

ESTTA Tracking number: **ESTTA736808**

Filing date: **03/30/2016**

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

Proceeding	91219631
Party	Plaintiff Meeshaa Inc., dba Diamond Essence
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Attachments	OPPOSER'S_REPLY_20160329.pdf(200968 bytes)

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_____)	
Meeshaa Inc.,)	
dba Diamond Essence,)	
)	
	Opposer,)	
)	
	v.)	Opposition No. 91219631
)	
Anaya Gems Inc.,)	
)	
	Applicant.)	
_____)	

OPPOSER'S REPLY TO APPLICANT'S
RESPONSE TO MOTION TO COMPEL

In Applicant's response to Opposer's motion to compel, Applicant stated that it will be filing supplemental responses to certain ones of the contested interrogatories within seven days. This was done, and Applicant served and filed its supplemental responses, which are of record in this proceeding for consideration by the Board in deciding the motion to compel.

Applicant continues with its discovery gamesmanship. Instead of providing, or agreeing to provide, supplemental responses after considering Opposer's attorney's letter of November 25, 2015 (Exhibit 5), Applicant maintained that its discovery responses were proper, and Applicant's attorney provided new first-use dates that are years earlier than those provided by Applicant in its interrogatory responses (Exhibit 6). By letter dated January 13, 2016, Opposer again requested Applicant to provide supplemental responses (Exhibit 7), but to no avail. Opposer was therefore forced to file this motion to

compel to obtain the discovery to which it is entitled. In an effort to frustrate Opposer's motion, Applicant then served supplemental responses to some of the contested interrogatories. However, as discussed below, the supplemental responses do not resolve all the discovery issues. This is similar to the dilatory tactic earlier employed by Applicant with respect to Opposer's first set of discovery requests, necessitating Opposer's filing of a motion to compel. That motion was not even responded to by Applicant and was granted by the Board on February 24, 2016.

Interrogatory No. 2

Applicant has not supplemented its answer to this interrogatory. In its response to the motion, Applicant contends that the interrogatory is unclear because there is no legal standard for simple "use" of a mark. When originally answering this interrogatory, Applicant did not raise this or any other objection and, therefore, has waived the right to now object.

Moreover, Applicant's objection is without merit, and the phrase "use of the mark" is notoriously common in trademark practice. Oral discussions in which a term was considered as a brand name do not constitute use of the mark. Applicant's answer is non-responsive to the interrogatory, and a supplemental response that includes an identification of responsive documents is required.

Interrogatory No. 3

In its supplemental response, Applicant states that its earliest sales records show use of the mark on November 21, 2011 and that Applicant used the mark in commerce much earlier than that. This is non-responsive to the interrogatory, which requests the exact date on which Applicant first used the mark in commerce for diamond jewelry. Is the earliest date November 21, 2011 or a "much earlier" date? Also, Applicant's alleged first-use date of the mark in commerce for diamond jewelry (November 21, 2011) is earlier than Applicant's first-use date of the mark for diamond jewelry (August 2012) stated in answer to interrogatory no. 2. The two answers are inconsistent and contradictory. At this stage of the proceeding, and after Applicant conducted both a "vigorous search" (when initially responding to the interrogatories) followed by a "diligent search" (when supplementing its responses), Opposer is entitled to an unambiguous answer concerning Applicant's first-use dates of the mark for diamond jewelry.

Applicant states that its earliest sales records is an invoice dated November 21, 2011. Applicant has failed to produce this invoice, and the earliest invoice produced by Applicant is dated April 17, 2012.¹

¹ Pursuant to an agreement between Opposer's and Applicant's attorneys, it was agreed that each party producing documents would provide copies of the documents to the other party's attorney. To date, this has been followed, and each party's attorney provided copies of documents being produced to the other party's attorney. However, none of the documents identified in Applicant's

Interrogatory No. 4

Opposer is satisfied with Applicant's supplemental response except for Applicant's failure to produce the "sales invoices" dated November 21, 2011. The earliest invoice produced by Applicant is dated April 17, 2012.

Interrogatory No. 5

Applicant's supplemental response is non-responsive. This interrogatory seeks the earliest date on which Applicant will or may rely concerning use of the mark and an identification of all documents that refer or relate thereto. The supplemental response states that the earliest date on which Applicant used the mark was September 1, 2011 though no documents have been identified. The supplemental response further states that the earliest material with a date on it is November 18, 2011. But Applicant has not stated the earliest date on which it will or may rely.

If Applicant intends to rely on September 1, 2011 without any supporting documents, such should be stated in the answer. If Applicant intends to rely on November 18, 2011 with supporting documents, such should be stated in the answer. Also, Applicant has failed to produce the "earliest material" dated November 18, 2011 referred to in the supplemental response.

supplemental responses has been provided to Opposer's attorney and therefore have not been produced in the manner agreed upon by counsel.

Interrogatory No. 6

Applicant's supplemental response states that all sales invoices and advertising material on which Applicant will rely "have been produced and continue to be available for review." This is not correct. None of the documents noted above that are identified in Applicant's supplemental responses has been produced.

Interrogatory No. 7

This interrogatory has not been supplemented by Applicant nor has Applicant addressed this interrogatory in its response to the motion to compel. Therefore the motion to compel has been conceded with respect to this interrogatory.

Interrogatories Nos. 8-11

Applicant has not supplemented its answers to these interrogatories, which seek information concerning Applicant's sales figures and advertising expenditures for goods sold and advertised under the mark. In its response to the motion, Applicant has not argued that the information sought by these interrogatories is irrelevant, and this ground of objection has therefore been withdrawn. In its place, Applicant asserts new grounds of rejection, namely, that the request for all sales figures on a quarterly basis is overly broad and unduly burdensome. However, when responding to these interrogatories, Applicant did not object that they are overly broad or unduly

burdensome and, therefore, Applicant has waived the right to now object to the interrogatories on these grounds.

As stated by the Board in SunKist Growers, Inc. v. Benjamin Ansehl, Co., 229 USPQ 147, n.6 (TTAB 1985), if Applicant maintains quarterly records in the normal course of business, then quarterly sales and advertising figures should be provided. Otherwise, annual figures are sufficient. Here, Applicant has not stated that it does not maintain quarterly sales and advertising figures and therefore quarterly information should be provided, especially since no timely objection was made to providing quarterly figures. If Applicant does not maintain quarterly information, then annual sales and advertising figures should have been provided. Further, none of Applicant's first-use dates is more than five years ago so that all sales and advertising figures from the first to the present should be provided.

Interrogatory No. 12

Applicant has withdrawn its objection and supplemented its response to this interrogatory. However, Applicant's supplemental response is non-responsive because it does not identify the documents concerning the first-use date stated in Applicant's application. Applicant must either state that there are no documents that support the first-use date stated in the application or identify the documents that support this date.

Production Request No. 1

Applicant has not supplemented its response to this production request, nor has Applicant addressed this production request in its response to the motion. All of the documents identified in Applicant's supplemental response must be produced, and Applicant should be directed to provide Opposer's attorney with copies of the produced documents as agreed upon and implemented by the parties.

For reasons stated above and in the motion to compel, Applicant respectfully requests that its motion and the relief sought therein be granted.

Respectfully submitted,

ADAMS & WILKS

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Meeshaa Inc.,
dba Diamond Essence

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing
OPPOSER'S REPLY TO APPLICANT'S MOTION TO COMPEL has been served
by first class mail, postage prepaid, this 30th day of March,
2016, on counsel for Applicant, by sending the same to:

Tal Hirshberg, Esq.
72 Mercer Street
New York, NY 10012-4494

Bruce L. Adams