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Filing date: **04/23/2015**

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

Proceeding	91219083
Party	Plaintiff Les Trois Petits Cochons, Inc.
Correspondence Address	LES TROIS PETITS COCHONS INC AMSTER ROTHSTEIN & EBENSTEIN LLP 4223 1ST AVENUE BROOKLYN, NY 11232 UNITED STATES ptodocket@arelaw.com
Submission	Motion to Compel Discovery
Filer's Name	Marc J. Jason
Filer's e-mail	ptodocket@arelaw.com
Signature	/Marc J. Jason/
Date	04/23/2015
Attachments	Op- poser's_Motion_to_Compel_and_Suspend_Pending_Determination_of_Motion.pdf(243894 bytes) Jason_Declaration_In_Support_of_Opposer's_Motion_to_Compel_and_Suspend_Pending_Determination_of_Motion.pdf(673638 bytes)

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

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LES TROIS PETITS COCHONS, INC.,	:	Opposition No. 91219083
Opposer,	:	
v.	:	Application Serial No. 86/101,426
	:	Filing Date: October 25, 2013
	:	Publication Date: July 1, 2014
PETIT COCHON KTK, LLC,	:	Trademark: LE PETIT COCHON
	:	
Applicant.	:	Application Serial No. 86/157,900
	:	Filing Date: January 6, 2014
	:	Publication Date: July 1, 2014
	:	Trademark: LE PETIT COCHON FRENCH CAFÉ & BOUTIQUE

-----X

**OPPOSER’S MOTION TO COMPEL AND TO SUSPEND
PENDING DETERMINATION OF MOTION**

Opposer Les Trois Petits Cochons, Inc. (“Opposer”) brings this Motion pursuant to 37 C.F.R. § 2.120(e). Opposer seeks an Order: (i) compelling applicant Petit Cochon KTK, LLC (“Applicant”) to make its initial disclosures; (ii) compelling Applicant respond to Opposer’s First Set of Interrogatories and Document Requests To Applicant (the “Discovery Requests”) without objection; (iii) indicating that Default will be entered against Applicant if it does not respond to the Discovery Requests within the time frame ordered by the Board; and (iv) suspending all other dates pending the Board’s determination of this Motion.

I. FACTS

This Opposition proceeding was filed by Opposer on October 29, 2014. On the same date, the Board issued its Order setting the trial dates, the deadline for the Applicant to answer, and various other deadlines including the due dates for the parties to conduct a discovery conference (January 7, 2015) and exchange initial disclosures (February 6, 2015).

In accordance with the scheduling Order, Applicant filed its answer on December 8, 2014; and counsel for the parties, Marc Jason for Opposer and Christopher Day for Applicant, conducted a discovery conference by telephone on January 7, 2015.

On February 10, 2015, Opposer served Applicant with its initial disclosures. (Jason Decl. ¶ 2.)¹ Opposer did not receive, and has not received, initial disclosures from Applicant. (Jason Decl. ¶ 3.) By email on February 10, 2015, Mr. Jason asked Mr. Day when he would be providing Applicant's initial disclosures. (Jason Decl. ¶ 4, Ex. A.) Mr. Jason did not receive a response to the email from Mr. Day. (Jason Decl. ¶ 5.)

On February 18, 2015, Mr. Jason sent another email to Mr. Day asking when Applicant's initial disclosures would be provided. (Jason Decl. ¶ 6, Ex. B.) Once again, Mr. Jason did not receive a response to the email from Mr. Day. (Jason Decl. ¶ 7.)

On March 3, 2015, Mr. Jason served Mr. Day with Opposer's Discovery Requests. (Jason Decl. ¶ 8, Ex. C.) The Discovery Requests were served by email and by regular U.S. Mail. (*Id.*)

In the email to Mr. Day attaching the Discovery Requests, Mr. Jason asked Mr. Day to provide Applicant's initial disclosures as soon as possible. (Jason Decl. ¶ 9, Ex. D.) Once again, Mr. Jason received no response from Mr. Day. (Jason Decl. ¶ 10.)

On or about March 3, 2015, Mr. Jason attempted to telephone Mr. Day to inquire about the status of Applicant's initial disclosures. (Jason Decl. ¶ 11.) Mr. Jason left a voicemail message with Mr. Day's office, but Mr. Jason never received a return call from Mr. Day. (Jason Decl. ¶ 12.)

As of the date of this Motion, Opposer has not received initial disclosures from Applicant. (Jason Decl. ¶ 13.) Moreover, although responses to the Discovery Requests were

¹ "Jason Decl." refers to the Declaration of Marc J. Jason filed herewith.

due from Applicant on April 6, 2015, no responses or objections have been received. (Jason Decl. ¶ 14.)

As reflected above, Opposer has made a good faith effort to contact Applicant's counsel to resolve the issues presented in this Motion, but has been unable to do so. Applicant has not been responsive to Opposer's emails and telephone call.

II. LEGAL ARGUMENT

37 C.F.R. § 2.120(e) provides that “[i]f a party fails to make required initial disclosures . . . or if a party . . . fails to answer . . . any interrogatory, or fails to produce and permit the inspection and copying of any document or thing, the party entitled to disclosure or seeking discovery may file a motion to compel disclosure . . . or an answer, or production and an opportunity to inspect and copy.” 37 C.F.R. § 2.120(e)(1).

The Trademark Trial and Appeal Board Practice and Procedure Manual (“TBMP”) confirms that a motion to compel is available in the event of a failure to provide required disclosures or discovery requested by means of interrogatories and requests for production of documents and things. T.B.M.P. § 523.01.

The TBMP also provides that if a party has failed to file any responses to interrogatories or document requests, that party may be found to have forfeited its right to object to the discovery requests on their merits, i.e., to object that the information sought by the request is irrelevant, overly broad, unduly vague and ambiguous, burdensome and oppressive, or not likely to lead to the discovery of admissible evidence. T.B.M.P. § 527.01 (c).

III. CONCLUSION

In this case, since Applicant has completely ignored its discovery obligations by not providing initial disclosures, not providing interrogatory responses, and not producing documents in response to the Discovery Requests, it is respectfully submitted that the Board

should issue an Order compelling Applicant to provide initial disclosures, and answer all the Discovery Requests and produce all documents requested without objection.

It is further respectfully requested that the Board's Order indicate that if responses to the Discovery Requests (including documents) are not provided by the time set by the Board, a default judgment will be entered against Applicant. *See* T.B.M.P. § 527.01(a); Fed. R. Civ. P. 37(b)(2)(A)(vi).

Lastly, it is respectfully requested that the Board stay all other dates pending a resolution of this Motion.

Respectfully submitted,

AMSTER, ROTHSTEIN & EBENSTEIN LLP
Attorneys for Opposer
90 Park Avenue
New York, New York 10016
(212) 336-8000

Dated: New York, New York
April 22, 2015

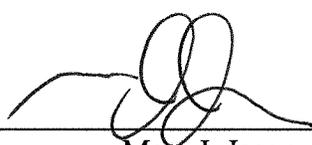
By: 

Anthony F. Lo Cicero
Marc J. Jason

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSER'S MOTION TO COMPEL AND TO SUSPEND PENDING DETERMINATION OF MOTION has been served on Applicant Petit Cochon KTK, LLC by delivering said copy via regular U.S. Mail and email to Applicant's attorney of record, as follows:

Christopher J. Day, Esq.
Law Office of Christopher Day
9977 North 90th Street, Suite 155
Scottsdale, AZ 85258
chris@daylawfirm.com

By: 

Marc J. Jason

Dated: New York, New York
April 22, 2015

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

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**DECLARATION OF MARC J. JASON IN SUPPORT OF OPPOSER'S MOTION TO
COMPEL AND TO SUSPEND PENDING DETERMINATION OF MOTION**

I, Marc J. Jason, hereby declare and state as follows:

1. I am a senior counsel at Amster, Rothstein & Ebenstein LLP, attorneys for opposer Les Trois Petits Cochons, Inc. ("Opposer") in this Opposition Proceeding. I make this declaration in support of Opposer's motion to compel initial disclosures and discovery responses from applicant Petit Cochon KTK, LLC ("Applicant"), and to suspend the proceeding pending determination of the motion.

2. On February 10, 2015, I served Applicant's counsel, Christopher Day, with Opposer's initial disclosures by email and regular U.S. Mail.

3. Opposer has not received initial disclosures from Applicant.

4. By email dated February 10, 2015, I asked Mr. Day when he would be providing Applicant's initial disclosures. A true and correct copy of this email is attached hereto as Exhibit A.

5. I did not receive a response from Mr. Day to my February 10, 2015 email.

6. On February 18, 2015, I sent another email to Mr. Day asking when Applicant's initial disclosures would be provided. A true and correct copy of this email is attached hereto as Exhibit B.

7. I did not receive a response from Mr. Day to my February 18, 2015 email.

8. On March 3, 2015, I served Mr. Day with Opposer's First Set of Interrogatories and Document Requests To Applicant (the "Discovery Requests") by email and regular U.S. Mail. A true and correct copy of the Discovery Requests is attached hereto as Exhibit C.

9. In my email to Mr. Day dated March 3, 2015, attaching the Discovery Requests, I asked Mr. Day to provide Applicant's initial disclosures as soon as possible. A true and correct copy of this email is attached hereto as Exhibit D.

10. I did not receive a response from Mr. Day to my March 3, 2015 email.

11. On or about March 3, 2015, I attempted to telephone Mr. Day at his office (tel: 602-258-4440) to inquire about the status of Applicant's initial disclosures. Mr. Day was not available and I left a voicemail message with Mr. Day's office.

12. I never received a return telephone call or any communication whatsoever from Mr. Day.

13. As of the date of this Declaration, Opposer has not received initial disclosures from Applicant.

14. As of the date of this Declaration, Opposer has not received any responses or objections to the Discovery Requests from Applicant.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed at New York, New York
April 22, 2015



Marc J. Jason

EXHIBIT A

Marc Jason

From: Marc Jason
Sent: Tuesday, February 10, 2015 11:44 AM
To: chris@daylawfirm.com
Cc: Anthony LoCicero
Subject: Trois Petits Cochons/Le Petit Cochon
Attachments: LTPC Initial Disclosures.pdf

Dear Chris:

Attached are the Initial Disclosures of Opposer Les Trois Petits Cochons. Please let me know when we will be receiving your disclosures.

Best,
Marc

Marc J. Jason, Esq.
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016
(212) 336-8099 (direct)
(212) 336-8000 (main)
(212) 336-8001 (fax)
mjason@arelaw.com

EXHIBIT B

Marc Jason

From: Marc Jason
Sent: Wednesday, February 18, 2015 11:50 AM
To: chris@daylawfirm.com
Cc: Anthony LoCicero
Subject: FW: Trois Petits Cochons/Le Petit Cochon
Attachments: LTPC Initial Disclosures.pdf

Dear Chris:

Following up on my email below, please advise as soon as possible when we will be receiving your initial disclosures.

Best,
Marc

Marc J. Jason, Esq.
Amster, Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016
(212) 336-8099 (direct)
(212) 336-8000 (main)
(212) 336-8001 (fax)
mjason@arelaw.com

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To: chris@daylawfirm.com
Cc: Anthony LoCicero
Subject: Trois Petits Cochons/Le Petit Cochon

Dear Chris:

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Marc

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New York, NY 10016
(212) 336-8099 (direct)
(212) 336-8000 (main)
(212) 336-8001 (fax)
mjason@arelaw.com

EXHIBIT C

3. As used herein, the term "Opposer's Marks" shall mean Opposer's TROIS PETITS COCHONS THREE LITTLE PIGS, TROIS PETITS COCHONS and THREE LITTLE PIGS marks.

4. As used herein, the term "Applicant's Marks" shall mean Applicant's LE PETIT COCHON and LE PETIT COCHON FRENCH CAFÉ & BOUTIQUE marks, either alone or in combination with words, symbols, designs or logos, as a trademark, trade name, service mark or otherwise.

INTERROGATORIES

1. Identify each product or service offered under Applicant's Marks.
2. With respect to each product or service offered under Applicant's Marks, state:
 - a. the date of first use;
 - b. the date of first use in commerce; and
 - c. whether such use has been continuous without interruption to the present, and, if not, the date(s) of non-use.
3. State whether Applicant is aware of any instances of actual confusion between Applicant's Marks and/or Opposer on the one hand, and Opposer and/or any of Opposer's Marks on the other hand; and if so, provide all relevant specifics, including the name and contact information of the person who was confused, to whom with Applicant he or she spoke, when and under what circumstances, what he or she said, and what, if any, response was given by or on behalf of Applicant, and identify any and all communications on the issue.
4. State whether Applicant received any inquiries as to whether or not there is a relationship between Applicant and Opposer; and if so, provide all relevant specifics, including the name and contact information of the person who made the inquiry, to whom with Applicant

he or she spoke, when and under what circumstances, what he or she said, what, if any, response was given by or on behalf of Applicant, and identify any and all communications on the issue.

5. Identify the individual(s) at Applicant who selected Applicant's Marks.

6. State whether the individual(s) who designed Applicant's Marks referenced Opposer or any of Opposer's Marks when selecting Applicant's Mark.

7. Identify the individual(s) at Applicant who decided to file an application to register Applicant's Marks.

8. Identify all trade shows attended by Applicant within the past three years, including the name(s) and date(s) of the show(s), and the individual(s) who attended the shows.

DOCUMENT REQUESTS

1. All documents concerning and/or referencing Opposer and/or any of Opposer's Marks.

2. All documents concerning any investigation conducted by or on behalf of Applicant regarding Opposer and/or any of Opposer's Marks.

3. All documents concerning any surveys, market research or market studies undertaken by or on behalf of Applicant in connection with Applicant's Marks.

4. All documents constituting or relating to the development and/or creation of any goods or services covered by Applicant's Marks, including hang tags, labels, packaging, menus, promotional material, *etc.*

5. For each product or service offered or sold under Applicant's Marks, documents sufficient to show the dates each of these products or services were first offered for sale and sold and/or provided, and if applicable, the dates each of these products or services were discontinued.

6. Documents sufficient to identify all the methods by which products or services offered or to be offered under Applicant's Marks have been or are intended to be advertised and promoted (*e.g.*, in newspaper advertisements, web sites, television commercials, *etc.*).

7. All documents which refer or relate to the actual and intended marketing, advertising and promotion of Applicant's products or services offered for sale or sold or to be sold or otherwise provided under Applicant's Marks.

8. All third party articles (including news and entertainment articles) concerning Applicant's use of or intended use of Applicant's Marks.

9. Documents sufficient to identify Applicant's customers for goods or services sold and/or provided under Applicant's Marks.

10. Documents sufficient to identify all locations where goods or services under Applicant's Marks are advertised and/or offered and/or sold and/or rendered.

11. Documents sufficient to identify all websites where goods or services under Applicant's Marks are advertised and/or offered and/or sold and/or rendered.

12. Specimens of menus, labels, order forms and packaging for Applicant's products or services bearing or sold or provided under Applicant's Marks.

13. Documents sufficient to describe the channels of trade through which products or services offered under Applicant's Marks are, were and are intended to be offered, including, without limitation, any retail stores and online websites where such products are or were intended to be sold or offered for sale.

14. All documents concerning investigations such as trademark, service mark, trade name, or corporate name searches conducted by or at the direction of Applicant relating to the conception, creation, use and/or registration of Applicant's Marks.

15. All documents which refer or relate to a likelihood of confusion between one or more of Opposer's Marks and/or Applicant on the one hand, and Applicant's Marks and/or Opposer on the other hand.

16. All documents which refer or relate to instances of actual confusion between one or more of Opposer's Marks and/or Applicant on the one hand, and Applicant's Marks and/or Opposer on the other hand, including, without limitation, any misdirected mail, telephone calls, orders, inquiries or complaints that Applicant received that were intended for Opposer or which referenced one or more of Opposer's Marks.

17. All documents which refer or relate to any inquiries regarding a relationship between Applicant and Opposer.

18. All documents which reflect when Applicant's knowledge of one or more of Opposer's Marks began.

19. All documents which refer or relate to any investigations, shopping, market study, survey or poll (including pretests conducted by Applicant or any person or persons acting for or on behalf of Applicant) concerning any matter relating to the within Opposition, including but not limited to: (a) Applicant's use or intended use of Applicant's Marks; or (b) the likelihood of confusion between one or more of Opposer's Marks and Applicant's Marks; or (c) the likelihood of confusion between Applicant and Opposer.

20. All documents relating to correspondence or communications with third parties concerning any of the issues relevant to the instant proceeding, including, without limitation, the strength of Applicant's Marks and the similarity or likelihood of confusion between Applicant's Marks and any of Opposer's Marks.

21. All federal trademark applications or registrations Applicant intends to make of record in this proceeding.

22. Documents sufficient to show Applicant's total annual gross revenue for sales of goods and services sold under Applicant's Marks in the United States since such sales began.

23. All business proposals, business plans, marketing plans, advertising plans, and advertising campaigns concerning products or services sold or provided or intended to be sold or provided under Applicant's Marks.

AMSTER, ROTHSTEIN & EBENSTEIN LLP
Attorneys for Opposer
90 Park Avenue
New York, New York 10016
(212) 336-8000

Dated: New York, New York
March 3, 2015

By: 

Anthony F. Lo Cicero
Marc J. Jason

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSER'S FIRST SET OF INTERROGATORIES AND DOCUMENT REQUESTS TO APPLICANT has been served on Applicant Petit Cochon KTK, LLC by delivering said copy via regular U.S. Mail and email to Applicant's attorney of record, as follows:

Christopher J. Day, Esq.
Law Office of Christopher Day
9977 North 90th Street, Suite 155
Scottsdale, AZ 85258
chris@daylawfirm.com

By: _____


Marc J. Jason

Dated: New York, New York
March 3, 2015

EXHIBIT D

Marc Jason

From: Marc Jason
Sent: Tuesday, March 03, 2015 2:12 PM
To: chris@daylawfirm.com
Cc: Anthony LoCicero
Subject: Trois Petits Cochons/Le Petit Cochon
Attachments: Les_Trois_Petits_Cochons_First_Set_of_Interrogatories_&_Document_Request....pdf

Dear Chris:

Attached please find Opposer's first set of interrogatories and document requests.

We still have not received Applicant's initial disclosures. Please provide them to us as soon as possible.

Best,
Marc

Marc J. Jason, Esq.
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mjason@arelaw.com

From: Marc Jason
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To: chris@daylawfirm.com

Cc: Anthony LoCicero

Subject: Trois Petits Cochons/Le Petit Cochon

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