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

Proceeding	91217154
Party	Plaintiff Nasty Pig, Inc.
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Attachments	DIRTY PIG - Reply in Support of Motion to Compel.pdf(29414 bytes )



stated objections. Opposer was compelled to seek relief from the Board only upon Applicant's refusal to respond to the amended interrogatories on this same ground. Under any objective view, it is clear that Opposer has made a sincere, good-faith effort to resolve the dispute presented in this motion – *i.e.*, Applicant's objection that Opposer's interrogatories exceed the subpart limitation set forth in 37 C.F.R. § 2.120(d).

On the merits of the motion, Applicant makes the incredible, and wholly unsupported, claim that Opposer's 26 numbered interrogatories somehow constitute over 200 separate interrogatories. (Opp. Br. at 3). While Opposer believes that each of its 26 numbered interrogatories constitutes a single interrogatory and that any subparts are subsumed within the general topic covered by each interrogatory, even under a very liberal reading, the propounded interrogatories, at most, constitute 52 interrogatories—well within the limitations set forth in 37 C.F.R. § 2.120(d).

For the foregoing reasons, Opposer's motion to compel should be granted.

### **ARGUMENT**

#### **A. The Record Demonstrates that Opposer Made a Good-Faith Effort to Resolve the Instant Discovery Dispute In Accordance with 37 C.F.R. § 2.120(e)(1)**

Applicant's primary argument in opposition to Opposer's motion to compel is its unfounded claim that Opposer did not make a good-faith effort to resolve the instant dispute in accordance with 37 C.F.R. § 2.120(e)(1). Such a claim is refuted by the record, which demonstrates that: (1) Opposer's counsel contacted Applicant's counsel in December 2014 shortly after receiving Applicant's written discovery responses; (2) Opposer's counsel scheduled and conducted a lengthy telephone call on January 8, 2015 in which the parties discussed in depth Applicant's objections to the interrogatories; (3) notwithstanding its disagreement with Applicant's count of the interrogatories, Opposer undertook the time and expense to revise and

substantially pare down its interrogatories in accordance with Applicant's objections; (4) Opposer served its amended set of interrogatories on January 12, 2015; and (5) Applicant once again refused to provide any substantive responses on the same ground that the interrogatories exceeded the 75 subpart limitation. The continued objection by Applicant made clear that the parties had a fundamental difference on this issue which required the Board's assistance.

Under any reasonable read of 37 C.F.R. § 2.120(e)(1), Opposer exhibited a good-faith effort to resolve the instant discovery dispute. Applicant's only argument in response rests on an attempt to distinguish between efforts to "resolve" the original interrogatories versus the amended interrogatories. Such a distinction is wholly arbitrary and finds no basis under the rules. 37 C.F.R. § 2.120(e)(1) provides that the party must have made a good faith effort to resolve with the other party "the issues presented in the motion." All of Opposer's efforts have been aimed at resolving the issue presented on this motion – *i.e.*, Applicant's objection that Opposer's interrogatories exceed the subpart limitation set forth in 37 C.F.R. § 2.120(d). Opposer's service of amended interrogatories was simply further evidence of its good-faith efforts to informally resolve this dispute without the need for Board intervention.<sup>1</sup> While such efforts by Opposer to informally resolve this dispute ultimately proved unsuccessful, it is beyond dispute that such good-faith efforts were made.

**B. Even a Liberal Count of the Amended Interrogatories Confirms that the Requests Satisfy the 75 Subpart Limitation in 37 C.F.R. § 2.120(d)**

As noted in its opening papers, Opposer's Amended First Set of Interrogatories consists of 26 listed interrogatories, nearly 1/3 of which merely seek facts supporting each of Applicant's

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<sup>1</sup> Applicant makes the confusing argument that this issue was "resolved" by virtue of Opposer's service of amended interrogatories. (Opp. Br. at 3). However, whether the issue was resolved was determined by the manner in which Applicant responded to the amended interrogatories. Applicant's refusal in late February 2015 to respond to the amended interrogatories by asserting the same objection revealed that the issue had decidedly not been resolved.

eight affirmative defenses asserted in its Answer. Because each of Opposer's 26 numbered interrogatories seeks information concerning a general topic, Opposer believes that each numbered interrogatory should be considered one interrogatory notwithstanding any subparts that seek specific details on issues subsumed within that general topic. See, e.g., Border Collie Rescue, Inc. v. Ryan, 2005 U.S. Dist. LEXIS 5983, at \*3 (M.D. Fla. Mar. 15, 2005) ("An interrogatory containing subparts directed at eliciting details concerning a 'common theme' should generally be considered a single question").

Nonetheless, even if one adopts a liberal reading that counts such subparts as separate interrogatories, Opposer's amended interrogatories do not exceed 75 as shown below:

**Interrogatory No. 1:**

Identify the persons who are most knowledgeable concerning the adoption and/or use of Applicant's Mark.

**Count: 2**

**Interrogatory No. 2:**

Describe in detail the reason(s) for selecting Applicant's Mark, including but not limited to, the reasons for (a) selecting the term DIRTY; (b) selecting the term PIG; and (c) combining those terms to form Applicant's Mark.

**Count: 1**

**Interrogatory No. 3:**

Identify all persons who or entities which participated in the conception and/or adoption of Applicant's Mark, including a description of the nature of their participation.

**Count: 2**

**Interrogatory No. 4:**

Identify any trademark searches, opinions or other investigations related to the adoption of Applicant's Mark, including, without limitation, the persons involved, the date(s), and the data or results of those searches, opinions or other investigations.

**Count: 4**

**Interrogatory No. 5:**

State whether Applicant was aware of Opposer's NASTY PIG Mark or goods or services offered for sale bearing Opposer's NASTY PIG Mark prior to October 8, 2013, when Applicant filed Application Serial No. 86/085,785.

**Count: 2**

**Interrogatory No. 6:**

State whether Applicant has any documentation (e.g., business plans, marketing plans, memos, correspondence or draft proposals of any kind) reflecting Applicant's bona fide intention, prior to or as of October 8, 2013, to use Applicant's Mark in commerce in connection with each and every good identified in International Class 25 in Application Serial No. 86/085,785.

**Count: 1**

**Interrogatory No. 7:**

Identify each product or service on or in connection with which Applicant (or any person or entity authorized by Applicant) has made use of Applicant's Mark (hereinafter "Applicant's

Products/Services”).

**Count: 1**

**Interrogatory No. 8:**

For each of Applicant’s Products/Services identified in response to Interrogatory No. 7 above, identify:

- (a) The date of first use for each such Product or Service;
- (b) The period of time during which each such Product or Service was or is being offered for sale;
- (c) The geographic area(s) in which each such Product or Service was or is being offered for sale;
- (d) The annual volume of sales for each year from the date of first use to the present, both by dollar amount and unit amount, for each such Product or Service;
- (e) The channels of trade (e.g., types of retail stores, catalogs, mail order, on-line, promotional sales, private sales, etc.) through which each such Product or Service was or is being offered for sale to the ultimate consumer; and
- (f) The type of consumers to whom each such Product or Service is or was offered for sale.

**Count: 6**

**Interrogatory No. 9:**

State whether Applicant’s Mark has been used in connection with any designs, stylizations (including, without limitation, font styles), or logos, and if so, describe the details of each such use.

**Count: 2**

**Interrogatory No. 10:**

Identify all Agreements concerning or relating to Applicant's Mark.

**Count: 1**

**Interrogatory No. 11:**

For each such agreement identified in the response to Interrogatory No. 10 above, identify the date of the agreement and describe the material terms thereof.

**Count: 2**

**Interrogatory No. 12:**

Describe the relationship between Applicant and Fitumi, including, but not limited to, (i) identifying all Agreements between Applicant and Fitumi with respect to Applicant's Mark; and (ii) identifying any attempts by Applicant or Fitumi to register any other marks comprising or consisting of the terms "NASTY" or "PIG."

**Count: 3**

**Interrogatory No. 13:**

Describe the relationship between Applicant and Putnam Accessory Group, including, but not limited to, (i) identifying all Agreements between Applicant and Putnam Accessory Group with respect to Applicant's Mark; and (ii) identifying any attempts by Applicant or Putnam Accessory Group to register any other marks comprising or consisting of the terms "NASTY" or "PIG."

**Count: 3**

**Interrogatory No. 14:**

Identify each web site or web page (whether owned by Applicant or third parties) on or through which Applicant's Mark and/or Applicant's Products/Services have been or are currently being advertised.

**Count: 2**

**Interrogatory No. 15:**

Identify each kind of advertising or marketing material (e.g., point-of-sale material, circular, flyer, poster, sticker, sales sheet, leaflet, brochure, catalog, sign, price list, on-line or email advertisement, print advertisement, radio or television advertisement, or other advertising material or promotional item) that has been used in connection with Applicant's Mark or Applicant's Products/Services.

**Count: 2**

**Interrogatory No. 16:**

Identify all known instances of actual confusion between goods or services bearing Opposer's NASTY PIG Mark and goods or services bearing Applicant's Mark.

**Count: 1**

**Interrogatory No. 17:**

Identify all persons knowledgeable about any such instances referred to in the response to Interrogatory No. 16 above and describe the nature of their knowledge.

**Count: 2**

**Interrogatory No. 18:**

Identify all third party uses, registrations and applications for registration of any marks containing or comprising the term “PIG” in connection with products or services identical or similar to any of Applicant’s Products/Services or Opposer’s goods or services in the United States.

**Count: 6**

**Interrogatory No. 19:**

Set forth all facts that support Applicant’s second affirmative defense that “the Notice of Opposition is barred by the [sic] acquiescence and laches.”

**Count: 1**

**Interrogatory No. 20:**

Set forth all facts that support Applicant’s third affirmative defense that “the Notice of Opposition is barred by the doctrine of waiver and estoppel.”

**Count: 1**

**Interrogatory No. 21:**

Set forth all facts that support Applicant’s fourth affirmative defense that “the Notice of Opposition is barred by Opposer’s failure to challenge the use of third party marks comprised in whole or in part of the term ‘pig’ on related goods and services by unrelated third parties.”

**Count: 1**

**Interrogatory No. 22:**

Set forth all facts that support Applicant's fifth affirmative defense that "Applicant's mark DIRTY PIG falls far outside the scope of protection to which Opposer's mark may extend."

**Count: 1**

**Interrogatory No. 23:**

Set forth all facts that support Applicant's sixth affirmative defense that "there are many 100's of third party 'pig' and 'pig' combination marks of record in the USPTO, thus rendering the 'pig' element of Opposer's mark to be weak."

**Count: 1**

**Interrogatory No. 24:**

Set forth all facts that support Applicant's seventh affirmative defense that "there were as many as 185 live third party live [sic] 'pig' and 'pig' combination marks of record in relevant classes in the USPTO at the time Opposer filed the application that resulted in Reg. No. 2800386, which Opposer admitted were not confusingly similar to Opposer's mark when it stated under oath in the application '... to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.'"

**Count: 1**

**Interrogatory No. 25:**

Set forth all facts that support Applicant's eighth affirmative defense that "except for the within opposition, Opposer has never challenged a 'pig' or 'pig' combination mark before the TTAB, thus acquiescing in the ongoing and continued weakening of its alleged mark."

**Count: 1****Interrogatory No. 26:**

Identify all persons who furnished any information used in responding to these Interrogatories and identify the relevant interrogatories to which their response pertain.

**Count: 2**

Accordingly, Opposer's Amended First Set of Interrogatories comprises at most a total of 52 interrogatories, well within the 75 numerical limitation provided in 37 C.F.R. § 2.120(d).

**CONCLUSION**

For the foregoing reasons, Opposer respectfully requests that the Board issue an order compelling Applicant to respond to Opposer's First Set of Amended Interrogatories.

Dated: New York, New York  
April 16, 2015

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.  
Attorneys for Opposer

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of the foregoing OPPOSER'S REPLY IN FURTHER SUPPORT OF MOTION TO COMPEL APPLICANT'S RESPONSES TO OPPOSER'S AMENDED FIRST SET OF INTERROGATORIES to be sent via first class, postage paid mail to Applicant Janoskians LLC's Attorney and Correspondent of Record, Stephen L. Baker, Esq., Baker and Rannells, P.A., 575 Route 28, Raritan, New Jersey 08869-1354.

Dated: New York, New York  
April 16, 2015

/Scott P. Ceresia/  
Scott P. Ceresia