

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

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Mailed: November 4, 2013

Cancellation No. 92055558

Economy Rent-A-Car, Inc.

v.

Emmmanouil Kokologiannis and
Sons, Societe Anonyme of
Trade, Hotels And Tourism S.A.

Yong Oh (Richard) Kim, Interlocutory Attorney:

This matter comes up on respondent's motion (filed July 2, 2013) to compel discovery and for leave to serve additional interrogatories. The motion is contested.

At issue are Interrogatory No. 18 from respondent's second set of interrogatories (served December 19, 2012), Document Request No. 36, and respondent's fourth set of interrogatories (served May 7, 2013). As last reset, discovery was scheduled to close on May 7, 2013.

Pursuant to Trademark Rule 2.120(e), the party seeking to compel discovery must demonstrate and certify that it made a good faith effort to resolve the issues raised in its motion to compel. Based on the parties' correspondences between June 19 and June 21, 2013, the Board finds that respondent made a good faith effort to resolve the dispute

prior to filing its motion to compel. In view thereof, the Board now turns to the merits of respondent's motion.

Trademark Rule 2.120(d)(1) imposes a seventy-five interrogatory limit, counting subparts, on the total number of written interrogatories a party may serve upon another party in a Board proceeding. If an interrogatory includes questions set forth as numbered or lettered subparts, the propounding party will be bound by its own numbering system such that each separately designated subpart will be counted by the Board as a separate interrogatory. *Pyttronic Industries Inc. v. Terk Technologies Corp.*, 16 USPQ2d 2055, 2056 (TTAB 1990). Compound questions seeking separate information will be counted as separate interrogatories even though they may not have been set forth separately. *Jan Bell Marketing Inc. v. Centennial Jewelers Inc.*, 19 USPQ2d 1636, 1637 (TTAB 1990). By extension, the Board will not be constrained by the propounding party's numbering or designating system and will look to the substance of the interrogatories to determine their count. *Kellogg Co. v. Nugget Distributors' Cooperative of America Inc.*, 16 USPQ2d 1468, 1469 (TTAB 1990). Where an interrogatory contains an initial question and follow-up questions to be answered if the initial question is answered in the affirmative, the initial question and each follow-up question will be counted as separate interrogatories. *Id.*

Here, the Board finds that with respondent's fourth set of interrogatories, respondent has exceeded the limit of seventy-five interrogatories.¹ Accordingly, respondent's motion to compel petitioner's responses to respondent's fourth set of interrogatories is hereby **DENIED**. As respondent has not used up its allotted seventy-five interrogatories prior to its service of the fourth set and as the fourth set was served prior to the close of discovery, respondent is allowed until **DECEMBER 3, 2013**, to serve petitioner with a revised set of interrogatories so as not to exceed the overall numerical limit.² Petitioner's responses thereto shall be due in accordance with Trademark Rule 2.120(a)(3).

As to Interrogatory No. 18 and Document Request No. 36, respondent seeks the annual number of rental car bookings made under the mark in question by petitioner's predecessor in interest during the years in which petitioner claims continuous use of its mark. Although such information is relevant and discoverable, petitioner maintains that such information is not within its possession, custody or

¹ By the Board's count, respondent propounded sixty interrogatories through its third set of interrogatories.

² Respondent's request for leave to serve additional interrogatories has been given no consideration as any such request must be filed and granted prior to the service of the proposed additional interrogatories. See Trademark Rule 2.120(d)(1).

control. A party cannot be compelled to produce something it does not have. *See, e.g., Harjo v. Pro-Football Inc.*, 50 USPQ2d 1705, 1715 (TTAB 1999), *rev'd on other grounds*, 284 F. Supp. 2d 96, 68 USPQ2d 1225 (D.D.C. 2003), *remanded*, 415 F.3d 44, 75 USPQ2d 1525 (D.C. Cir. 2005), *aff'd*, 565 F.3d 880, 90 USPQ2d 1593 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 631 (2009). As such, respondent's motion to compel Interrogatory No. 18 and Document Request No. 36 is hereby **DENIED**.

The parties are reminded of their duty to supplement their discovery responses when information or documents come to their attention. *See* Fed. R. Civ. P. 26(e) and TBMP § 408.03 (2013). If proper discoverable matter is withheld from the requesting party, then the responding party may be precluded from relying on such information and from adducing testimony with regard thereto during its testimony period upon appropriate motion filed by the requesting party. *See Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1896 n.5 (TTAB 1988).

Proceedings herein are **RESUMED** and trial dates are **RESET** as follows:

Plaintiff's 30-day Trial Period Ends	3/3/2014
Defendant's Pretrial Disclosures Due	3/18/2014
Defendant's 30-day Trial Period Ends	5/2/2014
Plaintiff's Rebuttal Disclosures Due	5/17/2014
Plaintiff's 15-day Rebuttal Period Ends	6/16/2014

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 taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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