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

Proceeding	92057280
Party	Defendant Meenaxi Enterprise, Inc.
Correspondence Address	JASON L DEFRANCESCO BAKER AND RANNELLS PA 575 RTE 28 STE 102 RARITAN, NJ 08869 UNITED STATES officeactions@br-tmlaw.com, k.hnasko@br-tmlaw.com, jld@br-tmlaw.com
Submission	Reply in Support of Motion
Filer's Name	Jason DeFrancesco
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Signature	/Jason DeFrancesco/
Date	05/05/2014
Attachments	Reply.pdf(106710 bytes) Affidavit of JLD.pdf(324188 bytes)

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

In the Matter of Regis No. 4,206,026
Mark: BOURNVITA

Cadbury UK, Ltd.,	:	Cancellation No. 92057280
	:	
Petitioner,	:	
v.	:	
	:	
Meenaxi Enterprises, Inc.,	:	
	:	
Registrant.	:	

REGISTRANT’S REPLY TO PETITIONER’S RESPONSE

Petitioner’s dilatory actions are made clear in its Response to Registrant’s Motion to Compel Discovery. Simply put, in view of the actions of its counsel, Petitioner has acquiesced and should be compelled to answer — without objection — the outstanding discovery initially served on November 18, 2013.

FACTS

1. Counsel for Petitioner was served by hand and accepted Registrant’s First Set of Requests for the Production of Documents and Things (hereinafter, “Document Requests”)(*See Petitioner’s Response*, p. 1 and the Certificate of Service for Document Requests attached to *Registrant’s Motion to Compel*, Exhibit B). Petitioner never rejected service of the Document Requests. Petitioner never objected to the Document Requests;

2. The caption of the Document Requests identify Cadbury UK, Ltd. as the only Petitioner (See Document Requests attached to *Registrant’s Motion to Compel*, Exhibit B);

3. Cadbury UK, Ltd. is the only Petitioner in the instant proceeding, and there has never been any other Petitioner named;

4. The instructions accompanying the Document Requests define “Petitioner” as “Cadbury UK, Ltd.” et al. (See Document Requests, attached to *Registrant’s Motion to Compel*, Exhibit B, p. 1 under heading, “Definitions and Instructions”). Petitioner was fully aware the Document Requests were directed to Cadbury UK, Ltd.;

5. Petitioner was fully aware of the obvious typo in the Document Request when it asked for and received several extensions of time to respond to “discovery.” The outstanding discovery was originally served by hand on November 18, 2013 and extended until this past April 4, 2014; and

6. Counsel for Petitioner even provided the undersigned with the same exact “document requests” (identical to the “Registrant’s First Set of Requests for the Production of Documents and Things” which are referenced herein as “Document Requests”) when the undersigned asked for a copy of the “exchanged discovery” (*See Declaration of Jason L. DeFrancesco in Support of Registrant’s Reply*, ¶¶ 4-7).

PETITIONER’S RESPONSE

Petitioner sought and received several extensions of time to respond to “discovery” without any intent of ever responding to Registrant’s First Set of Requests for the Production of Documents and Things (“Document Requests”) in view of an obvious typo.

Petitioner would imply that it never acquiesced because its extensions of time were ambiguously directed to “discovery” and not “document requests.” (*See Petitioner’s Response to Registrant’s Motion to Compel*, p. 2; hereinafter, “Petitioner’s Response”).

Petitioner would also argue a red herring — that its extension requests were based on settlement efforts. (*See Petitioner’s Response*, pp. 2-3). This neither tolls time to respond to “discovery” nor does it provide an excuse to deceit.

REGISTRANT'S REPLY

Petitioner was and has always been aware of an insignificant typo in the Document Requests when it asked for and received several extensions of time to respond to “discovery”.

The attempt of Petitioner's counsel to argue that its first, second, third, or fourth request for an extension of time to respond to “discovery” (impliedly ambiguous) did not mean or include “document requests” is unsettling. (*See Petitioner's Response*, p. 2).

In view of the e-mails between the Petitioner and Registrant, it is apparent that Petitioner's actions were purposefully calculated to mislead Registrant into believing it would respond to “discovery served on November 18, 2013” with no exception to the Document Requests. *See for example, Petitioner's Response*, Exhibit 1, p. 1:

Prior counsel for Registrant, Michael Kelly, advises that Meenaxi will agree to an extension of time for “Cadbury to respond to the discovery that Meenaxi served on November 18, 2013”. There is no question that the discovery served on November 18, 2013 includes Registrant's Document Requests. In response, counsel for Petitioner responds, “Michael - Thank you for agreeing to the extension of our client's time to respond to discovery for an additional thirty days.”

See also, Petitioner's Response, Exhibit 1, pp. 5-6:

Counsel for Petitioner addresses Mr. Kelly asking him among other things “whether [he] will consent to the extension of time to respond to discovery.” In response, Mr. Kelly stated that he is “willing to extend **the current arrangement** another 30 days, i.e., Cadbury's responses will be due on February 18” (emphasis added). This condition was agreed to by the Petitioner.

The above referenced e-mails were exchanged between Registrant's prior counsel (Kenyon & Kenyon, LLP) and Petitioner's counsel.

The most recent communications between Registrant’s current counsel (Baker & Rannells, PA) and Petitioner’s counsel, further provide that Petitioner’s actions were purposefully calculated to mislead Registrant into believing it would respond to “discovery” with no exception to the Document Requests. (*See the Declaration of Jason L. DeFrancesco in Support of Registrant’s Reply*, which shows that it was Petitioner’s counsel who provided the undersigned with an exact same copy of the Document Requests (typo and all) when asked for “the discovery”). *See also, Petitioner’s Response*, Exhibit 1, pp. 17-18:

Having just taken over the matter and being called by opposing counsel, the undersigned asked Mr. Kelly for “the discovery and initial disclosures exchanged thus far.” (*Id.* at p. 17.) In response Mr. Kelly states, “attached are Registrant’s document requests and interrogatories.” (*Id.* at p. 18.)

While Petitioner does not “believe the Board would look kindly on a motion to compel under these circumstances” (Petitioner’s Response, Exhibit 1, p. 27), Registrant disagrees as it is this type of scenario that should provide for the requested relief. Petitioner should not be rewarded for its dishonest practices and should have to deal with the consequences.

Although Petitioner argues that there is no support for the “draconian relief” that Registrant believes it is entitled to (*Petitioner’s Response* at pp. 4 and 9), Petitioner cites no legal authority to the contrary and fails to appreciate 37 CFR § 2.120(d)(2) and TBMP 403.03, which specifically permits such relief. Instead, Petitioner just distinguishes facts from the cases that Registrant cited in its Motion to Compel. Petitioner’s analysis however does not change the ruling in either case, which found that a minute typo is insignificant, especially when an error is easily identified (i.e., *Eane Corp. v. Town of Auburn*, 176 F.R.D. 433, 438 (D. Mass. 1997)) and or the error was known (i.e., *Ratzel v. Sidel*, 2006 U.S. Dist. LEXIS 73323 (E.D. Wis. Oct. 6,

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Registrant's Motion to Compel in the above-captioned matter was sent by first class mail on this the 5th day of May, 2014 to counsel for Registrant at the following address:

Robert A Becker
Fross Zelnick Lehrman & Zissu Pc
866 United Nations Plaza
New York, NY 10017

/Jason DeFrancesco/

Jason L. DeFrancesco

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

In the Matter of Regis No. 4,206,026
Mark: BOURNVITA

CADBURY UK, LTD.,	:	Cancellation No. 92057280
	:	
Petitioner,	:	
	:	
v.	:	
	:	
MEENAXI ENTERPRISES, INC.,	:	
	:	
Registrant.	:	
	:	

**DECLARATION OF JASON L. DE FRANCESCO IN SUPPORT OF
REGISTRANT'S REPLY**

I, JASON L. DE FRANCESCO, declare as follows:

1. This declaration is submitted in support of Meenaxi Enterprises, Inc.'s Reply to Petitioner's Response dated April 28, 2014 and incorporates the statements made in my declaration filed in support of the pending motion to compel.
2. On February 18, 2013, I filed an appearance in this instant matter.
3. On February 19, 2014, I received a phone call from Petitioner's counsel, Mr. Becker who among other things requesting an extension of time to respond to discovery.
4. During the phone call, I asked Mr. Becker to provide me with copies of the discovery exchanged. Having just taken over the matter, I had nothing in my possession other than what was filed with the TTAB.
5. On February 20, 2014, I again made my request to Mr. Becker, this time by e-mail, stating,

“Dear Robert...kindly send me the discovery and initial disclosures exchanged thus far...” (See Exhibit A, attached hereto).

6. Mr. Becker responded,

“As we discussed yesterday, attached are Registrant’s **document requests** and interrogatories...” (see *id.* with emphasis added to highlight the fact Mr. Becker uses the words “document requests” as a reference to my request for “discovery”).

7. The “document requests” attached to Mr. Becker’s e-mail were exactly the same as the Registrant’s First Set of Requests for the Production of Documents and Things that are subject to *Registrant’s Motion to Compel Discovery* and attached thereto as Exhibit B.

I HEREBY CERTIFY that the above statements are true. I am aware that if any of the foregoing statements are false, I am subject to the penalty of perjury pursuant to 28 U.S.C. 1746.

Dated: May 5, 2014

/Jason DeFrancesco/
JASON DE FRANCESCO

Exhibit A

Jason L. DeFrancesco

From: Robert A. Becker <rbecker@fzlz.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
Attachments: Registrant's First Set of Document Requests (F1346583x96B9E).pdf; Registrant's First Set of Interrogatories (F1346580x96B9E).pdf

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]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[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.
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