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

Proceeding	91210506
Party	Defendant E! Entertainment Television, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

OVATION, LLC, a Delaware limited liability company, Opposer, v. E! ENTERTAINMENT TELEVISION, LLC, a Delaware limited liability company, Applicant.	Opposition No. 91210506 Mark: POP OF CULTURE Serial No. 85/569,798 **APPLICANT'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL AND TO EXTEND DISCOVERY DEADLINES**

Applicant E! Entertainment Television, LLC ("Applicant") respectfully submits this reply in support of its motion to compel and to extend discovery deadlines. Although Applicant commenced discovery in November 2013, Opposer engaged in a series of tactics over months intended to unduly delay and thwart Applicant's discovery efforts. While Applicant was accommodating regarding Opposer's counsel's requests for extensions and its repeated failures to promptly communicate with Applicant, Opposer is incredibly attempting to paint Applicant as the obstructing party. However, the facts are clear: Opposer intentionally and repeatedly failed to comply with its discovery obligations, served facially deficient responses, only produced publicly available documents, and then failed to respond to Applicant's efforts to meet and confer and address scheduling issues. Accordingly, the Board should grant Applicant's motion in its entirety.

I. OPPOSER IGNORED APPLICANT'S ATTEMPTS TO MEET AND CONFER

There is no merit to Opposer's claim that Applicant failed to meet and confer. Applicant's counsel repeatedly asked for available times to meet and confer with Opposer's counsel. Opposer ignored those requests. It defies all logic for Opposer to now hide behind its own inactions as a basis for denial of the motion to compel. For evidence, the Board need look no further than

Opposer's own declaration and exhibits. On March 14, 2014, Applicant's counsel, Michael McCue, specifically asked for times and dates for a meet and confer:

From: McCue, Michael
Sent: Friday, March 14, 2014 9:38 AM
To: 'Whitney Walters'
Cc: 'Jill Pietrini'
Subject: RE: E!/Ovation

Whitney: One month has passed since I conveyed the proposal below. I understand and empathize with the family tragedy, but at this point the clock is ticking on the TTAB schedule and E!'s responses to Ovation's discovery requests, which are due on April 4. If Ovation is interested, the proposal I conveyed below is still on the table. However, in the interim, we need to move forward. Please let me know a few dates and times that you are available to confer on Ovation's responses to E!'s discovery requests and Ovation's document production. Thanks, Michael

(Declaration of Paul A. Bost, Ex. J) (emphasis added).

Having received no response, on March 27, 2014, Mr. McCue again inquired about dates and times for a meet and confer:

From: McCue, Michael [mailto:MMcCue@lrrlaw.com]
Sent: Thursday, March 27, 2014 12:10 PM
To: Whitney Walters
Cc: Jill Pietrini
Subject: RE: E!/Ovation

Whitney: We have not received any response to our proposal below for a settlement procedure or, in the alternative, our request that Ovation provide proposed dates to meet and confer on Ovation's discovery responses. I have been assuming that, under the circumstances, you and/or Jill have not had time to address the matter. While we are waiting for a response, E! requests an additional extension of time to respond to Ovation's discovery requests to April 29. This will provide us and you with more breathing room to address this case. Please let me know. Thanks, Michael

(*Id.*) (emphasis added). Finally, on March 31, 2014, Mr. McCue specifically told Opposer that Opposer had inappropriately ignored Applicant's request to meet and confer:

From: McCue, Michael [mailto:MMcCue@lrrlaw.com]
Sent: Monday, March 31, 2014 9:29 AM
To: Whitney Walters
Cc: Jill Pietrini
Subject: E!/Ovation

Whitney: While I am encouraged to hear that Ovation is working on a proposed settlement agreement, we have procedural issues that must be addressed.
We made a proposal regarding settlement on February 14 that included postponing our responses to discovery requests. In the alternative, we asked you to provide a date certain by which you would produce Ovation's long-overdue document production. Ten days later, on February 24, you responded and indicated that Jill's father had passed away. Given the personal circumstances, I waited another 3 weeks -- until March 14 -- to reach out again regarding the February 14 proposal. I also asked you to provide dates and times to meet and confer on Ovation's discovery responses. You did not respond. Assuming that you and Jill were addressing family issues, I waited another couple of weeks to March 27, when I asked you again for a response to my February 14 email and again for dates on which we can meet and confer regarding Ovation's discovery responses. I also asked for an extension of 30 days for E! to respond to discovery requests since I had held off work pending your response to my February 14 proposal and assuming that your delay in responding was due to family issues that you and Jill were experiencing. Now, after waiting nearly 6 weeks to respond to my February 14 email, you: (1) again ignored our request for a date certain to produce documents; (2) again ignored our request for a meet and confer; and (3) agreed to give us only 5 days extra days to respond to discovery requests, when we have been waiting for 6 weeks for you to respond to our proposal and waiting months for you to produce even a single document. Ovation has effectively taken an open-ended extension of time to produce documents. E! has been prejudiced by Ovation's failure to produce documents, including, for example, because of the deadline for disclosure of experts.

(*Id.* at Ex. K) (emphasis added). **Opposer's claim that "Applicant said nothing" about a meet and confer (Opp'n at 6) is plainly false**. Indeed, as Opposer continuously dodged Applicant's counsel's requests to meet and confer, Opposer has only itself to blame for not learning the "substance of Applicant's disputes" until the motion to compel was filed. (*Id.*)

Opposer's argument that Applicant should have brought a motion under Federal Rule of Civil Procedure 36 with respect to the insufficiency of Opposer's responses to Applicant's requests for admissions rather a "motion to compel" is an entirely unpersuasive red herring. Applicant's motion to compel cites to and seeks relief under Federal Rule of Civil Procedure 36(a)(6). (*See* Mot. to Compel, at 17-21.) Boiled down, Opposer's argument is that the Board should summarily deny Applicant's motion because it was titled a motion to compel rather than a motion to determine the sufficiency of Opposer's responses to Applicant's requests for admissions. Such a draconian application of form over substance runs contrary to the federal courts' public policy of deciding disputes on the merits and not on legal technicalities. There can be no doubt from Applicant's motion that Applicant is seeking relief under Rule 36. And even if it could be argued that the motion was mislabeled, federal courts liberally construe such motions as requests to determine the sufficiency of objections under Federal Rule of Civil Procedure 36. *See, e.g., Khaliel v. Norton Healthcare, Inc. Ret. Plan*, No. 3:08–CV–69–C, 2012 WL 6554714, at *7 (W.D. Ky. Nov. 20, 2012).

II. THE BOARD SHOULD COMPEL OPPOSER TO ANSWER APPLICANT'S INTERROGATORIES FULLY AND COMPLETELY

A. The Board Should Compel Opposer To Answer Interrogatory No. 4

Interrogatory No. 4 did not ask for whether the USPTO allowed Opposer's trademark application; it asked whether Opposer used the mark in a descriptive or distinctive manner. Opposer's answer that the USPTO allowed its application, therefore, is evasive because it did not answer the precise question asked (Opp'n at 9). Opposer claims it does not need to "address all the

ways in which Opposer claims to have used the CULTUREPOP Mark" (Opp'n at 9), but the interrogatory asked for "all facts supporting" Opposer's position. To the extent Opposer continues to rely on its boilerplate objections (Opp'n at 9), and since Opposer has not explained the basis for its boilerplate objections, the Board need not consider them. *Volkswagenwerk Aktiengesellschaft v. Mtd Prods. Inc.*, 181 U.S.P.Q. 471, 471 (T.T.A.B. 1974) ("the reasons for objecting by the party resisting discovery must be set forth and the burden of persuasion is on the objecting party to show that the interrogatories should not be answered").

B. The Board Should Compel Opposer To Produce Business Records And Identify The Responsive Documents For Interrogatory Nos. 2, 5-9, and 14-15

All Applicant asks is that the Board compel Opposer to do what Opposer said it would do in the first place. Under Federal Rule of Civil Procedure 33(d), a party can answer an interrogatory by electing to produce documents, "if the burden of deriving or ascertaining the answer will be substantially the same for either party," but the party must "[specify] the records that must be reviewed." *Id.*[1] Here, Opposer's answers to these interrogatories claimed that the answers were within Opposer's business records, but Opposer did not actually provide its business records.[2] Additionally, Opposer has not specified where in its undisclosed business records the answers might be found. Opposer's other arguments are distractions from its complete failure to comply with Rule 33(d).

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[1] Significantly, nowhere in Opposer's objections or responses and nowhere in Opposer's brief does Opposer present any evidence that the burden of ascertaining the answers is substantially the same for both parties. In the absence of such evidence, Opposer should not be permitted to reply upon Rule 33(d) and the Board should compel Opposer to answer. *See, e.g., Little Hocking Water Ass'n v. E.I. Du Pont De Nemours & Co.*, No. 2:09-cv-1081, 2013 WL 608154, at *44 (S.D. Ohio Feb. 19, 2013) (granting motion to compel answers to interrogatories in absence of evidence that the burden of ascertaining or deriving the answers from business records was substantially the same for both parties).

[2] As Applicant noted and Opposer did not dispute, Opposer produced 485 pages of documents containing minimally probative public information such as printouts of websites and internet articles. (Mot. to Compel. at 8.)

1. Interrogatory No. 2:[3]

Contrary to Opposer's arguments, information regarding the adoption of its mark is discoverable: "Information concerning a party's selection and adoption of its involved mark is generally discoverable (particularly of a defendant)." *See* TBMP § 414(4).

2. Interrogatory No. 5:

Opposer claims that it *did* specify the documents needed to answer this interrogatory by identifying its "Statement of Use" filed with the USPTO. However, the statement of use only identifies the first date of use for an entire ***class*** of goods, not the "goods and services" as requested by the interrogatory.

3. Interrogatory Nos. 6 and 7:

Opposer's objections regarding the vagueness of various terms is a red herring, as Opposer claimed that it will produce business records in response to these interrogatories despite these objections. However, contrary to Opposer's argument, Opposer's intent to use its mark on *other* goods and services is discoverable because, among other things, it will address whether the parties' goods and services are likely to overlap in the normal expansion of business.

4. Interrogatory No. 8:

Opposer claims it answered this interrogatory by indicating that it promotes goods and services under its mark on "websites, social media, and [by] word of mouth." However, the interrogatory asked Opposer to describe its promotional, marketing, and advertising plans "in detail," not to provide so little information as to be virtually non-responsive.

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[3] Importantly, for each of Interrogatory Nos. 2, 6-9, and 14-15, Opposer does not dispute that its responses to these interrogatories failed to identify the specific business records that contain the answers.

5. Interrogatory No. 9:

Opposer claims that it has described its customers and "agrees to produce business records" that sufficiently identifies them. (Opp'n at 10.) To date, however, Opposer has not identified any document that is responsive to this interrogatory.

6. Interrogatory Nos. 14-15:

Opposer claims that it has identified the names of ***some*** media channels in which it has used the CULTUREPOP mark. These interrogatories, however, asked for "all" such domain names, social media user names, and media, not merely some.

II. THE BOARD SHOULD COMPEL OPPOSER TO PRODUCE ALL REQUESTED DOCUMENTS WITHOUT OBJECTION.

A. Request for Production Nos. 1-3, 5-12, 15-22, and 25-26.

Opposer's claim that Board intervention is not needed because Opposer has "begun" production of documents in response to these requests fails. (Opp'n at 13.) In response to these Requests, Opposer was obligated to check its records thoroughly to provide the requested documents. *See Bison Corp. v. Perfecta Chemie B.V.*, 4 U.S.P.Q.2d 1718, 1720 (T.T.A.B. 1987). Instead – and as Opposer does not dispute – so far, Opposer has only produced ***publicly available*** documents. (McCue Decl. ¶ 36.) Opposer has not provided Applicant or the Board with any facts or cause to believe that Opposer ever searched its records for responsive documents, much less that it thoroughly reviewed them in response to these requests. The fact that Opposer has just "begun" producing documents for discovery requests served half a year ago demonstrates why the Board should compel Opposer to produce all responsive, non-privileged, documents in its possession, custody, or control without objection.

B. Requests for Production Nos. 4, 13-14, and 23-24.

1. Request No. 4:

Contrary to Opposer's claim, an opposer's selection and adoption of its mark is

discoverable. (*See* Opp'n at 14, n. 3) (admitting that *Varian Associates v. Fairfield-Noble Corp.*, 188 U.S.P.Q. 581, 583 (T.T.A.B. 1975) "addresses an opposer's . . . obligation to respond to discovery"). Opposer's argument that while its decision and selection of a mark may be relevant, its decision to ***register*** the mark is not is a distinction without a meaningful difference. The decision to register a mark is part of the process for deciding and selecting a mark and Applicant is not seeking privileged documents.

2. Request No. 13:

Documents concerning how Opposer has used the phrase "pop culture" and/or "popular culture" in connection with goods or services offered under Opposer's CULTUREPOP mark are directly relevant to the descriptive nature of Opposer's mark and to the weakness of Opposer's mark. Whether the evidence might also be used to attack Opposer's mark does not detract from its relevance for ***this*** proceeding.

3. Request No. 14:

Opposer's objection that it can provide summaries (or synopses) of its television programing rather than the requested scripts misses the point. The fact that there exists evidence which describes the products and services offered under Opposer's mark in general terms does not mean Applicant is precluded from requesting (and receiving) documents that would describe the products and services in more detail.

4. Request Nos. 23 and 24:

Opposer cannot genuinely claim that it is confused by the words "pop culture" and "popular culture" when its entire business is built around delivering programming and entertainment based on pop culture a.k.a. popular culture. Surely, Opposer has some semblance of understanding of what those words mean, especially since in response to other discovery requests that also included the words "popular culture," Opposer provided an answer despite the alleged ambiguity. (*See* Resp.

to Interrog. No. 7, Ex. B to Bost Decl.) Opposer's refusal to provide ***any*** documents is unjustifiable.

III. THE BOARD SHOULD COMPEL OPPOSER TO ADMIT OR DENY APPLICANT'S REQUESTS FOR ADMISSIONS WITHOUT OBJECTION

A. Nos. 2-4, 19-34, 63, 67-73, and 77-84

Opposer argues that it complied fully with Rule 36 by inserting an objection that tracked the language of the Rule, stating that, having conducted a "reasonable investigation" of its records, it could not admit and deny these requests. As one court explained at length, however, "permitting a party to avoid admitting or denying a proper request for admission simply by tracking the language of Rule 36(a) would encourage additional abuse of the discovery process." *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981). "[A] party could comply with the Rule merely by having his attorney submit the language of the Rule in response to the request." *Id.* This would turn a litigant's duty to make a reasonable inquiry into a "semantic exercise." *Id.* Not surprisingly, a party who claims it cannot admit or deny a request must "allege ***and specify*** any reasonable inquiry undertaken to obtain information which would enable plaintiff to admit or deny the admissions requested." *Han v. United States Dep't of Agriculture*, 580 F. Supp. 1564, 1566 (D. N.J. 1984) (emphasis added). Here, Opposer's answers to these requests did not detail any reasonable inquiry allegedly undertaken by Opposer.

Worse, even if Opposer complied with the "literal language" of Rule 36 by averring that it conducted a reasonable inquiry, "the evidence presented shows that [it] *did not*, in fact, make a reasonable inquiry into the matters sought to be admitted and was unwilling to do so." *In re Sweeten*, 56 B.R. 675, 678 (Bankr. E.D. Pa. 1986) (emphasis original) (granting sanctions). Nowhere does Opposer inform Applicant or the Board what inquiry it conducted before claiming it lacked information to admit or deny these requests.

Opposer's objections are premised upon the theory that it was Applicant's burden to

demonstrate why Opposer would possess the information needed to respond. (*See* Mot. to Compel, at 17-18) (claiming Applicant "has not made any showing . . . .") However, "[t]he burden is on the objecting party to persuade the court that there is a justification for the objection." 8B Charles A. Wright *et al.* eds., *Federal Practice and Procedure* § 2263 (3d ed.). Opposer claimed that it conducted a "reasonable inquiry" in response to these requests – it is only fair to now require Opposer to explain what that entailed. Opposer's continual refusal to do so should inform the Board that Opposer did nothing, rendering its boilerplate non-responses a clear and gross violation of Rule 36. *In re Sweeten*, 56 B.R. at 678 (granting sanctions).

B. Nos. 9-18, 37-47, 49-50, 53-57, 64-66, and 74.

Opposer's objection that the term "Media" renders these requests compound is baseless. The definition of Media explains what "might be included in" that word, and therefore, is not compound. *In re Omnitrition Int'l, Inc.*, No. C–92–4133 JPV (FSL), 1993 WL 271466, at *3 (N.D. Cal. June 2, 1993) (noting that examples of what might be included in the term "money paid" in an interrogatory did not render it compound). Request No. 57 is clear. It seeks an admission regarding whether CULTUREPOP is the same as pop culture. Request No. 74 is relevant because the goods and services Opposer has used its mark on is relevant to the scope of Opposer's trademark rights.

C. Nos. 51-52.

Applicant asked whether Opposer had trademark rights in the terms "pop culture" and "popular culture," these are straight-forward requests that warrant straight-forward admissions or denials. Opposer's response is completely non-responsive and evasive.[4] Opposer's alleged confusion over what "pop culture," "popular culture," and "trademark rights" mean is a disingenuous attempt to avoid discovery.

[4] Applicant sought clarification of Opposer's answers to Request Nos. 48, and 75-76. In response, Opposer clarified its answers to Request Nos. 48, and 75-76. (Opp'n at 20.)

V. AN EXTENSION OF TIME IS WARRANTED.

Applicant seeks a modest extension of time to serve its written objections and responses because Opposer did not communicate with Applicant for six weeks and then, when Opposer finally did respond, rejected Applicant's proposal and arbitrarily demanded that Applicant serve its objections and responses just five days later. Applicant properly sought an extension of time before the expiration of the April 9 deadline. Accordingly, good cause exists to grant Applicant's request for an extension.

CONCLUSION

Applicant respectfully requests that the Board enter an order granting the motion in its entirety.

Dated: this 19th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, I served a true and accurate copy of the foregoing document entitled, APPLICANT'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL AND TO EXTEND DISCOVERY DEADLINES, by first-class, United States mail, upon the following counsel for Opposer:

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