

Cancellation No. 92078349

*Judith Gurley Plastic Surgery, LLC*

*v.*

*David J. Witchell Salon & Spa, Inc.*

**Katie Bukrinsky, Interlocutory Attorney:**

This proceeding comes before the Board on Respondent's renewed motion, filed April 14, 2023, to compel supplemental discovery responses to its First Requests for Production (RFP) and First Set of Interrogatories (ROG), and test sufficiency of Petitioner's responses to First Request for Admissions (RFA). 16 TTABVUE.<sup>1</sup> Petitioner has filed a response. 18 TTABVUE.

The Board has considered the parties' briefs and materials submitted therewith, addresses the record only to the extent necessary to set forth the Board's analysis and

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<sup>1</sup> Citations to the cancellation record refer to TTABVUE, the Board's online docketing system. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding "TTABVUE" corresponds to the docket entry number, and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear. **The parties' submissions, including trial briefs, motions, responses, and replies, should utilize citations to the TTABVUE record created throughout the proceeding and during trial to facilitate the Board's review of the evidence throughout the proceeding and at final hearing.** See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.03 (2023).

findings, and does not repeat or address all of the parties' arguments or materials. *Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015). For purposes of this order, the Board presumes the parties' familiarity with the pleadings, and the arguments and materials submitted in connection with the subject motion.

Initially, the Board finds that Respondent's motion to compel and test sufficiency is timely inasmuch as it was filed prior to the day of the deadline for Petitioner's pretrial disclosures. *See* Trademark Rule 2.120(f)(1); 15 TTABVUE 7. In addition, the Board finds that Respondent has made a good faith effort, through conference and correspondence, to resolve the parties' dispute. *See* 16 TTABVUE 5-7. In view of Respondent's unrefuted representation that Petitioner has refused to produce further information, the Board finds that the parties have reached an impasse requiring the Board's intervention. *See also* 18 TTABVUE 5 (Petitioner's response asserting that its production is sufficient).

## **I. Motion to Compel**

### **A. Objections**

In its amended responses, Petitioner has asserted objections based on relevance, proportionality, burden, and confidentiality with respect to RFP Nos. 8, 10, 11, 12, 13, 16, 17, 20, 21, 22, 31, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 50, 53, and 54, and ROG Nos. 19, 20, 21, 22, 23, 28, 31, 38, 39, and 50, and based on these objections has refused to provide substantive responses. *See* 16 TTABVUE 180-203. Respondent's blanket objections to these discovery requests are nearly identical, and provide no explanation as to their factual basis. As such, they are insufficient. *See Hewlett Packard Enter. Dev. LP v. Arroware Indus., Inc.*, 2019 USPQ2d 158663, at \*4 (TTAB

2019) (responding party may not rely on conclusory statements when objecting but must specifically state the underlying basis for the objection); *Amazon Techs., Inc. v. Wax*, 93 USPQ2d 1702, 1704 (TTAB 2009) (objections to interrogatories must be made with particularity). *Compare Frito-Lay North Am. Inc. v. Princeton Vanguard LLC*, 100 USPQ2d 1904, 1910, (TTAB 2011) (undue burden and expense demonstrated where opposer showed that fully responding to the requests would cost it an additional \$70,000-\$100,000). *See also* TBMP §§ 405.04(b), 406.04(c) (objections must be made with specificity).<sup>2</sup>

Further, inasmuch as the Board's Standard Protective Order (SPO) is automatically imposed on this proceeding by Trademark Rule 2.116(g), Petitioner may not object on the basis of confidentiality. 37 C.F.R. § 2.116(g); *see also* TBMP § 412.01(a). To the extent a full response to any discovery request requires the disclosure of sensitive information or trade secrets, Petitioner may designate such information as "Confidential" or "Attorney's Eyes Only" under the SPO. *See* TBMP § 412.01(a).

For the foregoing reasons, Petitioner's relevance, proportionality, burden, and confidentiality objections are **overruled**.

Further, Petitioner's privilege objections (*see, e.g.*, RFP Nos. 31, 33, 34, 37-41, 44, 50, 53, and 54; ROG No. 22) are insufficient. Fed. R. Civ. P. 26(b)(5) requires a party

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<sup>2</sup> Petitioner explains the basis of its relevance objections, though not of its other objections, in its response to Respondent's motion. *See* 18 TTABVUE 6-11. The explanation should have been included with its objections. Nonetheless, the Board addresses the relevancy of Respondent's requests *infra*.

withholding responsive documents on the basis of a claim of privilege to “(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” It is not clear from Petitioner’s objections whether it is withholding responsive information on the basis of a specific privilege. *See, e.g.*, 16 TTABVUE 190-203. Accordingly, Petitioner’s privilege objections are **overruled except to the extent that** Petitioner produces a privilege log providing the information required by Fed. R. Civ. P. 26(b)(5).<sup>3</sup>

Although the Board has overruled Petitioner’s boilerplate objections, in view of Petitioner’s arguments in its response to the motion, the Board exercises its discretion to review those of Respondent’s discovery requests to which Petitioner objected to determine if the requested information is relevant and generally discoverable.

The scope of discovery is generally governed by the allegations in the pleadings. *See* Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”); *Phillies v. Phila. Consol. Holding Corp.*, 107 USP2d 2149, 2153 (TTAB 2013). *See also* TBMP § 402.01. This proceeding concerns a likelihood of confusion claim by Petitioner, who is asserting prior common law rights in the alleged mark “NO ONE WILL KNOW...EVERYONE WILL NOTICE.” *See* 1 TTABVUE. In the absence of a pleaded registration, priority in a mark may be established through

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<sup>3</sup> The privilege will be preserved only as to those documents identified on the privilege log.

prior common law use. *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1023 (TTAB 2009). *See also DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*3 (TTAB 2020). The asserted mark **must function as a trademark**, *DeVivo*, 2020 USPQ2d 10153, at \*7-8, and Petitioner must own proprietary rights therein. *Id.* at \*3 (citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43-45 (CCPA 1981)).

In its answer, Respondent denies Petitioner's assertion of priority and denies that Petitioner owns a protectable mark, including because Petitioner "failed to use the mark continuously and exclusively in U.S. Commerce" and "because Petitioner's failure to enforce its alleged common law rights has resulted in widespread use of the mark for services identical or similar to Petitioner's, causing the alleged mark to lose all trademark significance in connection with Petitioner's services, if it had any significance at all." 9 TTABVUE 3, 8.<sup>4</sup> Respondent alleges that third parties have used marks and phrases similar to Petitioner's pleaded mark, including the phrase "NO ONE WILL NOTICE. EVERYONE WILL KNOW" and variations thereof, in connection with medical, cosmetic, and plastic surgery services at the same time or before Petitioner's alleged first use in 2007. *Id.* at 11. In addition, Respondent asserts the affirmative defenses of abandonment by conduct, and that Petitioner committed fraud in connection with submitting its application for its pleaded mark. *Id.* at 13-15.

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<sup>4</sup> Petitioner's assertion (at 18 TTABVUE 3) that priority is established based on Respondent's admissions in its answer is incorrect. Respondent admits only that "Petitioner has **alleged** a first use of Petitioner's purported 'mark' that precedes the listed first use date" in Respondent's registration. 9 TTABVUE 8 ¶ 10 (emphasis added). Respondent denies that Petitioner has proved priority. *Id.* Accordingly, priority is disputed in this proceeding.

**B. Requests for Production of Documents (RFP)**

Respondent requests supplementation of Petitioner's responses to RFP Nos. 1-8, 10-17, 19-22, 26, 30, 31, 33-42, 44-45, 50-51, and 53-54. 16 TTABVUE 21.

A proper response to an RFP requires clearly and affirmatively stating: (1) that responsive documents exist and either will be produced at a specified time, or will be withheld on the basis of a specific objection or claim of privilege, or (2) that no responsive documents exist. *See* Fed. R. Civ. P. 34(b)(2); *Hewlett Packard*, 2019 USPQ2d 158663, at \*10; *see also* TBMP § 406.04(c).

**1. RFP Nos. 1-7, 14, 15, 26, 35, 36, and 51**

Respondent's motion is **granted**. Inasmuch as Petitioner does not clearly and affirmatively state that it has conducted a reasonable search and has previously produced all responsive documents or will do so by a specific date, the amended responses are insufficient. *Hewlett Packard*, 2019 USPQ2d 158663, at \*10.

The Board notes with respect to those responses that incorporate by reference the response to another RFP (i.e. RFP Nos. 5, 6, 15, 26, 35, and 36), that Petitioner is not required to produce the same document more than once, and is not required to correspond its production to the RFP. *See* Fed. R. Civ. P. 34(b)(2)(E) (party need not produce same information in more than one form, and may produce its documents "as they are kept in the usual course of business."). Accordingly, if Petitioner confirms in response to each of these RFP that it has conducted a reasonable search and already produced all responsive documents within its possession, custody, or control, its obligation will be satisfied.

**2. RFP Nos. 19, 30**

Motion **denied**. Petitioner's amended responses are construed as asserting that Petitioner has no responsive documents in its possession, custody, or control.<sup>5</sup>

**3. RFP Nos. 21, 31, 33, 34, 37, 38, 39, 40**

Motion **granted**. These RFP seek documents concerning Petitioner's knowledge of either Respondent's use of its mark, or the use by third parties of marks allegedly similar to Petitioner's mark. These requests are calculated to lead to the discovery of admissible evidence concerning Petitioner's ownership and priority of its asserted mark, and/or likelihood of confusion with Respondent's mark, including consumer perception of the parties' marks and goods. *See* TBMP § 414(9) and note 16 thereto.

**4. RFP Nos. 10-12**

Motion **denied** because it seeks documents identifying **all** of Petitioner's customers and providers. *See, e.g.*, TBMP § 414(3) and authorities cited therein (generally, the names of customers are not discoverable; however, the name of a party's first customer or, where abandonment has been alleged, the names of a limited number of customers for the period of time, may be permissible).

**5. RFP Nos. 16, 17, 20, 22, 50**

Motion **granted**. These RFP concern Petitioner's own use of its mark or communications with persons who use a similar mark. Accordingly, they are relevant to the claims and defenses in this proceeding. *See, e.g., Double J of Broward Inc. v.*

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<sup>5</sup> Nonetheless, Petitioner is reminded of its continual duty to supplement its responses. *See* Fed. R. Civ. P. 26(e)(1)(A). Failure to provide information in a timely fashion may result in imposition of the Estoppel Sanction, discussed later in this order.

*Skalony Sportswear GmbH*, 21 USPQ2d 1609, 1613 (TTAB 1991); TBMP § 414(5), (6), and (10) and notes thereto.

**6. RFP Nos. 8, 13, 41, 42, 44, 45, 53, 54**

Motion **denied**. The Board finds that the RFP as written are overly broad and seek information beyond what is necessary to this proceeding, given the issues and marks in dispute and the Board's jurisdiction. *See* Fed. R. Civ. P. 26(b); TBMP § 102.01 (Board has jurisdiction only to determine registrability).

**C. Interrogatories (ROG)**

Respondent seeks supplementation of Petitioner's responses to ROG Nos. 7, 8, 19-24, 28, 29, 31, 33, 35, 38, 39, 44, 45, and 50. 16 TTABVUE 15-17, 19-23.

**1. ROG No. 7**

Motion **denied**. Petitioner has stated that it has no documents concerning its adoption of its mark, *see* 16 TTABVUE 197 (RFP No. 43). In view thereof, the Board sees no basis to require supplementation of ROG No. 7, which requests the same information.

**2. ROG No. 8**

Respondent's motion is **denied**. The Board finds that Petitioner's response, though it quotes the Examining Attorney's words, fairly addresses the interrogatory.

**3. ROG No. 19**

Motion is **granted, in part**. The identification of the person(s) **primarily** responsible for marketing, advertising, and promotion of Petitioner's goods is relevant. *See J.B. Williams Co. v. Pepsodent GmbH*, 188 USPQ 577, 580 (TTAB 1975);



TBMP § 414(17). In addition, the identification of the person **primarily** responsible for bookkeeping and accounting may be relevant to the nature and extent of Petitioner's sales, which is relevant to both priority and likelihood of confusion. *See* TBMP 414(18) and cases cited therein.

**4. ROG Nos. 20, 21, 23**

Motion **granted, in part**. Number of procedures conducted on an annual basis, as well as annual marketing and advertising expenditures and annual sales revenues, in round numbers, are relevant to likelihood of confusion and must be produced. *See* TBMP § 414(18) and n.26 thereto. Similarly, the identification of media outlets through which goods or services are promoted, as well as the outlets or channels through which goods or services are sold or offered and their geographic location, is relevant. *See, e.g.*, TBMP § 414(16) and (18) and cited authorities. Petitioner must provide the foregoing information, as well as identify the documents which support its response.

**7. ROG No. 22**

Motion **denied**. This ROG is exceedingly broad and ambiguous, providing no indication as to what is requested.

**8. ROG No. 24**

Motion **granted, in part**. Petitioner should describe the "level of care exercised" by an ordinary purchaser of its services, **if such information is in its possession, custody, or control**. If Petitioner is not in possession of such information, it should serve a supplemental response stating so.

**9. ROG No. 28**

Motion **denied**. This interrogatory does not ask about Petitioner's knowledge, but rather the identity of third parties using **Respondent's** mark. A party need not investigate third-party use to respond to discovery requests. *Sheetz of Delaware, Inc. v. Doctor's Assocs. Inc.*, 108 USPQ2d 1341, 1348 (TTAB 2013).

**10. ROG No. 29**

Motion **denied**. The Board finds Petitioner's response sufficient.

**11. ROG No. 31**

Motion denied. This ROG is ambiguous as to what information is requested, and Respondent's brief does not clarify the meaning. Further, the record contains no evidence that Respondent clarified the meaning of this ROG to Petitioner.

**12. ROG No. 33, 35**

Motion **granted, in part**. Inasmuch as the Board has ordered Petitioner to supplement its response to RFP Nos. 3-5, Petitioner must also supplement its response to this ROG to address any newly identified responsive information. If following its search Petitioner does not identify any information other than that previously provided in its amended responses to these ROGs, it should serve supplemental responses stating so.

**13. ROG Nos. 38, 39, 50**

Motion **denied**. The Board is not persuaded that the requested information is relevant or proportional to this proceeding.

**14. ROG No. 44**

Motion **granted**. Petitioner does not dispute that it made the contention premised in the ROG in its response to an Office Action. *See also* Application Serial No. 88304473, May 20, 2021 Resp. to Office Action at 2. In view thereof, Petitioner must serve a supplemental response fairly responding to the ROG, or stating that it has no legal or factual basis for its contention.

**15. ROG No. 45**

Motion **denied**. The Board finds that Petitioner's response fairly addresses the ROG.

**II. Sufficiency of Responses to Requests for Admission (RFA)**

Respondent seeks to test the sufficiency of Petitioner's responses to RFA Nos. 6-12, 19, 20, 23-26, 28, 30, 31, and 36-40. 16 TTABVUE 23. A motion to test the sufficiency of a response to an admission request is solely a test of the **legal** sufficiency of that response. *See* Fed. R. Civ P. 36(a); *Hewlett Packard*, 2019 USPQ2d 158663, at \*6; *see also* TBMP § 524 and authorities cited therein. Disagreements regarding the veracity of such responses are matters to be determined at trial and are not properly the subject of a motion to test their sufficiency. *Hewlett Packard*, 2019 USPQ2d at \*6 ("The Board does not determine the accuracy, or factual support, of an admission or a denial of a request for admission.").

**A. RFA Nos. 6-9, 19, 20, 23-26, 28, 36-40**

Motion **granted**. In each of these RFA, Respondent asks about Petitioner's knowledge of third-party use of "EVERYONE WILL NOTICE. NO ONE WILL

KNOW” in connection with various services. *See* 16 TTABVUE 143-50. Respondent defines the term as follows:

The term “EVERYONE WILL NOTICE. NO ONE WILL KNOW.” is without regard to punctuation, and includes “EVERYONE WILL NOTICE, BUT NO ONE WILL KNOW”, “EVERYONE WILL NOTICE, NO ONE WILL KNOW”, “EVERYONE WILL NOTICE. NO ONE WILL KNOW.”, and the terms “EVERYONE WILL NOTICE” appearing together with “NO ONE WILL KNOW” (with or without another word or words, and/or punctuation).

*Id.* at 30 (RFA definitions).

In its amended responses, Petitioner denies or admits the request with respect to “**Registrant’s Mark.**” *Id.* at 143-150 (emphasis added). Registrant’s Mark is defined as the “designation and/or trademark of Registrant’s US Trademark Registration no. 5845907,” which is EVERYONE WILL NOTICE BUT NO ONE WILL KNOW. *Id.* at 30. Inasmuch as the definition of the phrase “EVERYONE WILL NOTICE. NO ONE WILL KNOW” encompasses variations **other than** Registrant’s Mark, Petitioner’s responses to these RFA are incomplete.

In addition, each of Petitioner’s responses to RFA No. 37-40<sup>6</sup> rephrase Respondent’s request, and answer that (incorrect) request rather than the one Respondent actually posed. *Id.* at 149-50.

For the foregoing reasons, Respondent’s motion is **granted, to the extent that** Petitioner must serve amended responses that specifically admit or deny each of the foregoing RFA **as written.**

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<sup>6</sup> In Petitioner’s responses, two of the RFA are identified as #39. The Board construes the second RFA as #40.

**B. RFA Nos. 10-12, 30, 31**

Motion **granted**. A proper response must admit the RFA, or [i]f a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it.” Fed. R. Civ. P. 36(a)(4). With respect to RFA Nos. 10-12, 30, and 31, Petitioner has not stated that it cannot admit part of the RFA; nor has it objected to the RFA on any cognizable grounds, but has instead asserted the improper objection that the documents “speak for themselves.” 16 TTABVUE 144, 148. *See, e.g., Miller v. Holzmann*, 240 F.R.D. 1, 4 (D.D.C. 2006) (“The tautological ‘objection’ that the finder of fact can read the document for itself . . . is not a legitimate objection but an evasion of the responsibility to either admit or deny a request for admission, unless a legitimate objection can be made or the responding party explains in detail why it can neither admit or deny the request.”). In view thereof, Petitioner’s responses to RFA Nos. 10-12 and 30, which only admit part of the RFA, are insufficient. Petitioner’s response to RFA No. 31 is further insufficient because in responding, Petitioner changed the second part of the RFA, and responded to a different question than that posed by the RFA. Accordingly, Respondent’s motion is **granted, to the extent that** Petitioner must serve amended responses that specifically admit or deny RFA Nos. 10-12, 30, and 31 **as written**.

**II. Summary Order**

Respondent’s motion to compel supplemental responses to the RFP and ROG and to test the sufficiency of responses to the RFA is **GRANTED, in part, to the extent and for the reasons set forth above**. In all other respects, the motion is **DENIED**.

Petitioner is allowed until **THIRTY DAYS** from the date of this order to:

- (1) Serve amended written responses to **RFA Nos. 6-12, 19, 20, 23-26, 28, 30, 31, and 36-40** that admit or deny each RFA **as written**, or state specifically why Petitioner can neither admit or deny each as written.
- (2) Serve supplemental written responses to **ROG Nos. 19, 20, 21, 23, 24, 33, 35, and 44** that fairly provide the information requested in each interrogatory; along with a properly signed verification verifying, under oath, the supplemental interrogatory responses.
- (3) Serve supplemental written responses to **RFP Nos. 1-7, 14-17, 20-22, 26, 31, 33-40, 50, and 51** that comply with Fed. R. Civ. P. 34(b)(2) and the Board's discussion.<sup>7</sup>
  - a. If Petitioner has no non-privileged documents in its possession, custody or control that are responsive to one or more of the above-identified requests, Petitioner must so state affirmatively in its response to the corresponding request.
  - b. If the production of documents responsive to any of the above-identified requests is voluminous in nature, Petitioner may produce a representative sampling of documents responsive to the corresponding request. If Petitioner chooses this option, it must

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<sup>7</sup> To the extent any RFP are duplicative, Petitioner need only produce a single copy of responsive documents, but should confirm in response to each RFP that it has produced all responsive documents.

affirmatively state in its response to the corresponding request that it is providing a representative sampling of documents.<sup>8</sup>

(4) Copy and produce previously unproduced documents in its possession, custody or control that are responsive to **RFP Nos. 1-7, 14-17, 20-22, 26, 31, 33-40, 50, and 51**

(5) If Petitioner withholds any documents on the basis of privilege, produce a privilege log that complies with Fed. R. Civ. P. 26(b)(5).

Petitioner is cautioned that a party that fails to provide information during discovery may, upon motion or objection by its adversary, be precluded from using that information at trial, “unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). *See, e.g., Panda Travel, Inc. v. Resort Option Enters., Inc.*, 94 USPQ2d 1789, 1792–93 (TTAB 2009) (documents not produced until after the start of trial stricken); *see also* TBMP § 527.01(e) (“Estoppel Sanction”) and cases cited therein.

In addition, parties have a duty to supplement discovery responses “in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1)(A).<sup>9</sup>

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<sup>8</sup> A production of “representative” documents must truly be a representative sampling, and not merely a self-serving selection of favorable documents. An evasive or incomplete response is the equivalent of a failure to disclose. *See* Fed. R. Civ. P. 26(g) and 37(a)(3)(B).

<sup>9</sup> More generally, the Board expects the parties (and their attorneys) to cooperate with one another in the discovery process and looks with extreme disfavor on those who do not. TBMP

Should Petitioner not comply with this order, Respondent's remedy may lie in a motion for sanctions pursuant to Trademark Rule 2.120(h)(1).

### III. Remaining Dates Reset

This proceeding **remains suspended for 30 days** to allow time for Petitioner comply with the Board's order. Thereafter, proceedings are **resumed** as set forth below:<sup>10</sup>

<b>Plaintiff's Pretrial Disclosures Due<sup>11</sup></b>	<b>8/25/2023</b>
<b>Plaintiff's 30-day Trial Period Ends</b>	<b>10/9/2023</b>
<b>Defendant's Pretrial Disclosures Due</b>	<b>10/24/2023</b>
<b>Defendant's 30-day Trial Period Ends</b>	<b>12/8/2023</b>
<b>Plaintiff's Rebuttal Disclosures Due</b>	<b>12/23/2023</b>
<b>Plaintiff's 15-day Rebuttal Period Ends</b>	<b>1/22/2024</b>
<b>Plaintiff's Opening Brief Due</b>	<b>3/22/2024</b>
<b>Defendant's Brief Due</b>	<b>4/21/2024</b>
<b>Plaintiff's Reply Brief Due</b>	<b>5/6/2024</b>
<b>Request for Oral Hearing (optional) Due</b>	<b>5/16/2024</b>

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§ 408. Each party and its attorney has a duty to make a good faith effort to satisfy the discovery needs of its adversary. *Id.*

<sup>10</sup> In the introduction to its motion, Respondent requests "re-opening of discovery to the extent necessary." 16 TTABVUE 2. However, Respondent presents no analysis of the factors pertinent to a motion to reopen. *See Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997); *see also* TBMP § 509.01(b). Nor does Respondent affirmatively assert that reopening discovery is indeed necessary, or indicate how it would use the additional time. In addition, Petitioner opposes reopening discovery. 18 TTABVUE 11. Accordingly, the motion to reopen is **denied**.

<sup>11</sup> The Board notes that Petitioner served pretrial disclosures in advance of its deadline. *See* 16 TTABVUE 6. Petitioner may serve amended pretrial disclosures by the deadline as reset, or rely on the pretrial disclosures previously served.



## **IMPORTANT TRIAL AND BRIEFING INSTRUCTIONS**

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, 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). Such briefs should utilize citations to the TTABVue record created during trial, to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. 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).

### **TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS**

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable.

Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.<sup>12</sup> The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

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<sup>12</sup> To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.