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

Proceeding	91215657
Party	Plaintiff Goya Foods, Inc.
Correspondence Address	STEPHEN L BAKER BAKER AND RANNELLS PA 575 ROUTE 28 RARITAN, NJ 08869 UNITED STATES officeactions@br-tmlaw.com, s.baker@br-tmlaw.com,p.chang@br-tmlaw.com,k.hnasko@br-tmlaw.com,s.cesaro@br-tmlaw.com
Submission	Reply in Support of Motion
Filer's Name	Jason L. DeFrancesco
Filer's e-mail	jld@br-tmlaw.com, k.hnasko@br-tmlaw.com
Signature	/Jason DeFrancesco/
Date	07/13/2015
Attachments	REPLYM2C.pdf(194053 bytes)

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

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Goya Foods, Inc.,

Opposer,

v.

GOYOGO FROZEN YOGURT LLC,

Applicant,

----------X

Opposition No. 91215657

Mark:

Serial No. 86060111

Mark: GOYOGO FROZEN YOGURT OUR INGREDIENTS YOUR CREATION

Serial No. 86037364

OPPOSER'S REPLY IN SUPPORT OF
ITS MOTION TO TEST SUFFICIENCY OF RESPONSES TO THE
REQUESTS FOR ADMISSIONS AND COMPEL DISCOVERY

Opposer, Goya Foods, Inc., files this in support of its motion to compel and in reply to Applicant's response thereof. In its response, Applicant states that it either answered the interrogatories and sufficiently responded to the request for admissions or that it should not have to comply with the rules of discovery under the accusation that Opposer has not fulfilled its obligations or revealed a confidence.

While deficiencies of Applicant's argument are further explained herein, it is first noted that Applicant has neither filed a motion to compel nor is the attack on Opposer's diligence a recognizable excuse for Applicant to not attend to its discovery obligations. *See Miss America Pageant v. Petite Productions, Inc.*, 17 USPQ2d 1067 (TTAB 1990) (citing Fed. R. Civ. P. 26(d) and Giant Food, Inc. v. Standard Terry Mills, Inc., 231 USPQ 626 (TTAB 1986); TBMP §

408.01. A party is not relieved of its discovery obligations, including its duty to cooperate, in spite of the fact that an adverse party wrongfully may have failed to fulfill its own obligations. With specific regards to Applicant's responses, Opposer replies in turn as follows:

APPLICANT FAILS TO ANSWER
INTERROGATORY NO. 6

In it its response Applicant states – for the first time – that it cannot answer Interrogatory No. 6 because it "is a start-up company that only began selling frozen yogurt in late 2013" and as a result, it "does not have records broken down as to the particulars requested." While there is no known waiver or exception that would excuse Applicant from discovery rules, the "particulars requested" in Interrogatory No. 6 are merely limited to Applicant's related advertising and promotional expenses. If Applicant has no expenses in this regard, it should say so. Considering the interrogatory was served June 2014, Applicant has had over a year to break these records down.

To the extent Applicant additionally argues that it does not have to answer the interrogatory based on the undersigned's disclosure of confidential information, which accompanied the motion to compel as exhibit no. 10 (at p. 3 thereof), this is without merit. Applicant either has advertising and promotional expenses or it does not. If it does, the information should be provided. On a side note, the inadvertent disclosure here is recognized, was unintentional and an isolated event. *See attached Declaration of Jason DeFrancesco*.

Nevertheless, Applicant has never objected to the request being unduly burdensome to it and it has never objected to the request not being relevant. Applicant has not answered the interrogatory and as a result, it should be compelled to do so.

APPLICANT FAILS TO ANSWER
INTERROGATORY NO. 19

Like Interrogatory No. 6, Applicant again insists that it does not have to answer No. 19. Further, Applicant newly argues, *for the first time in its response to the motion to compel*, that Interrogatory No. 19 is duplicative of Opposer's request for admission No. 46, and incorporates its response thereto to be responsive of Interrogatory No. 19.

First off, the duplicative objection was never raised and should not be considered. Second, the updated answer should be completely stated in supplemental answers to interrogatories, not in the argument of a response to a motion to compel. Third, the allegation by Applicant that it generally knew of Opposer's Marks either before it adopted its marks or before it applied to register its marks (as referenced in Applicant's response to Opposer's request for admission No. 46) is ambiguous and not responsive.

Applicant filed for its marks under Section 1(b) in September 2013, however it since alleged first use of GOYOgo prior to its filing date (i.e., in July 2013, see Applicant's Answer to Interrogatory No. 3, Exh. 7, attached to Opposer's Motion to Compel). While the discrepancy may be considered insignificant, it speaks volumes in light of the fact that Applicant refuses to now truthfully state when it became aware of Opposer's Marks asserted herein (which is what interrogatory No. 19 requests).

By Applicant stating it was generally aware of GOYA means it could have seen a commercial on television or heard someone repeating the catchy Goya jingle, "Goya oh boy-ah." Its general knowledge says nothing about the marks and goods at issue. Applicant should be compelled to answer the interrogatories in full.

APPLICANT HAS ABILITY TO RESPOND TO THE DUPONT REQUESTS FOR ADMISSION

Applicant states that it does not have to answer the request for admissions because it suggests that it does not deal in yogurt and or that the request is not relevant to this proceeding.

Opposer has provided explanation as to the relevance of the requests based on the *DuPont* factor/ relatedness test (which was provided for in the motion to compel at pp. 4-5). Further, the instant motion to test the sufficiency is based on determining:

> Is Applicant's purported inability to respond a sufficient response to the requests for admission?

The answer to the question should be "no" because Applicant does in fact deal in yogurt (albeit of the frozen kind). It therefore must have the ability to answer request regarding relatedness of the goods it deals in. Whether Applicant thinks the request is relevant or not, it still has to answer.

According to the Applicant, however, it has an inability to respond and purports this inability to be supported by two Internet references which magically confirm yogurt does not include frozen yogurt. As a preliminary matter, the Internet references Applicant cites in its response to Opposer's Motion to compel were not attached to its response and therefore should not be considered (notwithstanding the fact that they do not offer any insight to the matter). Further, the flaw with Opposer's argument is that it attempts to insert a limitation into the Opposer's request: *that yogurt is not frozen yogurt*. The flaw is fatal because the requests do not restrict the term yogurt to any form, shape or type of yogurt; and, Applicant never object to the term "yogurt" in the requests as being overly broad, vague or ambiguous. As a result, Applicant is not allowed to rewrite any restriction (magical or real) and refuse to answer.

"Yogurt" as provided in the requests for admissions includes all types of yogurt, not limited to the kind Applicant deals in. To the extent Applicant does not deal in yogurt, Opposer requests judicial notice be taken and that the contested applications be voided *ab initio*. Otherwise, it is requested that the Board find Applicant has the ability to respond to the requests for admissions and properly state that yogurt is related to certain goods.

CONCLUSION

Opposer, Goya Foods, Inc., respectfully requests the Board suspend the instant proceeding pending disposition of this motion. And, in view of the foregoing, Opposer respectfully requests the Board enter an order compelling Applicant to answer Interrogatory Nos. 6 and 19 and deem Request for Admission nos. 18-23 admitted or order Applicant to respond thereto without objection. Furthermore, based on the responses provided by Applicant, Opposer may need to take additional discovery and request that the Board allow it an additional 30-days to do so.

Dated: July 13, 2015

Respectfully submitted,

By: /Jason DeFrancesco/
Jason DeFrancesco
Attorneys for Goya Foods, Inc.
575 Route 28, Suite 102
Raritan, New Jersey 08869
(908) 722-5640

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded by first class postage prepaid mail by depositing the same with the U.S. Postal Service on this 13th day of July, 2015 to counsel for Applicant at the following address:

DENNIS F GLEASON
JARDIM MEISNER & SUSSER PC
30B VREELAND RD STE 201
FLORHAM PARK, NJ 07039

/Jason DeFrancesco/
Jason DeFrancesco

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DECLARATION OF JASON DEFRANCESCO IN SUPPORT OF OPPOSER'S
<u>REPLY IN SUPPORT OF ITS MOTION TO COMPEL</u>

My name is Jason DeFrancesco. I am an Associate of the law firm Baker and Rannells, PA, the firm representing the Opposer in this proceeding. The following is made upon my own personal knowledge.

1. I prepared the Opposer's Motion to compel discovery that was filed on June 8, 2015 in this matter.

2. Exhibit No. 10 referenced in the Motion and attached thereto has a portion that Applicant alleges to be "Trade Secret/ Commercially Sensitive Information" and disclosed pursuant to the Board's protective order.

3. That Opposer provides disclosure of Exhibit 10 thereto is contrary to the protective order in place. And that it is understood breach of the Board's protective order is serious.

4. To the extent the information was or was not provided properly by Applicant subject to the protective order and is or is not "Trade Secret/ Commercially Sensitive Information," the disclosure of the information was inadvertent, unintentional and due to a clerical error.

5. The undersigned appreciates the need for maintaining the confidential nature of certain information. And, procedures are in place to safeguard confidentiality, and such an event will not occur in the future.

I declare under the penalty of perjury that the foregoing is true and correct and that this Declaration was executed on July 13, 2015.

/Jason DeFrancesco/
Jason DeFrancesco