UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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gcp/jk

Mailed: May 21, 2008

Opposition No. 91164764

BRINK'S NETWORK, INCORPORATED

v.

THE BRINKMANN CORPORATION

George C. Pologeorgis, Interlocutory Attorney:

This case is before the Board for consideration of opposer's motion, filed October 23, 2007, for resumption of proceedings and for reconsideration of the Board's April 2, 2008 order to the extent that it indicates that opposer is to respond to applicant's revised first set of interrogatories without objection. The motion is fully briefed.[1]

As a brief background, applicant, on September 22, 2005, served opposer with its first set of interrogatories (among other discovery requests), in response to which opposer, on October 24, 2005, served a general objection on the ground that the total number of interrogatories,

[1] The Board, in exercising its discretion to do so, has considered opposer's reply brief. *See Harjo v. Pro-Football, Inc.*, 45 USPQ2d 1789, 1791 (TTAB 1998); TBMP § 502.02(b) (2d ed. rev. 2004).

counting subparts, exceeded seventy-five, in violation of Trademark Rule 2.120(d)(1). Applicant did not file a motion to compel opposer's responses, and did not seek opposer's consent to serving a revised set of interrogatories immediately following receipt of opposer's objections.

By order dated December 12, 2006, the Board ruled on opposer's motion to compel filed on December 8, 2005, wherein the Board granted opposer's motion to compel, resumed proceedings, and reset discovery to close February 15, 2007.

On December 13, 2006, applicant served upon opposer an *amended* first set of interrogatories, to which opposer, on January 11, 2007, interposed another general objection on the ground that the number of interrogatories in both the first set *and amended* first set of interrogatories exceeded seventy-five. Opposer, with respect to the *amended* first set of interrogatories, maintained its general objection on the ground that applicant had allowed the previously reset discovery period to close, and should have sought opposer's consent to the service of a revised set of interrogatories. Thereafter, applicant sent a letter dated January 19, 2007 to opposer, in which applicant afforded opposer the opportunity to agree to an amended set of interrogatories. In response thereto, opposer persisted in its position that

applicant should pursue a motion to compel. On February 5, 2007, applicant filed a motion to compel.

On April 2, 2007, the Board, in an order granting applicant's February 5, 2007 motion to compel discovery responses, suspended proceedings for six months pending settlement discussions between the parties, and ruled that, in the event of resumption, opposer "will be allowed time to respond to applicant's revised first set of interrogatories, without objection." (Board's order, page 3)

In its present motion, opposer now asks that the Board (1) resume proceedings and (2) reconsider its most recent order insofar as it directs opposer to respond to applicant's amended first set of interrogatories *without objection.*

In its motion, and in anticipation of resumption of proceedings herein, opposer notes that a sanction, imposed pursuant to Trademark Rule 2.120(g), would be appropriate only where the Board has entered an order related to discovery and a party has violated such order. Opposer claims that, inasmuch as it did not violate any Board order, it should be entitled to object on the merits to specific interrogatories in applicant's amended first set of interrogatories.

In response to the motion, applicant asserts that opposer has erred in characterizing the Board's April 2,

2007 order as imposing a sanction, under Trademark Rule 2.120(g), that is warranted only when a party violates a Board order, and that the Board, in its order, "followed general Board procedure." Additionally, applicant relies on the Board's decision in *No Fear Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000), for support that the Board may hold opposer to have forfeited its right to object to a discovery request on its merits. Finally, applicant maintains that opposer could have avoided the current situation "by simply agreeing to respond to Applicant's *Amended* First Set of Interrogatories in the first place," and asserts that it made opposer aware that its amended first set of interrogatories "was a replacement for the First Set."

In reply, opposer argues that applicant's reliance on the Board's *No Fear* decision is misplaced inasmuch as that case does not stand for the proposition that a nonmoving party to a motion to compel automatically forfeits its right to object to discovery requests on the merits, and re-emphasizes that its general objections to both sets of interrogatories were timely, as mandated by Trademark Rule 2.120(d)(1) and TBMP § 405.03(e).

On the issue of resolving discovery disputes of the nature presented here, the Board has provided specific guidance to parties as follows:

> If, on determining a motion to compel filed in response to a general objection to interrogatories on the ground of excessive number, the Board finds that the interrogatories are excessive in number, and that the propounding party has not previously used up its allotted 75 interrogatories, the Board normally will allow the propounding party an opportunity to serve a revised set of interrogatories not exceeding the numerical limit. *The revised set of interrogatories serves as a substitute for the excessive set,* and thus is deemed timely if the excessive set was timely.
> …
>
> In those cases where a party which has propounded interrogatories realizes, on receipt of a general objection thereto on the ground of excessive number, that the interrogatories are, in fact, excessive in number, *it is strongly recommended that the parties voluntarily agree to the service of a revised set of interrogatories, in the manner normally allowed by the Board,* instead of bringing their dispute to the Board by motion to compel.

See TBMP § 405.03(e)(2d ed. rev. 2004) (emphasis added).

With respect to all *inter partes* proceedings before it, the Board has an overriding interest in charging the parties to apprise themselves of and to meet their respective discovery obligations. To that end, the Board expects parties to cooperate in the discovery process, and looks with extreme disfavor on those who do not. Each party and its attorney have a duty to make a good faith effort to satisfy the discovery needs of its adversary. *See* TBMP § 408.01 (2d ed. rev. 2004).

Opposer is represented by able and experienced counsel. Its present motion and supporting brief clearly indicate that, throughout this proceeding, opposer has been fully aware of its discovery obligations under the Trademark Rules, as well as the applicable provisions stated above. We see no reason to doubt that opposer, from the day it filed this notice of opposition, has been amply aware that the Board expects full cooperation from all parties during the discovery phase of the proceedings before it.

More to the point, the Board finds nothing in the record to preclude it from finding that opposer is and was aware that (1) applicant's *amended* first set of interrogatories was served upon opposer as a substitute for, rather than an addition to, the first set of interrogatories and (2) its discovery obligation encompassed responding to applicant's *amended* first set of interrogatories, which clearly do not exceed seventy-five in number. We find no basis in opposer's assessment that applicant's *amended* set of interrogatories exceeds seventy-five. They clearly do not. When it imposed a general objection based on the total number of interrogatories, after having been served with interrogatories clearly captioned an "amended first set," and having been either aware of or informed that they were served as a substitute for the original set, opposer created

the very type of discovery dispute which the Board specifically disfavors.

Moreover, on the facts before us, applicant, in its January 19, 2007 letter, afforded opposer the opportunity to agree to an *amended* set of interrogatories. In response, opposer persisted in its position that applicant should pursue a motion to compel. In short, opposer would not agree and provided no viable reason for not providing such consent. We view opposer's objection as baseless, disingenuous, and lacking the cooperativeness that the Board reasonably expects parties to demonstrate during the discovery process.

Notwithstanding the foregoing, we note that opposer's objections to applicant's original and amended sets of interrogatories were, nonetheless, timely. Had opposer failed to interpose timely objections, our result here might be different, as the Board is invested with great discretion in determining whether a party shall forfeit its right to object to a discovery request on its merits. *No Fear Inc., supra,* 54 USPQ2d at 1554.

Accordingly, opposer's motion for reconsideration of the Board's April 2, 2007 order is granted. The Board's April 2, 2007 order is modified to the extent that opposer is allowed twenty days from the mailing date of this order in which to serve upon applicant full and complete responses

to applicant's *amended* set of interrogatories, without restriction as to the nature of objections which can be made thereto.[2] Opposer shall note that the Board will not entertain any motion or request for an extension of time or suspension of time in which to answer said interrogatories unless such a motion or request has been consented to by applicant.

Additionally, opposer's motion to resume proceedings is granted inasmuch as applicant, in its response to opposer's motion for reconsideration and to resume proceedings, stated that it does not object to the resumption of these proceedings. In view thereof, proceedings herein are resumed.

Discovery and trial dates are reset as follows:

DISCOVERY PERIOD TO CLOSE:	**07/25/08**
Testimony period for party in position of plaintiff to close:	**10/23/08**
Testimony period for party in position of defendant to close:	**12/22/08**
Rebuttal testimony period to close:	**02/05/09**

[2] We note that the parties filed, on July 27, 2007, an executed stipulated protective order. Accordingly, the Board will not entertain any objection to applicant's amended first set of interrogatories on the ground that such interrogatories seek confidential information.

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served 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 Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.