ESTTA Tracking number: **ESTTA725787**

Filing date: **02/09/2016**

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

Proceeding	91210416
Party	Defendant Kellogg North America Company
Correspondence Address	KATHERINE A MARKET HARTER SECREST & EMORY LLP 1600 BAUSCH & LOMB PLACE ROCHESTER, NY 14604 UNITED STATES kmarkert@hselaw.com, kshimomura@hselaw.com, jwebster@hselaw.com
Submission	Reply in Support of Motion
Filer's Name	Katherine A. Markert
Filer's e-mail	kmarkert@hselaw.com, jwebster@hselaw.com, kshimomura@hselaw.com
Signature	/Katherine A. Markert/
Date	02/09/2016
Attachments	Kellogg's Reply MTCompel.pdf(183109 bytes)

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

IN THE MATTER OF APPLICATION SERIAL NO. 85/641,987
MARK: KRAVE NATION

KRAVE PURE EATS, INC., OPPOSER, V. KELLOGG NORTH AMERICA COMPANY, APPLICANT.	OPPOSITION NO. 91210416

KELLOGG NORTH AMERICA COMPANY'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO (1) COMPEL OPPOSER TO RESPOND TO DISCOVERY, (2) DETERMINE THE SUFFICIENCY OF OPPOSER'S RESPONSES TO REQUESTS FOR ADMISSION, AND (3) UNILATERALLY EXTEND KELLOGG'S DISCOVERY PERIOD

Applicant Kellogg North America Company ("Kellogg") submits this reply in further support of its Motion to Compel, Determine the Sufficiency of Opposer's Responses to Requests for Admissions, and Unilaterally Extend Kellogg's Discovery Period. In this Reply, Kellogg briefly addresses points raised by Opposer Krave Pure Foods, Inc. as successor to Krave Pure Eats, Inc. ("KPF") in its response papers.

I. KPF Conceded Kellogg's Motion

In its original papers, Kellogg demonstrated that KPF unjustifiably failed to respond to Kellogg's Discovery Requests[1] and produce witnesses in response to Kellogg's Deposition Notices, and that Kellogg had good cause for its request to unilaterally extend its Discovery Period. In its response brief, KPF offered no legitimate objection or reason for its complete failure to conduct discovery. KPF's only apparent excuse is that it would prefer to respond later,

[1] Kellogg incorporates by reference the defined terms provided in its original motion papers. See n.1 of Kellogg's Motion, dated December 31, 2015. Docket Item # 33.

after the Board determines KPF's Motion to Consolidate, rather than in accordance with the Board's prior Scheduling Order.

KPF has repeatedly demonstrated an utter lack of respect for its obligations in this matter (failure to conduct discovery in accordance with past scheduling orders, failure to timely respond to discovery, failure to produce witnesses, etc.). KPF's vague assurances that it might provide discovery and produce witnesses at some later time simply are not enough to comply with its obligations. Absent an order compelling KPF to respond to Kellogg's Discovery Requests and produce witnesses, KPF will continue to ignore its discovery obligations.

Accordingly, Kellogg requests that the Board issue an order compelling KPF to respond to Kellogg's Discovery Request and produce its witnesses in response to the Deposition Notices.

II. KPF's Misrepresentations

KPF misrepresented Kellogg's position on several matters in its response brief. Kellogg offers the following discussion to correct such issues.

KPF states that during the parties' meet-and-confer conference on December 22, 2015, KPF "proposed extending the trial dates..." and "Kellogg rejected the proposal...." KPF's Response, p. 2. KPF misrepresented this discussion. During the December 22, 2015 call, KPF did not propose to extend the trial dates and, since such proposal never occurred, Kellogg could not have rejected it. In Kellogg's December 22, 2015 email to KPF's counsel[2], we confirmed the substance of the parties' earlier call. This email makes no reference to KPF's alleged proposal and Kellogg's alleged rejection because they never occurred.

KPF also advises that it "suggested a phone conference with the Interlocutory Attorney..." for the purpose of extending the trial dates and that "Kellogg refused...." KPF's Response, p. 3; Owen Decl. p. ¶ 4. Again, KPF's representation is incorrect. During the call,

[2] Attached as Exhibit 1 to the Declaration of KPF's counsel, sworn to on January 20, 2016. Docket Item # 34.

KPF proposed a call with the Interlocutory Attorney to discuss whether it was required to produce witnesses at depositions despite its pending Motion to Consolidate, not whether the parties could obtain an extension of the Scheduling Order. *See* Kellogg counsel's December 22, 2015(1:18 p.m.) email to KPF's counsel attached to the Owen Declaration (Docket Item #34), Exhibit 1 ("Kellogg's position is that KPF is required to attend the depositions as noticed and provide substantive responses to Kellogg's discovery requests. You advised that you may seek to have a conference with the Interlocutory Attorney to address this issue.").

At that time, Kellogg believed that a call would be helpful to convince KPF to produce its witnesses as noticed and before the expiration of the Discovery Period in the Scheduling Order. Later that evening (reflected in KPF's December 22, 2015 email (7:38 p.m.), Owen Decl. Ex. 1), KPF advised that KPF would not be producing its witnesses, expressed its confidence that the Board would extend the trial dates, and proposed contacting the Interlocutory Attorney to request an extension of the Scheduling Order. KPF is correct that Kellogg did not believe it was appropriate to request a conference with the Interlocutory Attorney on the eve of Christmas Eve to seek an extension of the Scheduling Order. *See* Kellogg counsel's December 23, 2015 email to KPF's counsel (Owen Decl. Ex. 1). Further, since KPF had firmly refused to produce witnesses as noticed, Kellogg did not believe that a conference with the Interlocutory Attorney would convince KPF to change its mind. Therefore, Kellogg saw no reason to seek the Interlocutory Attorney's assistance on such issue.

In its response, KPF misrepresents the history of the proceedings in an effort to portray Kellogg as an overzealous litigant and KPF as the reasonable party seeking order and efficiency in this proceeding. To the contrary, Kellogg is seeking to proceed with this opposition in a timely matter, in accordance with the Board's rules and Scheduling Order. KPF - in an

opposition that it filed - is refusing to participate in discovery and refusing to comply with its obligations, the Scheduling Order, and the governing rules, all of which needlessly increases the cost of this proceeding and delays its resolution.

Conclusion

For the reasons set forth in Kellogg's original motion papers and above, Kellogg respectfully requests that the Board issue an Order, pursuant to 37 C.F.R. § 2.120(e) and TBMP § 523.01, compelling KPF to provide substantive responses to Kellogg's Document Requests and Interrogatories, and produce its witness for depositions.

Kellogg also respectfully requests that the Board issue an Order, pursuant to 37 C.F.R. § 2.120(h) and TBMP § 524.01, determining that KPF's responses to Kellogg's RFAs were not justified and order KPF to answer Kellogg's RFAs.

Further, Kellogg respectfully requests that the Board issue an Order, pursuant to 37 C.F.R. § 2.120(e)(2), suspending this matter until this motion is decided and, pursuant to 37 C.F.R. § 2.120(a)(2) and TBMP § 509, unilaterally extending Kellogg's time to conduct discovery in this opposition by 30 days from KPF's deadline to serve responses to Kellogg's Discovery Requests, which will allow Kellogg time to conduct depositions of KPF's witnesses and serve follow-up discovery demands, thereby alleviating the prejudice to Kellogg created by KPF's refusal to respond to discovery.

Dated: February 9, 2016

HARTER SECREST & EMERY LLP

By: Katherine Markert

Jon O. Webster, Esq.
Kimberly I. Shimomura, Esq.
Katherine A. Markert, Esq.
Attorneys for Applicant
Kellogg North America Company
1600 Bausch & Lomb Place
Rochester, NY 14604
Tel.: (585) 232-6500

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Kellogg North America Company's Reply in Further Support of its Motion to (1) Compel Opposer to Respond to Discovery, (2) Determine the Sufficiency of Opposer's Responses to Requests for Admissions, and (3) Unilaterally Extend Kellogg's Discovery Period was sent via U.S. Mail, postage prepaid to Counsel for Opposer, Gregory N. Owen, Esq., Owen, Wickersham & Erickson, P.C., 455 Market Street, Suite 1910, San Francisco, California 94105 on February 9, 2016.

Katherine Markert

Katherine A. Markert