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April 19, 2019

Opposition No. 91240636
Cancellation No. 92068353

Information Builders, Inc.

v.

SWMG Productions, Inc.

Ann Linnehan, Interlocutory Attorney

This case now comes up for consideration of Information Builders, Inc.'s ("IBI") motion (filed January 30, 2019) to test the sufficiency of SWMG Productions, Inc.'s ("SWMG") responses to IBI's First Requests for Admissions. A brief in response was filed on February 19, 2019.

As a preliminary matter, the Board finds that IBI has shown (in the declaration attached to the motion) that it made a good faith effort, pursuant to Trademark Rule 2.120(i)(1), to resolve with SWMG the issues presented in the motion prior to seeking Board intervention.

If a propounding party is dissatisfied with a responding party's answer or objection to a request for admission, and wishes to obtain a ruling on the sufficiency thereof, the propounding party may file a motion with the Board to determine the sufficiency of the response. See Fed. R. Civ. P. 36(a); Trademark Rule 2.120(i). If

the Board, upon motion to test the sufficiency of a response to a request for admission, determines that an answer does not comply with the requirements of Fed. R. Civ. P. 36(a), it may order either that the matter is deemed admitted or that an amended answer be served. If the Board determines that an objection is not justified, it will order that an answer be served. Fed. R. Civ. P. 36(a).

Generally, if there is an admission or a denial, the Board will not find the response to be insufficient even if the responding party included an explanation or clarification of the admission or denial, or admitted after first denying. *Cf.* comments to Fed. R. Civ. P. 36(a)(4-6) regarding improper responses which may be considered effective admissions.

In support of its motion, IBI argues that SWMG has improperly objected to all of IBI's admission requests by beginning each response with the phrase "Denied for the reasons set forth in the general objections." IBI further asserts that SWMG has improperly objected to some/all of the requests on the ground that certain "commonly used and understood" terms/phrases contained in these requests are vague and ambiguous, i.e., "software," "promotes," "data," "manages," "filters," "making decisions," and "decision making. IBI further argues that SWMG improperly refers to other trademarks which have no relevance to the requests at issues; that SWMG improperly argues certain points that should be made during trial and not in a general objection to specific admission requests; and that SWMG makes certain individual objections which in the end are nonresponsive or merely an attempt to withhold evidence.

After carefully reviewing each request and response (including SWMG's general objections) at issue the Board finds that SWMG's responses are deficient. The Board is not persuaded by SWMG's objections or the arguments it makes in its response brief.[1] For example, the Board is not persuaded by SWMG's argument that the term "software" is vague and/or ambiguous in the contexts of the requests propounded by IBI or in the context of SWMG's services. The term "software" (and all the terms with which SWMG takes issue) is common place and well understood in the business world. Indeed, these terms are clearly defined in dictionaries. For instance, see the following dictionary definitions:[2]

soft·ware (sôft□wâr′, sŏft□-)
n.
Computers
The programs, routines, and symbolic languages that control the functioning of the hardware and direct its operation.

The American Heritage® Dictionary of the English Language (5th ed. 2019).

pro·mote (prə-mōt□)
tr.v. **pro·mot·ed**, **pro·mot·ing**, **pro·motes**
1.
a. To raise to a more important or responsible job or rank.
b. To advance (a student) to the next higher grade.
2. To contribute to the progress or growth of; further. See Synonyms at advance.
3. To urge the adoption of; advocate: *promote a constitutional amendment.*
4. To attempt to sell or popularize by advertising or publicity: *commercials promoting a new product.*
5. To help establish or organize (a new enterprise), as by securing financial backing: *promote a Broadway show.*

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[1] While the arguments set forth in SWMG's brief in response are not summarized here, the Board assumes the parties' familiarity therewith.

[2] The Board may take judicial notice of dictionary definitions, including online reference works which exist in print format or have regular fixed editions. See *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1590 (TTAB 2008) (judicial notice taken of definition from the Merriam-Webster Online Dictionary).

[Middle English *promoten*, from Old French *promoter*, from Latin *prōmovēre, prōmōt-* : *prō-*, forward; see PRO-[1] + *movēre*, to move; see **meuə-** in the Appendix of Indo-European roots.]

pro·mot′a·bil□i·ty *n.*
pro·mot□a·ble *adj.*

The American Heritage® Dictionary of the English Language (5th ed. 2019).

da·ta (dā□tə, dăt□ə, dä□tə)
pl.n. (used with a sing. or pl. verb)
1. Facts that can be analyzed or used in an effort to gain knowledge or make decisions; information.
2. Statistics or other information represented in a form suitable for processing by computer.
3. Plural of datum.

[Latin, pl. of *datum*; see DATUM.]

The American Heritage® Dictionary of the English Language (5th ed. 2019).

Again, these and all the terms with which SWMG takes issue are clearly defined in dictionaries and their use in the context of IBI's requests is understood.

In addition, SWMG's objection that IBI's requests are flawed because they presume that the parties "employ parallel branding strategies and sell competing software products when in fact differences in both are at the core of [SWMG's] arguments in this proceeding" is an issue reserved for trial. Similarly, the issue concerning the "different ways that [SWMG] and [IBI] use their trademarks with their respective products"[3] (as SWMG contends in its brief) and the issue of the very differences between the software products of each party are matter for trial. SWMG objections based on these arguments are without merit.

[3] For example, the fact that SWMG may emphasize some trademarks over others in certain situations should not prevent it from answering a certain or given admission request.

Accordingly, IBI's motion to test the sufficiency of SWMG's responses to IBI's First Requests for Admissions is granted. Within **30 days** of the date set forth in the caption of this order, SWMG must provide supplemental responses to each request for admission.

Proceedings for these consolidated proceedings are hereby resumed. Due to the passage of time, the Board find is appropriate to reset dates as follows:

DISCOVERY IS CLOSED	
Plaintiff's Pretrial Disclosures Due	6/2/2019
Plaintiff's 30-day Trial Period Ends	7/17/2019
Defendant's Pretrial Disclosures Due	8/1/2019
Defendant's 30-day Trial Period Ends	9/15/2019
Plaintiff's Rebuttal Disclosures Due	9/30/2019
Plaintiff's 15-day Rebuttal Period Ends	10/30/2019
Plaintiff's Opening Brief Due	12/29/2019
Defendant's Brief Due	1/28/2020
Plaintiff's Reply Brief Due	2/12/2020
Request for Oral Hearing (optional) Due	2/22/2020

NOTE: 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).