

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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General Contact Number: 571-272-8500

BUO

Mailed: January 13, 2016

Opposition No. 91220327

*3rd Generation Enterprises Co., Corp.*

*v.*

*Day's Beverages, Inc.*

**Benjamin U. Okeke, Interlocutory Attorney:**

Now before the Board is Applicant's combined motion, filed September 29, 2015, to compel Opposer to respond to Interrogatory No. 8(a) of Applicant's first set of interrogatories and to serve a corresponding supplemental response to Applicant's document production request No. 2, which seeks documents used in the preparation of, inter alia, Opposer's responses to Applicant's first set of interrogatories; and for an extension of the discovery period following resolution of the motion to compel to allow Applicant to engage in any necessary follow-up discovery.

The Board, in its discretion, suggested that the issues raised in the motion be resolved by telephone conference as permitted by TBMP § 502.06 (2015). The conference was held on January 12, 2016. Participating in the conference were Opposer's counsel, Jonathan M. Purow, Applicant's counsel, Alex R. Sluzas, and Board interlocutory attorney, Benjamin U. Okeke.

The Board carefully considered the arguments raised by the parties during the telephone conference, as well as the briefs on the motions and exhibits attached thereto, and the record of this case in coming to a determination regarding the issues presented in the motions.

During the telephone conference, the Board made the following findings and determinations:

***Motion to Compel***

Initially, the Board finds that Applicant made a sufficient good faith effort to resolve the parties' discovery disputes prior to seeking Board intervention. *See* Trademark Rule 2.120(e)(1). Additionally, the Board finds that the motion has been timely made. *Id.*

The Board reminded the parties that a party may take discovery not only as to matters specifically raised in the pleadings, but also as to any information that appears relevant to the subject matter of the case. *See* Fed. R. Civ. P. 26(b)(1); *Fischer Gesellschaft m.b.H. v. Molnar & Co.*, 203 USPQ 861, 856-66 (TTAB 1979); *Varian Assoc. v. Fairfield-Noble Corp.*, 188 USPQ 581, 583 (TTAB 1975) (relevancy construed liberally).

Interrogatory 8(a) seeks information relating to Opposer's use of the mark TOP POP in connection with its sale of soda, and specifically the "yearly sales of TOP POP soda by net dollar amount and physical quantity, from 2008 to the present." Applicant argues that although information regarding the use of marks that are not the subject of an *inter partes* proceeding is ordinarily not relevant and therefore, not

discoverable, the information it seeks is relevant to Opposer's ability to produce soda during a certain time period, which Opposer alleges was inhibited by damage to its facilities during a natural disaster. Applicant asserts that a showing that such damage had "only a minor, or temporary effect on the sales of TOP POP beverages, as shown by historical sales figures for TOP POP beverages, this would be evidence that the Board should not weigh this excuse for the failure to use the CITY CLUB mark significantly, if at all." 5 TTABVUE.

In response to Applicant's motion, Opposer submitted a supplemental response to Applicant's discovery requests, which Opposer asserts "render[s] [Applicant's] Motion moot." 8 TTABVUE 2. Opposer also asserts that Applicant should not be afforded additional time for discovery, inasmuch as Applicant waited until the final day of discovery to file its motion to compel, and had been given ample opportunity to take discovery. *Id.* at 3.

Applicant's reply brief asserts that Opposer's supplemental response was incomplete inasmuch as Opposer only supplied information dating back to 2011, when in fact the inquiry requested information dating back to 2008. Applicant also argues that it is Opposer's delay and objections that have necessitated the extension of time it seeks for follow-up discovery.

Initially, the Board acknowledges the relevance of the information Applicant seeks, particularly within the broad definition of relevancy prescribed by Fed. R. Civ. P. 26(b). Inasmuch as Opposer has failed to fully and completely respond to Interrogatory No. 8(a), by only providing information dating back to 2011,

Applicant's motion to compel is **GRANTED**. Opposer is reminded of its duty to supplement its discovery responses as necessary under Fed. R. Civ. P. 26(e). Therefore, Opposer must also supplement its response to Applicant's document request No. 2 as appropriate to account for the supplemental information provided in response to interrogatory No. 8(a).

Accordingly, Opposer is ordered to serve, within **FIFTEEN DAYS** from the issuance of this order, supplemental verified responses to Interrogatory No. 8(a) and document request No. 2,<sup>1</sup> to the extent indicated above without objection on the merits.<sup>2</sup> Further, Opposer is ordered to copy and send all responsive documents to Applicant at its own expense. *See Unicut Corp. v. Unicut, Inc.*, 220 USPQ 1013 (TTAB 1983); *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1556 (TTAB 2000).

In the event Opposer fails to serve full and complete responses to the outstanding discovery requests, as outlined by this order, in the time provided, Opposer is cautioned that it may be barred from relying upon or later producing

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<sup>1</sup> Opposer is reminded that its obligation to conduct a thorough search of its records and produce any responsive materials and if necessary to supplement its discovery responses and disclosures is ongoing and includes a search of electronically stored information. Electronically stored information may be produced in the form specified by the request. If no specification is made, the party must produce the electronically stored information in the form in which it is ordinarily maintained, or in a reasonably usable form. *See* Fed. R. Civ. P. 34(b)(2)(E)(ii). Fed. R. Civ. P. 34(a) "requires that, if necessary, a responding party 'translate' information it produces into a 'reasonably usable' form." However, the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.

<sup>2</sup> 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 trade secret, business-sensitive or otherwise confidential, 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. *See No Fear*, 54 USPQ2d at 1554.

documents or information at trial, or to use any information or witnesses to supply evidence on a motion or at a hearing, where such documents, information, or witnesses were withheld from discovery.<sup>3</sup> See Fed. R. Civ. P. 37(c)(1); *Panda Travel, Inc. v. Resort Option Enters., Inc.*, 94 USPQ2d 1789, 1792 (TTAB 2009); *Quality Candy Shoppes/Buddy Squirrel of Wisconsin Inc. v. Grande Foods*, 90 USPQ2d 1389, 1392 (TTAB 2007); *Presto Prods. v. Nice-Pak Prods.*, 9 USPQ2d 1895, 1896 n.5 (TTAB 1988); TBMP § 527.01(e).

However, with respect to Applicant's motion to "extend" the discovery period, a party will not be heard to complain when that party waits until the waning days of discovery to attend to its discovery needs and encounters difficulties in completing that task. See *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303, 1305 (TTAB 1987). In this case Applicant had ample time while it was measuring the sufficiency of Opposer's responses and engaging in its effort to resolve its discovery disputes with Opposer to file a motion to extend or to have earlier filed its motion to compel, which would have resulted in a suspension of the proceeding. However, Applicant failed to avail itself of either of these options. Indeed, the discovery period in this proceeding is closed, and therefore, Applicant's motion is actually one to reopen rather than to extend. However, the Board does not find that Applicant has shown excusable neglect sufficient to warrant a reopening of the discovery period.

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<sup>3</sup> Applicant is reminded that it must raise this matter by objecting to the evidence in question during the trial period and preserving its objection in its brief on the case. See *Panda Travel, Inc.* 94 USPQ2d at 1792-93; *General Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1593-94 (TTAB 2011); TBMP § 527.01(e).

Accordingly, Applicant's motion to "extend" (reopen) the discovery period to allow for follow-up discovery is **DENIED**. The discovery period in this proceeding is **CLOSED**.

The proceeding is **RESUMED**. The remaining disclosure and trial dates are reset as follows:

Plaintiff's Pretrial Disclosures	<b>2/14/2016</b>
Plaintiff's 30-day Trial Period Ends	<b>3/30/2016</b>
Defendant's Pretrial Disclosures	<b>4/14/2016</b>
Defendant's 30-day Trial Period Ends	<b>5/29/2016</b>
Plaintiff's Rebuttal Disclosures	<b>6/13/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>7/13/2016</b>

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