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

Proceeding	91225271
Party	Defendant Chengdu Westhouse Interactive Entertainment Co., Ltd.
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Submission	Opposition/Response to Motion
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Date	10/16/2017
Attachments	Opposition to Motion to Compel.pdf(577820 bytes)

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

Asustek Computer Incorporation,)
)
 Opposer,)
)
 v.)
)
 Chengdu Westhouse Interactive Entertainment)
 Co., Ltd.,)
)
 Applicant.)
 _____)

Opposition No. 91225271
Serial No. 86/217,642
Mark: ROG (& Design)



OPPOSITION TO MOTION TO COMPEL RESPONSES TO DISCOVERY

Opposer, Asustek Computer Incorporation (“Opposer”), has filed a motion to compel (“Motion”) the discovery responses of Applicant, Chengdu Westhouse Interactive Entertainment Co., Ltd. (“Applicant”). Opposer served discovery at the tail end of discovery and then waited until *three days* before the motion to compel deadline to complain *for the first time* about perceived deficiencies in Applicant’s responses. Opposer failed to give Applicant—a foreign litigant—sufficient time to respond to its 4-page “deficiency” letter mailed just *three days* before it rushed to file this Motion. Thus, Opposer has failed to make a good faith effort to meet and confer with Applicant to discuss perceived discovery issues before filing this Motion. TBMP § 523.02. Moreover, had Opposer bothered to confer with Applicant a reasonable time before rushing to file this Motion, Applicant could have confirmed that it possesses no additional, discoverable materials. Thus, Applicant’s responses and document production are sufficient, as it does not possess any additional, discoverable materials.

Opposer’s last-minute, baseless complaint about Applicant’s discovery is designed *solely* to trigger a suspension order and delay trial. Opposer has been unable to timely organize and produce documents in support of its case, as it is *still* attempting to “dump” additional “surprise” document production on Applicant *well after the close of discovery* and even *during the pendency of this Motion*. Opposer is clearly unprepared for trial and seeks a delay in the schedule so it can continue “dumping” documents on Applicant as part of its last-minute trial preparation. For these reasons and the additional reasons set forth below, Opposer’s motion should be denied in its entirety.

I. STATEMENT OF FACTS

Applicant, a limited company of China, has applied to register the mark ROG (& Design), depicted as follows (Ser. No. 86/217,642):



based on its *bona fide* intention to use the mark in connection with video game-related goods and services in classes 9 and 41. Applicant’s ROG is essentially a video game; “ROG” is an acronym for “Relic of God,” the full name of the video game. Motion, Declaration of Laura Winston (“Winston Decl.”), Ex. D (Applicant’s Interrogatory Response No. 3). The video game has not yet been released in the United States, but the ROG mark has been promoted in overseas markets. *Id.*

Opposer commenced this opposition on December 8, 2015, claiming a likelihood of confusion with its alleged prior marks IROG and ROG for “motherboards” and certain other types of computer hardware. TTABVUE Dkt. No. 1. The parties held their mandatory discovery conference and exchanged their Rule 26(a)(1) initial disclosures. According to the most recent Scheduling Order, discovery closed on August 11, 2017, and Opposer’s pretrial disclosures were

due on September 25, 2017. TTABVUE Dkt. No. 28. Opposer did not serve its pretrial disclosures, choosing instead to file this Motion on the day of its pretrial disclosures deadline on September 25, 2017.

During discovery, Opposer waited until May 25, 2017—less than two months before the close of discovery (as previously set) on July 12, 2017—to serve its first set of written discovery on Applicant. Motion, Winston Decl., Ex. A (Opposer’s interrogatories and document demands, collectively, “Requests”); *see also* TTABVUE Dkt. No. 26 (Scheduling Order in force at the time of service of the Requests). Applicant properly responded to all of Opposer’s requests by timely asserting valid objections and producing relevant and discoverable information and documents. *See, e.g.*, Motion, Exs. D, E. Inasmuch as Applicant has not yet used its mark in the U.S. and applied to register on an *intent-to-use* basis, its responsive discovery materials were relatively limited in volume, consisting primarily of information and samples of advertising/marketing materials relating to its upcoming release of ROG in the U.S. As explained further below, Opposer’s Motion is largely based on its subjective purported belief that Applicant “must” possess additional discovery materials when it does not.

Opposer did not complain about any perceived deficiencies in Applicant’s discovery responses until September 20th, 2017—long after the close of discovery and a mere *five days* before its pretrial disclosures were due on September 25, 2017. *See* Motion, p. 2 (discussing initial email and telephone calls). In these initial communications, Opposer did not bother to discuss any specific perceived deficiencies in Applicant’s discovery responses, only vaguely stating “we are preparing a letter regarding unresolved issues in your client’s responses and production.” *See* Winston Decl., Ex. F. Inasmuch as Opposer failed to identify its specific concerns, Applicant could not address them and duly waited for Opposer’s promised “letter” regarding discovery. In

these initial communications, Opposer’s counsel also asked for an unwarranted “extension” of all deadlines in this proceeding. Applicant properly denied this request on account of (1) the untimeliness of Opposer’s complaint; (2) the lack of good cause for an extension; (3) discovery was long closed and the case was clearly ready for trial, with Opposer’s pretrial disclosures immediately due; and (4) Opposer’s *real* reason for the extension request was to secure additional time to gather and produce more “late” document production (after the close of discovery) as part of its last-minute trial preparation efforts.

On September 22, 2017—just ***three days*** before Opposer’s pretrial disclosures deadline (and the deadline to file a motion to compel), Opposer’s counsel sent Applicant’s counsel a lengthy, four-page letter complaining about Applicant’s discovery responses. Motion, Winston Decl., Ex. G. This was the *first time* Opposer complained about Applicant’s discovery in any reasonable level of detail. Applicant’s undersigned U.S. counsel forwarded the letter to Applicant’s foreign counsel and explained Opposer’s numerous concerns.¹ **Opposer’s expectation that Applicant—a foreign litigant—must address each and every concern in a response letter within three days before the motion to compel deadline was patently unreasonable.** There is no way Applicant could possibly confer with U.S. and foreign counsel *and* provide a detailed response on such short notice. Nor was it required to grant a highly prejudicial 60-day extension to allow Opposer more time to prepare for trial (further delaying Applicant’s own registration)—particularly where Opposer has been less than diligent in serving and following up on its discovery requests. Opposer had *months* to complain about perceived deficiencies in Applicant’s discovery, but chose to wait until the eve of trial to complain for the *first time* in this litigation.

¹ Applicant is based in China and requires the assistance of U.S. and foreign counsel.

Worse, on October 4, 2017—*during the pendency of this Motion*—Opposer dumped voluminous *late* document production on Applicant long after the close of discovery. *See* Exhibit A, attached hereto (emails with additional *late* document production). Opposer is *still* attempting to dump additional late document production on Applicant *even today*. *See* Exhibit B attached hereto (additional late production dated today, October 16, 2017). Applicant has objected to this continuing “late” rolling document dump on the eve of trial. ***It is clear Opposer filed this Motion for the sole purpose of delaying this proceeding in order to continue “dumping” additional documents on Applicant before the start of trial.*** Opposer has no need for any additional discovery materials. Nor does Applicant possess additional materials to produce. Opposer knows this but nevertheless seeks to delay trial by way of this Motion.

The Board should not sympathize with Opposer when it (1) delayed until the near-end of discovery before serving its first written requests; (2) waited until *three days* before the pretrial disclosures deadline to complain for the *first time* about perceived deficiencies in Applicant’s responses; (3) failed to give Applicant sufficient time to meaningfully confer with Opposer in good faith before filing this Motion; and (4) while Opposer continues to “dump” late document production on Applicant *during the pendency of this Motion*, demonstrating Opposer merely seeks to delay in bad faith while it continues to prepare for trial. In short, Opposer has failed to meet and confer with Applicant in good faith regarding its discovery responses, and moreover, Applicant’s responses are sufficient. Accordingly, Opposer’s Motion should be denied in its entirety.

II. OPPOSER DID NOT MAKE A GOOD FAITH EFFORT TO RESOLVE THE DISPUTE INFORMALLY

Under CFR § 2.120(e), a motion to compel must be supported by a written statement from the moving party that such party or its attorney has made a good faith effort, by conference or

correspondence, to resolve with the other party or its attorney the issues presented in the motion, and has been unable to reach agreement. In determining whether a good faith effort to resolve the discovery dispute has been made, the Board may consider, among other things, whether the moving party has investigated the possibility of resolving the dispute, whether, depending on the circumstances, sufficient effort was made towards resolution, and whether attempts at resolution were incomplete. TMBP § 523.02.

Here, Opposer's "deficiency" letter dated a mere *three days* before its deadline to file this motion was hardly a "good faith" effort to resolve the dispute. Opposer failed to give Applicant—a foreign litigant—a reasonable time to respond. Opposer cannot reasonably expect Applicant to respond immediately before the deadline on such short notice. Moreover, had Opposer bothered to raise the issues earlier, the parties could have worked together to resolve them well in advance of trial in order to prevent this unnecessary dispute. Instead, Opposer simply rushed to file this Motion on the day of the deadline without giving Applicant a reasonable opportunity to address the perceived deficiencies. Under these circumstances, Opposer has failed to make a good faith attempt to resolve the dispute informally, warranting a denial of its Motion in its entirety.

Opposer will argue that it requested an "extension" of deadlines which might have allowed the parties more time to discuss. But Applicant was under no obligation to extend the trial deadlines where Opposer was less than diligent in serving and following up on discovery in a timely manner; where Opposer cannot articulate any good cause whatsoever for an extension; and where Opposer has continued to "dump" documents on Applicant well past the close of discovery. Opposer's actions demonstrate the extension request—and this Motion—were motivated by Opposer's need for additional time to gather and produce documents for trial, even though discovery is long closed. Opposer's continuing "rolling" document production underscores the

fact that it is unprepared for trial and merely seeks to delay this proceeding. Moreover, a 60-day extension, if granted, would have prejudiced Applicant by further delaying the registration of its mark. Under the circumstances, Applicant was justified in denying Opposer's extension request. The denial of an extension request is not an excuse to "rush" to file a motion to compel without first attempting to resolve the dispute in *good faith* and *in a timely manner well in advance of trial*. Accordingly, the Board should deny Opposer's Motion at least for the reason Opposer has failed to comply with the requirements of TMBP § 523.02.

III. APPLICANT'S INTERROGATORY RESPONSES WERE PROPER

Turning to Applicant's responses to the interrogatories, Opposer argues the responses to Interrogatory Nos. 1, 2, 4, 6, 24, 26, 31, 38, and 42 were improper. Opposer speculates the information is incomplete (e.g., Interrogatory No. 1) or in "contradiction" to other responses (e.g., Interrogatory No. 2), or otherwise lacking further elaboration or context. *See* Motion at pp. 10-13. ***A motion to compel is not the proper vehicle for arguing with Applicant about the accuracy of its responses.*** If, for example, *during discovery* Opposer was dissatisfied with Applicant's representation that its IP Counsel, Huo Sufang, is the sole managing agent of Applicant, it could have sought to depose Applicant to confirm whether "Applicant has other officers" or "likely has [other] managing agents." Likewise, Opposer could have tested its theory that managing the "advertising, sales and promotion" of a video game is "not a typical function of an IP counsel." *Id.*, p. 12. ***In short, Opposer's speculation about Mr. Sufang's job duties is argumentative and improper on motion to compel.*** Applicant's answers to these interrogatories are sufficient as written. Opposer is free to attempt to dispute Applicant's representations at trial, but a motion to compel is not the proper vehicle to raise such disputes. Moreover, Applicant does not possess any other information responsive to these interrogatories—a fact Applicant could have confirmed had

Opposer raised its concerns reasonably in advance of trial. Opposer already possesses everything it reasonably needs in order to proceed to trial in this case. Accordingly, the Motion should be denied with respect to these interrogatories.

IV. APPLICANT'S DOCUMENT PRODUCTION IS COMPLETE

Opposer vaguely complains about Applicant's document production, asserting that for various Requests, Applicant stated it would produce documents to the extent that they exist. Motion, at p. 13. If Opposer would have made a good faith effort to confer with Applicant in a *timely manner well in advance of trial*, Applicant could have confirmed that no additional documents exist. Inasmuch as Applicant does not possess additional responsive documents, its responses were proper.

V. CONCLUSION

Applicant respectfully requests that the Board deny Opposer's Motion for the following reasons: (1) Opposer failed to make a good faith effort to timely resolve the dispute well in advance of trial; (2) Applicant has sufficiently responded to the Interrogatories and possess no additional discoverable information; and (3) Applicant has sufficiently responded to the Document Requests and possess no additional discoverable documents.

Respectfully submitted,

Date: October 16, 2017

/Paulo A. de Almeida/
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Attorneys for Applicant,
Chengdu Westhouse Interactive
Entertainment Co., Ltd.

PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSITION TO MOTION TO COMPEL DISCOVERY** has been served on Laura J Winston, counsel for Opposer, on October 16, 2017, via email to:

tm@kimwinston.com, laurawinston@kimwinston.com

By: /Paulo A. de Almeida/
Paulo A. de Almeida

EXHIBIT A

Patel & Almeida, P.C.

From: Chintan Desai <chintandesai@kimwinston.com>
Sent: Wednesday, October 4, 2017 3:54 PM
To: paulo@paiplaw.com
Cc: Laura Winston; Firouzeh Nur-Vaccaro
Subject: Opposition No. 91225271 - AsusTek v. Chengdu (Email 1 of 3)
Attachments: Cover Letter 10-4-17.pdf; Privilege Log.pdf; ROG - Amended Responses to Applicant's First Set of Interrogatories.pdf; OPP 483 - 485.pdf; OPP 486 - 505.pdf; OPP 506 - 509.pdf; OPP 481.pdf; OPP 482.pdf

Importance: High

Dear Paulo:

Please see the attached correspondence regarding the following items:

- 1) Opposer's Amended Responses to Applicant's First Set of Interrogatories
- 2) Documents OPP 481-607 responsive to Applicant's First Set of Requests for Production of Documents
- 3) Privilege Log

Due to the combined size of the attachments, the attachments will be split up into three separate emails. Please confirm receipt of the emails along with the attachments.

Best regards,
Chintan Desai

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Patel & Almeida, P.C.

From: Chintan Desai <chintandesai@kimwinston.com>
Sent: Wednesday, October 4, 2017 4:01 PM
To: paulo@paiplaw.com
Cc: Laura Winston; Firouzeh Nur-Vaccaro
Subject: Opposition No. 91225271 - AsusTek v. Chengdu (Email 2 of 3)
Attachments: OPP 541 - 545.pdf; OPP 546 - 550.pdf; OPP 551 - 552.pdf; OPP 553 - 554.pdf; OPP 555 - 560.pdf; OPP 561 - 562.pdf; OPP 563 - 568.pdf; OPP 510 - 516.pdf; OPP 517 - 540.pdf

Dear Paulo:

Further to my previous email, please find enclosed the 2nd group of additional attachments. Please confirm receipt of the emails along with the attachments.

Best regards,
Chintan Desai

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Patel & Almeida, P.C.

From: Chintan Desai <chintandesai@kimwinston.com>
Sent: Wednesday, October 4, 2017 4:10 PM
To: paulo@paiplaw.com
Cc: Laura Winston; Firouzeh Nur-Vaccaro
Subject: Opposition No. 91225271 - AsusTek v. Chengdu (Email 3 of 3)
Attachments: OPP 573 - 574.pdf; OPP 575 - 578.pdf; OPP 579 - 581.pdf; OPP 582 - 594.pdf; OPP 595.pdf; OPP 596.pdf; OPP 597 - 607.pdf; OPP 569 - 570.pdf; OPP 571 - 572.pdf

Importance: High

Dear Paulo:

Further to my previous emails, please find enclosed the 3rd and final group of additional attachments. Please confirm receipt of the emails along with the attachments.

Best regards,
Chintan Desai

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EXHIBIT B

Patel & Almeida, P.C.

From: Firouzeh Nur-Vaccaro <firouzehnurvaccaro@kimwinston.com>
Sent: Monday, October 16, 2017 9:15 AM
To: paulo@paiplaw.com
Cc: Laura Winston; Chintan Desai
Subject: ROG - Supplemental Document Production
Attachments: ROG - Cover letter to P. de Almeida 10.16.17 (00060358xCF79E).pdf; OPP 614.pdf; OPP 615.pdf; OPP 616.pdf; ROG - Privilege Log 10.16.17 (00060360xCF79E).pdf

Dear Paulo,

Please see the attached correspondence and enclosures.

Best regards,

Firouzeh Nur-Vaccaro

Please note: Our New Jersey offices have moved. Our new address is 129 W. Evesham Road, Voorhees, NJ 08043. All other contact information remains the same.

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