

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

CME

Mailed: September 1, 2016

Opposition No. 91219888

4Life Trademarks, LLC

v.

Senuvo LLC

Christen M. English, Interlocutory Attorney:

This case now comes up on Opposer's motion to compel, filed May 12, 2016,¹ and Opposer's motion to strike Applicant's response brief, which is incorporated in Opposer's reply brief in support of its motion to compel, filed June 14, 2016.² Opposer's motion to compel is fully briefed. Applicant opposes Opposer's motion to strike.

The Board first considers Opposer's motion to strike Applicant's response brief as untimely. Opposer argues that it served its motion via email on May 12, 2016, pursuant to an agreement between the parties to serve "all documents

¹ Opposer's motion includes a request to compel Applicant to produce an expert report as required by Fed. R. Civ. P. 26(a)(2) or to strike Applicant's expert disclosure. In its response brief, Applicant indicates that it "does not intend to use the previously designated expert." 17 TTABUE 7. Accordingly, Opposer's motion is moot and will be given no further consideration to the extent it seeks to compel or strike Applicant's expert witness.

² Opposer specifically argues that the "Board should not take [Applicant's response brief] into account in deciding the Motion." 18 TTABVUE 2. Notwithstanding Opposer's phrasing, Opposer is effectively asking the Board to strike Applicant's response, and therefore, the Board treats Opposer's argument as a motion to strike even though, as a general rule, motions should not be embedded in other filings.

electronically,”³ and therefore, Applicant’s deadline to respond was May 27, 2016. 18 TTABVUE 2. Applicant did not file its response brief until June 1, 2016.

In response, Applicant argues that while the parties had “an initial understanding ... to serve documents electronically ... the parties’ devolved to a practice of providing service by standard physical delivery with a courtesy copy sent by email.” 19 TTABVUE 2. In support of its position, Applicant has submitted 10 certificates of service⁴ for various documents that Opposer served in this proceeding *after* the parties agreed to serve papers via email. Six certificates of service indicate service via either U.S. or express mail and e-mail, without identifying whether one method of service is courtesy service only, and three certificates of service indicate service by Federal Express only.⁵ *Id.* 6-16.

It is clear from Opposer’s certificates of service that the parties did not adhere to their agreement to serve all documents electronically. Indeed, the certificate of service attached to Opposer’s motion to compel indicates service via electronic means and U.S. mail, again without distinguishing whether one method of service is courtesy service only. 15 TTABVUE 10.

In view of the foregoing, Opposer’s argument that Applicant’s response brief is untimely is not well-taken. In the circumstances, it was entirely appropriate that

³ Opposer attached to its combined reply and motion to strike a copy of an October 14, 2015 email between the parties evidencing their agreement to serve papers via email. 18 TTABVUE 12-13.

⁴ The Board has not included in this number the certificate of service for Opposer’s motion to compel or reply brief in support thereof. 19 TTABVUE 14 and 17.

⁵ The duplicate certificate of service for Opposer’s first set of document requests also is not included in these numbers. 19 TTABVUE 10.

Applicant added five days to its response time pursuant to Trademark Rule 2.119(c). As such, Applicant's response, filed June 1, 2016 is timely, and the Board has considered it.

The parties are advised that, based on their conduct, any prior agreement to serve all papers electronically has been rescinded. If the parties wish to stipulate to email service going forward, the parties must file a written stipulation with the Board to that effect.

Turning to Opposer's motion to compel,⁶ the Board has carefully considered all of the parties' arguments with respect to Opposer's motion, presumes the parties' familiarity with the factual bases for their filings, and does not recount the facts or arguments here, except as necessary to explain the Board's decision.

The Board finds that Opposer made a good faith effort to resolve its discovery dispute prior to filing its motion to compel. Trademark Rule 2.120(e). Accordingly, the Board considers the discovery requests at issue in Opposer's motion.

Interrogatory No. 4

This interrogatory asks Applicant to identify each website it operates through which it has sold products⁷ and the dates during which such products "have been made available for sale on that website." 15 TTABVUE 69. In response, Applicant

⁶ Opposer's motion does not include separate copies of its interrogatories and document requests. The Board will assume that the interrogatories and document requests are accurately reproduced in Applicant's responses, served March 2, 2016.

⁷ More specifically, the interrogatory asks for information regarding "Your Products." Because Opposer did not file a separate copy of its discovery requests, the Board does not know how Opposer has defined the term "Your Products," but regardless of Opposer's definition, Applicant's verified and supplemental response as ordered herein may be limited to the goods set forth in the involved application.

has identified four websites and the “at least as early as [year]” that it began selling products through each identified website. *Id.* Opposer argues that Applicant’s response is deficient because Applicant has not identified the specific date (month, day, year) it commenced sales through each identified website nor has Applicant specified whether products are still being sold through each website, and if not, the date it discontinued sales. The Board agrees.

Accordingly, Opposer’s motion is granted and Applicant is ordered, within thirty days of the mailing date of this order, to serve on Opposer a supplemental written and verified response to this interrogatory, without objections on the merits,⁸ specifying for each website: (1) the date, by month, day and year, that it commenced selling products; and (2) whether products are still being sold, and if not, when Applicant discontinued sales.⁹ If this information is not available, Applicant shall state that in its verified, supplemental response and explain the efforts it made to locate the requested information.

⁸ As addressed *supra*, pp. 5-6, Applicant’s boilerplate general objections are improper, and therefore, are overruled.

“The Board generally is not inclined to hold a party to have waived the right to make privilege claims, even where the party is otherwise held to have waived its right to make objections to the merits of discovery requests....” *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1554 (TTAB 2000). “Objections going to the merits of a discovery request include those which challenge the request as overly broad, unduly vague and ambiguous, burdensome and oppressive, as seeking non-discoverable information on expert witnesses, or as not calculated to lead to the discovery of admissible evidence. In contrast, claims that information sought by a discovery request is ... subject to attorney-client or a like privilege, or comprises attorney work product, goes not to the merits of the request but to a characteristic or attribute of the responsive information.” *Id.*

⁹ In its response brief, Applicant asserts that it “did not specify an ending date for [its internet] sales because there is no ending date as the sales are ongoing.” 17 TTABVUE 3. This information is responsive to Interrogatory No. 4 and should be included in Applicant’s verified, supplemental response ordered herein.

Interrogatory No. 9

This interrogatory asks Applicant to identify its plans to expand use of the SENUVO mark in commerce, including “product expansion, geographic expansion, distribution networks, or otherwise.” 15 TTABVUE 70. Applicant has asserted boilerplate objections that this interrogatory is “vague ... ambiguous, overbroad, irrelevant and burdensome” and responded that it intends to use the mark SENUVO “for the goods and services described” in the involved application. *Id.* at 70-71.

Boilerplate blanket objections are fundamentally improper as a party must articulate objections with particularity. Federal R. Civ. P. 33(b)(4) (“The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived ...”); *see also Amazon Techs., Inc. v. Wax*, 93 USPQ2d 1702, 1704 (TTAB 2009) (recognizing that Fed. R. Civ. P. 33(b)(4) “make[s] clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived...”); *Metronic, Inc. v. Pacesetter Sys., Inc.*, 222 USPQ 80, 83 (TTAB 1984) (“[I]t is incumbent upon a party who has been served with interrogatories to respond by articulating his objections (with particularity) to those interrogatories which he believes to be objectionable, and by providing the information sought in those interrogatories which he believes to be proper”).

In its response to Opposer’s motion, Applicant maintains that Interrogatory No. 9 is over broad and ambiguous (17 TTABVUE 4), but Applicant has not explained the basis for this assertion or otherwise established that its boilerplate objections

are valid. Moreover, a party's plans for expansion is discoverable information. *See* TBMP § 414(8) (2016); *see also* TBMP § 414 (16) (regarding the discoverability of geographic areas of distribution). Accordingly, Applicant's boilerplate objections to Interrogatory No. 9 are overruled.

In addition, the Board finds that Applicant's current response to this interrogatory is not fully responsive. Accordingly, Opposer's motion to compel is granted with respect to Interrogatory No. 9 and Applicant is ordered, within thirty days of the mailing date of this order, to serve on Opposer a supplemental written and verified response to this interrogatory, without objections on the merits. *Amazon Techs.*, 93 USPQ2d at 1705-06 (overruling opposer's boilerplate objections as improper and ordering opposer to serve supplemental discovery responses without objections on the merits). If Applicant has no plans to expand, it must state that in its verified, supplemental response.

Interrogatory No. 14

This interrogatory requests that Applicant identify the "factual basis for [its] contention that Opposer cannot expand" the use of its mark to goods in International Classes 3, 5, 30 and 32 "that were claimed by Applicant" in the involved application.¹⁰ 15 TTABVUE 72. Opposer argues that the answer Applicant has provided is not responsive to the request. 15 TTABVUE 6. Applicant argues that its answer is responsive, and further asserts that it is not obligated "to identify its fact witnesses or other trial evidence prior to trial." 17 TTABVUE 4-5.

¹⁰ This is not a true affirmative defense, but it is allowed because it amplifies Applicant's denials of Opposer's likelihood of confusion claim.

A party need not disclose each document or exhibit that it plans to introduce prior to trial, but the Trademark Rules were amended in 2007 to provide that a party must identify in pretrial disclosures the witnesses that it expects may testify on its behalf. Trademark Rule 2.121(e); MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES, 72 Fed. Reg. 42242, 42246 (August 1, 2007); *see also* TBMP § 414(7). Interrogatory No. 14, however, does not ask Applicant to identify witnesses who may testify or documents on which Applicant may rely at trial. Rather, the interrogatory merely asks Applicant to set forth the “factual basis for [its] contention that Opposer cannot expand” use of its mark to the goods identified in the involved application. In response to this interrogatory, Applicant has not identified any such facts, but merely restated the theory of its “affirmative defense.”

Accordingly, Opposer’s motion to compel is granted with respect to Interrogatory No. 14, and Applicant is ordered within thirty days of the mailing date of this order to serve on Opposer a supplemental written and verified response to this interrogatory, without objections on the merits. If Applicant is not aware of any facts to support its “affirmative defense,” it shall so state this in its verified, supplemental response.

Interrogatory No. 15

By this interrogatory, Opposer seeks the facts upon which Applicant relies in asserting an affirmative defense of unclean hands.¹¹ 15 TTABVUE 73. Applicant’s

¹¹ Affirmative defenses, like claims, must be supported by enough factual background and detail to fairly place the claimant on notice of the basis for the defenses. *See IdeasOne Inc.*

response that “it is in the process of collecting information” through discovery to support an affirmative defense of unclean hands is unresponsive.¹² *Id.* Accordingly, Opposer’s motion to compel is granted with respect to Interrogatory No. 15, and Applicant is ordered, within thirty days of the mailing date of this order, to serve on Opposer a supplemental written and verified response to this interrogatory, without objections on the merits. If Applicant is not aware of any facts supporting an affirmative defense of unclean hands, it shall so state in its verified, supplemental response.

Interrogatory No. 16

Interrogatory No. 16 asks Applicant to “set forth [its] proposed amended recitation of goods” set forth in its seventh affirmative defense “incorporating all of [its] proposed restrictions and limitations.” *Id.* Applicant has responded that its “proposal for a possible amendment to its description of goods and services¹³ is sufficiently set forth” in its seventh affirmative defense. *Id.* As its seventh affirmative defense, Applicant has pleaded that it “should be able to register its

v. Nationwide Better Health Inc., 89 USPQ2d 1952, 1953 (TTAB 2009); *Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999) (noting that the primary purpose of pleadings “is to give fair notice of the claims or defenses asserted”); *see also* TBMP § 311.02(b). Applicant’s affirmative defense of unclean hands is not sufficiently pleaded as it consists merely of a bald conclusory allegation.

¹² Applicant asserts that Opposer “has not produced a single document in response to [Applicant’s] two document requests” and argues that “Opposer cannot ignore Applicant’s outstanding discovery requests and simultaneously demand ‘all facts’ supporting Applicant’s ongoing investigation of its unclean hands defense....” 17 TTABVUE 5. This argument is wholly without merit. *Miss Am. Pageant v. Petite Prods. Inc.*, 17 USPQ2d 1067, 1070 (TTAB 1990) (“[A] party is not relieved of its discovery obligations in spite of the fact that its adverse party has wrongfully failed to fulfill its own obligations.”).

¹³ Although Applicant has referenced services, the involved application does include any services.

mark with the additional limiting descriptor ‘marketed via network marketing,’” but Applicant only references the Class 5 goods in its involved application so it is unclear whether Applicant proposes to add the trade channel restriction “marketed via network marketing” to each class of goods set forth in the involved application or only the goods in Class 5.

Accordingly, Opposer’s motion is granted but only to the extent that Applicant is ordered, within thirty days of the mailing date of this order, to serve on Opposer a supplemental written and verified response to this interrogatory, without objections on the merits, indicating whether it proposes to add the specified trade channel restriction “marketed via network marketing” to the goods in each class set forth in the involved application or only to the goods identified in Class 5.

Interrogatory No. 17

By this interrogatory, Opposer asks Applicant to “set forth [its] proposed amended recitation of goods” for Opposer’s pleaded registration set forth in Applicant’s counterclaim. *Id.* Applicant has responded that it has sufficiently specified its proposed restriction in its counterclaim. *Id.* The Board agrees because, in its counterclaim, Applicant specifically proposes that limiting the goods in Opposer’s pleaded registration to “dietary supplements marketed via network marketing,” will “eliminate any alleged likelihood of confusion between the goods sold under the parties’ respective marks.” 8 TTABVUE 40 (internal quotations omitted). No further specification is needed. Accordingly, Opposer’s motion is denied with respect to Interrogatory No. 17.

Document Requests

Applicant has responded to each of Opposer's document requests as follows:

Applicant objects to this Request to the extent it seeks information and/or production of documents protected by the attorney-client privilege, the work product doctrine or any other applicable privilege. Applicant further objects to this request to the extent it seeks materials outside the custody and control of Applicant or to the extent the request seeks documents available from another source that is more convenient, less burdensome on Applicant or less expensive to produce. Subject to and without waiving its General and specific objections, Applicant will produce relevant, non-privileged documents, if any, responsive to this request.

15 TTABVUE 79-93.

This response is improper for a number of reasons:

1. As set forth above, Applicant's boilerplate general objections are improper, and in its response brief, Applicant has not explained the basis for its boilerplate objections or established why such objections are warranted.
2. A party asserting attorney-client privilege or the work product doctrine must: "(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A)(i)-(ii). Applicant has not complied with the second requirement for asserting a claim of privilege.
3. A party responding to a document request must state whether or not there are responsive documents and, if there are responsive documents, whether they will be produced at a specified reasonable time or withheld based on a

claim of privilege. Fed. R. Civ. P. 34(b)(2)(B); *No Fear*, 54 USPQ2d at 1555. Applicant has not complied with this requirement. In addition, Applicant's assertion that it "will produce relevant, non-privileged documents, if any, responsive to the request" suggests that Applicant has not actually searched for responsive documents and, therefore, has no idea whether there are documents responsive to particular requests for production. *No Fear*, 54 USPQ2d at 1555-56.

4. Fed. R. Civ. P. 34(b)(2)(E) provides that a "party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Applicant has produced 76 documents in response to Opposer's document requests.¹⁴ Notwithstanding Applicant's arguments to the contrary, it is clear from a review of the documents (attached to Opposer's reply brief) that the documents have not been produced as they are kept in the usual course of business.

In addition to the foregoing, Opposer argues that Applicant should have produced a document titled "Senuvo Declarations & Notices to Enrollers Using Paper Membership Applications," which is "explicitly identified in the document produced by Applicant [at] Bates number SV000144."¹⁵ 15 TTABVUE 8. The

¹⁴ Applicant served additional documents with its initial disclosures. 17 TTABVUE 6.

¹⁵ In its motion, Opposer asserts that Applicant also did not produce another document identified in Bates Number SV000144, namely, "Senuvo's Policies and Procedures, including the Terms and Conditions herein." 15 TTABVUE 8. Applicant has responded that it produced this document when it served initial disclosures, 17 TTABVUE 7, and Opposer has not disputed this assertion. Accordingly, Opposer's argument with respect to this document is moot.

document at Bates Number SV000144 not only references the document “Senuvo Declarations and Notices to Enrollers Using Paper Membership Applications,” but incorporates this document by reference. 18 TTBAVUE 90. Accordingly, the document “Senuvo Declarations and Notices to Enrollers Using Paper Membership Applications” is part of the document designated with Bates Number SV000144, and must be produced.

Lastly, Opposer asserts that the title of the document at Bates Number SV000144, “SENUVO IBC Membership Application” suggests that there are “electronic applications” that would be responsive to Request Nos. 6, 9, 10, 20 and/or 21.¹⁶ *Id.* at 7. If Applicant has in its possession, custody or control any executed IBC Membership Applications, such documents would be responsive to at least Document Request Nos. 20 and 21, and therefore, must be produced.

In view of the foregoing, Opposer’s motion to compel concerning Applicant’s responses to document requests is granted to the extent that Applicant is ordered to take the following action within thirty days of the mailing date of this order:

- Serve supplemental written responses to Opposer’s document requests, without objections on the merits, specifying whether Applicant has in its possession, custody or control any responsive documents. If Applicant does

¹⁶ In addition, Opposer argues that “Applicant produced a list of 17 active domain names that it presumably owns (SV0089-0091), but no corresponding website printouts for those domain names, which would clearly be responsive to Request No. 4.” 18 TTABVUE 7. Document Request No. 4, however, only asks for “representative examples” of Applicant’s use or proposed use of its mark on the internet, “including without limitation in connection with domain names or websites owned or controlled by you.” 15 TTABVUE 80. Applicant produced pages from one of its websites showing use of its mark. *See* 18 TTABVUE 68-70. This representative sample is sufficient to satisfy Request No. 4. If Opposer would like representative samples of documents from each website that Applicant owns, it must make such a request.

not have documents responsive to a specific request, Applicant shall state this in its supplemental response.

- Produce any additional responsive documents within its possession, custody or control by copying the documents and delivering them to Opposer at Applicant's own expense. *No Fear*, 54 USPQ2d at 1556.
- For all documents already produced in response to Opposer's document requests and those documents produced pursuant to this order, identify by Bates number which documents are responsive to which document requests.¹⁷
- Produce a privilege log or otherwise describe the nature of any responsive documents, communications, or tangible things not produced or disclosed because of a claim of privilege. *See* TBMP § 406.04(c) (describing the elements of a privilege log).
- Produce the document titled Senuvo Declarations & Notices to Enrollers Using Paper Membership Applications and any executed IBC Membership Applications.

To the extent any responsive documents are confidential, Applicant shall produce them pursuant to the Board's standard protective order that is automatically applicable to this proceeding.¹⁸

Summary

Opposer's motion to compel is granted to the extent set forth herein, but otherwise denied. Applicant is allowed until thirty days from the mailing date of this order to comply with the requirements set forth in this order. Proceedings are otherwise suspended and will resume on the schedule set forth below. If Applicant fails to fully comply with this order, Applicant may be subject to sanctions,

¹⁷ Contrary to Applicant's assertion, this should not be an onerous process.

¹⁸ A copy of the Board's standard protective order may be viewed here:

<http://www.uspto.gov/sites/default/files/documents/TTAB%20Standard%20Protective%20Order%20-%20FINAL%202016.pdf>

including the possible entry of judgment against it. Trademark Rule 2.120(g); Fed. R. Civ. P. 37(b)(2).

Dates are reset as follows:

Discovery Closes	October 19, 2016
Plaintiff's Pretrial Disclosures	December 3, 2016
30-day testimony period for plaintiff's testimony to close	January 17, 2017
Defendant/Counterclaim Plaintiff's Pretrial Disclosures	February 1, 2017
30-day testimony period for defendant and plaintiff in the counterclaim to close	March 18, 2017
Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due	April 2, 2017
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	May 17, 2017
Counterclaim Plaintiff's Rebuttal Disclosures Due	June 1, 2017
15-day rebuttal period for plaintiff in the counterclaim to close	July 1, 2017
Brief for plaintiff due	August 30, 2017
Brief for defendant and plaintiff in the counterclaim due	September 29, 2017
Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	October 29, 2017
Reply brief, if any, for plaintiff in the counterclaim due	November 13, 2017

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.

Opposition No. 91219888

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.
