

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Lykos

Mailed: December 17, 2002

Opposition No. 91124976

Savatar, Inc.

v.

Savitar Corporation

Angela Lykos, Interlocutory Attorney

This case now comes up for consideration of (1) applicant's motion to compel further responses to Interrogatory Nos. 7-8, 9-10, 14 of applicant's first set of interrogatories and to document production requests Nos. 1-2 (filed June 26, 2002); (2) opposer's cross-motion for entry a protective order (filed July 2, 2002); and (3) applicant's motion to extend discovery (filed August 15, 2002). The motions to compel and extend are fully briefed.¹

The Board has carefully reviewed the parties' respective arguments and accompanying exhibits, although the

¹ Both parties have submitted reply briefs with regard to their respective motions which the Board has considered because they clarify the issues herein. Consideration of a reply brief is discretionary on the part of the Board. See Trademark Rule 2.127(a).

Opposition No. 91124976

Board has not repeated the parties' complete arguments in this order.

Opposer's Motion for Protective Order

Opposer seeks entry of a protective order to allow for the exchange of confidential information. In order to provide full responses, opposer seeks to enter into an agreement for the exchange of confidential information materials.

Applicant, in response to opposer's motion, has stated that it has no objection to opposer's proposed protective agreement.

The Board has reviewed opposer's proposed protective agreement and finds that it is acceptable.

Accordingly, opposer's motion for entry of a protective order is granted, and the proposed protective order, of record at Exhibit E to opposer's motion, is hereby entered into the record and binding on the parties for purposes of this proceeding.²

Applicant's Motion to Compel

As a preliminary matter, we find that applicant has made a good-faith effort pursuant to Trademark Rule 2.120(e) to resolve the present discovery dispute prior to seeking to Board intervention. Based on the evidence before us,

² The parties are reminded that the Board's jurisdiction over the parties and their attorneys ends when this proceeding is terminated.

Opposition No. 91124976

applicant made a good-faith effort by correspondence to resolve with opposer's counsel the issues presented herein and was unable to reach an agreement.

Notwithstanding the above, the Board reminds the parties that they are expected to cooperate with another so that the case may proceed in an orderly manner within reasonable time constraints.

Turning now to the merits of applicant's motion to compel, with respect to Interrogatory Nos. 7-8, and 14, opposer has responded with objections on the grounds that the information sought is "overly broad, not limited in time, unduly burdensome," and irrelevant, and constitutes confidential customer and/or financial information.

To the extent that opposer objects to the information sought as confidential, such objections are now moot in light of the protective order now in place for this proceeding. Accordingly, applicant's motion to compel is granted as to Interrogatory Nos. 7-8, and 14 because an order for protecting the confidentiality of the documents produced is now in place, and the information sought is discoverable.

With regard to Interrogatory Nos. 9-10, opposer has objected to the interrogatories on the grounds that the information sought is "overly broad, not limited in time, unduly burdensome," and irrelevant, and that the customer

Opposition No. 91124976

information sought is confidential. Opposer asserts that it has otherwise provided a complete response with its response brief.³ Applicant contends, however, that opposer has failed to provide the information requested.

To the extent that opposer objects to the information sought as confidential, such objections are now moot in light of the protective order now in place for this proceeding. Accordingly, applicant's motion to compel further responses to Interrogatory Nos. 9-10 is granted because an order for protecting the confidentiality of the documents produced is now in place, and the information sought is discoverable.

Finally, with regard to document production requests Nos. 1-2, as applicant has acknowledged in its reply brief, opposer has provided complete responses to these requests in its response brief. Accordingly, applicant's motion to compel with respect to document production requests Nos. 1-2 is moot.

Opposer is hereby ordered to provide amended responses, in full, without objections or qualifications, to Interrogatory Nos. 7-8, 9-10, and 14, thirty (30) days from

³ See Declaration of Joyce Levesque, Chief Operating Officer/Chief Financial Officer for opposer.

the mailing date stamped on this order.⁴

The Board reminds the parties of the good faith effort requirements set forth in Trademark Rule 2.120 and *Sentrol, Inc. v. Sentex Systems, Inc.*, 231 USPQ 666 (TTAB 1986). That is, the parties must cooperate with each other so that the case may proceed in an orderly manner within reasonable time constraints.

The parties are also advised that if proper discoverable matter is withheld from the requesting party, then the responding party will be precluded from relying on such information and from adducing testimony with regard thereto during its testimony period. See *Shoe Factory Supplies Co. v. Thermal Engineering Company*, 207 USPQ 517 (TTAB 1980); and *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, at n.5 (TTAB 1988).

Applicant's Motion to Extend Discovery

Finally, turning to applicant's motion to extend discovery, applicant argues that since at the time it filed its motion to compel, the Board had not yet ruled on the motion, applicant should be permitted to conduct follow-up discovery after it receives amended discovery responses from opposer.

⁴ Applicant's remedy, should opposer fail to provide the ordered responses, will lie in a motion for entry of discovery sanctions in the form of entry of judgment dismissing the opposition. See Trademark Rule 2.120(g)(1).

Opposition No. 91124976

In response, opposer argues that applicant has failed to demonstrate "good cause" pursuant to Fed. R. Civ. P. 6(b), inasmuch as applicant had ample time to conduct discovery and does not need any additional time.

In reply, applicant argues that it cannot know the extent of any follow-up discovery which may be necessary until it receives complete responses to the discovery requests which are the subject of applicant's motion to compel.

It is well established that discovery may be extended in a situation where, had the adverse party provided complete and proper responses, the party would have time for follow-up discovery. See TBMP § 403.04. An improper response constitutes good cause for an extension of the discovery period. Therefore, the Board will, at the request of the propounding party, extend the discovery period so as to restore that amount of time which would have remained in the discovery period had the discovery responses been made in a timely and proper fashion. See *Miss America Pageant v. Petite Productions, Inc.*, 17 USPQ2d 1067 (TTAB 1990), and *Neville Chemical Company v. Lubrizol Corp.*, 184 USPQ 689 (TTAB 1975).

The record indicates that applicant served its discovery requests on March 8, 2002, and that on April 12, 2002, opposer served its responses. After unsuccessfully

Opposition No. 91124976

attempting to resolve the discovery dispute with opposer, applicant filed its motion to compel on June 26, 2002. The discovery period then closed on August 16, 2002. The Board, however, did not issue an order suspending proceedings pending disposition of the motion to compel until September 10, 2002, after the close of discovery.⁵ Opposer's failure to provide proper responses to the remaining discovery requests has deprived applicant of the opportunity to conduct follow-up discovery. Accordingly, to restore applicant to the position it would have been in had opposer properly responded to opposer's discovery requests, applicant's motion to extend discovery is approved to the extent indicated below.

Trial dates, including the close of discovery, are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	February 15, 2003
30-day testimony period for party in position of plaintiff to close:	May 16, 2003
30-day testimony period for party in position of defendant to close:	July 15, 2003
15-day rebuttal testimony period for plaintiff to close:	August 29, 2003

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

⁵ The Board notes that it inadvertently issued a second order on October 23, 2002 suspending proceedings pending disposition of the motion to compel. That order is hereby vacated.

Opposition No. 91124976

on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b).

An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.