

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

BUO

Mailed: December 5, 2014

Opposition No. 91214649

Noodle Time, Inc.

v.

Benny Hodge

Benjamin U. Okeke, Interlocutory Attorney:

On September 4, 2014, Opposer filed a motion to compel Applicant to supplement and/or amend his responses to its first set of interrogatories and its first set of document requests. On November 4, 2014, the Board entered an order granting Opposer's motion as conceded because Applicant failed to respond to the motion in any way. Now before the Board is Applicant's request for reconsideration of that order, filed November 19, 2014.

Applicant asserts that it has submitted answers to Interrogatories, responded to document requests, and produced documents which he believes are responsive to those requests. Additionally, Applicant attempted to supplement his discovery responses within his brief on his request for reconsideration. Opposer did not respond to this submission, but the Board will nevertheless take this request up on its merits.

Request for Reconsideration

Generally, the premise underlying a motion for reconsideration, modification or clarification 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 may not properly be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. Rather, the 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. *See Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005).

Trademark Rule 2.127(a), states, in pertinent part:

a brief in response to a motion shall be filed within fifteen days from the date of service of the motion unless another time is specified by the Trademark Trial and Appeal Board, or the time is extended by stipulation of the parties approved by the Board, or upon motion granted by the Board, or upon order of the Board.

Trademark Rule 2.127(a).

Therefore, inasmuch as Opposer's motion to compel was served by electronic mail¹ on September 4, 2014, and no requests for extension of time were filed or granted by the Board, Applicant's response to that motion was due no later than Friday, September 19, 2014. Indeed, Applicant, while

¹ Inasmuch as the parties' papers to this point have been served by electronic means, the Board presumes the parties' assent to this form of service pursuant to Trademark Rule 2.119(b)(6). Accordingly, the five additional days provided for under Trademark Rule 2.119(c) are not available to the parties in this proceeding.

nonetheless untimely, could have filed a response at any time before November 4, 2014 – the date the Board issued its order granting the motion as conceded – and sought to explain its tardiness and request a reopening of the time to respond to Opposer’s motion. However, Applicant failed to respond in any way in the 6 ½ weeks after the due date and prior to the issuance of the Board’s order. In fact, Applicant has yet to offer the Board any explanation as to his failure to respond to Opposer’s motion to compel. Instead, Applicant, in his request for reconsideration, advances arguments directed against the motion to compel that could have, and should have been advanced during the allowed time to respond to that motion.

Inasmuch as Applicant has not alleged, much less shown, that the Board erred in its application of the relevant law to the facts presented in this case, it appears that reconsideration would be inappropriate, and would simply sanction parties to ignore the Board’s rules and schedule.

Accordingly, Applicant’s request for reconsideration is **DENIED**. As stated in the Board’s November 4, 2014 order, Applicant must serve supplemental responses to Opposer’s first set of interrogatories and its first set of document requests and subsequently serve Opposer with any responsive documents, as indicated in Opposer’s motion no later than **TWENTY DAYS** from the mailing date of this order, without objection on the

merits.² *See, No Fear*, 54 USPQ2d 1551. Objections going to the merits of a discovery request include those which challenge the request as overly broad, unduly vague and ambiguous, burdensome and oppressive, as seeking non-discoverable information on expert witnesses, or as not calculated to lead to the discovery of admissible evidence. In contrast, claims that information sought by a discovery request is trade secret, business-sensitive or otherwise confidential, is subject to attorney-client or a like privilege, or comprises attorney work product, goes not to the merits of the request but to a characteristic or attribute of the responsive information. *Id.*, at 1554. Applicant is strongly encouraged to review the information regarding discovery and particularly interrogatories and document requests, and the information for *pro se* litigants found at the end of this order.

Applicant is cautioned that Opposer may seek to preclude him from relying on information, documents, or witnesses which should have been produced or identified in response to any of the discovery requests, but were not. *See Panda Travel, Inc. v. Resort Option Enters., Inc.*, 94 USPQ2d 1789, 1792 (TTAB 2009); *Quality Candy Shoppes/Buddy Squirrel of Wisconsin Inc.*

² Applicant's responses advanced in its brief on his request for reconsideration do not satisfy this order. Indeed, several of the responses provided by Applicant would have nonetheless been deemed unacceptable, had the Board considered them on their merits.

A party served with a request for discovery has a duty to thoroughly search its records for all information properly sought in the request, and to provide such information to the requesting party within the time allowed for responding to the request. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000). ***A proper written response to a document request requires the responding party to state whether responsive documents exist or not, and if so, that either they will be produced or will be withheld on a claim of privilege. Id.*** at 1556.

v. Grande Foods, 90 USPQ2d 1389, 1392 (TTAB 2007); *Presto Prods. v. Nice-Pak Prods.*, 9 USPQ2d 1895, 1896 n.5 (TTAB 1988); TBMP § 527.01(e).

If Applicant fails to respond to Opposer's discovery requests as ordered, Opposer's relief may be sought through a motion for sanctions, including the entry of judgment against Applicant. *See* Trademark Rule 2.120(g); Fed. R. Civ. P. 37(b)(2).³

Dates remain as set in the Board's November 4, 2014 order.

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 taking of testimony. Trademark Rule 2.125.

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

Discovery

The purpose of discovery is to advance the case by requiring parties to share certain relevant information upon request, so that the issues for trial may be focused and the case may proceed in an orderly manner within

³ Applicant should note that it may not "cherry-pick" what information it chooses to disclose to Opposer. Therefore, the argument that Applicant feels that he has produced sufficient responses and documents is not a viable argument under these circumstances (the time for that argument has passed with Applicant's opportunity to respond to Opposer's motion), and if raised as an objection will be looked upon with extreme disfavor as an exercise of gamesmanship. Applicant may not provide the information it sees fit, but must fully and completely respond to Opposer's discovery requests. *See* Fed. R. Civ. P. 26(g); *Johnston Pump/General Valve*, 13 USPQ2d at 1721 n.4 (Board warned counsel for opposer that its conduct of discovery in the case was "uncooperative" and "improper" and that any further misconduct may result in the imposition of the estoppel sanction); *Panda Travel*, 94 USPQ2d 1789, 1791 (TTAB 2009) ("Each party has a duty to make a good faith effort to satisfy the reasonable and appropriate discovery needs of its adversary."); *Amazon Techs. Inc. v. Wax*, 93 USPQ2d 1702, 1705 (TTAB 2009).

reasonable time constraints. An opposition before the Board is similar in many ways to a civil action in a Federal district court. There are pleadings (notice of opposition, answers, and, sometimes, a counterclaim), a wide range of possible motions; discovery (a party's use of discovery depositions, interrogatories, requests for production of documents and things, and requests for admission to ascertain the facts underlying its adversary's case), a trial, and briefs, followed by a decision on the case.

Unlike the case in a civil proceeding, the Board does not preside at the taking of testimony. Rather, all testimony is taken by deposition during the assigned testimony, or trial, periods, and the written transcripts, together with any exhibits, are then filed with the Board. No paper, document, or exhibit will be considered as evidence in the case unless it has been introduced in evidence in accordance with the applicable rules. *See* TBMP § 703.

A. Interrogatories

Ordinarily, a party on which interrogatories have been served should respond to them by stating, with respect to each interrogatory, either an answer or an objection. If an interrogatory is answered, the answer must be made separately and fully, in writing under oath. If an interrogatory is objected to, the reasons for objection must be stated in lieu of an answer. Fed. R. Civ. P. 33(b)(3), (b)(4); TBMP § 405.04(b) (3d ed. rev. 2013). Objections based on confidentiality are expected to be extremely limited because the

Board's standard protective order is automatically instituted for all Board *inter partes* proceedings. *See* Trademark Rule 2.116(g).

The Board prefers that the responding party reproduce each interrogatory immediately preceding the answer or objection thereto.

The duty to supplement disclosures and discovery responses in proceedings before the Board is governed by Fed. R. Civ. P. 26(e)(1) and (2). *See* Trademark Rule 2.116(a). Under that rule, a party that has made an initial or expert disclosure or has responded to a request for discovery with a response is under a duty to supplement or correct the response in a timely manner to include information under the particular circumstances specified in paragraphs (e)(1) and (2). *See Great Seats Inc. v. Great Seats Ltd.*, 100 USPQ2d 1323, 1326-27 (TTAB 2011) (opposer was under a duty to supplement its discovery responses and disclosing for the first time in its pretrial and amended pretrial disclosures the identities of twenty-seven witnesses resulted in surprise to applicant). In addition, as in the present case, a duty to supplement disclosures or responses may be imposed by order of the Board. *See Byer California v. Clothing for Modern Times Ltd.*, 95 USPQ2d 1175, 1179 (TTAB 2010).

B. Document Requests

A party served with a request for documents has a duty to thoroughly search its records for all information properly sought in the request, and to provide such information to the requesting party within the time allowed for

responding to the request. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000). A proper written response to a document request requires the responding party to state whether responsive documents exist or not, and if so, that either they will be produced or will be withheld on a claim of privilege; or the party may raise an appropriate objection. *Id.* at 1556.

The place of production is governed by Trademark Rule 2.120(d)(2). *See Elec. Indus. Ass'n v. Potega*, 50 USPQ2d 1775, 1777 (TTAB 1998). A party is only obliged to make documents and materials available for inspection and copying, where the documents are stored, and as they are kept in the ordinary course of business, *No Fear Inc.*, 54 USPQ2d at 1555, or as organized and labeled to correspond to the requests. Fed. R. Civ. P. 34(b)(2)(E)(i). However, in Board cases, parties often extend each other the courtesy of producing requested documents by copying the documents and forwarding them to the requesting party at the requesting party's expense. *See No Fear Inc.*, 54 USPQ2d at 1555. Indeed, the Board believes this is more efficient and thus encourages this method of producing documents. *Id.*

Pro Se Information

A. Representation

The Board notes that applicant currently represents itself *pro se*, i.e. without assistance from a licensed attorney. It should be noted that, while Patent and Trademark Rule 11.14 permits any party to represent itself, it is advisable for a person who is not acquainted with the technicalities of the

procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney. In addition, as the impartial decision maker, the Board may not provide legal advice, though it may provide general procedural information.

B. Electronic Resources

All parties may refer to the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), the Trademark Act, and the Trademark Rules of Practice, all available on the USPTO website, www.uspto.gov. The TTAB homepage provides electronic access to the Board’s standard protective order, and answers to frequently asked questions. Other useful resources include the ESTTA filing system⁴ for Board filings and TTABVUE for status and prosecution history.

Compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.

⁴ Use of electronic filing with ESTTA—as the parties have done so far—is strongly encouraged. This electronic file system operates in real time and provides filers with confirmation that the filing has been received. When papers are filed through ESTTA the papers must still be served on the other party to the proceeding.

If the parties have questions about or need assistance with ESTTA, they may call the Board at (571) 272-8500 or (800) 786-9199 (toll free) from 8:30 a.m. until 5:00 p.m. (EST).

While electronic filing is preferred, papers may also be filed by mail. The parties should refer to TBMP §§ 107-111 for information on filing by mail. If ESTTA filing is not possible for any reason, the filer should submit its papers by mail, with a certificate of mailing. See TBMP § 110 *et. seq.*

C. Service of Papers

Trademark Rule 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or the other party itself, if unrepresented, and proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all papers which applicant may file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made. The statement, whether attached to or appearing on the paper when filed, will be accepted as *prima facie* proof of service.

The following is an example of an acceptable Certificate of Service:

Certificate of Service

The undersigned certifies that a copy of the attached <describe filing> was served, by first class mail, upon opposer at the following address:

Janet C. Moreira
Maven Intellectual Property
5801 Biscayne Blvd
Miami, FL 33137,

on <insert date>.

/Benny Hodge/