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

Proceeding no.	92081595
Party	Plaintiff Mercury One, Inc.
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Date	01/19/2024
Attachments	01.19.24 Notice of Expert Identification.Sowers.Petitioner.vfnl.pdf(254984 bytes )

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

**Cancellation No.: 92081595**

***In the matter of:***

1. Reg. No. 6,008,523; word mark HONEST HISTORY Filed: April 19, 2018, Registration Date: March 10, 2020
2. Reg. No. 6,504,087; word mark HONEST HISTORY Filed: October 22, 2020, Registration Date: September 28, 2021
3. Reg. No. 6,504,088; word mark HONEST HISTORY Filed: October 22, 2020, Registration Date: September 28, 2021

***MERCURY ONE, INC.,  
PETITIONER/PLAINTIFF,  
V.  
HONEST HISTORY CO.,  
RESPONDENT/DEFENDANT.***

**PETITIONER'S NOTICE OF EXPERT DISCLOSURE  
(MR. BRIAN SOWERS) WITH POSSIBLE EXTENSIONS TO  
SCHEDULING ORDER FOR EXPERT DISCOVERY**

By this Notice, Petitioner provides the Trademark Trial and Appeal Board (TTAB) with notice under TBMP 401.03 of its intention to use Mr. Brian Sowers of Applied Marketing Science as a survey expert in this Cancellation proceeding. Additionally, Petitioner provides Notice to the TTAB that Respondent was served on Jan. 18, 2024 with Mr. Sowers Expert Report in compliance with Rule 26(a)(2)(B), including subparts.

Because the TTAB may contemplate suspension of the proceedings and/or extension of the Scheduling Order deadlines upon receiving this Notice, the Parties have exchanged positions of extending the deadlines to the Scheduling Order with only one issue yet to be resolved.

**A. Disclosure of Expert Mr. Brian Sowers**

Pursuant to TBMP 401.03, Petitioner notifies the TTAB that it served Respondent with an expert report for Mr. Brian Sowers of Applied Marketing Science that complies with the required disclosures under Rule 26(a)(2)(B) including subparts. Petitioner's service of Mr. Sower's Expert Report upon Respondent occurred on January 18, 2024 (the date the Expert Report was signed), which is prior to the expert disclosure deadline of January 22, 2024. Under

TBMP 401.03, Petitioner is notifying the TTAB of its intention to use expert testimony from Mr. Brian Sowers in this proceeding.

Respondent has known that Petitioner might be using Mr. Sowers as a survey expert in this proceeding. Petitioner has initially identified Mr. Brian Sowers as their survey expert to Respondent, by name with a list of possible opinion topics, on May 25, 2023 (*Petitioner's Suppl. Initial Discl.*, ¶ D, p. 5, May 25, 2023). One week earlier, Petitioner notified Respondent of its intention to use a survey expert (with topics identified) on May 17, 2023. *Petitioner's Initial Discl.*, ¶ D, p. 4, May 17, 2023. More recently, Petitioner identified Mr. Brian Sowers as its survey expert to Respondent, by name with a list of possible opinion topics, on December 13, 2023. *Petitioner's Second Suppl. Initial Discl.*, ¶ D, p. 4-5, Dec. 13, 2023.

#### **B. Petitioner's Position on Suspension of the Proceeding**

Under 37 C.F.R. § 2.120(a)(2)(iii), “[u]pon disclosure by any party of plans to use expert testimony, whether before or after the deadline for disclosing expert testimony, the Board, either on its own initiative or on notice from either party of the disclosure of expert testimony, may issue an order regarding expert discovery and/or set a deadline for any other party to disclose plans to use a rebuttal expert.” While the TTAB may contemplate suspending the proceedings to allow for expert discovery, Petitioner believes it would not be in the best interest of the parties or the proceeding to suspension of this proceeding.

There are two reasons a suspension of the proceedings would not serve the best interests of the parties or the proceeding, as follows: (1) there has been ample notice of Petitioner's intention to use this expert; and (2) there is an extensive deposition schedule already scheduled between the deponents and counsel for the parties, which would likely be disrupted by a suspension. If this proceeding is suspended, some or all of these scheduled depositions will need to be reset, which would require a tremendous amount of time and effort to “re-do” what has already been established as convenient for multiple individuals.

As shown above, Petitioner has provided several notices to Respondents of its intention to use a survey expert, and provided Mr. Sowers identification, by name, with possible opinion topics to Respondent on several occasions since May 17, 2023. Accordingly, there should be no reasonable surprise in the present disclosure of Petitioner's intention to use Mr. Sowers as its survey expert testimony. As set forth in TBMP 401.03,

If a party discloses plans to use an expert witness early in the discovery period, the Board may choose not to suspend discovery activities unrelated to the expected expert witnesses and may direct that all discovery activities continue concurrently with the disclosures and discovery relative to the experts.

*See also, General Council of the Assemblies of God v. Heritage Music Foundation*, 97 USPQ2d 1890, 1893 (TTAB 2011) (in any given case, suspension of proceedings for expert-related discovery may not be necessary). For these same reasons, Petitioner believes the proceedings should not be suspended.

Second, the parties have established a deposition schedule over the next few weeks, through the coordination of multiple schedules, as follows:

David Knight – January 31, 2024  
Brooke Knight – February 1, 2024  
Heidi Colburn – February 2, 2024  
Suzanne Grishman – February 7, 2024  
Mercury One 30(b)(6) Deposition – February 13, 2024  
David Barton – February 21, 2024

These deponents and their counsel have expended a significant amount of time and effort in agreeing to this current deposition schedule. Because a suspension of the proceedings will likely require the parties and their counsel to re-set all of these depositions, Petitioner believes the proceedings should not be suspended.

**C. Possible Schedule Order Extensions to Accommodate Expert Discovery**

Instead of suspending the proceedings, Petitioner and Respondent agree that it would be preferable to extend the deadlines in the Scheduling Order to accommodate expert discovery without suspending the proceedings. The parties have exchanged communications that agree to a proposal regarding accommodating expert discovery, which is as follows:

- (1) maintain the opening expert disclosures (including reports) shall be due January 22, 2024;
- (2) set the close of fact discovery as the same February 22, 2024 discovery cut-off deadline in the Scheduling Order;
- (3) allow for expert discovery, including expert depositions, to be completed within 45 days after the close of fact discovery; and,
- (4) modify the deadlines from Pretrial Disclosures to Oral Argument by adding one month.

The only deadline that appears not to be agreed upon between the parties, to date, is the deadline for the submission of rebuttal expert reports. Petitioner proposed a rebuttal disclosure deadline (including reports) as 30 days after service of the expert report, as per Fed. R. Civ. P. 26(a)(2)(D)(ii). Respondent requests that rebuttal reports be due on March 7, 2023, which is 45 days after service of the expert reports. The parties may be able to compromise on this one issue, but Petitioner wanted to inform the TTAB of the agreement to date between the parties.

The proposed revisions to the Scheduling Order is set forth below with columns showing the original and first revised deadlines to the Scheduling Order, which are agreed upon between the parties (except for the rebuttal expert report deadline).

	Initial TTAB Deadlines	First Revised Deadlines	Proposed Deadlines
Expert Disclosures Due	9/22/2023	1/22/2024	
Fact Discovery Closes	10/22/2023	2/22/2024	2/22/2024*
Rebuttal Expert Deadline			[30 days or 45 days after Expert Rpt. Served]
Expert Discovery Closes			4/7/2024
Plaintiff's Pretrial Disclosures Due	12/6/2023	4/6/2024	5/6/2024
Plaintiff's 30-day Trial Period Ends	1/20/2024	5/20/2024	6/20/2024
Defendant's Pretrial Disclosures Due	2/4/2024	6/4/2024	7/4/2024
Defendant's 30-day Trial Period Ends	3/20/2024	7/20/2024	8/20/2024
Plaintiff's Rebuttal Disclosures Due	4/4/2024	8/4/2024	9/4/2024
Plaintiff's 15-day Rebuttal Period Ends	5/4/2024	9/4/2024	10/4/2024
Plaintiff's Opening Brief Due	7/3/2024	11/4/2024	12/4/2025
Defendant's Brief Due	8/2/2024	12/2/2024	1/2/2025
Plaintiff's Reply Brief Due	8/17/2024	12/17/2024	1/17/2025
Request for Oral Hearing (optional) Due	8/27/2024	12/27/2024	1/27/2025

This proposal would allow for additional time for the exchange opening and rebuttal expert disclosures and conduct expert discovery, as well as accommodating travel and “black-out” periods communicated between the parties. Namely, Petitioner has notified Respondent of several “black-out” travel days that are believed to be relevant if the Scheduling Order deadlines are extended. These black-out dates include the following: (1) one of Petitioner’s experts is out of the country (US) travelling between April 27 to May 15, 2024 and July 16 to August 25, 2024;

and (2) Petitioner's counsel is out of the country (US) traveling between March 6 to 23, 2024. Extending the deadlines for the end of expert discovery, which is a new deadline not previously considered, to April 7, 2024 makes sense in view of travel schedules.

**D. Conclusion**

Petitioner files this Notice under TMBP 401.03 and respectfully requests consideration of the Petitioner's proposal regarding setting new or extended deadlines to the Scheduling Order. Petitioner respectfully requests consideration of its proposed revision to the Scheduling Order under the TTAB's wide latitude in management of this proceeding. *Monster Energy Co. v. Martin*, 125 USPQ2d 1774, 1777-78 (TTAB 2018).

Respectfully submitted,

Dated: January 19, 2024

/s/ D. Scott Hemingway /  
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## CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 2.119, I hereby certify that a true and complete copy of the foregoing Mercury One's PETITIONER'S NOTICE OF EXPERT DISCLOSURE (MR. BRIAN SOWERS) WITH POSSIBLE EXTENSIONS TO SCHEDULING ORDER FOR EXPERT DISCOVERY has been served by forwarding filing with the TTAB and serving electronically on January 19, 2023 to:

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Dated: January 19, 2023

/D. Scott Hemingway/  
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