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

mbm

December 27, 2023

Opposition No. 91276953

May Flower International, Inc.

v.

Amoy Food Limited

Mary Beth Myles, Interlocutory Attorney:

This proceeding now comes before the Board for consideration of Applicant's motion (filed August 28, 2023) to compel Opposer's attendance at its Fed. R. Civ. P. 30(b)(6) deposition and Opposer's cross-motion (filed September 18, 2023) for a protective order. Applicant filed a combined reply in support of its motion to compel and response to Opposer's cross-motion for a protective order on October 9, 2023.

The Board has considered the parties' briefs on the contested motions, but does not repeat or discuss all of their arguments, except as necessary to explain the Board's order. *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Background

By way of background, on May 30, 2023, Applicant served a Rule 30(b)(6) deposition notice on Opposer. 12 TTABVUE 14-22.[1] The deposition was noticed for

[1] Citations to the record or briefs in this order include citations to the publicly available documents on the Trademark Trial and Appeal Board Inquiry System (TTABVUE), the

June 23, 2023. *Id.* at 14. On June 7, 2023, having received no response from Opposer, Applicant's counsel emailed Opposer's counsel requesting the identification of Opposer's Rule 30(b)(6) witness(es) and the topics on which the witness(es) would be deposed. *Id.* at 22. Applicant's counsel also stated that unless Opposer advised otherwise, Applicant presumed Opposer had no objection to the deposition proceeding remotely on the noticed date. *Id.* Opposer's counsel responded on June 13, 2023, stating that its witness would be Opposer's General Manager Min Liu, but that she was not available on the noticed date and requesting to reschedule the deposition for July 2023. *Id.* at 23. Because discovery was scheduled to close on June 28, 2023, Applicant's counsel responded on June 22, 2023, stating that Applicant would consent to an extension of discovery to allow the deposition to take place in July 2023. *Id.* at 24. Applicant's counsel requested that Opposer's counsel provide alternative dates for the Rule 30(b)(6) deposition to be conducted in July as soon as possible. *Id.*

Opposer's counsel responded on June 26, 2023, stating that Opposer's counsel was away on vacation until July 7, 2023 and informing Applicant that it would provide dates for the rescheduled deposition upon his return and after hearing from his client. *Id.* at 25. The parties agreed to extend discovery before rescheduling the deposition and discovery was then extended through August 28, 2023. *Id.* at 25-27.

On July 12, 2023, having received no communication from Opposer, Applicant's counsel emailed Opposer's counsel again requesting dates for the Rule 30(b)(6)

Board's electronic docketing system. The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry, if applicable. The Board expects that the parties will cite to the record using the TTABVUE docketing system throughout this proceeding.

deposition. *Id.* at 28. After Opposer's counsel failed to respond, Applicant's counsel emailed again on July 28, 2023 stating that unless Opposer responded by August 1, 2023, with deposition dates, Applicant would file a motion with the Board. *Id.* at 29. Opposer's counsel responded on August 9, 2023 by objecting to the topics of examination in the Rule 30(b)(6) deposition notice. *Id.* at 30-46. On August 28, 2023, Applicant filed its motion to compel Opposer to designate a witness under Rule 30(b)(6) and to appear for the properly noticed deposition.

On September 18, 2023, Opposer filed a combined response to Applicant's motion to compel and a cross-motion for a protective order to prohibit the deposition from proceeding until the parties have had an opportunity to meet and confer on the topics of examination.

II. Applicant's Motion to Compel and Opposer's Cross-motion for a Protective Order

By way of its motion, Applicant seeks to compel Opposer's attendance at its Rule 30(b)(6) discovery deposition. As an initial matter, the Board finds that Applicant's motion to compel is timely. *See* Trademark Rule 2.120(f)(1).

The deposition of a party may be taken on notice alone. Fed. R. Civ. P. 30(b)(1) and (6); *Consolidated Foods Corp. v. Ferro Corp.*, 189 USPQ 582, 583 (TTAB 1976). Where the party to be deposed objects to certain topics in a Rule 30(b)(6) deposition notice, the serving party should take the deposition and, thereafter, may file a motion to compel responses to any questions that the witness refused to answer. Trademark Rule 2.120(f); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 523.01 (2023). Where the responding party fails altogether to designate a

witness, or where such witness refuses to attend the deposition, the serving party may file a motion to compel, after making a good faith effort to resolve the dispute. Trademark Rule 2.120(f)(1). *See also S. Industries Inc. v. Lamb-Weston Inc.*, 45 USPQ2d 1293, 1298 (TTAB 1997).

The Board finds that Applicant made the required good faith effort to resolve the dispute prior to filing its motion. After Opposer informed Applicant that it was not available for the deposition on the noticed date, Applicant made multiple attempts to reschedule the deposition. Applicant consented to an extension of discovery on the understanding that the deposition would be rescheduled and conducted in July 2023 and Opposer's counsel agreed to provide dates for the rescheduled deposition when he returned from vacation after July 7, 2023. Opposer never contacted Applicant at any time in July 2023 and completely failed to respond to two email inquiries from Applicant regarding the deposition before the end of July. While Opposer did eventually respond to Applicant's last email on August 9, 2023, Opposer only served objections to the deposition topics and still failed to provide dates for the deposition. Applicant was not required to wait indefinitely for Opposer to respond to its inquiries or to provide its availability for the deposition. Applicant's efforts are sufficient to discharge its obligation to make a good faith effort to resolve the dispute prior to filing its motion.

The Board also finds that, for the reasons explained below, Applicant's motion to compel is well founded. Applicant properly noticed the Rule 30(b)(6) deposition of Opposer during the discovery period, providing Opposer approximately one month

notice for the scheduled deposition. While Applicant subsequently agreed to reschedule the deposition for July 2023, because of scheduling conflicts with Opposer's witness and counsel, Opposer failed to reschedule the deposition during July as agreed upon by the parties. Opposer also failed to lodge objections to the deposition notice and did not file a motion to quash or for a protective order prior to the expiration of the agreed upon extension for the deposition. Instead, Opposer completely failed to communicate with Applicant during July 2023 and has not provided any explanation for its silence or its failure to reschedule the deposition, as agreed upon by the parties.

To the extent Opposer objected to the topics identified in the Rule 30(b)(6) deposition notice, it was incumbent upon Opposer "to either (1) designate a witness and proceed with the noticed deposition subject to any appropriate objections made on the record, or (2) file a timely motion to quash or for a protective order." *OMS Invests., Inc. v. Habit Horticulture LLC*, 2022 USPQ2d 1074, at *5 (TTAB 2022). While Opposer did file a motion for a protective order, Opposer did not do so until September 18, 2023—long after the date of the deposition as originally noticed and a month and a half after Applicant agreed to an extension through July 2023 to reschedule and complete the deposition. Opposer's motion for a protective order is therefore **denied** as untimely. *See OMS Invests.*, 2022 USPQ2d 1074, at *5 (cross-motion for a protective order filed two weeks after noticed deposition denied as untimely). In the absence of a timely filed motion for a protective order, any objections

Opposer had to the topics of examination did not excuse Opposer from rescheduling the deposition for a reasonable time.[2]

In view of the foregoing, Applicant's motion to compel Opposer's attendance at its Rule 30(b)(6) discovery deposition is **granted**. Opposer is required to designate a Rule 30(b)(6) witness and attend the deposition, which is to be conducted within **30 days** of the date of this order, subject to the guidance provided below. The parties are expected to cooperate in the scheduling and manner of Opposer's Rule 30(b)(6) deposition. *See Sunrider Corp. v. Raats*, 83 USPQ2d 1648, 1654-1655 n.12 (TTAB 2007) (parties have a duty to cooperate in resolving conflicts in the scheduling and taking of depositions).

If Opposer fails to prepare and produce a witness for the duly noticed Rule 30(b)(6) deposition, Applicant's remedy may lie in a motion for sanctions under Trademark

[2] In any event, there is no indication that Opposer's failure to reschedule the deposition as agreed upon in July 2023 was based on its later-served objections to the deposition notice. Rather, Opposer simply failed to communicate with Applicant at all for the entire month of July 2023. In the absence of any indication from Opposer that it had objections to the deposition notice, Applicant was under no obligation to meet and confer with Opposer regarding the topics prior to the deposition. *See OMS Invests.*, 2022 USPQ2d 1074, at *3-4 (declining to require all parties to meet and confer on Rule 30(b)(6) topics as a matter of course, because discovery in Board proceedings is relatively narrow and the Board expects parties in most cases to be able to notice and complete depositions without the need for formal conference requirements or motion practice). Moreover, the Committee Notes to the 2020 Amendment to Fed. R. Civ. P. 30(b)(6) explain that there is no requirement that the parties actually reach agreement regarding the topics of examination. Instead, a responding party that is unable to resolve its objections with the serving party and is unwilling to waive them is **required** to either file a timely motion to quash or for a protective order, or to produce a witness on the noticed topics and reassert its objections during the deposition. *See* Fed. R. Civ. P. 30(c)(2) ("An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection."). Neither the Trademark Rules nor the Federal Rules of Civil Procedure permit a party duly served with a Rule 30(b)(6) notice to refuse to produce a witness on topics it unilaterally decides are objectionable.

Rule 2.120(h)(2). *See Fifth Generation Inc. v. Titomirov Vodka LLC*, 2019 USPQ2d 418666, at *5 (TTAB 2019) (responding party may be subject to sanctions for failing to attend a deposition after being served with a proper notice in the absence of a motion to quash prior to the date of the noticed deposition).

Although the Board denies Opposer's cross-motion for a protective order as untimely, the Board exercises its discretion to provide the following guidance.

Information concerning a party's stock ownership or the identity of stockholders is generally not discoverable. *See* TBMP § 414(14) and authorities cited therein; *see also Domond v. 37.37, Inc.*, 113 USPQ2d 1264, 1267 (TTAB 2015) (stock prices not discoverable). Opposer is therefore not required to prepare a witness to testify as to its stock or stock ownership.

A party generally need not provide discovery with respect to any marks not involved in the proceeding. *See* TBMP § 414(11) and authorities cited therein. Opposer is therefore not required to prepare a witness to testify as to its use of any other marks apart from its pleaded mark.

Additionally, Opposer's procedure for applying for trademarks outside the United States has no bearing on this proceeding. *See Double J of Broward Inc. v. Skalony Sportswear GmbH*, 21 USPQ2d 1609, 1612-13 (TTAB 1991). *See also Oland's Breweries [1971] Ltd. v. Miller Brewing Co.*, 189 USPQ 481, 489 n.2 (TTAB 1975) (use or promotion of a mark confined to a foreign country, including Canada, is immaterial to ownership and registration in U.S.), *aff'd, Miller Brewing Co. v. Oland's Breweries*,

548 F.2d 349, 192 USPQ 266 (CCPA 1976). Opposer is therefore not required to prepare a witness to testify as to its registration process outside the United States.

Finally, the Board notes that several topics of examination in the deposition notice each identify Application Serial No. 90757571 as Opposer's pleaded pending application, as opposed to Application Serial No. 97466977. This is clearly a typographical error that should not have provided fodder for motion practice or a basis for objecting to discovery. *See Cadbury UK Ltd. v. Meenaxi Enter., Inc.*, 115 USPQ2d 1404, 1407-08 (TTAB 2015) (parties expected to demonstrate good faith and cooperation during discovery; party cannot avoid discovery obligations due to an obvious typographical error in discovery requests).

The Board notes that this guidance does not constitute a determination that any specific question that may be asked during the discovery deposition is or is not objectionable. To the extent Opposer objects to any specific question during the deposition, it should make its objections in accordance with the Federal Rules of Civil Procedure. *See* TBMP § 404.08.

Proceedings are resumed. Applicant's motion to compel was filed on the last day of discovery. The close of discovery is therefore reset for the sole purpose of completing the Rule 30(b)(6) deposition of Opposer:

Discovery Closes	**1/26/2024**
Plaintiff's Pretrial Disclosures Due	**3/11/2024**
Plaintiff's 30-day Trial Period Ends	**4/25/2024**
Defendant's Pretrial Disclosures Due	**5/10/2024**
Defendant's 30-day Trial Period Ends	**6/24/2024**
Plaintiff's Rebuttal Disclosures Due	**7/9/2024**
Plaintiff's 15-day Rebuttal Period Ends	**8/8/2024**
Plaintiff's Opening Brief Due	**10/7/2024**

Defendant's Brief Due	**11/6/2024**
Plaintiff's Reply Brief Due	**11/21/2024**
Request for Oral Hearing (optional) Due	**12/1/2024**

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.

IMPORTANT TRIAL AND BRIEFING INSTRUCTIONS

Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Such briefs should utilize citations to the TTABVUE record created during trial to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. 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).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered

– use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.[3] The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the ESTTA help webpage.

[3] To facilitate accuracy, ESTTA provides previews of each page before submitting.