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

Proceeding	91186154
Party	Plaintiff Top Gun Intellectual Properties, LLC
Correspondence Address	Michael F Sarney KATTEN MUCHIN ROSENMAN LLP 575 Madison Avenue New York, NY 10022 UNITED STATES michael.sarney@kattenlaw.com
Submission	Motion to Compel Discovery
Filer's Name	Michael Sarney
Filer's e-mail	michael.sarney@kattenlaw.com
Signature	/michael sarney/
Date	06/10/2009
Attachments	Top Gun Motion to Compel.pdf (21 pages)(548527 bytes)

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

TOP GUN INTELLECTUAL PROPERTIES, LLC,	)	
Opposer,	)	Opposition No. 91186154
v.	)	
UNITED IP, LLC,	)	
Applicant.	)	

MOTION TO COMPEL DISCOVERY

Pursuant to 37 C.F.R. §2.120(e) and Rule 37 of the Federal Rules of Civil Procedure, Opposer Top Gun Intellectual Properties, LLC hereby moves for an Order to Compel Discovery, for Applicant United IP, LLC's failure to respond to Opposer's First Set of Interrogatories to Applicant and Opposer's First Set of Requests for Production of Documents and Things to Applicant.

Opposer's attorney has made several good faith attempts, through written correspondence and by telephone to Applicant to resolve the issues presented in this motion, but Applicant has not responded to any of Opposer's attorney's attempted communications.

Pursuant to 37 C.F.R. §2.120(e), copies of Opposer's First Set of Interrogatories to Applicant and Opposer's First Set of Requests for Production of Documents and Things to Applicant are attached hereto as Exhibits A and B respectively.

As this Motion embodies a brief pursuant to 37 C.F.R. §2.127(a), no separate brief is attached.

On January 9, 2009, Opposer served on Applicant, Opposer's First Set of Interrogatories to Applicant (Exhibit A) and Opposer's First Set of Requests for Production of Documents and Things to Applicant (Exhibit B). Opposer served Applicant by first class mail at the correct address of record (See certificate's of service, Exhibits A and B hereto).

As of April 14, 2009, Applicant had not received any responses to the interrogatories or requests for production. On April 14, 2009, Opposer's counsel wrote to Applicant regarding the failure to respond (Exhibit C). Opposer's counsel never received a response.

On May 6, 2009, Opposer filed a motion to compel Applicant to respond to the outstanding discovery requests. On May 16, 2009, Opposer's motion was denied without prejudice, on the basis that Opposer was required to make a better effort to secure the discovery responses prior to filing the motion to compel. The discovery period was re-opened and is now scheduled to close June 22, 2009.

Upon receipt of the Order denying the motion to compel, Opposer's counsel called Applicant's identified representative, Carl Henderson, on June 2, 2009, in effort to obtain the outstanding discovery responses. Mr. Henderson advised that he was unable to discuss the matter at that time, and requested that Opposer's counsel call back the next day. Accordingly, the next day, June 3, 2009, Opposer's counsel again called Mr. Henderson. Mr. Henderson did not answer the phone and Oppoer's counsel left a voice message stating that he was calling to discuss the outstanding discovery, and requested that Mr. Henderson return his call. Mr. Henderson did not return the call, and on June 5, 2009, Opposer's attorney again called Mr. Henderson. This time, the phone was answered by a receptionist, who stated that Mr. Henderson was not in the office and that he would return the next day. Opposer's counsel left a message

asking Mr. Henderson to return his call the next day. To date, Mr. Henderson has not returned the call.

It is clear that Applicant has no intention of responding to the outstanding discovery or even discussing the matter with Opposer's counsel. It is submitted that more than sufficient efforts were made in good faith to resolve the issue and Opposer's counsel should not have to repeatedly reach out to Applicant only to be ignored. In fact, it is submitted that the Order denying the prior motion to compel for insufficient efforts was not properly based. A complete failure to respond to outstanding discovery is not a dispute which Rule 2.120 was intended to address. A dispute is a disagreement over an issue, usually in good faith. A party's complete failure to abide by the Federal Rules of Civil Procedure is not a dispute: rather, it is a *per se* violation of the Rules.

Opposer is entitled to discovery in connection with Applicant's pending application and intent to use the subject trademark. Opposer's First Set of Interrogatories to Applicant and Opposer's First Set of Requests for Production of Documents and Things to Applicant are proper under Rule 26 of the Federal Rules of Civil Procedure, in that they relate to the subject matter of this opposition proceeding.

Accordingly, Opposer respectfully requests that the Board enter an Order compelling Applicant to respond to Opposer's First Set of Interrogatories to Applicant and Opposer's First Set of Requests for Production of Documents and Things to Applicant, and to produce the requested documents. It is further requested that the Board order that such responses be made without the raising of any objections, on the grounds that Applicant failed to respond within thirty (30) days, as required by Rules 33 and 34 of the Federal Rules of Civil Procedure, and thereby waived any and all objections which might have been raised. See TBMP 527.03.

Dated: June 10, 2009

KATTEN MUCHIN ROSENMAN LLP

By: Michael F. Sarney

575 Madison Avenue
New York, New York 10022
Attorneys for Opposer

CERTIFICATE OF SERVICE

I, the undersigned, Michael Sarney, hereby certify that, on the 10th day of June, 2009, I caused to be served a true and correct copy of

MOTION TO COMPEL DISCOVERY

by U.S. Mail, first class, by depositing the same in a depository of the United States Postal Service, on the Applicant, as follows:

J Carl Henderson
Director of Legal Affairs
United IP, LLC
3403 E John Carpenter Freeway
Irving, Texas 75062

Michael Sarney

EXHIBIT A

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

Top Gun Intellectual Properties, LLC,	)	Opposition No. 91186154
Opposer,	)	
v.	)	
United IP, LLC,	)	
Applicant.	)	

OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT

Opposer, Top Gun Intellectual Properties, LLC hereby propounds the following written interrogatories to Applicant, United IP, LLC, pursuant to Rule 33 of the Federal Rules of Civil Procedure and the Trademark Rules, and requests that they be answered separately and fully, under oath and in writing, by an officer of Applicant within 30 days of the service hereof.

Definitions

The following definitions are applicable throughout the interrogatories which follow, unless otherwise indicated:

A. "Person" or "Persons" shall mean and include any natural person, association, partnership, corporation, firm, organization or any other kind of business or legal entity, its agents or employees.

B. "Document" and "Documents" shall mean and include all written, recorded, or graphic matters, however produced or reproduced, whether or not privileged, pertaining in any way to the subject matter of this action. This definition includes, but is not limited to, any and all originals, copies, or drafts of any and all of the following:

records; notes, summaries; contracts or agreements; drawings; sketches; invoices, orders or acknowledgments; diaries, reports, forecasts or appraisals; memoranda or telephone or in-person conversations by or with any person, or any other memoranda; letters, telegrams, telexes, or cables prepared, drafted, received or sent; tapes, transcripts or recordings; photographs, pictures or films; computer programs or data or other graphic symbolic, recorded or written materials of any nature whatsoever. Any document which contains any comments, notation, addition, insertion or marking of any kind which is not part of another document or document which does not contain any comment, notation, addition, insertion, or marking of any kind which is part of another document, is to be considered a separate document.

C. "You", "Your" and "Applicant" shall mean and include United IP, LLC, and all predecessors in title unless otherwise indicated, and shall also include all present or former agents, employees, consultants, experts, investigators and/or persons acting or purporting to act, directly or indirectly on behalf of United IP, LLC or its predecessors, or any firm, corporation, partnership or business venture of any kind with which they are or have been affiliated.

Interrogatories

INTERROGATORY NO. 1

Identify all goods or services upon or in connection with which Applicant has used the designation "TOP GUN" and the date when Applicant first started using such designation in connection with each of such goods or services.

INTERROGATORY NO. 2

State whether Applicant ever conducted or had conducted on its behalf any investigation as to the availability for use of the term or mark "TOP GUN" either prior to or after the adoption and use of that term or mark by Applicant, and if the answer is other than an unqualified negative, identify the persons most knowledgeable of said investigation(s), and identify all documents referring or relating to such investigation(s) including, but not limited to, requests for and results of any and all investigations of the records of the United States Patent and Trademark Office, state and local agencies, common-law usages or otherwise, and any and all private investigations performed by Applicant or its attorneys or other agents.

INTERROGATORY NO. 3

Describe the relationship between Applicant and the entity Micrin.

INTERROGATORY NO. 4

Describe the relationship between Applicant and the entity Top Gun Products.

INTERROGATORY NO. 5

Identify the person(s) most knowledgeable about the goods offered for sale and/or sold by Applicant in connection with the designation TOP GUN.

INTERROGATORY NO. 6

Identify any other trademarks, service marks or other indicia of source used by Applicant on or in connection with the goods or services identified by Applicant in response to Interrogatory No. 1 above.

INTERROGATORY NO. 7

Identify by name and title all officers of Applicant.

INTERROGATORY NO. 8

Identify the person(s), including, but not limited to, employees of Applicant, advertising agencies, public relation firms or marketing consultants, who were responsible for and/or who participated in the design, selection or adoption of the designation "TOP GUN".

INTERROGATORY NO. 9

Identify all individuals or entities to whom Applicant has granted any right or license to use the designation TOP GUN and identify all goods and services in connection with which each such right or license to use the designation TOP GUN has been granted.

INTERROGATORY NO. 10

Describe the class of customers to which Applicant sells goods or offers services under or in connection with the designation "TOP GUN".

INTERROGATORY NO. 11

Describe the channels of trade through which Applicant's goods bearing the mark "TOP GUN" are marketed, advertised, offered for sale, sold and/or distributed.

INTERROGATORY NO. 12

Identify the person(s) employed by or on behalf of Applicant who has been and/or is now responsible for marketing, distribution, advertising and promotion of Applicant's good in connection with the designation TOP GUN.

INTERROGATORY NO. 13

Identify the person(s) with knowledge concerning the date and the circumstances when Applicant first became aware of Opposer's use of the designation TOP GUN.

INTERROGATORY NO. 14

Identify each witness Applicant expects to call to testify on its behalf at final hearing in this proceeding, state the subject matter of each such witness's expected testimony and identify each exhibit that Applicant intends to introduce or rely upon in connection with such testimony.

INTERROGATORY NO. 15

Identify each expert witness Applicant expects to call to testify at final hearing in this proceeding, and, for each such expert witness, state the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which each expert is expected to testify; a summary of the grounds for each such opinion; and the education, training, employment history, publications, and every other fact on which Applicant intends to rely to show the qualifications of each such expert.

Dated: January 9, 2009

KATTEN MUCHIN ROSENMAN LLP
Attorneys for Opposer

By: Michael F. Sarney

575 Madison Avenue
New York, New York 10022
Tel. (212) 940-8698
Fax. (212) 940-8987

CERTIFICATE OF SERVICE

I, the undersigned, Michael Sarney, hereby certify that, on the 9th day of January, 2009, I caused to be served a true and correct copy of

OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT

by U.S. Mail, first class, by depositing the same in a depository of the United States Postal Service, on the Applicant, as follows:

J Carl Henderson
Director of Legal Affairs
United IP, LLC
3403 E John Carpenter Freeway
Irving, Texas 75062

Michael Sarney

84319141_1

EXHIBIT B

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

Top Gun Intellectual Properties, LLC,	)	
	)	Opposition No. 91186154
Opposer,	)	
	)	
v.	)	
	)	
United IP, LLC,	)	
	)	
Applicant.	)	
	)	

OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS TO APPLICANT

Opposer, Top Gun Intellectual Properties, LLC, hereby requests that Applicant United IP, LLC, produce the documents and things requested below within thirty (30) days for inspection and copying, in accordance with Rule 34 of the Federal Rules of Civil Procedure, at the offices of Opposer's counsel.

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, all documents should be produced as they are kept in the usual course of business or organized and labeled to correspond with the categories of this request.

DEFINITIONS AND INSTRUCTIONS

1. "Applicant" means United IP, LLC, its officers, employees, attorneys, agents and representatives, and any predecessor, successor, parent or subsidiary entity, either United States or foreign, with respect to all or any part of the business of Applicant.

2. "Opposer" means Top Gun Intellectual Properties, LLC.

3. "Documents" means and includes all matters within the scope of Rules 26 and 34 of the Federal Rules of Civil Procedure, however and by whomever produced or reproduced, now or at any time in Applicant's possession, custody or control, including but not limited to letters, telexes, telephone records and notations, minutes, advertisements, reports, memoranda, notes, notebooks, data sheets, work sheets, drawings, agreements, invoices, computer programs and data studies, analyses, comparisons, surveys, memoranda of conversations, sound or video recordings, information storage disk, tapes, cards of films, diaries, or any other tangible records of any kind, including drafts of the foregoing and copies of reproductions of all the foregoing upon which notations and writing have been made but do not appear on the originals. Any document which contains any comments, notation, addition, insertion or marking of any kind which is not part of another document or document which does not contain any comment, notation, addition, insertion, or marking of any kind which is part of another document, is to be considered a separate document.

5. "Number and Gender": When necessary to facilitate any response to this request: (a) any word may be construed as either singular or plural; and (b) any word in one gender may be construed as having any other gender.

6. If Applicant is not in possession, custody or control of any documents responsive to particular request, then Applicant should so state in its response to such request.

7. This request shall be deemed to be continuing so as to require prompt, further and supplemental production if Applicant locates or obtains possession, custody

or control of additional responsive documents at any time prior to final hearing, subject to the provisions of Rule 26 of the Federal Rules of Civil Procedure.

REQUESTS

REQUEST NO. 1

All documents which refer and/or relate to Opposer, including, without limitation, all documents referring and/or relating to any goods offered for sale or sold by Opposer under the designation "TOP GUN"

REQUEST NO. 2

All documents which establish the earliest use by Applicant of the designation "TOP GUN" in connection with any goods or services.

REQUEST NO. 3

Documents sufficient to identify all goods or services which Applicant has sold, offered for sale or provided under the name "TOP GUN."

REQUEST NO. 4

All documents describing or identifying the types of consumers to whom Applicant currently offers for sale or sells goods, or intends to offer for sale or sell goods in the future, in connection with the mark "TOP GUN."

REQUEST NO. 5

Samples (at least one copy) of each document utilized by Applicant in marketing, advertising, offering for sale or selling goods under or in connection with the mark "TOP GUN," from the time Applicant first began using such mark through the present, including but not limited to tags, labels, placards, catalogues, circulars, leaflets, direct

mail pieces, websites, newspaper and magazine advertisements, cartons, containers, counter cards, packing or other promotion, advertising or shipping material.

REQUEST NO. 6

All documents evidencing, relating to and/or referring to any agreements entered into by Applicant in connection with the use of the mark "TOP GUN."

REQUEST NO. 7

All documents relating to or evidencing any confusion with respect to Applicant's goods offered for sale or sold under the designation "TOP GUN," including, without limitation, any misdirected e-mails, written correspondence, or phone calls.

REQUEST NO. 8

All documents referring to, relating to and/or commenting upon any search, survey or other investigation conducted by Applicant, or on behalf of Applicant, relating to the designation "TOP GUN".

REQUEST NO. 9

All documents that refer to, relate to and/or comment upon Applicant's decision to offer for sale or sell goods under the designation "TOP GUN".

REQUEST NO. 10

All documents that refer to, relate to and/or comment upon any opinion, written or oral, relating to Applicant's decision to adopt, use, expand its use of and/or register the mark "TOP GUN".

REQUEST NO. 11

Documents sufficient to identify Applicant's organizational and/or corporate structure.

REQUEST NO. 12

All marketing plans, media plans, business plans, or other strategic planning documents referring or relating to the use of the TOP GUN mark or to any goods or services sold or offered for sale under the TOP GUN mark.

REQUEST NO. 13

All documents referring or relating to any complaints received from customers or others concerning the nature or quality of any of Applicant's goods or services sold or provided under or in connection with the TOP GUN mark.

REQUEST NO. 14

All documents relied upon by Applicant in responding to Opposer's First Set of Interrogatories to Applicant.

REQUEST NO. 15

All documents, the identification of which was sought in Opposer's First Set of Interrogatories to Applicant.

REQUEST NO. 16

All documents which Applicant intends to rely upon at final hearing in this proceeding.

Dated: January 9, 2009

KATTEN MUCHIN ROSENMAN LLP
Attorneys for Opposer

By: Michael F. Sarney

575 Madison Avenue
New York, New York 10022
Tel. (212) 940-8800
Fax. (212) 940-8987

CERTIFICATE OF SERVICE

I, the undersigned, Michael Sarney, hereby certify that, on the 9th day of January, 2009, I caused to be served a true and correct copy of

OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS TO APPLICANT

by U.S. Mail, first class, by depositing the same in a depository of the United States Postal Service, on the Applicant, as follows:

J Carl Henderson
Director of Legal Affairs
United IP, LLC
3403 E John Carpenter Freeway
Irving, Texas 75062

Michael Sarney

84319141_1

EXHIBIT C

Katten
Katten Muchin Rosenman LLP

575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
212.940.8776 fax

MICHAEL F. SARNEY
michael.sarney@kattenlaw.com
212.940.8698 direct
212.894.5798 fax

April 14, 2009

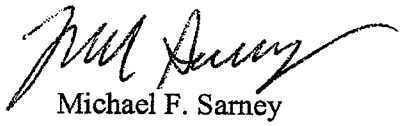
Mr. J. Carl Henderson.
Director of Legal Affairs
United IP, LLC
3403 E John Carpenter Freeway
Irving, Texas 75062

Re: Top Gun Intellectual Properties, LLC v. United IP LLC
Our Ref.: 340217-00001

Dear Mr. Henderson:

On January 9, 2009, we served upon you, by US Mail, First Class, Opposer's First Set of Interrogatories to Applicant and Opposer's First Set of Requests for Production of Documents and Things to Applicant. To date, we have received no response. As such, United IP is in default on those discovery requests and all objections have been waived. Accordingly, we hereby demand that you immediately provide full and complete responses to the aforementioned discovery requests. If we do not hear for you promptly, we will file a motion to compel.

Very truly yours,



Michael F. Sarney

MFS:cc