

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

Mailed: January 3, 2014

Opposition No. 91206915

mybody, L.L.C.

v.

Eric Lucas

**Robert H. Coggins,
Interlocutory Attorney:**

Now before the Board is opposer's combined motion (filed October 11, 2013) to compel discovery and for a unilateral extension of time, and applicant's cross-motion (filed October 31, 2013, combined with its brief in opposition) for a bilateral extension of time.¹

Procedural Issue

It is not clear that opposer's motion and reply are presented in at least 11-point type and fully double spaced. See Trademark Rule 2.126(b). Notwithstanding this doubt, it is clear that opposer's filings fall well short of the page limitations imposed by Trademark Rule 2.127(a); and, in view thereof, the possibility of an over length brief is not at issue, and both filings have been considered. Opposer is

¹ Opposer's change of correspondent (filed November 7, 2013) is noted and entered.

reminded of the point and spacing requirements of Trademark Rule 2.126(b). See TBMP § 106.03 (3d ed. rev.2 2013).

Motion to Compel

By way of the motion to compel, opposer seeks a Board order requiring applicant to respond to opposer's first and second sets of interrogatories.

Good faith effort

Trademark Rule 2.120(e)(1) requires that a motion to compel discovery 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 the issues presented in the motion but has been unable to reach agreement. Opposer's motion contains such a statement (see motion, p. 3) and an explanation of some of the effort (see motion, p. 2).

From applicant's brief in opposition (see Exhibits 6 and 7 attached thereto), the Board has ascertained that on June 30, 2013, opposer sent to applicant an email which contains the following: "Also, we have two sets of interrogatories outstanding with you that need completion. Can you respond on those? We are starting to run short on time so I would appreciate your direct attention on these items"; and on July 5, 2013, opposer sent to applicant an email which contains the following: "We also need to have a

date when you can respond to our interrogatories sufficiently in advance of the other discovery deadline," to which applicant replied "I will attend to the responses as soon as I am discharged." The email string appears to show that, thereafter, "Heidi" sent a follow-up to applicant on the status of the interrogatory responses. On October 9, 2013, opposer sent to applicant an email which contains the following: "I am checking to see about your responses per the email string below. The last communication was from Heidi Abdul to you on September 20, 2013 inquiring about late responses. ... Would you please circle back with me by close of business today to let us know when we might expect to have responses." Applicant responded on October 9th and stated, *inter alia*: "Will take a look. I do not have Heidi's communication but have been having website difficulties. ...I will have a substantive response by end of today regarding your concerns." Opposer states in its reply brief that the September 20th email was sent "after leaving a phone message" for applicant seeking to discuss the status of responses to the first and second sets of interrogatories (reply, p. 3); and that contrary to applicant's October 9th statement that applicant would respond by the end of that day, applicant had not responded as of the filing of the motion to compel.

The Board finds that opposer has shown that it made a good faith effort, pursuant to Trademark Rule 2.120(e)(1), to resolve with applicant the outstanding discovery issues presented in the motion prior to seeking Board intervention. The multiple inquiries, and especially the final October 9th email to which applicant replied but then failed to act within the time promised, are sufficient to establish, under the specific circumstances of this case, opposer's good faith attempt to resolve the issues.

Interrogatories

Applicant states in its brief in opposition that it has provided opposer with answers to the first twenty-five interrogatories from the first set propounded upon him, but apparently not to the final (i.e., twenty-sixth) interrogatory of the first set or any of the interrogatories of the second set propounded upon him. See brief in opp., p. 7. Applicant states that the rules permit opposer only twenty-five interrogatories.

The Board reminds applicant that Trademark Rule 2.120(d)(1) provides, in relevant part, that "[t]he total number of written interrogatories which a party may serve upon another party pursuant to Rule 33 of the Federal Rules of Civil Procedure, in a proceeding, shall not exceed seventy-five." Applicant is mistaken that the twenty-five interrogatory limit of Fed. R. Civ. P. 33(a)(1) controls the

number of interrogatories in a Board proceeding. Trademark Rule 2.116(a) states that "[e]xcept where otherwise provided, and wherever applicable and appropriate, procedure and practice in inter partes proceedings shall be governed by the Federal Rules of Civil Procedure." It is clear from this provision that the Trademark Rules govern in the first instance, i.e., the Federal Rules apply "except where otherwise provided" by the Trademark Rules, and even then, only when the Federal Rules are "applicable and appropriate." Inasmuch as Trademark Rule 2.120(d)(1) allows a party to serve no more than seventy-five interrogatories, applicant's objection to opposer's twenty-sixth through thirtieth interrogatories on the grounds of excessive number is not well-taken and is overruled. Moreover, applicant's arguments that opposer has not produced un-redacted documents is not germane to opposer's motion. Applicant is not relieved of its discovery obligations even if opposer has wrongfully failed to fulfill its own obligations, since discovery before the Board is not governed by any concept of priority of discovery.² *Miss America Pageant v. Petite Productions Inc.*, 17 USPQ2d 1067, 1070 (TTAB 1990).

Accordingly, opposer's motion to compel is **granted** to the extent that applicant is allowed until **thirty days** from

² The Board does not imply that opposer has "wrongfully failed to fulfill" any obligation. This is merely a reference to the standard explained in the cited case.

the mailing date of this order in which to serve upon opposer responses to interrogatory nos. 26-30. Inasmuch as applicant has shown that the failure to respond to the outstanding interrogatories was due, at least in part, to counsel's serious health problems, applicant has shown excusable neglect and has not forfeited the right to object on the merits to interrogatory nos. 26-30. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993); and *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 n.7 (TTAB 1997) (reason for the delay and whether it was within reasonable control of party is most important factor). In view thereof, the motion to compel is **denied** to the extent it seeks responses without objection.³

Motions to Extend

Opposer seeks a unilateral, sixty-day extension of the discovery period for the limited purpose of allowing opposer - "and not applicant" - time to take additional discovery, if needed. Motion, p. 3; reply, p. 4. In addition, opposer asks "that the discovery period be otherwise closed." Motion, p. 4; reply, p. 4. Applicant, on the other hand, seeks a bilateral, sixty-day extension of the discovery period (including a resetting of the deadline for expert

³ Although applicant maintains the ability to object, the Board does not expect that applicant will do so. The Board has reviewed interrogatory nos. 26-30 and finds them to be relevant and unambiguous.

disclosure) and bases its good cause on, *inter alia*, counsel's ongoing health issues and the discovery disputes between the parties.

As last reset, the close of discovery was set to November 14, 2013. See scheduling order dated July 8, 2013. When opposer filed its combined motion to compel and extend on October 11, 2013, discovery was still open and the deadline for expert disclosure had not yet passed. Similarly, when the Board issued the October 29, 2013 suspension order (suspending proceedings pending disposition of opposer's motion), discovery was still open. It is curious that opposer would seek an order that discovery is now closed to applicant when the discovery period for both parties had not yet expired upon the filing of opposer's motion; at the time the motion was filed, more than one month remained in the discovery period.

In view of the responses compelled hereinabove, in view of both parties' seeking a sixty-day extension, and in accordance with usual Board practice not to truncate the remaining discovery period upon determination of an earlier-filed motion to compel, the motions to extend are **granted** to the extent that the discovery period is enlarged on the schedule below. This enlargement contemplates the thirty-day response period ordered of applicant, plus a period of sixty days beyond that. Inasmuch as the deadline for expert

disclosure had not yet run on the date the motion to compel was filed, a new deadline therefor is also provided.

Schedule

Proceedings are **resumed**. Applicant is allowed until **thirty days** from the mailing date of this order in which to provide responses to interrogatory nos. 26-30. The parties are allowed the same thirty days to respond to other outstanding discovery, if any, which was timely served prior to the filing of the motion to compel.⁴ Dates are reset on the following schedule.

Applicant's Compelled Responses Due	30 Days
Expert Disclosures Due	3/8/2014
Discovery Closes	4/7/2014
Plaintiff's Pretrial Disclosures	5/22/2014
Plaintiff's 30-day Trial Period Ends	7/6/2014
Defendant's Pretrial Disclosures	7/21/2014
Defendant's 30-day Trial Period Ends	9/4/2014
Plaintiff's Rebuttal Disclosures	9/19/2014
Plaintiff's 15-day Rebuttal Period Ends	10/19/2014

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

⁴ This is not an order compelling any other outstanding discovery; it is merely a scheduling matter.

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