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

CME

Mailed: April 29, 2016

Opposition No. 91220956

Unique Photo Inc.

v.

Sanjay Agarwal

Christen M. English, Interlocutory Attorney:

This case now comes up on Opposer's motion, filed January 28, 2016, to compel Applicant to: (1) supplement his responses to Interrogatory Nos. 5, 7, 10, 11, 14, 15, 17-20 and 26; (2) produce documents in response to Document Request Nos. 1, 6, 7, 20, 22, and 29; and (3) verify his interrogatory responses "without qualification." 10 TTABVUE 14. Applicant opposes the motion.

The Board has carefully considered all of the parties' arguments, presumes the parties' familiarity with the factual bases for their filings, and does not recount the facts or arguments, except as necessary to explain the decisions herein.

As an initial matter, the Board finds that Opposer made a good faith effort to resolve its discovery dispute prior to filing the motion to compel. Nonetheless, in many instances, Opposer quibbles over semantics. Such arguments elevate form over substance and needlessly expend the Board's limited resources. Opposer also argues that "Applicant has continually evaded Opposer's requests [to extend proceedings] in

what amounts to a greatly reduced chance for successful completion of discovery." 10 TTABVUE 12-13. This argument is not well-taken. Opposer did not serve discovery requests until the last day of the discovery period, and therefore, Opposer has itself to blame if the "successful completion of discovery" has been "greatly reduced." *Cf. Am. Vitamin Prods. Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1316 n.4 (TTAB 1992) and TBMP §403.04 (2015).

With the foregoing in mind, the Board addresses in turn below each of the discovery requests at issue in Opposer's motion.

Interrogatory No. 5

The Board finds that Applicant's response to this interrogatory, as clarified in Applicant's letter of January 25, 2016, is sufficient. Accordingly, Opposer's motion to compel is **DENIED** with respect to Interrogatory No. 5.

Interrogatory No. 7

This interrogatory asks Applicant to identify "all advertising and promotional activities conducted by Applicant or Applicant's business(es) with respect to Applicant's goods and services using the mark UUNIQUE in the United States, and provide all documents which refer or relate to such advertising and promotional activities." 10 TTABVUE 25. Because the request seeks both information and documents, it is in the nature of a combined interrogatory and document request. While the better approach would have been to serve an interrogatory requesting only information and a separate document request seeking documents, this is not a basis on which to deny Opposer's motion.

In response to this discovery request, Applicant indicates that "[t]he trademark UUnique was represented at CES 2015 organised [sic] by Brightstar in Las Vegas…." 10 TTABVUE 40. Applicant, however, has not described the specific promotional activities in which he engaged at the conference (*e.g.* operating a trade show booth, handing out and/or testing product samples, distributing promotional literature, giving a speech about UNIQUE products, etc.). Applicant also has not produced any documents or stated that he does not have any documents "which refer or relate to such advertising and promotional activities."

Accordingly, Opposer's motion to compel is **GRANTED** with respect to Interrogatory No. 7. Within **THIRTY DAYS** from the mailing date of this order, Applicant is ordered to serve: (i) a supplemental written and verified response to Interrogatory No. 7 describing the activities in which he engaged at the CES 2015 conference and indicating whether he has any responsive documents; and (ii) any responsive documents.[1]

Interrogatory No. 10

Applicant is an individual. It is reasonable to read Applicant's response to Interrogatory No. 10 as identifying himself as the person most knowledgeable about his use or plans to use the mark UNIQUE. For this reason, the Board finds that

[1] The Board cannot compel a party to produce what he does not have, but it is foreseeable that Applicant may have responsive documents given that his mark UNIQUE "was represented at CES 2015." 10 TTABVUE 40.

Applicant's response needs no further supplementation, and Opposer's motion is **DENIED** with respect to Interrogatory No. 10.

Interrogatory No. 11

The Board has reviewed Applicant's response to this interrogatory and finds that it is sufficient. Accordingly, Opposer's motion is **DENIED** with respect to Interrogatory No. 11.

Interrogatory Nos. 14 and 15

Interrogatory 14 asks Applicant to "[i]dentify and describe each poll, survey, consumer study, or other market research project directed to the United States commenced or completed by Applicant or by Applicant's business(es) with respect to the UUNIQUE mark." 10 TTABVUE 26. Interrogatory 15 asks Applicant to identify any third parties who "cooperated with" him in any polls, surveys, consumer studies or market research identified in response to Interrogatory No. 14 and to "describe the nature and details of such cooperation." 10 TTABVUE 27.

In response to Interrogatory No. 14, Applicant stated that he "made a survey on the trademarks that have already been registered that [contain] the word 'unique[,]'" and he reproduced the results of this "survey" in the form of a chart. 10 TTABVUE 41-44. With respect to Interrogatory No. 15, Applicant indicated that "[t]here have been on [sic][2] third parties that cooperated in any way with me in relation to the above table." 10 TTABVUE 44.

[2] In his letter of January 25, 2016, Applicant acknowledged that his use of the word "on" was a typographical error and that "there have been ***no*** third parties that cooperated in any way

To "survey" means "to ask (many people) a question or a series of questions in order to gather information about what most people do or think about something." http://www.merriam-webster.com/dictionary/survey (last visited April 27, 2016). In the context of trademark litigation "a survey is designed to prove the state of mind of a prospective purchaser." 6 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, §32:163 (4th ed. March 2016 update). It is clear that Applicant's search for registered trademarks incorporating the word "unique" is not a survey.[3] Nor does the search qualify as a poll, consumer study, or market research because the search did not require any inquiries or research of consumers. Accordingly, the trademark search that Applicant identified is not responsive to Interrogatory No. 14.

For this reason, Opposer's motion to compel with respect to Interrogatory No. 14 is **GRANTED** only to the extent that Applicant is ordered within **THIRTY DAYS** of the mailing date of this order to provide a written supplemental and verified response identifying any surveys, polls, consumer studies or market research (all of which require either consumer inquiry or research) that he has conducted with respect to his involved mark UUNIQUE. To the extent Applicant has not engaged in any such

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with [him] in relation to the table [identified in response to Interrogatory No. 14]." 10 TTABVUE 97 (emphasis added).

[3] Opposer, who is represented by counsel, surely knew that the search that Applicant identified in response to Interrogatory No. 14 did not qualify as a survey, particularly as Applicant identified the same search in response to Interrogatory No. 16, which specifically inquired as to trademark searches. By bringing a motion to compel with respect to Interrogatory Nos. 14 and 15, Opposer has wasted the Board's limited time and resources.

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