

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

MBA

Mailed: September 26, 2008

Opposition No. 91177807

7-Eleven, Inc.

v.

Susan B. Bucenell

**Michael B. Adlin, Interlocutory Attorney:**

This case now comes up for consideration of opposer's motion to compel, filed May 5, 2008.<sup>1</sup> The motion is fully briefed.

Background

Applicant applied for registration of the mark HEALTHY GULP, in standard characters, for "Pet Beverages, namely, vitamin, mineral, and supplement enriched flavored and plain purified bottled water for cats and dogs."<sup>2</sup> In its notice of opposition, opposer alleges that it has priority of use and that applicant's mark is likely to cause confusion with, and dilute, an alleged "family" of opposer's marks which contain the word GULP and are used and registered<sup>3</sup> in

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<sup>1</sup> Opposer's consent motion for extension, filed April 17, 2008, is noted, and effectively granted herein.

<sup>2</sup> Application Serial No. 78916143, filed June 24, 2006, based on an alleged intent to use the mark in commerce.

<sup>3</sup> Registration Nos. 1110172, 1470871, 1566263, 1615968, 1586016, 2749708, 2997248, 2494955, 2528578, 2928007, 3076786 and 3082886.

connection with soft drinks, reusable plastic cups, beverage containers and other products, including BIG GULP, DOUBLE GULP and CAR GULP. Several of opposer's registrations are over five years old. In its answer, applicant admits that "Priority is not an issue as the Opposer's registrations are of record," but otherwise denies the salient allegations in the notice of opposition.

The Parties' Contentions

By its motion, opposer seeks to compel applicant to respond, or to respond more completely, to opposer's Interrogatory Nos. 4 and 18 and Requests for Production Nos. 5, 7 and 26. Opposer alleges that applicant's responses to these discovery requests fail to provide sufficient information regarding: (1) applicant's sales of products bearing applicant's mark; (2) the geographic territories in which applicant's products bearing the mark are marketed, sold or distributed; or (3) applicant's knowledge of third party uses of marks containing GULP.

In opposing the motion, applicant contends that she "has already fully responded to the discovery requests," including via applicant's May 16, 2008 letter to opposer, which was transmitted after opposer filed its motion to compel. Applicant also argues that opposer's efforts to meet and confer prior to filing its motion were incomplete or insufficient.

In its reply brief, opposer claims that applicant's supplemental responses and productions remain deficient. It also contends that its meet and confer efforts were sufficient.

Decision

Turning first to opposer's efforts to meet and confer, while opposer failed to directly respond to applicant's question regarding the relevance of sales information, its efforts to meet and confer were adequate under the circumstances. It was clear, or at least should have been clear from the parties' communications, that opposer was seeking additional information regarding applicant's sales because such information could be relevant to opposer's likelihood of confusion claim. Furthermore, with the exception of opposer's failure to directly respond to this single question, it appears that opposer did all it could to resolve the parties' discovery disputes prior to filing its motion.

Turning next to the specific discovery requests at issue, Interrogatory No. 4 and Document Request No. 5 seek information regarding applicant's "volume of sales, in dollars and units," and applicant's "annual sales." In her original responses, applicant objected to these requests as "not relevant and not reasonably calculated to lead to the discovery of admissible evidence," but nonetheless indicated

that she did not commence sales until August 2007, and promised to provide the requested information when available. In her supplemental production of May 19, 2008, applicant provided the amount of "Healthy Gulp's total sales for year ending 2007" and indicated that she has no responsive documents. Opposer claims, however, that "Applicant has still not provided any information regarding the number of product units she has sold nor has Applicant provided up to date sales information." Opposer also argues that "it does not appear credible that Applicant can have no documents (e.g., state and federal tax filings) evidencing her gross sales."

As opposer points out, information about applicant's sales of HEALTHY GULP products is reasonably calculated to lead to the discovery of admissible evidence regarding opposer's likelihood of confusion claim. Sunkist Growers, Inc. v. Benjamin Ansehl Co., 229 USPQ 147, 148 (TTAB 1985); TBMP § 414(18) (2d ed. rev. 2004). Accordingly, applicant's objections to these requests are **OVERRULED**, and opposer's motion to compel is **GRANTED**, to the extent that if applicant has additional and/or more recent information or documents responsive to these requests, including any documents or information about "the number of product units," she must provide it, within **THIRTY DAYS** of the mailing date of this order. The parties are reminded of the requirement to

supplement their discovery responses with recent information "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties ...." Fed. R. Civ. P. 26(e)(1)(A). Furthermore, opposer may seek to preclude applicant from relying on information or documents which should have been produced in response to these or any other discovery requests, but were not. See, Presto Products v. Nice-Pak Products, 9 USPQ2d 1895, 1896 n. 5 (TTAB 1988).

In Document Request No. 7, opposer requested "documents sufficient to establish the geographic territory in which each [of applicant's HEALTHY GULP products] has been marketed, sold and distributed," and applicant originally indicated that she had no such documents. During the meet and confer process, applicant indicated that the product is marketed "worldwide," and provided information and documents regarding specific geographic locations where the product was given away and marketed. Opposer claims, however, that the information and documents provided are insufficiently detailed or explained. While information and documents about applicant's geographic territories is discoverable, TBMP § 414(16), it appears that applicant's responses, including her explanation of those responses in her response

to opposer's motion, are adequate, and in its reply brief opposer does not contend otherwise. Accordingly, opposer's motion to compel further response to this request is **DENIED**.

Opposer's Interrogatory No. 18 and Document Request No. 26 address applicant's knowledge of third party products sold or distributed under marks containing GULP. After initially objecting and not responding to these requests, applicant provided information and documents sufficient to identify certain third party product names, but for the most part did not provide the requested information concerning the "person manufacturing or distributing [the products] ... annual volume of products distributed, and geographic territory in which distributed." Applicant claims that this information is "equally available to both parties," and, more importantly, that she "does not know the requested details." Nevertheless, in her opposition to the motion to compel, applicant described the methods by which she identified the product names. This is enough. Applicant cannot provide what she does not have, and she is not required to conduct research in order to respond to opposer's discovery requests. Johnston Pump/General Valve Inc. v. Chromalloy American Corp., 10 USPQ2d 1671, 1675 (TTAB 1988) (party "need not investigate the matter in order to answer the discovery question, but the witness must answer to the extent the information is known to him").

Accordingly, opposer's motion is **DENIED** with respect to these requests. Of course, should applicant become aware or obtain possession of additional responsive information or documents, she must supplement her responses, Fed. R. Civ. P. 26(e)(1)(A), and if she fails to do so, opposer may seek to preclude her from relying on such information or documents. Presto Products, 9 USPQ2d at 1896 n. 5.

Conclusion

Opposer's motion is **GRANTED IN PART**, to the extent that within **THIRTY DAYS** of the mailing date of this order, applicant shall supplement her responses to Interrogatory No. 4 and Document Request No. 5, pursuant to the requirements of this order. Opposer's motion is otherwise **DENIED**. Proceedings herein are resumed, and discovery and trial dates are reset as follows:

Discovery Period to Close:	January 25, 2009
30-day testimony period for party in position of plaintiff to close:	April 25, 2009
30-day testimony period for party in position of defendant to close:	June 24, 2009
15-day rebuttal testimony period to close:	August 8, 2009

News from the TTAB

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For

further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

[http://www.uspto.gov/web/offices/com/sol/notices/72fr42242\\_FinalRuleChart.pdf](http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf)

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>

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