

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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Mailed: October 26, 2015

Opposition No. **91215657**

*Goya Foods, Inc.*

*v.*

*GoYoGo Frozen Yogurt LLC*

**Yong Oh (Richard) Kim, Interlocutory Attorney:**

This matter comes up on Opposer's motion (filed June 3, 2015) to compel discovery and to test the sufficiency of Applicant's responses to Opposer's requests for admission. The motion is fully briefed.

Background

On March 31, 2014, Opposer filed a notice of opposition against Application Serial Nos. 86037364 and 86060111 for GOYOGO FROZEN YOGURT OUR INGREDIENTS YOUR CREATION in standard characters and in stylized form for "self-serve frozen yogurt shop services." As grounds for the opposition, Opposer has alleged priority and likelihood of confusion, dilution, fraud and no bona fide intent to use the marks. Applicant answered the notice of opposition on May 12, 2014, and Opposer propounded its discovery requests on June 12, 2014. Applicant responded to Opposer's requests for admission on July 14, 2014, and to Opposer's interrogatories on

July 30, 2014. The parties attempted to resolve the perceived deficiencies in Applicant's responses between August 18, 2014 (the date of Opposer's first deficiency letter), and May 27, 2015 (the date of Opposer's last correspondence), during which time Applicant twice provided amended discovery responses.

As last reset, discovery closed on April 22, 2015. On June 3, 2015, three days prior to the due date for Opposer's pretrial disclosures, Opposer filed the subject motion seeking to compel further responses to Interrogatory Nos. 6 and 19 and to test the sufficiency of Applicant's responses to Admission Request Nos. 18 – 23.

#### Decision

As a preliminary matter, both a motion to compel discovery and a motion to test the sufficiency of responses to requests for admission must be supported by a written statement from the moving party that it has made a good faith effort, by conference or correspondence, to resolve with the other party the issues presented in its motion, and that it has been unable to reach agreement. *See* Trademark Rules 2.120(e)(1) and (h)(1). Opposer has certified as such through the declaration of its counsel, *see Declaration of Jason DeFrancesco*, 9 TTABVUE 11, and the Board is satisfied from the parties' correspondences that sufficient efforts were made to resolve the dispute. The Board, therefore, turns to the merits of the motion.

Interrogatory No. 6

*For each Service identified in response to Interrogatory No. 2, above, set forth for each of the past five years the dollar amount expended by Applicant on advertising and promotion of the Mark Being Opposed.*

In its second amended response to this interrogatory, Applicant has stated that such information will be provided “[s]ubject to a protective order” and “to the extent [such information] is maintained.” This does not provide a sufficient basis for declining to respond to the interrogatory. First, Applicant’s conditioning of a response subject to a protective order is not well taken in view of the standard protective order that is automatically in place in this proceeding.<sup>1</sup> *See* Trademark Rule 2.116(g). Second, there is no dispute that annual advertising figures relating to the goods and services under the involved marks are discoverable. *See Varian Assocs. v. Fairfield-Noble Corp.*, 188 USPQ 581, 583 (TTAB 1975) (sales and advertising expenditures have bearing on registrability). Nevertheless, Applicant asserts that “there is nothing to produce as Applicant, which is a start-up company that only began selling frozen yogurt in late 2013 does not have records broken down as to the

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<sup>1</sup> It is noted, however, that as part of its motion to compel, Opposer submitted an unredacted copy of discovery responses which Applicant designated as “Trade Secret/Commercially Sensitive.” Although the Board has now marked the whole of Opposer’s submission as confidential, the Board finds troubling the carelessness by which Opposer has handled information designated by Applicant as “Trade Secret/Commercially Sensitive,” particularly in light of Opposer’s acknowledgment of the standard protective order and awareness of Applicant’s concern as evidenced in Opposer’s Second Deficiency Notice dated December 30, 2014. Opposer is placed on notice that further breaches will be construed as willful violations of the Board’s protective order and subject to appropriate sanctions.

The Board adds that in view of the Board’s designation of Opposer’s motion to compel as confidential, Opposer is ordered to submit a redacted version for the public record. A cover letter explaining the filing is recommended.

particulars requested.” *Response of Applicant*, 11 TTABVUE 9-10. The Board does not find this persuasive.

In response to Interrogatory No. 2, Applicant identified its service as selling frozen yogurt products and, by its own admission, only since late 2013. In view of the period of time involved and the single service identified, the Board sees nothing complicated or burdensome about the interrogatory so as to preclude a response. Applicant either has advertising expenditures or it does not and if it does, it should not prove unduly burdensome to provide them. Opposer’s motion to compel further responses to Interrogatory No. 6 is hereby **GRANTED**.

Applicant is reminded that it has a duty to thoroughly search its records for all information properly sought. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1555 (TTAB 2000). A responding party which, due to an incomplete search of its records, provides an incomplete response to a discovery request, may be precluded, upon motion, from relying at trial on information from its records that was properly sought in a discovery request but was not included in the response thereto unless the response was timely supplemented pursuant to Fed. R. Civ. P. 26(e). *See Panda Travel, Inc. v. Resort Option Enters., Inc.*, 94 USPQ2d 1789, 1791 (TTAB 2009).

*Interrogatory No. 19*

*Identify the date Applicant first became aware of any of Opposer’s Marks.*

Applicant objects to this interrogatory as being compound and further objects “to the term ‘became aware’ when applied to a corporation.” These objections are not well taken.

Irrespective of whether the interrogatory is or is not a compound one, that is not a basis for declining to respond to the interrogatory, particularly where no issue has been raised as to whether Opposer’s interrogatories exceed the number allowed under Trademark Rule 2.120(d)(1).

As to the suggestion that Applicant, as a corporate entity, cannot be “aware” of Opposer’s marks, the objection is overruled as such information may be obtained from knowledgeable employees and/or from corporate files and records. *See Am. Optical Corp. v. Exomet, Inc.*, 181 USPQ 120, 123 (TTAB 1974). Indeed, Applicant appears to have waived this particular objection in its response to Admission Request No. 46 wherein Applicant readily admits that it was “aware” of one or more of Opposer’s marks. Although this admission overlaps the information requested in the interrogatory, it is not fully responsive to the interrogatory as it does not provide the date Applicant first became aware of any of Opposer’s marks. Accordingly, Opposer’s motion to compel further responses to Interrogatory No. 19 is **GRANTED**.

Admission Request Nos. 18-23

18. Admit that yogurt and flan are related.
19. Admit that yogurt and milk are related.
20. Admit that yogurt and custard are related.

*21. Admit that yogurt and flavored, sweetened gelatin desserts are related.*

*22. Admit that yogurt and fruit beverages are related.*

*23. Admit that yogurt and frozen confections are related.*

Here, Applicant contends that yogurt and frozen yogurt are different products and therefore questions the relevance of these requests. The objection is well taken. Each party has a duty to seek only such discovery as is proper and relevant to the issues in the case. Applicant's services relate to frozen yogurt yet Opposer seeks discovery on yogurt. To the extent that the requests encompass yogurt products beyond frozen yogurt, the Board finds the requests to be overbroad.

However, Applicant's objection that the term "related" is "vague, ambiguous and undefined" is overruled in view of Opposer's several clarifications regarding its meaning. Similarly, the Board finds "fruit beverages" and "frozen confections" in Request Nos. 22 and 23 sufficiently definite so as to warrant a response.

Accordingly, Opposer's motion to test the sufficiency of Applicant's responses is **GRANTED in part** and Applicant is hereby ordered to serve amended answers to Admission Request Nos. 18-23 to the extent that the requests are limited to frozen yogurt.

Applicant's responses are to be served no later than **NOVEMBER 30, 2015**. Proceedings herein are **RESUMED** and dates are **RESET** as follows:

Plaintiff's Pretrial Disclosures Due	<b>12/15/2015</b>
Plaintiff's 30-day Trial Period Ends	<b>1/29/2016</b>
Defendant's Pretrial Disclosures Due	<b>2/13/2016</b>

Defendant's 30-day Trial Period Ends	<b>3/29/2016</b>
Plaintiff's Rebuttal Disclosures Due	<b>4/13/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>5/13/2016</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 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.

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