

ESTTA Tracking number: **ESTTA734018**

Filing date: **03/16/2016**

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

Proceeding	91215896
Party	Plaintiff Bells Brewery, Inc.
Correspondence Address	SARAH M ROBERTSON DORSEY & WHITNEY LLP 51 W 52ND ST NEW YORK, NY 10019-6119 UNITED STATES ny.trademark@dorsey.com, robertson.sarah@dorsey.com, ewing.bruce@dorsey.com
Submission	Opposition/Response to Motion
Filer's Name	Sarah M. Robertson
Filer's e-mail	ny.trademark@dorsey.com, robertson.sarah@dorsey.com, pro- goff.susan@dorsey.com, sunderji.fara@dorsey.com, os- owski.kaydi@dorsey.com
Signature	/smr/
Date	03/16/2016
Attachments	20160316 Opposer Response Motion Sanctions 91215896.pdf(718683 bytes)

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

Bell's Brewery, Inc.,)	
)	
Opposer,)	Opposition No. 91215896
v.)	
)	
Innovation Brewing,)	
)	
Applicant.)	
)	

**BELL'S' MEMORANDUM IN OPPOSITION
TO APPLICANT'S MOTION FOR SANCTIONS**

I. INTRODUCTION

Opposer Bell's Brewery, Inc. ("Bell's") submits this memorandum of law in opposition to the motion filed by applicant, Innovation Brewing ("Applicant"), for sanctions to prospectively preclude Bell's from introducing at trial certain documents produced on February 5, 2016 (the "February 5 Production").¹ As an initial matter, this motion *in limine*, disguised as a motion for sanctions, is plainly barred by the Board's established practice because "[t]he Board does not make prospective or hypothetical evidentiary rulings," and, accordingly, the Board "will deny a motion to prospectively exclude evidence that might be introduced at trial." Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 527.01(f); *RTX Scientific Inc. v. Nu-Calgon Wholesaler Inc.*, 106 USPQ2d 1492, 1493 (TTAB 2013). On this basis alone, Applicant's motion should be denied.

Even if Applicant's motion *in limine* is somehow not barred by Board practice, Bell's' production was proper and timely. Thus, there is no legal basis for Applicant to seek to exclude

¹ The facts in support of Bell's' Memorandum In Opposition to Applicant's Motion for Sanctions are set forth in the declaration of Fara S. Sunderji, dated March 16, 2016, attached as Exhibit 1, and the exhibits attached thereto (the "Sunderji Decl.").

the documents in Bell's' February 5 Production from evidence. Accordingly, the Board should deny Applicant's motion in its entirety.

II. STATEMENT OF FACTS

Applicant's motion is directed solely to a supplemental document production that Bell's made on February 5, 2016, concurrently with Bell's' service of its pretrial disclosures. This production updated the information provided in Bell's' previous responses to Applicant's documents requests served on November 11, 2014 and consisted of documents containing: (i) corrected information; (ii) updated information; and (iii) additional and updated samples of and information regarding Bell's' use of its marks. Sunderji Decl." ¶¶ 2, 9–11.

More specifically, 454 of the 478 documents in the supplemental production consist of single-page photographs, screenshots, or promotional materials showing Bell's' use of its marks in the course of the promotion of its products. Sunderji Decl. ¶ 10. These documents are the same type of documents that Bell's produced as part of its earlier productions, and consist of representative samples of Bell's' use of its marks, a significant portion of which depict promotional events that took place since the close of discovery on March 20, 2015. Sunderji Decl. ¶¶ 10–12. Bell's also provided Applicant with up-to-date beer sales and merchandise expenditures, which merely made current information that had already been provided during discovery. Sunderji Decl. ¶ 11. Bell's also corrected a minor error in one document that it had previously produced regarding the cost to Bell's and/or its distributors of truck wraps displaying Bell's' marks. Sunderji Decl. ¶¶ 11, 13.

Applicant served its First Set of Requests for Production on November 11, 2014, and on December 16, 2014, Bell's timely served its responses and objections. Sunderji Decl. ¶¶ 2–3. In pertinent part, the requests and responses included the following:

REQUEST NO. 1: Produce representative samples of all labels, tags, containers, business cards, letterheads, invoices, sales slips, brochures, and advertising and promotional materials which have ever been used by Opposer and which bear the INSPIRED BREWING mark.

RESPONSE:

Subject to and without waiving General Objection Nos. 1, 2 and 3, Opposer will produce representative samples of product and marketing materials used by Opposer and which bear the INSPIRED BREWING mark that are in its possession, custody and control.

REQUEST NO. 2: Produce representative samples of all labels, tags, containers, business cards, letterheads, invoices, sales slips, brochures, and advertising and promotional materials which have ever been used by Opposer and which bear the purported BOTTLING INNOVATION SINCE 1985 mark.

RESPONSE:

Subject to and without waiving General Objection Nos. 1, 2, 3 and 4, Opposer will produce representative samples of product and marketing materials used by Opposer and which bear the BOTTLING INNOVATION SINCE 1985 mark that are in its possession, custody and control.

REQUEST NO. 15: Produce all Documents and Things that support Opposer's opposition of Applicant's INNOVATION BREWING mark.

RESPONSE:

See General Objection Nos. 1, 2, 4, 5 and 7, Opposer further objects to this Request as premature and to the extent this Request imposes disclosure obligations on Opposer beyond the requirements of the Trademark Rules of Practice. Subject to and without waiving any objections, Opposer will produce non-privileged documents in its possession, custody and control responsive to this Request to the extent such materials exist and to the extent not already produced in response to other Requests.

Additionally, Bell's interposed a general objection that it "reserve[d] the right to supplement its answers to the Requests should additional responsive documents become available." Sunderji Decl. ¶ 4. Bell's produced documents responsive to these requests on January 8, 2015 and March 20, 2015, including representative samples of product and marketing materials used by

Bell's which bore its marks, as well as documents that support Bell's' opposition to Applicant's INNOVATION BREWING mark. Sunderji Decl. ¶ 5. In addition, Bell's produced documents typically relied upon in an opposition based on likelihood of confusion, such as sales figures and expenditures for promotional materials. *Id.* Despite Bell's' general objection reserving the right to supplement its responses should additional documents become available and its specific objection that Request No. 15 was premature, Applicant did not move to compel the production of documents in response to any request. Sunderji Decl. ¶ 6.

After discovery closed in March 2015, the Opposition was suspended for much of the time until it resumed in January 2016. Sunderji Decl. ¶¶ 7–8. At that time, Bell's began preparing for trial. In drafting its pretrial disclosures and preparing for trial, Bell's identified additional documents that support its opposition to Applicant's INNOVATION BREWING mark, including additional samples of product labels and marketing materials used by Bell's and which bore its marks, many of which came into existence after Bell's' last production on May 7, 2015. Sunderji Decl. ¶ 8. Some of the documents are dated as recently as January 2016. Sunderji Decl. ¶ 10. Bell's also identified a few additional documents containing updated or corrected information, the details of which are discussed at pages 7-8, *infra*. Bell's produced these documents on February 5, 2016, the due date for its pretrial disclosures and before the start of its trial period, which opened on February 20, 2016. Sunderji Decl. ¶¶ 8–9.

On February 9, 2016, Applicant communicated its intention to file this motion, and after various meet and confer letters and a phone call, Applicant filed its motion on February 25, 2016. Sunderji Decl. ¶ 14. At that time, Applicant was aware that Bell's was scheduled to take the trial testimony of Ms. Laura Bell on March 9, 2016. Sunderji Decl. ¶ 9, Ex. A. On March 7, 2016, Applicant informed Bell's it would not attend Ms. Bell's' testimonial deposition. Sunderji

Decl. ¶ 18, Ex. C. Accordingly, Applicant did not cross examine Ms. Bell, and in spite of the objections to the February 5 Production raised in Applicant’s motion, Applicant did not avail itself to the procedural opportunities provided in the TBMP to object to documents as they were introduced into evidence. Sunderji Decl. ¶ 19. Notably, Bell’s chose not to introduce into evidence all the documents from the February 5 Production at the testimonial deposition of Ms. Bell, and therefore many of the documents that are the subject of Applicant’s motion have not been introduced into evidence and may not ever be introduced. Sunderji Decl. ¶ 19.

Both during the telephonic meet and confer and by letter after Applicant filed its motion, Bell’s offered to narrow the dispute by using only a limited set of documents from the February 5 Production during the direct testimony of Ms. Bell. Sunderji Decl. ¶ 16, Ex. B. As noted in Bell’s’ March 1 letter, Bell’s offered to limit the universe of documents that may be relied upon to 109 documents, 106 of which are single-page photographs demonstrating the use of Bell’s’ marks since May 7, 2015, the date of Bell’s’ last production. *Id.* During the telephonic meet and confer, Applicant refused to accept this offer to narrow the dispute to the documents that might actually be at issue and Applicant never responded to Bell’s’ written offer to compromise. Sunderji Decl. ¶ 17.

III. APPLICANT’S MOTION IS BARRED ON BOTH PROCEDURAL AND SUBSTANTIVE GROUNDS

A. Applicant’s Motion Is a Motion *in Limine* That Is Barred by Board Practice

The Board has long held that “[i]t is not [its] practice to make prospective or hypothetical evidentiary rulings.” *Greenhouse Systems Inc. v. Carson*, 37 USPQ2d 1748, 1750 (TTAB 1995). In fact, Section 527.01(f) of the TBMP makes clear that “the Board will deny a motion to prospectively exclude evidence.” Section 527.01(f) of the TBMP also specifically advises parties that “[r]ather than requesting a discovery sanction prospectively, the better practice is to

file a motion to strike or otherwise object to such evidence after it is introduced, identifying the specific evidence objected to and the asserted basis for exclusion thereof.” *See Greenhouse Systems Inc.* at 1750. Since Bell’s had yet to introduce any documents into evidence at the time Applicant filed its motion, Applicant’s motion is one that seeks to prospectively exclude evidence directly contrary to the Board’s rules. The motion should be denied on this basis alone.

Applicant seems to be aware of the Board’s required practice, but apparently believes that to comply with this practice is too burdensome. *See* Motion at 6 (“Applicant recognizes its right to file one or more motions to strike and/or to object to the relevancy of introduced documents during trial, but Applicant should not be burdened with doing so . . .”).² Applicant puts forth no reason, legal or otherwise, as to why the Board’s ban on motions *in limine* should not apply to it.

The Board recently reiterated in *Emilio Pucci International BV v. Sachdev* that “[t]he TBMP has been carefully drafted so as to make clear the Board’s practices and procedures under applicable authorities [and] [t]he Board expects that parties will adhere to the manual.” Opposition No. 91215100, at *10 (TTAB Jan. 20, 2016). In *Sachdev*, the Board denied a party’s motion for a protective order that it filed instead of serving responses to pending discovery requests because the motion was “in direct violation of the Board’s practice as set forth in the TBMP.” *Id.* The Board also criticized the movant who, like Applicant here, did not set forth any factual or legal support for her position. *Id.* at 8–9. The Board should likewise deny Applicant’s motion in this proceeding.

B. Bell’s February 5, 2016 Production Was Proper and Timely

² As noted, Applicant chose not to attend the testimonial deposition of Ms. Bell and therefore failed to object to any of the documents in the February 5 Production that were introduced into evidence as exhibits. Sunderji Decl. ¶ 19.

1. Bell's' Production Was Not Unduly Burdensome To Review

Applicant's motion does not identify any specific documents to which it objects. Instead, Applicant objects to the timing and volume of the February 5 Production. Of the 478 documents produced, however, 454 are single-page photographs or screenshots that plainly show examples of Bell's' marks as used on products, promotional materials or in social media.³ The review of documents of this nature does not require a significant amount of time.

The remaining documents that were produced consisted of:

- One list of beer festivals at which Bell's' had participated;
- One spreadsheet containing an updated summary of the cost and volume of Bell's' merchandise bearing its marks, along with detailed supporting information broken out by product, and a related spreadsheet showing similar information for website sales to customers in the US and North Carolina, where Applicant is located;
- Updated sales figures for Bell's' sales of beer displaying its marks;
- One 2-page document providing updated statistics regarding Bell's' social media reach;
- Nine multi-page documents consisting of photographs and/or graphics showing the use of Bell's' marks in its promotional materials;
- Five press releases showing the use of Bell's' marks in the header; and
- One document that corrected information contained in BELLS-000512, a document previously produced by Bell's, regarding the cost to Bell's and/or its distributors of truck wraps bearing Bell's' marks.

Sunderji Decl. ¶ 11.

³ Many of the photographs are publicly available on Bell's' Facebook page, which Applicant has closely monitored from time to time. Sunderji Decl. ¶ 10.

None of these documents are time consuming to review; none of them introduced new subject matter; and all of them were produced more than one month before Bell's' scheduled testimonial deposition. Under the circumstances, Applicant's complaints about the timing and volume of the February 5 Production are without merit.

2. Bell's' Production Was Substantively Proper

Pursuant to Section 408.03 of the TBMP and Rule 26(e)(1) of the Federal Rules of Civil Procedure, “[a] party who has...responded to a request for discovery with a response is under a duty to supplement or correct the response in a timely manner.” *See also Entravision Communications Corp. v. Liberman Television, LLC*, 113 USPQ2d 1526, 1527 (TTAB 2015); *Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005) (“Discovery responses may be supplemented at any time, even during trial...”). The February 5 Production was made to comply with Bell's' obligations under these provisions.

a. Bell's Was Required to Correct Its Prior Produced Document under Rule 26(e)

As part of the February 5 Production, Opposer produced one document (BELLS-002331–34), which provided information about the cost to Bell's and/or its distributors of truck wraps bearing Bell's' marks. This document corrected and updated similar information contained in BELLS-000512, in compliance with Bell's' obligations under Rule 26(e)(1). This correction could not have been disclosed any earlier because it was not discovered until 2016. Sunderji Decl. ¶ 13. The production of BELLS-002331–34 on February 5, 2016 to supply corrected information, therefore, was both timely and proper, and was done to comply with Rule 26(e)(1).

b. Bell's Updated and Supplemental Documents Were Also Required or Permitted

The Board has said time and time again that, “[f]or purposes of likelihood of confusion,

the Board generally accepts and considers evidence related to likelihood of confusion for the period up to the time of trial, and this includes evidence of the fame of a plaintiff's mark." *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 n.18 (TTAB 2014) (citing *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1595 n. 13 (TTAB 2011)). It follows that if the Board accepts evidence of the use and recognition of a plaintiff's mark *up until the time* of trial for likelihood of confusion purposes, a plaintiff must be permitted to rely upon evidence that did not come into existence until after discovery closed, since the trial period undoubtedly always begins after the close of discovery. Bell's' documents updating and supplementing its prior productions show Bell's' use of its marks up to the time of trial and provide information about that use. These materials are relevant to the strength of Bell's' marks and the commercial impression those marks make in the marketplace. These factors are an integral part of any plaintiff's case involving likelihood of confusion.

Moreover, the Board has held that "a party is not precluded from making evidence of record simply because it was not provided to the adverse party during discovery." *Katz Commc'ns, Inc. v. Katz Marketing Solutions, LLC*, Ser. No. 77649608, 2013 WL 3188904, at *2 (TTAB Feb. 21, 2013) (non precedential). Documents do not have to be produced during discovery unless they are asked for in a valid document request. *Id.* at *3. Even when there is a valid request, where a party "does not unequivocally refuse to provide the requested information" the Board is reluctant to impose the harsh penalty of preclusion of documents based on Fed. R. Civ. P. 37(c)(1). *Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005); TBMP § 527.01(e) (noting that the "the preclusion sanction under Fed. R. Civ. P. 37(c)(1) may not apply" where a party "does not 'unequivocally refuse.'") Bell's plainly agreed to, and did, produce documents in response to Applicant's document requests, and Applicant does not claim

otherwise in its motion.

Further, where a responding party has indicated in its discovery responses that it will be producing only a representative sample of responsive documents, the Board has permitted the responding party to introduce supplemental documents which are similar in nature to those previously produced as part of the representative sample, as Bell's has done here. *See Carefirst of Maryland, Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1499 (TTAB 2005). If the requesting party is dissatisfied with a discovery response, it will not be permitted to later strike supplemental responses and/or documents from the record, because objections to discovery responses must be raised through a motion to compel. *See* TBMP § 523.04; *see also The H.D. Lee Company, Inc. v. Maidenform, Inc.*, 87 USPQ2d 1715, 1719 (TTAB 2008). Applicant made no such motion here, and thereby waived its right to object to Bell's' discovery responses. Moreover, Applicant's Requests Nos. 1 and 2 only called for representative samples. Sunderji Decl. ¶ 3.

Applicant relies on *Panda Travel, Inc. v. Resort Option Enterprises, Inc.*, in which the opposer made four supplemental document productions *after* the start of its trial period. 94 USPQ2d 1789, 1791 (TTAB 2009). The Board granted the applicant's motion to strike because it found that the opposer "avoided presenting evidence of continuous use until well into the testimony period, and immediately before [the trial] deposition." *Id.* In stark contrast, the February 5 Production was made *prior* to the opening of Bell's' testimony period, and more than one month before it took any testimony, and the documents cover the same subject matter as documents produced during discovery. Sunderji Decl. ¶¶ 12, 15.

Applicant's citation to *Hot Tamale Mama...and More, LLC v. SF Investments, Inc.*, 110 USPQ2d 1080 (TTAB 2014), is similarly misplaced. In that case, the opposer failed to serve any

responses or produce any documents in response to the applicant's discovery requests. The Board denied the motion to compel because the applicant failed to properly meet and confer with the opposer prior to filing the motion. *Id.* at 1082. In contrast, here, not only did Bell's serve timely responses to Applicant's document requests during discovery, it also produced responsive documents in a timely manner.

c. Bell's Supplemental Production Was Substantially Justified and Harmless

Applicant acknowledges in its motion, Motion at 4, that an estoppel sanction under Rule 37 will not apply where a supplemental disclosure is "substantially justified or is harmless." In assessing whether the disclosure of supplemental information is substantially justified or harmless, the Board weighs the following five factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence. *Entravision*, 113 USPQ2d at 1528. Applying these factors to the facts here, Bell's submits that the February 5 Production was both substantially justified and harmless.

"[Surprise or] prejudice [factors 1 and 2] may arise when a party is surprised with ... new subject matter after the deadlines for discovery have passed. However, if there is no meaningful change in [subject matter], the non-moving party will suffer little prejudice." *Id.* (internal citations and quotations omitted). Here, there can be no surprise because the documents in the February 5 Production did not contain subject matter that is different from that of the documents produced during discovery, and nowhere does Applicant claim that they do.⁴ Sunderji Decl. ¶

⁴ Applicant's claim that the timing of the production prevented it from "exploring the nature of such documents in discovery" is specious. *See* Motion at 5. At no time during discovery did Applicant serve a deposition notice and Applicant has already used its allotted interrogatories. Sunderji Decl. ¶ 6. Applicant therefore cannot now credibly

12. Factor three also favors Bell's because the production was made at the time Bell's served its pretrial disclosures, more than two weeks before Bell's' testimony period opened, and more than one month before Bell's took any testimony. Sunderji Decl. ¶¶ 9, 15, 19; *c.f.*, *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1757 (TTAB 2013) (denying respondent's motion to strike even where "the preferable practice would have been for petitioner to supplement its discovery responses prior to the taking of [the] testimony depositions."). Thus, the trial was not disrupted and this factor leads to the conclusion that the production was harmless. As to the importance of the evidence as covered by the fourth factor, the documents contained in the February 5 Production are all relevant to the likelihood of confusion analysis, many of them going to the strength and fame of Bell's' marks. Thus, the documents, only some of which are likely to be offered into evidence, are important to show the continued and widespread use of Bell's' marks. Finally, Bell's made its supplemental production on February 5, 2016 because almost one year had passed since the close of discovery and Bell's is legally permitted to rely upon recent uses of its marks, as well as updated product sales and merchandise figures, to support its case. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d at 1740 n.18 ("[f]or purposes of likelihood of confusion, the Board generally accepts and considers evidence related to likelihood of confusion for the period up to the time of trial, and this includes evidence of the fame of a plaintiff's mark.") Accordingly, the fifth factor falls in Bell's' favor as well. Because all five of the relevant factors favor finding that the February 5 Production was both substantially justified and harmless, Bell's submits that Applicant's motion seeking the preclusion at trial of documents contained in the February 5 Production should be denied in its totality.

argue that it would have explored the nature of the February 5 Production during discovery had it been produced last year.

IV. CONCLUSION

For the foregoing reasons, Bell's respectfully requests that the Board deny Applicant's motion.

Respectfully Submitted,

DORSEY & WHITNEY LLP

Dated: March 16, 2016

By: /smr/

Sarah M. Robertson
Susan Progoff
Fara S. Sunderji
51 West 52nd Street
New York, New York 10019
Tel: (212) 415-9200
Email: ny.trademark@dorsey.com

THE FIRM OF HUESCHEN AND SAGE
G. Patrick Sage
Joanna T. French
Seventh Floor, Kalamazoo Building
107 West Michigan Avenue
Kalamazoo, Michigan
Tel: (269) 382-0030

*Attorneys for Opposer,
Bell's Brewery, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2016, a copy of the foregoing BELL'S' MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION FOR SANCTIONS was served on Applicant via First Class Mail, postage prepaid to:

Ian D. Gates, Esq.
DASCENZO INTELLECTUAL PROPERTY LAW, P.C.
1000 SW Broadway, Suite 1555
Portland, Oregon 97205

/klo/
Kaydi Osowski

EXHIBIT 1

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

Bell's Brewery, Inc.,)	
)	
)	Opposition No. 91215896
v.)	
)	
Innovation Brewing,)	
)	
Applicant.)	
)	

**DECLARATION OF FARA S. SUNDERJI IN SUPPORT OF BELL'S
MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION FOR SANCTIONS**

I, FARA S. SUNDERJI, declare as follows:

1. I am an associate with the firm of Dorsey & Whitney LLP, representing Opposer, Bell's Brewery, Inc. ("Bell's"), in the above captioned Opposition proceeding. I am licensed to practice law in the State of New York. I submit this Declaration for the purpose of setting forth certain facts and identifying documentary exhibits in support of Bell's' Memorandum in Opposition to Applicant's Motion for Sanctions.
2. On November 11, 2014, applicant Innovation Brewing ("Applicant") served Bell's by mail with Applicant's First Set of Requests for Production.
3. On December 16, 2014, Bell's timely served its responses and objections to Applicant's First Set of Requests for Production. Requests Nos. 1, 2 and 15, and Bell's' responses to those request were as follows:

REQUEST NO. 1: Produce representative samples of all labels, tags, containers, business cards, letterheads, invoices, sales slips, brochures, and advertising and promotional materials which have ever been used by Opposer and which bear the INSPIRED BREWING mark.

RESPONSE:

Subject to and without waiving General Objection Nos. 1, 2 and 3, Opposer will produce representative samples of product and marketing materials used by Opposer and which bear the INSPIRED BREWING mark that are in its possession, custody and control.

REQUEST NO. 2: Produce representative samples of all labels, tags, containers, business cards, letterheads, invoices, sales slips, brochures, and advertising and promotional materials which have ever been used by Opposer and which bear the purported BOTTLING INNOVATION SINCE 1985 mark.

RESPONSE:

Subject to and without waiving General Objection Nos. 1, 2, 3 and 4, Opposer will produce representative samples of product and marketing materials used by Opposer and which bear the BOTTLING INNOVATION SINCE 1985 mark that are in its possession, custody and control.

REQUEST NO. 15: Produce all Documents and Things that support Opposer's opposition of Applicant's INNOVATION BREWING mark.

RESPONSE:

See General Objection Nos. 1, 2, 4, 5 and 7, Opposer further objects to this Request as premature and to the extent this Request imposes disclosure obligations on Opposer beyond the requirements of the Trademark Rules of Practice. Subject to and without waiving any objections, Opposer will produce non-privileged documents in its possession, custody and control responsive to this Request to the extent such materials exist and to the extent not already produced in response to other Requests.

4. Bell's' responses and objections to Applicant's First Set of Requests for Production also interposed a general objection that it "reserve[d] the right to supplement its answers to the Requests should additional responsive documents become available."

5. On January 8, 2015 and March 20, 2015, Bell's produced documents responsive to Applicant's First Set of Requests for Production which included, *inter alia*, representative samples of product and marketing materials used by Bell's which bore its marks, documents that support Bell's' opposition to Applicant's INNOVATION BREWING mark, and documents containing Bell's' sales figures and expenditures for promotional materials for products bearing Bell's' marks.
6. Applicant never moved to compel the production of documents in response to any request. Applicant also did not serve a notice of deposition during discovery, but it did serve 75 interrogatories.
7. Discovery in this proceeding closed on March 20, 2015, but Bell's timely served a supplemental document production on May 7, 2015.
8. The proceeding was suspended for much of the time between the close of discovery on March 20, 2015 and January 2016. When the proceeding resumed on January 7, 2016, the Board set February 5, 2016 as the deadline for Bell's to serve its pretrial disclosures. In drafting its pretrial disclosures and preparing for trial, Bell's identified additional documents that support its opposition to Applicant's INNOVATION BREWING mark, including additional samples of product labels and marketing materials used by Bell's and which bore its marks, many of which came into existence after Bell's' last production on May 7, 2015.
9. Simultaneously with the service of Bell's' pretrial disclosures on February 5, 2016, Bell's made a supplemental document production in response to Applicant's First Set of Requests for Production (the "February 5 Production"). At that time, Bell's also informally notified Applicant that that it would be taking the testimonial deposition of Ms. Laura Bell on March

9, 2016 in Kalamazoo, Michigan. A true and correct copy of my February 5, 2016 email to Applicant's counsel (without the attachment) is attached as Exhibit A.

10. The February 5 Production consists of 478 documents, 454 of which are single-page photographs, promotional materials or screenshots from social media that plainly show examples of Bell's' marks as used on products or in the promotion of its products, a significant portion of which depict promotional events that took place since the close of discovery on March 20, 2015. Some of the documents are dated as recently as January 2016 and many of the photographs are publicly available on Bell's' Facebook page, which Applicant has closely monitored from time to time.

11. The remaining documents produced as part of the February 5 Production consist of:

- One list of beer festivals at which Bell's' had participated;
- One spreadsheet containing an updated summary of the cost and volume of Bell's' merchandise bearing its marks with detailed supporting information broken out by product, and a related spreadsheet showing similar information for website sales to customers throughout the US and in North Carolina, where Applicant is located;
- Updated sales figures for Bell's' sales of beer displaying its marks;
- One 2-page document providing updated statistics regarding Bell's' social media reach;
- Nine multi-page documents consisting of photographs and/or graphics showing the use of Bell's' marks in its promotional materials;
- Five press releases showing the use of Bell's' marks in the header; and
- One document that corrected information contained in BELLS-000512, a document previously produced by Bell's, regarding the cost to Bell's and/or its distributors of truck wraps bearing Bell's' marks.

12. The documents contained in the February 5 Production did not contain subject matter that is different from that of the documents produced by Bell's during discovery.
13. The minor error in contained in BELLS-000512 regarding the cost to Bell's and/or its distributors of truck wraps bearing Bell's' marks was discovered in 2016.
14. On February 9, 2016, Applicant communicated its intention to file this motion. Between February 9, 2016 and February 25, 2016, the date on which Applicant filed this motion, Bell's and Applicant exchanged various meet and confer letters and participated in a telephonic meet and confer, all relating to the February 5 Production.
15. Bell's' trial period opened on February 20, 2016 and Bell's served its formal Notice of Taking Trial Testimony on Applicant on February 22, 2016.
16. Both during the telephonic meet and confer on February 23, 2016 and by letter dated March 1, 2016, Bell's offered to narrow the dispute by using only a limited set of documents from the February 5 Production during the direct testimony of Ms. Bell. As detailed in the letter, Bell's offered to limit the universe of documents that it might rely upon to 109 documents, 106 of which are single-page photographs demonstrating the use of Bell's' marks since May 7, 2015, the date of Bell's' last production. A true and correct copy of Bell's' March 1, 2016 letter is attached hereto as Exhibit B.
17. During the telephonic meet and confer on February 23, 2016, Applicant refused to accept Bell's' offer to narrow the dispute to the documents which might actually be at issue. Applicant never responded to the written offer in Bell's' March 1, 2016 letter.
18. On March 7, 2016, Applicant informed Bell's it would not attend Ms. Bell's testimonial deposition. A true and correct copy of Applicant's March 7, 2016 letter is attached hereto as Exhibit C.

19. On March 9, 2016, Bell's took the testimonial deposition of Ms. Bell in Kalamazoo, Michigan. Applicant did not attend Ms. Bell's testimonial deposition, and thus did not cross examine Ms. Bell or object to any documents offered into evidence at Ms. Bell's deposition. At the deposition, Bell's did not introduce into evidence all the documents from the February 5 Production.

Pursuant to 28 U.S.C. §1746, I, Fara S. Sunderji, further declare under penalty of perjury that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated: March 16, 2016

/Fara S. Sunderji/
Fara S. Sunderji

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2016, a copy of the foregoing DECLARATION OF FARA S. SUNDERJI IN SUPPORT OF BELL'S' MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION FOR SANCTIONS was served on Applicant via First Class Mail, postage prepaid to:

Ian D. Gates, Esq.
DASCENZO INTELLECTUAL PROPERTY LAW, P.C.
1000 SW Broadway, Suite 1555
Portland, Oregon 97205

_____/klo/
Kaydi Osowski

EXHIBIT A

Osowski, Kaydi

From: Sunderji, Fara
Sent: Friday, February 05, 2016 6:49 PM
To: Ian Gates (ian@dascenzoiplaw.com)
Cc: Robertson, Sarah; Progoff, Susan; Osowski, Kaydi
Subject: Bell's Brewery, Inc. v. Innovation Brewing -- Opposition No. 91215896
Attachments: OPPOSER'S PRETRIAL DISCLOSURES.PDF

Dear Ian:

Attached please find a courtesy copy of our client's Pretrial Disclosures.

We will be sending you a link to download our client's supplemental document production under separate cover.

Finally, we wanted to let you know that our client will be taking the testimony of its Vice President, Ms. Laura Bell, in Kalamazoo, Michigan on March 9, 2016. We will serve the formal notice when the testimony period opens later this month.

Regards,

Fara S. Sunderji

Associate

Co-manager of Dorsey's IP Blog: [The TMCA](#)



DORSEY & WHITNEY LLP
51 West 52nd Street | New York, NY 10019-6119
P: 212.415.9291

CONFIDENTIAL COMMUNICATION

E-mails from this firm normally contain confidential and privileged material, and are for the sole use of the intended recipient. Use or distribution by an unintended recipient is prohibited, and may be a violation of law. If you believe that you received this e-mail in error, please do not read this e-mail or any attached items. Please delete the e-mail and all attachments, including any copies thereof, and inform the sender that you have deleted the e-mail, all attachments and any copies thereof. Thank you.

EXHIBIT B

FARA S. SUNDERJI
Associate
(212) 415-9291
Sunderji.Fara@dorsey.com

March 1, 2016

VIA ELECTRONIC MAIL

Ian D. Gates, Esq.
Dascenzo Intellectual Property Law, P.C.
1000 SW Broadway, Suite 1555
Portland, OR 97205

Re: *Bell's Brewery, Inc. v. Innovation Brewing – Opposition No. 91215896*

Dear Ian:

We write to follow up on our call of last week regarding Applicant's objections to Opposer's supplemental production of February 5, 2016 and Applicant's recently filed Motion for Sanctions.

As we stated during the meet and confer process, Opposer's February 5 supplemental production was entirely proper under the relevant rules, including, but not limited to Federal Rule 26(e). We also maintain that Opposer has a right to use and present evidence relevant to its claim of likelihood of confusion and the "Board generally accepts and considers evidence related to likelihood of confusion for the period up to the time of trial." See *Balenciaga v. Flora Pharmica, LLC*, Opposition No. 91214074, at * 6 (TTAB Sept. 25, 2014) (citing *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 n.18 (TTAB 2014)); see also *General Mills Inc. v. Fage Dairy Processing SA*, 100 USPQ2d 158, n.13 (TTAB 2011). Moreover, "a party is not required, in advance of trial, to disclose each document or other exhibit it plans to introduce." TBMP § 414(7); see also *Katz Communications, Inc. v. Katz Marketing Solutions LLC*, Opposition No. 91191178, at *4, 8 (Feb. 21, 2013) (confirming that "a party is not precluded from making evidence of record simply because it was not provided to the adverse party during discovery.")

From your motion, it appears as if you are relying on Applicant's Document Request No. 15 to claim that Opposer should have produced the February 5 supplemental production during discovery. As you know, Opposer objected to this request on various grounds, including, but not limited to, the fact that the request was premature and purported to impose obligations beyond those required under the Trademark Rules of Practice. Unless it is Applicant's contention that all of the documents in the supplemental production are responsive to other requests, aside from Requests 1 and 2, which only call for "representative samples," your motion for sanctions appears to be baseless. As a result, we request that you withdraw your motion.

Ian D. Gates, Esq.
March 1, 2016
Page 2

However, as an accommodation to Applicant and in an effort to narrow any remaining dispute to the documents that might be used as exhibits during the direct testimony of Ms. Laura Bell, Opposer represents that it will not use any documents from its February 5, 2016 production as exhibits during the direct examination of Ms. Bell, other than the documents listed below:

- Updated Sales Figures - BELLS-003306-003309
- Updated/Corrected Vehicle Wrap Information - BELLS-002331-002334
- Updated Social Media Reach – BELLS-002255-002256
- Documents demonstrating Opposer's use of its marks since May 7, 2015 – See Schedule A for a list of Bates numbers

As noted, Opposer represents that the 106 single page documents identified in Schedule A came into existence after May 7, 2015, the date of Opposer's previous production. For the avoidance of doubt, Opposer is not making any representations or admissions with respect to the documents not identified in this letter other than that Opposer will not rely on those documents during the direct examination of Ms. Bell.

Sincerely,


Fara Sunderji

cc: Joanna T. French, Esq., Hueschen & Sage PLLC

Schedule A

BELLS-002008	BELLS-002154	BELLS-002398
BELLS-002009	BELLS-002157	BELLS-002399
BELLS-002011	BELLS-002161	BELLS-002405
BELLS-002012	BELLS-002163	BELLS-002406
BELLS-002014	BELLS-002166	BELLS-002408
BELLS-002015	BELLS-002167	BELLS-002447
BELLS-002018	BELLS-002178	BELLS-002448
BELLS-002019	BELLS-002190	BELLS-002451
BELLS-002023	BELLS-002196	BELLS-002463
BELLS-002024	BELLS-002201	BELLS-002469
BELLS-002027	BELLS-002213	BELLS-002470
BELLS-002037	BELLS-002226	BELLS-002471
BELLS-002043	BELLS-002232	BELLS-002473
BELLS-002047	BELLS-002234	BELLS-002476
BELLS-002048	BELLS-002235	BELLS-002495
BELLS-002055	BELLS-002236	BELLS-002499
BELLS-002056	BELLS-002240	BELLS-003231
BELLS-002063	BELLS-002245	BELLS-003232
BELLS-002065	BELLS-002252	BELLS-003238
BELLS-002066	BELLS-002253	BELLS-003239
BELLS-002091	BELLS-002257	BELLS-003284
BELLS-002092	BELLS-002294	BELLS-003286
BELLS-002093	BELLS-002308	BELLS-003287
BELLS-002107	BELLS-002310	BELLS-003290
BELLS-002109	BELLS-002317	BELLS-003291
BELLS-002111	BELLS-002318	BELLS-003292
BELLS-002112	BELLS-002320	BELLS-003297
BELLS-002120	BELLS-002322	BELLS-003298
BELLS-002126	BELLS-002327	BELLS-003300
BELLS-002129	BELLS-002328	BELLS-003301
BELLS-002132	BELLS-002372	BELLS-003302
BELLS-002140	BELLS-002374	BELLS-003303
BELLS-002142	BELLS-002375	BELLS-003304
BELLS-002145	BELLS-002389	BELLS-003305
BELLS-002149	BELLS-002391	
BELLS-002151	BELLS-002395	

EXHIBIT C

March 7, 2016

VIA EMAIL – Sunderji.Fara@dorsey.com

Fara S. Sunderji
Dorsey & Whitney LLP
51 West 52nd Street
New York, New York 10019-6119

Re: Bell's Brewery, Inc. v. Innovation Brewing, LLC regarding the INNOVATION
BREWING Mark - Opposition No. 91215896; DIPL File - IVB 401OPP

Dear Fara:

Further to our prior correspondence regarding the forthcoming trial deposition of Laura Bell, I am writing to let you know that Mr. Charles Own at this time no longer plans to attend the deposition and represent Applicant *pro se*. Therefore, Applicant will not be represented during the testimony.

Sincerely,



Ian D. Gates
Email: ian@dascenzoiplaw.com

IDG:nmg