

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

Mailed: April 30, 2007

Opposition No. 91168862

Opposition No. 91168968

Red Head, Inc. d/b/a Cabo Wabo
Enterprises, Inc.

v.

Brady Bunte

Cheryl Goodman, Interlocutory Attorney:

This case now comes up on applicant's motion to compel the deposition of Sammy Hagar and to extend the discovery period, filed December 1, 2006.¹

Applicant has noticed the deposition of Sammy Hagar, owner of opposer, but applicant states that opposer will not produce Mr. Hagar for deposition. Applicant seeks to compel the deposition of Mr. Hagar asserting that Mr. Hagar has "unique first hand knowledge of factors regarding adoption and use of the CABO WABO mark" and asserting that opposer's 30(b)(6) witness (i.e., Mr. Kauffman) had "short tenure" of one year," "limited knowledge" of the company, and was unable to answer questions regarding licensing, advertising, prior litigation of opposer's pleaded CABO WABO marks, and opposer's ownership.

In response, opposer asserts Mr. Hagar has limited knowledge of opposer's business and has attached a declaration from Mr. Hagar that declares that Mr. Hagar has "no direct personal knowledge of such facts" relevant to this matter; that "[s]uch facts are known in detail by Mr. Kauffman" and that he is "not involved in the management of his businesses" but hires others "to run my business." Opposer maintains that applicant's motion should be denied because of Mr. Hagar's lack of knowledge and because requiring the deposition of Mr. Hagar is burdensome, harassing, and inconvenient due to Mr. Hagar's busy schedule. Opposer also asserts that Mr. Kauffman was not produced pursuant to a Rule 30(b)(6) notice, that the notice did not include the topics that applicant sought discovery on; that applicant provided no written discovery on these issues; and that opposer can provide additional witnesses (other than Mr. Hagar) or documents to respond to the areas of inquiry for which applicant seeks discovery.

Applicant has not disputed that he did not depose Mr. Kauffman as a 30(b)(6) witness and Mr. Kauffman's notice was not attached to the deposition transcript excerpt submitted with applicant's motion. Applicant also has not disputed opposer's assertion that he did not seek written discovery

¹ Opposer's consented motion to extend time to respond to the motion to compel, filed December 20, 2006, is granted.

on licensing, advertising, and prior litigation of opposer's pleaded CABO WABO marks.

A party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied. However, when a party seeks to take the deposition of an official at the highest level or "apex" of a corporation, the court may exercise its authority under the federal rules to limit discovery. Fed. R. Civ. P. 26(b)(1); *see, e.g., Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.C. RI 1985).

When determining whether to allow an apex deposition, courts often consider: (1) whether or not the high-level deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case. *See e.g., First United Methodist Church of San Jose v. Atlantic Mutual Ins. Co.*, 1995 WL 5566026 at 2 (N.D. Cal. 1995) and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods, such as interrogatories and depositions of lower level employees. *See Salter v. Upjohn*, 593 F.2d 649, 651 (5th Cir. 1979). If the party has not conducted any 30(b)(6) depositions, the court may require the party to conduct a 30(b)(6) deposition prior to permitting the deposition of a high level corporate executive. *Folwell v. Hernandez*, 210 F.R.D. 169, 173 (M.D.N.C. 2002).

In this case, applicant is seeking to depose Mr. Hagar only after conducting what apparently was a 30(b)(a)(1) deposition of Mr. Kauffman. Additionally, it appears that applicant has not sought written discovery on the topics of licensing, advertising, prior litigation of opposer's pleaded CABO WABO marks, and opposer's ownership which are the areas for which it seeks a deposition of Mr. Hagar.

The Board finds that applicant has not exhausted the less intrusive discovery methods of written discovery and deposing opposer's 30(b)(6) witnesses. In view thereof, applicant's motion to compel is denied. Applicant is required to depose opposer's 30(b)(6) witnesses and to serve written discovery with regard to the questions of licensing, advertising, prior litigation and opposer's ownership, prior to seeking a deposition of Mr. Hagar.

In the event that the 30(b)(6) deposition(s) and written discovery prove unsatisfactory, applicant may renew his motion, if necessary and appropriate, at a later date.

Applicant's motion to extend discovery is granted. The discovery period is extended by an additional ninety days.

Proceedings are resumed.

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

DISCOVERY PERIOD TO CLOSE:	August 1, 2007
30-day testimony period for party in position of plaintiff to close:	October 30, 2007
30-day testimony period for party in position of defendant to close:	December 29, 2007
15-day rebuttal testimony period for party in position of plaintiff to close:	February 12, 2008

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.