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COPYRIGHT CLAIMS BOARD **DOCKET NO.: 23-CCB-0211**

JOSEPH ROONEY,

Claimant,

v.

ALEXANDRA VON PARIS,
and
ROUT ONE APPAREL, LLC

Respondents.

RESPONDENTS' SUR-REPLY

Claimant's Reply misrepresents Respondents' discovery production by stating:

> Respondent's defense rests almost entirely **on evidence not produced during discovery, specifically**
>
> - Exhibits 4, 5, 6, 7, 22, 23, and 25 form the cornerstone of their public domain defense yet were never disclosed
> - Exhibit 4, 5, 6, 7, 23, and 25 are clearly dated as either 10/15/2024 or 10/22/204 which is after discovery closed on July 29, 2024
> - Marketing images on page 11 of their response were withheld during discovery
> - Exhibit 22 does not show a date but was not included in discovery
> - These exhibits form the basis for their key public domain and sales arguments.

See Claimant's Reply at 1. These assertions are false and incorrect as a matter of law.

I. As a Matter of Law, Third-Party Websites Are Not Within a Party's "Possession, Custody or Control" and There is No Duty to Create Documents.

Well-established federal law provides that a party is only required to produce information and documents within its possession, custody or control. *See* Fed.R.Civ.P 34; *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 US 136, 166 (1980). **Exhibits 4, 5, 6, 7, 23** and **25** are screenshots of Third-Paty websites and are not in Respondents' possession, custody or control. In addition, since a party has no duty to create documents, Respondents were not required to print and produce website pages that are available to the public.

II. Respondents' Exhibits 4, 5, 6, and 22 Were Produced or Already in His Possession

Exhibit 4 is a screenshot of certain pages from Old Bay / McCormick's website showing language in the public domain. Respondents' Int. Answer No. 5 (*See* Answers to Interrogatories pp. 6-7 attached hereto) included the public domain defense and provided Claimant with both the website address and the relevant language from it. Respondents did not provide printouts of the *entire* website as most of it is not relevant. Moreover, Claimant admits that he already had the information in the website (http://www.oldbay.com/OLD-BAY-STORY.aspx) and relied on its contents in Exhibit G attached his Claimant's Witten Testimony.

Exhibit 5 is comprised of screenshots from Old Bay / McCormick's website. The only relevant section is the photograph and highlighted text on the last two pages of the exhibit, which were also provided to Claimant on p. 7 of the Respondents' Int. Answers at No. 5. *See id*.

Exhibit 6 is a compilation of screenshots from 3 websites with the relevant sections highlighted. All three website addresses and the relevant language were provided to Claimant on p.7 in Answer to Interrogatory No. 5. *See id*.

Exhibit 22 is McCormick's publicly filed 10-k. It is available on the internet and McCormick's website. Respondents' Int. Answer No. 15(c) on p. 13 states "McCormick's SEC filings and Income Statement show that it spent $198,100,000 on advertising in 2023". *See id.* Exhibit 22 was provided simply to corroborate that monetary figure already provided.

III. Respondents Exhibits 7 and 23 and Marketing Images Are Rebuttal Exhibits.

Exhibit 7 is a printout from the Huffington Post website which contains the language "*battle bland food*." For the first time in this case, Claimant's Written Testimony characterized this as a "key phrase" and repeatedly relies on it to attempt to show originality. Exhibit 7 is a rebuttal exhibit to show that the phrase was already in the public domain as well. The burn line at the top of Exhibit 7 shows that Respondents found it and printed it on October 15, 2024, just 9

days before the response was filed. It could not have been produced prior to the discovery deadline in July or the deadline for Claimants' Written Testimony.

Exhibits 23 and 25 (and the marketing images on page 11 of the Respondents' Response) are also used to rebut arguments raised in Claimant's Statement for the first time. They are simply screenshots of Respondents' website (which Claimant is well aware of), and publicly available ads and articles about Old Bay, which Respondents found contemporaneous with the filing of Respondents' Statement. Indeed, even Claimant notes the burn-line dates at the top showing 10/22/24 which indicates the date they were printed from the internet to respond to Claimant's brief. They were not withheld as Claimant alleges. (Also *see* Int. Answers p.13).

Accordingly, Claimant's contentions are incorrect or false. Even if the CCB believes the Respondents' should have supplemented in some way in the days before filing their Response, the Claimant was not prejudiced or harmed. He fails to even allege how he was harmed because he was not. He had ample opportunity in the 21-days before the filing deadline for Claimant's Reply to challenge or rebut the evidence. Respondents will consent to Claimant filing a supplement if he believes he can add additional evidence or argument to support his claims.

Dated: November 14, 2024

COLE SCHOTZ P.C.

/s/ Gary H. Leibowitz

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Proof of Delivery

I hereby certify that on Thursday, November 14, 2024, I provided a true and correct copy of the Respondents' Sur-Reply to the following:

Joseph Rooney, represented by Joseph Rooney, served via ESERVICE at joe@epgdenver.com

Signed: /s/ Gary H Leibowitz