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

Proceeding	91206915
Party	Plaintiff mybody, L.L.C.
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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.: 85/597,114
Published in the Official Gazette on August 28, 2012

MYBODY, L.L.C.

Opposer,

vs.

ERIC LUCAS

Applicant.

Opposition No.: 91206915

**OPPOSER'S REPLY TO
APPLICANT'S
MEMORANDUM IN
OPPOSITION TO OPPOSER'S
MOTION TO COMPEL
DISCOVERY**

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rules 33 and 37 of the Federal Rules of Civil Procedure, Opposer, MyBody L.L.C., hereby replies to Applicant's Memorandum in Opposition to Opposer's Motion to Compel Discovery and in Support of Applicant's Request to Extend the Discovery Period dated October 31, 2013.

Applicant has failed to respond to Opposer's Interrogatories and Document Requests and the Board should enter an order compelling Applicant to do so. Counsel for Opposer has made repeated good faith efforts to resolve the issues with Applicant, but such efforts have been unsuccessful.

I. REPLY TO MEMORANDUM IN OPPOSITION TO OPPOSER'S MOTION TO COMPEL DISCOVERY.

A. Opposer's Interrogatories Were Proper and Should Have Been Answered Promptly. Applicant's assertion that Opposer exceeded the maximum number of permissible interrogatories is incorrect. Pursuant to Trademark Rule 2.120(d), the rule applicable to this proceeding, the total number of interrogatories which a party may serve upon another party pursuant to Rule 33 of the Federal Rules of Civil Procedure shall not exceed seventy-five (75), including subparts. 37 C.F.R. § 2.120(d)(1); Kellogg Co. v. Nugget Distribs. Coop. of Am., Inc., 16 USPQ2d 1468 (TTAB 1990). In Applicant's Answer to Opposer's Interrogatories, dated March 18, 2013, Applicant objected to the inclusion of a twenty-sixth (26th) interrogatory and refused to answer. Similarly, Applicant refused

to respond to Opposer's Second Set of Interrogatories to Applicant, dated June 5, 2013, which totaled four (4) additional interrogatories. Taken together, Opposer sent thirty (30) interrogatories to Applicant, well-under the aforementioned limit of seventy-five (75). Applicant makes no claim that the interrogatories represented a substantial burden, nor that the discrete subparts, in aggregate, exceeded the seventy-five (75) interrogatory limit; the objection turns solely upon Applicant's failure to apply the correct rule. Applicant should have fully responded to each set of interrogatories in a timely manner. The unanswered interrogatories are critical to this dispute because those interrogatories are simply seeking to discover the Applicant's date of first use in commerce.

Assuming, arguendo, that Applicant was correct about the number of permitted interrogatories (it is clear that they are not), that party must, within the time for and instead of serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number. 37 C.F.R. § 2.120(d). A party **should not** answer what is considers to be the first seventy-five (75) and object to the rest as excessive. Here, Applicant answered the first twenty-five (25) interrogatories while refusing to respond to interrogatories twenty-six (26) through thirty (30). Applicant is mistaken as to the number of permissible interrogatories. Applicant failed to object in an appropriate fashion, and the Motion to Compel should be granted.

B. Opposer Made a Good Faith Effort to Resolve the Discovery Dispute with Applicant. Opposer sought to resolve the discovery disputes on numerous occasions before seeking TTAB intervention. In the Applicant's Memorandum in Opposition to Opposer's Motion to Compel, Applicant again fails to provide the applicable rule with respect to the sufficiency of Opposer's good faith efforts. The pertinent section for this proceeding, Code of Federal Regulations 37, states:

A motion to compel initial disclosures, expert testimony disclosure, or discovery must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion but the parties were unable to resolve their differences.

37 C.F.R. § 2.120(e)(1). In Opposer's Motion to Compel, dated October 11, 2013, Opposer substantially complied with the requirements by providing a written statement which detailed a good faith effort to work with Applicant. That same motion provided a summary of the correspondence between the parties, identified the unsettled issues, detailed the efforts undertaken by Opposer to coax timely responses from Applicant, and stated explicitly that Opposer had acted in good faith. The plain language of 37 C.F.R. §2.120 requires that the motion to compel be accompanied by a written statement by the moving party that they made a good faith effort, by conference or correspondence, to resolve with the other party the issues presented in the motion. Opposer has acted in good faith by

extending discovery to accommodate Applicant's counsel and making repeated, often unanswered requests to address the discovery disputes. Opposer has herewith submitted a separate statement supplementing the previous statement of Opposer outlined above.

Applicant, on the other hand, has failed to adequately answer both sets of Opposer's interrogatories and appears to delay responding to five simple foundational interrogatories as a means to drag out the discovery for settlement leverage. **Each side** should make a good faith effort to satisfy the discovery requests of the other party. *Sentrol, Inc. v. Sentex Sys., Inc.* 231 U.S.P.Q. 666 (TTAB 1986). They should attempt, in good faith, to resolve their differences without board intervention. If an opponent proves uncooperative in discovery or fails to fully answer interrogatories, after making a good faith effort, it is appropriate for movant to ask the Board to compel. *MacMillan Bloedel, Ltd. v. Arrow-M Corp.*, 203 U.S.P.Q. 952 (TTAB 1979). Applicant has caused undue delay by failing to respond to Opposer's informal communications. On September 20, 2013, after leaving a phone message, Opposer corresponded with counsel for Applicant seeking to discuss the status of responses to the unanswered First Requests and the Second Requests. With deadlines approaching, multiple past extensions, and no response from Applicant, Opposer sent another email on October 9, 2013, which reiterated the need to complete discovery. Later on October 9, 2013, Applicant in a responsive email claimed that the September 9, 2013 email had not been received and agreed to address Opposer's concerns by the end of that day. Contrary to Applicant's promise to respond, Applicant again neglected to answer and Opposer was forced to compel discovery by motion on October 11, 2013. The pervasive lack of communication by Applicant made any resolution by and between the parties impossible. As such, the Motion to Compel should be granted.

C. Opposer's Redacted Discovery Did Not Impede Applicant's Deposition Schedule. The claim that Applicant was hindered in scheduling depositions by Opposer's redacted discovery production is wholly without merit and is not relevant to Opposer's motion to compel answers to Opposer's interrogatories. From February 22, 2013 to October 31, 2013, while the parties were attempting to schedule depositions by email (see, e.g., the emails attached as Exhibits 6 and 7 of Applicant's Declaration in Opposition of Opposer's Motion to Compel), Applicant did not once indicate concerns about the redactions or any corresponding impact upon requested depositions. While Applicant neglected to respond to many of Opposer's communications, Applicant had numerous opportunities to raise the issue. Applicant did not do so until the Memorandum in Opposition to Opposer's Motion to Compel, dated October 31, 2013. It is unreasonable that, after nearly nine months, Applicant intends to raise this argument now.

It is not clear why Applicant is raising this issue in his memorandum on the Motion to Compel issue as it is not germane to the issue of whether Applicant should be compelled to respond to Opposer's interrogatories. In any event, the Opposer's Motion to Compel is proper so that the parties may proceed without further delay.

II. CONCLUSION

For the reasons stated above, Opposer respectfully requests that the Board grant Opposer's Motion to Compel and orders Applicant to answer Opposer's First Requests and Opposer's Second Requests within twenty (20) days from the mailing date of the Board's ruling on the motion. Opposer also respectfully requests that the Board grant Opposer's motion for an extension of the discovery period for the limited purpose of allowing Opposer (and not Applicant) time to review Applicant's discovery responses as ordered by the Board, and to pursue follow-up discovery if necessary. Opposer requests that the extension run from the date of service of Applicant's discovery responses as ordered by the Board, and that the discovery period be otherwise closed. Opposer requests that the testimony period be re-set to follow close of discovery.

Respectfully submitted,

Attorneys for MyBody, LLC

By: 

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Dated: November 13, 2013.

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Written Statement in Support of a Discovery Motion (37 CFR 2.120(e))

The attorney for the moving party, by this written statement, confirms that a good faith effort has been made, by telephone conference, correspondence and otherwise, to resolve with the attorney for the opponent the issues presented in the accompanying Opposer's Motion to Compel and Motion to Extend Discovery and Trial Dates but has been unable to reach agreement.

The attorney also confirms that if issues raised in the motion are subsequently resolved by agreement between the parties, the Board will be promptly informed in writing and, if issues remain, will also be informed of those issues in the motion which still require adjudication.

Respectfully submitted,

Attorneys for MyBody, LLC

By: 

Dated: November 13, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2013, a true and correct copy of Opposer's Reply to Applicant's Memorandum in Opposition to Opposer's Motion to Compel and Written Statement in Support of a Discovery Motion was deposited with the United States Postal Service, as first class mail, postage prepaid to:

Damon L. Ward
Ward Law Group
301 Fourth Avenue S
378 Grain Exchange Bldg
Minneapolis, MN 55415-1015

By: 

Heidi Abdul
Paralegal