

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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JK

August 12, 2019

Opposition No. 91236165

Vina Concha y Toro S.A.

v.

Citadel Trading Corp.

J. Krisp, Interlocutory Attorney:

This proceeding is now before the Board for consideration of Applicant's April 5, 2019 renewed motion for discovery sanctions pursuant to Trademark Rule 2.120(h)(1). The motion is fully briefed.

Analysis

Trademark Rule 2.120(h)(1) states, in pertinent part,

... if a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, including a protective order, the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure

TBMP § 507.01(a) (June 2019). One or more of various sanctions may be entered by the Board. *Id.*

Applicant moves for sanctions "for Opposer's failure to fully comply with" the November 5, 2018 order. 18 TTABVUE 3.

First, Applicant argues that the purported “verification” of Opposer’s “Supplemental Answers and Objections” served on November 19, 2018 is undated. 18 TTABVUE 4. For its part, Opposer maintains that on November 19, 2018 it served a verified copy of its supplemental answers and indicated that it would consider whether further supplementation might be required. 21 TTABVUE 2.

Whereas the record includes a November 19, 2018 email referencing responses attached thereto, the record does not include supplemental responses which are dated November 19, 2018. 18 TTABVUE 19. Applicant states in its motion that its Exhibit A is Opposer’s supplemental answers, but those answers - “Opposer’s Supplemental Answers and Objections” to Applicant’s first set of interrogatories and document requests - are dated April 6, 2018, the same date on Opposer’s **initial** responses, and clearly prior to the November 5, 2018 order. 18 TTABVUE 4, 9; 9 TTABVUE 28. Furthermore, the actual “Verification” thereon is blank and undated in that it merely states “August , 2018.” 18 TTABVUE 17. In a footnote, Opposer references a “November 23, 2018 email exchange between counsels,” but the record does not include a copy of that email. Thus again, the Board is left to speculate. 21 TTABVUE 3. In sum, the record does not include a clear indication that Opposer served properly verified supplemental responses to discovery, as compelled in the Board’s November 5, 2018 order.

Second, Applicant argues that the supplemental responses to Interrogatory Nos. 8, 14 and 15 are deficient. The Board discusses each of these in turn.

Applicant argues that the supplemental response to **Interrogatory No. 8** was unchanged from the initial insufficient response. Indeed, Opposer's "Supplemental" response to Interrogatory No. 8 (18 TTABVUE 13) is identical to its initial response, as follows:

Summarize the substance of Italo Jofré's knowledge relating to the promotion and distribution of wines under Opposer's Marks in the United States.

Initial Response served April 6, 2018: Mr. Italo Jofré has been the Fine Wine Export Manager of Viña Concha y Toro S.A. since at least 2008 and has knowledge of the promotion and distribution of wines under Opposer's Marks in the United States during the relevant reasonable period.

Correspondence between counsels indicates that the parties disagree on the nature of information sought. The interrogatory does not request details of Mr. Jofre's proposed testimony, nor does it request his qualifications to be a witness. Opposer's response 1) only provides Mr. Jofre's employment position, and 2) merely duplicates the request itself by merely stating that Mr. Jofre "has knowledge." Applicant's interrogatory clearly seeks more than a duplication of the request itself. However, as a whole the interrogatory remains simply unclear in that it essentially seeks unspecified "substance of ... knowledge relating to..." Opposer specifically sought direction as to what Applicant was seeking with this interrogatory, and the record does not reflect that sufficient clarity was forthcoming. 18 TTABVUE 19, 21. On this record the Board cannot determinedly find that Opposer's response is insufficient.

Applicant argues that the supplemental response to **Interrogatory No. 14** mirrored the initial response, that the business records produced (VINA000285) did not disclose the information requested (gross wholesale and retail sales), and that

Opposer's U.S. importer/exporter possesses responsive information and documents.

Opposer's "Supplemental" response to **Interrogatory No. 14** adds substance to its initial response, as follows:

Set forth the actual gross wholesale and retail sales, by month and year, of of (sic) Opposer's wines other than those sold under Opposer's Marks in the United States for each year since 2010 and identify all documents related thereto.

Initial response served April 6, 2018: Opposer objects to this Interrogatory on the grounds that it is irrelevant, overbroad, ambiguous, unduly burdensome in that it seeks "all" documents and is not restricted to the U.S., seeks to discover facts or information outside the possession and control of the Opposer and not reasonably calculated to disclose relevant information.

Supplemental response adds: Further, Opposer produces and exports wines to the U.S. It is neither a wholesaler nor a retailer of the wines it produces and does not have possession or control of the information sought by this Interrogatory. There are no documents with this information in the requested format.

In its November 5, 2018 order, the Board noted Opposer's allegation in its pleading that it is "Latin America's largest producer of wine" and is "America's largest exporter of wine from Chile." (1 TTABVUE 3), and noted that "Applicant is entitled to discovery that could test and refute Opposer's allegation regarding Opposer's size and overall wine business." 13 TTABVUE 6. With its supplemental response, Opposer clarifies that it does not have the information sought because it is not a wholesaler or retailer and thus has no gross wholesale and retail sales information to provide.¹ Document VINA000285, which Applicant maintains is insufficient, indeed does not provide the gross wholesale and retail sales; however, it is accompanied by a response

¹ Opposer reiterated this in a subsequent email of November 26, 2018 (18 TTABVUE 21) and in its brief elaborated that market circumstances indicate that third parties may have the sales information. 21 TTABVUE 4.

that explains why Opposer does not have the requested information. In sum, Opposer's supplemental response is sufficient in that it explains why Opposer lacks the requested information. However, it is insufficient because it remains unverified.

Applicant argues that the supplemental response to **Interrogatory No. 15**, that Opposer does not maintain records of negative comments relating to its wines, is inadequate in the absence of a verified response. Opposer's "Supplemental" response to **Interrogatory No. 15** adds information to its initial response, as follows:

Identify all negative comments relating to Opposer's wines from wine rating entities, publications, consumers, retailers and distributors.

Initial response served April 6, 2018: Opposer objects to this Interrogatory on the grounds that it is irrelevant, overbroad, ambiguous and unduly burdensome, not restricted to the U.S. and seeks to discover facts or information outside the possession and control of the Opposer and not reasonably calculated to disclose relevant information.

Supplemental response adds: Opposer does not maintain or retain records of negative comments relating to Opposer's wines from wine rating entities, publications, consumers, retailers and distributors.

Applicant argues that the supplemental response "is inadequate in the absence of a verified response indicating that it is unaware of negative comments." 18 TTABVUE 6.

Opposer's supplemental response renders its response as a whole, in essence, a statement that it does not have the requested information. However, it was incumbent on Opposer to affirmatively set forth this statement, and to serve it as a verified answer.

Turning to the requested remedy, Applicant seeks discovery sanctions in the form of precluding Opposer from offering herein 1) testimony of Italo Jofré, by way of

affidavit or otherwise; 2) any evidence relating to the promotion and distribution of wines under Opposer's marks in the United States; and 3) any evidence to substantiate the allegations in Paragraph 1 of the Notice of Opposition that Opposer is Latin America's largest producer of wine and accounts for nearly a quarter of Chile's total wine production and that Opposer is America's largest exporter of wine from Chile.

On this record, Opposer has not refused to communicate with Applicant in the parties' efforts to resolve the impasse, has not exhibited a pattern of uncooperativeness, and has not entirely failed to fulfill the Board's directive in the November 5, 2018 order, having provided supplemental information in part. The Board finds that under these circumstances, the requested sanctions are not warranted. Accordingly, Applicant's motion for sanctions is **denied**.

Nonetheless, Opposer is allowed until **twenty days from the date of this order** to serve a verified copy of its supplemental responses, failing which Applicant may file a renewed timely motion for sanctions.

Schedule

Proceedings are resumed. The Board expects that the parties will proceed to trial, and trial dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	9/16/2019
Plaintiff's 30-day Trial Period Ends	10/31/2019
Defendant's Pretrial Disclosures Due	11/15/2019
Defendant's 30-day Trial Period Ends	12/30/2019
Plaintiff's Rebuttal Disclosures Due	1/14/2020
Plaintiff's 15-day Rebuttal Period Ends	2/13/2020
Plaintiff's Opening Brief Due	4/13/2020

Defendant's Brief Due	5/13/2020
Plaintiff's Reply Brief Due	5/28/2020
Request for Oral Hearing (optional) Due	6/7/2020

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).