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

Proceeding	91215049
Party	Defendant Hammer Brand LLC dba Wolf Brand Scooters
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I. OPPOSER’S REFUSAL TO PRODUCE A WITNESS FOLLOWED MONTHS OF EVASION AND DELAY.

A. Opposer’s “deficient”-notice argument is without merit.

Opposer asserts that Applicant’s Deposition Notice was deficient under Trademark Rule 2.120(b) because it commanded Mr. Chang, a California resident, to appear in person for a deposition in Cleveland, Ohio. Opposer thus tries to blame Applicant for Opposer’s egregious discovery tactics by claiming that it was justified in ignoring Applicant’s many attempts to schedule a deposition. In other words, Opposer argues that the (purportedly defective) Notice retroactively excuses Opposer’s months-long refusal to engage in good-faith discussions to schedule the deposition. This argument is without merit.

First, Opposer’s argument is based on a false premise. Applicant’s Notice stated that it would take the deposition of Opposer in Cleveland “or other location mutually agreed upon by the parties[.]” (Ex. 9 to Applicant’s Motion to Compel). Opposer never offered an alternative location—until its Response brief here, filed a month after Opposer was served with the Notice.

Nor did Opposer ever object to the Notice. Pursuant to TBMP § 404.08(a), “[o]bjections to errors and irregularities in a notice of the taking of a discovery deposition must be promptly served, in writing, on the party giving the notice; any such objections that are not promptly served are waived.” *See also* FED. R. CIV. P. 32(d)(1) (“An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.”); TBMP § 707(c) (citing FED. R. CIV. P. 32(d)(1)). By not promptly serving written objections to Applicant’s notice, Opposer has waived them. *See* 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:117 (4th ed.) (“The types of objections that are waived unless raised promptly are those such as objection to the notice for taking testimony....”) (citing TBMP § 707(c)). *See also Plymouth Cordage Co. v. Solar Nitrogen Chems., Inc.*, 152 U.S.P.Q. 202, 203 (TTAB 1966)

("[R]espondent should have been aware of the irregularity in petitioner's notice when it was received and prompt objection would have enabled petitioner to make any necessary corrections therein. Having failed to note any objection to petitioner's notice until said witnesses were called to testify, it must be deemed under the rule that respondent had waived its objections to the irregularities in the notice."). *Cf. HighBeam Marketing, LLC v. Highbeam Research, LLC*, 85 U.S.P.Q. 2d 1902, 106 (TTAB 2008) ("Instead of defying the subpoena, [the witness] should have either complied fully therewith by appearing for [the] deposition or sought to quash that subpoena in the district court.").

Finally, Applicant's deposition notice did not identify Mr. Chang—or any other individual—for deposition. Instead, pursuant to Rule 30(b)(6), Applicant served a deposition notice to Opposer itself. Under the rule, *Opposer* is required to identify a witness who can testify on behalf of the company on the topics set forth in the notice. *See* TBMP § 404.06(b) (Upon service of notice, the " 'named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf[.] ... The persons designated must testify about information known or reasonably available to the organization.' ") (*quoting* FED. R. CIV. P. 30(b)(6)). Instead, Opposer claimed that only Mr. Chang can testify for the company and because he was out of the country, no deposition could go forward. Opposer's refusal to abide by the Notice is improper. *See, e.g., Great Am. Ins. Co. of New York v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534 (D. Nev. 2008) (organization that no longer has a person with knowledge on the designated topics is *not* relieved of the duty to prepare a corporate witness designee).

In short, Opposer's manufactured excuses for ignoring the Notice do not withstand scrutiny.

B. Opposer did not make a good-faith attempt to schedule the deposition.

Opposer's alleged "attempt to ameliorate any hardship on the Applicant" was made only after Applicant repeatedly asked for available dates, only after Opposer ignored Applicant's repeated requests, only after Applicant served its Notice, and only after Applicant filed its Motion to Compel.

The "facts" offered by Opposer itself show that Opposer failed to engage in good-faith discussions concerning the deposition. According to Opposer, on August 19, when Applicant requested available dates for a deposition, Opposer "was not aware of any scheduling conflicts." (Response, Fact No. 11). But Opposer failed to inform Applicant that there were no scheduling conflicts. Further, Opposer states that on September 8, it became aware that Mr. Chang was out of the country and would not be returning until late October. (*Id.*, No. 13). Again, Opposer did not inform Applicant of Mr. Chang's purported unavailability. Only after Applicant served its Deposition Notice on September 24 did Opposer inform Applicant that Mr. Chang was (allegedly) out of the country and unavailable for deposition. (Response, Fact No. 14). And only after Applicant filed its Motion did Opposer claim that Mr. Chang's travel plans had suddenly changed, so that he was now available for deposition—but only via teleconference. (Opposer's Ex. 4). Had Opposer responded to Applicant's initial request in June and actually made a good-faith attempt to schedule a deposition, Applicant's Notice and Motion to Compel would have been unnecessary.¹

¹ Applicant first asked Opposer about available dates in a June 20 letter. (Applicant's Ex. 7). Opposer claimed that it never received this letter (Response, Facts Nos. 8-9), even though Applicant sent it to counsel's address where all other mailings have been received. Regardless, Opposer admits that she received a copy of the June 20 letter when Applicant emailed it to Opposer on July 10 (Response, Facts No. 9). Therefore, between July 10 and September 24, when Applicant served the deposition notice, Opposer had more than two months to work with Applicant to schedule the deposition.

II. OPPOSER SHOULD BE COMPELLED TO PRODUCE RESPONSIVE DOCUMENTS.

Opposer also claims that it made a good-faith effort to respond to Applicant's document requests. As Applicant explained (see Mem. in Supp. at 7-8), Opposer's "effort" consisted mainly in delaying responses and producing a few documents in piece-meal fashion. Regardless, Applicant's Motion to Compel merely requested the Board to order Opposer to produce—at the Rule-30(b)(6) deposition—documents previously requested. Opposer complains that it "cannot produce documents which do not exist." But Opposer has not yet produced all documents that it has already agreed to produce. Indeed, as late as September 25, 2014, Opposer informed Applicant that it was "currently working with our client to gather the documentation you requested in your August 19th letter, and in the second set of discovery requests. I am sure you can appreciate the delay associated with gathering these requests while our client is overseas." (Applicant's Ex. 12, E. Bray Sept. 25, 2014 E-Mail). As explained above, Opposer claims not to have learned that Mr. Chang was out of the country until September 8. If Opposer has been continuously and diligently working to respond to documents requests, it is reasonable to ask how Opposer's counsel was not aware—until September 8—that Mr. Chang was out of the country. Once again, Opposer is manufacturing excuses after the fact.

III. CONCLUSION

Opposer's Response demonstrates Opposer's tactic of ignoring Applicant's discovery efforts and then offering post-hoc excuses. Applicant has worked with Opposer—or has tried to—but ultimately was left with no choice but to serve its Notice and demand a witness and responsive documents. The Board should grant Applicant's Motion and (1) extend the October 30 discovery deadline only for the purpose of taking Opposer's Rule-30(b)(6) deposition; (2) compel Opposer to produce a witness for deposition in Cleveland no later than November 26, along with documents responsive to the requests set forth in the Notice; and (3) award Applicant

attorneys' fees and costs incurred in moving the Board for this order, together with any other relief the Board deems appropriate.

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Respectfully submitted,

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