



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

In the matter of:

Mark: **CARABAO & Bull Design (in Red)**
 Ser. No.: **78/330,948**
 Filed: **November 20, 2003**
 Published: **March 15, 2005**

Red Bull GmbH,	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91164680
	:	
Carabao Tawandang Co., Ltd.,	:	
	:	
Applicant.	:	

**OPPOSER’S RESPONSE TO APPLICANT’S MOTION FOR EXTENSION OF THE
DISCOVERY PERIOD TO TAKE “FOLLOW-UP” DISCOVERY**

Opposer, Red Bull GmbH, by its attorneys, Hogan & Hartson L.L.P., hereby responds to Applicant’s, Carabao Tawandang Co., Ltd.’s, *unilateral* Motion for Extension of the Discovery Period to take “Follow-Up” Discovery (“Applicant’s Motion”).

INTRODUCTION

Applicant contends that it—but not Opposer—is entitled to an extension of the discovery deadline in this case because it alone purportedly needs additional time to conduct further discovery in view of the materials produced to it by Opposer on October 3, 2005—a date agreed to by both parties for the production of such materials. See accompanying Declaration of Anna Kurian Shaw in Support of Opposer’s Response to Applicant’s Motion for Extension of the Discovery Period to Take “Follow-Up” Discovery (“Shaw Declaration”) at ¶ 5. In this regard,



Applicant essentially contends that it is entitled to a unilateral, one-sided extension because it was allegedly denied (“robbed” it says) of the opportunity to conduct additional, “follow-up” discovery because such materials were provided to it with only 10 days remaining in the discovery period. *See* Applicant’s Motion, at p. 2. Applicant’s contention is unfounded. Applicant agreed to the October 3, 2005 production date for Opposer’s materials and made no attempt or request to take follow-up discovery prior to the close of discovery. Instead Applicant filed its Motion only on the last day of the discovery period.

Moreover, permitting Applicant to unilaterally take follow-up discovery would be manifestly unjust in view of Applicant’s extraordinary refusal to (a) answer *any* of Opposer’s interrogatories and (b) to produce, much less indicate a willingness to produce, *any* documents in response to any of Opposer’s written discovery requests. *See* Shaw Declaration at ¶¶ 8-13, Ex. D (Applicant’s Responses and Objections to Opposer’s First Set of Interrogatories), Ex. E (Applicant’s Responses and Objections to Opposer’s First Requests for the Production of Documents), Ex. F (Applicant’s Responses and Objections to Opposer’s Second Set of Interrogatories) and Ex. G (Applicant’s Responses and Objections to Opposer’s Second Requests for the Production of Documents). Indeed, Applicant has not responded substantively to a single interrogatory or produced a single page of documents during this proceeding despite numerous requests to do so. *Id.* It is, therefore, astounding that Applicant would urge that it alone is entitled to an extension of the discovery period to conduct “follow-up” discovery. ^{1/}

^{1/} Applicant’s unilateral motion is all the more galling in view of Applicant’s refusal on numerous occasions to even consider Opposer’s requests that the discovery period be extended to the mutual benefit of both parties. *See* Shaw Declaration at ¶¶ 2, 8.

Applicant's Motion should be seen for what it is, a mere tactic by which Applicant hopes to stall production of its own discovery responses.

Nevertheless, Opposer opposes Applicant's motion only to the extent it seeks a unilateral extension of time for Applicant alone. In this regard, Opposer requests that the Board extend the discovery period an additional 60 days from the mailing of the Board's decision on Applicant's Motion with respect to *both parties* and reset the testimony and briefing periods.

FACTUAL BACKGROUND

On September 9, 2005, the undersigned newly retained counsel for Opposer contacted counsel for Applicant by telephone to inform counsel for Applicant of Opposer's change in legal representation. *See* Shaw Declaration at ¶ 2. During this telephone call, and in view of Opposer's change in counsel, Opposer's counsel suggested that the parties mutually agree to an extension of the discovery period. *Id.* Counsel for Applicant adamantly rejected this suggestion and indicated that under no circumstances would it be amenable to extending the discovery period. *Id.* During the period between September 9 and September 18, 2005 counsel for the parties were in contact several times regarding certain discovery issues including, for example, entry of a suitable protective order and certain outstanding discovery disputes. *Id.* at 3¶. On September 12, 2005, Opposer propounded its first set of written interrogatories and requests for the production of documents. *Id.* at ¶ 6, Ex. C. To date, Applicant has not substantively responded to a single one of Opposer's interrogatories and has not produced a single document in response to Opposer's document requests. *Id.* at ¶ 8-13.

By letter dated September 19, 2005, Opposer notified Applicant that Opposer would be providing supplemental interrogatory and request for admission responses and producing documents responsive to Applicant's production requests on October 3, 2005. *Id.* at ¶ 4, Ex. A.

In response, by letter dated September 20, 2005, Applicant indicated that it was amenable to receipt of Opposer's supplemental interrogatory responses and document production on October 3, 2005. *Id.* at ¶ 5, Ex. B. In its letter, Applicant made no suggestion that it would be either prejudiced by receiving materials on October 3, 2005 or that it would need additional time for "follow-up" discovery before the close of discovery on October 14, 2005. *Id.* As agreed by the parties, Opposer provided supplemental interrogatory and request for admission responses and over 8,000 pages of documents to Applicant on October 3, 2005. *Id.* at ¶ 7.

On October 11, 2005, Applicant contacted Opposer by telephone and requested a unilateral extension to the discovery period purportedly so that Applicant alone could propound and conduct additional discovery. *Id.* at ¶ 8. In response, Opposer again suggested that the parties mutually extend the discovery deadline. *Id.* Applicant rejected the suggestion of a bilateral extension of the discovery period, insisting, inexplicably, that somehow only it alone was entitled to conduct further discovery. *Id.* Given the unilateral terms of the extension as proposed by Applicant, Opposer denied the request. *Id.*

Following the October 11, 2005 call in which it requested a unilateral extension to the discovery period, Applicant, on October 12, 2005, "responded" to Opposer's First Set of Interrogatories (which consisted of 36 interrogatories) by stating without factual or legal support, that it was refusing to answer any of Opposer's interrogatories because such purportedly exceed the maximal number allowed by the rules governing this matter. *Id.* at ¶ 9. Similarly, on October 12, 2005, Applicant provided written objections to Opposer's First Set of Requests for the Production of Documents and refused to produce *any* documents. *Id.* at ¶ 10. To date, not a single page of documents has been produced in response to any of Opposer's requests for documents. *Id.* at ¶ 10, 12, and 13.

On October 27, 2005, Applicant responded to Opposer's Second Set of Interrogatories (consisting of two interrogatories). *Id.* at ¶ 11, Ex. F. Once again, Applicant simply stated, without factual and legal support, that it was refusing to answer any of Opposer's interrogatories because such purportedly exceed the maximal number allowed by the rules governing this matter. *Id.* Similarly, on October 24, 2005, Applicant provided written objections to Opposer's Second Set of Requests for the Production of Documents. *Id.* at ¶ 12. As before, Applicant's response to Opposer's request for production refused to produce any responsive document and none have been produced to date. *Id.* at ¶ 12-13, Ex. G.

ARGUMENT

A. Applicant Had Ample Opportunity to Review the Discovery Materials Provided to It By Opposer Yet Failed To Propound The Follow-Up Discovery It Now Seeks

Applicant's Motion goes to great lengths in urging that it needs an additional 60 days of exclusive discovery because "Applicant did not receive any documents until Tuesday, October 4, 2005, when Opposer produced approximately 8,250 pages of documents and supplemental responses to Applicant's interrogatories and requests for admission." Applicant's Motion, at p. 3. Thus, Applicant admittedly received responsive interrogatory answers and documents at least 10 days before the close of discovery. *Id.* at 2. In fact, Applicant was advised by letter dated September 19, 2005 that it would be receiving such documents and supplemental interrogatory responses at that time and Applicant indicated that it was amenable to receiving these materials from Opposer within that time frame. *See* Shaw Declaration at ¶ 4, Ex. A. Despite being advised on September 19, 2005 that responsive materials were forthcoming, as well as the nature of the materials that were forthcoming, Applicant never objected (much less suggested it would be prejudiced). *Id.* at ¶ 5, Ex. B. Nor did it suggest then that it wanted or needed an extension of

the discovery deadline – in fact only weeks earlier it had insisted the opposite. *Id.* at 2, 5, Ex. B. Although Applicant now contends, after the fact, that it was unable to complete a review of the produced materials due to the Jewish New Year and the fact that October 10, 2005 was a Federal Holiday, Applicant provides no justification and/or explanation as to (a) why Applicant did not raise these issues earlier, (b) why it did not plan accordingly when it was notified that on September 19, 2005 that material would be forthcoming, (c) why it never served or requested follow-up discovery prior to the filing of Applicant’s Motion, or (d) why Applicant categorically refused to agree to Opposer’s repeated suggestion that the parties mutually extend the discovery period. *See* Applicant’s Motion, at p. 3.

B. Applicant Declined Every Invitation to Extend Discovery

Notwithstanding Applicant’s hollow contention that 10 days was insufficient time to review the discovery material provided to it and propound “follow-up” discovery, Applicant declined several invitations from Opposer that the parties mutually extend the discovery deadline. In fact, on no less than two separate occasions, Opposer suggested that the parties *jointly* extend the discovery deadlines and on each occasion Applicant refused. *See* Shaw Declaration ¶ 2, 8.

Applicant’s Motion intimates that Opposer was unwilling to accommodate Applicant’s desire to conduct “follow-up” discovery. *See* Applicant’s Motion, at p. 4-5 n.21. This contention, however, is simply inaccurate. Specifically, Opposer was more than willing to agree to a mutual extension of the discovery period for Applicant to conduct “follow-up” discovery. *See* Shaw Declaration ¶ 2, 8. However, Applicant did not find such proposal acceptable. *Id.* Applicant’s unwillingness to compromise is all the more perplexing when it was apparently the

Applicant's counsel's personal schedule that it says prohibited it from conducting follow-up discovery. *Id.* at ¶ 15, Ex. I, and Applicant's Motion, at p. 3.

C. Applicant Has Not Substantively Responded to *Any* of Opposer's Discovery Requests

Omitted from Applicant's Motion is the fact that it (a) has failed to respond substantively to *any* of Opposer's interrogatories and (b) has failed to produce, or indicate a willingness to produce subject to its objections, *any* documents in response to any of Opposer's written discovery requests. *Id.* at ¶¶ 9-13, Exs. D-G. Indeed, discovery has been, at best, a one-sided affair in this proceeding. Nonetheless, Applicant incredulously contends that although it purportedly needs additional discovery, Opposer is not entitled to any such extension. 2/ Applicant's utter failure to respond to Opposer's discovery requests – not producing even one page of documents when Opposer has produced over 8000 pages of documents – speaks volumes. Namely, Applicant's Motion is purely a stalling tactic to delay or avoid its own discovery responses. For this reason alone, Applicant's Motion for a *unilateral* extension of the discovery period should be denied. 3/

D. The Discovery Deadline Should Be Mutually Extended

Although Opposer believes Applicant had sufficient time to review the discovery material provided to it and propound "follow-up" discovery, Opposer is willing to accede to Applicant's

2/ Applicant contends that Opposer is not entitled to an extension purportedly because Applicant did not serve discovery until September 12, 2005 such that responses would not be due until October 12, 2005 (*i.e.*, 2 days before the close of discovery). *See* Applicant's Motion, at p. 5. Such argument, however, does not excuse Applicant's failure to substantively answer any of Opposer's interrogatories or to produce a single document before the discovery cut-off date, much less justify an extension of the discovery period for the exclusive benefit of the party that failed to produce any discovery materials. *See* Shaw Declaration ¶¶ 9-13, Exs. D-G.

request for a sixty (60) day extension of the discovery period if that extension applies to both parties, and to that end requests that the Board extend the discovery period for an additional 60 days from the mailing of the Board's decision on Applicant's Motion with respect *to both parties*.

In view of Applicant's Motion and the proximity to the opening of Opposer's testimony period on December 14, 2005, Opposer respectfully requests that the testimony periods be reset after Applicant's Motion is decided by the Board.

CONCLUSION


For the foregoing reasons, Opposer requests that Applicant's Motion For Extension of the Discovery Period to Take "Follow-Up" Discovery be DENIED or in the alternative that the Board grant an additional sixty (60) days of discovery to both parties as described above.

Respectfully Submitted,

HOGAN & HARTSON L.L.P.

Dated: November 3, 2005

By: _____


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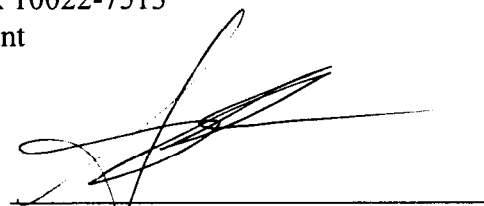
Attorneys for Opposer,
Red Bull GmbH

3/ As discussed below, Opposer does not object to an extension of the discovery period provided such is granted to both parties.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2005, a complete and accurate copy of the foregoing **OPPOSER'S RESPONSE TO APPLICANT'S MOTION FOR EXTENSION OF THE DISCOVERY PERIOD TO TAKE "FOLLOW-UP" DISCOVERY** was served by first-class mail, addressed to the following:

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