

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

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Mailed: June 25, 2015

Opposition No. 91217290

Christopher Lohring

v.

Three Notch'd Brewing Company, LLC

Cheryl S. Goodman, Administrative Trademark Judge:

This case now comes before the Board for consideration of Applicant's motion, filed February 27, 2015, to compel written discovery. The motion is fully briefed.¹

¹ The Board notes that Opposer improperly redacted the entirety of its argument as well as most of the exhibits in its response to the motion. The redaction of legal arguments and case citations and non-confidential exhibits or non-confidential portions of exhibits is improper. *See e.g., In re Violation of Rule 28(d)*, 635 F.3d 1352, 98 USPQ2d 1144 (Fed. Cir. 2011) (material in brief such as legal argument and case citations improperly marked as confidential; parties must confine their confidentiality markings to information covered by protective order); *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1787 (TTAB 2001) (parties improperly designated entirety of testimony depositions as confidential). Opposer is allowed until TWENTY DAYS from the mailing date of this order to file a copy of its response with an unredacted version of its legal argument and case citations, and to redact only those exhibits (including portions of exhibits e.g., discovery responses) which are truly confidential for the public record, failing which the Board will redesignate TTABVUE #12 as non-confidential in its entirety. *Swiss Watch International Inc. v. Federation of the Swiss Watch Industry*, 101 USPQ2d 1731, 1736 n.12 (TTAB 2012) (providing opposer time to redesignate only that testimony that is truly confidential, otherwise the entirety of the testimony would become part of the public record). Similarly, in its exhibits to the motion to compel, Applicant redacted portions of Opposer's discovery responses that clearly were not confidential under the terms of the Board's protective agreement. Applicant is allowed until TWENTY DAYS from the mailing date of this order to file a copy of its motion with proper redactions of Opposer's discovery responses, i.e., only those that are truly confidential, failing which, the Board will redesignate TTABVUE #7 as non-confidential.

By its motion, Applicant requests that the Board compel Opposer to provide complete responses to Applicant's Interrogatory No. 9 and Request for Production of Documents ("RPD") No. 10.²

Initially, the Board considers whether Applicant made a good faith effort to resolve the discovery dispute prior to filing the motion to compel.

A motion to compel discovery filed with the Board must be supported by a written statement from a moving party that the party or its attorney has made a good faith effort, by conference or correspondence, to resolve the issues with the other party but the parties were unable to resolve their differences. Trademark Rule 2.120(e). *See Amazon Technologies Inc. v. Wax*, 93 USPQ2d 1702, 1705 (TTAB 2009) (discussing good faith effort requirement); *Pioneer Kabushiki Kaisha v. Hitachi*, 74 USPQ2d at 1679 n.11 (motion to compel demonstrated good faith effort and included copies of relevant document requests and responses).

In this case, Applicant, through several emails, letters and telephone conferences with Opposer, has clearly demonstrated a good faith effort to resolve the discovery dispute prior to filing the motion.

Regarding the merits of Applicant's Motion to Compel, Applicant argues that Opposer's supplemental responses to Applicant's discovery requests with respect to Interrogatory No. 9 and RPD No. 10 are incomplete and "rely on objections that are lacking in merit." Both the supplemental response to Interrogatory No. 9 and RPD

² Applicant also sought an award of costs and attorneys' fees but has withdrawn this request in its reply. The Board notes in any event, that it does not award fees, costs or expenses to any party. *Pioneer Kabushiki Kaisha v. Hitachi High Technologies America Inc.*, 74 USPQ2d 1672, 1678 n.8 (TTAB 2005).

No. 10 reference “Exhibit 30.” Applicant’s position is that “Exhibit 30’ fails to provide information responsive to Applicant’s discovery requests.”³

In response, Opposer argues that the motion to compel should be denied as he has provided a “sampling of sales figures,” but otherwise properly objected to these requests, refusing “to produce documents that improperly seek trade secret business information [annual advertising and promotional expenditures] which has no bearing, or value, on the Applicant’s defenses or counterclaims.” The motion is denied, in part, and granted, in part, to the extent set forth below.

Interrogatory No. 9

Applicant’s Interrogatory No. 9 requests that Opposer provide, for the goods referred to in the Notice of Opposition, the “annual dollar volume of Opposer’s sales revenues in the United States of products bearing or sold under the Opposer’s mark, and the annual advertising and promotional expenditures for each year (or for each month for periods of less than a year) associated with the Opposer’s mark from the first sale of each product of goods to the present.”

Opposer’s initial response to this interrogatory request lodged objections on the basis of relevance, scope and that the request was not reasonably calculated to lead to the discovery of admissible evidence. Opposer’s supplemental response to this interrogatory has maintained these objections and as stated supra, referenced Exhibit 30. Opposer’s objections to the information sought in this interrogatory request are overruled. Information such as annual dollar volume of sales, annual

³ Exhibit 30 is a package distribution report for the period from January 2013 to October 2014 for the state of Massachusetts.

advertising and promotional expenditures are relevant to the counterclaims and within the scope of discovery. *See Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 USPQ 147, 149 (TTAB 1985) (sales and advertising figures relevant to issue of abandonment); *J. B. Williams Co. v. Pepsodent G.m.b.H.*, 188 USPQ 577, 579 (TTAB 1975) (relevant to issue of abandonment).

Opposer's supplemental response to this interrogatory request is insufficient as the referenced document (i.e., business record) does not provide annual advertising, promotional expenditures, or annual sales figures from the first sale of goods to the present under the Notch trademark.

Accordingly, the motion to compel is **granted** to the extent that Opposer is allowed until THIRTY (30) DAYS from the mailing date of this order to provide a further supplemental response to this interrogatory stating (in round numbers) the annual dollar volume of sales revenues in the U.S. and the annual advertising and promotional expenditures for each year of sales for the goods identified under the NOTCH trademark from the "first sale of each product of goods to the present."

Request for Production of Documents No. 10

Applicant's Request for Production of Documents No. 10 requests the following: "All documents evidencing Opposer's annual dollar volume of sales in the United States of goods and services on which or in connection with the Opposer's Mark or Variations of Opposer's Mark have been used for every year from the date of first

use to the present. Include all documents which reflect, refer to, relate to or evidence the information given in response to Applicant's Interrogatory No. 11."⁴

Although Opposer's initial response included specific objections as to overbreadth, scope and that the request was not calculated to lead to the discovery of admissible evidence, Opposer's supplemental written response did not include any specific objections. Therefore, the Board deems the prior objections withdrawn. *See e.g., Gassaway v. Jarden Corp.*, 292 F.R.D. 676, 681 (D. Kan. 2013) (court considered objections withdrawn as to defendant's amended responses to interrogatory requests as initial objections omitted in amended responses). Opposer's initial response contained general objections which were maintained in the supplemental response. To the extent that Opposer's general objections provided in his supplemental response are directed to RFP No. 10, they are overruled in their entirety.⁵ *Medtronic, Inc. v. Pacesetter Systems, Inc.*, 222 USPQ 80 (TTAB 1984) (blanket objections to discovery requests are vague and conclusory and will not suffice as any objections must be stated with particularity as to a particular request); *see also DL v. District of Columbia*, 251 F.R.D. 38, 44 (D.D.C. 2008) (court overruled general objections to discovery requests in their entirety because the objections were not applied with sufficient specificity to the particular

⁴ Interrogatory No. 11 requests that Opposer state whether it "obtained any opinion or advice, formal or informal, regarding Applicant's Mark and, if so, for all such opinions or advice, identify the person who requested the opinion or advice, the person rendering the opinion or advice, the person receiving the opinion or advice, the date the opinion or advice was requested and the date the opinion or advice was received."

⁵ The Board also notes that any objection and withholding of documents based on the lack of execution of a mutually agreed to protective order is unwarranted, as the Board's standard protective order is applicable at the commencement of the Board proceeding and the parties are subject to its terms.

discovery request to evaluate the merits and were an insufficient basis for withholding further discovery).

Opposer's supplemental response to this document request is insufficient as the produced document, Exhibit 30, is not directly responsive to the request as it does not provide annual dollar volume sales information from the date of first use to the present.

Accordingly, the motion to compel is **granted in part** with respect to Request for Production of Documents No. 10 to the extent that Opposer is allowed until THIRTY (30) DAYS from the mailing date of this order to produce documents evidencing Opposer's annual dollar volume of sales in the U.S. for goods under the NOTCH mark or variations of the NOTCH mark for every year from the date of first use until the present. The motion to compel is **denied in part** with respect to the portion of Request for Production of Documents No. 10 requesting documents related to information given in response to Interrogatory No. 11 inasmuch as Opposer, in its response to Interrogatory No. 11, has objected on the basis of attorney-client privilege and work product.⁶

In summary, the motion to compel is granted, in part, and denied, in part, as set forth above. In view of the foregoing, Opposer is allowed until THIRTY (30) DAYS from the mailing date of this order in which to provide a supplemental written response to Interrogatory No. 9 and to produce documents responsive to Applicant's Request for Production of Documents No. 10 to the extent indicated herein.

⁶ In conjunction with RFP No. 10, the Board presumes Opposer has provided Applicant with a privilege log in regard to any responsive documents subject to attorney-client or work product privilege. See Fed. R. Civ. P. 26(b)(5).

Proceedings are resumed.

Dates are reset as follows:

Discovery Closes	August 29, 2015
Plaintiff's Pretrial Disclosures	October 13, 2015
30-day testimony period for plaintiff's testimony to close	November 27, 2015
Defendant/Counterclaim Plaintiff's Pretrial Disclosures	December 12, 2015
30-day testimony period for defendant and plaintiff in the counterclaim to close	January 26, 2016
Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due	February 10, 2016
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	March 26, 2016
Counterclaim Plaintiff's Rebuttal Disclosures Due	April 10, 2016
15-day rebuttal period for plaintiff in the counterclaim to close	May 10, 2016
Brief for plaintiff due	July 9, 2016
Brief for defendant and plaintiff in the counterclaim due	August 8, 2016
Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	September 7, 2016
Reply brief, if any, for plaintiff in the counterclaim due	September 22, 2016

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 the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.