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

Proceeding	92055558
Party	Plaintiff Economy Rent-A-Car, Inc.
Correspondence Address	NICOLE M MEYER DICKINSON WRIGHT PLLC 1875 EYE STREET NW, SUITE 1200 WASHINGTON, DC 20006 UNITED STATES trademark@dickinsonwright.com, nmeyer@dickinsonwright.com, slittlepage@dickinsonwright.com
Submission	Opposition/Response to Motion
Filer's Name	Melissa Alcantara
Filer's e-mail	trademark@dickinsonwright.com, slittlepage@dickinsonwright.com, nmeyer@dickinsonwright.com, malcantara@dickinsonwright.com
Signature	/Melissa Alcantara/
Date	12/08/2013
Attachments	Petitioner's Opposition To Motion For Additional Interrogatories.pdf(2107151 bytes)

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

ECONOMY RENT-A-CAR, INC.)

Petitioner,)

v.)

EMMANOUIL KOKOLOGIANIS)
AND SONS, SOCIETE)
ANONYME OF TRADE,)
HOTELS AND TOURISM S.A.,)

Respondent.)

Cancellation No. 92055558

Registration No. 3256667

**PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO
SERVE ADDITIONAL INTERROGATORIES EXCEEDING THE LIMIT**

INTRODUCTION

Petitioner Economy Rent-A-Car, Inc. hereby sets forth its Brief in opposition to Respondent's "Motion For Leave To Serve Additional Interrogatories Exceeding The Limit" in the above-styled proceeding. For the reasons and arguments set forth below, Petitioner, through its undersigned counsel, respectfully requests the Trademark Trial and Appeal Board ("TTAB") to deny Respondent's motion.

Respondent was previously given until December 3, 2013 to serve its final set of interrogatories in this proceeding. See TTAB Order, dated November 4, 2013 (Dkt. 20). Rather than complying with the TTAB Order, or even seeking additional time to serve interrogatories (or an expanded set of interrogatories) beyond the date and number previously authorized by the TTAB, Respondent has instead served a motion seeking

leave to serve additional interrogatories. Respondent's motion (Dkt. 21), in effect, seeks not only an expansion of the number of interrogatories authorized under 37 CFR §2.120(d)(1), but also an extension of the December 3 discovery deadline date for such interrogatories set by the prior TTAB Order (Dkt. 20).

Respondent's motion amounts to nothing more than a redundant and vexatious "cut and paste" motion¹ that is virtually identical to the request it coupled with a prior motion to compel discovery that was filed on July 2, 2013 (Dkt. 17) and denied by the Trademark Trial and Appeal Board ("TTAB") on November 4, 2013 (Dkt. 20). Respondent now asserts almost the identical arguments that were previously given no consideration by the TTAB in the November 4, 2013 Order. Moreover, the proposed "new" Fourth Set of Interrogatories demands a response "within 30 days after service thereof", leaving Petitioner entirely uncertain as to whether it must actually respond to them within thirty days from the November 29, 2013 service date indicated therein. If so, then Respondent's proposed (and admittedly excessive) interrogatories plainly violate (again) Trademark Rule 2.120(d)(1). If not, then the proposed interrogatories would be untimely under the TTAB's prior November 4, 2013 Order (particularly in the absence of any time extension request made by Respondent and granted by the TTAB).

In light of such conduct, Petitioner can only ascribe a dilatory objective on the part of Respondent's counsel—namely, strategy seeking to again delay this proceeding and obstruct commencement of the trial phase in this case. Thus, the TTAB is urged to act expeditiously on the Respondent's frivolous motion, denying that request for the

¹ One need only compare Paragraphs 4 through 13 of Respondent's present motion with Paragraphs 24 through 33 of Respondent's prior combined "Motion To Compel Answers To Interrogatories and Production of Documents, And Motion For leave To Serve Additional Interrogatories Exceeding The Limit" to see that Respondent has simply "cut and pasted" its prior arguments into its present motion.

very same reasons it was previously given “no consideration” due to Respondent’s failure to comply with 37 CFR §2.120(d)(1).

STATEMENT OF FACTS

On July 2, 2013, Respondent filed a combined motion to both compel discovery responses and a “Motion For Leave To Serve Additional Interrogatories Exceeding The Limit” of permissible interrogatories. Respondent asserted various arguments in its aforesaid motion, all of which were timely rebutted in Petitioner’s own responsive opposition brief (filed on July 11, 2013). In addition to its rebuttal arguments, Petitioner pointed out that Respondent had failed to obtain leave from the TTAB before serving what was clearly an excessive number of interrogatories.²

On November 4, 2013, the TTAB entered its Order on Respondent’s aforesaid combined discovery motion and, at page 3 stated: “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.” In addition, the TTAB expressly made December 3, 2013 the deadline date for Respondent “to serve petitioner with a revised set of interrogatories so as not to exceed the overall numerical limit” (emphasis added). (Dkt. 20, at p.3). Such directions were clear and unequivocal.

On November 29, 2013, Respondent—ignoring the plain and unambiguous import of the TTAB’s above-noted statement regarding both the requirements of

² In its November 4, 2013 Order, the TTAB found that Respondent’s proposed Fourth Set of Interrogatories exceeded the permissible number under 37 CFR §2.120(d)(1) and denied Respondent’s motion to compel discovery in its entirety.

Trademark Rule 2.120(d)(1) and the deadline date for serving a set of interrogatories that would not exceed the overall numerical limit—instead served Petitioner with a Motion For Leave To Serve Additional Interrogatories Exceeding The Limit. Both the Respondent's motion and its interrogatories (which plainly exceeded numerical limits) were served and filed on the same day.³

Thus, Respondent has either followed the same erroneous path that it previously undertook when the TTAB gave "no consideration" to the request for leave to serve additional interrogatories in this proceeding, or it has waived its right to serve any further interrogatories in the case. As noted, it either served an excessive number of interrogatories without TTAB authorization, or it failed to meet its December 3 deadline date for serving any further interrogatories in this case.⁴ Moreover, Respondent, in attempting to justify its present motion, simply regurgitated the same language and meritless arguments which it previously asserted in its July 2, 2013 motion.

ARGUMENT

I. Respondent's Motion For Leave To Serve Additional Interrogatories Must Be Denied For Failure To Comply With 37 CFR §2.120(d)(1).

To the extent that Respondent has "served" a new Fourth Set Of Written Interrogatories, they are unquestionably excessive in number. Respondent, however, apparently seeks to avoid that "problem" by coupling them with a motion for leave to

³ Respondent attached its proposed "Fourth Set Of Interrogatories" as an exhibit to its motion to exceed the interrogatory limitations. The TTAB had, in its November 4, 2013 Order, concluded that Respondent had served 60 interrogatories (counting subparts). The new set of interrogatories included 24 separately numbered additional interrogatories (with at least two of those interrogatories, Nos.45 and 46, containing additional subparts).

⁴ Again, Petitioner points out that Respondent has not requested any extension of time to serve the subject interrogatories beyond the December 3 deadline date.

exceed the numerical limits under Trademark Rule 2.120()(1). That Rule, which governs requests to exceed interrogatory numerical limits, is clear, precise and mandatory. It expressly states that: "A motion for leave to serve additional interrogatories *must* be filed and granted prior to the service of the proposed additional interrogatories..."(emphasis added).

At page 3 of its November 4, 2013 Order, the TTAB expressly advised Respondent that it would give "no consideration" to Respondent's request for leave to serve additional interrogatories in this case because Respondent had failed to comply with 37 CFR §2.120(d)(1). Despite the clear language of the Trademark Rule, and despite the fact that the TTAB had expressly called Respondent's attention to that Rule, Petitioner again finds itself confronted with the very same request as was asserted (and given no consideration) back in July of 2013.

In view of the foregoing, and to the extent that Respondent argues that it has met the December 3 deadline for serving its final set of interrogatories, Petitioner believes that the TTAB must deny Respondent's request to serve additional interrogatories in this case. Moreover, since this is the second time Respondent has failed to comply with Trademark Rule 2.120(d)(1), coupled with the fact that discovery closed long ago, Respondent's motion should be denied *with prejudice* so that Petitioner may finally proceed with its Trial Testimony in this litigation.

II. Respondent, Having Failed To Meet The Discovery Deadline Set Forth By The TTAB, Is Not Entitled To Pursue Further Discovery.

As noted *supra*, the TTAB granted Respondent an extended deadline date of December 3, 2013 in which to serve a "revised set of interrogatories so as not to

exceed the overall numerical limit” of 75. At no time following the entry of the aforesaid Order did Respondent seek a time extension from the TTAB (or from Petitioner). Instead, it waited until two business days before the deadline date to file a motion seeking leave to exceed the numerical interrogatory limits. It did not timely serve (as it could have) a set of interrogatories that complied with the TTAB's Order (i.e., a set within the numerical limits) and then file a motion seeking leave to serve additional interrogatories. Likewise, it did not file any request for an extension of time to serve the excessive number of interrogatories that are now the subject of its motion. Thus, Respondent has missed the deadline date for additional discovery in this case and demonstrates no “excusable neglect”⁵ for giving it yet another time extension in order to undertake any further discovery (or “reopening” the time to serve interrogatories).

II. Respondent Has Failed To Prove That Good Cause Exists To Warrant Relief From Interrogatory Limits Imposed Under 37 CFR §2.120(d)(1).⁶

Petitioner certainly recognizes that the TTAB has the authority to grant a party leave to serve more than 75 interrogatories in a proceeding before it. However, the Board has always required a showing of “good cause” in order to grant such relief from the limits imposed by 37 CFR §2.120(d)(1). This is particularly true where, as here, the requesting party has not sought leave to serve additional interrogatories before actually

⁵ Fed.R.Civ.P. 6(b) applies the “excusable neglect” standard in this situation where the deadline of taking action has passed before any time extension request.

⁶ Petitioner believes that Respondent’s failure to comply with 37 CFR §2.120(d)(1) or, alternatively, to meet the TTAB imposed discovery deadline date, should be dispositive of the discovery issue raised in Respondent’s motion. Out of caution, however, Petitioner addresses (again) Respondent’s claimed “good cause” arguments found first in Respondent’s July 2, 2013 motion and regurgitated by it in its present motion. Because the identical factual arguments are again asserted by Respondent, Petitioner has reluctantly reasserted/renewed that section of its own prior opposition brief into the present brief.

serving them on its adversary. See, Trademark Trial and Appeal Board Manual of Procedure, §405.03(a) (“A motion for leave to serve additional interrogatories must be filed and granted prior to the service of the proposed additional interrogatories...”). As noted by the TTAB in *Baron Phillippe De Rothschild S.A. v. Rothschild & Co.*, 16 U.S.P.Q.2d 1466, 1467, n. 5 (TTAB, 1990), “the good cause requirement of Trademark Rule 2.120(d)(1) must necessarily be interpreted in a restrictive manner to effectuate the new rule’s purpose of curtailing the number of interrogatories permitted to be served in a proceeding.” In the present case, Respondent has certainly not met its burden of establishing “good cause” to warrant the relief it now seeks from 37 CFR §2.120(d)(1).

Respondent’s contention that it requires more interrogatories because it has been confused and misled by Petitioner’s pleading, initial disclosures, and discovery responses is, at best, disingenuous. Respondent’s complaints about Petitioner’s pleading is particularly suspect because Respondent failed to move for a more definite statement, a motion that could have been made under Fed.R.Civ.P. Rule 12(e).⁷

Discovery in this case opened on July 11, 2012. Respondent waited over five months before it served its first set of discovery requests on December 18, 2012. Respondent’s inordinate delay in pursuing any discovery following the pleadings in this case is left completely unexplained by Respondent and is certainly “curious” in light of arguments that it now advances concerning the vague nature of the Petition For Cancellation (and Petitioner’s Initial Disclosure Statement). Also entirely unexplained is

⁷ It is noteworthy that not only did Respondent fail to file a Rule 12(e) motion directed at Petitioner’s pleading, it did not question or voice any concerns about the specificity of the pleading during the August 9, 2012 telephone conference under Rule 26 with the Interlocutory Attorney in this case, even though the parties’ respective pleadings was a primary topic of discussion during that conference.

why Respondent did not pursue any discovery depositions in this case if it truly felt that it was being provided with vague or misleading discovery responses.

Respondent, referring to Petitioner's predecessor in interest, argues that following the pleadings, "Petitioner's Initial Disclosure statement did not include the name of Petitioner's alleged predecessor-in-interest". Motion, at p. 3. Under the federal rules, however, a party is required to identify the "names of witnesses"—not companies. In its Initial Disclosure Statement, Petitioner made the following witness identification in connection with its predecessor:

Bob Martyn	7256 Sepulveda Blvd. Van Nuys, CA 818-901-1828 (Last Known Address)	Use of the mark ECONOMY RENT-A-CAR mark in the State of California and transfer of said mark
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Petitioner also made the following identification of documents:

Copies of Yellow Pages advertising materials (and documents related thereto) used by Petitioner's predecessor to promote the ECONOMY RENT-A-CAR mark in California;
Assignment and transfer documents conveying rights in the ECONOMY RENT-A-CAR mark to Petitioner's related companies and licensing mark to Petitioner;

When Respondent, four months later, finally got around to seeking written discovery in this case, Petitioner promptly provided it with copies of the above-noted documents and further identified its corporate predecessor (including the relationship between Bob Martyn and the corporate predecessor of Petitioner). In response to Respondent's first set of interrogatories, Petitioner made the following disclosures:

Interrogatory No. 4

Identify the "predecessor-in-interest" in paragraph 7 of Petitioner's Amended Petition for Cancellation in the above-styled proceeding, through which Petitioner claims to have established priority of use for the unregistered word mark ECONOMY RENT-A-CAR.

Response To Interrogatory No. 4:

UDBC, Inc., a California corporation doing business at 7254 Sepulveda Blvd., Van Nuys, CA 91405.

Interrogatory No. 5

Identify the "predecessor-in-interest" and the "licensee", including names and addresses of the responsible individuals, officers and directors, in paragraph 2 of Petitioner's Amended Petition for Cancellation in the above-styled proceeding, through which Petitioner claims to have been "rendering its vehicle rental services in California since at least as early as December of 1993."

Response To Interrogatory No. 5:

UDBC, Inc., a California corporation doing business at 7254 Sepulveda Blvd., Van Nuys, CA 91405. On information and belief, Peter Thomas is the President (and Director) and Bob Martyn is the Secretary/Treasurer (and Director) of that corporation. Each person's business address is at the above-noted location.

Interrogatory No. 6

Describe each transfer of any rights in Petitioner's alleged trademark ECONOMY RENT-A-CAR, identifying the date and the parties and the scope of rights transferred, from 1992 to the present, including any transfer of rights involving third parties.

Response To Interrogatory No. 6:

In lieu of a written description, Petitioner has produced Document Nos. P-56 through P-81, as well as P-123 through P-128, in its response to Registrant's document requests. The aforesaid documents provide the information sought by Registrant in this interrogatory.

Thus, Respondent was fully and completely informed of the predecessor company named in the pleadings, the identity of Bob Martyn (named in the Initial Disclosure Statement), the relationship of Mr. Martyn to the predecessor company, and was provided with the documents that fully demonstrated the transfer of trademark rights from that company to the Petitioner. For Respondent to now argue that it was somehow left confused or misled by Petitioner regarding the latter's predecessor is nothing short of frivolous.⁸

Finally, Respondent contends that four other companies are "implicated in the historical use of Petitioner's trademark" and, for that reason, additional interrogatories are required. Motion, at p. 6. That is simply false. Petitioner's predecessor, long before Respondent sought to register its "Economy" mark in this country, briefly used other marks for other car rental services (such as "Ugly Duckling" or "Robin Hood"). Respondent does not explain how the past use of such other, distinctly different marks is remotely relevant to any issue in this proceeding. Indeed, the proposed interrogatories do not even inquire into whether any of those companies ever used any

⁸ Respondent also claims it was misled about the "parental" relationship of Proveedores y Soluciones DAC S.A. to Petitioner. Respondent fails to explain how any such a relationship is relevant to any claim in this proceeding. In fact, there is no such relevancy.

mark containing the word "Economy" (see, for example, Interrogatory Nos. 27, 36, 40 and 41). Respondent argues that "facts relating to the history of use of [the Economy Rent-A-Car] mark are central to the resolution of this dispute" (Motion, at p.7), yet the aforesaid interrogatories do not address such facts. Indeed, interrogatories addressing use of names or other marks that have not been pled by Petitioner, or even owned by Petitioner, are simply irrelevant to the issues in this case. See generally, *Volkswagenwerk Aktiengesellschaft v. Thermo-Chem Corp.*, 176 U.S.P.Q. 493 (TTAB, 1974), accord, *Volkswagenwerk Aktiengesellschaft v. MTD Products, Inc.*, 181 U.S.P.Q. 471 (TTAB, 1974).

As noted *supra*, Respondent must demonstrate "good cause" for leave to exceed the numerical limits on interrogatories imposed under 37 CFR §2.120. The same standard applies with even more force where, as here, the TTAB has already ordered the Respondent to limit its proposed interrogatories to a number that does "not to exceed the overall numerical limit." (Dkt. 20, at p.3). Respondent's conduct in this case fails to meet the requirements of Trademark Rule 2.120(d)(1) and the TTAB Order of November 4, 2013.

CONCLUSION

Even though discovery was closed in this proceeding, Respondent was given until December 3, 2013 in which to serve additional interrogatories, but only to the extent that they fell within the numerical limits of Trademark Rule 2.120(d)(1). Respondent was not given leave to file interrogatories beyond that Rule's limitations, and it was not given any extension of time to expand or broaden any right to ask

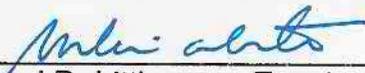
additional interrogatories. Moreover, Respondent itself never requested additional time to serve additional interrogatories and, in fact, still has not requested such a time extension. Accordingly, Respondent has either forfeited its right to serve further interrogatories in this proceeding, or it has again violated Rule 2.120(d)(1) in attempting to serve interrogatories beyond that authorized by either the Rule or the TTAB.⁹

In addition to the foregoing, Respondent has utterly failed to meet *its* burden of demonstrating good cause to exceed the numerical limitation on interrogatories imposed by Rule 2.120(d)(1). Respondent has not shown a legitimate need to exceed the Rule's interrogatory limitations and has not even shown that many of the additional interrogatories are directed at seeking relevant evidence admissible at trial.

For all of the foregoing reasons, Petitioner requests that the TTAB deny Respondent's "Motion For Leave To Serve Additional Interrogatories Exceeding The Limit" in this proceeding.

December 8, 2013

ECONOMY RENT-A-CAR INC.

By: 
Samuel D. Littlepage, Esquire
Melissa Alcantara, Esquire
DICKINSON WRIGHT PLLC
International Square Building
1875 Eye Street, N.W., Suite 1200
Washington, D.C. 20006-5420
Tel: (202) 457-0160
Fax: (202) 659-1559
Email: slittlepage@dickinsonwright.com
Email: malcantara@dickinsonwright.com

Counsel For Petitioner

⁹ Again, it bears repeating that Respondent could have served interrogatories within the numerical limits of Rule 2.120(d)(1) prior to the December 3 deadline and simultaneously filed a motion to serve additional interrogatories beyond those limits. It chose not to do so.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO SERVE ADDITIONAL INTERROGATORIES EXCEEDING THE LIMIT** was served this 8th day of December, 2013, upon Respondent's counsel of record, via fax transmission and first class mail, postage prepaid, as identified below:

John Motteli
Sharon Gobat
Da Vinci Partners LLC
St. Leonhardstrasse 4
CH-9000 St. Gallen
Switzerland
Fax: +41 71 230 1001



Melissa Alcantara, Esquire
Counsel for Petitioner