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

Proceeding no.	91276953
Party	Defendant Amoy Food Limited
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MAY FLOWER INTERNATIONAL, INC.,

Opposer,

v.

AMOY FOOD LIMITED,

Applicant.

Mark: AMOY

Opposition No.: 91276953

Serial No.: 90757571

**APPLICANT’S REPLY IN SUPPORT OF
MOTION TO COMPEL AND
OPPOSITION TO CROSS MOTION FOR
PROTECTIVE ORDER**

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Applicant AMOY FOOD LIMITED hereby submits this Reply in further support of its Motion to Compel the deposition of Opposer MAY FLOWER INTERNATIONAL, INC. and in opposition to Opposer’s Cross Motion for Protective Order.

A. Applicant’s Efforts to Meet and Confer Were More than Sufficient

Opposer’s claims that the meet and confer process was not sufficient are absolutely without merit. After receiving the Notice of Deposition on May 30, 2023, Opposer strung Applicant along, indicating that Opposer would be made available for deposition, but never providing any actual availability. Only on August 9, 2023, over two months after the Notice was served, did Opposer indicate *for the first time* that it objected to the Notice by serving formal objections to Applicant. Opposer’s intentions during the meet and confer process were made clear – that it would make Applicant believe that Opposer would appear for deposition, while never actually providing availability for deposition and attempting to run out the clock on discovery with the deposition still pending.

Pursuant to TBMP § 523.02, “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.” Applicant has satisfied the meet and confer requirements of the Board’s rules.

Opposer’s citation to Board authority is wholly unavailing. As stated in *Hot Tamale Mama...and More, LLC v. SF Invs., Inc.*, 110 USPQ2d 1080, 1081-82 (TTAB 2014) “Trademark Rule 2.120(e)(1) calls for the moving party to show that it has made a good faith effort to resolve the issues presented in the motion, *and that the parties were unable to resolve their differences*” (emphasis added), and further that “the good faith efforts of the parties should be directed to understanding differences and actually investigating ways in which to resolve the dispute.” Applicant made repeated attempts to confirm Opposer’s availability for deposition, sending no fewer than five meet and confer correspondence emails to obtain available deposition dates from Opposer. Opposer though refused to provide available dates over the course of two months of follow up correspondence, even after indicating that it would make itself available for deposition in July 2023. Not once over the two months did Opposer indicate that it objected to the substance of the Notice or the deposition. Then, on August 9, 2023, Opposer responded to Applicant’s repeated meet and confer emails not by stating any issue as to scheduling or availability for deposition, as had been in question during the parties’ meet and confer process, but by objecting to the Notice for the very first time.

Pursuant to TBMP § 408.08(a), “Objections to errors and irregularities in a notice of the taking of a discovery deposition must be promptly served, in writing, on the party giving the notice; any such objections that are not promptly served are waived.” Opposer’s objections to the

Notice were thus completely untimely as they were served over two months after service of the Notice – the objections were not promptly served by any stretch. Once Opposer’s untimely objections to the Notice were served, Opposer effectively confirmed that Opposer would not make itself available for deposition, that it would resist deposition by any means including by making out of time objections simply for purposes of delay and obfuscation. The issue between the parties in dispute then, and disputed on this Motion, was strictly whether Opposer would be available for deposition. By the time Opposer served its dilatory objections, it was clear that the parties were unable to resolve their differences of whether Opposer would or would not sit for deposition. Applicant’s meet and confer process was thus reasonable and complete as, through many rounds of follow up, it confirmed that Opposer would not in fact make itself available. If Opposer truly objected to the topics for examination, and was not merely resisting deposition for purposes of delay and avoidance, it would have conferred with Applicant on the topics as required by Fed. R. Civ. P. 30(b)(6) and as requested by Applicant.

B. Applicant’s Notice Identifies the Topics for Examination with Reasonable Particularity

Opposer objects to the topics of the Notice on grounds that the topics are not defined with reasonable particularity or are otherwise improper under the discovery rules. Opposer’s objections are merely a tactic to delay or avoid deposition as the topics of deposition relate to the primary issues and claims of the case and are not unduly burdensome or overbroad.

“The nonmoving party’s obligation to produce a 30(b)(6) witness, or produce documents, turns on whether the disputed deposition topics and document requests fall within the scope of Federal Rule of Civil Procedure 26(b)...Rule 26(b), in turn, permits discovery into any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the

needs of the case.” *Buie v. District of Columbia*, 327 F.R.D. 1, 6-7 (D.D.C. Aug. 14, 2018) (internal citations omitted). “Determining whether proposed discovery is relevant and proportional requires consideration of the importance of the issues at stake, the amount in controversy, the parties’ access to the information, the parties’ resources, the importance of the discovery in resolving the issues, and the burden of the discovery relative to the likely benefit. Information within this scope need not be admissible in evidence to be discoverable. *Id.* (internal citations omitted).

1. Applicant’s topics do not seek cumulative or duplicative discovery

Opposer contends that **Topics 13-16**, which seek testimony on Opposer’s Responses to Interrogatories, Responses to Interrogatories, and Initial Disclosures, and Opposer’s produced documents in this action, as well as **Topics 2, 4, 5, 6, 7, 8, 12, 23**, which Opposer alleges ask for the same information and documents requested in document requests and interrogatories, are objectionable as constituting discovery on discovery and/or are cumulative and/or duplicative, and thus that Opposer should not be required to produce a witness for such topics. Opposer’s objections are unavailing.

While “the purpose of a Rule 30(b)(6) deposition is not to confirm or test the written discovery that a party has already provided,” the court in *Cook v. Lynn & William, Inc.*, 344 F.R.D. 149, 156 (D. Mass. May 22, 2023), which was cited by Opposer, reserved that it would strike the relevant deposition topics on the basis that “nothing in the record suggests that the defendant has concealed any documents from the plaintiff.” Further, the court there was receptive to discovery where “defendant did not confirm whether certain requested documents exist” as required under Fed. R. Civ. P. 34(b)(2)(C). *Id.* The record here strongly indicates that Opposer has withheld and concealed information and documents in discovery on the basis of its

limited document production (which was confined to public record documents) and failure to indicate whether it was holding documents back on the basis of objections in its discovery responses. *See* Dkt. No. 12 Ex. H, J. Applicant is thus entitled to testimony from Opposer’s witness related to discovery responses (Topics 13-16) and matters purportedly already inquired of (Topics 2, 4, 5, 6, 7, 8, 12, 23) because of the apparent concealment and lack of fulsome response previously by Opposer. Applicant has had no opportunity to discover the information previously from a source that was more convenient and less burdensome. These topics are accordingly appropriate for testimony by Opposer at deposition.

2. Applicant’s topics are not improper, overly broad, or unduly burdensome

The “general rule in legal actions is to favor broad disclosure” through discovery. *CFTC v. McGraw-Hill Cos.*, 390 F. Supp. 2d 27, 31 (D.D.C. 2005). To meet the standard of defining deposition topics with reasonable particularity, the Rule 30(b)(6) notice must contain sufficient information to put the receiving party on notice of the areas of inquiry that will be explored in the deposition. *See Alexander v. FBI*, 186 F.R.D. 137, 140 (D.D.C. Dec. 13, 1998). Applicant has reasonably defined the examination topics here – Opposer’s objections for overbreadth and undue burden are improper and merely intended to avoid and delay. Opposer’s objections on the particular topics as identified in the Opposition are not valid as discussed below.

Topic 1. YOUR corporate or company structure, including without limitation the ownership interest and relationship between YOU and any parent, subsidiary, sister company, and/or related company, entity, or individual, description of the formation and operation of YOUR company, and description of stock ownerships.

TBMP § 414(14) provides, “Generally, the names and addresses of the stockholders of a corporate party or other entities owned or controlled by the party are irrelevant, and not

discoverable, *unless* there is a question as to whether that party and another entity are ‘related companies’ within the meaning of Trademark Act § 5, 15 U.S.C. § 1055” (emphasis added).

Here, ownership and use of the AMOY mark are critical issues of the case. Each party contends that it uses and owns the AMOY mark. There is further a question in this matter of whether the parties are related in any way, and whether Opposer’s use as a distributor benefits Applicant’s use as the producer and rightful owner of the mark. Topic 1 is thus proper.

Topic 2. YOUR past and present officers, directors and employees, including without limitation job titles and responsibilities.

This topic is not improper because it seeks potential witnesses with knowledge of the parties, the marks at issue, and their areas of responsibility and knowledge. Applicant is entitled to learn the identities of all such persons. “The mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden.” *Fagan v. District of Columbia*, 136 F.R.D. 5, 7 (D.D.C. 1991).

Topic 3. YOUR practice and procedure for applying for trademarks worldwide.

The topic is not overly broad, unduly burdensome, or not proportional to the needs of the case because Applicant is a foreign entity based in Hong Kong. The request is not only proper in that the procedure worldwide covers the U.S., but worldwide practice by Opposer is likely to lead to information as to if and how Opposer had knowledge of and a relationship with Applicant.

Topic 4. ALL of YOUR GOODS offered, provided, sold, or otherwise used IN COMMERCE under the ASSERTED MARK or ANY other MARK used by YOU.

Topic 5. First use in commerce of ALL of YOUR GOODS under the ASSERTED MARK or ANY other MARK used by YOU.

These topics are not overly broad, unduly burdensome, or not proportional to the needs of the case because Opposer's contended ownership of the mark and business practice as a distributor are critical issues of the case. Opposer claims to use and own the AMOY mark as a distributor. Opposer's practice as to all of its goods under any of its marks is discoverable in relation to how and why Opposer is claiming ownership of the AMOY mark as a distributor.

Topic 21. ALL factual and documentary bases for YOUR claim that YOU own the ASSERTED MARK in the United States.

Opposer contends that it cannot be expected to answer as to how facts form the basis of its legal theories. "While asking a 30(b)(6) witness about facts is entirely appropriate, the lay witness should not be expected to testify as to how any such facts form the basis of a legal affirmative defense [or other theory]. [D]epositions, including 30(b)(6) depositions, are designed to discover facts...not legal theories." *Neponset Landing Corp. v. The Nw. Mut. Life Ins. Co.*, 279 F.R.D. 59, 61 (D. Mass. 2011) (citation omitted). This topic though is not seeking any substantiation or explanation of a legal theory such as Opposer's claims of priority and likelihood of confusion against Applicant. This topic seeks facts of ownership of the asserted mark. Opposer cannot hide from testimony merely by asserting that all requested facts are objectionable as forming the basis of a legal theory.

Topic 22. ALL factual and documentary bases for YOUR claim that YOU own common law rights to the ASSERTED MARK in the United States.

Like Topic 21, this topic is proper as Applicant merely seeks facts of common law use or sale with respect to Opposer's asserted mark. Actual sale of products under the asserted mark is a factual matter and a key issue in this case. Topic 22 is thus discoverable.

3. Applicant's topics are not ambiguous, confusing, or misleading, and Opposer failed to confer on the topics as required by Rule 30(b)(6)

Opposer contends that **Topics 11, 17-20** are ambiguous, confusing, and misleading as App. Serial No. 90757571 is not Opposer's application. Applicant acknowledges that App. Serial No. 90757571 is Applicant's application, and that it transposed the parties' application numbers in the Notice and should have identified App. Serial No. 97466977 in these topics. However, it is clear from Applicant's use of the defined term "ASSERTED MARK" in the topics, and the details of the application provided in the topics including that the declaration of use was filed June 20, 2022, that the topics are inquiring of App. Serial No. 97466977. This conclusion further could have easily been reached had Opposer complied with its requirement under Rule 30(b)(6) to confer promptly on the examination topics as requested by Applicant. Instead, Applicant's raising of objections on these topics only in the untimely objections and on its cross motion indicate an intent to delay and avoid by raising baseless issues too late in the process.

CONCLUSION

Applicant respectfully asks the Board to compel Opposer's attendance for its deposition and deny Opposer's cross motion for a protective order.

Dated: October 9, 2023

By: /Kevin Viau/

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CERTIFICATE OF SERVICE

I am over the age of 18 and am not a party to this action. I am employed in the County of Santa Clara, California, and my business address is 1871 The Alameda, Suite 250, San Jose, California 95126.

I hereby certify that on October 9, 2023, I served the foregoing **APPLICANT’S REPLY IN SUPPORT OF MOTION TO COMPEL AND OPPOSITION TO CROSS MOTION FOR PROTECTIVE ORDER** on Opposer via email by sending the document to the person(s) at the email addresses listed below.

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Dated: October 9, 2023

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