

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

Lykos

Mailed: February 24, 2006

Opposition No. 91166542

Heineken Brouwerijen B.V.

v.

The Sleeman Brewing &  
Malting Co. Ltd.

Angela Lykos, Interlocutory Attorney

This case now comes up for consideration of opposer's combined motion (filed January 13, 2006) to:

(1) compel applicant to serve supplemental responses to Interrogatory Nos. 2, 4-10, 13-15, 19-21, and 23-26 of opposer's first set of interrogatories;

(2) compel applicant to serve supplemental responses to Document Production Request Nos. 1-5, 7, 8, 11-14, 16-19, 21 of opposer's first set of document production requests;

(3) compel applicant to serve its discovery documents on counsel for opposer, for which applicant will be reimbursed;

(4) test the sufficiency of applicant's responses to Request for Admission Nos. 21, 24, and 66-69 of opposer's first set of requests for admissions;

(5) enter into the proposed stipulated protective order offered by opposer to govern the exchange of confidential information;

(6) direct applicant to serve a privilege log; and

(7) extend the discovery and testimony periods in this case by 120 days.<sup>1</sup> The motion is fully briefed.<sup>2</sup>

As a preliminary matter, the Board finds that opposer 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, opposer made a good-faith effort by correspondence and telephone calls to resolve with applicant'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.

Based on the submissions before us, the parties' have reached resolution on the following issues:

(1) applicant has agreed to enter into the proposed stipulated protective order offered by opposer;

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<sup>1</sup> On January 26, 2006, the Board suspended proceedings pending disposition of the above motions. Thus, opposer's motion to suspend is now moot.

<sup>2</sup> The Board has exercised its discretion to consider opposer's reply brief. See Trademark Rule 2.127(a).

(2) applicant has agreed to serve supplemental responses to Interrogatory Nos. 2, 4-10, 13-15, 19-21, and 23-26 of opposer's first set of interrogatories once a protective order in place;

(2) applicant has agreed to serve supplemental responses to Document Production Request Nos. 1-5, 7, 8, 11-14, 16-19, 21 of opposer's first set of document production requests once a protective order in place;

(3) applicant has accepted opposer's offer for reimbursement for the cost of production of its discovery documents;

(4) applicant did not contest opposer's motion to test the sufficiency of its responses to Request for Admission Nos. 21 and 24 of opposer's first set of requests for admissions; and

(5) applicant has agreed to the 120-day extension of the discovery and testimony periods as proposed by opposer.

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 B to opposer's motion, is hereby entered into the record and binding on the parties for purposes of this proceeding.<sup>3</sup>

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<sup>3</sup> The parties are reminded that the Board's jurisdiction over the parties and their attorneys ends when this proceeding is terminated.

Now that a protective order is in place, opposer's motion to compel applicant to provide supplemental responses to Interrogatory Nos. 2, 4-10, 13-15, 19-21, and 23-26 of opposer's first set of interrogatories; supplemental responses to Document Production Request Nos. 1-5, 7, 8, 11-14, 16-19, 21 of opposer's first set of document production requests; and supplemental responses to Request for Admission Nos. 21 and 24 of opposer's first set of requests for admissions is granted. Opposer's motion to extend the discovery and testimony periods in this case by 120 days is granted as well.

The remaining issues for the Board to decide are opposer's motion to test the sufficiency of applicant's responses to Request for Admission Nos. 66-69 of opposer's first set of request for admissions, and opposer's motion to order applicant to serve a privilege log.

First, we will consider opposer's motion to test the sufficiency of applicant's responses to Request for Admission Nos. 66-69 of opposer's first set of requests for admissions. These admission requests pertain to the shape of the container for applicant's products and appearance of applicant's mark. Applicant has failed to provide responses to these admission requests on the grounds that the requests are "nonsensical" because "applicant's mark is the subject of an intent-to-use application and is for a two-dimensional

mark." Opposer asserts that applicant's objections to the admission requests are improper, maintaining that whether applicant's design mark is in use is irrelevant to opposer's inquiries asking applicant to characterize its own design.

The Board agrees with opposer that applicant's objections are improper. While the admission requests may not be the most artfully worded, the information requested - the nature of the mark and containers applicant intends to use - are certainly relevant to this proceeding. As such, applicant's objections are overruled.

Next, we consider opposer's motion to order applicant to serve a privilege log. Opposer contends that in several instances, applicant withheld responsive information and documents based on a claim of privilege, but failed to identify the particular privilege it was asserting.

Applicant, in its responsive brief, has failed to provide a reason for its refusal to provide a privilege log.

Applicant's refusal to provide a privilege log lacks merit. Fed. R. Civ. P. 26(b)(5), made applicable to Board proceedings by Trademark Rule 2.116(a), provides that where a claim of privilege is invoked, a party must make the claim expressly and provide a description or privilege log of the documents, communications or things not disclosed in such a manner that will enable other parties to assess the applicability of the privilege or protection. As such,

opposer's motion to order applicant to provide a privilege log in conformance with Fed. R. Civ. P. 26(b)(5) is granted.

In view of the foregoing, applicant is hereby ordered to serve supplemental responses to Interrogatory Nos. 2, 4-10, 13-15, 19-21, and 23-26 of opposer's first set of interrogatories; supplemental responses to Document Production Request Nos. 1-5, 7, 8, 11-14, 16-19, 21 of opposer's first set of document production requests; and supplemental responses to Request for Admission Nos. 21 and 24, and 66-69 of opposer's first set of requests for admissions, in full and without objections, and to provide a full and complete privilege log with respect to those discovery requests for which information and documents are being withheld under a claim of privilege, **thirty (30) days** from the mailing date of this order, failing which opposer may move for sanctions, including the entry of judgment, pursuant to Trademark Rule 2.120(g). Opposer is ordered to reimburse applicant for the cost of production of its discovery documents **thirty (30) days** from the mailing date of this order as well.

Proceedings are resumed, and trial dates, including the close of discovery, are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	June 25, 2006
30-day testimony period for party in position of plaintiff to close:	September 23, 2006
30-day testimony period for party in	

position of defendant to close: November 22, 2006

15-day rebuttal testimony period for  
plaintiff to close: January 6, 2007

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.