

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

Mailed: May 24, 2012

Opposition No. 91200187

Ultimate Nutrition, Inc.

v.

Tanja Herbst

Cheryl S. Goodman, Interlocutory Attorney:

This case now comes up on opposer's motion, filed April 16, 2012, for sanctions or to compel discovery. Applicant has not filed a response thereto.

The Board turns first to the motion for sanctions.

With regard to the motion for discovery sanctions, such a request is premature as no Board discovery order has issued and applicant has not at this point failed to comply with an order of the Board with regard to disclosure or discovery under Trademark Rule 2.120(g)(1). *Amazon Technologies Inc. v. Wax*, 93 USPQ2d 1702, 1706 (TTAB 2009). Accordingly, the motion for sanctions will be given no consideration. *Id.*

The Board turns next to the motion to compel.

With regard to its good faith effort to resolve the discovery dispute, opposer advises that it corresponded with applicant's counsel on March 29, 2012, regarding deficient

discovery responses and applicant's counsel advised that applicant "would produce some documents, but only at the end of April." Applicant further advised that it would not provide additional supplemental responses. Opposer did agree to extend the deadline for applicant's production to April 13, 2012. However, applicant never produced the responsive documents nor did applicant supplement the responses that opposer deemed deficient. Opposer has not indicated since filing its motion to compel that applicant has produced responsive documents.

The Board finds that opposer made a good faith effort to resolve the discovery dispute.

With regard to the relief requested, opposer seeks production of responsive documents that applicant agreed to produce as "Applicant has not produced a single document that she has agreed to produce" and production of documents without objection with respect to Document Request nos. 5, 9, 15, 16, 17, 18, 27, 36, 42, and 47-50. Opposer also requests supplementation of Requests for Admissions Nos. 1, 2 and 3, Interrogatory Request nos. 13, 14, 15, 21 and 22, and interrogatory responses properly signed by applicant. Lastly, opposer seeks a resetting of "all relevant dates."

*Requests for Admission Nos. 1, 2 and 3*

Opposer's complaint with regard to these requests is that applicant's response is directed to ownership of the

application, whereas the requests are directed to ownership of the mark.<sup>1</sup>

Opposer's motion with regard to these requests for admissions is granted. Applicant is allowed until THIRTY DAYS from the mailing date of this order to supplement her responses to these admissions with regard to *ownership of the mark VENS NUTRITION*.

*Interrogatory Request nos. 14 and 15*

The motion to compel is denied with respect to Interrogatory Request nos. 14 and 15 inasmuch as opposer has not supported its motion to compel by providing copies of these interrogatory requests with its motion. A motion to compel must be accompanied by all discovery requests at issue. See Trademark Rule 2.120(e) "A motion to compel discovery shall include . . . a copy of the interrogatory with any answer or objection that was made."<sup>2</sup>

*Interrogatory Requests nos. 13 and 21*

Applicant has interposed objections that these requests are "vague, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence."

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<sup>1</sup> Although opposer has moved to compel responses to the requests for admissions, the Board construes the motion as one to test the sufficiency of the responses.

<sup>2</sup> Opposer's exhibit includes Interrogatory Request nos. 1-13 and 20-23. While applicant's responses to requests nos. 14 and 15 are provided, applicant's responses do not repeat the interrogatory request in the response.

The Board finds that applicant's vague and burdensome objections are conclusory and unsupported, and that the requests are relevant. *See Amazon Technologies Inc. v. Wax*, 93 USPQ2d 1702, 1704-1705 (TTAB 2009) (objections must be stated with specificity). In view thereof, applicant's objections to these requests are overruled, and applicant must provide substantive responses.

Accordingly, the motion to compel is granted with respect to Interrogatory Request nos. 13, and 21. Applicant is allowed until THIRTY DAYS from the mailing date of this order to serve supplemental substantive responses to Interrogatory Request nos. 13 and 21.

*Interrogatory Request no. 22*

Applicant has asserted work product, privilege, attorney-client privilege, "or any other privilege, protection or immunity" objections. However, applicant failed to provide a privilege log to support these objections. *See Sonnino v. University of Kansas Hosp. Authority* 221 F.R.D. 661 (D.Kan.2004) (general objections as to attorney-client privilege and work product that are unsupported by a privilege log are insufficient to preserve the privilege and immunity); *Amazon Technologies Inc. v. Wax*, 93 USPQ2d at 1706 n.6 (if party maintains objections based on attorney-client privilege or attorney work product, it must produce a privilege log).

In view thereof, these objections are overruled as unsupported, and applicant must provide a substantive response.

Accordingly, the motion to compel is granted with respect to Interrogatory request no. 22, and applicant is allowed until THIRTY DAYS from the mailing date of this order to serve a supplemental substantive response to Interrogatory Request no. 22.

*Interrogatory responses to be signed by Applicant*

Opposer's motion to compel is granted with regard to applicant providing a copy of its interrogatory responses *signed by applicant*. Applicant is an individual, not a corporation, and therefore, applicant's counsel cannot sign on behalf of applicant as an agent, although objections to interrogatories must be signed by counsel. See TBMP Section 405.04(c) (3d ed. 2011) ("Responses to interrogatories must be signed by the person making them, and objections to interrogatories must be signed by the attorney making them").

Applicant is allowed until THIRTY DAYS from the mailing date of this order to serve a copy of its interrogatory responses signed by applicant; with any objections, not overruled herein, signed by counsel.

*Document Request nos. 2, 4, 6, 8, 10, 14, 20, 21, 22, 23, 25, 29, 30, 31, 32, 33, 34, 35, 39, 40, 41, 45, 50, 52*

In her written responses to opposer's document requests, applicant indicated she would make available for inspection and copying all documents she believes are responsive to the requests identified above. However, opposer indicates that no documents have been produced.

In view thereof, the motion to compel is granted with regard to these document requests to the extent that applicant shall make available to opposer for inspection and copying all responsive documents with respect to document request nos. 2, 4, 6, 8, 10, 14, 20, 21, 22, 23, 25, 29, 30, 31, 32, 33, 34, 35, 39, 40, 41, 45, 50<sup>3</sup>, and 52 within THIRTY DAYS of the mailing date of this order.

*Document Request nos. 5, 9, 27, and 48*

With regard to these requests, applicant has objected on the basis that these requests are vague, and overly and unduly burdensome.

The Board finds applicant's objections unsupported. Accordingly, the objections are overruled. Additionally, applicant, instead of making a statement as to whether she

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<sup>3</sup> With regard to request no. 50, for which applicant states she will produce responsive documents, opposer complains about applicant's objection regarding non-parties Daniel Holzl and Vens Nutrition. To the extent that such information is available to applicant i.e., within her possession, custody or control, applicant must produce responsive documents regarding Holzl or Vens Nutrition as they may be relevant to this proceeding; however, opposer cannot by its request require applicant to seek discovery from another party for documents and things not in her possession, custody or control.

has responsive documents in her possession, custody or control, or stating that no responsive documents exist, has stated either "Applicant currently does not use the trademark in the U.S.;" or that the "trademark has since been owned by the applicant" or that "the word VENS has no meaning." These are not proper written responses to the document requests.

In view thereof, opposer's motion to compel is granted to the extent that applicant is allowed until THIRTY DAYS from the mailing date of this order to provide amended written responses without interposing objections, which state whether responsive documents are in applicant's possession, custody or control. If no responsive documents exist, applicant should so state. Additionally, if responsive documents exist, applicant is allowed until THIRTY DAYS from the mailing date of this order to produce the responsive documents for inspection and copying.

*Document request no. 47*

Applicant's objection is that this request is overbroad as neither Daniel Holzl nor Vens Nutrition are parties to the proceeding.

The Board does not find the request overbroad, and accordingly, the objection is overruled. By its request, opposer cannot direct applicant to seek discovery from a third party for documents not within her possession, custody

or control. However, to the extent that applicant does have responsive documents in her possession, custody or control with regard to this request i.e., documents relating to Daniel Holzl's involvement with Vens Nutrition, it is her obligation under Fed. R. Civ. P. 34 to comply with this request for production.

Accordingly, the motion to compel is granted with regard to this request and applicant is allowed until THIRTY DAYS from the mailing date of this order to amend her written responses indicating whether responsive documents exist or not--and to produce responsive documents for inspection and copying.

*Document request no. 49*

The Board finds applicant's vague or overly burdensome or unduly burdensome objection to this request unsupported. Accordingly, these objections are overruled. Applicant's statement that she "does not use the trademark in the U.S." is not a proper written response to this document request. Applicant must state whether she has responsive documents in her possession, custody or control. Alternatively, if no such documents exist, she should so state.

This document request seeks the identity of manufacturers, distributors and other third parties that sell, distribute or advertise or intend to sell, distribute or advertise products bearing the mark. While the places of

business of manufacturers of involved goods are discoverable, TBMP Section 414(14), the identity of vendors and distributors of applicant's goods are not. See TBMP 414(3) (names of dealers is confidential information not discoverable under protective order). Accordingly, the motion to compel is granted with regard to production of documents relating to location of the manufacturers, but denied with regard to the production of documents relating to the identity of distributors/third parties who sell or distribute applicant's goods.

In view thereof, the motion to compel is granted in part and denied in part. Applicant is allowed until THIRTY DAYS from the mailing date of this order to amend her written responses to indicate whether she has documents responsive to this request, and to produce responsive documents with respect to her manufacturers. If no such documents exist, she should so state in writing.

*Document request nos. 15, 16, 17, 18, 36, and 42*

Applicant's objections to these requests are that the requests are vague, and/or overbroad or burdensome. Applicant has also asserted claims of attorney-client, work product or other privilege.

The vague, overbroad or burdensome objections are unsupported and accordingly overruled. The claims of privilege have not been supported by a privilege log, and

accordingly, these objections are overruled. See *Sonnino v. University of Kansas Hosp. Authority* 221 F.R.D. at 661 (general objections as to attorney-client privilege and work product that are unsupported by a privilege log are insufficient to preserve the privilege and immunity).

Accordingly, the motion to compel is granted to the extent that applicant is allowed until THIRTY DAYS from the mailing date of this order to provide amended written responses indicating whether responsive documents exist and to produce responsive documents for inspection and copying; if no such responsive documents exist, she should so state in writing.

In summary, opposer motion is granted with regard to Interrogatory Request nos. 13, 21 and 22 and for the providing of interrogatory responses signed by applicant; denied with respect to Interrogatory Request nos. 14 and 15; granted with regard to Requests for Admission nos. 1, 2 and 3; granted with regard to Document Request nos. 2, 4, 6, 8, 10, 14, 20, 21, 22, 23, 25, 29, 30, 31, 32, 33, 34, 35, 39, 40, 41, 45, 50 and 52; granted with regard to Document Request nos. 5, 9, 15, 16, 17, 18, 27, 36, 42, 47-48; and granted in part and denied in part with regard to Document Request no. 49 as set forth above.

Proceedings are resumed.

Opposer's motion to reset dates is granted. Dates are reset as follows:

Plaintiff's Pretrial Disclosures	7/15/12
Plaintiff's 30-day Trial Period Ends	8/29/12
Defendant's Pretrial Disclosures	9/13/12
Defendant's 30-day Trial Period Ends	10/28/12
Plaintiff's Rebuttal Disclosures	11/12/12
Plaintiff's 15-day Rebuttal Period Ends	12/12/12

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.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.