

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

Mailed: September 9, 2016

Opposition No. 91221666

*PepsiCo, Inc.*

*v.*

*MVS International Inc.*

**Michael Webster, Interlocutory Attorney:**

This case comes before the Board for consideration of Opposer's motion (filed June 10, 2016) to compel written discovery. The motion is fully briefed.

By way of its motion, Opposer seeks an order compelling Respondent to: (1) produce, without objection, complete written, signed responses to Opposer's second set of interrogatories; (2) produce written responses and any and all documents and things responsive to Interrogatory No. 9 and Document Requests 15-18 and Request for Admission No. 11; and (3) produce a signed copy of its responses and objections to Opposer's request for admissions dated October 21, 2015. In addition, Opposer requests that the Board extend discovery and trial dates for 90 days following the determination of the motion.

In response to the motion, Applicant states that it was "under the impression the parties were actively negotiating a possible settlement and no discovery requests

were due at this time.”<sup>1</sup> Additionally, Applicant argues that, inasmuch as Opposer has sent only one email to discuss Applicant’s discovery responses, Opposer has not made a good faith effort pursuant to Trademark Rule 2.120(e)(1) to resolve the discovery dispute. Applicant further states that, as evidence of its willingness to work with Opposer, it is serving Opposer with answers to Opposer’s second set of interrogatories.<sup>2</sup>

In reply, Opposer contends that it has made a good faith effort to resolve the dispute through multiple emails and letters and that Applicant’s recent responses do not address Interrogatory No. 9, Document Request Nos. 15-18 and Request for Admission No. 11.

Inasmuch as Applicant has served responses to Opposer’s second set of interrogatories as well as a signed copy of Applicant’s request for admissions, the motion to compel is moot with respect to those discovery requests.

With respect to Opposer’s efforts to resolve the discovery dispute prior to filing the motion, Opposer has provided a statement regarding the parties’ communications along with copies of the letters and emails exchanged between the parties. In view thereof, the Board finds that Opposer has made a good faith effort to resolve the parties’ dispute prior to seeking Board intervention in accordance with Trademark Rule 2.120(e)(1) and that Opposer’s motion is timely.

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<sup>1</sup> 11 TTABVUE at 3.

<sup>2</sup> Applicant did not provide a copy of the responses with its brief or identify the date the responses were served.

As to the merits of the remaining discovery issues in Opposer's motion to compel, the motion is **GRANTED** for the reasons set forth below.

Interrogatory No. 9

With respect to Interrogatory No. 9, the motion to compel is **GRANTED** to the extent that Applicant must provide a full and complete response to the interrogatory. Applicant's objection based on attorney-client privilege and attorney work product is overruled. The identification of search reports or documents containing opinions regarding the availability of Applicant's mark is discoverable information. *See Fisons Ltd. v. Capability Brown Ltd.*, 209 USPQ 167, 170 (TTAB 1980); *Goodyear Tire & Rubber Co. v. Tyrco Industries*, 186 USPQ 207, 208 (TTAB 1975); TBMP § 414(6) (2016). The interrogatory does not request the comments or opinions of attorneys relating to such reports or documents. Such information is not discoverable.

Document Requests Nos. 15-18

The motion to compel is **GRANTED** with respect to the above-identified documents requests. Applicant must produce all non-privileged responsive documents to each of the document requests in its possession, custody or control inasmuch as each document request asks for production of information or documents that is properly discoverable. Thus, Applicant's objections to the document requests are overruled. Accordingly, to the extent that Applicant has not produced non-privileged responsive documents to any of the above-identified document requests based upon its now overruled objections, Applicant must produce such responsive documents. If there are no responsive, non-privileged documents in Applicant's

possession, custody or control which are responsive to any of the above-identified document requests, Applicant must so state affirmatively in response to the corresponding document request.

In view of the above, Applicant is allowed until THIRTY (30) DAYS from the mailing date of this order in which to provide a full and complete response to Opposer's Interrogatory No 9. Additionally, Applicant is allowed THIRTY (30) DAYS from the mailing date of this order to produce non-privileged documents responsive to Document Request Nos. 15-18 as indicated herein. To the extent that Applicant claims privilege to any of Opposer's document requests, Applicant is required to provide Opposer with a privilege log within the same thirty (30) days provided above, if it has not already done so.<sup>3</sup>

In the event that Respondent fails to serve full responses as ordered herein, Petitioner's remedy may lie in a motion for sanctions, as appropriate. *See* Trademark Rule 2.120(g) (1); TBMP § 411.05.<sup>4</sup>

Request to Extend Discovery

Opposer's request to extend discovery and trial dates by 90 days is **DENIED**. However, the Board has *sua sponte* extended discovery and reset the remaining dates as set forth below.

Proceedings herein are resumed. Discovery and trial dates are reset as follows:

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<sup>3</sup> Applicant is advised that the Board prefers that the responding party reproduce each interrogatory immediately preceding the answer or objection. *See* TBMP § 405.04 (2016).

<sup>4</sup> The Board expects the parties (and their attorneys) to cooperate with one another in the discovery process and looks with extreme disfavor on those who do not. TBMP § 408 (2016). Each party and its attorney have a duty to make a good faith effort to satisfy the discovery needs of its adversary. *Id.*

Discovery Closes	<b>11/8/2016</b>
Plaintiff's Pretrial Disclosures	<b>12/23/2016</b>
Plaintiff's 30-day Trial Period Ends	<b>2/6/2017</b>
Defendant's Pretrial Disclosures	<b>2/21/2017</b>
Defendant's 30-day Trial Period Ends	<b>4/7/2017</b>
Plaintiff's Rebuttal Disclosures	<b>4/22/2017</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>5/22/2017</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 Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.