

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

MBA

Mailed: June 27, 2012

Opposition No. 91202227

Under Armour, Inc.

v.

Douglas A. Leftridge

**Michael B. Adlin, Interlocutory Attorney:**

This case now comes up for consideration of applicant's contested motion, filed April 27, 2012, to compel responses to its interrogatories and to extend the discovery period. While applicant's motion also originally sought to compel the production of documents, opposer claims in response to the motion, the parties' correspondence confirms, and applicant does not dispute, that the parties resolved the production issue after the filing of applicant's motion.

The question presented is simple on its face - whether applicant's interrogatories exceed the Board's generous and often-abused limit of 75 interrogatories, "counting subparts." Trademark Rule 2.120(d)(1). In this case, however, this ordinarily simple counting exercise is made, if not more complicated, then potentially more nuanced, by the scope of discovery in this proceeding given the nature of opposer's claims of priority and likelihood of confusion

and dilution. See generally, TBMP § 405.03(d) (3d ed. rev. 2012) (where interrogatory requests "that a particular piece of information" be provided for multiple years or multiple involved marks, "it will be counted as a single interrogatory").

More specifically, in this case, applicant seeks registration of ARMOURADE, in standard characters, for "Prepared entrees consisting of fruit drinks and fruit juices ... vegetable juices, vegetable-fruit juices and smoothies."<sup>1</sup> In its notice of opposition, opposer alleges prior use and registration of UNDER ARMOUR, ARMOUR and a plethora of variations thereof, for clothing, sports equipment, and an extremely wide range of other products and services, and that use of applicant's mark would be likely to cause confusion with, and dilute, opposer's many pleaded marks. While opposer specifically pleads prior registration of UNDER ARMOUR for "Bottled water," and ownership of applications to register the same mark for, *inter alia*, "energy drinks," "herbal juices" and "nutritional drinks," based on an intent to use the mark for these products, opposer pleads so much more than only these marks and registrations. In fact, opposer pleads ownership of **92** applications and registrations for UNDER ARMOUR and ARMOUR

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<sup>1</sup> Application Serial No. 85200700, filed December 17, 2010, based on an alleged intent to use the mark in commerce.

marks for if not everything, than many things under the sun. The pleaded registrations are of record by virtue of Trademark Rule 2.122(d)(1) and opposer's attaching printouts of them to its pleading, and, as a result, opposer's 15 page notice of opposition is accompanied by exhibits totaling 597 pages. In its answer, applicant denies the salient allegations in the notice of opposition.<sup>2</sup> In other words, unless and until opposer pares down its notice of opposition, the scope of discovery in this proceeding could justifiably be extensive, even though it appears that the vast majority of opposer's pleaded marks and registrations are extremely unlikely to be relevant to any decision on the merits in this case.<sup>3</sup>

In any event, before addressing the substance of applicant's motion, and other issues raised by the parties' filings,<sup>4</sup> opposer's argument that applicant failed to

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<sup>2</sup> Applicant filed and served two "answers" on December 2, 2011, the second of which is not construed as an amended answer (which could have been filed as a matter of course under Fed. R. Civ. P. 15(a)(1)(A) in any event) because it apparently merely corrects the certificate of service.

<sup>3</sup> In other words, opposer cannot rely on its pleaded marks and registrations in support of its claims and at the same time refuse to respond to discovery requests regarding them. Applicant, by contrast, has a single involved application, so the proper scope of opposer's discovery of applicant is, under opposer's current notice of opposition, significantly narrower. TBMP § 414(11)(3d ed. rev. 2012).

<sup>4</sup> One consequence of filing motions, and especially discovery motions, is that doing so sometimes results in Board rulings or comments on issues not specifically addressed, but implicitly raised by, the parties' filings, in the interest of ensuring efficient litigation. Parties can avoid this potential result by resolving disputes on their own.

adequately "meet and confer" is not well-taken. While it would have been preferable for applicant to have provided his calculation of the number of interrogatories served, opposer was no more specific, stating in response to applicant's communications only that the "total number of interrogatories [is] well in excess of 75." Opposer's Response to Applicant's Motion Ex. G. As the party objecting, opposer had an obligation to do more, i.e. to be more specific, and providing an explanation of its count would (or at least should) have "started the conversation." In fact, "[w]hile it was initially applicant's obligation to confer with opposer prior to filing [its] motion, opposer was under an equal obligation to participate in good faith in applicant's efforts to resolve the matter." Amazon Technologies Inc. v. Wax, 93 USPQ2d 1702, 1705 (TTAB 2009). In any event, it is clear that each party made the decision to "roll the dice" and accept the Board's count, rather than working together to ensure that applicant obtained what it needed without unduly burdening opposer. Indeed, opposer knew full well, based on applicant's communications if not its own experience, that absent compromise, the Board would decide, and it is clear that opposer was satisfied with this result, having chosen not to attempt to avoid it.

Turning to how many interrogatories applicant served, opposer's count -- whether "at least 180" or "nearly 200" --

is, if not disingenuous, unreasonable. For example, where applicant requests opposer to identify, in Interrogatory No. 12, "all inquiries, investigations, surveys, evaluations and or studies," opposer counts this as 5 subparts, even though the words are essentially synonyms, a technique which is unfortunately commonplace (and likely employed by opposer on occasion)<sup>5</sup> because parties all too often treat discovery as a method of inflicting pain, increasing costs, delaying, obfuscating and harassing, rather than obtaining relevant and necessary information, and parties anticipate their adversaries engaging in such nonsense during discovery. Similarly, where applicant requests opposer to identify, in Interrogatory No. 13, each "sign, display, point-of-sale display, label, hangtag, wrapper, container [or] package," opposer counts this as eight subparts, when under any reasonable interpretation it is one. By the Board's count, applicant has thus far served **61** interrogatories, with Interrogatory Nos. 2, 6, 7 and 8 each comprising one and the remaining interrogatories comprising multiple parts, as follows: Interrogatory No. 1 - 2; Interrogatory No. 3 - 4;

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<sup>5</sup> From this point forward, any discovery-related position taken by either party which does not appear consistent with the "Golden Rule" will be subject to increased scrutiny. See generally, TBMP § 402.01 (3d ed. rev. 2012); see also, Peterson v. BMI Refractories, 124 F.3d 1386, 1396 (11<sup>th</sup> Cir. 1997) ("There is no better guide to professional courtesy than the golden rule: you should treat opposing counsel the way you yourself would like to be treated.").

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Interrogatory No. 4 - 4; Interrogatory No. 5 - 4;  
Interrogatory No. 9 - 2; Interrogatory No. 10 - 2;  
Interrogatory No. 11 - 2; Interrogatory No. 12 - 2;  
Interrogatory No. 13 - 2; Interrogatory No. 14 - 3;  
Interrogatory No. 15 - 2; Interrogatory No. 16 - 6;  
Interrogatory No. 17 - 8; Interrogatory No. 18 - 2;  
Interrogatory No. 19 - 2; Interrogatory No. 20 - 2;  
Interrogatory No. 21 - 2; Interrogatory No. 22 - 2;  
Interrogatory No. 23 - 2; Interrogatory No. 24 - 2.

Accordingly, applicant's motion is hereby **GRANTED** and opposer is allowed until **THIRTY DAYS** from the mailing date of this order to serve substantive responses to applicant's interrogatories. In the event opposer fails to comply with the requirements of this order, opposer may be subject to sanctions, potentially including entry of judgment against it. Trademark Rule 2.120(g); Fed. R. Civ. P. 37(b)(2). Furthermore, applicant may seek to preclude opposer from relying on information or documents which should have been produced in response to any of applicant's discovery requests, but were not. See, Panda Travel, Inc. v. Resort Option Enterprises, Inc., 94 USPQ2d 1789, 1792 (TTAB 2009); Quality Candy Shoppes/Buddy Squirrel of Wisconsin Inc. v. Grande Foods, 90 USPQ2d 1389, 1392 (TTAB 2007) (same); Presto Products v. Nice-Pak Products, 9 USPQ2d 1895, 1896 n. 5 (TTAB 1988); TBMP § 527.01(e) (3d ed. rev. 2012).

It is well-settled that "the Board will, upon motion, reopen or extend discovery solely for the benefit of a party whose opponent, by wrongfully refusing to answer, or delaying its responses to discovery, has unfairly deprived the propounding party of the right to take follow-up." Miss America Pageant v. Petite Productions, Inc., 17 USPQ2d 1067, 1070 (TTAB 1990). Here, because over two months remained in the discovery period when applicant filed its motion, opposer is entitled to serve discovery, if it must, and there is no basis upon which to extend discovery for applicant only, but the discovery period is extended briefly as set forth below.<sup>6</sup>

As they move forward with conducting discovery in a more cooperative manner and work harder to resolve any issues without Board intervention, the parties should be aware of the following:

- to the extent that either party asserts the attorney-client privilege or attorney work product doctrine, it must "describe the nature of the documents, communications or tangible things not produced or disclosed ... in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim" of privilege; Fed. R. Civ. P. 26(b)(5)(A)(ii);

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<sup>6</sup> In the event opposer pares down its notice of opposition, the Board would be happy to entertain a motion to shorten the discovery period or otherwise limit discovery, and either party may make such a request in a teleconference between both parties and the Board without filing a written motion.

- unless and until it pares down its notice of opposition such that only marks for beverage products are pleaded, opposer's limitation of its responses to "beverage products" may be inappropriate;
- failing to understand part of a request is not a basis upon which to refuse to respond to any of the request, and therefore opposer's response to, for example, Document Request No. 3, is inappropriate;
- where applicant requests "font of type," opposer should interpret the request as seeking "font;"
- opposer should interpret applicant's Document Request No. 15 as seeking samples of products offered under Opposer's Marks;<sup>7</sup>
- opposer's contention that applicant's Document Request No. 18 concerning actual confusion calls for information or documents which are "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence" appears to be a mistake, rather than a disingenuous response, but in any event, any actual confusion is of course directly relevant;
- opposer's objection to applicant's Document Request No. 35 also appears to be a mistake, because under Fed. R. Civ. P. 26(a)(1)(A)(ii) it would be odd indeed if documents identified

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<sup>7</sup> Given opposer's decision to plead 92 applications and registrations, a request for all products offered under any of opposer's pleaded marks would not necessarily be overly broad or unduly burdensome, and the obvious difficulty in potentially having to produce all samples of all products offered under any of opposer's pleaded marks could be the result of opposer's broad claims rather than applicant making an inappropriate request.

in opposer's initial disclosures were not within its control, including because "[c]ontrol with respect to the production of documents" is defined "not only as possession, but as the legal right to obtain the documents requested upon demand;" Pioneer Kabushiki Kaisha v. Hitachi High Technologies, 74 USPQ2d 1672, 1679 (TTAB 2005) (quoting Cochran Consulting, Inc. v. Uwaterc USA, Inc., 102 F.3d 1224, 41 USPQ2d 1161, 1166 (Fed. Cir. 1996)); see also, Sedona Corp. v. Open Solutions, Inc., 249 F.R.D. 19, 22 (D. Conn. 2008) and In re Hallmark Capital Corp., 534 F.Supp.2d 981, 982-83 (D. Minn. 2008).

Suffice it to say, these issues are not the only ones raised by opposer's responses, and the Board will not hesitate to grant any motion to compel on other issues, if appropriate, though it is anticipated that motions to compel will be unnecessary from this point forward.

In any event, applicant's motion to compel is granted and opposer is ordered to serve substantive responses to applicant's interrogatories within 30 days of the mailing date of this order. Proceedings herein are resumed, and disclosure, discovery and trial dates are reset as follows:

Expert Disclosures Due	<b>September 18, 2012</b>
Discovery Closes	<b>October 18, 2012</b>
Plaintiff's Pretrial Disclosures	<b>December 2, 2012</b>
Plaintiff's 30-day Trial Period Ends	<b>January 16, 2013</b>
Defendant's Pretrial Disclosures	<b>January 31, 2013</b> <b>March 17, 2013</b>

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Defendant's 30-day Trial Period Ends

Plaintiff's Rebuttal Disclosures

**April 1, 2013**

Plaintiff's 15-day Rebuttal Period Ends

**May 1, 2013**

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

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