

THIS ORDER IS NOT A
PRECEDENT OF THE
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

JK

January 23, 2023

Opposition No. 91267259

LT Overseas North America, Inc.

v.

Pickin' Cotton Communications, LLC

**Before Zervas, Lynch and Dunn,
Administrative Trademark Judges.**

By the Board:

This proceeding is before the Board for consideration of Opposer's September 21, 2022 motion for the sanction of judgment against Applicant for failure to comply with a discovery order of the Board. 21 TTABVUE.¹ The motion is fully briefed.

¹ In this order, the Board cites to the proceeding record by the TTABVUE docket entry number and TTABVUE page number, in accordance with the guidance provided in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 106.03, 702.05 and 801.01 (2022).

In the January 26, 2021 institution order (2 TTABVUE 6) and the January 7, 2022 order (11 TTABVUE 6), the Board advised Applicant's representative of the importance of hiring legal representation, adhering to applicable authorities, and the possible consequences of failing to do so. Nonetheless, Applicant chose to proceed herein without the benefit of legal counsel. *Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at *1 (TTAB 2020) (quoting TBMP Section 114.01, and noting that compliance with the Trademark Rules of Practice, and where applicable, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, is required of all parties even those who assume the responsibility and risk of representing themselves); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1038 n.5 (TTAB 2012).

Background

On April 27, 2021, Opposer served Applicant with discovery requests (interrogatories, requests for production, and requests for admissions), making Applicant's responses thereto due May 27, 2021. Fed. R. Civ. P. 33(b)(2) and 34(b)(2)(A).² *See also* Trademark Rule 2.120(a)(3) and TBMP §§ 405.04(a) and 406.04(a). No responses were served. Opposer made a good faith effort pursuant to Trademark Rule 2.120(f)(1) to obtain the responses and contacted Applicant seeking the responses without success. On August 25, 2021, Opposer filed a motion to compel Applicant to serve responses to the interrogatories and requests for production without objection. On September 6, 2021, as noted in its brief in response to the motion, Applicant served untimely responses. 8 TTABVUE 11, 42 and 71. Applicant's objections, and to the extent that it responded, its responses, were deficient on their face.

On January 7, 2022 the Board ruled that Opposer's motion to compel was moot, because Applicant had served untimely responses after Opposer moved to compel. 11 TTABVUE 2. Noting the untimeliness of, as well as the obvious deficiencies in the responses, and remarking on Applicant's failure to cooperate in discovery and dilatory conduct, the Board issued a discovery order wherein it exercised its discretion to review the deficient late responses rather than requiring a second motion to compel. 11 TTABVUE 2-4. *Midwestern Pet Foods Inc. v. Societe des Produits Nestle S.A.*, 103

² The Federal Rules of Civil Procedure cited herein are made applicable to Board proceedings by Trademark Rule 2.116(a). TBMP § 101.02.

USPQ2d 1435, 1439 (Fed. Cir. 2012) (“Supervision of discovery ... lies within the Board's discretion.”). In the discovery order the Board overruled Applicant’s “boilerplate responses” and boilerplate objections (11 TTABVUE 2-4), and found the responses to the requests for production to be non-compliant with Fed. R. Civ. P. 34(b)(2)(C) in that they failed to state whether Applicant was withholding documents. The Board ordered Applicant to serve supplemental responses to Opposer’s Interrogatories, Nos. 3-5, 14-35, and 38-41, and requests for production, without objection by January 28, 2022. 11 TTABVUE 5-6. The Board also specified that in the event Applicant fails to comply, Opposer’s remedy may lie in a motion for sanctions, as appropriate, under Trademark Rule 2.120(h)(1). 11 TTABVUE 6.

The Board also ruled that Opposer’s Requests for Admission are deemed admitted pursuant to Fed. R. Civ. P. 36(a)(3) because Applicant did not timely respond. 11 TTABVUE 4.

On January 17, 2022 Applicant filed a motion for an extension to comply with the order, requesting an extension “to respond to Opposer’s request for Statement of Admissions.” 12 TTABVUE 2. In its brief Opposer contested the motion on the bases that the Board had already found the requests for admissions to be deemed admitted, and Applicant did not show excusable neglect for its delay in serving responses to the requests for admission. 13 TTABVUE. With its reply brief, Applicant submitted a copy of what it had served January 26, 2022, prior to the January 28, 2022 deadline: responses to the interrogatories (14 TTABVUE 24), responses to the requests for production (14 TTABVUE 48), and responses to Opposer’s requests for admissions

coupled with arguments that its failure to serve timely responses earlier was justified by excusable neglect (14 TTABVUE 3-6, 13).

Before the Board could consider Applicant's contested motion to extend, Applicant withdrew that motion without prejudice (15 TTABVUE) and concurrently filed a motion for summary judgment on Opposer's sole claim of likelihood of confusion (16 TTABVUE). The Board denied summary judgment. 19 TTABVUE.

Opposer filed a motion for sanctions pursuant to Trademark Rule 2.120(h)(1).

Authorities and Analysis

A motion for sanctions for failure to comply with an order of the Board is appropriate when the Board has entered an order relating to discovery, and the order has been violated. TBMP § 527.01(a). 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, ...

The Board's January 7, 2022 order was a discovery order, and specifically advised Applicant that the same consequence may result from disobeying that order as would result from disobeying an order granting an adversary's motion to compel. That is, the Board ordered Applicant to serve sufficient discovery responses without objection, and definitively stated that if Applicant failed to comply, Opposer's remedy may lie in a motion for sanctions under Trademark Rule 2.120(h)(1). 11 TTABVUE 5-6.³

³ In the context of addressing a motion for sanctions against a party who failed to serve timely initial disclosures, the Board held that sanctions under Trademark Rule 2.120(g)(1)

The sanctions that may be entered by the Board include, inter alia, striking all or part of the pleadings of the disobedient party; refusing to allow the disobedient party to support or oppose designated claims or defenses; prohibiting the disobedient party from introducing designated matters in evidence; and entering judgment against the disobedient party. *See also* TBMP § 411.05. The entry of judgment is a harsh sanction, but is appropriate where a party has been fully advised of its discovery obligations, yet fails to comply. *Revolution Jewelry Works, Inc. v. Stonebrook Jewelry, LLC dba Revolution Jewelry*, 2022 USPQ2d 229, at *6 (TTAB 2022) (citing *Baron Philippe de Rothschild*, 55 USPQ2d at 1854 (“Default judgment is a harsh remedy, but is justified where no less drastic remedy would be effective, and there is a strong showing of willfulness.”)).

Here, Opposer moves for the sanction of judgment against Applicant for failure to comply with the January 7, 2022 discovery order, on the basis that:

- 1) the supplemental responses served January 26, 2022 contain the same type of general, boilerplate objections that the Board already overruled;
- 2) the supplemental responses to the document requests renewed the previously-overruled objections based on the attorney-client privilege and the work product doctrine by stating throughout its responses that it would only produce “nonprivileged documents;”
- 3) the supplemental responses to the interrogatories and document requests renewed the previously-overruled objections based on proportionality;

[redesignated as Trademark Rule 2.120(h)(1) effective January 14, 2017] “may be ordered only where a party’s failure to make disclosures follows an order of the Board affirming or reiterating the party’s obligation to make such disclosures.” *Kairos Inst. of Sound Healing LLC v. Doolittle Gardens LLC*, 88 USPQ2d 1541, 1543 (TTAB 2008). Here, the January 7, 2022 discovery order clearly affirmed and reiterated Applicant’s obligation to serve full and complete responses to Opposer’s discovery requests.

- 4) the supplemental responses to the document requests impermissibly state “Applicant will produce nonprivileged documents responsive to this Request to the extent that such documents exists [sic], are within Applicant’s possession, custody or control, and are located after a reasonable search;” and
- 5) the supplemental production is a one-page document dated “March 1st 2020” but stamped “08/05/2010,” and is of questionable authenticity (21 TTABVUE 64).

21 TTABVUE 3-5.

Although Applicant’s brief contesting the motion is untimely, in view of the dispositive nature of the motion, the Board exercises its discretion to consider the brief. 23 TTABVUE. Trademark Rule 2.127(a); TBMP § 502.02(b).

Opposer’s Interrogatories and Requests for Production

The Board has reviewed the supplemental responses ordered in the January 7, 2022 order: Interrogatories Nos. 3-5, 14-35 and 38-41, and the Requests for Production. 21 TTABVUE 15, 39.

Turning to the interrogatories, in its supplemental responses Applicant deleted its overruled general objections based on attorney-client privilege, work product and proportionality, though it repeated all other general objections. Compare 8 TTABVUE 44 and 14 TTABVUE 24. Furthermore, Applicant’s supplemental responses to the following are incomplete, truncated and non-responsive, and therefore insufficient: Interrogatories Nos. 3, 4, 5, 21, 22 and 23. Additionally, Applicant merely repeats a response, or a minor variation thereof, for Interrogatories Nos. 14 -20, 24-28, 31-35 and 38-40, its repeated response being:

Applicant has Applied for Applicant’s Mark, established a business plan, and reasearched (sic) including the 14 steps identified in our “intent to use” plan for the mark.

Inasmuch as Opposer's interrogatories probe a variety of relevant topics, the repeated response is inappropriate, evasive, and fails to meet the requirements of Fed. R. Civ. P. 33(b)(3). TBMP § 405.04(b). Both Opposer and the Board are left to speculate as to the substance of Applicant's responses. For example, if the repeated references to "the 14 steps" refer to the one-page document Applicant produced wherein it enumerated a series of short phrases as paragraphs 1 through 14 (21 TTABVUE 64), the supplemental responses are remarkably ambiguous to the point of providing no responsive information.

Turning to the requests for production, in its supplemental responses Applicant repeated its general objection based on proportionality, which the Board overruled, and included a list of boilerplate objections highly similar to those it previously served. Compare 8 TTABVUE 13 and 14 TTABVUE 50. In its supplemental responses Applicant simply repeats verbatim the following evasive and unacceptable response to each of the forty-four requests:

Subject to and without waiving the foregoing objections, Applicant will produce nonprivileged documents responsive to this Request to the extent that such documents exists [sic], are within Applicant's possession, custody or control, and are located after a reasonable search. Applicant's "Intent to Use" plan and/or other documents, already provided to Opposer, addresses this request.

14 TTABVUE 52, 21 TTABVUE 39. Thus, the responses are clearly lacking in substance and are wholly inadequate. More to the point, the responses reflect a distinct and obvious disregard for the Board's discovery order. Fed. R. Civ. P. 34(b)(2)(B). TBMP § 406.04(c).

In view of the straightforward nature of Opposer's likelihood of confusion claim, as well as the typical and basic information pertaining thereto which Opposer has repeatedly sought to obtain, the one-page document that Applicant produced is insufficient. The document, on its face, is exceedingly brief, merely lists enumerated phrases that lack detail and substantive context, and is not associated or correlated with any specific document request(s). On its face the document is so lacking in content, and so ambiguous, evasive and cryptic as to be non-responsive. Even viewing the record in a light favorable to Applicant, given Applicant's continual references to "a business plan" and "our 'intent to use' plan" for the mark, as recited in its supplemental responses (e.g. to Interrogatories Nos. 14-20, 24-28, 31-35, 38-40), Applicant's complete lack of production of documents related to any such "plan" is simply inexplicable. As a result of Applicant's conduct, Opposer repeatedly has been denied information to which it is entitled.

In sum, Applicant's supplemental responses to Opposer's interrogatories and requests for production indicate a deliberate failure to comply with the Board's discovery order and to make the requisite effort to satisfy Opposer's discovery needs. TBMP § 408.01, and cases cited therein. In the discovery order the Board addressed the deficient and untimely responses, provided an additional opportunity to Applicant to meet its obligations, and warned that it expects cooperation with Opposer in the discovery process and looks with extreme disfavor on contrary conduct⁴. 11

⁴ The order also noted that Applicant was a party to other Board opposition proceedings and is familiar with the Rules of Procedure. 11 TTABVUE 5.

TTABVUE 4-5. *Panda Travel Inc. v. Resort Option Enter., Inc.*, 94 USPQ2d 1789, 1791 (TTAB 2009); *Amazon Tech. Inc. v. Wax*, 93 USPQ2d 1702, 1705 (TTAB 2009). Even when Opposer moved for sanctions, Applicant argued in an untimely brief merely that it “has answered in good faith” and “has made good faith answers;” it merely cited nondescript and vague matters pertaining to “the nature of our business” and noted that it is a small company. 23 TTABVUE 2-3. These explanations are insufficient to persuade the Board that Applicant, if provided another opportunity, would be forthcoming with complete and complying responses to Opposer’s discovery. Applicant’s representative, Matt Fogarty, MD, is its Chief Operations Officer and seemingly has the information and documents needed to appropriately respond in discovery. Furthermore, nothing in the record indicates that the seasonings and spices business is of such a nature that would preclude timely and fully responding to straightforward, typical inquiries regarding matters such as creation of the applied-for mark, the goods, channels of trade and distribution, and marketing. On this record, the Board concludes that any sanction less than judgment is likely to be ineffective and thus futile.

Decision

Opposer’s motion for discovery sanctions is granted. Trademark Rules 2.120(h)(1).

Accordingly, judgment is entered against Applicant, the opposition is sustained, and registration to Applicant is refused.

