

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

EJW

**Mailed: July 31, 2014**

**Opposition No. 91210506**

**Ovation LLC**

**v.**

**E! Entertainment Television, LLC**

**ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:**

This case now comes up for consideration of Applicant's combined motion (filed April 9, 2014) to compel discovery responses, to deem certain admission requests as admitted, to extend Applicant's time to serve its written objections and responses to Opposer's discovery requests, and to extend the remaining trial dates by ninety days. The motion is fully briefed.

For purposes of this order, the Board presumes the parties' familiarity with the parties' arguments and materials submitted in connection with the referenced motion.

Background

Before addressing the subject motion, it is appropriate to review relevant facts which preceded the filing of said motion. The Board finds as follows:

- 1) That Applicant served the subject discovery on Opposer on November 13, 2013; thus, responses were due no later than December 17, 2013.
- 2) The parties agreed that Opposer's time to respond to Applicant's discovery would be extended for thirty days, that is, until January 16, 2014). The parties also agreed to an extension of the trial schedule for a period of sixty days.
- 3) Applicant agreed to an additional seven-day extension of time, that is, until January 23, 2014. The parties also agreed to a second extension of the trial schedule for sixty days.
- 4) The parties executed the Board's standard protective agreement on January 29, 2014.
- 5) In accordance with the parties' agreed schedule, Opposer timely served its written objections and responses to Applicant's discovery on January 23, 2014; however, Opposer did not serve any documents on Applicant until April 5, 2014, more than two months after the parties had submitted an executed copy of the Board's standard protective agreement.

Applicant's Motion to Compel

Applicant requests the following in its motion, *viz.* (i) that the Board compel Opposer to either answer interrogatory nos. 2, 4-9, 14, and 15 fully, without objection, or to serve amended answers that fully comply with Fed. R. Civ. P. 33(d) (motion at 1 and 23); (ii) that the Board compel Opposer to

produce without objection documents responsive to requests for production nos. 4, 13, 14, and 23-24 (motion at 1 and 23); and (iii) that the Board compel Opposer to produce all responsive, non-privileged documents to production request nos. 1-3, 5-12, 15-22, and 25-26 (motion at 14).

- *Good Faith Effort to Resolve Dispute*

A motion to compel discovery must be supported by a written statement from the moving party showing that the party has made a good faith effort, by conference or correspondence, to resolve the issues with the other party, but that the parties were unable to resolve their differences. *See* Trademark Rule 2.120(e)(1); TBMP § 523.02 (2014). *Cf. The Phillies v. Phila. Consol. Holding Corp.*, 107 USPQ2d 2149, 2151 (TTAB 2013). The Board expects that, as was done here, the statement will be supported by a recitation of the communications conducted, including dates, a summary of telephone conversations, and copies of any correspondence exchanged, where applicable (*e.g.*, emails, letters, notes to file).

Opposer argues that Applicant failed to make the requisite good faith effort to resolve its discovery dispute with Opposer before filing the subject motion to compel, however, the Board is not so persuaded. The record shows that Applicant sought out a “meet and confer” regarding Opposer’s discovery responses on three occasions: (i) when Applicant’s counsel specifically requested Opposer’s counsel to provide “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" (3/14/14 email from Michael McCue to Whitney Walters, motion Exh. A, Dec. of Paul Bost, Exh. J); (ii) when Applicant's counsel reminded Opposer's counsel that there had been no response to Applicant's request for settlement or, "in the alternative, our request that Ovation provide proposed dates to meet and confer on Ovation's discovery responses" (3/27/14 email from Michael McCue to Whitney Walters, motion Exh. A., reply brief at 2); and (iii) when Applicant's counsel reminded Opposer's counsel that Opposer had "again ignored our request for a meet and confer" (3/31/14 email from Michael McCue to Whitney Walters; motion Exh. A; reply brief at 2). Opposer's counsel did not respond to Applicant's inquiries regarding a "meet and confer" (see, e.g., 3/28/2014 email from Whitney Walters to Michael McCue, Bost Dec., Exh. J); and there is no evidence of record indicating that Opposer's counsel was willing or intended to meet and confer with Applicant's counsel regarding Opposer's discovery responses. While the good faith efforts of the parties should be directed to understanding differences and actually investigating ways in which to resolve the dispute (*see Hot Tamale...and More, LLC v. SF Investments, Inc.*, 110 USPQ2d 1080 (TTAB 2014)), where, as is in this case, the non-moving party is not cooperating in that effort and where there are clear attempts to "meet and confer" by the movant, the movant can hardly be said not to have made a good faith effort to resolve the parties' dispute. Thus, in view of the facts in this particular case, it

is adjudged that Applicant made a sufficient good faith effort to resolve the parties' discovery dispute. *See* Trademark Rule 2.120(e)(1).

Before turning to the specific discovery requests raised in Applicant's motion, there are four general issues to be addressed. First, to the extent that Opposer objects to an interrogatory or request for production based on privilege or the attorney work product doctrine, Opposer is required to produce a privilege log. There is no indication in the record that Opposer has done so. *See* Fed. R. Civ. P. 26(b)(5)(A)(ii); and *Amazon Techs. Inc. v. Wax*, 93 USPQ2d 1702, 1706 n.6 (TTAB 2009). However, TBMP § 414 reveals that most, if not all, of Opposer's privilege objections would be overruled as Applicant is seeking generally discoverable matter. Opposer is strongly urged to review TBMP § 414 before supplementing any responses or creating its privilege log, if any is to be produced.

Second, Opposer's objections that certain interrogatories and requests for production seek confidential information are **OVERRULED** to the extent that the Board's standard protective order<sup>1</sup> automatically applies to all *inter partes* proceedings as of institution of the proceeding. *See* Trademark Rule 2.116(g); *see also Amazon Techs.*, 93 USPQ at 1706 n.6. Discovery of confidential material may be conducted in accordance with the standard order.

Third, Opposer responded with "boilerplate" objections response to the interrogatories and production requests at issue. This response included a

---

<sup>1</sup> The Board's Standard Protective Order may be found at the TTAB's web page. <http://www.uspto.gov/trademarks/process/appeal/index.jsp>.

general objection indicating that privileged materials would not be produced, without any indication as to whether privileged materials actually exist, and if so, on what specific ground(s) Opposer claimed privilege. Opposer also asserted a general objection stating that the requests were overly broad and unduly burdensome, without providing any specifics to support this contention. This practice is improper; therefore, these general objections are **OVERRULED** and will be given no consideration. *See* Fed. R. Civ. P. 34(b)(2)(B). *See also Medtronic, Inc. v. Pacesetter Sys., Inc.*, 222 USPQ 80, 83 (TTAB 1984) (party must articulate objections to interrogatories with particularity).

Fourth, the Board finds that Opposer's responses under Fed. R. Civ. P. 33(d) to be inadequate. As discussed in *Johnson & Johnson and RoC Int'l S.A.R.L. v. Obschestvo s organitchennoy; otvetstvennostiu "WDS"*, 95 USPQ2d 1567 (TTAB 2010), a party responding to interrogatories by invoking Fed. R. Civ. P. 33(d) must comply with three specific conditions, as the Board explained in *No Fear, Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000), and *Jain v. Ramparts, Inc.*, 49 USPQ2d 1429 (TTAB 1998). First, a responding party "must identify documents which the responding party knows to contain the responsive information, and may not merely agree to provide access to a voluminous collection of records which may contain the responsive information." *No Fear*, 54 USPQ2d at 1555. Second, "a party may not rely on the option to produce business records unless it can establish that

providing written responses would impose a significant burden on the party.” *Id.* Third, “even if the responding party can meet” the above two requirements and “can identify particular documents in which the inquiring party will find its answers, the inquiring party must not be left with any greater burden than the responding party when searching through and inspecting the records.” *Id.* “That is, the determination and weighing of the parties’ respective burdens is only necessary and appropriate if the responding party already has established that it would be unduly burdensome for it to provide written answers to the interrogatories, and if its responses to the interrogatories have specified in sufficient detail the business records from which the answers to the interrogatories can be ascertained.” *Jain*, 49 USPQ2d at 1434.

Here, Opposer has failed to identify the documents which it knows contain information responsive to Applicant’s interrogatories. Instead, Opposer responded by setting forth boilerplate responses which referred Applicant to an unknown set of documents, which “Opposer will produce ... once a suitable protective order has been entered.”

Second, Opposer has failed to establish that providing written responses would impose a significant burden on Opposer. Merely stating that “the burden for preparing a response is substantially the same for Applicant as it is for Opposer,” is insufficient justification for Opposer’s apparent document dump in response to Applicant’s interrogatories. Insofar as Opposer has not met the

first two requirements under *Jain*, there is no need to address the third requirement for responding under Fed. R. Civ. P. 33(d).

Turning to Applicant's interrogatories and requests for production of documents, the Board issues the following orders on the motion to compel with respect to the discovery responses at issue (in the order addressed by Applicant in its motion):

- *Interrogatories*

- 1) Interrogatory No. 4: "Explain whether the CULTUREPOP Mark as used by Opposer is descriptive or inherently distinctive and state all facts supporting Opposer's position." Applicant asserts in its affirmative defense that Opposer's mark is merely descriptive and has not acquired secondary meaning. In view thereof, the Board finds this interrogatory to be relevant. Further, "a question is not necessarily objectionable merely because it requires a party or witness to give an opinion or contention that relates to the application of law to fact." *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 USPQ2d 1671, 1676 (TTAB 1988) (finding that query as to whether Opposer believes the marks in question are confusingly similar not objectionable because Opposer's claim was based on likelihood of confusion). *Cf. Gould Inc. v. Sanyo Electric Co., Ltd.*, 179 USPQ 313, 314 (TTAB 1973) (question of whether Opposer believes marks to be confusingly similar is relevant; the interrogatory is not objectionable

simply because it calls for an opinion). Opposer's response referring to the decision by the Examining Attorney is not responsive. Applicant's motion to compel is granted with respect to this interrogatory.

2) Interrogatory Nos. 2, 5-9, and 14-15:

a. With respect to Interrogatory No. 2, which requests information supporting or relating to Opposer's decision to adopt the CULTUREPOP mark, Opposer's failure to respond to this and other interrogatories (and to Applicant's requests for production of documents) until a protective order is entered is simply evasive. As discussed *supra*, under Trademark Rule 2.116(g), the Board's protective order applies to this proceeding without the need for action by the parties. Furthermore, this interrogatory should have been answered and not responded to by referring Applicant to a set of unknown documents. Information concerning a party's selection and adoption of its involved mark is generally discoverable. TBMP § 414(4). Applicant's motion to compel is granted with respect to this interrogatory.

b. With respect to Interrogatory No. 5, which requests Opposer to identify all goods and services for which Opposer has used the CULTUREPOP mark, Opposer's general objections to this interrogatory, as discussed *supra*, are not acceptable and are

**OVERRULED.** Applicant is entitled to inquire as to which goods or services Opposer is actually using the mark. Further, as discussed *supra*, this interrogatory should have been answered and not responded to by referring Applicant to a set of unspecified business documents or its statement of use. Applicant's motion to compel is granted with respect to this interrogatory.

- c. With respect to Interrogatory No. 6, which requests Opposer to identify all goods and services for which Opposer intends to use the CULTUREPOP mark and to state all activities undertaken by Opposer to prepare to commence such use, Opposer's general objections to this interrogatory, as discussed *supra*, are not acceptable and are **OVERRULED**. Further, as discussed *supra*, this interrogatory should have been answered and not responded to by referring Applicant to a set of unspecified business documents. A party's plans for expansion may be discoverable under protective order. TBMP § 414(8) (2014). *See Johnston Pump/General Valve Inc.*, 10 USPQ2d at 1675 (Opposer's intent to expand business to include manufactured products similar to Applicant's is relevant). Applicant's motion to compel is granted with respect to this interrogatory.

- d. With respect to Interrogatory No. 7, Applicant requests that Opposer explain whether the goods and services identified in response to Interrogatory No. 6 are related to art, music, or other forms of popular culture. Except with respect to the wording “other forms of popular culture,” Opposer’s general objections to this interrogatory, as discussed *supra*, are not acceptable and are **OVERRULED**. Further, as discussed *supra*, this interrogatory should have been answered and not responded to by referring Applicant to a set of unspecified business documents. However, the wording “other forms of popular culture” is over broad and unclear. Therefore, the Board construes “other forms of popular culture” to refer to “contemporary culture,” wording set forth in Opposer’s notice of opposition (see ¶6). In view thereof, Applicant’s motion to compel is granted with respect to this interrogatory to the extent that *Opposer must respond as to whether its goods and services are related to art, music, or contemporary culture.*
- e. With respect to Interrogatory No. 8, which requests Opposer to describe Opposer’s promotional, marketing and advertising plans and activities for the goods and services offered under the CULTUREPOP mark, Opposer’s general objections to this interrogatory, as discussed *supra*, are not acceptable and are

**OVERRULED.** Further, as discussed *supra*, this interrogatory should have been answered and not responded to by referring Applicant to a set of unspecified business documents. The interrogatory requests relevant information insofar as Opposer alleges in the notice of opposition (see ¶6) that it extensively promotes and advertises its services and mark. Applicant's motion to compel is granted with respect to this interrogatory. However, Opposer's response may be served in accordance with the standard protective agreement applicable to this proceeding.

- f. With respect to Interrogatory No. 9, which requests Opposer to describe the consumers for Opposer's goods and services offered under the mark CULTUREPOP, Opposer's general objections to this interrogatory, as discussed *supra*, are not acceptable and are **OVERRULED.** Further, as discussed *supra*, this interrogatory should have been answered by referring Applicant to a set of unspecified business documents. Merely partially identifying its "demographics" as adults between the ages of 25 and 54 years old is non-responsive. The classes of customers for a party's involved goods or services are discoverable. TBMP § 414(3) (2014). Applicant's motion to compel is granted with respect to this interrogatory.

*g.* With respect to Interrogatory No. 14, which requests Opposer to list all domain names and social media user names that contain the CULTUREPOP mark (or element thereof), Opposer's general objections to this interrogatory, as discussed *supra*, are not acceptable and are **OVERRULED**. Further, as discussed *supra*, this interrogatory should not have been answered by referring Applicant to a set of unspecified business documents. Nonetheless, insofar as Opposer provided a list of domain names and social media names, the Board finds this response to be sufficient. Therefore, the motion to compel is denied with respect to Interrogatory No. 14.

*h.* With respect to Interrogatory No. 15, which requests that Opposer identify all media used to promote the CULTUREPOP mark or any of the goods or services offered under that mark, Opposer's general objections to this interrogatory, as discussed *supra*, are not acceptable and are **OVERRULED**. Further, as discussed *supra*, this interrogatory should not have been answered by referring Applicant to a set of unspecified business documents. The Board also fails to see how this interrogatory "with subparts," exceeds the total number of written interrogatories that a party may serve. Nonetheless, insofar as Opposer provided a list of television channel, domain names and

social media names, the Board finds this response to be sufficient. Therefore, the motion to compel is denied with respect to Interrogatory No. 15.

- *Requests for Production of Documents*

Applicant requests that the Board order Opposer to produce without objection documents responsive to requests for production nos. 4, 13, 14, and 23-24 and all responsive, non-privileged documents to production request nos. 1-3, 5-12, 15-22, and 25-26.

- 1) Request Nos. 1-3, 5-12, 15-22, and 25-26: Applicant states that the documents served by Opposer are either non-responsive or are partially responsive and that no internal documents have been produced in connection with these requests, including Opposer's trademark search report referenced in its response to request no. 2 . In contrast, Opposer claims that it has responded to these requests. Opposer also contends that Applicant has not been responsive to Opposer's discovery requests. Regardless of whether Applicant has been responsive to Opposer's discovery requests, Opposer must fully respond to Applicant's requests for production of documents.<sup>2</sup> Each party is under an obligation to respond to an adversary's request for discovery during the time allowed therefor under the applicable rules,

---

<sup>2</sup> Opposer responded that it will provide representative samples of non-privileged documents to production request nos. 9, 10, and 12. Insofar as Applicant requested "all documents," said response is sufficient, except that sufficient documents must be produced.

irrespective of the sequence of requests for discovery, or of an adversary's failure to respond to a pending request for discovery. *See* TBMP § 403.03 (2014) and cases cited therein. Furthermore, Opposer's general objections to these production requests, as discussed *supra*, are not acceptable and are **OVERRULED**. Therefore, *except as explained below*, Applicant's motion to compel is granted *to the extent that Opposer is ORDERED to either state that no other responsive documents exist (to the extent it has not already done so<sup>3</sup>) or to supplement its previous responses to these production requests with complete, sufficient responses.*

- a. Production Request No. 3: alternative marks considered for adoption by Opposer are not relevant to this proceeding. *Cf.* TBMP § 414(11) (2014).
- b. Production Request No. 16: said request is overly broad; Opposer is required to produce only annual sales, stated in round numbers, since 2010, for Opposer's involved goods or services sold under its involved mark. *See* TBMP § 414(18) (2014). Said information may be produced in accordance with the standard protective order.

2) Requests for Production Nos. 4, 13-14, and 23-24:

---

<sup>3</sup> It is noted that in response to production request nos. 6, 7, 8, Opposer states that no other responsive documents are known to exist. This response is sufficient.

- a. Request No. 4: Applicant requests “all documents referring or relating to Opposer’s decision to apply for a registration of the CULTUREPOP mark.” Applicant essentially argues that its request relates to Opposer’s decision to adopt and use its mark. However, that was not the request posed, would be duplicative of production request no. 1, and Applicant has not justified why documents related to Opposer’s decision to file a trademark application *per se* are relevant. Further, the request for “all” documents is over broad. In view thereof, with respect to request no. 4, the motion to compel is denied.
- b. With respect to production requests nos. 13-14 and 23-24, Opposer’s general objections to these production requests, as discussed *supra*, are not acceptable and are **OVERRULED**. However, inasmuch as the requests for “all” documents is overly burdensome, Applicant’s motion to compel is granted to the extent that Opposer is ORDERED to either state that no other responsive documents exist or to supplement its previous responses to these production requests with complete, sufficient responses. With respect to request nos. 13, 23, and 24, *see Johnson & Johnson v. Rexall Drug Co.*, 186 USPQ 167, 171 (TTAB 1975) (party is entitled to take discovery to determine whether grounds exist for any affirmative defenses or

counterclaims); and as to request no. 14, *see Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 USPQ2d 1671, 1675 (TTAB 1988) (questions concerning specific goods on which Opposer uses mark are proper to extent scope of inquiry is limited to those goods identified in application, or involve goods of type marketed by Applicant, or mentioned by Opposer during discovery).

Applicant's "Motion to Compel Applicant to Admit or Deny"

Insofar as a "motion to compel" responses to requests for admission is not provided for under the Trademark Rules (*see* Trademark Rule 2.120(h)), for judicial efficiency, the Board construes Applicant's motion to compel as a motion to test the sufficiency of Opposer's responses to Applicant's Requests for Admission.<sup>4</sup>

To determine whether Opposer's responses are sufficient, the Board must consider whether they comply with the requirements of Federal Rule 36(a)(4), which is applicable to this proceeding under Trademark Rule 2.116(a). Federal Rule 36(a)(4) requires that the answering party admit or deny the matter set forth in the requests for admission, or detail the reasons why the party can do neither. Rule 36(a)(4) also specifically provides that "[t]he answering party may assert lack of knowledge or information as a reason for

---

<sup>4</sup> Inasmuch as Applicant's good faith effort to address Opposer's discovery responses was addressed already in this order (*see supra*), there is no need to repeat that discussion here.

failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.”

The Board is also mindful that requests for admission are useful for, *inter alia*, determining prior to trial which facts are not in dispute, thereby narrowing the matters that must be tried. *See, e.g., Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1394 (TTAB 2007) (“The facts set out below are not in dispute ... [but] have been admitted by Applicant in response to Opposer’s requests for admissions”); and *Squirtco v. Tomy Corporation*, 212 USPQ 304, 306 n.5 (TTAB 1981) (“requests for admission are not to be used to discover facts but to establish facts of a peripheral nature which are not in dispute”). Consequently, “a denial in response to a request for admission is merely a refusal to stipulate to certain matter.” *Sinclair Oil Corporation v. Sumatra Kendrick*, 85 USPQ2d 1032, 1032 n.8 (TTAB 2007), *citing National Semiconductor Corp. v. Ramtron Int’l Corp.*, 265 F.Supp.2d 71 (D.D.C. 2003). Further, requests for admission are not to be employed as a means to establish facts which are obviously in dispute or to answer questions of law. *Lakehead Pipe Line Co. v. American Home Assurance Co.*, 177 F.R.D. 454, 457-58 (D.Minn. 1997) (plaintiffs were justified in making only qualified responses in relation to documents whose import was in dispute) (internal citations omitted). *See generally* TBMP § 407.02 (2014); and 8A Fed. Prac. & Proc. Civ.2d § 2255 (2009).

In its motion, Applicant argues, *inter alia*, that Opposer did not admit or deny request nos. 2-4, 19-34, 63, 67-73, and 77-84, and requests that the Board enter an order requiring Opposer to do so. Similarly, Applicant contends that Opposer's objections to request nos. 9-18, 37-47, 49-50, 53-57, 64-66, and 74 are improper and that Opposer should be ordered to admit or deny those admission requests because Opposer has failed to make a reasonable inquiry so to be able to respond to those requests. Applicant also asserts that the Board should require Opposer to admit or deny request nos. 48, 51-52, and 75-76 because Opposer's boilerplate objections are meritless or "simply disingenuous." The Board will address each group in turn.

1) Request Nos. 2-4, 19-34, 63, 67-73, and 77-84:

Opposer has objected to each request for admission at issue on the basis that the request is "vague and ambiguous," overbroad, "seeks information not in the possession, custody, or control of Opposer," and "seeks information not relevant to the claims or defenses of any party, nor likely to lead to the discovery of admissible evidence." For the reasons discussed, *supra*, these general objections are not well-taken. Nonetheless, the Board finds that Applicant has sought to use its admission requests to establish facts that are obviously in dispute and/or to establish facts which would require research beyond the scope of a reasonable inquiry required under Fed. R. Civ. P. 36(a)(4). For instance, admission request no. 3 asks Opposer to admit that "pop

culture” is a well-known phrase in the United States; no. 4 requests Opposer admit or deny that “pop culture” is short for “popular culture”; and request no. 19 requests Opposer to admit or deny that entertainment is considered part of popular culture.

Opposer states that “it has made a reasonable inquiry, and that information it knows or can readily obtain is insufficient to enable it to admit or deny the requests.” Opposer cannot reasonably be required to undertake such factual investigation and legal analysis to respond to the first identified group of Applicant’s requests for admission. Federal Rule 36(a)(4) requires only a “reasonable inquiry” into information that the responding party knows or can readily obtain. In view of the foregoing, the Board finds that Opposer’s responses to request nos. 2-4, 19-34, 63, 67-73, and 84 are sufficient. Additionally, with respect to request nos. 77-83, insofar as the requests involve Applicant’s asserted mark “E!,” said requests are not relevant to this proceeding. Thus, Opposer’s responses thereto are sufficient.

2) Request Nos. 9-18, 37-47, 49-50, 53-57, 64-66, and 74:

Similar to the first group of admission requests, the Board finds that Applicant has sought to use the foregoing admission requests to establish facts that are obviously in dispute. Further, if a responding party believes that a matter of which an admission has been requested presents a genuine issue for trial, the party may deny the matter;

alternatively, the responding party may set forth reasons why it cannot admit or deny the matter.

- a. With respect to request nos. 9-18, Opposer has neither admitted nor denied the requests; nor has it stated that it has made a reasonable inquiry. Instead, Opposer has set forth objections to the requests. With four exceptions, the Board finds that Opposer's objections do not provide a sufficient reason for failing to respond with one of the three required responses. The wording "in the field of" is a phrase of art used in trademark law and the term "media" was clearly defined as "television programming, websites and/or electronic publications (definition no. 6, instructions to requests for admission); therefore, the Board finds no reason why Opposer could not have responded to the foregoing requests, except for requests nos. 9, 10, 15, and 18, which respectively use the vague terminology "popular culture," "pop culture," "new music," and "innovators." In view thereof, Opposer's objections to requests nos. 9, 10, 15, and 18 are **SUSTAINED**; and Opposer's objections to requests 11-14 and 16-17 are **OVERRULED**. Accordingly, Opposer must respond to admission request nos. 11-14 and 16-17.
- b. With respect to request nos. 37, 38, and 47 the Board finds that these requests are vague and ambiguous; therefore, Opposer's objections thereto are **SUSTAINED**.

- c. With respect to request nos. 39-46 and 64-65, which request an admission regarding third parties, Opposer's objection that the response must be based on information that is not in its possession, custody, or control is **SUSTAINED**.
- d. With respect to request nos. 49-50, which request an admission regarding the meaning of the terms "popular culture" and "pop culture," the Board finds these requests to be vague and ambiguous. Therefore, Opposer's objections thereto are **SUSTAINED**.
- e. In regard to request nos. 53-56, Opposer's objections are **SUSTAINED** insofar as Applicant is requesting admissions regarding ownership of terms that are not the subject of this proceeding. Opposer's response to admission request no. 57 is sufficient.
- f. With regarding to request no. 66, which essentially requests a response based on knowledge of third-party use of the terms "pop" and "culture," Opposer's objection that it requests information not in its possession, custody, or control is **SUSTAINED**.
- g. Opposer's objections to request no. 74 are **OVERRULED**.<sup>5</sup>  
Accordingly, Opposer must respond to admission request no. 74.

---

<sup>5</sup> Opposer contends that admission request no. 74 is irrelevant because it constitutes a collateral attack on the validity of Opposer's registration of CULTUREPOP. This objection is unavailing insofar as Opposer has not pleaded any such registration. Further, the mere taking of discovery on matters concerning the validity of a pleaded registration, under any circumstances, is not objectionable on the basis that it constitutes a collateral attack on the registration. *See* TBMP § 414(22) (2014).

The request regarding Opposer's use of its alleged mark is directly relevant to Applicant's possible defenses in this proceeding.

3) Request Nos. 48, 51-52, and 75-76:

- a. As regards request no. 48, insofar as the meaning of "popular culture" is a factual issue to be resolved, Opposer's objection that the request is vague and ambiguous is **SUSTAINED**. Nonetheless, Opposer's explanation in response is deemed to be denial; and no further response is required.
- b. In regard to request nos. 51-52, Opposer's objections are **SUSTAINED** insofar as Applicant is requesting admissions regarding ownership of terms that are not the subject of this proceeding.
- c. Opposer's response to request no. 75 is deemed to be a denial and is thus sufficient. Request no. 76 inquires about a mark that is not involved in this proceeding; therefore, to the extent Opposer objects thereto on that basis, the objection is **SUSTAINED**.

Summary of Orders Regarding Applicant's Discovery; Response Deadline

Applicant's motion to compel is denied in part and granted in part, as discussed *supra*. Applicant's effective motion to test the sufficiency of Opposer's admission responses is granted in part and denied in part, as discussed *supra*. Opposer is allowed until **THIRTY DAYS** from the mailing

date of this order to serve on Applicant at the address of Applicant's counsel appropriate responses as discussed *supra*. Opposer must produce confidential or proprietary information and/or documents, if applicable, pursuant to the protective order applicable to this proceeding by operation of Trademark Rule 2.116(g). *See Amazon Technologies, Inc. v. Wax*, 93 USPQ2d 1702, 1706 n.6 (TTAB 2009).

As to any interrogatories or requests for production of documents to which Opposer has not responded based on an allegation of privilege, Opposer is allowed until **THIRTY DAYS** from the mailing date of this order to serve on Applicant at the address of Applicant's counsel a "privilege log", which must include the following information: the specific privilege that assertedly applies to the particular discovery request, the basis for the objection to response or production, and a description of the privileged document(s). Fed. R. Civ. P. 26(b)(5)(A)(ii).

**With respect to those document requests for which Applicant's motion to compel was granted, if no documents exist that are responsive to Applicant's document requests, Opposer must state so explicitly as to each document request.**

Opposer is also advised that a production of "representative" documents must truly be a representative sampling, and not merely a self-serving selection of favorable documents. *See, e.g., The Procter & Gamble Company v. Keystone Automotive Warehouse, Inc.*, 191 USPQ 468 (TTAB 1976). **An**

**evasive or incomplete response is the equivalent of a failure to disclose.** See Fed. R. Civ. P. 37(a)(4); Trademark Rule 2.116(a). Opposer is reminded that if a party provides an incomplete response to a discovery request, that party may be precluded from relying at trial on information from its records which was properly sought in the discovery request, but which was not included in the response thereto, unless the response is supplemented in a timely fashion pursuant to Fed. R. Civ. P. 26(e). See *Bison Corp. v. Perfecta Chemie B.V.*, 4 USPQ2d 1718 (TTAB 1987); and TBMP § 408.02 (2014).

Opposer is also reminded that parties have a continuous duty to supplement discovery responses “in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1)(A). See, e.g., *Hunter Indus., Inc. v. The Toro Company*, 110 USPQ2d 1651 (TTAB 2014); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc. dba Watermark Cruises*, 107 USPQ2d 1750 (TTAB 2013); and TBMP § 408.03 (2014). Therefore, **should Opposer find additional information or materials that are responsive to Applicant’s previously served discovery, Opposer should promptly supplement its responses.**

Applicant's Motion to Extend Time for Responding to Discovery

Applicant requests that the Board extend by thirty days Applicant's time to respond to Opposer's discovery requests, which were due on April 9, 2014. In support thereof, Applicant explains that Opposer's counsel did not respond for six weeks to Applicant's February 14, 2014 proposal to suspend the proceeding for settlement, including the time for Applicant to respond to Opposer's discovery, and that given that Opposer had failed to produce its documents in response to Applicant's discovery requests, Applicant "did not reasonably expect that Opposer would suddenly be concerned about maintaining the current discovery schedule" (motion at 22).

In response, Opposer argues that Applicant has continuously sought to delay its obligation to respond to Opposer's discovery. Further, Opposer contends that Applicant's filing of the instant motion to compel does not toll the time for Applicant to respond to Opposer's discovery.

In reply, Applicant emphasizes that Opposer did not communicate with Applicant for six weeks, then, when Opposer's counsel did respond, rejected Applicant's proposal and demanded that Applicant serve responses five days later. Applicant also reiterates that it timely filed its motion for an extension of time.

The appropriate standard for allowing an extension of a prescribed period prior to the expiration of the term is "good cause." *See* Fed. R. Civ. P. 6(b) and TBMP § 509 (2014) and cases cited therein. The Board is generally liberal in

granting extensions before the period to act has lapsed, so long as the motion sets forth with particularity facts that constitute good cause for the requested extension, *Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQd 1479, 1480 (TTAB 2000), and the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. *See, e.g., SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 USPQ2d 1372, 1375 (TTAB 2001) (cursory and unsupported statements are insufficient to show good cause); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000); and *American Vitamin Products, Inc. v. DowBrands Inc.*, 22 USPQ2d 1316 (TTAB 1992).

At the outset, the Board notes that Applicant has not been guilty of negligence or bad faith, nor has the privilege of extensions been abused. Further, after careful review of the record, the Board finds that there was a pattern of discovery extensions granted between the parties, as well as lack of communication from Opposer's counsel, both of which reasonably misled Applicant into believing that Opposer would agree to another extension of Applicant's deadline for responding to Opposer's discovery. Specifically, in December and January, 2013, due to the health problems of Opposer's counsel, Opposer requested that its deadline for responding to Applicant's discovery be extended; and Applicant so agreed (see, e.g., emails between Whitney Walters and Michael McCue, dated December 3, 2013 and January 10, 2014; motion Exh. A). Then, on February 6, 2014, although

Opposer's counsel stated that it would be helpful to have Applicant's responses to Opposer's interrogatories before discussing settlement, Opposer's counsel also stated that document production can be delayed for both sides to minimize costs. On February 12, 2014, Opposer's counsel reiterated that it preferred to have Applicant's discovery responses for settlement discussions. However, in response, on February 14, 2014, Applicant's counsel reminded Opposer's counsel that the parties had agreed to a 67-day reciprocal delay to respond to discovery requests; thus, responses were not yet due. Applicant also proposed, *inter alia*, that Opposer's production of documents and Applicant's responses to Opposer's discovery could be delayed until after a period of suspension. Because of family issues of Opposer's counsel, Opposer did not substantively respond to Applicant for approximately six weeks, until March 28, 2014, when Opposer stated that it would give Applicant only a five-day extension of time (until April 9<sup>th</sup>) to respond to its discovery requests.

Insofar as Opposer wanted Applicant's responses for purposes of settlement, but Opposer also stated that production of documents could be delayed to save on costs, then Opposer's counsel did not communicate with Applicant's counsel for six weeks regarding Applicant's proposal to suspend and delay service of discovery responses, the Board finds that Applicant reasonably delayed in responding to Opposer's discovery requests. In view thereof, the Board finds that there is good cause for the extension of time

sought by Applicant. Accordingly, Applicant's motion for an extension of thirty days to respond to Opposer's discovery requests is granted. Applicant is thus allowed until **THIRTY DAYS** from the mailing date of this order to serve on Opposer complete responses, including documents, to Opposer's previously served discovery.

Applicant's Motion to Extend Trial Periods by Ninety Days

Applicant requests that the trial periods in this proceeding be extended for ninety days and Opposer does not contest the motion. In view thereof, Applicant's motion to so extend the trial dates is granted. See Trademark Rule 2.127(a). However, it is noted that when the motion to compel was filed, approximately two months remained in the discovery period. Based on the circumstances of this case, the Board finds that an additional thirty days, totaling a period of ninety days (not ninety days added to sixty days), is a sufficient period for the parties' follow-up discovery. Accordingly, the trial schedule is reset as shown below.

Proceeding Resumed; Trial Dates Reset

This proceeding is resumed. Trial dates are reset in accordance with the following schedule:

<b>Parties' Discovery Responses Due</b>	<b>8/30/2014</b>
<b>Expert Disclosures Due</b>	<b>10/29/2014</b>
<b>Discovery Closes</b>	<b>11/28/2014</b>
<b>Plaintiff's Pretrial Disclosures Due</b>	<b>1/12/2015</b>
<b>Plaintiff's 30-day Trial Period Ends</b>	<b>2/26/2015</b>
<b>Defendant's Pretrial Disclosures Due</b>	<b>3/13/2015</b>

<b>Defendant's 30-day Trial Period Ends</b>	<b>4/27/2015</b>
<b>Plaintiff's Rebuttal Disclosures Due</b>	<b>5/12/2015</b>
<b>Plaintiff's 15-day Rebuttal Period Ends</b>	<b>6/11/2015</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. *See* Trademark Rule 2.125, 37 C.F.R. § 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. § 2.129.

