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

Proceeding	91197504
Party	Defendant Alpha Phi Omega
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OMEGA, S.A.,

OPPOSER,

v.

ALPHA PHI OMEGA,

APPLICANT.

**Opposition Nos.
91197504 (Parent) &
91197505 (Child)**

**Serial Nos.
77950436 & 77905236**

**REPLY TO OPPOSER’S OPPOSITION TO MOTION (1) TO COMPEL DISCOVERY
AND
(2) TO TEST SUFFICIENCY OF RESPONSES TO REQUESTS FOR ADMISSION**

Introduction

As noted in Alpha Phi Omega’s opening brief, there are at least 28 Greek letter fraternities or sororities with the Greek word “Omega” in their name. further, the continuous existence of many of those fraternities and sororities dates back to the 1800s, many, in existence since prior to Opposer’s adoption of the mark OMEGA for its high end watches.

Applicant itself has continuously since 1925 used the ALPHA PHI OMEGA mark, the Greek alphabet letters, ΑΦΩ, and the coat-of-arms shown here.

It is Applicant’s pending application to register its Greek alphabet letters as a mark for clothing, and the application to register this coat-of-arms as a mark for jewelry which are the subjects of the pending oppositions. It is noteworthy to realize that Applicant has various other subsisting registrations of both of these marks, namely Reg. No. 3,835,075, Reg. No.



2,320,138, and Reg. No. 3,834,436, *each of which notes first use dating back to 1925.*

Notwithstanding 88 years of concurrent use without any known instances of confusion, Opposer opposes the pending applications asserting there is a likelihood of confusion and that the marks sought to be registered allegedly dilute Opposer's marks. Indeed, even though dozens of fraternities and sororities use the Greek letter "Omega" in their name, many dating well back in the 1800s, before Opposer's adoption of the OMEGA mark, it has now decided to commence opposing filings by any of those fraternities and sororities to register any marks containing OMEGA. Opposer has made multiple filings with the TTAB adverse to fraternities and sororities seeking to register marks containing OMEGA in their name, including proceedings pending in the TTAB against the Lambda Tau Omega Sorority (Proceeding No. 91208652) and the Omega Psi Phi Fraternity (Proceeding No. 91197082), the filing of requests for extensions to oppose a filing of the Psi Sigma Omega Service Fraternity (Serial No. 78739642) and the successful bullying of the International Brotherhood of Omega Delta Phi into abandoning an application to register its fraternity name (Proceeding No. 91186613).

Omega seeks to have its cake and eat it too. Although it now interferes with any efforts by fraternities or sororities with the word "Omega" in their name, it nonetheless claims that the existence of dozens of fraternities and sororities with "Omega" in their name, many dating back to the 1800s prior to Omega's adoption of its mark, is irrelevant to these proceedings. Omega is mistaken, to prevail on its dilution claim, it must show that its mark was famous prior to the adoption by Applicant in 1925 of the ALPHA PHI OMEGA mark, the Greek letters, ΑΦΩ, and the coat-of-arms. Further, in scrutinizing whether the mark is adequately distinctive to be famous, it is necessary to consider the uses of similar marks by others.

Insufficient Responses To Requests For Admissions

This motion was necessitated in part by Omega's insufficient discovery responses in which it denied 46 of 48 Request for Admission. The Requests for Admission were straight-

forward, simple, and specific. In a fundamentally basic use of this discovery tool, virtually all of the requests were merely that Omega admit it has no basis to dispute some extremely simple basic facts, many relating to facts so well-known and incontrovertible that the TTAB could likely take judicial notice thereof. Notwithstanding, Omega expressly denied 46 of the 48 requests. It would only admit that the Greek Alphabet letter, Ω is pronounced “Omega” and that Opposer does not “advertise or market” its products in the “Greek Affinity Products Market.” See Exhibit C, Responses to Request for Admission Nos. 2 and 13.

These deficiencies were exacerbated by Omega’s refusal to answer the Interrogatory requesting that it explain its denials of any of the Request for Admission, and its representation in response to the Request for Production that it would produce any documents and things supporting its denials. Notwithstanding the representation they would produce these records, that is not what Omega did here. Instead, they dumped approximately 2900 documents on us none of which appear to provide any information supporting the denials of 46 of the 48 Requests for Admissions.

Opposer’s Supplemental Responses are just as insufficient. Now, rather than more generally “deny” 46 of the requests as it first did, Opposer amends its responses to state it “ lacks sufficient knowledge and belief to admit or deny the truth of this Request to Admit and therefore denies same.” The supplemental denials now suffer from the deficiency of blindly claiming inadequate knowledge without first engaging in “reasonable inquiry” as required by TBMP §407.03(b).

Of each of the 46 requests Omega denied, its responses are wholly insufficient, thus the requests should be deemed admitted. As mentioned above, virtually all of the requests were simply, hardly disputable facts in which the request was simply that Omega admit it *has no*

evidentiary basis to dispute the statement. For instance, Request for Admission No. 3 inquired as follows:

Admit that Opposer *has no evidentiary basis to dispute* that the word “Omega” has been continuously used in the United States as part of the name of various Greek letter social, professional, or honorary fraternities or sororities since prior to the introduction into the United States by or on behalf of Opposer or Opposer’s predecessor(s) in interest of any product bearing any of the marks upon which the Opposition is based.

(emphasis added). Omega expressly denies the “Admit that Opposer *has no evidentiary basis to dispute*” requests claiming, “it lacks knowledge sufficient to admit or deny the truth of the Request to Admit and therefore denies same.” Not only such a response facially deficient, the effect of the responses is actually a tacit admission Omega “*has no evidentiary basis to dispute*” these requests. For example, with Request No. 3 quoted just above, we did not request that Omega *admit that the word Omega has been so used* by various fraternities since prior to Omega’s entrée into the States, rather, we asked them to merely to admit they have *no evidentiary basis to dispute* this occurred. By claiming they have no knowledge one way or the other on the subject is thus a tacit admission Omega *has no evidentiary basis to dispute* the facts recited in these requests.

Omega’s initial responses are insufficient. Its supplemental responses misuse the “insufficient knowledge” excuses, and in doing so essentially constitute a tacit admission of the Requests. the Requests for Admission should be “deemed admitted” pursuant to TBMP § 524.01.

Omega’s Supplemental Responses Do Not Moot This Motion

Omega misleads the TTAB asserting much of this motion is now mooted by its supplemental discovery responses. Omega’s supplementation of its discovery responses *subsequent to the filing of this motion* was an egregious farce, a mockery of the discovery process. Its “identification” by document numbers of the documents it claims are responsive to

the specific discovery requests is a gross deception. Rather than identify responsive documents, all the purported identification by document number does is confirm our suspicion the production was merely a document dump. None of the now specifically identified documents are *at all* responsive to the specific discovery requests for which the documents are stated to be responsive. NONE of them. For example:

1. Interrogatory No. 3: This interrogatory directed Omega to provide annual itemizations of its sale “ in the United States *prior to 1925* of any product sold under the marks upon which the Opposition is based” (emphasis added). The pertinence of this, of course, goes to Opposer’s dilution claim, Because Applicant has used is ALPHA PHI OMEGA marks continuously since 1925, the burden is on Opposer to show that its mark was famous prior to the adoption by Applicant of its marks. In its initial response, Opposer stated it would be producing documents providing this information. The document dump did not contain any of this requested information. Then, subsequent to the filing of this motion, Omega deceptively “supplemented” its Interrogatory responses (see Exhibit 18 to Omega’s opposition Brief) identifying the documents which it states are responsive to this request, identifying documents OSA002802: OSA002853-2859; and OSA002861. None of these documents are *at all responsive to this interrogatory*. 2802 is a listing of sales from 2004-2009, not sales “prior to 1925.” Similarly, 2853-2859 non-responsively identifies sales from 2003-2009 and 2861 identifies sales from 1999-2003.¹

2. Interrogatory No. 4: This interrogatory directed Omega to provide annual itemizations of the extent of its advertising and marketing “in the United States *prior to 1925*”

¹ Because Omega labeled these documents Confidential, for Attorney’s eyes only, we are not filing them with this Reply, especially since the confidential information contained in the documents is not pertinent to this motion. The fact remains, the documents Omega claims provide the requested information are totally non-responsive. We will file these documents of record should the TTAB advise it desires to review them.

(emphasis added). Just as Omega did with its supplemental response to Interrogatory No. 3, its supplemental response to this Interrogatory was a mockery; it identified totally non-responsive documents. The documents it identifies are OSA002803-2826 and OSA002848. These documents do not at all relate to sales and marketing efforts prior to 1925; the identified documents are advertising media placement suggestions for the years 2000 through 2011.

3. Interrogatory No. 5: This interrogatory directed Omega to provide information relating to media attention received “in the United States *prior to 1925*” (emphasis added). Just as Omega did with its supplemental response to Interrogatory Nos. 3 and 4, its supplemental response to this Interrogatory was a mockery; it identified totally non-responsive documents. The documents it identifies are OSA000219-1766. The identified documents consist of dozens of more recent advertisements placed by Omega and a self-published book produced by Omega about Omega; these documents do not at all relate to media attention received in the United States prior to 1925 relating to Omega product.

4. Interrogatory No. 10: This interrogatory directed Omega to provide information relating to any evidentiary basis for claiming that OMEGA was a famous mark “in the United States *prior to 1925*” (emphasis added). Just as Omega did with its supplemental responses to the other Interrogatories, its supplemental response to this Interrogatory was a mockery; it identified totally non-responsive documents. The documents it identifies are OSA000219-1767 and OSA02803-2826. The identified documents consist of dozens of more recent advertisements placed by Omega and a self-published book produced by Omega about Omega and the advertising placement proposals for 2010 and 2011; these documents do not at all relate to OMEGA fame in the United States prior to 1925.

5. Interrogatory No. 12: This interrogatory directed Omega to provide information

relating to any evidentiary basis for claiming that the Applicant's coat-of-arms mark is "likely to be recognized as an identification or association with Opposer of its products." Just as Omega did with its supplemental responses to the other Interrogatories, its supplemental response to this Interrogatory was a mockery; it identified totally non-responsive documents. The nearly 100 documents it identifies are not at all responsive to this request. The identified documents are merely marketing materials with photographs of Omega products. None of these documents at all relate to whether the Applicant's coat-of-arms mark is "likely to be recognized as an identification or association with Opposer of its products." .

It is disturbing for Omega to claim to the TTAB that its "supplemental" responses moot many of the concerns raised in the motion. Quite to the contrary, all the supplemental responses do is confirm the approximately 2900 documents produced by Omega are nothing other than a document dump; they are not at all responsive to the discovery requests.

In addition to misrepresenting to the TTAB that many of the disputes are now moot, Omega argues in the alternative that it need not respond to discovery requests associated with whether its marks were famous in the United States prior to 1925 when applicant adopted the ALPHA PHI OMEGA mark, the Greek alphabet letters, ΑΦΩ, and the coat-of-arms, suggesting it need not prove whether its mark was famous prior to that date unless and until Applicant first proves it has continuously used these marks since its founding in 1925. There is absolutely no basis for Opposer to suggest that Alpha Phi Omega was not founded in 1925, nor any basis for suggesting it ever had a cessation of operations at any time thereafter. There is absolutely no basis for Opposer to suggest that Alpha Phi Omega has not been using its Greek Alphabet letters, ΑΦΩ, continuously since 1925. There is absolutely no basis for Opposer to suggest that Alpha Phi Omega has not been using its coat-of-arms since 1925.

Omega's Response to the Request for Production Remains Deficient

Although Omega prepared supplemental responses to the Interrogatories purporting to identify the responsive information, it has not even purportedly attempted to cure the deficiencies in its responses to the Request for Production. The deficiencies discussed in our brief in support of this motion remain.

Good Faith Efforts To Resolve

It is Omega that is making a mockery of the discovery process. By letter dated May 24, 2013 provided to Opposer's counsel by email, and First Class Mail, the deficiencies in Opposer's responses were described in detail, counsel for Opposer was reminded of the approaching close of discovery, and a prompt response was requested. *See* Exhibit D. Apparently Opposer elected to ignore the letter describing the deficiencies; no response was received by Movant or its counsel, until well after this motion was filed. Indeed, notwithstanding our efforts to address the deficiencies, Omega ignored the request until June 17, two days prior to the discovery deadline, and well after the filing of this motion. We sought to meet and confer, Omega ignored the request. Omega's election to ignore the request should not be rewarded. Further, even its deficient supplemental responses only exacerbate, rather than cure the deficiencies. Omega's action make clear it will not voluntarily cure its deficient behavior.

CONCLUSION

Omega's Supplemental Responses do nothing to cure its discovery deficiencies. Omega misrepresented in its responses to Alpha Phi Omega's Interrogatories No. 3, 4, 5, 9, 10, 11, 12 and 13. that "that "Opposer will make documents available that are responsive." Then, rather than do so, Omega dumped approximately 2900 documents, none of which provided the information requested in these Interrogatories. Omega should be compelled to provide complete

narrative answers to these interrogatories.

Omega misrepresented in its responses to Alpha Phi Omega's Request for Production Nos. 2, 4, 11, 12, 13, 14, 15, 20 and 21 that that "Opposer will make responsive documents" or "a representative sampling of responsive documents available." Then, rather than do so, Omega dumped approximately 2900 documents, none of which provided the information requested in these Requests for Production. Omega should be compelled to fully produce the requested items.

FURTHER, to avoid burying any responsive items in yet another document dump, Omega should be required to segregate those items providing a separate collection of documents responsive to each request appropriately labeled so as to identify which collection of documents are responsive to each request, or in the alternative, to provide an index with the production identifying which documents are responsive to which requests.

As for the Responses to Request for Admissions the responses remain insufficient. Omega's "Supplemental Responses" did nothing to cure the insufficiency of the responses, indeed, the supplemental responses actually constitute tacit admissions of the requests. Accordingly, the Requests for Admission should be "deemed admitted."

/jackawheat/

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CERTIFICATE OF SERVICE AND ELECTRONIC SUBMISSION

I hereby certify that a true copy of this REPLY TO OPPOSER'S OPPOSITION TO

MOTION TO (1) TO COMPEL DISCOVERY AND (2) TO TEST SUFFICIENCY OF RESPONSES TO REQUESTS FOR ADMISSION is being filed electronically with the U.S. Patent and Trademark Office using the ESTTA service, and a copy has been served on counsel for Opposer by mailing said copy this 22nd day of June, 2013, via First Class Mail, postage prepaid, to:

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