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

Proceeding	91217290
Party	Defendant Three Notch'd Brewing Company, LLC
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Attachments	2015-03-20 TNB Reply in Support of Motion to Compel (R).pdf(205156 bytes )

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

CHRISTOPHER LOHRING,	)	
	)	
Opposer,	)	
	)	Opposition No. 91217290
v.	)	
	)	Serial No. 85/920,112
THREE NOTCH'D BREWING COMPANY, LLC,	)	
	)	
Applicant.	)	
	)	

**APPLICANT'S REPLY IN SUPPORT OF  
MOTION TO COMPEL DISCOVERY RESPONSES**

Applicant Three Notch'd Brewing Company, LLC ("Applicant"), by counsel, files this Reply in support of its Motion to Compel Discovery Responses pursuant to Rule 37 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice (37 C.F.R. § 2.120), and states as follows:

1. Applicant filed its Motion on February 27, 2015, seeking to compel Opposer's complete responses to Applicant's Interrogatory No. 9 and Request for Production of Documents and Things (RPD) No. 10, which seek, *inter alia*, financial information and documents relating to the sales and advertisement of goods sold under Opposer's Mark.

2. On March 14, 2015, Opposer filed its Response to Applicant's Motion to Compel ("Response"). Opposer's Response includes a nearly five-page "Factual Summary" covering a variety of topics that are irrelevant to Applicant's Motion, including the prosecution of an application not at issue in this proceeding. Indeed, Opposer's Response is premised on the flawed position that since Opposer should prevail on the merits (because it purports to raise evidence of its use of its mark), Applicant should be prevented from discovery that would prove

otherwise. Opposer is not entitled to such a presumption. This is the discovery stage of the proceeding and Opposer is obligated to produce responsive information and documents, and not rest on its pleading to argue discovery is unnecessary.

3. Opposer's Response further purports to summarize Applicant's Counterclaims in this proceeding, stating that "no further details" regarding the Counterclaims are "alleged anywhere" aside from those recited in Opposer's Response. To the contrary, and as clearly stated in the Counterclaims, Applicant alleges that "Opposer has not used...[Opposer's] NOTCH mark for such goods as de-alcoholised beer or porter," and that "Opposer knew at the time of filing of the Statement of Use that his statement that the mark NOTCH had been used in commerce for all goods listed in [Opposer's] Application [for NOTCH] was false, the statement was material and it was made with intent to deceive the U.S. Patent and Trademark Office." Counterclaims ¶¶ 13-14 (emphasis added).<sup>1</sup>

4. In other words, Applicant believes that Opposer had not used Opposer's NOTCH mark with all of the goods listed in its trademark application, despite representing the exact opposite to the USPTO. Accordingly, Applicant requested details regarding Opposer's use of the NOTCH mark, and in particular requested evidence of Opposer's sales and advertisement of goods under the NOTCH mark going back to at least the date of first use stated in Opposer's application. The requested documents are directly relevant to Applicant's Counterclaims, and are particularly important, inasmuch as Opposer has not, to date, produced any evidence of its use in commerce of NOTCH with "de-alcoholised beer" or "porter." In fact, if such use was as clear as Opposer contends, Opposer should be willing to produce the discovery requested so as to establish its position.

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<sup>1</sup> Applicant has similarly asserted in an affirmative defense that "Opposer has abandoned its alleged mark, NOTCH, by non-use of the mark...with respect to the following goods: de-alcoholised beer and porter." Answer at 4.

5. [REDACTED]

6. If, as Opposer contends, the requested documents comprise “competitive business information,” the documents may be produced with confidentiality designations under the parties’ protective order, which has already been agreed to by the parties and is currently in place. Regardless, the documents are responsive and discoverable and will definitively show whether or not Opposer has been using the NOTCH mark as it claims to have been. Therefore, Applicant maintains that there is no basis for Opposer to withhold the documents.

WHEREFORE, Applicant respectfully requests that the Board order that Opposer provide complete responses to Applicant’s Interrogatory No. 9 and RPD No. 10, and produce

any documents responsive to these requests.<sup>2</sup>

Respectfully submitted,

Date: March 20, 2015

By: /s/ Robert C. Van Arnam

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<sup>2</sup> Applicant withdraws its request for attorneys' fees, in light of 37 CFR § 2.127(f). In *Ernest Schultz v. Artisan Entertainment Inc.*, 2001 WL 304050, at \*2 n.7 (TTAB Mar. 28, 2001), the Board stated that it "does award costs and attorney fees," but Applicant now believes this to have been either a misprint or a misstatement.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of March, 2015, the foregoing APPLICANT'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL DISCOVERY RESPONSES AND BRIEF IN SUPPORT THEREOF has been served on Opposer, Christopher Lohring, by mailing a true and correct copy of the same by first class mail, postage prepaid, to:

Daniel N. Smith, Esq.  
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/s/ Robert C. Van Arnam

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