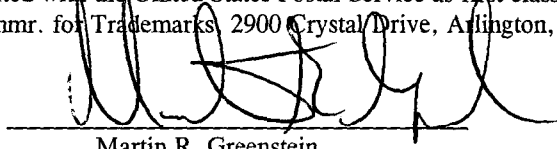


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CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to the Asst. Commr. for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513 on June 27, 2003.



Martin R. Greenstein

TTAB

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



VELOTREND)
)
)
 Opposer,)
)
 v.)
)
 CAMPAGNOLO SRL,)
)
)
 Applicant.)
)

06-30-2003

U.S. Patent & TMOtc/TM Mail Rcpt Dt. #22

Opposition No. 124
Appln. Ser. No. 75/841,357
Mark: **ERGOBRAIN**

OPPOSER'S RESPONSE TO APPLICANT'S MOTION FOR AN ORDER TO COMPEL RESPONSES TO APPLICANT'S FIRST SET OF INTERROGATORIES, TO COMPEL PRODUCTION OF DOCUMENTS, AND FOR A PROTECTIVE ORDER

Opposer, VELOTREND ("VeloTrend" or "Opposer") responds to and opposes

Applicant's Motion as follows:

APPLICANT'S MOTION TO COMPEL RESPONSES TO APPLICANT'S FIRST SET OF INTERROGATORIES:

Opposer objected to the number of interrogatories served by Applicant as being excessive in exactly the form provided by the TBMP, Sec. 406.03(e). Applicant is correct in that Opposer "would not agree that the number of interrogatories was not excessive". However, Applicant is NOT correct in stating that Opposer would not "allow Applicant's attorney to submit a revised, smaller set of interrogatories". Exactly the opposite is true - the undersigned specifically agreed

that Opposer could withdraw this First Set of Interrogatories and serve a revised First Set of Interrogatories no broader in scope. In fact, during that conversation, Applicant's attorney (Katherine Vieyra) stated "if we do that you will probably just object again", or words to that effect, to which the undersigned replied "if they are still objectionable, I will", or words to that effect. Shortly after receiving Applicant's motion, the undersigned telephoned lead counsel Peter Hochberg to explain this conversation, and at Mr. Hochberg's request, talked directly with Ms. Vieyra, again reiterating that position, and explaining that this is exactly the relief the TTAB would grant anyway, so why wouldn't it be offered.. Ms. Vieyra said she did not recall that part of the conversation, so the undersigned suggested she withdraw the motion without prejudice, and submit a revised set per above. Ms. Vieyra said she would consider that (especially in view of the agreed extension of time to respond to the motion graciously agreed to by Applicant's counsel), and get back to the undersigned. We have received no further communication in that regard. However, Opposer yet again reiterates its offer and suggests that Applicant simply withdraw its current First Set of Interrogatories, with our full agreement, and serve a revised First Set of Interrogatories no broader in scope than the originals. Other than that, discovery is now closed, and no new discovery can be served.

Turning to the substantive issue of counting interrogatories, Applicant served a total of 22 numbered interrogatories. However, the total number, including subparts, is actually well in excess of 100 interrogatories. By way of example:

- Int. #1: This interrogatory is actually at least 5 separate inquiries:
- a. Identify all present partners of Opposer who has knowledge ...
 - b. Identify all past partners of Opposer who has knowledge ...
 - c. Identify any related company of Opposer who has knowledge...
 - d. Identify any manufacturer of goods or services who has knowledge...
 - e. Identify any distributor of goods or services who has knowledge ...

Int. #2: This interrogatory is actually at least 14 - and possibly 20 or more - separate inquiries:

- a. Identify each person having knowledge/info on the initial selection of BIKEBRAIN
- b. Identify each person having knowledge/info on the adoption of BIKEBRAIN
- c. Identify each person having knowledge/info on the contemplated date of first use of ...
- d. Identify each person having knowledge/info on the actual date of first use of ...
- e. Set forth all facts known to Opposer referring or relating to its (BIKEBRAIN's) creation ...
- f. Set forth all facts known to Opposer referring or relating to its initial selection ...
- g. Set forth all facts known to Opposer referring or relating to its contemplated date of first use ..
- h. Set forth all facts known to Opposer referring or relating to its actual date of first use ...
- i. Set forth all facts known to Opposer referring or relating to its adoption
- j. Identify all documents referring or relating to its (BIKEBRAIN's) creation ...
- k. Identify all documents referring or relating to its selection ...
- l. Identify all documents referring or relating to its adoption ...
- m. Identify all documents referring or relating to its contemplated date of first use ...
- o. Identify all documents referring or relating to its actual date of first use ...

Interrogatory #2 goes on ask for (in the very unusual format of saying "If appropriate, such information may include...") numerous other categories of information requested, including the manner of use, the manner of planned use, a description of the types of media used by Opposer, a description of the type of media Opposer plans to use, the name of the first buyer, and several other categories. If these are deemed to be interrogatories (rather than things that "may be included" "if appropriate" - whatever that may mean) the number of separate interrogatories in this one Interrogatory. #2 alone exceeds 20.

Similarly, Interrogatories Nos. 6 and 7 include at least 7 separate inquiries each, Interrogatory No. 9 includes at least 9 separate inquiries, Interrogatories Nos. 17 and 18 includes at least 6 and possibly 7 separate inquiries. In fact, the ONLY interrogatories that are limited to a single inquiry are Nos. 8, 9 (possibly) and 14. The others all include at least 2 in a few instances, 3-4 in many instances, and larger numbers in many other instances.

Overall, the total number of interrogatories, including subparts, is:

<u>Int. #</u>	<u>Number, Including Subparts</u>
8, 9, 14	1 each = 3 total
19, 21, 22	2 each = 6 total
11	2-3 = 2+
4, 5, 20	3 each = 9 total
10	3-4 = 3-4

<u>Int. #</u>	<u>Number, Including Subparts</u>		
16	4	=	4
12	4-5	=	4-5
1, 15	5	=	10 total
6, 7	7 each	=	14 total
17, 18	6-7 each	=	14-16 total
13	9	=	9
3	10	=	10
2	20+	=	20+
Total, including subparts		=	107 - 111+ Separately Counted Interrogatories

If the Board believes a more detailed explanation of the count on each interrogatory is required, Opposer requests a short additional period to provide same. However, such is likely unnecessary, and for the foregoing reasons, Applicant's Motion to Compel should be denied.

APPLICANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS:

Applicant also moves to compel production of documents. Opposer does not understand the basis for this request, and absolutely no explanation is given. Opposer responded, in full, to Applicants' Request for Production of Documents. The only apparent dispute is the location of production. Applicant has made no attempt to schedule a time for production at and where the documents are kept, and in fact, other than the reference in the caption of the Motion, Applicant does not discuss in any way why or how Opposer's response to the Request for Production is in any way deficient. Indeed, even the supporting memorandum does not mention the Motion to Compel Production of Documents in *it's* caption, and certainly not in its text. The only reference anywhere to production of documents is Applicant's demand, in its Motion (but not the supporting memorandum) that documents be produced "at the office of Applicant's counsel". There is no absolute right to have production take place at the office of Applicant's counsel, and Applicant's cites no authority or reason for that demand.

Moreover, even if there were some basis for a motion to compel production of documents (and again, there is absolutely no basis given in the moving papers), Applicant's explanation of

its mandatory telephone conference prior to bringing this motion makes it quite clear that the conference dealt *only* with “attempt to resolve whether the number of interrogatories was excessive”. Since a preliminary conference is a mandatory prerequisite to even bringing a motion to compel responses on discovery, even the very bringing of this motion as to production requests is improper and premature.

APPLICANT’S REQUEST FOR A PROTECTIVE ORDER:

Finally, Applicant requests a protective order relieving it of its responsibility to reply to discovery served by Opposer until twenty-one days after “Applicant receives proper responses to Applicant’s discovery requests”. There is no authority cited for such a request, and no other rationale or basis for the request, other than Applicant’s claim that “it would be unfair to Applicant to provide responses to Opposer’s discovery request before receiving responses from Opposer to Applicant’s requests, *since Applicant was first in making its discovery requests*” (emphasis added).

Applicant’s request for a protective order must be denied. The rules and practice of the Board are quite clear - there is no right of response based on “priority”. TBMP Sec 403.03 specifically states:

Discovery in proceedings before the Board is not governed by any concept of priority of discovery or deposition. That is, a party which is the first to serve a request for discovery does not thereby gain a right to receive a response to its request before it must respond to its adversary's subsequently served request for discovery, and this is so even if its adversary fails to respond, or respond completely, to the first party's request for discovery. Rather, a party is under an obligation to respond to an adversary's request for discovery during the time allowed therefor under the applicable rules, irrespective of the sequence of requests for discovery, or of an adversary's failure to respond to a pending request for discovery. See FRCP 26(d); Miss America Pageant v. Petite Productions, Inc., 17 USPQ2d 1067 (TTAB 1990); and Giant Food, Inc. v. Standard Terry Mills, Inc., 231 USPQ 626 (TTAB 1986).

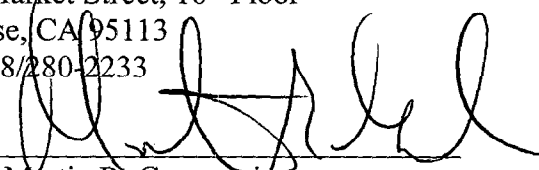
Applicant is already in default of its obligations and has waived its right to raise objections,

having provided no response whatsoever prior to the deadline. Therefore, Applicant's request for a protective order must be denied, and Applicant must respond to Opposer's discovery, in full. Opposer does note that it voluntarily offered Applicant a 30 day extension of its time to respond - equal to the 30 day extension Applicant graciously granted Opposer to respond to this motion. However, that 30 day extension to respond to discovery has now expired, with no responses served by Applicant.

For the foregoing reasons, Applicant's Motion should be denied in all respects.

Dated: June 27, 2003

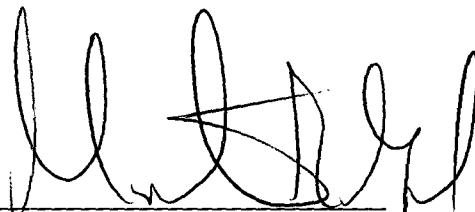
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By: 
Martin R. Greenstein
Attorneys for Opposer VeloTrend

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSER'S RESPONSE TO APPLICANT'S MOTION FOR AN ORDER TO COMPEL RESPONSES TO APPLICANT'S FIRST SET OF INTERROGATORIES, TO COMPEL PRODUCTION OF DOCUMENTS, AND FOR A PROTECTIVE ORDER is being served by first class mail postage prepaid on this 27 day of June, 2003, on Applicant's attorneys:

D. PETER HOCHBERG, ESQ.
D. PETER HOCHBERG CO., L.P.A.
The Baker Building, 6th Floor
1940 East 6th Street
Cleveland, OH 44114


Martin R. Greenstein