

ESTTA Tracking number: **ESTTA42466**

Filing date: **08/17/2005**

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

Proceeding	91162715
Party	Plaintiff PERSIS INTERNATIONAL, INC. Mr Edward F Richards 3540 N. Southport #116 Chicago, IL 60657 UNITED STATES
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Date	08/17/2005
Attachments	Reply in Support of Motion to Compel.pdf (5 pages)

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

PERSIS INTERNATIONAL, INC.)	
)	
Petitioner/Opposer)	Opposition No.: 91162715
)	Application No.: 76/214,968
v.)	Mark: SOHMER
)	
BURGETT, INC.,)	
)	
Respondent/Applicant.)	
)	

**OPPOSER’S REPLY TO APPLICANT’S RESPONSE TO THE MOTION TO COMPEL
DISCOVERY**

Pursuant to §502.02(b) of the Trademark Trial and Appeal Board Manual of Procedure 37 C.F.R. §2.127(a), Persis International, Inc. (“Opposer”) submits this Reply to Applicant’s Response to the Motion to Compel Discovery.

Introduction

This motion to compel became necessary because Burgett, Inc.’s (“Applicant”) responses to Opposer’s written discovery are not satisfactory, and because Applicant continues to ignore Opposer’s attempts to facilitate discovery. *See* Fed. R. Civ. Pro. 37(a)(3) (“an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.”). In fact, Applicant continues to do everything and anything it can to avoid producing any discovery responses to support its sworn statement about its use of the SOHMER mark in commerce for at least five years prior to February 5, 2004.

Applicant's Failure To Support the Claims Of Use In Its Sworn Declaration.

In response to Opposer's contention that the Applicant's second sworn declaration (the "February 5 Declaration") contains false information, Applicant now claims that the sworn declaration it filed on February 5, 2004 (attached to Opposer's Motion to Compel as Exhibit 1) "was not the only way of showing further evidence of [Applicant's] recent use" because Applicant could have provided "additional documentary evidence" to the Examining Attorney during the prosecution of its application. (*See Applicant's Response at 4.*) Instead of producing this "additional documentary evidence," Applicant continues to evade Opposer's requests for any evidence to support Applicant's sworn declaration that it used the SOHMER mark in a substantially exclusive and continuous manner for five years prior to February 5, 2004. The burden to prove its use of the SOHMER mark is Applicant's. Opposer is not required to prove the absence of use. The only support Applicant has offered to bolster the claims in its sworn February 5 Declaration is the sworn February 5 Declaration itself, and now, Applicant's new statement that, during the prosecution of its application, it had "additional documentary evidence" to support its asserted claim of substantially exclusive and continuous use. Applicant did not provide it to the Examining Attorney. (*See Applicant's Response at 4.*)

If Applicant had and was prepared to submit this "additional documentary evidence" to the Examining Attorney in support of the claims in its sworn February 5 Declaration during prosecution of its application, then Applicant should be ordered to produce such evidence now. If Applicant does not produce evidence to support its sworn February 5 Declaration claiming substantially exclusive and continuous use of the SOHMER mark from at least 1999 through 2004, then Applicant should be precluded from relying on it in any manner in this proceeding.

Applicant Reasons For Providing Insufficient Discovery Responses Are Circular.

In order to claim it has acted in good faith and responded sufficiently during discovery for this proceeding, Applicant relies on parsimonious interpretations of definitions and requests in Opposer's written discovery, while completely ignoring Opposer's clarifications of those definitions and requests.

Applicant explains in a circular fashion that its responses to Opposer's Interrogatories 5-8 and 12-15 are satisfactory because Applicant believes it has responded satisfactorily in light of its own interpretations of certain terms in Opposer's interrogatories. Applicant continues to ignore the contents of Opposer's May 20, 2005 letter (attached to Opposer's Motion to Compel as Exhibit 6 and referred to hereafter as the "May 20th Letter"), in which Opposer, after receiving Applicant's deficient discovery responses, clearly explained why Applicant's responses were insufficient and how Applicant could remedy the situation. Applicant simply submitted more deficient responses to Opposer's Second Set of Interrogatories and Document Requests.

Applicant explains that its responses to Opposer's Requests for Production of Documents 3, 4, 9 and 14 are sufficient because "date of first use" is a term of art meaning only the date the mark was first used in commerce. Thus, according to Applicant, since its predecessor in interest listed 1872 as the date of first use in the expired and cancelled trademark registrations, 1872 is the date of first use, and a sufficient response to Opposer's written discovery. This position is untenable. Applicant cannot pretend to believe that Opposer is seeking information about evidence of use in 1872. The May 20th Letter requested that Applicant supplement its meager responses to Opposer's first set of written discovery and clarified for Applicant the type of information Opposer sought.

Conclusion

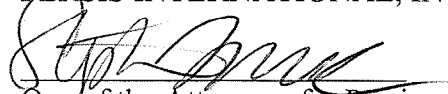
Applicant made this Motion to Compel necessary by refusing to disclose evidence that directly bears on the key issue in this opposition—Applicant’s own use of the SOHMER mark from at least 1999. Opposer, in good faith, clarified its discovery requests by providing Applicant with written notice that its interpretations of Opposer’s written discovery requests were incorrect. However, Applicant did not proceed in good faith when it failed to supplement its first set of discovery responses, nor did it proceed in good faith when it submitted incomplete and insufficient responses to its second set of discovery requests. Applicant is aware that Opposer’s discovery focused on ascertaining Applicant’s use or non-use of the SOHMER mark during the time period claimed in Applicant’s sworn February 5 Declaration, yet Applicant continues to shirk its discovery obligations.

Opposer respectfully requests that its Motion to Compel be granted and Applicant be ordered to fully and properly answer Opposer’s Interrogatories Nos. 5-8, 12-15 and 24-26, and Opposer’s Document Requests Nos. 3, 4, 9, 14 and 20.

Dated: August 17, 2005

Respectfully submitted,

PERSIS INTERNATIONAL, INC.


One of the Attorneys for Persis
International, Inc.

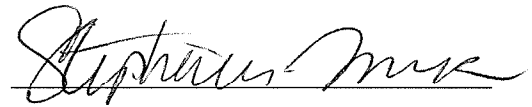
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PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **Reply to Applicant's Response to the Motion to Compel Discovery** has been served on

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via e-mail and by mailing said copy on August 17, 2005 First Class Mail, postage prepaid to the above address.

A handwritten signature in black ink, appearing to read "Stephanie Towner", written over a horizontal line.

Stephanie Towner