

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

Baxley

Mailed: August 29, 2015

Opposition No. 91205896

Beau L. Tardy

v.

Wild Brain Entertainment, Inc.

**Andrew P. Baxley, Interlocutory Attorney:**

In an April 3, 2015 order, the Board, among other things, determined that, in view of Opposer's statement that "he and Applicant 'have had email discussions regarding standing and evidence and Opposer has supplemented [his] discovery responses with a Supplemental Disclosure to make corrective information known to Applicant as a part of the discovery process'" and Applicant's failure to file a reply brief in which it disputed that statement, the renewed motion to compel that Applicant filed on December 23, 2014 is moot.

On April 3, 2015, Applicant filed a request for partial reconsideration of that order.<sup>1</sup> In particular, Applicant notes that Opposer's supplemental disclosure was served prior to the filing of the renewed motion to compel and that such disclosure did not resolve the parties' discovery dispute. Accordingly, Applicant contends that the April 3, 2015 order is in error and that the renewed motion to compel should be decided on the merits.

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<sup>1</sup> The request for reconsideration is dated April 8, 2015.

In response, Opposer contends that the renewed motion to compel is moot because he filed a notice of reliance under the resumed; that he is willing to accept the penalty of estoppel if he attempts to rely upon any evidence at trial that he did not disclose during discovery; that Applicant did not seek to depose Opposer and did not serve any additional discovery requests; and that he has already provided all relevant information.

In reply, Applicant contends that Applicant's notice of reliance was prematurely filed; and that whether Opposer disclosed all the evidence upon which he intends to rely is not at issue in renewed motion to compel.

The premise underlying a motion for reconsideration under Trademark Rule 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such a motion should be limited to a demonstration that based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change.

In the request for reconsideration, Applicant correctly noted that the Board mistakenly believed that Opposer's supplemental disclosure was after the filing of the motion to compel and that the supplemental disclosure had resolved the parties' discovery dispute.<sup>2</sup> Accordingly, the request for reconsideration is granted to the extent that the Board will decide the renewed motion to compel on the merits.

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<sup>2</sup> Under the circumstances, Applicant should have filed a reply brief in which it clearly stated that the supplemental disclosures did not resolve the parties' discovery dispute and did not render moot the renewed motion to compel.

As an initial matter, under the schedule set forth in the Board's April 3, 2015 order, Opposer's thirty-day testimony period was reset to close on July 12, 2015 and was therefore reset to open on June 13, 2015. Accordingly, the notice of reliance that Opposer filed on April 24, 2015 was premature and will receive no consideration. *See* Trademark Rule 2.122(e); TBMP § 704.02 (2015).

The Board finds that Applicant made a good faith effort to resolve the parties' discovery dispute following the Board's November 14, 2014 order and prior to filing the renewed motion to compel. *See* Trademark Rule 2.120(e)(1). The Board further notes that, contrary to Opposer's apparent belief, serving and supplementing one's initial disclosures is not an acceptable substitute for serving proper responses to discovery requests. *See* TBMP § 401.02.

Rather, Applicant is generally entitled to take discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). More particularly, Applicant is entitled to take discovery regarding any of the allegations set forth in Opposer's fourth amended notice of opposition, the operative complaint herein, and its pleaded defenses. *See Mack Trucks, Inc. v. Monroe Auto Equipment Co.*, 181 USPQ 286, 287 (TTAB 1974); TBMP § 402.01. Thus, even if the Board assumes that Opposer has disclosed all of the information upon which he intends to rely at trial, such disclosure does not limit the scope of Applicant's permissible discovery. Opposer brought this case and, in doing so, should have expected that he would be required to respond to discovery requests

and produce documents to support any and all of the allegations in the fourth amended notice of opposition.

With regard to Applicant's documents requests, Opposer's responded to each one other than document request nos. 20 and 41 with objections and statements that it has provided responsive documents. These responses are acceptable, subject to Opposer's duty to correct or supplement them, as necessary, in accordance with the following. *See Fed. R. Civ. P. 26(e) and 34(b); No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1555-56 (TTAB 2000) (responding party "was obligated to respond to each request; and a proper response requires either stating that there are responsive documents and they will be produced or withheld on a claim privilege or stating that he has no responsive documents").

In response to document request nos. 20, Opposer stated that, subject to objections, responsive documents are available on the USPTO website. In response to document request no. 41, Opposer stated that, subject to objections, it had provided responsive documents and that other responsive documents were available on the USPTO website. These responses are acceptable, subject to Opposer's duty to correct or supplement them as necessary. *See id.*; Fed. R. Civ. P. 26(b)(2)(C)(i).

Because Opposer did not produce documents as they are kept in the ordinary course of business, his document production should have been organized and labelled to correspond to each document request. *See Fed. R. Civ. P. 34(b)(2)(E)(i); TBMP § 406.04(b)*. To the extent that Opposer has not done so already, Opposer is allowed until **thirty days** from the mailing date set forth in this order to re-serve

his document production in a manner that is organized and labelled to correspond to each document request and to correct and/or supplement his responses to Applicant's document requests, as necessary.<sup>3</sup>

Regarding Applicant's interrogatories, Opposer's responses to interrogatory nos. 5 and 13 are acceptable. For reasons set forth in the November 14, 2014 order at 7, Opposer need not respond further to Applicant's interrogatory nos. 4 and 12. Because Opposer is an individual, the Board presumes that he is the person whose identity is responsive to Applicant's interrogatory nos. 9 and 10. Unless Opposer intends to respond otherwise, Opposer need not respond further to these interrogatories.

Opposer's remaining responses consist almost entirely of identical boilerplate objections based on alleged irrelevance. The Board stated in the November 14, 2014 order at 6 that these objections "indicate a failure to participate in good faith in the discovery process in this case."

Each interrogatory must be answered separately and fully in writing under oath; any objections must be stated with specificity. *See* Fed. R. Civ. P. 33(b)(3) and (4); TBMP § 405.04(b). Accordingly, Opposer is allowed until **thirty days** to serve amended responses to Applicant's interrogatories, wherein Opposer responds separately and fully to each interrogatory. In the interest of satisfying Applicant's discovery needs, Opposer is directed to serve amended responses to Applicant's

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<sup>3</sup> If documents responsive to a particular request do not exist, Opposer is not obligated to create such documents solely to satisfy Applicant's discovery requests. *See Washington v. Garrett*, 10 F.3d 1421, 1437-38 (9th Cir. 1993).

interrogatory nos. 1 through 3, 6 through 8, and 11 by providing the following information. *See* TBMP § 402.02.

In response to Applicant's interrogatory no. 1, Opposer must identify each of the business entities through which Opposer has provided his pleaded goods and services, i.e., "merchandise, pop culture websites, cartoon character, TV show, comics, [] web streaming entertainment[, and] production services," under the DIZZY trade name. Fourth amended notice of opposition at 2.

In response to Applicant's interrogatory nos. 2 and 3, Opposer must describe the nature of his use of the DIZZY trade name for each of his pleaded goods and services for each year since 2009. *See Neville Chemical Co. v. Lubrizol Corp.*, 184 USPQ 689, 690 (TTAB 1975) (allowed to provide figures for each of last five years and a statement that there have been sales for the other years); *American Optical Corp. v. Exomet, Inc.*, 181 USPQ 120, 122 (TTAB 1974) (interrogatory too broad, requiring identity of products having no relevance to opposition).

For reasons already set forth in the November 14, 2014 order at 7, Opposer need only respond further to Applicant's interrogatory nos. 6 and 8 by providing his total annual sales and advertising/promotional figures in round numbers for his pleaded goods and services under the DIZZY trade name for each year since 2009. He may provide those figures under the Board's standard protective order. For reasons already set forth in the November 14, 2014 order at 8, Opposer need only respond further to Applicant's interrogatory no. 7 by identifying the states in which he has

distributed, sold, or offered for sale goods and/or services under the pleaded DIZZY brand name for each year since 2009.

In response to Applicant's interrogatory no. 11, Opposer need only identify the manufacturers of its pleaded "merchandise" sold under the pleaded DIZZY brand name. This interrogatory is otherwise essentially overlaps with Applicant's interrogatory nos. 1 through 3.

Proceedings herein are resumed. Remaining dates are reset as follows.

Plaintiff's Pretrial Disclosures Due	<b>10/11/2015</b>
Plaintiff's 30-day Trial Period Ends	<b>11/25/2015</b>
Defendant's Pretrial Disclosures Due	<b>12/10/2015</b>
Defendant's 30-day Trial Period Ends	<b>1/24/2016</b>
Plaintiff's Rebuttal Disclosures Due	<b>2/8/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>3/9/2016</b>

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