

ESTTA Tracking number: **ESTTA600890**

Filing date: **04/28/2014**

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

Proceeding	92057280
Party	Plaintiff Cadbury UK Limited
Correspondence Address	ROBERT A BECKER FROSS ZELNICK ET AL 866 UNITED NATIONS PLZ NEW YORK, NY 10017 UNITED STATES rbecker@frosszelnick.com
Submission	Opposition/Response to Motion
Filer's Name	Robert A. Becker
Filer's e-mail	rbecker@frosszelnick.com
Signature	/Robert Becker/
Date	04/28/2014
Attachments	F1439821.PDF(2090879 bytes)

The Federal Rules of Civil Procedure state that document requests must identify to whom they are directed. Fed. R. Civ. P. 34(b)(2)(A). The first sentence of Exhibit B reads as follows:

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, and Section 2.120 of the Trademark Rules of Practice of the United States Patent and Trademark Office, Petitioner Meenaxi Enterprise, Inc. (hereinafter “Registrant”) hereby requests that Petitioner Venture Execution Partners, Inc. (hereinafter “Petitioner”) produce the documents and things listed below for inspection and copying at the offices of Kenyon & Kenyon LLP, 1 Broadway, New York, New York 10004, within thirty (30) days of the date of service of this *First Set of Requests for the Production of Documents and Things*, pursuant to the attached Definitions and Instructions.

(Emphasis in original.) On their face the requests were not addressed to Cadbury and created no obligation for Cadbury to respond. Indeed, “Petitioner” was defined in the document to mean “Venture Execution Partners, Inc.” The failure to direct the requests to Cadbury is the basis of Registrant’s motion. But this error was not the fault of Cadbury; it was the fault of Registrant. Since the set of document requests was not directed to Cadbury, Cadbury had no obligation under Fed. R. Civ. P. 34(b)(2)(A) to respond. As such, there never has been a deadline for Cadbury to respond to Exhibit B, by objection or otherwise.

The extension requests discussed by Registrant do not alter this fact. These extension requests concerned “discovery,” not “document requests.” Never in the e-mails discussing the requests for extensions did Cadbury even refer to the document requests. As such, Registrant’s counsel’s claim in its April 8, 2014 declaration (hereinafter “DeFrancesco Decl.”), submitted with the Motion, that “Petitioner acted with intent to deceive” (Paragraph 17) is baseless.

Indeed, the requests for extensions were grounded in the hopes of settlement.¹ More specifically:

¹ Registrant attached some of the e-mails concerning the extension requests between the parties’ attorneys to the Motion as Exhibits C, D, E, F, G, I, and J but omitted several others. As a result, the exhibits to the Motion provide a skewed impression of Petitioner’s actions and motives. Therefore, attached hereto as Exhibit 1 is a complete set in chronological order of all e-mails concerning discovery requests between the parties’ attorneys since December 9, 2013. The pages of Exhibit 1 have been paginated in the upper right corner from page 1 to page 30. In Exhibit 1,

1. Petitioner first requested an extension of time to respond to discovery so that Petitioner would have the opportunity to provide Registrant with a “proposal” “for a resolution of this matter.” (Exhibit 1, p. 1.)
2. Petitioner’s second request for an extension was on January 9, 2014, following settlement discussions, and was agreed to because Registrant was “traveling and we will not have a chance to discuss the offer before the upcoming discovery response deadline.” (Exhibit 1, pp. 3-5.)
3. As the due date for discovery approached without any response to the settlement offer, the parties agreed to extend Petitioner’s deadline to respond to discovery until March 4, 2014. (Exhibit 1, pp. 7-8, 10, 13.)
4. In the two weeks prior to the March 4 deadline, Petitioner followed up with Registrant’s counsel about the still-outstanding January 9, 2014 settlement proposal and learned that Mr. DeFrancesco had replaced prior counsel as Registrant’s attorney. (Exhibit 1, pp. 14-15.) The January 9, 2014 settlement proposal was conveyed to new counsel. (Exhibit 1, p. 17.) During a subsequent phone conference, Registrant agreed to extend Cadbury’s time to provide responses to discovery requests until April 3 so that Registrant could respond to the long-outstanding settlement proposal.² (Exhibit 1, pp. 16, 19.) As of this submission, Registrant still has not formally responded to Petitioner’s settlement offer.

On April 3, 2014, Petitioner served responses to the Interrogatories consisting of objections thereto under Rule 2.120(d)(1) (*see* Exhibit H) and did not respond to Exhibit B. On

the e-mail exchanges labelled “**Jason L. DeFrancesco**” in the upper left corner were also included as exhibits to the Motion; the e-mail exchanges labelled “**Brittany Brady**” in the upper left corner were not included as exhibits to the Motion. (Please note that in Exhibit 1, a portion of the February 20, 2014 e-mail from Robert A. Becker, one of Petitioner’s attorneys, to Mr. DeFrancesco has been redacted because it deals with other issues.)

² In his declaration, Mr. DeFrancesco seems to argue that Cadbury’s agreement to provide responses to discovery requests obligated Cadbury to respond to the misdirected document requests. (DeFrancesco Decl. at Paragraphs 12-13.) But Mr. DeFrancesco is ignoring the facts that the term “discovery requests” can refer to interrogatories or document requests (which is presumably why, in Paragraph 5 of his own declaration, Mr. DeFrancesco defined

April 7, 2014, Registrant's counsel informed Petitioner's counsel by e-mail that he intended to make a motion to compel based on Petitioner's responses to the Interrogatories. On April 8, 2014, Registrant's counsel and Petitioner's counsel had a phone conference to discuss Petitioner's responses to the Interrogatories as well as the fact that Petitioner had not responded to Exhibit B. Later that day, Registrant's counsel informed Petitioner's counsel that he would not be making a motion to compel based on Petitioner's responses to the Interrogatories, but that he would be making a motion to compel based on the fact that Registrant had not responded to Exhibit B. (Exhibit 1, pp. 27-30.) In an e-mail response later that day, Petitioner's counsel stated: "I respectfully suggest that it would be cheaper and quicker for both parties if you simply re-serve your document requests with the error corrected, rather than engage in motion practice." (Exhibit 1, p. 27.) Registrant refused and filed the Motion.

As of the filing date of the Motion, discovery was scheduled to close on June 9, 2014, as per the Board's February 21, 2014 Order. If Registrant had simply re-served Exhibit B with the error corrected on that day, Petitioner's responses would have been due on May 8, which would have left Registrant more than a month to take follow-up discovery. Instead, Registrant has made an unnecessary motion designed to burden the TTAB and the parties in the hope of getting an order precluding Cadbury from asserting any objections to the document requests. But since the requests were not directed to Cadbury and given that Registrant cannot establish that Cadbury's conduct rises to any level that merits such draconian relief (indeed Registrant does not even bother to discuss when such sanctions are appropriate) the motion must be denied. Registrant is free to serve proper discovery on the proper party. That is the only relief that it needs and to which it is entitled.

Exhibit B as the "Documents Requests") and that Petitioner in fact did respond timely to the discovery requests that were properly served, namely, the Interrogatories.

ARGUMENT

As shown above, Petitioner has acted in good faith throughout this litigation, including by attempting to resolve this case by settlement.

Other than questioning Petitioner's good faith, the sole basis for Registrant's motion is that Registrant's error in wrongly addressing the document requests to "Venture Execution Partners, Inc." instead of "Cadbury UK Limited" is but "a minor typographical error" (Motion, p. 3). Registrant suggests that Cadbury is responsible for and should be sanctioned because Registrant did not proofread its own document. Registrant offers no legal support for its attempt to pass off the consequences of its error to Cadbury.

As an initial matter, Registrant's error in the first sentence of Exhibit B is not "a minor typographical error." Rather, it is a crucial mistake in the operative sentence of Registrant's failed attempt to request the production of documents from Cadbury, the effect of which is that no such request was ever made to Cadbury.

Registrant tries to get around the fundamental nature of this problem by stating that Exhibit B incorporates by reference the definitions set forth in the Interrogatories, and that the definitions in the Interrogatories state: "The term 'Petitioner' shall refer to Cadbury UK Limited, and any predecessor or successor corporation or entity; any parent, subsidiary, of affiliated company; and any attorney, officer, director, agent, representative or employee of Cadbury UK Limited or any of the other foregoing entities." (Exhibit A, p. 2.)

But the definition of "Petitioner" in the Interrogatories cannot cure the error in the first sentence of Exhibit B, since that document specifically defines the term "Petitioner" to mean "Venture Execution Partners, Inc." This specific definition set forth in the operative sentence of Exhibit B necessarily prevails over a general definition set forth in a separate document. And if

“Petitioner” as used in the first sentence of Exhibit B had the definition set forth in the Interrogatories, this would mean that Registrant was requesting that Petitioner and its predecessors, successors, and affiliated companies and their attorneys, officers, directors, agents, representatives, and employees should all produce documents to Registrant, which is absurd. It is clear that the definition of “Petitioner” set forth in the Interrogatories was only intended to apply to the word “Petitioner” as used in individual discovery requests, although Registrant thwarted that intention with respect to Exhibit B by specifically defining “Petitioner” to mean “Venture Execution Partners, Inc.” in the first sentence.

But even putting aside the fact that Registrant’s error was not “a minor typographical error,” as Registrant contends, the two cases cited by Registrant regarding typographical errors do not support Registrant’s proposition here that Cadbury was obligated to respond to Exhibit B. In *Ratzel v. Sidel* (E.D. Wis. 2006),³ the plaintiff, Lee Ratzel, was a prisoner in a Wisconsin state prison who was suing Joe Sidel, an employee of that prison. At the time of Ratzel’s suit against Sidel, Ratzel also had pending a separate suit against a different prison employee, Terry Gable. The motion to compel in the *Ratzel* case involved a set of document requests addressed to Sidel, but it did not involve a typographical error in those document requests. Instead, plaintiff made an error in the *motion to compel*, addressed to the court, in which he mistakenly asked the court to compel Gable, rather than Sidel, to respond to discovery. The case has nothing to do with a party’s obligation to respond to discovery that on its face was not addressed to it.

Also unavailing is *Eane Corp. v. Town of Auburn*, 176 F.R.D. 433 (D. Mass. 1997) (copy attached hereto as Exhibit 3), also cited by Registrant. In *Eane*, plaintiff’s motion to compel involved two requests for admission that referred to an opinion letter “and further note[d]” that

³ Attached hereto as Exhibit 2 is the October 6, 2006 Order to Compel Discovery in the *Ratzel* case (hereinafter “*Ratzel* Order”), to which Registrant cites.

that opinion letter was attached to the complaint as Exhibit 21. The defendant objected to those requests because there was no Exhibit 21 to the complaint. The letter was in fact attached as Exhibit 28. The court granted the motion to compel because the letter was attached, could be easily located, and could be identified. 176 F.R.D. at 438. But here, the requests were directed to a wholly different entity. Under Fed. R. Civ. P. 34(b)(2)(A), the “party to whom the request is directed must respond in writing....” Unlike the situation in *Eane*, here, Cadbury was *not* the party to whom the discovery request was directed. As such, the case is inapposite.⁴

In addition, Registrant argues that Petitioner’s extensions of time to respond to discovery and Petitioner’s decision not to respond to Registrant’s critically flawed attempt to request documents from Petitioner has caused Registrant “hardship” and “severe prejudice.” (Motion, p. 4.) But Registrant never even purports to explain what that prejudice is, because there isn’t any. As set forth above, when Registrant made its motion to compel on April 8, 2014, discovery was scheduled to close on June 9, 2014. If Registrant had simply re-served a corrected version of Exhibit B on April 8, Petitioner’s responses would have been due on May 8, and Registrant would have had more than a month to take follow-up discovery. Now the case has been suspended, and a new schedule will eventually be issued by the Board, so there is no reason why Registrant will not retain its time to take follow-up discovery.

Finally, Registrant argues that since Petitioner cannot show “excusable neglect,” the Board should rule that Petitioner has forfeited its right to object to the discovery requests. (Motion, p. 4.) Registrant is apparently referring to Section 527.01(c) of the TBMP, which states: “A party which fails to respond to a request for discovery...during the time allowed therefor, and which is unable to show that its failure was the result of excusable neglect, may be

⁴ The only other case cited by Registrant, *No Fear Inc. v. Rule*, 54 U.S.P.Q.2d 1551 (T.T.A.B. 2000), did not involve an error in discovery requests.

found, upon motion to compel filed by the propounding party, to have forfeited its right to object to the discovery request on its merits.” (Footnote omitted.) But this statement is inapplicable here, because there were no document requests that were actually directed to Petitioner. Further, Cadbury does not claim that its lack of a response was the result of neglect. There was no response because through its sloppiness Registrant failed to serve requests addressed to Cadbury and therefore failed to trigger any obligation on the part of Cadbury. Forfeiture of the right to object to discovery requests on the merits is appropriate only where the moving party has actually served discovery requests directed to the non-moving party, the non-moving party has neglected to respond to those requests, and that neglect is not excusable. Registrant has offered no rule, case, or TBMP section to support its argument that where the moving party has failed in its attempt to direct discovery requests to the non-moving party, and therefore the non-moving party has not served responses, the non-moving party should be found to have waived its right to make objections on the merits. Furthermore, the *No Fear* case cited by Registrant makes it clear that the only situation in which the non-moving party can be found to have waived its right to make objections on the grounds of privilege or confidentiality, rather than on the merits, is where the motion specifically seeks such relief and the non-moving party fails to respond to the motion. 54 U.S.P.Q.2d 1551, 1554 & n.2. This is not the case here either.

CONCLUSION

In its motion to compel, Registrant accuses Petitioner of “gamesmanship.” (Motion, pp. 2, 4.) This motion does involve gamesmanship—by Registrant. Registrant has always possessed the ability to re-serve Exhibit B with the error cured and thus to obligate Petitioner to respond to the document requests 30 days later. But instead Registrant elected to make this motion, in the hope of obtaining a ruling from the Board that Petitioner may not raise objections to the

document requests in Exhibit B, including objecting to the demand in Exhibit B that Petitioner deliver the requested documents to Registrant's attorney's office. But neither the cases cited in the Motion nor any other caselaw supports a grant of such draconian relief. Where, as here, the only errors that were made were made by Registrant, it is improper to grant Registrant the relief requested. Accordingly, Registrant's motion to compel should be denied.

Dated: New York, New York
April 28, 2014

Respectfully submitted,

FROSS ZELNICK LEHRMAN
& ZISSU, P.C.

By: 

Barbara A. Solomon

Robert A. Becker

866 United Nations Plaza
New York, New York 10017
(212) 813-5900

*Attorneys for Petitioner Cadbury UK
Limited*

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of PETITIONER'S RESPONSE TO REGISTRANT'S MOTION TO COMPEL DISCOVERY to be served by prepaid, first-class mail on this 28th day of April, 2014 upon Registrant's attorney at the below listed address:

Jason L. DeFrancesco, Esq.
Baker & Rannells PA
575 Route 28
Suite 102
Raritan, NJ 08869

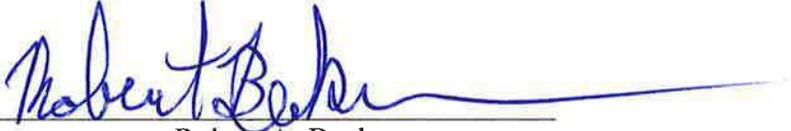

Robert A. Becker

EXHIBIT 1

Jason L. DeFrancesco

From: Barbara Solomon <bsolomon@fzlj.com>
Sent: Tuesday, December 10, 2013 11:48 AM
To: Kelly, Michael; Robert A. Becker
Cc: Marsh, Michelle
Subject: RE: Bournvita

Michael – Thank you for agreeing to the extension of our clients time to respond to discovery for an addition thirty days or until January 17. This will also confirm that if we serve any discovery on Meenaxi before we respond to the outstanding requests your client will have 60 days to respond.

As for a resolution of this matter, I hope to have a proposal to you before the holidays.

Barbara A. Solomon
 Fross Zelnick Lehrman & Zissu
 866 United Nations Plaza
 New York, New York, 10017
 Ph: 212-813-5900
 Fax: 212- 813-5901

From: Kelly, Michael [<mailto:MKelly@kenyon.com>]
Sent: Monday, December 09, 2013 5:45 PM
To: Robert A. Becker
Cc: Marsh, Michelle; Barbara Solomon
Subject: Bournvita

Rob:

Following up on our call last week, Meenaxi is willing to agree to a 30-day extension of time for Cadbury to respond to the discovery that Meenaxi served on November 18, 2013 provided that Meenaxi shall receive the same length of time (i.e., 60 days) to respond to any discovery served on it before Cadbury responds to Meenaxi's November 18 discovery requests.

Let me know if Cadbury agrees.

Thank you.

Michael Kelly
Kenyon & Kenyon LLP
 One Broadway | New York, NY 10004-1007
 212.908.6030 Phone | 212.425.5288 Fax
mkelly@kenyon.com | www.kenyon.com

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Brittany Brady

From: Kelly, Michael [MKelly@kenyon.com]
Sent: Thursday, January 09, 2014 11:34 AM
To: Barbara Solomon
Cc: Marsh, Michelle
Subject: RE: Cancellation Action - Bournvita

I'm available at 3pm today if that works.

From: Barbara Solomon [<mailto:bsolomon@fztz.com>]
Sent: Thursday, January 09, 2014 11:23 AM
To: Kelly, Michael
Subject: Cancellation Action - Bournvita

Mike:

Do you have time today to discuss this matter. We do have a proposal to make to you about settlement.

Barbara A. Solomon
Fross Zelnick Lehrman & Zissu
866 United Nations Plaza
New York, New York, 10017
Ph: 212-813-5900
Fax: 212- 813-5901

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Brittany Brady

From: Robert A. Becker
Sent: Thursday, January 09, 2014 5:19 PM
To: 'mkelly@kenyon.com'
Cc: Barbara Solomon; Brittany Brady
Subject: BOURNVITA cancellation

Michael -

I understand that you and Barbara had a substantive discussion today of our client's settlement position. Since you will now be discussing our client's settlement position with your client, are you willing to consent to an additional 30-day extension of our client's time to respond to discovery? Since our deadline is 1/17, we would appreciate a response to this e-mail at your and your client's earliest convenience. Thank you.

Rob Becker

Robert A. Becker
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
phone 212-813-5900
fax 212-813-5901

Jason L. DeFrancesco

From: Robert A. Becker <rbecker@fzlz.com>
Sent: Monday, January 13, 2014 12:41 PM
To: Kelly, Michael
Cc: Marsh, Michelle; Barbara Solomon; Brittany Brady
Subject: RE: Cancellation action against registration of BOURNVITA

Michael -

We agree to this.

Rob Becker

Robert A. Becker
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
phone 212-813-5900
fax 212-813-5901

From: Kelly, Michael [<mailto:MKelly@kenyon.com>]
Sent: Monday, January 13, 2014 11:16 AM
To: Barbara Solomon
Cc: Robert A. Becker; Marsh, Michelle
Subject: RE: Cancellation action against registration of BOURNVITA

Barbara,

Our client is traveling and we will not have a chance to discuss the offer before the upcoming discovery response deadline. Therefore, we are willing to extend the current arrangement another 30 days, i.e., Cadbury's responses will be due on February 18 (accounting for the holiday weekend) and Meenaxi would have 60 days to respond to any discovery served on it before February 18. Let me know if this is acceptable.

Michael Kelly
Kenyon & Kenyon LLP
One Broadway | New York, NY 10004-1007
212.908.6030 Phone | 212.425.5288 Fax
mkelly@kenyon.com | www.kenyon.com

From: Barbara Solomon [<mailto:bsolomon@fzlz.com>]
Sent: Monday, January 13, 2014 10:41 AM
To: Kelly, Michael

Cc: Robert A. Becker

Subject: Cancellation action against registration of BOURNVITA

Michael -

I am following up on our discussion of last week. Can you please get back to me today and let me know the status of our settlement offer as well as whether you will consent to the extension of time to respond to discovery.

Also, we have now received two unsolicited and anonymous emails, attached, concerning your client and its business activities. The emails make claims not only about your client's activities surrounding the BOURNVITA mark but also allegations concerning other business practices of your client. We do not have any idea who is sending these emails.

Barbara A. Solomon
Fross Zelnick Lehrman & Zissu
866 United Nations Plaza
New York, New York, 10017
Ph: 212-813-5900
Fax: 212- 813-5901

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Brittany Brady

From: Barbara Solomon
Sent: Thursday, January 23, 2014 5:27 PM
To: 'Kelly, Michael'
Cc: Robert A. Becker
Subject: RE: Cancellation action against registration of BOURNVITA

Mike –Do you have any idea when this will be? The delay is obviously cutting deeply into our extension period for responding to discovery requests. We do not want to have to divert resources to finalizing our responses if we are going to settle but I cannot comfortably wait until the deadline to see where things stand.

Barbara A. Solomon
Fross Zelnick Lehrman & Zissu
866 United Nations Plaza
New York, New York, 10017
Ph: 212-813-5900
Fax: 212- 813-5901

From: Kelly, Michael [<mailto:MKelly@kenyon.com>]
Sent: Thursday, January 23, 2014 5:04 PM
To: Barbara Solomon
Cc: Marsh, Michelle
Subject: RE: Cancellation action against registration of BOURNVITA

Barbara,

Our client contacts are traveling extensively outside the country. We will meet with them once they return to discuss the proposal.

Michael Kelly
Kenyon & Kenyon LLP
One Broadway | New York, NY 10004-1007
212.908.6030 Phone | 212.425.5288 Fax
mkelly@kenyon.com | www.kenyon.com

From: Barbara Solomon [<mailto:bsolomon@fzlj.com>]
Sent: Wednesday, January 22, 2014 2:23 PM
To: Kelly, Michael
Subject: RE: Cancellation action against registration of BOURNVITA

Michael –

Where do things stand on our client's settlement proposal?

Barbara A. Solomon
Fross Zelnick Lehrman & Zissu
866 United Nations Plaza
New York, New York, 10017
Ph: 212-813-5900
Fax: 212- 813-5901

From: Kelly, Michael [<mailto:MKelly@kenyon.com>]
Sent: Monday, January 13, 2014 11:16 AM
To: Barbara Solomon
Cc: Robert A. Becker; Marsh, Michelle
Subject: RE: Cancellation action against registration of BOURNVITA

Barbara,

Our client is traveling and we will not have a chance to discuss the offer before the upcoming discovery response deadline. Therefore, we are willing to extend the current arrangement another 30 days, i.e., Cadbury's responses will be due on February 18 (accounting for the holiday weekend) and Meenaxi would have 60 days to respond to any discovery served on it before February 18. Let me know if this is acceptable.

Michael Kelly
Kenyon & Kenyon LLP
One Broadway | New York, NY 10004-1007
212.908.6030 Phone | 212.425.5288 Fax
mkelly@kenyon.com | www.kenyon.com

From: Barbara Solomon [<mailto:bsolomon@fziz.com>]
Sent: Monday, January 13, 2014 10:41 AM
To: Kelly, Michael
Cc: Robert A. Becker
Subject: Cancellation action against registration of BOURNVITA

Michael -

I am following up on our discussion of last week. Can you please get back to me today and let me know the status of our settlement offer as well as whether you will consent to the extension of time to respond to discovery.

Also, we have now received two unsolicited and anonymous emails, attached, concerning your client and its business activities. The emails make claims not only about your client's activities surrounding

the BOURNVITA mark but also allegations concerning other business practices of your client.⁹ We do not have any idea who is sending these emails.

Barbara A. Solomon
Fross Zelnick Lehrman & Zissu
866 United Nations Plaza
New York, New York, 10017
Ph: 212-813-5900
Fax: 212- 813-5901

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Brittany Brady

From: Kelly, Michael [MKelly@kenyon.com]
Sent: Wednesday, January 29, 2014 6:35 PM
To: Barbara Solomon
Cc: Marsh, Michelle; Robert A. Becker
Subject: RE: Cancellation action against registration of BOURNVITA

They should be back next week. If we cannot respond to the offer next week, we can discuss a further extension.

Michael Kelly
Kenyon & Kenyon LLP
One Broadway | New York, NY 10004-1007
212.908.6030 Phone | 212.425.5288 Fax
mkelly@kenyon.com | www.kenyon.com

From: Barbara Solomon [<mailto:bsolomon@fzlj.com>]
Sent: Wednesday, January 29, 2014 11:54 AM
To: Kelly, Michael
Cc: Marsh, Michelle; Robert A. Becker
Subject: RE: Cancellation action against registration of BOURNVITA

Michael – Our extension to respond to the discovery requests, premised on our discussing settlement, is running out and we have not heard back from you on the offer we made. Please advise as to when you anticipate being able to speak to your client and also whether in light of the delay encountered on your side you will further extend the deadline for our response.

Barbara A. Solomon
Fross Zelnick Lehrman & Zissu
866 United Nations Plaza
New York, New York, 10017
Ph: 212-813-5900
Fax: 212- 813-5901

From: Kelly, Michael [<mailto:MKelly@kenyon.com>]
Sent: Thursday, January 23, 2014 5:04 PM
To: Barbara Solomon
Cc: Marsh, Michelle
Subject: RE: Cancellation action against registration of BOURNVITA

Barbara,

Our client contacts are traveling extensively outside the country. We will meet with them once they return to discuss the proposal.

Michael Kelly

Kenyon & Kenyon LLP

One Broadway | New York, NY 10004-1007

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mkelly@kenyon.com | www.kenyon.com

From: Barbara Solomon [<mailto:bsolomon@fzlz.com>]

Sent: Wednesday, January 22, 2014 2:23 PM

To: Kelly, Michael

Subject: RE: Cancellation action against registration of BOURNVITA

Michael –

Where do things stand on our client's settlement proposal?

Barbara A. Solomon
Fross Zelnick Lehrman & Zissu
866 United Nations Plaza
New York, New York, 10017
Ph: 212-813-5900
Fax: 212- 813-5901

From: Kelly, Michael [<mailto:MKelly@kenyon.com>]

Sent: Monday, January 13, 2014 11:16 AM

To: Barbara Solomon

Cc: Robert A. Becker; Marsh, Michelle

Subject: RE: Cancellation action against registration of BOURNVITA

Barbara,

Our client is traveling and we will not have a chance to discuss the offer before the upcoming discovery response deadline. Therefore, we are willing to extend the current arrangement another 30 days, i.e., Cadbury's responses will be due on February 18 (accounting for the holiday weekend) and Meenaxi would have 60 days to respond to any discovery served on it before February 18. Let me know if this is acceptable.

Michael Kelly

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212.908.6030 Phone | 212.425.5288 Fax

mkelly@kenyon.com | www.kenyon.com

From: Barbara Solomon [<mailto:bsolomon@fziz.com>]
Sent: Monday, January 13, 2014 10:41 AM
To: Kelly, Michael
Cc: Robert A. Becker
Subject: Cancellation action against registration of BOURNVITA

Michael -

I am following up on our discussion of last week. Can you please get back to me today and let me know the status of our settlement offer as well as whether you will consent to the extension of time to respond to discovery.

Also, we have now received two unsolicited and anonymous emails, attached, concerning your client and its business activities. The emails make claims not only about your client's activities surrounding the BOURNVITA mark but also allegations concerning other business practices of your client. We do not have any idea who is sending these emails.

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Jason L. DeFrancesco

From: Robert A. Becker <rbecker@fzlz.com>
Sent: Friday, February 07, 2014 3:38 PM
To: Kelly, Michael
Cc: Barbara Solomon; Brittany Brady
Subject: BOURNVITA cancellation

Mike -

As per our conversation just now, our client's discovery responses will be due 3/4/14.

Rob Becker

Robert A. Becker
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
phone 212-813-5900
fax 212-813-5901

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Jason L. DeFrancesco

From: Robert A. Becker <rbecker@fzlz.com>
Sent: Tuesday, February 18, 2014 5:49 PM
To: Kelly, Michael
Cc: Brittany Brady; Barbara Solomon
Subject: BOURNVITA

Mike -

Back on 2/7, you agreed to extend our client's time to respond to your client's outstanding discovery requests till 3/4 while we waited to hear from your client re settlement. We still have not heard back from you re settlement, and a good bit of our extension period has now been taken up waiting to hear from your client, so we are virtually where we were on 2/7. Under these circumstances, we think it would make sense for you to agree to a further 30-day extension of our client's time to respond to your client's discovery requests. And it probably makes sense to file a 30-day extension of all dates in the TTAB schedule.

Please let us know whether you consent to this. Thanks.

Rob Becker

Robert A. Becker
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Brittany Brady

From: Kelly, Michael [MKelly@kenyon.com]
Sent: Tuesday, February 18, 2014 6:34 PM
To: Robert A. Becker
Cc: Brittany Brady; Barbara Solomon; Marsh, Michelle
Subject: RE: BOURNVITA

Rob,

Please be advised that Meenaxi has decided to proceed with different counsel. His information is below and he entered his appearance today. Any request should be directed to him.

Jason DeFrancesco, Esq.
575 Route 28, Ste 102
Raritan, New Jersey 08869
(908) 722-5640
jld@br-tmlaw.com

From: Robert A. Becker [<mailto:rbecker@fzlj.com>]
Sent: Tuesday, February 18, 2014 5:49 PM
To: Kelly, Michael
Cc: Brittany Brady; Barbara Solomon
Subject: BOURNVITA

Mike -

Back on 2/7, you agreed to extend our client's time to respond to your client's outstanding discovery requests till 3/4 while we waited to hear from your client re settlement. We still have not heard back from you re settlement, and a good bit of our extension period has now been taken up waiting to hear from your client, so we are virtually where we were on 2/7. Under these circumstances, we think it would make sense for you to agree to a further 30-day extension of our client's time to respond to your client's discovery requests. And it probably makes sense to file a 30-day extension of all dates in the TTAB schedule.

Please let us know whether you consent to this. Thanks.

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Brittany Brady

From: Robert A. Becker
Sent: Thursday, February 20, 2014 3:02 PM
To: 'Jason L. DeFrancesco'
Cc: Brittany Brady; Barbara Solomon
Subject: RE: Cadbury v Meenaxi; No. 92057280
Attachments: Registrant's Initial Disclosures (F1346579x96B9E).pdf; Petitioner Cadbury UK Limited's Initial Disclosures (F1346462x96B9E).pdf

Here you go.

Robert A. Becker
 Fross Zelnick Lehrman & Zissu, P.C.
 866 United Nations Plaza
 New York, NY 10017
 phone 212-813-5900
 fax 212-813-5901

From: Jason L. DeFrancesco [<mailto:JLD@br-tmlaw.com>]
Sent: Thursday, February 20, 2014 2:58 PM
To: Robert A. Becker
Subject: RE: Cadbury v Meenaxi; No. 92057280

(Can you send to me?)

From: Robert A. Becker [<mailto:rbecker@fzlj.com>]
Sent: Thursday, February 20, 2014 2:57 PM
To: Jason L. DeFrancesco
Cc: K. Hnasko; J. Rannells; Brittany Brady; Barbara Solomon
Subject: RE: Cadbury v Meenaxi; No. 92057280

We were not served with requests for admission. Both parties have made their initial disclosures.

Robert A. Becker
 Fross Zelnick Lehrman & Zissu, P.C.
 866 United Nations Plaza
 New York, NY 10017
 phone 212-813-5900
 fax 212-813-5901

From: Jason L. DeFrancesco [<mailto:JLD@br-tmlaw.com>]
Sent: Thursday, February 20, 2014 2:53 PM
To: Robert A. Becker
Cc: K. Hnasko; J. Rannells; Brittany Brady; Barbara Solomon
Subject: RE: Cadbury v Meenaxi; No. 92057280

Robert,

I will communicate your client's offer to our client and let you know.

In the meantime, thank you for the document requests and interrogatories. Please let me know if you were served with a request for admissions and if initial disclosures have been made?

Regards,
Jason

From: Robert A. Becker [<mailto:rbecker@fzlj.com>]
Sent: Thursday, February 20, 2014 2:20 PM
To: Jason L. DeFrancesco
Cc: K. Hnasko; J. Rannells; Brittany Brady; Barbara Solomon
Subject: RE: Cadbury v Meenaxi; No. 92057280

Mr. DeFrancesco -

As we discussed yesterday, attached are Registrant's document requests and interrogatories. I also have set forth below our client's settlement offer, which was originally made by my colleague Barbara Solomon in her 1/9 phone call with Mike Kelly.

REDACTED

Please let us know whether your client accepts these terms, in which case we will draft a settlement agreement for your review. I look forward to speaking with you tomorrow at 3:30 about the discovery schedule, and perhaps settlement.

Rob Becker

Robert A. Becker
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
phone 212-813-5900
fax 212-813-5901

From: Jason L. DeFrancesco [<mailto:JLD@br-tmlaw.com>]
Sent: Thursday, February 20, 2014 1:57 PM
To: Robert A. Becker
Cc: K. Hnasko; J. Rannells
Subject: Cadbury v Meenaxi; No. 92057280
Importance: High

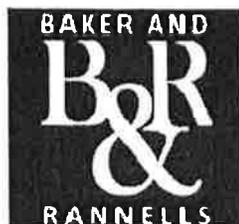
Dear Robert,

Thank you for contacting me the other day regarding this matter.

As discussed, kindly send me the discovery and initial disclosures exchanged thus far so that I may be able to attend to the related issues/requests you raised. *I would be grateful if you could provide me the courtesy of e-mailing all the documents to me today.*

I look forward to speaking with you tomorrow at 3:30PM.

Regards,
Jason



Jason DeFrancesco, Esq.
575 Route 28, Ste 102
Raritan, New Jersey 08869
(908) 722-5640
jld@br-tmlaw.com

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Jason L. DeFrancesco

From: Robert A. Becker <rbecker@fzlz.com>
Sent: Friday, February 21, 2014 4:45 PM
To: Jason L. DeFrancesco
Cc: Brittany Brady; Barbara Solomon
Subject: BOURNVITA cancellation

Mr. DeFrancesco -

This e-mail is to memorialize our phone conversation this afternoon during which you agreed that our client's responses to discovery requests would be due 4/3. We look forward to hearing your client's response to the settlement offer set forth in my e-mail to you of yesterday.

Rob Becker

Robert A. Becker
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
phone 212-813-5900
fax 212-813-5901

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Brittany Brady

From: Robert A. Becker
Sent: Monday, March 03, 2014 3:06 PM
To: 'Jason L. DeFrancesco'
Cc: 'K. Hnasko'; 'J. Rannells'; Brittany Brady; Barbara Solomon
Subject: RE: Cadbury v Meenaxi; No. 92057280

Mr. DeFrancesco -

Once again I called your office but the receptionist transferred the call and let it ring continuously--no one picked up and there was no voice mail.

Can you let us know your client's response to the settlement offer below? Thank you.

Rob Becker

Robert A. Becker
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
phone 212-813-5900
fax 212-813-5901

From: Robert A. Becker
Sent: Thursday, February 20, 2014 2:20 PM
To: 'Jason L. DeFrancesco'
Cc: K. Hnasko; J. Rannells; Brittany Brady; Barbara Solomon
Subject: RE: Cadbury v Meenaxi; No. 92057280

Mr. DeFrancesco -

As we discussed yesterday, attached are Registrant's document requests and interrogatories. I also have set forth below our client's settlement offer, which was originally made by my colleague Barbara Solomon in her 1/9 phone call with Mike Kelly.

REDACTED

Please let us know whether your client accepts these terms, in which case we will draft a settlement agreement for your review. I look forward to speaking with you tomorrow at 3:30 about the discovery schedule, and perhaps settlement.

Rob Becker

Robert A. Becker

Brittany Brady

From: Jason L. DeFrancesco [JLD@br-tmlaw.com]
Sent: Wednesday, March 05, 2014 6:52 PM
To: Robert A. Becker
Cc: J. Rannells; K. Hnasko
Subject: RE: Cadbury v Meenaxi; No. 92057280

Dear Robert,

I have no answer regarding settlement. I look forward to receiving your discovery responses.

Best regards,
 Jason

From: Robert A. Becker [mailto:rbecker@fzlj.com]
Sent: Thursday, February 20, 2014 3:02 PM
To: Jason L. DeFrancesco
Cc: Brittany Brady; Barbara Solomon
Subject: RE: Cadbury v Meenaxi; No. 92057280

Here you go.

Robert A. Becker
 Fross Zelnick Lehrman & Zissu, P.C.
 866 United Nations Plaza
 New York, NY 10017
 phone 212-813-5900
 fax 212-813-5901

From: Jason L. DeFrancesco [mailto:JLD@br-tmlaw.com]
Sent: Thursday, February 20, 2014 2:58 PM
To: Robert A. Becker
Subject: RE: Cadbury v Meenaxi; No. 92057280

(Can you send to me?)

From: Robert A. Becker [mailto:rbecker@fzlj.com]
Sent: Thursday, February 20, 2014 2:57 PM
To: Jason L. DeFrancesco
Cc: K. Hnasko; J. Rannells; Brittany Brady; Barbara Solomon
Subject: RE: Cadbury v Meenaxi; No. 92057280

We were not served with requests for admission. Both parties have made their initial disclosures.

Robert A. Becker
 Fross Zelnick Lehrman & Zissu, P.C.
 866 United Nations Plaza
 New York, NY 10017
 phone 212-813-5900
 fax 212-813-5901

Brittany Brady

From: Kelly, Michael [MKelly@kenyon.com]
Sent: Tuesday, March 11, 2014 12:03 PM
To: Robert A. Becker
Cc: Brittany Brady; Barbara Solomon
Subject: RE: BOURN VITA

Rob,

I passed your request onto Meenaxi's counsel. He does have them in Word format.

Michael Kelly**Kenyon & Kenyon LLP**

One Broadway | New York, NY 10004-1007

212.908.6030 Phone | 212.425.5288 Fax

mkelly@kenyon.com | www.kenyon.com

From: Robert A. Becker [<mailto:rbecker@fzlj.com>]

Sent: Monday, March 10, 2014 11:44 AM

To: Kelly, Michael

Cc: Brittany Brady; Barbara Solomon

Subject: BOURN VITA

Mike -

Can I ask a favor? Can you send me your ex-client's discovery requests in word so I can use them to set up our responses? I would ask your successor, but since he asked me to send him the pdfs, I'm pretty sure he doesn't have them in word.

Rob Becker

Robert A. Becker
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
phone 212-813-5900
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Brittany Brady

From: Robert A. Becker
Sent: Monday, April 07, 2014 2:35 PM
To: 'Jason L. DeFrancesco'
Cc: Barbara Solomon; Brittany Brady
Subject: Cadbury v. Meenaxi
Attachments: First Set of Interrogatories and Document Requests to Registrant (F14272....pdf; Petitioner's First Set of Requests for Admission to Registrant (F1427248....pdf; Notice of Deposition of Meenaxi Gandhi (F1427250x96B9E).pdf

Mr. DeFrancesco -

Attached are our client's first set of interrogatories and document requests, first set of requests for admission, and notice of deposition.

Rob Becker

Robert A. Becker
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017
phone 212-813-5900
fax 212-813-5901

Jason L. DeFrancesco

From: Jason L. DeFrancesco
Sent: Tuesday, April 08, 2014 10:30 AM
To: 'Robert A. Becker'
Cc: J. Rannells; K. Hnasko; 'Barbara Solomon'; 'Brittany Brady'
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. Becker,

Although it appears I misunderstood your availability, I did not hear from you this morning in regards to firming up a time to call.

Please call me Today, Tuesday, April 8, 2014 at 11:15 AM EST

In effort to obtain an answer without Board intervention, this communication represents continuing good-faith attempts to confer with a party failing to act.

Thank you,
Jason

From: Jason L. DeFrancesco
Sent: Monday, April 07, 2014 6:45 PM
To: 'Robert A. Becker'
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. Becker,

Ok. Please call me tomorrow: Tuesday, April 8, 2014 at 10:00 AM EST.

Again, I am unsure what there is to discuss when there are just boiler plate objections (much different than your cited recent decision of the Board). Unless you have substantive response to provide us, we shall move to compel.

Nevertheless, I look forward to speaking with you tomorrow and suggest we may also discuss your response to requests for production (due April 4, 2014) which we did not receive.

This is a good-faith attempted to confer with a party failing to act, in effort to obtain an answer without Board intervention.

Regards,
Jason

From: Robert A. Becker [<mailto:rbecker@fzlz.com>]
Sent: Monday, April 07, 2014 6:22 PM
To: Jason L. DeFrancesco
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

I have to leave now. I am available the rest of the week except the following times:

Tuesday: Before 11 and 1-2

Wednesday: Before 2:30

Thursday: 12:30-3:30

If you let me know when you are available, I will get back to you tomorrow morning to firm up a time for a call.

Robert A. Becker
 Fross Zelnick Lehrman & Zissu, P.C.
 866 United Nations Plaza
 New York, NY 10017
 phone 212-813-5900
 fax 212-813-5901

From: Jason L. DeFrancesco [<mailto:JLD@br-tmlaw.com>]
Sent: Monday, April 07, 2014 6:18 PM
To: Robert A. Becker
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. Becker,

I am unsure how to resolve "the issue raised" by your response – because its non-responsive and you answered nothing.

I am however available now. (908) 722-5640. Please follow the prompts to reach me.

Jason DeFrancesco

From: Robert A. Becker [<mailto:rbecker@fzlj.com>]
Sent: Monday, April 07, 2014 6:07 PM
To: Jason L. DeFrancesco
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. DeFrancesco -

This confirms that the attached is the only response to Registrant's interrogatories that we served. Please let us know when you would like to have a telephone conference to resolve the issue raised by our response, since your e-mail below does not satisfy your client's obligations to confer prior to a motion to compel under Rule 2.120(e)(1). See TBMP Section 405.03(e) and this recent opinion of the Board <http://ttabvue.uspto.gov/ttabvue/v?pno=91209030&pty=OPP&eno=11>.

Rob Becker

Robert A. Becker
 Fross Zelnick Lehrman & Zissu, P.C.
 866 United Nations Plaza
 New York, NY 10017
 phone 212-813-5900
 fax 212-813-5901

From: Jason L. DeFrancesco [<mailto:JLD@br-tmlaw.com>]
Sent: Monday, April 07, 2014 5:36 PM
To: Robert A. Becker; Barbara Solomon
Cc: J. Rannells; K. Hnasko
Subject: Meenaxi adv. Cadbury; No. 92057280

Mr. Becker,

If you have mailed a response to Registrant's First Set of Interrogatories (served November 18, 2013) *in addition to what is attached* please e-mail a copy it as it was not received.

Otherwise, please confirm that the attached is the extent of your response so we can pursue a motion to compel.

This is a good-faith attempted to confer with a party failing to act, in effort to obtain an answer without Board intervention.

Regards,
Jason



Jason DeFrancesco, Esq.
575 Route 28, Ste 102
Raritan, New Jersey 08869
(908) 722-5640
jld@br-tmlaw.com

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Jason L. DeFrancesco

From: Robert A. Becker <rbecker@fzlj.com>
Sent: Tuesday, April 08, 2014 12:31 PM
To: Jason L. DeFrancesco
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. DeFrancesco -

I respectfully suggest that it would be cheaper and quicker for both parties if you simply re-serve your document requests with the error corrected, rather than engage in motion practice. And for that reason, I do not believe the Board would look kindly on a motion to compel in these circumstances.

Rob Becker

Robert A. Becker
 Fross Zelnick Lehrman & Zissu, P.C.
 866 United Nations Plaza
 New York, NY 10017
 phone 212-813-5900
 fax 212-813-5901

From: Jason L. DeFrancesco [mailto:JLD@br-tmlaw.com]
Sent: Tuesday, April 08, 2014 12:14 PM
To: Robert A. Becker
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. Becker,

Thank you for the call earlier in attempts to resolve the discovery issues regarding interrogatories and requests for production.

While I do not agree with the interrogatory count, I withdraw Interrogatory Nos. 1-38 and will be serving new interrogatories.

With regards to the Request for Production, you stated that you will not reply because of the typo on the first page (incorrectly identifying Venture Execution Partners, Inc.). I am unable to agree this is good reason, so I am writing to let you know that we will file a motion to compel.

Best,
 Jason

From: Jason L. DeFrancesco
Sent: Tuesday, April 08, 2014 10:30 AM
To: 'Robert A. Becker'
Cc: J. Rannells; K. Hnasko; 'Barbara Solomon'; 'Brittany Brady'
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. Becker,

Although it appears I misunderstood your availability, I did not hear from you this morning in regards to firming up a time to call.

Please call me Today, Tuesday, April 8, 2014 at 11:15 AM EST

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Thank you,
Jason

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Sent: Monday, April 07, 2014 6:45 PM
To: 'Robert A. Becker'
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
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Mr. Becker,

Ok. Please call me tomorrow: Tuesday, April 8, 2014 at 10:00 AM EST.

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Nevertheless, I look forward to speaking with you tomorrow and suggest we may also discuss your response to requests for production (due April 4, 2014) which we did not receive.

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To: Jason L. DeFrancesco
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

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 Wednesday: Before 2:30
 Thursday: 12:30-3:30

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 866 United Nations Plaza
 New York, NY 10017

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From: Jason L. DeFrancesco [<mailto:JLD@br-tmlaw.com>]
Sent: Monday, April 07, 2014 6:18 PM
To: Robert A. Becker
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. Becker,

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I am however available now. (908) 722-5640. Please follow the prompts to reach me.

Jason DeFrancesco

From: Robert A. Becker [<mailto:rbecker@fzlz.com>]
Sent: Monday, April 07, 2014 6:07 PM
To: Jason L. DeFrancesco
Cc: J. Rannells; K. Hnasko; Barbara Solomon; Brittany Brady
Subject: RE: Meenaxi adv. Cadbury; No. 92057280

Mr. DeFrancesco -

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Rob Becker

Robert A. Becker
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From: Jason L. DeFrancesco [<mailto:JLD@br-tmlaw.com>]
Sent: Monday, April 07, 2014 5:36 PM
To: Robert A. Becker; Barbara Solomon
Cc: J. Rannells; K. Hnasko
Subject: Meenaxi adv. Cadbury; No. 92057280

Mr. Becker,

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This is a good-faith attempted to confer with a party failing to act, in effort to obtain an answer without Board intervention.

Regards,
Jason



Jason DeFrancesco, Esq.
575 Route 28, Ste 102
Raritan, New Jersey 08869
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EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LEE RATZEL,

Plaintiff,

v.

Case No. 05-C-1236

JOE SIDEL,

Defendant.

ORDER TO COMPEL DISCOVERY

Plaintiff Lee Ratzel, a Chapter 980 detainee at Wisconsin Resource Center (WRC), sued defendant Joe Sidel, a patient care technician at WRC, under 42 U.S.C. § 1983. Ratzel claims Due Process and Equal Protection violations in connection with Sidel's alleged assault and battery. Having received none of the discovery materials he requested, Ratzel filed a motion to compel discovery. As set forth below, Ratzel's motion will be granted in part.

Sidel raises several objections to Ratzel's discovery requests and to his motion to compel.¹ First, Sidel points out—and correctly so—that he was not obligated to make initial disclosures to Ratzel, given that Ratzel is a *pro se* plaintiff in the custody of the State of Wisconsin. *See* Fed. R. Civ. P. 26(a)(1)(E)(iii). Second, Sidel argues that Ratzel's discovery requests are directed to non-parties. Sidel is correct that Rule 34 may be applied only to a party to an action. Insofar as Ratzel

¹ Sidel also objects that Ratzel's motion to compel names the wrong defendant, given that Terry Gable is named as the defendant in several paragraphs (though not in the caption) and given that discovery requests in this case were never properly presented to Gable. Ratzel concedes in his reply that he made a typographical error—Ratzel having a separate suit against Gable—and that in this motion he is not requesting the court to compel discovery of Gable. This typographical error is not relevant to my analysis, especially in light of the fact that Sidel's response indicates he is fully aware that the motion is directed at him. However, for the sake of clarity, I note that this order has no effect on any extant discovery request Ratzel has directed at Terry Gable.

wishes to compel discovery of a non-party, he must obtain a subpoena pursuant to Fed. R. Civ. P. 45.

The heart of Sidel's argument is that Ratzel's discovery requests are overly broad and that records and reports concerning the alleged shoving incident can be found in Ratzel's treatment records, to which Ratzel has access. The WRC Handbook, which is provided to all detainees, sets forth the specific procedures by which a detainee can obtain and/or review his treatment records. Sidel notes that he referred Ratzel to these records when he responded to Ratzel's discovery requests. Contrary to Sidel's suggestion, however, it is not clear that all of the discoverable information relating to this incident will be contained in Ratzel's treatment records. Ratzel alleges that a staff nurse witnessed the incident and made a written record of it. (Pl.'s Compl. ¶¶ 30, 31.) The nurse's account could very well have been written only in a medical log book, and not in Ratzel's treatment record. Ratzel should therefore be given access to any eye-witness accounts of the incident that are in the possession of Sidel or other WRC employees or staff.

Ratzel has requested an award of reasonable expenses, including attorney's fees, incurred in filing his motion to compel. Fed. R. Civ. P. 37(a)(4)(A) states in part: "If the motion is granted . . . , the court shall . . . require the party or deponent whose conduct necessitated the motion of the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees" Ratzel's request for this award is denied for at least two reasons. First, a *pro se* litigant cannot incur expenses within the meaning of Rule 37(a)(4)(A) for the simple reason that one cannot incur expenses payable to oneself. Second, "the word 'attorney' connotes an agency relationship between two parties (client and attorney), such that fees a lawyer might charge himself are not 'attorney fees.'"

Pickholtz v. Rainbow Technologies, Inc., 284 F.3d 1365, 1375 (Fed. Cir. 2002). Similarly, legal fees a *pro se* litigant might charge himself are not “attorney fees” within the meaning of the rule.

Ratzel has also requested sanctions against Sidel, alleging that Sidel’s failure to comply with his discovery requests was in bad faith. However, I find that defendant’s nondisclosure was not in bad faith, but instead was substantially justified in light of Ratzel’s vague and overly broad discovery requests and in light of the fact that defendant was not obligated to make initial disclosures. Therefore, no sanctions against defendant are warranted.

IT IS THEREFORE ORDERED that plaintiff’s motion to compel discovery is **GRANTED IN PART**. To the extent any documented eye-witness accounts of the alleged incident exist, defendant is to serve plaintiff with same on or before November 1, 2006. If plaintiff seeks eye-witness accounts from non-parties, he may petition the court for a subpoena pursuant to Fed. R. Civ. P. 45(a).

Dated this 6th day of October, 2006.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

EXHIBIT 3

176 F.R.D. 433

(Cite as: 176 F.R.D. 433)

C

United States District Court,
D. Massachusetts.

EANE CORPORATION, Plaintiff,

v.

TOWN OF AUBURN, William Bylund, Adele Hamilton, Richard Hedin, Patricia LaMountain, David O'Gara, Christopher Rath and John Vella, Defendants.

No. Civ. A. 96-40180-NMG.

Dec. 31, 1997.

Tabloid newspaper owner brought civil rights action against town, members of local cable television channel committee, and former and current operations managers for public access cable channel, alleging that defendants conspired to violate owner's rights under First and Fourteenth Amendments in their refusal to broadcast videotapes, which owner had submitted, for failure to submit cablecast request form identifying videotape's sponsor. Owner moved to compel discovery. The District Court, Gorton, J., held that: (1) defendants sufficiently answered interrogatory asking who decided whether videotape sponsor's name would be broadcast on public access channel and on what basis; (2) defendants sufficiently answered interrogatory asking why sponsors of certain channel broadcasts were not identified on the air; (3) defendants sufficiently answered interrogatory asking for purpose of requiring cablecast request form for videotapes submitted for broadcast and whether defendants' interests could be served without so requiring; (4) interrogatory asking for identity of each witness that defendants expected to call at trial and detailed statement of witness' anticipated testimony was overbroad and an improper request for attorney work product; (5) owner was entitled to responses both to request for admission as to whether current operations

manager sought legal opinion as to whether defendants were required to broadcast owner's videotapes and to interrogatory asking same question, despite error in request as to date of letter; (6) personnel evaluations and reprimand letters which owner sought, through requests for production of documents, regarding current operations manager were not protected from discovery on basis that evaluations and letters contained confidential, personal information; and (7) personnel evaluations and reprimand letters were relevant.

Motion allowed in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A  **1534****170A** Federal Civil Procedure**170AX** Depositions and Discovery**170AX(D)** Written Interrogatories to Parties**170AX(D)3** Answers; Failure to Answer

170Ak1534 k. Sufficiency; supplementation of answers. **Most Cited Cases**

Defendants town, local cable television channel committee members, and operations managers for local public access channel sufficiently answered tabloid newspaper owner's interrogatory asking who decided whether videotape sponsor's name would be broadcast on channel and on what basis by responding that there were no express criteria for determining whether to identify sponsor on the air and that defendants would make such determination consistently with First Amendment, in owner's civil rights action arising from defendants' alleged refusal to broadcast videotapes which owner had submitted. **U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. §§ 1981, 1983, 1985.**

176 F.R.D. 433

(Cite as: 176 F.R.D. 433)

[2] Federal Civil Procedure 170A 1534

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)3 Answers; Failure to Answer

170Ak1534 k. Sufficiency; supplementation of answers. [Most Cited Cases](#)

Defendants town, local cable television channel committee members, and operations managers for public access channel sufficiently answered tabloid newspaper owner's interrogatory asking why sponsors of certain channel broadcasts were not identified on the air by responding that channel did not require sponsorship identification on the air and that defendants had not yet broadcast a program sponsor's identity, in owner's civil rights action arising from defendants' alleged refusal to broadcast videotapes which owner had submitted. [U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. §§ 1981, 1983, 1985.](#)

[3] Federal Civil Procedure 170A 1534

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)3 Answers; Failure to Answer

170Ak1534 k. Sufficiency; supplementation of answers. [Most Cited Cases](#)

Defendants town, local cable television channel committee members, and operations managers for public access channel sufficiently answered tabloid newspaper owner's interrogatory asking for purpose of requiring cablecast request form for videotapes submitted for broadcast and whether defendants' interests could be served without so requiring by responding that form was used to ensure broad access to channel, for effective channel management, and to protect defendants against lawsuits, in owner's civil rights

action arising from defendants' alleged refusal to broadcast videotapes. [U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. §§ 1981, 1983, 1985.](#)

[4] Federal Civil Procedure 170A 1534

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)3 Answers; Failure to Answer

170Ak1534 k. Sufficiency; supplementation of answers. [Most Cited Cases](#)

Former operations manager for local public access cable television channel sufficiently answered tabloid newspaper owner's interrogatories asking why section was added to cablecast request form on certain month requesting identity of videotape sponsor and whether current operations manager later asked former manager to assist in reinstating form by responding that sponsor identification section of form existed prior to specified month and that current manager did not ask former manager to assist in reinstating form, in owner's civil rights action. [U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. §§ 1981, 1983, 1985.](#)

[5] Federal Civil Procedure 170A 1506

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)2 Scope

170Ak1506 k. Adverse party's case; contention interrogatories. [Most Cited Cases](#)

Federal Civil Procedure 170A 1517

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)2 Scope

176 F.R.D. 433

(Cite as: 176 F.R.D. 433)

170Ak1517 k. Work product privilege; trial preparation materials. [Most Cited Cases](#)
(Formerly 170Ak1515)

Tabloid newspaper owner's interrogatory asking defendants town, local cable television channel committee members, and operations managers for local public access channel for identity of each and every document that defendants would use in course of present litigation and date, authorship, and summary of each document was vague, overbroad, and an improper request for attorney work product, in owner's civil rights action arising from defendants' alleged refusal to broadcast videotapes which owner had submitted. [U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. §§ 1981, 1983, 1985.](#)

[6] Federal Civil Procedure 170A 1506

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)2 Scope

170Ak1506 k. Adverse party's case; contention interrogatories. [Most Cited Cases](#)

Federal Civil Procedure 170A 1517

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)2 Scope

170Ak1517 k. Work product privilege; trial preparation materials. [Most Cited Cases](#)
(Formerly 170Ak1515)

Tabloid newspaper owner's interrogatory asking defendants town, local cable television channel committee members, and operations managers for local public access channel for identity of each witness that defendants expected to call at trial and detailed statement of witness' anticipated testimony was over-

broad and an improper request for attorney work product, in owner's civil rights action arising from defendants' alleged refusal to broadcast videotapes which owner had submitted. [U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. §§ 1981, 1983, 1985.](#)

[7] Federal Civil Procedure 170A 1681.1

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(G) Admissions on Request

170Ak1681 Response

170Ak1681.1 k. In general. [Most Cited Cases](#)

Defendants town, local cable television channel committee members, and operations managers for public access channel sufficiently answered tabloid newspaper owner's request for admission that channel was public forum by denying that channel was public forum, in owner's civil rights action, arising from defendants' alleged refusal to broadcast videotapes which owner had submitted, and alleging conspiracy to violate owner's First and Fourteenth Amendment rights. [U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. §§ 1981, 1983, 1985.](#)

[8] Federal Civil Procedure 170A 1503

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)2 Scope

170Ak1503 k. Relevancy and materiality. [Most Cited Cases](#)

Tabloid newspaper owner was not entitled to answer from former operations manager for local public access cable television channel to interrogatory asking who made decision that channel was not public forum, when such decision was made, and, if channel was not public forum, what kind of forum it was, in

176 F.R.D. 433

(Cite as: 176 F.R.D. 433)

light of assertion by manager and other defendants, in response to request for admission, that channel was not public forum, in owner's civil rights action against town, local cable channel committee members, and channel operations managers, as relevance of inquiry was whether channel was public forum. *U.S.C.A. Const.Amends.* 1, 14; 42 *U.S.C.A. §§* 1981, 1983, 1985.

[9] Federal Civil Procedure 170A 1532.1

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)3 Answers; Failure to Answer

170Ak1532 Duty to Answer

170Ak1532.1 k. In general. **Most**

Cited Cases

Federal Civil Procedure 170A 1678

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(G) Admissions on Request

170Ak1678 k. Duty to respond. **Most Cited**

Cases

Tabloid newspaper owner was entitled to responses both to request for admission as to whether current operations manager for local public access cable television channel sought legal opinion as to whether defendants town, local cable channel committee members, and channel operations managers were required to broadcast owner's videotapes, which request identified attorney's opinion letter as attached to complaint, and to interrogatory asking same question, despite error in request as to date of letter, as letter attached to complaint could easily be identified, in owner's civil rights action. *U.S.C.A. Const.Amends.* 1, 14; 42 *U.S.C.A. §§* 1981, 1983, 1985; *Fed.Rules Civ.Proc.Rule* 36(a), 28 *U.S.C.A.*

[10] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1591 k. Employment, records of.

Most Cited Cases

Privileged Communications and Confidentiality

311H 413

311H Privileged Communications and Confidentiality

311HVII Other Privileges

311Hk413 k. Employment relationships; personnel records. **Most Cited Cases**

Personnel evaluations and reprimand letters which tabloid newspaper owner sought, through requests for production of documents, regarding current operations manager for public access cable television channel were not protected from discovery on basis that evaluations and letters contained confidential, personal information, in owner's civil rights action against town, local cable channel committee members, and operations managers for channel, arising from defendants' alleged refusal to broadcast videotapes which owner had submitted, where defendants had not sought protective order. *U.S.C.A. Const.Amends.* 1, 14; 42 *U.S.C.A. §§* 1981, 1983, 1985; *Fed.Rules Civ.Proc.Rule* 26(b)(1), 28 *U.S.C.A.*

[11] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1591 k. Employment, records of.

Most Cited Cases

176 F.R.D. 433

(Cite as: 176 F.R.D. 433)

Personnel evaluations and reprimand letters which tabloid newspaper owner sought, through requests for production of documents, regarding current operations manager for public access cable television channel were relevant in owner's civil rights action against town, local cable channel committee members, and operations managers for channel, alleging conspiracy to violate owner's First and Fourteenth Amendment rights through refusal to broadcast videotapes; requested personnel records could help show manager's role in broadcast decisions and whether manager's superiors endorsed manager's decisions. [U.S.C.A. Const.Amend. 1, 14](#); [42 U.S.C.A. §§ 1981, 1983, 1985](#); [Fed.Rules Civ.Proc.Rule 26\(b\)\(1\), 28 U.S.C.A.](#)

[12] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1591 k. Employment, records of.

[Most Cited Cases](#)

Personnel evaluations and reprimand letters which tabloid newspaper owner sought, through requests for production of documents, regarding current operations manager for public access cable television channel were not protected from discovery on basis that requests were meant to harass current manager, in owner's civil rights action against town, local cable channel committee members, and operations managers for channel, arising from defendants' alleged refusal to broadcast videotapes which owner had submitted, absent argument to show harassment other than assertion that requested records were irrelevant. [U.S.C.A. Const.Amend. 1, 14](#); [42 U.S.C.A. §§ 1981, 1983, 1985](#).

[13] Privileged Communications and Confidentiality 311H 413

311H Privileged Communications and Confidentiality
311HVII Other Privileges

311Hk413 k. Employment relationships; personnel records. [Most Cited Cases](#)
(Formerly 170Ak1591)

Employee personnel evaluations are not privileged documents for discovery purposes. [Fed.Rules Civ.Proc.Rule 26\(b\)\(1\), 28 U.S.C.A.](#)

*436 [Steven R. Maher](#), Auburn, MA, for Plaintiff.

[Richard C. Van Nostrand](#), Mirick, O'Connell, DeMaille & Lougee, [Robert J. Hennigan, Jr.](#), Power & Hennigan, Worcester, MA, for Defendants.

MEMORANDUM AND ORDER

GORTON, District Judge.

On August 20, 1996, the plaintiff, EANE Corporation ("EANE"), filed the present action under [42 U.S.C. §§ 1981, 1983, and 1985](#), alleging that the Town of Auburn, William Bylund, Adele Hamilton, Richard Hedin, Patricia LaMountain, David O'Gara, Christopher Raths and John Vella ("the Defendants") conspired to violate its First and Fourteenth Amendment rights, by refusing it access to the local public access channel ("the PAC"). Pending before this Court is EANE's motion to compel discovery.

I. Background

EANE alleges that the Defendants wrongfully denied it access to the PAC in retaliation for articles critical of the Defendants published in *Auburn Magazine*, EANE's tabloid newspaper which covers Auburn municipal affairs and government. Between February, 1995 and August, 1996, EANE submitted six videotapes for broadcast over the PAC, only two of which were aired. EANE asserts that the Defendants' refusal to air the others violated its First Amendment

176 F.R.D. 433

(Cite as: 176 F.R.D. 433)

rights.

On October 31, 1995, the Local Channel Committee (“LCC”), composed of Hamilton, Hedin, LaMountain and O’Gara, enacted a requirement that all videotape submissions for broadcast must be accompanied by a Cablecast Request Form (“CRF”). The Defendants refused to air EANE’s videotapes submitted after October 31, 1995, because EANE did not submit CRFs for any of them. The CRF does not request information about the substance of a submitted videotape, but rather solicits the identification of the videotape’s sponsor. In addition, the CRF states on its face that it is a public record, that the LCC may identify on the air the sponsor of any videotape and that broadcast dates and times are not guaranteed.

EANE contends that the Defendants’ use of the CRF chills political speech by (1) requiring identification of a videotape’s sponsor, thereby potentially subjecting the sponsor to retaliation and (2) failing to guarantee the timing of the airing of a videotape, thereby potentially curtailing the impact of the broadcast. EANE served various discovery requests on the Defendants, including: (1) interrogatories for all defendants, (2) interrogatories for Bylund and Raths, the former and current Operations Managers for the PAC, (3) requests for the production of documents concerning Bylund’s employment and (4) requests for admissions. EANE now moves to compel answers to portions of those discovery requests, the previous answers to which it claims were evasive, incomplete or nonresponsive.

II. Analysis

A. Interrogatories Concerning the CRF

[1] EANE contends that the Defendants refused to answer Interrogatory No. 1(c), (e), and (f), which asks who decides whether a sponsor’s name will be broadcast on the PAC and on what basis. The De-

fendants responded that “[t]here are no express criteria established” for determining whether to identify a sponsor on the air, and added that, were they to decide to identify a sponsor on the air they would do so in a way consistent with the First Amendment. Because the Defendants, in fact, answer the Interrogatory in question, EANE’s motion to compel will be denied with respect to that Interrogatory.

*437 [2] EANE next claims that the Defendants failed to answer Interrogatory No. 2, which asks why the sponsors of 13 PAC broadcasts from 1994 to 1996 were not identified on the air. The Defendants answered that the PAC does not require sponsorship identification on the air and that the Defendants have not yet broadcast a program sponsor’s identity. Given the Defendants’ answer, EANE’s motion to compel a further answer will be denied.

EANE further contends that the Defendants did not answer Interrogatory No. 3, which requests information about communications between the Defendants and Auburn’s Board of Selectmen concerning the CRF and EANE. The Defendants, however, provided such information and therefore EANE’s motion to compel an answer will be denied.

[3] EANE maintains that the Defendants also evaded answering Interrogatory No. 9, which asks the purpose of requiring a CRF and whether the Defendants’ interests could be served without so requiring. The Defendants answered that the CRF is used (1) to ensure broad access to the PAC, (2) for effective channel management, and (3) as just one way for the Defendants to protect themselves against possible lawsuits. The answer is responsive and EANE’s motion to compel will be denied.

[4] In EANE’s Interrogatory No. 1(d) to Bylund, EANE asks why a section on the CRF was added in February, 1995, requesting the identity of a videotape’s sponsor. Interrogatory No. 1(f) to Bylund

176 F.R.D. 433

(Cite as: 176 F.R.D. 433)

inquires as to whether Rath asked Bylund to assist him in reinstating the CRF in October, 1995. Bylund answered that the sponsor identification section of the CRF existed prior to February, 1995, and that Rath did not ask Bylund to assist him in reinstating the CRF. The answer is responsive and EANE's motion to compel further answers to those Interrogatories will, therefore, be denied.

B. Interrogatories Concerning Document and Witness Identification

[5] EANE's Interrogatory No. 4 to all Defendants asks for the identity of "each and every document that you will use in the course of this litigation", and the date, authorship and summary of each document. The Defendants object to that Interrogatory as vague, overbroad and, to the extent applicable, an improper request for attorney work product. The objection is well taken and EANE's motion to compel an answer will, therefore, be denied.

[6] In Interrogatory No. 6 to all Defendants, EANE requests the identity of each witness that the Defendants expect to call at trial and a detailed statement of his or her anticipated testimony. The Defendants' objection that the request is overbroad is well taken and the Interrogatory also calls for attorney work product. For those reasons, EANE's motion to compel will be denied.

C. Discovery Regarding the PAC as a Public Forum

[7] EANE contends that the Defendants evaded its Request for Admission No. 17, which asks them to admit that the PAC is a public forum. The Defendants adequately responded by denying that the channel is a public forum.

[8] EANE claims that Bylund failed to answer Interrogatory No. 6, which asks (1) who made the decision that the channel was not a public forum, (2) when such a decision was made and (3) if the PAC is not a public forum, what kind of forum it is. Bylund

responded that no answer was required to Interrogatory No. 6. The only relevance of EANE's inquiry concerns whether the PAC is a public forum, and because the Defendants assert that it is not a public forum, in response to Request for Admission No. 17, EANE's motion to compel an answer to Interrogatory No. 6 will be denied.

D. Discovery Concerning Opinion Letter

[9] EANE's Request for Admission No. 6 to all Defendants asks whether Rath sought a legal opinion from attorney Dee Moschos concerning whether the Defendants were required to air EANE's videotapes. In the request, EANE identifies an October 18, 1995 opinion letter from Moschos to Rath and further notes that the letter is EANE's *438 Exhibit 21 attached to its complaint. EANE's Interrogatory No. 1(c) to Rath asks the same question as the Request for Admission, although it states that the Moschos letter is dated October 17, 1995.

The Defendants object to both requests because they claim that no Exhibit 21 was attached to EANE's complaint. An opinion letter dated October 17, 1995 from Moschos to Rath, however, appears as EANE's Exhibit 28 attached to its complaint. Because the letter was attached to EANE's complaint, where it can easily be located and identified despite EANE's typographical error, EANE's motion to compel with respect to those two requests will be allowed. See [Fed.R.Civ.Pro. 36\(a\)](#).

E. Document Production Requests Concerning Bylund's Employment

[10] EANE sought all personnel evaluations and reprimand letters regarding Bylund through Request for Production of Documents Nos. 5 and 6. The Defendants objected on three grounds: (1) that the documents contain confidential, personal information, (2) that the information EANE seeks is irrelevant and (3) that Eane's request is meant to harass Bylund.

176 F.R.D. 433

(Cite as: 176 F.R.D. 433)

[11][12][13] The Defendants' first ground for objecting is unpersuasive because employee personnel evaluations are not privileged documents and they have not sought a protective order. With respect to the Defendants' second ground, the information requested is relevant because EANE alleges a conspiracy by the Defendants to violate its constitutional rights and Bylund's personnel records could help show his role in their decisions about whether to air EANE's videotapes and whether Bylund's superiors endorsed his decisions. *See* Fed.R .Civ.Pro. 26(b)(1). As to the Defendants' third ground for objecting, the personnel records are relevant to EANE's conspiracy claim and the Defendants offer no argument to show harassment, other than their assertion that the records are irrelevant. EANE's motion to compel production of Bylund's personal evaluations and reprimand letters will, therefore, be allowed.

ORDER

For the foregoing reasons:

1) the plaintiff's motion to compel with respect to Request for Admission No. 6 to all Defendants, Interrogatory No. 1(c) to Raths and Request for Production of Documents Nos. 5 and 6 is **ALLOWED**, and

2) the plaintiff's motion to compel with respect to all other discovery requests is **DENIED**.

So ordered.

D.Mass.,1997.

Eane Corp. v. Town of Auburn

176 F.R.D. 433

END OF DOCUMENT