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

Proceeding	91168862
Party	Plaintiff Red Head, Inc. d/b/a Cabo Wabo Enterpris Red Head, Inc. d/b/a Cabo Wabo Enterpris ,
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Submission	Opposition/Response to Motion
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Signature	/James J. Wolfson/
Date	12/28/2006
Attachments	Cabo opp MTC.pdf (10 pages)(30388 bytes) Cabo Ex A.pdf (3 pages)(117263 bytes) Cabo Ex B.pdf (3 pages)(176476 bytes) Cabo Ex C.pdf (1 page)(53564 bytes)

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

In The Matter of Application Serial Nos. 78/468,953, 78/551,176
Marks: CABO AZUL and CABO NUTS

Red Head Inc.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition Nos. 91168862
	)	and 91168968
Brady Bunte,	)	
	)	
Applicant.	)	
	)	

OPPOSER'S MEMORANDUM OF LAW IN
OPPOSITION TO APPLICANT'S MOTION TO COMPEL

NOW COMES Opposer Red Head Inc., which does business as and will hereinafter be referred to as "Cabo Wabo", and files this its Memorandum of Law in Opposition to Applicant's Motion to Compel the deposition of Sammy Hagar.

INTRODUCTION

Applicant has already deposed Cabo Wabo's president and day-to-day business manager, Steve Kauffman. Mr. Kauffman has complete knowledge of Cabo Wabo's business and was able to answer all of Applicant's relevant questions when he was deposed. Despite the fact that Mr. Kauffman was able to answer all of the Applicant's relevant questions, only deposed Mr. Kauffman for two (2) hours.

Applicant now moves to compel the depositon of Cabo Wabo's owner, the internationally acclaimed, singer-songwriter Sammy Hagar. In sharp contrast to Mr. Kauffman, Mr. Hagar has virtually no personal knowledge of Cabo Wabo's business -- he is a superstar in the music industry and is not in the liquor business. If Applicant had

further legitimate questions relevant to this proceeding, it had plenty of opportunity to ask them of Mr. Kauffman. In view of the foregoing, Cabo Wabo can only conclude that Applicant's sole reason for insisting upon the deposition of Mr. Hagar after deposing Mr. Kauffman is to harass, inconvenience and burden Mr. Hagar.

In its Motion to Compel, Applicant claims that it needs to depose Mr. Hagar because of Mr. Kauffman's alleged limited knowledge regarding certain matters. These issues, however, are not critical to this dispute as evidenced by the fact that Applicant either served no written discovery on these issues or can be better responded to through the production of documents. Moreover, Mr. Hagar has no particular knowledge regarding any of the topics Applicant identifies; these subjects can be far better handled by other witnesses.

Accordingly, Cabo Wabo respectfully requests that the Board deny Applicant's Motion to Compel and protect Mr. Hagar from a harassing, inconvenient and burdensome deposition.

FACTUAL BACKGROUND

Cabo Wabo is a California corporation, wholly-owned by the internationally acclaimed and recognized singer and songwriter, Sammy Hagar. *See* Ex. A, Declaration of Sammy Hagar ("Hagar Dec."), ¶¶ 2, 5. Cabo Wabo owns and operates a number of different businesses, including nightclubs, restaurants, clothing and tequila. With regard to the tequila side of its business, Cabo Wabo imports and distributes premium CABO WABO® brand tequila and owns numerous registrations and applications for the CABO WABO mark and other marks which incorporate the term "CABO" on and in connection with tequila and tequila-related products. *See id.* at ¶ 5.

On January 25, 2006, Cabo Wabo filed these consolidated opposition proceedings opposing the registration of Applicant's marks CABO AZUL and CABO NUTS as applied for in U.S. Trademark Application Serial Nos. 78/468,953 and 78/551,176. On July 19, 2006, Applicant served Cabo Wabo with interrogatories, request for production of documents and requests for admission. Applicant's Interrogatories Nos. 34 and 35 specifically requested that Cabo Wabo identify each and every person who provided answers to the interrogatories and all witnesses Cabo Wabo intended to call on its behalf.

On July 26, 2006, Cabo Wabo responded to Applicant's interrogatories, identifying Mr. Kauffman as the individual who had provided answers to the interrogatories and the individual whom Cabo Wabo would call on its behalf as a witness. Cabo Wabo also identified Steve Kauffman as the individual "who will testify about Cabo Wabo's business, marks, knowledge of Opposer's mark and business, and the likelihood of confusion and dilution of the CABO WABO Marks." *See* Ex. B, Opposer's Responses and Objections to Applicant's First Set of Interrogatories.

On October 2, 2006, Applicant noticed the depositions of Messrs. Kauffman and Hagar. On October 16, 2006, Applicant deposed Mr. Kauffman for less than two hours. On November 10, 2006, Applicant's attorneys sent a letter regarding the scheduling of Mr. Hagar's deposition. *See* Ex. C. Applicant has insisted on taking the deposition of Mr. Hagar and, on December 1, 2006, filed its motion to compel the deposition of Mr. Hagar.

ARGUMENT AND CITATION OF AUTHORITY

I. Mr. Hagar Has No Direct Knowledge Of The Relevant Facts.

Although Mr. Hagar owns Cabo Wabo, he is not involved in the operation or management of the business - Mr. Kauffman fulfills that role, making a deposition of Mr. Hagar burdensome and duplicative. *See* Ex. A, Hagar Dec., ¶ 4.

Mr. Hagar is a world famous, singer-songwriter whose travel and business schedule would make arranging a deposition very inconvenient and burdensome. *See* Ex. A, Hagar Dec., ¶ 2. Mr. Hagar is "a singularly unique and important individual who [could] be easily subjected to unwarranted harassment and abuse." *See Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985). Indeed, the very reason why Mr. Hagar has hired individuals like Mr. Kauffman is to handle his business interests and to have overall management responsibility while he remains free to pursue his entertainment career and other endeavors. *See* Ex. A, Hagar Dec., ¶ 4.

The Board has held that "when a party seeks to depose a very high-level official of a large corporation" that deposition may be successfully opposed if there is evidence (1) "that the official has no direct knowledge of the relevant facts"; or (2) "that there are other persons with equal or greater knowledge of the relevant facts." *FMR Corp. v. Alliant Partners*, Opposition No. 108,350, 1999 WL 696008, *6 (TTAB, July 15, 1999). "If the movant meets this initial burden, then the burden shifts to the party seeking the deposition to show that the official has unique or superior personal knowledge of relevant facts." *Id.* If the party seeking the deposition does not satisfy this showing, then the Board will grant the motion for protective order and require the party seeking the deposition to attempt to obtain discovery through less intrusive methods." *Id.*

In this case, the Board should enter an order preventing the deposition of Mr. Hagar because (1) Mr. Hagar has no unique personal knowledge of the facts surrounding this controversy; and (2) a deposition of Mr. Hagar would be burdensome and harassing given Mr. Hagar's lack of knowledge, celebrity status and extremely busy schedule.

A. Mr. Hagar does not have any unique personal knowledge about this controversy.

Applicant's notice of deposition should be precluded because Mr. Hagar has no unique personal knowledge regarding this matter to warrant his deposition. Rule 26(b) gives the Board power to regulate harassing or burdensome depositions, and unless a high level executive has unique personal knowledge about the controversy, the court should regulate the discovery process to avoid oppression, inconvenience, and burden to the corporation and to the executive. *See Folwell v. Hernandez*, 210 F.R.D. 169, 173 (M.D.N.C. 2002) (unless a high level executive has unique personal knowledge about the controversy, the court should regulate the discovery process to avoid oppression, inconvenience, and burden to the corporation and to the executive).[1]

For example in *Pioneer Kabushiki Kaisha DBA Pioneer Corp. v. Hitachi High Technologies America, Inc.*, 2005 WL 1113337, *1 (TTAB, May 2, 2005), the Board found good cause for the entrance of a protective order as to Hitachi's executive vice-president, Mr. Kobayashi, because he had "no unique or superior personal knowledge of

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[1] Even when an executive does have personal knowledge about the case, the Board still may fashion a remedy which reduces the burden on the executive. *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 205 F.R.D. 535, 536 (S.D.Ind. 2002) (limited coordinated deposition permitted in order to avoid the possibility of numerous, repetitive, harassing, or abusive depositions).

the facts." *Id.* at * 3. In this case, Mr. Hagar has no unique personal knowledge of the facts in this case. *See* Ex. A, Hagar Dec., ¶ 4. As such, the Court should enter a protective order.

B. Mr. Kauffman has greater knowledge of the relevant facts about this controversy.

Mr. Kauffman has far greater knowledge of the relevant facts about this case and is a less intrusive source of discovery for Applicant. "[C]ourts have granted a protective order when a party seeks to initiate its discovery 'at the top' before exhausting less intrusive discovery methods." *FMR Corp.*, 1999 WL 696008 at *3.

Less intrusive means of obtaining such discovery include requiring the seeking party to "first depose lower-level employees, take the corporate deposition, and propound interrogatories before noticing the [apex person's] deposition." *Id.* at *4 (citing *Baine v. General Motors Corp.*, 141 F.R.D. 332, 335-336 (M.D. Ala. 1991)). Only if none of those avenues suffice, and the plaintiff can then make a "colorable showing of good cause that the high-level official possesses necessary information to the case, the trial court may then lift the protective order and allow the deposition to proceed." *Id.*

Applicant has not taken advantage of Mr. Kaufman as a less intrusive source of discovery and one with greater knowledge regarding the facts of this case. Despite Cabo Wabo's discovery responses identifying Mr. Kauffman as the individual with knowledge of the relevant facts in this case, Applicant noticed both the deposition Mr. Kauffman and Mr. Hagar on the same day without even first deposing Mr. Kauffman. Moreover, Applicant deposed Mr. Kauffman for one hour and fifty minutes even though Applicant was entitled to seven hours of deposition time. However, Applicant now wants to depose Mr. Hagar who knows less of the relevant facts than Mr. Kauffman. Applicant has not

sufficiently attempted less intrusive means of discovery and a deposition of Mr. Hagar appears to be intended to harass, burden and inconvenience Mr. Hagar without any real basis for discovery.

II. The Discovery Sought By Applicant From Mr. Hagar Is Available From Another More Convenient, Less Burdensome Source.

Pursuant to Trademark Rule 2.120(f), the TTAB may "make any order which justice requires to protect a party from annoyance, embarrassment, oppression, undue burden or expense." *Id.* at. *3. The Board can limit or prevent such a deposition where the discovery sought is available from another source which is more convenient, less burdensome, and less duplicative. *See* Fed. R. Civ. P. 26; *Pioneer*, 2005 WL 1113337 at * 2 ; *FMR Corp,* 1999 WL 696008 at *3. .

In this case, Applicant, prior to moving to compel the deposition of Mr. Hagar, never identified areas of inquiry about which that he only now claims he must depose Mr. Hagar. Had Applicant done so, Cabo Wabo could have easily have provided other witnesses (and documents) far better able to testify than Mr. Hagar. Any deposition of Mr. Hagar would thus be inconvenient, burdensome and duplicative.

III. The Discovery Sought By Applicant From Mr. Hagar Could Have Been Obtained By Less Intrusive Means.

Applicant's motion to compel the deposition of Mr. Hagar is without merit and has been interposed purely for harassment. Applicant claims that it must depose Mr. Hagar because of Mr. Kauffman's short tenure with Cabo Wabo and his lack of knowledge regarding: (1) license agreements regarding the CABO WABO marks; (2) advertising of the CABO WABO marks; and (3) prior litigation regarding the CABO WABO marks. However, Mr. Hagar has no knowledge regarding these subjects.

Moreover, Applicant has given no indication to Cabo Wabo that it sought deposition testimony regarding: (1) license agreements; or (2) prior litigation of the CABO WABO mark, and Mr. Hagar is not knowledgeable regarding the advertising of the CABO marks. Had Applicant only asked, Cabo Wabo would have provided additional witnesses or documents suitable to respond to these areas of inquiry.

Moreover, Mr. Kauffman was able to testify about all the issues identified by Cabo Wabo in its response to Applicant's interrogatories. Cabo Wabo identified Mr. Kauffman as the individual "who will testify about Cabo Wabo's business, marks, knowledge of Opposer's mark and business, and the likelihood of confusion and dilution of the CABO WABO Marks." Applicant does not dispute that Mr. Kauffman provided relevant testimony on those issues. As such, Applicant was aware of the areas of Mr. Kauffman's testimony and made no attempt to inform Cabo Wabo of other topics on which sought discovery.

Furthermore, while Applicant claims that Mr. Kauffman was produced pursuant to a Rule 30(b)(6) notice to Cabo Wabo, that claim is inaccurate. Applicant simply noticed the depositions of Messrs. Kauffman and Hagar without a listing of the topics on which Applicant sought to discovery. For Applicant to now claim or suggest that Cabo Wabo did not fulfill its discovery obligations is without merit. Applicant could have obtained the discovery it sought long ago by serving Cabo Wabo with a 30(b)(6) notice listing the topics on which it sought discovery.

Finally, Applicant argues that since Mr. Hagar once owned the CABO WABO marks prior to their assignment to Cabo Wabo makes Mr. Hagar's deposition "reasonably necessary." Applicant's position is unpersuasive for two reasons: (1) Cabo

Wabo is now the owner of marks, not Mr. Hagar; and (2) the critical issues in this proceedings are not related to the actions of Mr. Hagar many years ago.

CONCLUSION

For the foregoing reasons Cabo Wabo respectfully requests that the Board deny Applicant's Motion to Compel and prohibit the deposition of Sammy Hagar.

Respectfully submitted this 28th day of December 2006.

Respectfully submitted,

GREENBERG TRAURIG, LLP

Date: December 28th, 2006

By: /s/ James J. Wolfson

James J. Wolfson, Esq.
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Atlanta, GA 30327
(678) 553-2457 Telephone
(678) 553-2212 Facsimile

Attorneys for Opposer
Red Head, Inc., d/b/a
CABO WABO ENTERPRISES

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2006, a true and correct copy of the foregoing **OPPOSER'S MEMORANDUM OF LAW IN OPPOSITION TO APPLICANT'S MOTION TO COMPEL** was served by first class mail, postage prepaid, to counsel for Applicant, addressed as follows:

Bruce B. Brunda, Esq.
Stetina Brunda Garred & Brucker
75 Enterprise, Suite 250
Aliso Viejo, CA 92656

/s/Jonathan K. Waldrop

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

In The Matter of Application Serial Nos. 78/468,953, 78/551,176
Marks: CABO AZUL and CABO NUTS

Red Head Inc., d/b/a/ CABO WABO ENTERPRISES, Opposer, v. Brady Bunte, Applicant.	Opposition Nos. 91168862 and 91168968

DECLARATION OF SAMMY HAGAR

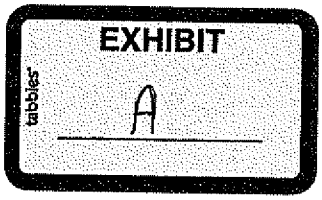
Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1.

My name is Sammy Hagar. I am over the age of eighteen (18) years, and am competent in all ways to give this declaration. All of the facts stated herein are true and accurate and based upon my personal knowledge, except where otherwise noted.

2.

For more than forty (40) years, I have been a professional musician/singer/songwriter. I am currently in the midst of a very busy period of recording and touring commitments, and will be traveling outside the United States quite frequently. These commitments are scheduled many months in advance and are not possible to rearrange without substantial inconvenience and expense to myself and many others.



3.

I am the sole owner of Red Head Inc. (hereinafter Cabo Wabo") which is a California Corporation with a mailing address at P.O. Box 5395, Novato, California 94948. Cabo Wabo owns and operates night clubs and restaurants, and also is involved in the sale of tequila and clothing.

4.

Although I am the owner of Cabo Wabo, I am not involved in the management and operation of these businesses. I have hired professional managers, as well as accountants and attorneys, to run my businesses.

5.

For example, my tequila business is operated by Stephen Kauffman, who is the President of the division of Cabo Wabo that is responsible for the importation and sale of tequila. He is the day-to-day manager of that business.

6.

With regard to the facts and issues that I have been told are relevant to this matter, such as how the CABO WABO® marks are used, how CABO WABO® tequila is imported, distributed, marketed and sold, whether there are uses by unrelated parties of marks that consist in whole or in part of the word "Cabo," and the nature of the tequila and liquor industry, I have virtually no direct personal knowledge of such facts. Such facts are known in detail by Mr. Kauffman.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Executed this 28 day of NOV, 2006.

Sammy Hagar

ORIGINAL

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

In The Matter of Application Serial No. 78/468,953
Mark: CABO AZUL

Red Head, Inc., d/b/a/ CABO WABO ENTERPRISES,	)	
Opposer,	)	
v.	)	Opposition No. 91168862
Brady Bunte,	)	
Applicant.	)	

OPPOSER'S RESPONSES AND OBJECTIONS
TO APPLICANT'S FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. P. 33 and 37 C.F.R. § 2.120, Opposer Red Head, Inc. d/b/a Cabo Wabo Enterprises ("Cabo Wabo") serves its Responses and Objections to Applicant's First Set of Interrogatories ("First Interrogatories").

RESERVATION OF RIGHTS

In responding to Brady Bunte's ("Applicant") First Interrogatories, Cabo Wabo states that it has conducted a diligent search, reasonable in scope, of those files and records in its possession, custody or control believed to be the most likely to contain information responsive to the interrogatories herein. Cabo Wabo has also solicited information from those individuals believed to be the most likely to have knowledge of such matters. Cabo Wabo has not undertaken to search or review each and every file and record in its possession, custody or control, nor has Cabo Wabo solicited information from every individual employed by or otherwise affiliated with Cabo Wabo.

Neither Cabo Wabo's responses to the First Interrogatories nor the production of any documents in response thereto shall constitute an admission by Cabo Wabo that either the

EXHIBIT
B

items from which Applicant can ascertain or derive the answer to relevant portions of this Interrogatory, and the burden of ascertaining or deriving the answer is substantially the same for Applicant as it is for Cabo Wabo.

INTERROGATORY NO. 33:

Identify all third party uses of any names or marks that include the term "CABO" or "CABO WABO", in relation to any of Opposer's Goods.

RESPONSE: Cabo Wabo objects to this Interrogatory on the grounds that it is vague, ambiguous, overly broad and unduly burdensome. Cabo Wabo further objects to this Interrogatory on the grounds that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Cabo Wabo objects to this Interrogatory to the extent that it seeks or purports to seek information protected from discovery by the attorney-client privilege, the immunity for work product, documents prepared in anticipation of litigation, confidential and proprietary business records and documents designated confidential by agreement or through settlement of litigation, and information subject to any other applicable privilege, immunity, or protection. Subject to and without waiving its objections, Cabo Wabo responds that it will produce certain documents and items from which Applicant can ascertain or derive the answer to relevant portions of this Interrogatory, and the burden of ascertaining or deriving the answer is substantially the same for Applicant as it is for Cabo Wabo.

INTERROGATORY NO. 34:

Identify each and every person who was consulted or provided information in connection with the preparation of your answers to the foregoing interrogatories, or who provided information or documents in connection with your responses to Applicant's Second Request for Production of Documents, and, for each such person, identify the interrogatory(ies) or document request(s) in connection with which he/ she provided information, documents or was consulted.

RESPONSE: Cabo Wabo objects to this Interrogatory on the grounds that it is vague, ambiguous, overly broad and unduly burdensome. Cabo Wabo further objects to this Interrogatory on the grounds that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Cabo Wabo objects to this Interrogatory to the extent that it seeks or purports to seek information protected from discovery by the attorney-client privilege, the immunity for work product, documents prepared in anticipation of litigation, confidential and proprietary business records and documents designated confidential by agreement or through settlement of litigation, and information subject to any other applicable privilege, immunity, or protection. Subject to and without waiving its objections, Cabo Wabo responds that Steve Kauffman, President of Tequilera Cabo Wabo, was consulted and provided information and documents.

INTERROGATORY NO. 35:

Identify all witnesses you intend to call on your behalf in this matter, and describe in detail the subject matter of each witness's anticipated testimony.

RESPONSE: Cabo Wabo objects to this Interrogatory on the grounds that it is vague, ambiguous, overly broad and unduly burdensome. Cabo Wabo objects to this Interrogatory to the extent that it seeks or purports to seek information protected from discovery by the attorney-client privilege, the immunity for work product, documents prepared in anticipation of litigation, confidential and proprietary business records and documents designated confidential by agreement or through settlement of litigation, and information subject to any other applicable privilege, immunity, or protection. Subject to and without waiving its objections, Cabo Wabo responds that its witnesses include: Steve Kauffman, President of Tequilera Cabo Wabo, who will testify about Cabo Wabo's business, marks, knowledge of Opposer's mark and business, and the likelihood of confusion and dilution of the CABO WABO Marks.

INTERROGATORY NO. 36:

LAW OFFICES
Stetina Brunda Garred & Brucker
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November 10, 2006

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Via Email & First Class Mail
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RE: *Red Head Inc. dba Cabo Wabo Enterprises, Inc., v. Brady Bunte*
Application Serial Nos. 78/551,176 and 78/468,593
Opposition Nos. 91168968 and 91168862
Marks: CABO NUTS and CABO AZUL
Our Refs: BUNTE-010M and BUNTE-008M

Dear Jim:

I just wanted to follow-up with you with respect to the deposition of Mr. Hagar, as previously noted in my correspondence of June 30, 2006, Mr. Hagar is likely to have greater knowledge regarding the business of Opposer, and I understand is the sole owner of Opposer. We again request an indication of when Mr. Hagar will be available for deposition.

According to our files, discovery is set to close in these matters on December 3, 2006. Therefore, I look forward to hearing from you at your earliest opportunity.

Very truly yours,

STETINA BRUNDA GARRED & BRUCKER

/bbb/

Bruce B. Brunda

BBB/kc
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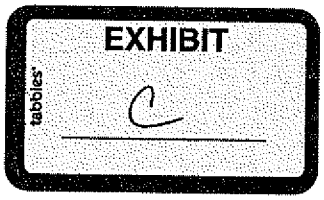

* ADMITTED TO PENNSYLVANIA BAR ONLY
† PATENT AGENT