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Filing date: **04/30/2014**

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

Proceeding	92055094
Party	Defendant Temperance Distilling Company, Inc.
Correspondence Address	RICHARD S MACMILLAN MACMILLAN SOBANSKI & TODD LLC ONE MARITIME PLAZA 5TH FLOOR, 720 WATER STREET TOLEDO, OH 43604 UNITED STATES emch@mstfirm.com
Submission	Other Motions/Papers
Filer's Name	Joseph W. Tucker
Filer's e-mail	tucker@mstfirm.com, docketing@mstfirm.com
Signature	/Joseph W. Tucker/
Date	04/30/2014
Attachments	Status Report [1-53928].pdf(1527921 bytes)

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

In the Matter of Trademark Registration 3,885,993
 Mark: SWIG
 Registration Date: December 7, 2010

SWIG, INC.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92055094
)	
TEMPERANCE DISTILLING)	
COMPANY, INC.,)	
)	
Registrant.)	
)	

REGISTRANT’S STATUS REPORT ON MOTION TO QUASH

Registrant Temperance Distilling Company, Inc., hereby submits a status report on the Motion to Quash filed in the United States District Court for the Northern District of Ohio.

1. This status report is being timely filed in response to the Board’s Order dated April 11, 2014.
2. The United States District Court for the Northern District of Ohio issued the attached Order on February 28, 2014.
3. The District Court’s ruling has no bearing on the merits of Petitioner’s Contested Motion for Extension of Time, for the reasons set forth in Registrant’s Opposition. Specifically, Petitioner served, for the first time, subpoenas for deposition by written questions on October 18, 2013, which was 27 days after the opening of its trial period. For the Board’s consideration, copies of these subpoenas, which are dated October 18, 2013, are attached. Therefore, Petitioner failed to comply with TBMP § 703.02(c). As such, any delay caused by Registrant’s Motion to

Quash in the District Court cannot constitute “good cause” under TBMP § 509.01(a).

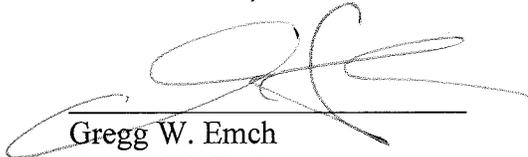
4. Registrant reiterates that Petitioner’s request for an extension was necessitated by Petitioner’s own lack of diligence and unreasonable delay in conducting its trial period.

Petitioner waited until more than halfway through its 30-day trial period to begin to attempt to obtain the testimony the Pearsons (non-parties) by subpoenas. This is evidenced by the attached first set of subpoenas, which are dated October 9, 2013. These first subpoenas were quashed by the United States District Court for the Northern District of Ohio in the attached Order dated October 16, 2013. As noted in the Order, Petitioner did not formally oppose Registrant’s first Motion to Quash. After the District Court quashed the first subpoenas, Petitioner waited another 2 days, until October 18, 2013 (27 days into its 30-day trial period, and a mere 3 days from the close of its trial period), to issue the second subpoenas to the Pearsons. Given these facts, any delay was entirely a result of Petitioner’s actions in conducting its trial period, and as such, Petitioner cannot demonstrate “that the requested extension of time is not necessitated by the party’s own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor” as required by TBMP § 509.01(a).

5. Other than being unable to meet the standard for an extension of time, Petitioner’s Motion is flawed in that Petitioner seeks more time to pursue particular testimony from non-parties that Petitioner is not entitled to because of the failure to follow TBMP § 703.02(c). The Board should not allow Petitioner to benefit from disregarding procedural rules in this manner. For all the above reasons, Registrant respectfully requests that the Board deny Petitioner’s Contested Motion for Extension of Time.

Respectfully submitted,

MacMILLAN, SOBANSKI & TODD, LLC



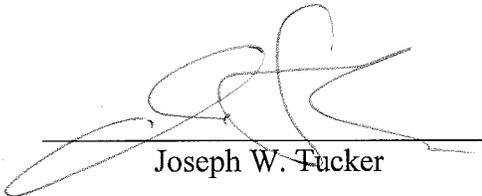
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*Attorneys for Registrant
Temperance Distilling Company, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Status Report was sent this 30th day of April, 2014, by prepaid first-class mail to Petitioner's attorneys of record as follows:

Jeffrey A. Tinker
Cathryn A. Berryman
500 Winstead Building
2728 N. Harwood Street
Dallas, Texas 75201



Joseph W. Tucker

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Swig, Inc.,

Case No. 3:13-mc-00088

Petitioner,

v.

ORDER

Temperance Distilling Company, Inc.,

Respondent.

Before me is the second motion of Temperance Distilling Company, Inc., to quash subpoenas to testify served by Swig, Inc., on Molly and Brian Pearson, who are former employees of Temperance. (Doc. No. 3). Temperance asserts I must quash the subpoenas pursuant to Rule 45(c)(3)(A) because the testimony Swig seeks would require the Pearsons to testify about the content of conversations the Pearsons had with Temperance's attorneys, and therefore would force the Pearsons to testify about matters protected by the attorney-client privilege. *See* Fed. R. Civ. P. 45(a)(3)(A)(iii) (issuing court must quash or modify a subpoena that requires disclosure of privileged material if no exception or waiver applies). I ordered the Pearsons to answer Swig's written deposition questions and then to submit notarized copies of their response to my chambers. (Doc. No. 7). The Pearsons timely complied with my order.

I have reviewed the Pearsons' responses and conclude those responses do not discuss any information which implicates the attorney-client or any other privilege. Therefore, I deny Temperance's motion to quash the subpoenas and direct the clerk's office to return the completed

deposition questions to the office of Jones & Solomon. Thereafter, Joseph Solomon, counsel for the Pearsons, shall serve copies of the completed deposition questionnaires on Swig, Inc.

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Ohio

Swig, Inc.)

Plaintiff)

v.)

Temperence Distilling Company, Inc.)

Defendant)

Civil Action No. Cancellation 92055094

(If the action is pending in another district, state where:

U.S. Trademark Trial & Appeal Board)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Brian Pearson, 622 Main St., Genoa, OH 43430

Testimony: **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

SEE EXHIBIT "A" OF THE NOTICE OF INTENT TO TAKE DEPOSITION BY WRITTEN QUESTIONS, ATTACHED HERETO.

Place: Office of the summoned witness, or any agreed upon time/place.	Date and Time: 10/21/2013 5:00 pm
---	--------------------------------------

The deposition will be recorded by this method: written answers to questions

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 10/18/2013

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Jeffrey A. Tinker
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (*name of party*) Swig, Inc.

_____, who issues or requests this subpoena, are:
Jeffrey A. Tinker, 2728 N. Harwood Street, Suite 500, Dallas, TX 75201, jtinker@winstead.com, 214-745-5346;
Texas Bar No. 24060733; authorized to practice in the U.S. District Court for the Northern District of Texas.

Civil Action No. Cancellation 92055094

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party; or

(iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

EXHIBIT A

DIRECT QUESTIONS TO BE ANSWERED BY BRIAN PEARSON

QUESTION NO. 1:

1. State your full name, occupation, and official title.

Answer: _____

QUESTION NO. 2:

2. What were the exact dates of your employment at Temperance Distilling Company, Inc.?

Answer: _____

QUESTION NO. 3:

3. On what date did Temperance Distilling Company, Inc. first begin using the mark “SWIG” (or a variation thereof) on alcoholic beverages in interstate commerce?

Answer: _____

QUESTION NO. 4:

4. On what products did Temperance Distilling Company, Inc. use the mark “SWIG” (or a variation thereof) in interstate commerce during your employment?

Answer: _____

QUESTION NO. 5:

5. What were the channels of trade in which Temperance Distilling Company, Inc. offered its products bearing the mark “SWIG” during your employment?

Answer: _____

QUESTION NO. 6:

6. During your employment, were any sales or offers for sale made by Temperance Distilling Company, Inc. to any restaurants, bars or lounges with respect to its products bearing the mark “SWIG”?

Answer: _____

QUESTION NO. 7:

7. Other than knowledge gained by you during your discussions with an attorney representing Temperance Distilling Company, Inc., were you aware of any of the following Federal trademark registrations for the mark “SWIG” (or variations thereof) owned by Swig, Inc. prior to April 19, 2010: (1) SWIG – Reg. No. 3416488 (restaurant and cocktail lounge services); (2) SWIG & Design – Reg. No. 2243360 (cocktail lounge services); (3) SWIG SALOON – Reg. No. 3836245 (restaurant, bar, cocktail lounge, and prepared food take-out services); and (4) SWIG SODA – Reg. No. 1839570 (carbonated soft drinks)?

Answer: _____

QUESTION NO. 8:

8. Other than knowledge gained by you during your discussions with an attorney representing Temperance Distilling Company, Inc., were you aware of the use of the mark “SWIG” (or variations thereof) for any restaurant and cocktail lounge services offered by Swig, Inc. prior to April 19, 2010?

Answer: _____

QUESTION NO. 9:

9. To your knowledge, are alcoholic beverages excluding beer closely related to restaurant, bar and cocktail lounge services?

Answer: _____

QUESTION NO. 10:

10. To your knowledge, are alcoholic beverages excluding beer sold or offered for sale to the public by restaurants, bars and cocktail lounges?

Answer: _____

QUESTION NO. 11:

11. To your knowledge, during your employment, did any of the distributors of Temperance Distillery Company, Inc., sell or offer for sale the SWIG-branded alcoholic beverages to any restaurants, bars or cocktail lounges?

Answer: _____

QUESTION NO. 12:

12. During your employment, what were the target customer demographics for the SWIG-branded alcoholic beverages offered for sale by Temperance Distillery Company, Inc.?

Answer: _____

QUESTION NO. 13:

13. To your knowledge, during your employment, were any skills or sophistication required for customers to purchase the SWIG-branded alcoholic beverages offered for sale by Temperance Distillery Company, Inc.?

Answer: _____

QUESTION NO. 14:

14. To your knowledge, are the SWIG-branded alcoholic beverages offered for sale by Temperance Distillery Company, Inc. as of today's date the same or substantially similar to the SWIG-branded products sold or offered for sale by this company during your employment?

Answer: _____

QUESTION NO. 15:

15. To your knowledge, is the mark "SWIG" used by Swig, Inc. for restaurant and cocktail lounge services similar in appearance, sound, connotation or commercial impression to the mark "SWIG" used by Temperance Distillery Company, Inc. for alcoholic beverages except beer?

Answer: _____

BEFORE ME, the undersigned authority, on this day personally appeared Brian Pearson, known to me to be the person whose name is subscribed to the foregoing instrument in the capacity therein stated, and being duly sworn, acknowledged to me that the answers to the foregoing questions are true as stated. I further certify that the records attached hereto are exact duplicates of the original records.

Given under my hand and seal of office this the ____ day of _____, 2013.

NOTARY PUBLIC IN AND FOR
STATE OF OHIO

Requested by:

Jeffrey A. Tinker
WINSTEAD PC
2728 N. Harwood St., Suite 500
Dallas, TX 75201
(214) 745-5346

ATTORNEY FOR PETITIONER
SWIG, INC.

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Ohio

Swig, Inc.)

Plaintiff)

v.)

Temperence Distilling Company, Inc.)

Defendant)

Civil Action No. Cancellation 92055094

(If the action is pending in another district, state where:

U.S. Trademark Trial & Appeal Board)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Mollie Pearson, 603 Main St., Genoa, OH 43430

Testimony: **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

SEE EXHIBIT "A" OF THE NOTICE OF INTENT TO TAKE DEPOSITION BY WRITTEN QUESTIONS, ATTACHED HERETO.

Place: Office of the summoned witness, or any agreed upon time/place.	Date and Time: 10/21/2013 5:00 pm
---	--------------------------------------

The deposition will be recorded by this method: written answers to questions

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 10/18/2013

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Jeffrey A. Tinker
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (*name of party*) Swig, Inc.

_____, who issues or requests this subpoena, are:
Jeffrey A. Tinker, 2728 N. Harwood Street, Suite 500, Dallas, TX 75201, jtinker@winstead.com, 214-745-5346;
Texas Bar No. 24060733; authorized to practice in the U.S. District Court for the Northern District of Texas.

Civil Action No. Cancellation 92055094

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____
_____ *Server's signature*

_____ *Printed name and title*

_____ *Server's address*

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

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(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party; or

(iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

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(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

EXHIBIT A

DIRECT QUESTIONS TO BE ANSWERED BY MOLLIE PEARSON

QUESTION NO. 1:

1. State your full name, occupation, and official title.

Answer: _____

QUESTION NO. 2:

2. What were the exact dates of your employment at Temperance Distilling Company, Inc.?

Answer: _____

QUESTION NO. 3:

3. On what date did Temperance Distilling Company, Inc. first begin using the mark “SWIG” (or a variation thereof) on alcoholic beverages in interstate commerce?

Answer: _____

QUESTION NO. 4:

4. On what products did Temperance Distilling Company, Inc. use the mark “SWIG” (or a variation thereof) in interstate commerce during your employment?

Answer: _____

QUESTION NO. 5:

5. What were the channels of trade in which Temperance Distilling Company, Inc. offered its products bearing the mark “SWIG” during your employment?

Answer: _____

QUESTION NO. 6:

6. During your employment, were any sales or offers for sale made by Temperance Distilling Company, Inc. to any restaurants, bars or lounges with respect to its products bearing the mark “SWIG”?

Answer: _____

QUESTION NO. 7:

7. Other than knowledge gained by you during your discussions with an attorney representing Temperance Distilling Company, Inc., were you aware of any of the following Federal trademark registrations for the mark “SWIG” (or variations thereof) owned by Swig, Inc. prior to April 19, 2010: (1) SWIG – Reg. No. 3416488 (restaurant and cocktail lounge services); (2) SWIG & Design – Reg. No. 2243360 (cocktail lounge services); (3) SWIG SALOON – Reg. No. 3836245 (restaurant, bar, cocktail lounge, and prepared food take-out services); and (4) SWIG SODA – Reg. No. 1839570 (carbonated soft drinks)?

Answer: _____

QUESTION NO. 8:

8. Other than knowledge gained by you during your discussions with an attorney representing Temperance Distilling Company, Inc., were you aware of the use of the mark “SWIG” (or variations thereof) for any restaurant and cocktail lounge services offered by Swig, Inc. prior to April 19, 2010?

Answer: _____

QUESTION NO. 9:

9. To your knowledge, are alcoholic beverages excluding beer closely related to restaurant, bar and cocktail lounge services?

Answer: _____

QUESTION NO. 10:

10. To your knowledge, are alcoholic beverages excluding beer sold or offered for sale to the public by restaurants, bars and cocktail lounges?

Answer: _____

QUESTION NO. 11:

11. To your knowledge, during your employment, did any of the distributors of Temperance Distillery Company, Inc., sell or offer for sale the SWIG-branded alcoholic beverages to any restaurants, bars or cocktail lounges?

Answer: _____

QUESTION NO. 12:

12. During your employment, what were the target customer demographics for the SWIG-branded alcoholic beverages offered for sale by Temperance Distillery Company, Inc.?

Answer: _____

QUESTION NO. 13:

13. To your knowledge, during your employment, were any skills or sophistication required for customers to purchase the SWIG-branded alcoholic beverages offered for sale by Temperance Distillery Company, Inc.?

Answer: _____

QUESTION NO. 14:

14. To your knowledge, are the SWIG-branded alcoholic beverages offered for sale by Temperance Distillery Company, Inc. as of today's date the same or substantially similar to the SWIG-branded products sold or offered for sale by this company during your employment?

Answer: _____

QUESTION NO. 15:

15. To your knowledge, is the mark "SWIG" used by Swig, Inc. for restaurant and cocktail lounge services similar in appearance, sound, connotation or commercial impression to the mark "SWIG" used by Temperance Distillery Company, Inc. for alcoholic beverages except beer?

Answer: _____

BEFORE ME, the undersigned authority, on this day personally appeared Mollie Pearson, known to me to be the person whose name is subscribed to the foregoing instrument in the capacity therein stated, and being duly sworn, acknowledged to me that the answers to the foregoing questions are true as stated. I further certify that the records attached hereto are exact duplicates of the original records.

Given under my hand and seal of office this the ____ day of _____, 2013.

NOTARY PUBLIC IN AND FOR
STATE OF OHIO

Requested by:

Jeffrey A. Tinker
WINSTEAD PC
2728 N. Harwood St., Suite 500
Dallas, TX 75201
(214) 745-5346

ATTORNEY FOR PETITIONER
SWIG, INC.

UNITED STATES DISTRICT COURT

for the

Northern District of Ohio

Swig, Inc.
Plaintiff
v.
Temperence Distilling Company, Inc.
Defendant
Civil Action No. Cancellation 92055094
(If the action is pending in another district, state where:
U.S. Trademark Trial & Appeal Board)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Brian Pearson, 622 Main St., Genoa, OH 43430

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Information related to the selection and use of the SWIG mark by Temperence Distilling Company, Inc. and knowledge of Swig, Inc.'s use of the SWIG mark.

Table with 2 columns: Place (Jones & Solomon, Two Maritime Plaza, 3rd Floor, Toledo, OH 43604) and Date and Time (10/17/2013 2:00 pm)

The deposition will be recorded by this method: audio, stenographic, or videographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 10/09/2013

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Jeffrey A. Tinker
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Swig, Inc.

Jeffrey A. Tinker, 2728 N. Harwood Street, Suite 500, Dallas, TX 75201, jtinker@winstead.com, 214-745-5346; Texas Bar No. 24060733; authorized to practice in the U.S. District Court for the Northern District of Texas.

Civil Action No. Cancellation 92055094

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party; or

(iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

UNITED STATES DISTRICT COURT

for the

Northern District of Ohio

Swig, Inc.
Plaintiff
v.
Temperence Distilling Company, Inc.
Defendant

Civil Action No. Cancellation 92055094

(If the action is pending in another district, state where:
U.S. Trademark Trial & Appeal Board)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Molly Pearson, 603 Main St., Genoa, OH 43430

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Information related to the selection and use of the SWIG mark by Temperence Distilling Company, Inc. and knowledge of Swig, Inc.'s use of the SWIG mark.

Table with 2 columns: Place (Jones & Solomon, Two Maritime Plaza, 3rd Floor, Toledo, OH 43604) and Date and Time (10/17/2013 2:00 pm)

The deposition will be recorded by this method: audio, stenographic, or videographic means

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The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 10/09/2013

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Jeffrey A. Tinker
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Swig, Inc.

Jeffrey A. Tinker, 2728 N. Harwood Street, Suite 500, Dallas, TX 75201, jtinker@winstead.com, 214-745-5346; Texas Bar No. 24060733; authorized to practice in the U.S. District Court for the Northern District of Texas.

Civil Action No. Cancellation 92055094

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

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(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

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(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

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(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Contempt.* The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Swig, Inc.,

Case No. 3:13-mc-00088

Petitioner,

v.

ORDER

Temperance Distilling Company, Inc.,

Registrant.

Before me is the motion of Temperance Distilling Company, Inc., to quash subpoenas to testify served by Swig, Inc., on Molly and Brian Pearson, who are former employees of Temperance. (Doc. No. 1). Swig has subpoenaed the Pearsons to testify concerning “[i]nformation related to the selection and use of the SWIG mark by [Temperance] Distilling Company, Inc.[.] and knowledge of Swig, Inc.’s use of the SWIG mark.” (Doc. No. 1-1 at 1, 4). Temperance asserts I must quash the subpoenas pursuant to Rule 45(c)(3)(A) because the testimony Swig seeks would require the Pearsons to testify about the content of conversations the Pearsons had with Temperance’s attorneys, and therefore would force the Pearsons to testify about matters protected by the attorney-client privilege. *See* Fed. R. Civ. P. 45(a)(3)(A)(iii) (issuing court must quash or modify a subpoena that requires disclosure of privileged material if no exception or waiver applies). Swig has not filed a written response, but has indicated through counsel that it opposes Temperance’s motion.

Ordinarily, a party does not have standing to move to quash a subpoena filed on a nonparty. *See 9 Moore’s Federal Practice*, § 45.50[3] (Matthew Bender 3d ed.). Where, as here, a party seeks to

assert its own privilege, however, the party may move to quash the subpoena. 9 *Moore's Federal Practice*, § 45.51[3]; see also *Donahoo v. Ohio Dept. of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002) (“The law is clear, absent a claim of privilege, a party has no standing to challenge a subpoena to a nonparty.”). Temperance asserts the Pearsons formerly were high-level employees and any knowledge they may have concerning Swig’s use of the SWIG mark “comes directly from privileged communications” with Temperance’s attorneys. (Doc. No. 1 at 3). Further, Temperance asserts any knowledge the Pearsons have concerning the selection and use of the SWIG mark by Temperance “is inherently intermingled with, and inseparable from, the privileged communications between the Pearsons (acting as employees of [Temperance]) and [Temperance’s] attorneys.” (Id.).

The attorney–client privilege “applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee’s corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation. [*Upjohn v. United States*,] 449 U.S. [383], 394 [(1981)].” *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir. 1997) (quoting *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1492 (9th Cir. 1989)). It appears the information Swig seeks is protected by the attorney-client privilege, and Swig has not identified any exception to or waiver of the privilege. Therefore, pursuant to Rule 45(a)(3)(A)(iii), Temperance’s motion to quash the subpoenas issued to Molly and Brian Pearson is granted.

So Ordered.

s/ Jeffrey J. Helmick _____
United States District Judge