

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

In the matter of
Trademark Application on Serial No. 75/925,313
Filed: February 9, 2000
Published: November 7, 2000
Mark: NETRAQ

SUN MICROSYSTEMS, INC.

Opposer,

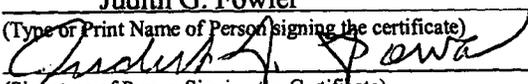
v.

MCM INTEGRATED
TECHNOLOGIES LTD.,

Applicant.

Opposition No. 123,455

TRADEMARK TRIAL AND
APPEAL BOARD
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MEMORANDUM OF LAW IN SUPPORT OF
OPPOSER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS
AND RESPONSES TO INTERROGATORIES AND TO EXTEND
TESTIMONY PERIODS

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Pursuant to Rule 37 of the Federal Rules of Civil Procedure and Rule 2.120(e) of the Patent & Trademark Office Trademark Rules of Practice, Opposer Sun Microsystems, Inc. ("Opposer" or "Sun") hereby seeks an order from the Trademark Trial & Appeal Board (the "Board"), compelling Applicant MCM Integrated Technologies Ltd. ("Applicant" or "MCM") to provide responses to interrogatories and produce documents responsive to document requests duly served on Applicant in this proceeding. Applicant has refused to produce documents and information regarding Applicant's advertising activities and expenditures, revenues, pricing, geographic territories of trademark use, and planned future use of its mark – categories of information that are routinely discoverable in proceedings before this Board. The only basis Applicant has articulated for its refusal to provide the requested information and documents is Applicant's assertion that the parties are *direct competitors*, and that disclosure of such information would provide an unfair competitive advantage to Opposer. To address Applicant's confidentiality concerns, Opposer proposed that the parties enter into the Board's standard protective order, but Applicant flatly and inexplicably rejected this proposal. Far from justifying its position, Applicant's admission that the parties' products are directly competitive underscores the likelihood of confusion in this matter, and highlights Opposer's need for full and complete discovery. In view of the prejudice to Opposer arising from Applicant's refusal to comply with its discovery obligations, Opposer respectfully requests that the Board issue an order compelling Applicant to provide full and complete responses to the outstanding interrogatories, and to produce all responsive documents, within two weeks of the Board's Order on this Motion. Further, Opposer respectfully requests that the Board extend the testimony periods in this matter, such that Opposer's testimony period shall commence 30 days from the date of the Board's order.

PRELIMINARY STATEMENT

A. Background of This Proceeding

Opposer Sun Microsystems is one of the world's leading technology companies. Since at least 1994, Opposer has used the mark NETRA in connection with computer servers and other computer hardware, software and related products. In 1996, Opposer obtained Federal Trademark Registration No. 1,987,943 for NETRA for

computer hardware; computer software for use in computer networking and computer network management; computer operating system software; computer software for use in accessing, browsing and transmitting data over a global communications network; and instruction manuals supplied as a unit therewith.

In or about December 2000, Opposer acquired Cobalt Networks, Inc. Since approximately 1998, Cobalt had used the mark RAQ in connection with computer servers. In 2000, Cobalt obtained a Federal Trademark Registration, Registration No. 2,366,929, for RAQ, for use in connection with "computer hardware, namely, servers." Since its acquisition of Cobalt, Sun has continued to use and promote the RAQ brand in connection with some of its computer servers and related products, while continuing to use and promote its NETRA mark in connection with other servers and related products.

On February 9, 2000, Applicant filed an application, Serial Number 75/925,313, to register the mark NETRAQ in connection with "computer hardware, namely, computer servers." That application was published for opposition on November 7, 2000. Opposer timely filed its opposition on March 5, 2001.

B. Applicant's Refusal to Comply with Discovery Requests

During the discovery period in this proceeding, Opposer properly served interrogatories, requests for production of documents and requests for admissions on Applicant. Declaration of Jedediah Wakefield in Support of Opposer Sun Microsystems, Inc.'s Motion to Compel Applicant's Production of Documents and Responses to Interrogatories ("Wakefield Decl."), ¶¶ 2-4, Exhs. 1-3. Applicant chose to respond to some of the discovery requests, but refused to

provide the requested documents and information in response to a number of crucial interrogatories and document requests. Wakefield Decl., ¶¶ 5 and 6, Exhs. 4 and 5. In particular, Applicant failed to provide complete responses or flatly refused to provide the requested information or documents in response to Opposer's interrogatory Nos. 8-13, 23 and 26, and document request Nos. 7, 13, 16, and 17. Wakefield Decl., Exh. 4 and 5. The specific requests to which Applicant has refused to provide the requested discovery read as follows:

INTERROGATORY NO. 8:

For each of Applicant's Products,¹ identify the exact or approximate fee or sales price charged by Applicant and the retail price and/or the price paid by End-Users for each of Applicant's Products and/or each product or service ultimately distributed to End-Users in which one or more of Applicant's Products is incorporated.

INTERROGATORY NO. 9:

Separately for each year, identify each state, province and country in which Applicant sold or distributed Applicant's Products.

INTERROGATORY NO. 10:

Separately for each year, and for each state, province and country, state the revenues earned from the distribution of each of Applicant's Products.

INTERROGATORY NO. 11:

Separately for each year, and for each state, province and country, state Applicant's total expenditures on marketing, advertising and promotion, including but not limited to expenditures relating to Applicant's marketing, advertising and promotion via the Internet or any global computer network or by any other means, for each of Applicant's Products.

¹ In its document requests and interrogatories, Opposer defined "Applicant's Mark" as "the term NETRAQ as allegedly used or intended to be used by Applicant on or in connection with goods and/or services, including as set forth in Application No. 75/925,313, and in the Answer filed by Applicant in the instant proceeding." Opposer defined "Applicant's Products" as "any and all products and/or services that Applicant has advertised, marketed, offered for sale, distributed, rendered or otherwise caused to be provided or that applicant intends to advertise, market, offer for sale, distribute, render or otherwise cause to be provided under or in connection with Applicant's Mark." Thus, the interrogatories and document requests at issue relate only to the involved products and the involved marks. See Wakefield Decl., Exhs. 1 and 2.

INTERROGATORY NO. 12:

Separately for each year, and for each state, province and country, state Applicant's sales volume, including but not limited to sales volume resulting from sales via the Internet or any global computer network or by any other means, for each of Applicant's Products.

INTERROGATORY NO. 13:

Separately for each year, and for each state, province and country, state the number of visitors to Applicant's web site.

INTERROGATORY NO. 23:

Separately for each year, and by state, province and country, identify in detail all advertising and promotional activities Applicant has engaged in for Applicant's Products, including but not limited to attendance at trade shows or seminars, print, radio or television advertising, or advertising or promotion over the Internet.

INTERROGATORY NO. 26:

If your response to any of the Requests for Admissions contained in Opposer's First Set of Requests for Admissions is anything other than an unqualified admission, for each such response, state all facts on which you base your denial or the qualification of your admission to the request.

REQUEST NO. 7:

Documents sufficient to identify by state, province and country the geographic regions in which End-Users of Applicant's Products reside or do business.

REQUEST NO. 13:

All documents concerning the manner and extent of any planned future use of Applicant's Mark.

REQUEST NO. 16:

Documents sufficient to identify by state, province and country all of Applicant's advertising and marketing expenditures in connection with Applicant's Mark.

REQUEST NO. 17:

Documents sufficient to show by state, province and country all revenues of Applicant from Applicant's Products.

Wakefield Decl., Exhs. 1 and 2, 4 and 5.

These document requests and interrogatories relate to a number of routinely discoverable topics, including the geographic territories of Applicant's sales and promotional activities,

Applicant's pricing for the relevant products, Applicant's revenues from sales of the relevant products, and Applicant's planned future use of the relevant mark.

Notably, Applicant has raised no objection that the requests are overbroad, unduly burdensome, call for irrelevant material, seek privileged information, or are otherwise improper in any way.² Wakefield Decl., ¶¶ 8 and 10. Rather, Applicant has withheld the relevant information and documents on the basis of a single objection; because the parties' server products are in *direct competition*, Applicant refuses to provide the information and documents because doing so might provide an "unfair advantage" to Opposer, Applicant's admitted "competitor." For example, in response to Interrogatory No. 12 Applicant states that

NetRaq servers are in *direct competition* to some of the product lines more recently introduced by the Opposer under the NETRA and Sun Cobalt RaQ marks. Consequently, a more detailed response to this question will not be given as it will give undue advantage to our competition

Wakefield Decl., Exh. 4, (Applicant's Response to Interrogatories, ¶ 15 thereto) (emphasis added.)

In an effort to resolve this matter and avoid needless motion practice, Opposer offered to enter into an appropriate protective order to address Applicant's confidentiality concerns. Wakefield Decl., ¶ 9, Exh. 7. Opposer offered to stipulate to the Board's standard order for the protection of confidential information, which provides for outside counsel's only designation of documents to address any competitive concerns. *Id.* Opposer also explained the relevance of these requests, pointing out that they relate to routine topics of discovery in trademark opposition proceedings. Wakefield Decl., ¶ 10.

² Having failed to raise them, Applicant has waived any such objections. Fed. R. Civ. P. 33(b)(4), *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) ("Failure to object to discovery requests within the time required constitutes a waiver of any objection."); see also *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.* 187 F.R.D. 528, 529., (E.D.P.A. 1999) (failing to respond to a Rule 34 request within the time permitted waives all objections thereto – including claims of privilege and work product).

Despite these efforts, in a telephone conversation on April 4, 2002, counsel for Applicant stated that Applicant flatly refused to enter into a protective order or to provide any additional information or documents without an order from the Board. Wakefield Decl., ¶ 10. Applicant's counsel offered no justification for Applicant's position, merely stating that Applicant would force Opposer to "jump through that hoop" in order to get the required information. *Id.*

Applicant's steadfast and unjustified refusal to provide directly relevant and discoverable documents and information flies in the face of the Federal Rules of Civil Procedure and the Trademark Rules of Practice. In view of Applicant's cavalier approach to the Rules of this Board, the imposition of issue or evidence preclusion sanctions would be well within the Board's discretion. At a minimum, an order requiring Applicant to produce all responsive documents and information is warranted.

ARGUMENT

A. **This Board May Compel Applicant to Respond to Discovery Requests Seeking Relevant Information and Documents.**

Pursuant to Rule 37(a)(2)(B) of the Federal Rules of Civil Procedure and Rule 2.120(e) of the Trademark Rules of Practice, Opposer is entitled to an order compelling Applicant to respond to the document requests and interrogatories that were duly served on Applicant in accordance with Rules 33 and 34 of the Federal Rules. Rule 37 states in pertinent part:

If . . . a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that the inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request.

Fed. R. Civ. P. 37(a)(2)(B), *see also* TBMP § 523, *et seq.*

The Board has granted motions to compel discovery from Applicants upon a showing that the information or documents sought are likely to lead to the discovery of relevant evidence. *See Fisons Ltd. v. Capability Brown Ltd.*, 209 U.S.P.Q. 167, 169 (T.T.A.B. 1980) (motion to compel under Rule 2.120(c) is appropriate when a party refuses to respond to a proper discovery request).

B. Applicant has Objected to and Refuses to Respond to Requests Seeking Relevant and Discoverable Information and Documents.

The interrogatories to which Applicant has refused to provide responses plainly seek documents and information that are directly relevant under the *Polaroid* likelihood of confusion factors, and are within the contemplation of Section 419 of the Trademark Board Manual of Procedure. See *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir.), cert. denied, 368 U.S. 820, 82 S.Ct. 36, 7 L.Ed.2d 25 (1961). The requests are tailored to seek only the information relevant to this proceeding. Notably, Applicant does not argue that such information does not exist or is somehow privileged, but merely refuses to provide requests on the basis of the fact that its NETRAQ products are directly competitive with Opposer's NETRA and RAQ products. While this concern may warrant the imposition of some form of protective order, Applicant rejected the notion of entering the Board's standard protective order or any form of protective order, leaving Opposer with no choice but to bring this motion.

The particular requests with which Applicant has failed to comply are tailored to seek information regarding the nature of Applicant's advertising activities and associated expenditures, sales revenue for the relevant products, the prices charged for the relevant products, and the geographic territories in which Applicant's sales and promotional activities take place. As set forth below, Applicant should be ordered to produce all responsive documents and interrogatories immediately.

1. Advertising and Revenue Information is Relevant in This Proceeding.

Section 419 of the Trademark Board Manual of Procedure identifies a number of categories and types of information that are properly discoverable in Opposition and Cancellation proceedings. TBMP § 419 specifically provides that information concerning advertising activities and advertising expenditures is discoverable: TBMP § 419(17) provides that "[t]he identity of any advertising agency engaged by a party to advertise and promote the party's involved goods or services under its involved mark is discoverable, as is the identity of the advertising agency employees having the most knowledge of such advertising and promotion."

See *J. B. Williams Co. v. Pepsodent G.m.b.H.*, 188 U.S.P.Q. 577 (T.T.A.B. 1975). Likewise, TBMP § 419(18) provides that "annual sales and advertising figures" for a party's goods or services sold under its involved mark are proper matters for discovery. See *Sunkist Growers, Inv. v. Benjamin Ansehl Co.* 229 U.S.P.Q. 147 (T.T.A.B. 1985); *J. B. Williams*, 188 U.S.P.Q. 577; *Neville Chem. Co. v. Lubrizol Corp.*, 184 U.S.P.Q. 689 (T.T.A.B. 1975).

"The Board has held that annual sales and advertising figures of recent years given in round numbers for specific goods bearing the involved mark(s) are proper matters for discovery since the information may well have a bearing upon issues in an opposition or cancellation proceeding." *Sunkist Growers*, 229 U.S.P.Q. at 148 (response stating gross sales have been "substantial" insufficient to meet the burden of producing responsive information to a request for advertising expenditures and gross sales); see also *J.B. Williams*, 188 U.S.P.Q. at 579 (sales and advertising figures are proper matters for discovery in opposition and cancellation proceedings); *Neville Chem.*, 184 U.S.P.Q. at 690 (requiring party to produce sales and advertising figures for six different categories of goods in various relevant years).

In this matter, Applicant has refused to provide responses to discovery requests seeking information concerning Applicant's revenues and advertising and promotional activities. In particular, Applicant has refused to respond to requests regarding the nature of its advertising and promotional activity, the geographic areas in which Applicant engages in advertising and promotional activities, and the type of advertising activities. See, e.g., Applicant's Responses to Interrogatory Nos. 11 and 23 (Wakefield Decl. Exhs. 1. and 4), and Document Request No 16. (Wakefield Decl. Exhs. 2 and 5). Applicant has also refused to provide any information regarding its revenues associated with the relevant mark. See, e.g., Applicant's Responses to Interrogatory Nos. 10 and 12 (Wakefield Decl. Exhs. 1. and 4), and Document Request No 17. (Wakefield Decl. Exhs. 2 and 5).

2. **Information Regarding Applicant's Geographic Territories of Use is Relevant and Discoverable.**

"Information relating to the areas of distribution for a party's involved goods or services sold under its involved mark is discoverable." TBMP §417(16); see *Johnston Pump / General Value Inc. v. Chromalloy Am. Corp.*, 10 U.S.P.Q. 2d 1671 (T.T.A.B. 1988), 10 U.S.P.Q. 2D 1671; *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 190 U.S.P.Q. 193 (T.T.A.B. 1976); *J. P. Williams*, 188 U.S.P.Q. 577; *Miller & Fink Corp. v. Servicemaster Hosp. Corp.*, 184 U.S.P.Q. 495 (T.T.A.B. 1975).

Here, Applicant has refused to provide information or documents in response to requests which seek to discover the areas of distribution and promotion of Applicant's products. See, e.g., Interrogatory Nos. 9 and 13, (Wakefield Decl., Exhs. 1 and 4) and document request No. 7 (Wakefield Decl., Exhs. 3 and 5). Such requests are entirely appropriate, and Applicant should be ordered to provide complete responses and all responsive documents.

3. **Applicant's Pricing Information is Relevant and Discoverable.**

Though not dispositive, information regarding the price of a party's goods or services is relevant to likelihood of confusion. Such information bears on the channels of trade used by the party, as well as the degree of care likely to be exercised by prospective consumers. See *Information Clearing House Inc. v. Find Magazine*, 492 F. Supp. 147, 158 n. 32 (S.D.N.Y.1980) (though not dispositive, price differential is a factor to consider in making assessing likelihood of confusion under the Lanham Act).

Here, Applicant has objected to Opposer's Interrogatory No. 8, which calls for pricing information for Applicant's products. Wakefield Decl., Exhs. 1 and 4. In view of Opposer's offer to enter into a protective order, Applicant's refusal to provide any further information in response to this Interrogatory is unjustified, and Applicant should be ordered to provide a complete and detailed response.



4. **Evidence Concerning Applicant's Planned Future Use of Applicant's Mark Should be Produced.**

Information concerning a party's plans for expansion is routinely discoverable. *See* TBMP §419(8) ("a party's plans for expansion may be discoverable under protective order."); *see Johnston Pump/General Valve*, 10 U.S.P.Q. 2d 1671. Opposer's Document Request No. 13 seeks documents regarding Applicant's planned future use of its mark. Wakefield Decl., Exh. 2. Applicant again flatly refuses to produce any documents, citing to concerns regarding competition. Wakefield Decl., Exh. 5. Applicant should be ordered to produce all responsive information, subject to the terms of an appropriate protective order.

5. **Applicant Should State the Facts Supporting its Denials or Qualifications of Requests for Admissions.**

Along with its interrogatories and document requests, Opposer served a Request for Admissions ("RFAs"). Wakefield Decl., Exh. 5. Applicant did not assert any objections to the RFAs, conceding their relevance in this proceeding. Wakefield Decl., Exh. 6. As set forth above, Opposer's Interrogatory No. 26 asks Applicant to state the facts on which Applicant bases its denials or qualifications of its admissions. Wakefield Decl., Exh. 1. Despite conceding the relevance of the RFAs, Applicant refuses to provide any substantive response to Interrogatory No. 26. Wakefield Decl., Exh. 4. Applicant does not assert any objection to Interrogatory No. 26, but instead repeats its claims that disclosing such information would "lead to an unfair commercial advantage to our competition." Although Applicant states in its response that a "further detailed response to such questions will . . . be considered on the basis of having a confidential agreement between the Applicant and the Opposer," Applicant refuses to enter into such an agreement. Wakefield Decl., ¶ 10 and Exh. 4. Accordingly, Opposer has no choice but to move to compel a response to Interrogatory No. 26.

C. **Good Cause Exists for the Extension of the Testimony Periods**

As noted above, Opposer will be prejudiced if it is forced to complete the currently scheduled testimony periods in this proceeding without access to the vital information sought by

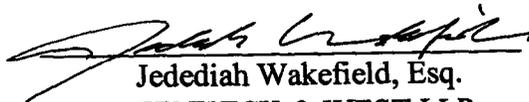
the discovery requests. Accordingly, Opposer respectfully submits that good cause exists for a brief extension of the testimony periods. Specifically, Opposer requests that the Board issue an order extending the testimony periods in this matter, such that Applicant's supplemental discovery responses and production of documents shall be due within 15 days of the date of the Board's Order, and Opposer's testimony period shall commence 30 days from the date of that Order. No prior extensions of the testimony periods have been sought or obtained in this proceeding.

CONCLUSION

For the foregoing reasons, Opposer Sun Microsystems, Inc. respectfully requests that the Board issue an order compelling Applicant to provide all the information sought by Interrogatory Nos. 9-13, 23 and 26, and all documents sought by Document Request Nos. 7, 13, 16 and 17, within two weeks of the Board's order. Opposer has no objection to the imposition of an appropriate protective order by the Board. In view of Applicant's refusal to provide this crucial discovery in a timely fashion, Opposer respectfully requests that the Board grant a brief extension of the testimony periods in this matter, such that Opposer's testimony period shall commence 30 days from the date of the Board's order on this Motion.

Respectfully submitted,

Dated: April 5, 2002



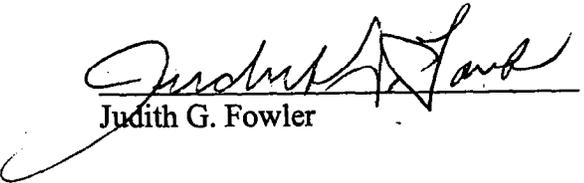
Jedediah Wakefield, Esq.
FENWICK & WEST LLP
275 Battery Street
San Francisco, CA 94111
(415) 875-2300

Attorneys for Opposer
SUN MICROSYSTEMS, INC.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum of Law in Support of Opposer's Motion to Compel Production of Documents and Responses to Interrogatories and to Extend Testimony Periods was served on this 5th day of April, 2002, by first class mail, postage prepaid, upon:

Richard C. Nielsen, Barrister & Solicitor, Stewart, Aulinger & Company, 1200 – 805 West Broadway, Vancouver, British Columbia, V5Z 1K1, Canada.



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Memo of Law in Support of Opposer's Motion to Compel Production of Documents; Motion to Compel Applicant's Production of Documents; Declaration of Jedediah Wakefield in Support of Opposer's Motion to Compel re NETRAQ 75/925,313 (Opp. 123,455) for

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Mark: NETRAQ
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 Applicant: MCM Integrated Technologies LTD Registrant:

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TEL 415.875.2300 | FAX 415.281.1350 | www.fenwick.com

July 31, 2002

TANDA L. NEUNDORF

EMAIL TNEUNDORF@FENWICK.COM
DIRECT DIAL 415.875.2304

VIA FACSIMILE: (703) 308-9333

Jill S. Taylor, Esq.
Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
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U.S. Patent & TMO/TM Mail Rpt Dt. #74

Re: Sun Microsystems, Inc. v. MCM Integrated Technologies Ltd.
NETRAQ Trademark Opposition No. 91,123,455 in the U.S.

Dear Ms. Taylor:

Pursuant to your letter of July 10, 2002 and your voicemail message to me today, we are attaching a copy of the Memorandum of Law in Support of Opposer's Motion to Compel Production of Documents and Responses to Interrogatories and to Extend Testimony Periods, filed by Sun Microsystems, Inc. on April 5, 2002, in connection with the above-referenced trademark opposition matter. Please do not hesitate to contact me if you have any questions or concerns regarding the attached document, or Opposer's Motion to Compel or Declaration of Jedediah Wakefield, also filed by Sun Microsystems, Inc. on April 5, 2002.

Very truly yours,


Tanda L. Neundorf

Encl.

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