

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Baxley

Mailed: February 10, 2014

Opposition No. 91198614
Opposition No. 91198615
Opposition No. 91198616

Traci Macaro ("Macaro")

v.

Ooh La La! Jewelry and
Accessories, Inc. ("Inc.")

Cancellation No. 92054700

OOH LA LA! Jewelry and
Accessories, Inc.

v.

OOH LA LA LLC ("LLC")

Cancellation No. 92054821

OOH LA LA! Jewelry and
Accessories, Inc.

v.

Traci Macaro

Andrew P. Baxley, Interlocutory Attorney:

Because the above-captioned cancellation proceedings are the equivalents of compulsory counterclaims in the above-captioned opposition proceedings,¹ the Board hereby

¹ Macaro is a member of LLC, respondent in Cancellation No. 92054700. Macaro and LLC are represented by the same attorney, David R. Burkholder. In addition, Macaro has been improperly

orders their consolidation. See Fed. R. Civ. P. 42(a); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991); Trademark Rules 2.106(b)(2) and 2.114(b)(2); TBMP Sections 313 and 511 (3d ed. rev.2 2013). The consolidated cases may be presented on the same record and briefs. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989) and *Hilson Research Inc. v. Society for Human Resource Management*, 26 USPQ2d 1423 (TTAB 1993).

The Board file will be maintained in Opposition No. 91198614 as the "parent" case. As a general rule, from this point onward, only a single copy of any submission should be filed herein. That copy, however, should include all of the consolidated proceeding numbers in the caption thereof.

Despite being consolidated, each proceeding retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleading; a copy of the decision shall be placed in each proceeding file.

On November 7, 2013, LLC filed a motion to compel discovery in Cancellation No. 92054700. The Board will treat the filing of that motion to compel as tolling dates

listed as a party defendant in the caption of several of LLC's filings in Cancellation No. 92054700.

in that case. See also the Board's January 14, 2014 suspension order. Accordingly, Inc.'s consented motion (filed December 11, 2013) to extend dates in Cancellation No. 92054700 is moot.

Inc.'s consented motion (filed February 5, 2014) to suspend proceedings in Cancellation No. 92054700 for sixty days for settlement negotiations does not include a detailed report on the status of the parties' settlement negotiations, as required by the Board's November 20, 2012 order. Accordingly, that motion is denied.

Inc.'s motion (filed November 22, 2013) to extend time to respond to LLC's motion to compel in Cancellation No. 92054700 is granted as conceded. See Trademark Rule 2.120(e)(1). Accordingly, the brief in response to the motion to compel that Inc. filed on December 6, 2013 is accepted as timely filed.

LLC did not include copies of document requests, interrogatories and responses thereto that are at issue in the motion to compel as exhibits to its brief in support of that motion, as required by Trademark Rule 2.120(e)(1). See *Fidelity Prescriptions, Inc. v. Medicine Chest Discount Centers, Inc.*, 191 USPQ 127, 128 (TTAB 1976) (Board must be able to render a meaningful decision on a motion to compel). However, because Inc. included such copies as exhibits to

its brief in response to that motion, the Board will consider the motion to compel.

To the extent that LLC's motion to compel relates to Inc.'s responses to LLC's document requests, the Board finds that LLC has not satisfied its obligation under Trademark Rule 2.120(e) to make a good faith effort to resolve discovery disputes before seeking the Board's intervention. Notably, LLC served thirty document requests and now seeks further responses to all of those document requests. In addition, LLC has not made any specific arguments or cited to any authority to support the discoverability of documents sought through any of its document requests. See TBMP Section 414 (3d ed. rev.2 2013) regarding the discoverability of various types of information in Board proceedings.

At least some of the problems herein should be resolved without Board intervention, and the Board suggests greater effort to avoid or resolve such controversies. LLC must adhere to the strictures set forth in *Sentrol, Inc. v. Sentex Systems, Inc.*, 231 USPQ 666 (TTAB 1986), and repeated below:

[E]ach party and its attorney has a duty not only to make a good faith effort to satisfy the discovery needs of its opponent but also to make a good faith effort to seek only such discovery as is proper and relevant to the specific issues involved in the case. Moreover, where the parties disagree as to the propriety of certain requests for discovery, they are under an obligation to get

together and attempt in good faith to resolve their differences and to present to the Board for resolution only those remaining requests for discovery, if any, upon which they have been unable, despite their best efforts, to reach an agreement. Inasmuch as the Board has neither the time nor the personnel to handle motions to compel involving substantial numbers of requests for discovery which require tedious examination, it is generally the policy of the Board to intervene in disputes concerning discovery, by determining motions to compel, only where it is clear that the parties have in fact followed the aforesaid process and have narrowed the amount of disputed requests for discovery, if any, down to a reasonable number.

Based on the foregoing, LLC's motion to compel in Cancellation No. 92054700 is denied without prejudice with regard to Inc.'s document requests.²

To the extent that LLC, in its motion to compel in Cancellation No. 92054700, seeks responses to interrogatories, the Board finds that LLC made a good faith effort to resolve the parties' discovery dispute in compliance with Trademark Rule 2.120(e)(1). In response to LLC's first set of interrogatories, Inc. responded with a general objection that LLC's total number of interrogatories exceeds the numerical limit of seventy-five set forth in

² Nonetheless, Inc. is reminded that the Board expects parties to cooperate in the discovery process and looks with disfavor upon those who do not. See TBMP Section 408.01. Inc. is further reminded that it may, upon timely objection at trial by LLC, be precluded from using as trial evidence information and documents that were properly requested but not provided during discovery. See Fed. R. Civ. P. 37(c)(1).

Any further motion to compel should include citation to specific authority which supports the moving party's contention that the information sought through the discovery request at issue is properly discoverable. See TBMP Section 414.

Trademark Rule 2.120(d)(1). By its motion, LLC seeks a determination that its interrogatories are within the numerical limit.

In determining whether the number of interrogatories served by one party on another exceeds the numerical limit, the Board counts each subpart within an interrogatory as a separate interrogatory, regardless of whether the subpart is separately designated (i.e., separately numbered or lettered). If an interrogatory includes questions set forth as numbered or lettered subparts, each separately designated subpart will be counted by the Board as a separate interrogatory; the propounding party will, to that extent, be bound by its own numbering system, and will not be heard to complain that an interrogatory, although propounded with separately designated subparts, should nevertheless be counted as a single interrogatory because the interrogatory concerns a single transaction, set of facts, etc., or because the division was made for clarification or convenience. On the other hand, 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 and

will instead look to the substance of the interrogatories, counting 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 of the combined questions as a separate interrogatory. See TBMP Section 405.03(d) and cases cited therein.

If an interrogatory contains both an initial question, and follow-up questions to be answered if the first is answered in the affirmative, the initial question and each follow-up question are counted as separate interrogatories. Similarly, where an interrogatory begins with a broad introductory clause (e.g., "Describe fully the facts and circumstances surrounding applicant's first use of the mark XYZ, including:") followed by several subparts (e.g., "Applicant's date of first use of the mark on the goods listed in the application," "Applicant's date of first use of the mark on such goods in commerce," etc.), the Board will count the broad introductory clause and each subpart as a separate interrogatory, whether or not the subparts are separately designated. If an interrogatory requests information concerning more than one issue, such as information concerning both "sales and advertising figures," or both "adoption and use," the Board will count each issue

on which information is sought as a separate interrogatory. In contrast, if an interrogatory requests "all relevant facts and circumstances" concerning a single issue, event, or matter; or asks that a particular piece of information, such as, for example, annual sales figures under a mark, be given for multiple years, and/or for each of the responding party's involved marks, it will be counted as a single interrogatory. See *id.*

The Board has reviewed LLC's interrogatories in accordance with the foregoing and finds that they exceed the numerical limit of seventy-five. Inc.'s general objection to LLC's interrogatories on the basis that they exceed the numerical limit of seventy-five is therefore sustained.³ In view thereof, the motion to compel is denied with regard to LLC's interrogatories.⁴

Proceedings herein are resumed in Cancellation No. 92054700.⁵ Dates in the newly consolidated proceedings are reset as follows:

Expert disclosures due:	March 19, 2014
Discovery closes:	April 18, 2014

³ The Board does not reveal a specific numerical count in its determinations of whether interrogatories exceed the numerical limit.

⁴ LLC may serve an amended set of interrogatories that complies with the numerical limit.

⁵ The remaining consolidated proceedings were already moving forward.

Macaro's pretrial disclosures in the oppositions due:	June 2, 2014
Macaro's 30-day testimony period as plaintiff in the oppositions to close:	July 17, 2014
Inc.'s pretrial disclosures in the oppositions and cancellations due:	August 1, 2014
Inc.'s 30-day testimony period as defendant in the oppositions and as plaintiff in the cancellations to close:	September 15, 2014
Pretrial disclosures for Macaro's rebuttal in the oppositions and for Macaro and LLC as defendants in the cancellations due:	September 30, 2014
30-day testimony period Macaro and LLC as defendants in the cancellations and for rebuttal for Macaro as plaintiff in the oppositions to close:	November 14, 2014
Inc.'s rebuttal disclosures as plaintiff in the cancellations due:	November 29, 2014
Inc.'s 15-day rebuttal testimony period as plaintiff in the cancellations to close:	December 29, 2014
Brief for Macaro as plaintiff in the oppositions due:	February 27, 2015
Brief for Inc. as defendant in the oppositions and as plaintiff in the cancellations due:	March 29, 2015
Brief for Macaro and LLC as defendant in the cancellations and reply brief, if any, for Macaro as plaintiff in the oppositions due:	April 28, 2015
Reply brief, if any, for Inc. as plaintiff in the cancellations due:	May 13, 2015

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. An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.