

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

wbc

Mailed: July 31, 2013

Opposition No. 91195961

ELVH, Inc.

v.

Kelly Van Halen

Wendy Boldt Cohen, Interlocutory Attorney:

This case now comes up for consideration of applicant's motion (filed July 31, 2012) to compel responses to its interrogatories served May 18, 2012.

Applicant alleges that opposer's general objection to its interrogatories based on the total number of interrogatories is improper. Accordingly, applicant asks that opposer be compelled to serve responses to its interrogatories and if its motion to compel is denied, applicant be granted leave to serve amended interrogatories.

Opposer alleges that applicant has served in excess of the permissible number of interrogatories and that it need not respond to the interrogatories. Accordingly, opposer asks that applicant's motion be denied.

The Board finds initially that applicant made a good faith effort, as required by Trademark Rule 2.120(e)(1), to

resolve the parties' discovery dispute prior to seeking Board intervention.

The number of interrogatories, including subparts, allowed a party pursuant to Fed. R. Civ. P. 33 in a proceeding before the Board is limited to seventy-five, except upon a showing of good cause to exceed this limit by motion for leave to do so, filed with the Board. Trademark Rule 2.120(d)(1). In counting interrogatories to determine if this limit has been exceeded the Board will count each subpart with an interrogatory as a separate interrogatory, regardless of whether the subpart is separately designated, i.e., separately numbered or lettered. See *Jan Bell Marketing Inc. v. Centennial Jewelers Inc.*, 19 USPQ2d 1636 (TTAB 1990). The propounding party is bound not only by its own numbering system, by designating subparts, which are counted separately, but also by the Board's construction of the body of the interrogatories. *Id.* at 1637. If a propounding party sets forth its interrogatories as seventy-five or fewer separately designated questions (counting both separately designated interrogatories and separately designated subparts), but the interrogatories actually contain more than seventy-five questions, the Board will not be bound by the propounding party's numbering or designating system. Rather, the Board will look to the substance of the interrogatories, and count each question as a separate interrogatory. For example, if

two or more questions are combined in a single compound interrogatory, and are not set out as separate subparts, the Board will look to the substance of the interrogatory, and count each question as a separate interrogatory. See *Jan Bell Marketing, Inc. v. Centennial Jewelers, Inc.*, 19 USPQ2d 1636 (TTAB 1990). In determining whether a set of interrogatories exceeds the limit, "each subdivision of separate questions, whether set forth as a numbered or lettered subpart, or as a compound question or a conjunctive question, is counted as a separate interrogatory." *Kellogg Co. v. Nugget Distributors' Cooperative of America Inc.*, 16 USPQ2d 1468, 1469 (TTAB 1990); TBMP § 405.03(d) (2013).

Central to opposer's argument that applicant's interrogatories exceed seventy-five, is that applicant's interrogatories contain compound questions and multiple subparts, e.g., Interrogatory No. 37 seeks information regarding each of applicant's prior served requests for admission. Because this interrogatory seeks information which concerns a multitude of subjects it is counted as multiple interrogatories. Additionally, applicant's use of questions which require follow-up answers if answered in the affirmative increase the number of distinct interrogatories presented, e.g., interrogatory no. 10 asks "if you contend that you would be damaged" which requires opposer to first answer this

question and then further asks "please state all facts including an identification of all relevant documents. . ."

In view thereof, after reviewing applicant's May 18, 2012 interrogatories,¹ the Board finds that applicant has exceeded its permissible number of interrogatories for this proceeding. Accordingly, applicant's motion to compel is **DENIED**. Opposer need not respond to applicant's May 18, 2012 interrogatories. Notwithstanding the foregoing, applicant is allowed **fourteen days** from the date hereof to serve amended interrogatories that do not exceed the numerical limit.² If applicant properly serves a revised set of interrogatories, opposer's responses to the amended interrogatories shall be due pursuant to Trademark Rule 2.120(a)(3).

Proceedings are resumed. Dates are reset as follows:

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| Plaintiff's 30-day Trial Period Ends | 10/30/2013 |
| Defendant's Pretrial Disclosures | 11/14/2013 |
| Defendant's 30-day Trial Period Ends | 12/29/2013 |
| Plaintiff's Rebuttal Disclosures | 1/13/2014 |
| Plaintiff's 15-day Rebuttal Period Ends | 2/12/2014 |

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

¹ We have not been asked to decide whether such interrogatories are relevant. However, the scope of discovery under Fed. R. Civ. P. 26(b)(1) is relatively broad. See also TBMP § 414.

² Should applicant serve a revised set of interrogatories in accordance with the order herein, the revised set may not seek information beyond the scope of the May 18, 2012 set. See *Jan Bell Marketing, Inc. v. Centennial Jewelers, Inc.*, 19 USPQ2d 1636, 1637 (TTAB 1990); *Kellogg Co. v. Nugget Distributors' Cooperative of America Inc.*, *supra*; TBMP § 405.03(e).

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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 Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.