

ESTTA Tracking number: **ESTTA1313605**Filing date: **10/02/2023**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91284805
Party	Defendant Grace Tingting Fu
Correspondence address	STEPHEN L ANDERSON ANDERSON LAW - WE PROTECT IMAGINATION 401 W. A STREET, SUITE 2200 SAN DIEGO, CA 92101 UNITED STATES Primary email: attorneys@brandxperts.com Secondary email(s): grace.fu@monsters-club.com 951-296-1700
Submission	Opposition/Response to Motion
Filer's name	Stephen L. Anderson
Filer's email	attorneys@brandxperts.com
Signature	/StephenLAnderson/
Date	10/02/2023
Attachments	Fus Response to Opposers MTC Discovery .pdf(363820 bytes )



More particularly, notwithstanding and despite the reasonable and relatively extensive correspondence on Applicant's part Opposer and its counsel have failed in their own affirmative duty to cooperate in the discovery process and has repeatedly failed to make any good faith effort to resolve the issues raised or to even provide any substantive response supporting its position with candor, specificity and support prior to bringing (let alone within) its Motion to Compel.<sup>1</sup>

Opposer has egregiously flouted the limits of discovery propounding well over 75 Interrogatories and 75 Requests For Production, in large part due to their own definitions and instructions supplied therewith, as well as the fact that the substantial majority of each of the numbered questions themselves seek separate responses for multiple questions contained therein for what are plainly separate subparts and subcategories.<sup>2</sup>

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<sup>1</sup> (See Exhibits A-5, A-7, A-9, A-11, and A-14; 37 CFR § 2.120(e), Fed. R. Civ. Proc. 34, and Trademark Trial and Appeal Board Manual of Procedure § 406.05(a) - (e); *Emilio Pucci International BV v. Sachdev*, 118 USPQ2d 1383, 1385 (TTAB 2016) (parties have affirmative duty to cooperate in the discovery process; improper to file motion for protective order instead of responding to discovery requests in a timely manner); *Cadbury UK Ltd. v. Meenaxi Enter., Inc.*, 115 USPQ2d 1404, 1408 (TTAB 2015) (parties expected to demonstrate good faith and cooperation during discovery); *Amazon Technologies Inc. v. Wax*, 93 USPQ2d 1702, 1705 (TTAB 2009) (quoting *Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 120 (D. Nev. 1993)) (parties expected to cooperate in the meet and confer process by presenting to each other the merits of their respective positions with candor, specificity and support: "In order for the meet and confer process to be meaningful and serve its intended purpose, 'the parties must present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions.'"). See also *Hot Tamale Mama...and More, LLC v. SF Investments, Inc.*, 110 USPQ2d 1080, 1081 (TTAB 2014); *Sunrider Corp. v. Raats*, 83 USPQ2d 1648, 1654 (TTAB 2007) (parties have a duty to cooperate in resolving conflicts).

<sup>2</sup> The Board is not bound by a party's numbering or designation system. Instead, the Board will look at the substance of each interrogatory to see "whether it actually asks multiple distinct questions (e.g., sales figures and advertising expenditures), in which case each question is counted as a single interrogatory, or whether it asks a single question, or all relevant facts and circumstances concerning a single issue, applicable to all pleaded marks or all asserted goods and services (such as, sales figures for each of a party's marks for multiple years), in which case it is counted as a single interrogatory. *One Jeanswear Group Inc. v. YogaGlo, Inc.*, 127 USPQ2d 1787

Indeed, the subparts contained in Opposer's First Set of Interrogatories (Nos. 1- 30) are so numerous, that despite the express requirements set forth in the TBMP<sup>3</sup>, Opposer's counsel has failed and refused to count or even acknowledge them<sup>4</sup>.

After Applicant Grace Fu ("applicant") properly served her objections and explanatory comments, adding shameful insult to injury, rather than reconsidering its clearly erroneous position, Opposer's counsel has acted in a manner that shocks the conscience.

As shown within its own Exhibits and detailed below, Opposer has not made a good-faith effort to resolve this dispute and has never served any revised requests conforming to the statutory limit instead, it has made unfair and unreasonable demands that Applicant waive her right to statutory time to respond to its unamended and unserved discovery, it has failed to appear at scheduled meeting times reserved by Applicant's counsel at Opposers request, and it has failed to provide any cogent arguments or support for its position.

Choosing simply to mischaracterize, ignore and otherwise refuse to respond to repeated requests that the Opposer cooperate herein, refusing to reasonably recount and restate their discovery requests or otherwise provide a counting method thereof, now Opposer has needlessly burdened the

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(TTAB 2018) [precedential].

<sup>3</sup> See e.g., TBMP § 405.03(d), Notes 1 and 3; TBMP §405.03(e), Note 5; *Emilio Pucci International BV v. Sachdev*, 118 USPQ2d 1383, 1385 (TTAB 2016) (parties should specifically discuss their respective counting methods in attempt to resolve dispute over number of interrogatories.

<sup>4</sup> After falsely asserting at page 10 of its Motion that "Interrogatory No. 1 (the only discovery request for which Applicant argues includes more than one topic) is only one interrogatory," at page 11 of its Motion Opposer (9 TTABVUE), Opposer makes further false and ignorant assertions that misstate and mischaracterize the Applicant's objections along with a concession that at most Interrogatory No. 1 would be counted as four... and at most, Opposer has served 33, and not 30, interrogatories." Otherwise Opposer has completely failed in providing the Board (or the Applicant) with its "counting method" and has Opposer has blatantly and knowingly misrepresented Applicant's repeated position as to all discovery requests.

Board with a motion that could have been easily been avoided. Citing (without perhaps actually reading) only one easily distinguishable case, *One Jeanswear Group v. YogaGlo, Inc.* and basing their entire motion on mischaracterizations, false statements, and pure hard headedness, Opposer has now decided to waste this Board's time with an unwarranted motion that itself demonstrates a fundamental misunderstanding of the applicable rules and authorities. For all these reasons, Applicant should not be compelled to respond to Opposer's impermissible, excessive interrogatories and requests.

## **I. FACTUAL BACKGROUND**

### **A. Applicant's Objection to Excessive Interrogatories**

As detailed below, Opposer served interrogatories on Applicant that, counting the extensive, disparate subparts, grossly exceeds the 75 interrogatories permitted by 37 CFR § 2.120(d) and Fed. R. Civ. Proc. 33. *See* Ex. A-1; A-3<sup>5</sup>. (9 TTABVUE 26-39 and 57-70);

Served with such excessive discovery requests that only allowed Applicant one mandated option, namely that of complying with the express instructions contained in 37 C.F.R. §§ 2.120(d), (e) and TBMP Sections 405.03(e) 406.05(a) - (e) by timely responding with her General Objections to "Opposer's First Set of Interrogatories and each of them, on the ground that they are excessive in number" and her General Objections to Opposer's First Set of Production of Documents and each of them, on the ground that they are excessive in number."<sup>6</sup> (See: Exh. A-5) 9 TTABVUE at 86-89.

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<sup>5</sup> Exhibit citations herein refer to the Exhibits respectively attached to the Declaration of Heather Smith-Carra, Exhibit A in Support of Opposer's Motion to Compel dated September 12, 2023 (9 TTABVUE 13-17) and the respective documents referenced thereby.



<sup>6</sup> Board's rules are clear that if a party believes that the number of interrogatories served upon it exceeds seventy-five, "and is not willing to waive this basis for objection, the party shall, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a

Along with Applicant’s General Objections, Applicant’s counsel sent a cover letter explaining that in view of “the excessive, abusive and overreaching set of discovery propounded, and without waiver of my client’s many specific objections to the individual interrogatories and requests within the set, I hope we can engage in a meaningful discussion about properly limiting these discovery requests” along with a note briefly highlighting a few of the problems with Opposer’s discovery sets that caused it to extend well beyond the reasonable limits thereon. *Id* at 82-83.

### **B. Applicant’s Counting Methodology**

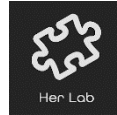
Opposer’s First Set of Interrogatories consists of thirty separately numbered questions that actually amount to well over 75 separate questions.

As explained repeatedly from the outset: According to the governing definitions and instructions included within both sets of Discovery propounded by the Opposer: “Applicant’s Mark” means the mark that is the subject of U.S. Trademark Application Serial No. 97/336,471 and this opposition proceeding, and any other similar mark(s) used by Applicant whether registered or not.”

As has been repeatedly explained to Opposer’s counsel, including on August 11, “the mark that is the subject of this action is CANDLE LAB (and design): . However “Applicant also uses each of the components of this combined mark separately: CANDLE LAB,  and

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general objection on the ground of their excessive number.” Trademark Rule 2.120(d), 37 C.F.R. § 2.120(d) (emphasis added).



Applicant also uses a different mark HER LAB (and design) which shares the final word LAB but that mark is not believed to be “similar.”” *Id.*

Within Applicant’s Initial Disclosures, in correspondence with Opposer’s counsel and elsewhere, Applicant has maintained that she has used each of these marks independent of one another and thus the mark that is the subject of U.S. Trademark Application Serial No. 97/336,471 and this





opposition proceeding, **Candle Lab** itself is two distinct marks, a word mark (consisting of the words CANDLE LAB) and a design mark (showing a stylized depiction of a stick figure made up of an arch and a circular dot.) Sometimes the marks are used together, sometimes they are not.



Applicant has filed trademark Applications for each of these elements separately:

App. No. Reg. No. Mark

<a href="#">97336471</a>	Opposed	 Candle Lab
<a href="#">97340928</a>	<a href="#">7048339</a>	 Her Lab
<a href="#">90627363</a>		<b>CANDLE LAB</b> STANDARD CHARACTER MARK
<a href="#">90627353</a>		<b>HER LAB</b> STANDARD CHARACTER MARK

As Opposer was specifically advised on August 11, and repeatedly thereafter, even without considering the HER LAB (and design mark) but simply limiting the responses to the Applicant's CANDLE LAB mark at issue, the interrogatories remained excessive and unreasonable in number.

"For example, Opposer's Interrogatory No. 1 requests that Applicant

Describe in detail the process through which Applicant created\* and selected\* Applicant's Mark, including how the process was conducted\*, who participated in the process\*, the reasons why Applicant selected Applicant's Mark\*, and the timeline during which this process occurred\*.

The definition you supplied causes the Interrogatory and the set (inasmuch as you use this erroneous style throughout your sets) to be compound and to further become excessive in number.

1 Describe in detail the process through which Applicant 1 created Applicant's 1 Word Mark,

Describe in detail the process through which Applicant 2 created Applicant's 2 Design Mark

Describe in detail the process through which Applicant selected Applicant's 3 Word CANDLE LAB –

4 Describe in detail the process through which Applicant selected Applicant's DISTINCT DESIGN ELEMENT

How was the process of creating WORD MARK conducted?  
How was the process of selecting WORD MARK conducted

How was the process of creating DESIGN MARK conducted?  
How was the process of selecting DESIGN MARK conducted?

Or

5 what was the process of creating word mark/ how was it conducted

6 what was the process of creating design mark/ how was it conducted

7 what was the process of selecting word mark/how was it conducted

8 what was the process of selecting design mark/how was it conducted

9 Who participated in the process of creating the word mark

10 Who participated in the process of creating the design mark

11 Who participated in the process of selecting the word mark

12 Who participated in the process of selecting the design mark

13 WHAT ARE THE REASONS why Applicant selected Applicant's WORD MARK

14 WHAT ARE THE REASONS WHY APPLICANT SELECTED DESIGN MARK



WHAT WAS THE TIMELINE DURING WHICH THE PROCESS OF CREATING THE WORD MARK OCCURRED?  
WHAT WAS THE TIMELINE DURING WHICH THE PROCESS OF SELECTING THE WORD MARK OCCURRED  
WHAT WAS THE TIMELINE DURING WHICH THE PROCESS OF CREATING THE DESIGN MARK OCCURRED?  
WHAT WAS THE TIMELINE DURING WHICH THE PROCESS OF SELECTING THE DESIGN MARK OCCURRED

Even without the response adding in the Applicant HER LAB and HER LAB and design mark into the mix, Opposer's Interrogatory No. 1 AMOUNTS TO 18 INTERROGATORIES ALONE!

These facts were reiterated on August 21 and 28, 2023 (See Exs. A-7 and A-9), not just as to Interrogatory No. 1 but as to all of the Opposer's discovery requests, thusly:

"The term "Applicant's Mark" was specially defined in your interrogatories (No. 14 of your definitions) – thusly: "Applicant's Mark" means the mark that is the subject of U.S. Trademark Application Serial No. 97/336,471 and this opposition proceeding, and any other similar mark(s) used by Applicant whether registered or not.

The specially defined term then appears at least 26 times (or more) being in each and every interrogatory within your set except Nos. 25 and 28-30.

As I explained, Interrogatory No. 1 requests that my client

"Describe in detail the process through which Applicant created and selected Applicant's Mark, including how the process was conducted, who participated in the process, the reasons why Applicant selected Applicant's Mark, and the timeline during which this process occurred."

As I also explained, the mark that is the subject of this action is CANDLE LAB (and design):

Applicant also uses the word and design components of this combined mark separately

Applicant also uses the registered mark HER LAB (and design) **which shares the final word LAB but that mark is not believed to be "similar."**

As such, as I clearly demonstrated (and you did not refute), your first interrogatory itself constitutes MORE than TEN SUBPARTS.

When you add the HER LAB and design mark to the mix, there is just no way that the set can be anything but EXCESSIVE.

**The same goes for almost every interrogatory in the set.**

As such, my client properly objected to your set of discovery and I although have painstakingly identified my position, you twist my words and then simply maintain (without any authority or explanation) that you "disagree."

...

I made myself available to speak with you last week on the date and time you requested.

However, you ignored my courtesies and rather than simply propounding a proper set of discovery as I suggested, you now write me to say "you disagree"- (without providing any support whatsoever for your position), and without reason, authority or explanation, you add insult to injury, trying to bully your way around the rules of procedure.

Your failure to meet and confer as we had scheduled - and your subsequent correspondence further demonstrates your bad faith and disregard.

Your failure to highlight your position further belies its weakness.

...

Please therefore clarify your position accordingly.

More specifically, please advise:

do you intend to serve an amended set of discovery, or  
do you intend to continue arguing that your initial set was not excessive?

If the latter, AS I ALREADY REQUESTED (and you ignored) please re-review the interrogatories and advise me of the number of total questions, including subparts that you see.

As requested previously, please provide your counting method and any authority for your position.

Once I am better advised of the nature of your position and the matters you wish to discuss, provided that you AGREE IN WRITING NOT TO GHOST ME AGAIN, we can likely schedule another time to meet and confer.

Turning back to the subject matter of Interrogatory No. 1 (the FIRST OF MANY discovery requests which contains subparts), it is actually at least ten or eleven separate questions and as shown above, may fairly be broken into 18 or more separate questions.

OPPOSER'S INTERROGATORY NO 2 states:

Describe in detail the steps Applicant took to determine availability of Applicant's Mark in the United States (e.g., searches or other clearance activities), including the person(s) involved in making such a determination.

Even limiting the response to the CANDLE LAB and design mark (and excluding the HER LAB and HER LAB and design marks) Interrogatory No. 2 (which is objectionable on other grounds as well), itself is another 2 questions: one asking for the steps taken and the second question asking who was involved in the determination. This goes on throughout the set.

Nearly all of Opposer's Interrogatories include the specially defined term "Applicant's Mark" and many others including Nos. 6, 7, 8, 9, 10, 11, 14, 15, 21, 25, 27 and 28 each have clearly identifiable and separate subparts. In total there are well over 75 interrogatories.

For example, Interrogatory No. 8 asks that Applicant |Identify all ways in which Applicant uses\*, has used\*, or intends to use\* Applicant's Mark, including but not limited to use in printed materials, electronic media, digital media, internet, videos, webcasts\* clothing, and merchandise of any type.\*

Inasmuch as using a mark in a print ad is very different than intending to use a different mark on clothing or merchandise, Interrogatory No. 8 has at least three and as many as five different subparts.

Interrogatory No. 9 asking Applicant to "Identify all geographical areas in which Applicant uses or has used Applicant's Mark, from the date of Applicant's first use of Applicant's Mark to the present, and describe the use in each area, including the date the use started, and, if applicable, the date the use stopped" itself is another three questions.

Interrogatory No. 14 asks a three part question, that she "Describe in detail the methods in which goods and services bearing Applicant's Mark are currently advertised, have been advertised, or are intended to be advertised in the future." While its follow up has many (perhaps 6 to 10) more:

Interrogatory No. 15 For each method of advertisement identified in response to Interrogatory No. 14 above, identify the form of advertising (e.g., brochure, television advertisement, trade show, website); identify the dates and geographic areas of said advertising; identify all of the person(s) or entities who developed or created the advertising materials; identify contact information for all entities used by Applicant to advertise any goods or services under Applicant's Mark; identify the person(s) most knowledgeable about Applicant's advertising

activities; and identify all documents related thereto.

Opposer's 32 Requests suffer from the same problems, and themselves are compounded by the excessive Interrogatories:

Request No. 1 All documents and things asked to be identified by Applicant in its Response to Opposer's First Set of Interrogatories.

Request No. 2 All documents and things used, referred to, or relied upon by Applicant in preparing its Responses to Opposer's First Set of Interrogatories.

A party may properly refuse to respond to a document request seeking all documents identified or referred to in response to interrogatories if the number of interrogatories is believed to be excessive. *See Towers, Perrin, Forster & Crosby Inc. v. Circle Consulting Group Inc.*, 16 USPQ2d 1398, 1399 (TTAB 1990) (refusal to respond to document requests was proper; petitioner could not respond to document requests without first having to answer excessive interrogatories).

## II. ARGUMENT

### A. Opposer's Motion Should be Denied Because the Interrogatories and Requests are Excessive and Violate the Rules on Discovery Limitations

As provided by Trademark Rule 2.120(d), the total number of interrogatories a party may serve upon another party in an entire proceeding may not exceed 75 total, counting subparts. When determining the number of interrogatories each subpart must be counted separately. *Kellogg Co. v. Nugget Distrib. Coop. of Am. Inc.*, 16 USPQ2d 1468, 1469 (TTAB 1990).

As its sole authority for its Motion to Compel, Opposer relies on the precedential case of *One Jeanswear Group Inc. v. YogaGlo, Inc.*, 127 USPQ2d 1793 (TTAB 2018), which under the circumstances is easily distinguished from the facts at bar.

As Opposer was advised on August 21,

["37 C.F.R. § 2.120\(d\)](#) does not provide for extra interrogatories in cases where more than

one mark is pleaded and/or attacked by the plaintiff (whether in a single proceeding, or in consolidated proceedings), because in such cases, the propounding party may simply request that each interrogatory be answered with respect to each involved mark of the responding party, and the interrogatories will be counted the same as if they pertained to only one mark." (TBMP 405.03(c))

In the One Jeanswear case, the Applicant's interrogatories did SIMPLY REQUEST THAT THE INTERROGATORIES BE ANSWERED WITH RESPECT TO EACH INVOLVED MARK OF THE RESPONDING PARTY, namely, within the set of Interrogatories served therein, Opposer One Jeanswear defined the involved mark as follows:

'The term "Applicant's Mark" means the mark GLO shown in the opposed application."

(The Marks at issue in that case were word marks in standard characters, the mark GLO in standard character form goods and services in Classes 18 and 35).

Applicant's Interrogatory 1: "*Separately, for each of Opposer's Marks and for each product listed in the respective registration, state: ...*

- a. the volume of sales in the U.S. in dollars in each year beginning with the date of first use in the U.S. and up to the present;
- b. the volume of sales in the U.S. in units in each year beginning with the date of first use in the U.S. and up to the present;
- c. the dollar amount in advertising spent in the U.S. in each year beginning with the date of first use in the U.S. and up to the present;

In that case, (involving a standard character word mark that was properly identified) the Applicant's counsel was able to show that including the plainly identified subparts, the entire set remained below 75 questions. Therefore, according to the Board, the Applicant (Yoga Glo) should have recognized that the interrogatories (and subparts) related only to the mark involved in the opposed application.

However, in this case, . . . Opposer CandleScience's First Set of Interrogatories contains subparts hidden within the questions themselves. Numerous subparts and subquestions that can only be overlooked by Opposer's counsel, who still maintains in her motion that Opposer's Interrogatory No. 1 is only one Interrogatory, while it like most of its fellows contains more than

just a few subparts, quickly turning 30 interrogatories into more than 90. More importantly, in this case, the definition of Applicant's mark clearly expanded significantly on the "involved mark" of the responding party at issue, and in total caused Opposer to well exceed the limits of permissible discovery. On such basis, alone, Opposer's Motion must be denied.

Respectfully submitted October 2, 2023

ANDERSON LAW

WE PROTECTIMAGINATION®

By: /StephenLAnderson/

Stephen L. Anderson

5190 Governor Drive, Suite 108

San Diego, California 92122

email: [attorneys@brandxperts.com](mailto:attorneys@brandxperts.com)

Attorney for Applicant

Grace T. Fu

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO COMPEL has been served via e-mail upon counsel for Opposer.

Michael L. Krashin  
Anna King &  
Heather Smith Carra

BANNER & WITCOFF, LTD.  
71 South Wacker Drive, Suite 3600  
Chicago, Illinois 60606  
Telephone: 312-463-5000

[mkrashin@bannerwitcoff.com](mailto:mkrashin@bannerwitcoff.com)  
[aking@bannerwitcoff.com](mailto:aking@bannerwitcoff.com)  
[HSmith@bannerwitcoff.com](mailto:HSmith@bannerwitcoff.com)

I declare under the penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct and that this declaration was executed in the City of Temecula, CA on October 2, 2023

/StephenLAnderson/ \_\_\_\_\_  
Stephen L. Anderson