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

Proceeding	91201070
Party	Plaintiff Anderson Valley Acquisition Company, LLC
Correspondence Address	THOMAS R LEAVENS LEAVENS STRAND GLOVER ADLER LLC 203 NORTH LASALLE STREET SUITE 2550 CHICAGO, CA 60601 UNITED STATES tleavens@lsglegal.com
Submission	Opposition/Response to Motion
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Signature	/Thomas R. Leavens/
Date	01/09/2012
Attachments	Opposer's 56(d) Motion.pdf (10 pages)(6687404 bytes) Opposer's 56(d) Motion Exhibit A.pdf (2 pages)(1601839 bytes) Opposer's 56(d) Motion Exhibit B.pdf (9 pages)(5518141 bytes) Opposer's 56(d) Motion Exhibit B, Cont'd.pdf (9 pages)(5196832 bytes) Opposer's 56(d) Motion Exhibit C.pdf (4 pages)(2706621 bytes)

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

In the Matter of Application Serial No. 85178395: BOONVILLE CIDER HOUSE BITE HARD CIDER,
Published in the Official Gazette on April 26, 2011, in International Class 33

ANDERSON VALLEY ACQUISITION COMPANY, LLC,	)	
Opposer,	)	
v.	)	**Opposition No. 91201070**
MATTHEW HARNDEN & ROGER SCOMMEGNA	)	
Applicants	)	

OPPOSER'S RULE 56(D) MOTION TO CONTINUE APPLICANTS' MOTION FOR SUMMARY JUDGMENT PENDING DISCOVERY

Opposer, Anderson Valley Acquisition Company, LLC ("Opposer"), by its attorneys, Leavens, Strand, Glover & Adler, LLC, requests that this Board continue Applicants' Motion for Summary Judgment pending further discovery in the form of oral depositions pursuant to Rule 56(d) of the Federal Rules of Civil Procedure and Trademark TBMP §528.06.

I. PROCEDURAL BACKGROUND

Opposer owns the trademark THE LEGENDARY BOONVILLE BEER ("Opposer's Mark"), Registration No. 3,801,569, in International Class 32 for "Beer, ale, lager, stout, and porter; Malt liquor." On August 10, 2011, Opposer filed its Opposition to the registration of Applicants' proposed mark "BOONVILLE CIDER HOUSE BITE

HARD CIDER" ("Applicants' Mark"), Serial No. 85,178,395 in International Class 33 for "Hard cider." Applicants filed their Answer on September 19, 2011.

On November 17, 2011, Opposer timely served its Initial Disclosures, Discovery Requests, and Interrogatories on Applicants. The next day, on November 18, 2011, Applicants filed their First Motion for Summary Judgment. Due to Applicants' failure to serve their Initial Disclosures prior to filing a motion for summary judgment pursuant to Trademark Rule 2.127(e)(1), the motion was dismissed on December 6, 2011.

On December 1, 2011, Applicants served their Initial Disclosures on Opposer, and on December 9, 2011 filed the Motion for Summary Judgment presently at issue ("Applicants' Motion").

On December 14, 2011, Opposer's counsel requested that Applicants, through their counsel, respond to discovery requests to facilitate Opposer's response to Applicants' Motion. On December 27, 2011, Opposer's counsel made a second attempt to obtain discovery responses from Applicants, and included a list of document requests and interrogatories it needed to respond to Applicants' Motion. On January 5, 2012, Opposer again requested Applicants respond to the requested discovery.

On January 9, 2011, the day Opposer's response to Applicants' Motion was due, Applicants' counsel agreed to respond to the following discovery requests (Email from Applicants' Counsel attached hereto as Exhibit A):

<u>DOCUMENT REQUESTS</u>: 1, 3, 4, 5, 6, 7, 8, 10, 13, 14, 16, 17, 20, and 21.

<u>INTERROGATORIES</u>: 3, 5, 6, 8, 10, 12, 13, 14, 15, and 17. (Discovery Requests attached hereto as Exhibit B). However, Applicant's counsel refused to agree to produce either Applicant for deposition concerning the subject areas addressed by the

foregoing written discovery requests. Opposer's motion is made therefore with respect to oral deposition only in reliance upon Applicants' counsel's agreement to provide responses to written discovery prior to Opposer's response to Applicants' Motion.

Despite the discovery responses Applicants are willing to provide, Applicants' Motion seeks summary adjudication on matters Opposer cannot respond to on the merits without first deposing Applicants, Roger Scommegna and Matthew Harden. These depositions are necessary because: (1) Applicants' Motion rests almost entirely on the Declaration of Roger Scommegna; (2) the Declaration of Roger Scommegna raises factual allegations, support for which are solely in Applicants' control; and (3) the issues raised in Applicants' Motion are unusually complex, such that absence of an oral deposition of Mr. Scommegna will seriously prejudice Opposer. *See Orion Group Inc. v. Orion Insurance Co.*, 12 USPQ2d 1923, 1925 (TTAB 1989). Opposer is entitled to orally depose Scommegna and Harnden to test the veracity of the allegations contained in the Declaration of Scommegna and the responses to the written discovery requests Applicants have agreed to provide. Therefore, Opposer requests oral depositions of Scommegna and Harnden, which will be conducted in accordance with Federal Rule 30 and 37 C.F.R. §2.120(b).

II. LEGAL STANDARD FOR 56(D) MOTION

Rule 56(d) of the Federal Rules of Civil Procedure provides:

> When Facts are Unavailable to Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).[1]

The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. *Parrish v. Board of Commissioners of the Alabama State Bar,* 533 F.2d 942, 948 (5th Cir.1976). The nonmovant is entitled to discovery in order to: "(1) test the veracity of the declaration testimony submitted by defendant and (2) explore fact-intensive issues such as intent and actual confusion." *Royal Oak Enterprises, LLC v. Nature's Grilling Products, LLC*, 2011 WL 5858057 (N.D.Ga. 2011) citing *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988).

Additionally, the Trademark Trial and Appeal Board Manual of Procedure requires that "a request for time to take discovery must be supported by an affidavit showing that the nonmoving party cannot present by affidavit facts essential to justify its opposition to the motion." TBMP §528.06. If a party has demonstrated a need for discovery that is reasonably directed to obtaining facts essential to its opposition to the motion, discovery will be permitted, especially if the information sought is largely within the control of the party moving for summary judgment. *Orion Group Inc.,* 12 USPQ2d at 1925. Upon showing a sufficient basis for its need for additional discovery, the nonmovant "cannot be deprived of the discovery needed to place at issue material factual questions in opposition to the motion." *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 852 (Fed. Cir. 1992).

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[1] [1] Effective December 1, 2009, Rule 56 was amended such that subdivision (d) carries forward without substantial change the provisions of former subdivision (f). *See* Advisory Committee Note to Rule 56.

III. OPPOSER CANNOT RESPOND TO APPLICANTS' MOTION WITHOUT DEPOSING ROGER SCOMMEGNA AND MATTHEW HARNDEN

Based upon the allegations set forth in the Declaration of Roger Scommegna, Applicants' Motion alleges there is no likelihood of confusion between Opposer's Mark and Applicants' proposed mark, a scope of use of "Boonville" connected to the Boonville Hotel, and that Opposer's mark is descriptive. Opposer cannot conceivably respond to the above contentions without the opportunity to orally depose Scommegna and Harnden to "test the veracity of the declaration testimony submitted" and respond to Applicants' Motion. Attached as Exhibit C is the Affidavit of Opposer's legal counsel, Thomas R. Leavens, setting forth in detail the discovery necessary to respond to Applicants' Motion.

A. Discovery is Needed to Oppose Applicants' Likelihood of Confusion Argument

In Applicants' Motion, Applicants assert that there is no likelihood of confusion between the marks. Without deposing Scommegna and Harnden, there is no way for Opposer to know the actual and intended commercial impression of Applicants' Mark, the scope of Applicants' goods associated with the Mark, the channels of trade of Applicants' goods, Applicants' knowledge of third party uses of the term "Boonville," or whether actual confusion exists between Opposer's and Applicants' Marks. (Affidavit of Thomas R. Leavens, para. 8) Responding to Applicants' Motion without such knowledge would deprive Opposer of the discovery needed to place at issue material factual questions in opposition to the motion.

1. Discovery is Required to Determine the Overall Commercial Impression of the Marks at Issue

Applicants state that "some preliminary marketing and limited manufacturing of hard cider under similar marks has been made." (Applicants' Motion at 10 and Decl. of Scommegna, para. 2). Relying on the Declaration of Scommegna, Applicants assert the legal conclusion that "it is undisputed that they [the marks] present entirely different commercial impressions rendering them unlikely to cause any confusion." (Applicants' Motion at 14). When analyzing likelihood of confusion, the Board should "consider the marks, not as they would compare if subjected to a side-by-side comparison, but rather in terms of whether the marks are sufficiently similar in their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. Moreover, "the focus is on the average purchaser, who normally retains a general rather than a specific impression of the trademarks." *General Mills, Inc. and General Mills IP Holdings II, LLC v. Fage Dairy Processing Industry S.A.*, 100 U.S.P.Q.2d 1584 (TTAB 2011).

To respond to Applicants' allegation, Opposer requires the opportunity to orally depose Scommegna and Harnden to determine the actual and intended commercial impression of Applicants' Mark, including the scope and extent of marketing and manufacturing of Applicants' goods. (Aff. of Leavens, para. 8(a)).

2. Discovery is Necessary to Determine the Scope of Applicants' Goods

Applicants assert that "Opposer is in the business of making and selling beer, while Matt and Roger are in the business of making and selling hard cider." (Applicants' Motion at 13). Yet, the Declaration of Roger Scommegna states, "...preliminary marketing and manufacturing under similar marks has been made. Samples of this use

can be seen below." (Decl. of Scommegna, para. 2). The samples in the Declaration include images of both "Apple Cider" and "Apple Currant." The contradictory allegations set forth in the Declaration of Scommegna raise questions about the scope of Applicants' goods. Without the opportunity to orally depose Scommegna and Harnden on this issue, Opposer cannot possibly know the extent and scope of Applicants' Goods. (Aff. of Leavens, para. 8(b)).

3. Discovery is Necessary to Determine Applicants' Channels Of Trade

Applicants allege that the Boonville Hotel in Mendocino, California is owned by Applicant Scommegna, and that the "Boonville Hotel sells wine, beer, hard cider, to its guests." (Decl. of Scommegna, para. 4). The Declaration later states, "I have seen many if not all of the various beer products offered for sale by the Anderson Valley Brewing Company, since, among other things, the Boonville Hotel sells these products as part of its meal offerings and in its small bar." (Decl. of Scommegna, para. 7). Applicant Scommegna's allegations suggest that the Boonville Hotels either sells or intends to sell both Applicants' and Opposer's goods, raising the material issue of Applicants' intended channels of trade.

Opposer is unaware of Applicants' current or intended channels of trade for its goods. To respond to Applicants' Motion, Opposer must orally depose Scommegna and Harnden as to the current and intended channels of trade for Applicants' goods. (Aff. of Leavens, para. 8(c)).

4. Discovery is Necessary to Determine Third Party Uses of the Term "Boonville"

Applicants contend that "Jim Ball Vineyards, located in Boonville, California, has been using the word/name 'Boonville' … to identify one of its wine products since at

least 2007." (Decl. of Roger Scommegna, para. 5). Opposer is unaware of the circumstances surrounding any such third party use or Applicants' knowledge of such third party use.

To respond to Applicants' Motion, Opposer must orally depose Scommegna and Harnden about their personal knowledge of third parties using the mark "Boonville." (Aff. of Leavens, para. 8(d)).

5. Discovery is Needed to Determine Whether Actual Confusion Exists Between the Marks

Applicants allege that "there is no likelihood of confusion." (Applicants' Motion at 13). Opposer does not know whether any instances of actual confusion exist. In order to respond to Applicants' contention, Opposer must orally depose Scommegna and Harnden about any instances of actual confusion between Applicants' and Opposer's Marks. (Aff. of Leavens, para. 8(e)).

B. Discovery is Required to Determine the Claimed Scope of Use of Applicants' Mark

Applicants allege that Scommegna "is one of the owners of The Boonville Hotel in Boonville California ... for over eight years." Applicants further allege that "The Boonville Hotel sells wine, beer, and yes hard cider, to its guests… it has done so for 23 years under that name." (Decl. of Scommegna, para. 4).

Opposer does not know any of the facts surrounding the above allegations, or the association between Applicant's use of the term "Boonville" in connection with a hotel and the goods described in Applicant's application, and must therefore orally depose Scommegna in order to respond to Applicants' Motion concerning the relationship between Applicant Scommegna and the Boonville Hotel, the scope of the goods and

services offered by the Boonville Hotel, and the connection between Applicant's alleged uses of the term "Boonville." (Aff. of Leavens, para. 9).

C. Discovery is Necessary to Determine the Strength of the Marks

Finally, Applicants' Motion attacks the strength of Opposer's mark. Applicants state that Opposer "uses 'Boonville' prominently and descriptively to identify the place where it brews beer." Applicants also state that "as can be clearly seen, and as can be gleaned from the applied for mark (and consistent with the disclaimer filed by Roger and Matt), Boonville is being (and will be) used to identify the location of the source of the hard cider." (Applicants' Motion at 10 and Decl. of Scommegna, para. 3).

Opposer does not know, with any certainty, the reason or circumstances surrounding Applicants' disclaimer of the term "Boonville" in their application or how Applicants' intentions with respect to use of the term "Boonville" may have otherwise been expressed. This information will impact Opposer's ability to respond to Applicants' Motion. Therefore, Opposer must orally depose Scommegna and Harnden concerning these matters. (Aff. of Leavens, para. 10).

IV. CONCLUSION

Applicants' Motion relies almost entirely on the Declaration of Roger Scommegna – a Declaration replete with factual allegations that Opposer cannot contend without first deposing Applicants. Opposer has met its burden of identifying the specific facts it needs through discovery to properly respond to Applicants' Motion. To adjudicate Applicants' Motion without allowing Opposer the opportunity to orally depose Roger Scommegna and Matthew Harnden will deprive Opposer of the discovery needed to place at issue material factual questions in opposition to Applicants' Motion. For the

foregoing reasons, Opposer respectfully requests this board grant its motion pursuant to Rule 56(d) and continue Applicants' Motion pending the conclusion of the depositions requested herein.

DATED: January 9, 2012

Respectfully submitted,

Leavens, Strand, Glover & Adler, LLC

By: _____

Thomas R. Leavens
203 N. LaSalle Street
Suite 2550
Chicago, IL 60601
(312) 488-4170

Attorneys for Opposer

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Opposer's Rule 56(d) Motion to Continue Applicants' Motion for Summary Judgment Pending Discovery was served upon:

Adam L. Brookman
Boyle Fredrickson, S.C.
840 North Plankinton
Milwaukee, Wisconsin 53203
abrookman@boylefred.com

via email, this 9th day of January, 2012.

_____

Thomas R. Leavens

From: Adam Brookman [alb@boylefred.com]
Sent: Monday, January 09, 2012 1:28 PM
To: Thomas R. Leavens
Subject: RE: Opposition No. 91201070

Tom,

I apologize for not responding to you sooner. While I believe your discovery requests are neither warranted nor relevant, solely in the interest of cooperation, we will respond to the subset of requests you identified. You should have those responses electronically later today or tomorrow. If you don't receive them, please let me know.

Adam

From: Thomas R. Leavens [mailto:tleavens@lsglegal.com]
Sent: Thursday, January 05, 2012 11:25 AM
To: Adam Brookman
Subject: FW: Opposition No. 91201070

Hello Adam,

I am following up on my earlier message below and my call to you of yesterday. Please let me know if the applicant in Opposition No. 91201070 will respond to the discovery requests described below. If we do not receive your response by the end of the day today, we will assume that the applicant does not intend to respond and that Anderson Valley Beer Company will be required to file a motion to compel with the USPTO. Best, Tom

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From: Thomas R. Leavens
Sent: Tuesday, December 27, 2011 12:45 PM
To: Adam Brookman
Subject: RE: Opposition No. 91201070

Dear Adam,

Further to your message below concerning discovery before responding to the summary judgment motion filed by your clients in Opposition No. 91201070, the following are the pending documents requests and interrogatories we believe are appropriate for response by the applicant prior to taking your client's depositions. The numbers correspond to the numbers of the respective discovery requests served by Anderson Valley Acquisition Company, LLC on November 17, 2011.

DOCUMENT REQUESTS: 1, 3, 4, 5, 6, 7, 8, 10, 13, 14, 16, 17, 20, and 21.

INTERROGATORIES: 3, 5, 6, 8, 10, 12, 13, 14, 15, and 17.

Please let me know your thoughts after you have had an opportunity to review these requests. Best, Tom

---

From: Adam Brookman [mailto:alb@boylefred.com]
Sent: Wednesday, December 14, 2011 4:26 PM
To: Thomas R. Leavens
Subject: RE: Opposition No. 91201070

Dear Tom,

First, I believe the current stay takes our obligation to respond to your discovery off the table. Second, as I believe I mentioned when we last spoke, since Matt and Roger have not begun formal use of the mark most, if not all of your requests are irrelevant or there is nothing which is responsive. Third, since my clients bring to the table the application and nothing more, and your client bears the burden of proof, I don't understand what discovery you need of my client that is necessary to oppose our motion. Our motion for summary judgment is based on an absence of likelihood of confusion. That analysis focuses on the two marks as they appear in the registration and application. To the extent you wish to rely on something that is outside the four corners of your client's registration or my clients' application, you can certainly do so and put that evidence in your response. Finally, in response to my expressed confusion over what you were looking for, my recollection is that you were going to put together a targeted list of discovery requests that you believed were relevant.

At the moment, it is not my intention to respond to your discovery requests. Nor do I believe any discovery of my clients is necessary or warranted. However, if you identify certain requests that you believe are necessary for you to respond to your motion I will certainly consider it.

Best regards.

Adam

From: Thomas R. Leavens [mailto:tleavens@lsglegal.com]
Sent: Wednesday, December 14, 2011 3:57 PM
To: Adam Brookman
Subject: Opposition No. 91201070

Dear Adam,

We have received the Resubmitted Motion For Summary Judgment filed by Matthew Harnden and Roger Scommegna in the United States Patent & Trademark Office in connection with Opposition No. 91201070. As I mentioned earlier when we spoke concerning the applicant's earlier motion, Anderson Valley Acquisition Company, LLC wishes to conduct discovery in connection with its response to this motion. After we have reviewed the applicant's response to Anderson Valley Acquisition Company, LLC's initial document requests and interrogatories that are due December 17, we will advise you of the subject areas for depositions that we believe would be appropriate at that time. Best, Tom

Thomas R. Leavens
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

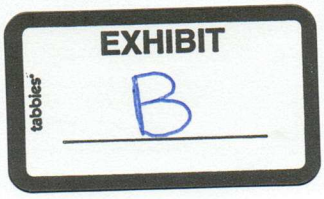
In the Matter of Application Serial No. 85178395: BOONVILLE CIDER HOUSE BITE HARD CIDER,

Published in the Official Gazette on April 26, 2011, in International Class 33

ANDERSON VALLEY ACQUISITION	)	
COMPANY, LLC,	)	
	)	
Opposer,	)	
	)	
v.	)	**Opposition No. 91201070**
	)	
MATTHEW HARNDEN & ROGER	)	
SCOMMEGNA	)	
Applicants	)	

OPPOSER'S FIRST REQUEST FOR THE
PRODUCTION OF DOCUMENTS AND THINGS TO APPLICANT

Opposer, Anderson Valley Acquisition Company, LLC ("Opposer"), by its attorneys, Leavens, Strand, Glover & Adler, LLC, propounds the following Requests for Production of Documents and Things to Applicant, Matthew Harnden and Roger Scommegna ("Applicant") pursuant to Trademark Rule 2.116, 37 C.F.R. §2.116 and Rule 34 of the Federal Rules of Civil Procedure. Oppposer requests that all documents and things be produced within thirty (30) days



after service hereof upon counsel for Opposer. These Requests are to be interpreted and answered in accordance with the Definitions below.

DEFINITIONS

1. "Applicant," "you" or "your" shall be defined to the broadest extent permitted by the Federal Rules of Civil Procedure and shall include the Applicant herein, and any parent, subsidiary, associated, merged or affiliated organization, including any predecessors-in-interest of any such company or entity and their present and former officers, agents, directors, trustees, employees, independent contractors and all persons acting or purporting to act on their behalf.

2. "Person" or "Persons" mean natural persons, all governmental entities, agencies, officers, departments, or affiliates of the United States of America, or any other governmental entity and any corporation, partnership, foundation, proprietorship, association, organization, or group of natural persons.

3. "Director," "Officer," "employee," "agent," and "representative," means any individual serving as such and any individual serving at any relevant time in such capacity, even though no longer serving in such capacity. Applicant's "representatives" refers to and includes Applicant's officers, directors, agents, employees, attorneys, and consultants, as well as other individuals or business entities in the employ of or otherwise acting on its behalf.

4. The terms "relating to" and "referring to" shall be interpreted so as to encompass the scope of discovery set forth in Rule 26(b)(1) of Fed. R. Civ. P.

5. "Document(s)" means all materials within the full scope of Rule 34 of Fed. R. Civ. P. including but not limited to: all writings and recordings, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise (including without limitation, correspondence, memoranda, notes, diaries,

minutes, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, tags, labels, invoices, brochures, periodicals, telegrams, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and intraoffice communications, offers, notations of any sort of conversations, working papers, applications, permits, file wrappers, issued patents, patent applications, surveys, indices, telephone calls, meetings or printouts, teletypes, telefax, invoices, worksheets, and all drafts, alterations, modifications, changes and amendments of any of the foregoing), graphic or aural representations of any kind (including without limitation, photographs, charts, micro-fiche, microfilm, videotape, recordings, motion pictures, plans, drawings, surveys), and electronic, mechanical, magnetic, optical or electric records or representations of any kind (including without limitation, computer files and programs, tapes, cassettes, discs, recordings).

6. "Documents which refer or relate to" any given subject means each document that constitutes, deals with, refers to, or is in any way pertinent to that given subject including, but not limited to, documents concerning the preparation of other documents.

7. "And" as well as "or" shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of the request all responses which otherwise might be construed to be outside its scope.

DOCUMENTS REQUESTED

REQUEST NO. 1: All documents which refer or relate to Applicant's decision to manufacture, distribute, advertise, promote or sell hard cider under the mark BOONVILLE CIDER HOUSE BITE HARD CIDER (the "Mark").

RESPONSE:

REQUEST NO. 2: All documents which refer or relate to goods sold by Applicant under or in association with the Mark.

RESPONSE:

REQUEST NO. 3: All documents which refer or relate to Opposer, Opposer's products or services, or Opposer's use of the mark THE LEGENDARY BOONVILLE BEER.

RESPONSE:

REQUEST NO. 4: All documents which refer or relate to any association or perceived association between Opposer or Opposer's products or services and BOONVILLE.

RESPONSE:

REQUEST NO. 5: All documents which refer or relate to Applicant's methods of advertising or promotion of its hard cider product bearing the Mark, and identify the territory of dissemination of such advertising or promotion.

RESPONSE:

REQUEST NO. 6: All documents which refer or relate to the possibility of litigation or other conflict between Applicant and Opposer involving Applicant's use of the Mark.

RESPONSE:

REQUEST NO. 7: All documents evidencing the channels of trade through which Applicant has offered or distributed its hard cider product under or in association with the Mark.

RESPONSE:

REQUEST NO. 8: All documents which refer or relate to any registration or application to register the Mark by Applicant in the United States Patent & Trademark Office or under the laws of any state or territory.

RESPONSE:

REQUEST NO. 9: All documents which refer or relate to the date of first use of the Mark in connection with hard cider and the date of first use of the Mark in interstate commerce in connection with hard cider.

RESPONSE:

REQUEST NO. 10: All documents which refer or relate to any market research, surveys, searches, investigations or studies conducted or caused to be conducted by Applicant, relating to the Mark.

RESPONSE:

REQUEST NO. 11: All documents which refer or relate to the amount of money expended by Applicant for advertising or promoting its hard cider product under the Mark.

RESPONSE:

REQUEST NO. 12: All documents which refer or relate to the volume of sales of Applicant's hard cider product under the Mark for each year Applicant has made such sales.

RESPONSE:

REQUEST NO. 13: All documents which refer or relate to any instance of actual confusion, mistake, or deception, or any instance which may indicate a likelihood of confusion, mistake, or deception regarding the source, sponsorship, approval, connection or endorsement of the products or services advertised, promoted or sold by Applicant under or in association with the Mark and the products or services advertised, promoted or sold by Opposer.

RESPONSE:

REQUEST NO. 14: All documents which refer or relate to any discussion relative to whether the Mark should be modified, or its use discontinued, expanded, or modified by Applicant.

RESPONSE:

REQUEST NO. 15: All documents which refer or relate to any notice received by Applicant stating or implying that the Mark allegedly infringed a mark used by another person or company or requesting that Applicant change or abandon the Mark.

RESPONSE:

REQUEST NO. 16: All documents which refer or relate to any request by Applicant to any person to abandon or change a mark it was using because of Applicant's use of the Mark.

RESPONSE:

REQUEST NO. 17: All agreements by and between Applicant and any third party relating to the advertising, promotion, marketing or sale of Applicant's hard cider product under or in association with the Mark.

RESPONSE:

REQUEST NO. 18: All documents which refer or relate to or support the allegations in Paragraph 3 of Applicant's Affirmative Defenses that "Opposer has not used its claimed marks as a trademark in commerce so as to be able to establish prior use of the mark."

RESPONSE:

REQUEST NO. 19: All documents which refer or relate to or support the allegations in Paragraph 4 of Applicant's Affirmative Defenses that "To the extent Opposer has made any trademark use of its claimed mark, its use has been geographically limited to only a small portion of the country."

RESPONSE:

REQUEST NO. 20: All documents which refer or relate to or support the allegations in Paragraph 5 of Applicant's Affirmative Defenses that "To the extent Opposer has made any trademark use of its claimed mark, its use has been in different channels of trade from those in which Applicant's marks will be used."

RESPONSE:

REQUEST NO. 21: All documents which refer or relate to or support the allegations in Paragraph 6 of Applicant's Affirmative Defenses that "To the extent Opposer has made any trademark use of its claimed mark, its goods have been marketed to and used by different consumers from those of Applicant."

RESPONSE:

REQUEST NO. 22: All documents which refer or relate to or support the allegations in Paragraph 7 of Applicant's Affirmative Defenses that "Opposer's trademark registration is invalid because Opposer knew or should have known that it had not made use of the mark in connection with all of the goods set forth in the registration at the time of the filing of the Statement of Use or at the time of the filing of the Section 8 and 15 Affidavit."

RESPONSE:

REQUEST NO. 23:. All documents which refer or relate to or support the allegations in Paragraph 8 of Applicant's Affirmative Defenses that "Opposer is not the proper owner of the mark THE LEGENDARY BOONVILLE BEER and/or the asserted registration."

RESPONSE:

REQUEST NO. 24: All documents identified in Applicant's responses to Opposer's First Set of Interrogatories to Applicant.

RESPONSE:

DATED: November 17, 2011

Respectfully submitted,

Leavens, Strand, Glover & Adler, LLC

By: _____

Thomas R. Leavens
203 N. LaSalle Street
Suite 2550
Chicago, IL 60601
(312) 488-4170

Attorneys for Opposer

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Opposer's First Request For Production Of Documents and Things was served upon:

Adam L. Brookman
Boyle Fredrickson, S.C.
840 North Plankinton
Milwaukee, Wisconsin 53203
abrookman@boylefred.com

via email and U.S. mail, proper costs prepaid, this 17th day of November, 2011.

_____

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

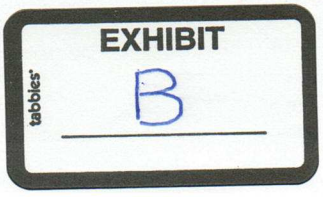
In the Matter of Application Serial No. 85178395: BOONVILLE CIDER HOUSE BITE HARD CIDER,

Published in the Official Gazette on April 26, 2011, in International Class 33

ANDERSON VALLEY ACQUISITION COMPANY, LLC,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91201070
	)	
MATTHEW HARNDEN & ROGER SCOMMEGNA	)	
Applicants	)	

OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT

Opposer, Anderson Valley Acquisition Company, LLC ("Opposer"), by its attorneys, Leavens, Strand, Glover & Adler, LLC, directs the following interrogatories to Applicant, Matthew Harnden and Roger Scommegna ("Applicant") to be answered in accordance with Trademark Rule 2.116, 37 C.F.R. §2.116 and Rules 26(e) and 33, Federal Rules of Civil Procedure. Applicant is required to answer these Interrogatories in writing, under oath, by an agent with knowledge of the matters referred to therein, and to serve a copy of its answers within



30 days after service hereof upon counsel for Applicant. These Interrogatories are to be interpreted and answered in accordance with the Definitions below.

DEFINITIONS

1. "Applicant," "you" or "your" shall be defined to the broadest extent permitted by the Federal Rules of Civil Procedure and shall include the Applicant herein, and any parent, subsidiary, associated, merged or affiliated organization, including any predecessors-in-interest of any such company or entity and their present and former officers, agents, directors, trustees, employees, independent contractors and all persons acting or purporting to act on their behalf.

2. "Person" or "Persons" mean natural persons, all governmental entities, agencies, officers, departments, or affiliates of the United States of America, or any other governmental entity and any corporation, partnership, foundation, proprietorship, association, organization, or group of natural persons.

3. "Director," "Officer," "employee," "agent," and "representative," means any individual serving as such and any individual serving at any relevant time in such capacity, even though no longer serving in such capacity. Applicant's "representatives" refers to and includes Applicant's officers, directors, agents, employees, attorneys, and consultants, as well as other individuals or business entities in the employ of or otherwise acting on its behalf.

4. The terms "relating to" and "referring to" shall be interpreted so as to encompass the scope of discovery set forth in Rule 26(b)(1) of Fed. R. Civ. P.

5. "Document(s)" means all materials within the full scope of Rule 34 of Fed. R. Civ. P. including but not limited to: all writings and recordings, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise (including without limitation, correspondence, memoranda, notes, diaries,

minutes, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, tags, labels, invoices, brochures, periodicals, telegrams, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and intraoffice communications, offers, notations of any sort of conversations, working papers, applications, permits, file wrappers, issued patents, patent applications, surveys, indices, telephone calls, meetings or printouts, teletypes, telefax, invoices, worksheets, and all drafts, alterations, modifications, changes and amendments of any of the foregoing), graphic or aural representations of any kind (including without limitation, photographs, charts, micro-fiche, microfilm, videotape, recordings, motion pictures, plans, drawings, surveys), and electronic, mechanical, magnetic, optical or electric records or representations of any kind (including without limitation, computer files and programs, tapes, cassettes, discs, recordings).

6. "Identify," "identification," "describe," or "description" means:

a. With respect to a Person, the name and present home and business addresses (if unknown, the last known), present place of employment (if unknown, the last known), date(s) of commencement and termination of employment, job title and description of his or her duties and responsibilities;

b. With respect to a corporation or other legal entity, the full name, address and state of incorporation, if known, and the identity of the person(s) who acted on behalf of such entity with respect to the subject matter of the interrogatory;

c. With respect to a Document, the type of document (e.g., letter, telex, contract, calendar pad, report), the number of pages of which it consists, a general description of the Document's contents, identification of the person(s) who prepared the Document, for whom it was prepared, who signed it, to whom it was delivered, mailed, or otherwise received, and to

whom a copy was sent or otherwise received, date of writing, creation or publication, the identifying number(s), letter(s), or combination thereof, if any, and the significance or meaning of such number(s), letter(s) or combination thereof, and the present location and identity of the custodian of that document. Documents to be identified shall include both documents in your possession, custody or control, documents known by you to have existed but no longer existing, and other documents of which you have knowledge or information;

d. With respect to a Document: once but no longer in your possession, custody or control, or the possession, custody or control of your agents (including but not limited to attorneys) include the date on and circumstances under which the document was disposed of, destroyed, surrendered from or otherwise left your possession, custody or control, the identity of its present (or last known) custodian and the location of such document, if known. In lieu of identification of a document, you may, simultaneously with the filing of your answers to these interrogatories, produce such document for inspection and copying by Applicant, at the office of Applicant's counsel, provided that such document is segregated in such a way as to indicate the particular interrogatory to which it is responsive.

e. With respect to oral communications (including a conversation, conference, or other oral contract), identify all persons making the statement, all persons to whom such statement was made, and all other persons present at the time of such statement; state the date of such statement; state the place where such statement was made, or if by telephone, the person participating in the telephone call, the person making the call, and the place where the persons participating in the call were located; and state the substance of such statement.

7. "Describe" and/or "state" means to set forth fully and unambiguously every fact relevant to the subject of the interrogatory, of which you (including your agents and representatives) have knowledge or information.

INTERROGATORIES

INTERROGATORY NO. 1: Identify all goods by product type or category that Applicant has marketed, advertised or sold under or in association with the mark BOONVILLE CIDER HOUSE BITE HARD CIDER (the "Mark").

RESPONSE:

INTERROGATORY NO. 2: For each type or category of goods identified in your response to Interrogatory No. 1, please identify the dates such goods were first used, the dates such goods were first used in commerce, the territorial areas of the United States in which such goods were available and the date, if any, such goods were no longer available to the public.

RESPONSE:

INTERROGATORY NO. 3: Identify each person who participated in, provided information concerning, or was consulted with respect to the decision by Applicant to adopt the Mark for use in connection with hard cider.

RESPONSE:

INTERROGATORY NO. 4: What has been Applicant's volume of sales of each of its products sold under or in association with the Mark in each year since their respective dates of first use, in terms of both dollars and units?

RESPONSE:

INTERROGATORY NO. 5: Identify each advertising agency, graphic designer, artist, consultant and any other person or entity that participated in, provided information concerning or was consulted with respect to the selection of the Mark for Applicant's hard cider product or any label, packaging, or advertising or promotional material therefor.

RESPONSE:

INTERROGATORY NO. 6: Identify all methods of advertising or promotion of Applicant's hard cider product bearing the Mark and identify the territory of dissemination of such advertising or promotion.

RESPONSE:

INTERROGATORY NO. 7: State the amount of money expended by Applicant for advertising and promotion of its products under the Mark for each year that it has expended such money and by method of advertising or promotion and territory of dissemination of such advertising or promotion.

RESPONSE:

INTERROGATORY NO. 8: State whether Applicant has ever conducted, or had conducted, any trademark searches, market research, surveys, investigations, tests, or studies

relating to the Mark, or any term or mark similar thereto, and if so, identify all such searches, market research, surveys, investigations, tests, or studies and produce all documents relating thereto.

RESPONSE:

INTERROGATORY NO. 9: Identify each and every type or class of customer to which Applicant has sold its hard cider product under or in association with the Mark.

RESPONSE:

INTERROGATORY NO. 10: Identify each channel of trade through which Applicant has sold its hard cider product under or in association with the Mark.

RESPONSE:

INTERROGATORY NO. 11: Identify the date and the method by which Applicant first had knowledge of the use of the mark THE LEGENDARY BOONVILLE BEER by Opposer.

RESPONSE:

INTERROGATORY NO. 12. Identify the date and the method by which Applicant first had knowledge of any association, or perceived association, between Opposer or Opposer's products or services and BOONVILLE.

RESPONSE:

INTERROGATORY NO. 13: Identify each instance of actual confusion, mistake, or deception, or any instance which may indicate a likelihood of confusion, mistake, or deception regarding the source, sponsorship, approval, connection or endorsement of the products advertised, promoted or sold by Applicant under or in association with the Mark and the goods or services advertised, promoted or sold by Applicant.

RESPONSE:

INTERROGATORY NO. 14: For each instance identified in your response to Interrogatory No. 13, identify the person or persons having knowledge of the instance and the date and place of the instance.

RESPONSE:

INTERROGATORY NO. 15: Identify any meetings (by date, location, and persons present) where any discussion was held relative to whether the Mark should be modified, discontinued or expanded by Applicant.

RESPONSE:

INTERROGATORY NO. 16: Identify any requests by Applicant to anyone to abandon or change a mark based on Applicant's use of the Mark. For each request state the date and place it was made, the name and address of the person to whom it was made, the reason it was made, a description of the reply that was received as a result of the request, and all persons having knowledge concerning such request.

RESPONSE:

INTERROGATORY NO. 17: Has Applicant acquired through assignment, license, or any other transfer from a third party, or granted to any third party, any rights in the Mark? If so, from or to whom was the transfer, what was the date of the transfer, and what documents relate thereto?

DATED: November 17, 2011

Respectfully submitted,

Leavens, Strand, Glover & Adler, LLC

By: _____

Thomas R. Leavens
203 N. LaSalle Street
Suite 2550
Chicago, IL 60601
(312) 488-4170

Attorneys for Opposer

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Applicant's First Set of Interrogatories was served upon:

Adam L. Brookman
Boyle Fredrickson, S.C.
840 North Plankinton
Milwaukee, Wisconsin 53203
abrookman@boylefred.com

via email and U.S. mail, proper costs prepaid, this 17th day of November, 2011.

_____

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

In the Matter of Application Serial No. 85178395: BOONVILLE CIDER HOUSE BITE HARD CIDER,
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ANDERSON VALLEY ACQUISITION COMPANY, LLC,	)	
Opposer,	)	
v.	)	**Opposition No. 91201070**
MATTHEW HARNDEN & ROGER SCOMMEGNA	)	
Applicants	)	

AFFIDAVIT OF THOMAS R. LEAVENS IN SUPPORT OF OPPOSER'S RULE 56(D) MOTION TO CONTINUE APPLICANTS' MOTION FOR SUMMARY JUDGMENT PENDING DISCOVERY

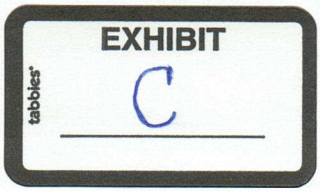
1. I am counsel of record for Opposer, Anderson Valley Acquisition Company ("Opposer") in this action.

2. I have personal knowledge regarding the facts and circumstances set forth in this affidavit and could testify competently and truthfully regarding the same if called as a witness in this matter.

3. On November 17, 2011, Opposer propounded interrogatories and document requests on Applicant in the above-captioned Opposition related to Applicants' proposed mark, BOONVILLE CIDER HOUSE BITE HARD CIDER ("Applicants' Mark").

4. On December 9, 2011, Applicants filed their Motion for Summary Judgment ("Applicants' Motion") asserting a multitude of factual allegations related to Applicants' Mark and Opposer's Mark, THE LEGENDARY BOONVILLE BEER ("Opposer's Mark").

5. On January 9, 2012, Applicants' Counsel, Adam Brookman, agreed to respond to certain interrogatories and document requests, which are set forth in Opposer's



Rule 56(d) Motion to Continue Applicants' Motion for Summary Judgment Pending Discovery ("Opposer's Motion") and detailed in Exhibit B to Opposer's Motion. However, Mr. Brookman refused to agree to make either Applicant available for deposition prior to Opposer's response to Applicants' Summary Judgment Motion.

6. Despite Applicants' agreement to respond to certain written discovery requests, Opposer cannot respond to the allegations set forth in Applicants' Motion without the opportunity to orally depose Applicants, Scommegna and Harnden, on the merits of Applicants' Motion, nor can Opposer present by affidavit facts essential to justify its opposition to Applicants' Motion.

7. Relying almost entirely on the Declaration of Roger Scommegna, Applicants' Motion alleges: (a) there is no likelihood of confusion between Applicants' and Opposer's Marks; (b) Applicants have used "Boonville" in connection with the Boonville Hotel; and (c) weakness of Opposer's Mark. Each of these allegations must be raised in the depositions of Scommegna and Harnden.

8. First, Opposer must depose Scommegna and Harnden regarding the allegation in Applicants' Motion that "there is no likelihood of confusion" between Applicants' and Opposer's Marks. (Applicants' Motion at 13).

a. Specifically, Applicants argue there is no likelihood of confusion between Applicants' and Opposer's Marks when it states: "it is undisputed that they [the marks] present entirely different commercial impressions rendering them unlikely to cause any confusion." (Applicants' Motion at 14). Yet, Applicants state that "some preliminary marketing and limited manufacturing of hard cider under similar marks has been made." (Applicants' Motion at 10 and Decl. of Scommegna, para. 2). Opposer is unaware of the facts surrounding the commercial impression of Applicants' Mark. To respond to

Applicants' Motion, Opposer must depose Scommegna and Harnden on the issues of commercial impression, marketing, and manufacturing of Applicants' goods.

b. Applicants also argue there is no likelihood of confusion because "Opposer is in the business of making and selling beer, while Matt and Roger are in the business of making and selling hard cider." (Applicants' Motion at 13)." Opposer does not know the scope of Applicants' goods and therefore must depose Scommegna and Harnden to obtain the facts necessary to respond to Applicants' Motion.

c. Applicant Scommegna further alleges that he owns the Boonville Hotel, which sells both Opposer's goods and hard cider. (Applicants' Motion at 10 and Decl. of Scommegna, para. 7). Opposer is unaware of Applicants' current or proposed channels of trade for Applicants' goods. To respond to Applicants' Motion, Opposer must depose Scommegna and Harnden as to current and intended channels of trade for Applicants' goods.

d. Additionally, Applicants assert that "Jim Ball Vineyards, located in Boonville, California, has been using the word/name 'Boonville' … to identify one of its wine products since at least 2007." (Decl. of Roger Scommegna, para. 5). Opposer is unaware of the facts surrounding Applicants' allegations of third party use of "Boonville." To respond to Applicants' Motion, Opposer must orally depose Scommegna and Harnden about such third party uses.

e. Applicants' last allegation concerning likelihood of confusion is that "there is no likelihood of confusion." (Applicants' Motion at 13). To respond to Applicants' Motion, Opposer must depose Scommegna and Harnden about any instances of actual confusion between Opposer and Applicants' Marks.

9. Second, Applicants allege use of the term "Boonville" in connection with the operation of a hotel but do not explain the association between such use and Applicants' claim of rights in Applicants' Mark. To respond to Applicants' Motion, Opposer must

depose Scommegna and Harnden about the facts surrounding the allegations concerning Applicants' other uses of the term "Boonville." (Decl. of Scommegna, para. 4).

10. Third, Applicants argue that their use of the term "Boonville" "will be used to identify the location of the source of the hard cider." (Decl. of Scommegna, para. 3). To respond to Applicants' Motion, Opposer must depose Scommegna and Harnden to determine their intended use of the term "Boonville."

11. Unless and until Opposer has the opportunity to depose Scommegna and Harnden, it will be deprived of the discovery needed to place at issue material factual questions in opposition to the motion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT
Thomas R. Leavens

(Signature)

SUBSCRIBED and SWORN TO
Before me this 9th day of January, 2012.

Notary Public

OFFICIAL SEAL
HEATHER R. LIBERMAN
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES AUG. 26, 2015