

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

-----X		
SIGLER COMPANIES, INC.,	:	
	:	
Opposer,	:	
	:	Opposition No. 91200197
v.	:	
	:	
TSDC, LLC,	:	
	:	
Applicant	:	
-----X	:	

RESPONSE TO SIGLER’S MOTION TO COMPEL

Applicant TSDC, LLC (“TSDC”) submits this Response to the motion of Opposer, the Sigler Companies, Inc. (“Sigler”).

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I. Introduction

TSDC’s Response is based on Sigler’s motion as reduced by way of its first Supplement. The legal principles cited by Sigler are all unremarkable and require no response; they merely have little to do with its actual claims of a failure to disclose, as set forth below. The factual recitations set forth in Sigler’s motion are accurate, but inaccurately omit lapses in time between communications among counsel when such lapses would balance its presentation, intended to suggest dilatory conduct on behalf of TSDC’s counsel. TSDC will not address these essentially immaterial matters.

Sigler's motion also tends to give a misleading impression concerning compliance by TSDC without acknowledging what is obvious from inspection of the materials produced and the prior submissions in this matter – namely that TSDC consists fundamentally of one woman and her non-profit organization, whose activities evolved over time from an informal charitable endeavor to one with greater scope and reach. TSDC is not a sophisticated business or a particularly well-organized and bureaucratized party that would be expected to keep and maintain rigorous records of its activities, and in fact the omission of any material from disclosure here is solely a result of that state of affairs rather than some attempt to avoid proper compliance.

II. Answers to Interrogatories

i) Interrogatories 2 and 35 – Succession of rights in interest

Sigler states, in its Supplement to its Motion to Compel, that TSDC's response to Interrogatory 2 is insufficient because it "still does not clearly explain *who* used the designation." But Interrogatory 2 does not ask for such information, requesting instead the following:

(a) Describe in detail each and every product and service ever intended, or already marketed by Applicant and/or its licensee(s) at any time under the designation FIGHT LIKE A GIRL CLUB CLAIM YOUR POWER.

(b) Set forth the date of first use of the Mark on or in connection with each such product and service identified in response to Interrogatory No. 2(a).

This request is for "each and every **product and service**" and "the **date** of first use," and is directed to TSDC. TSDC's responded by providing the requested information. Interrogatory 2 does not seek the identification of a "who," but of a "what" and "when"; the response fairly suggests that "what" and "when" is claimed on behalf of TSDC, and

the interrogatory requests no information respecting the identity of any predecessors in interest.

Sigler may not, because it has questions or theories about TSDC's case concerning the specifics of the corporate history and succession of rights in question, turn an interrogatory into something it is not as grounds for a motion to compel. "Whether that information is discoverable the Court need not consider at this time, because plaintiff's interrogatory does not ask for it. . . . The Court will not rewrite the interrogatory to seek information that is not requested by its plain terms." *Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212, 224 (N.D. Ill. 2001); *see also, Fid. Nat. Title Ins. Co. of New York v. TCF Nat'l Bank Ill.*, 02 C 668, 2003 WL 22455505 (N.D. Ill. Oct. 28, 2003) (party "cannot rewrite its interrogatory after the fact").

The same can be said regarding Interrogatories 35 and 36. Interrogatory 35 states:

Describe in detail each and every product and service ever intended to marketed, or already marketed, by Applicant and/or its licensee(s) at any time in connection with the FIGHT LIKE A GIRL phrase.

Sigler states, "TSDC should explain precisely which individual or entity allegedly engaged in the use described in supplemental answer to Interrogatory 35 – and why TSDC is relying on it." Such an answer would be a legitimate ground for a motion to compel if the interrogatory asked for it. Interrogatory 35 does not ask for it. Again, Sigler, has identified what it believes is a flaw in TSDC's legal position and in TSDC's responses to discovery, but all it has identified is a flaw in its own discovery technique: It has failed to ask specific questions with respect to succession in interest in connection with the marks in question.

ii) Interrogatories 35 and 36 – Ornamental use

Sigler’s complaints with respect to TSDC’s responses concerning ornamental use are in the same vein. The relevant portion of Interrogatory 35 asks:

Describe in detail each and every product and service ever intended to marketed, or already marketed, by Applicant and/or its licensee(s) at any time in connection with the FIGHT LIKE A GIRL phrase.

TSDC’s response distinguishes between an admittedly ornamental use of the mark in the first instance and use as a trademark from May 12, 2007. Sigler condemns TSDC for not engaging in legal argumentation in an interrogatory response by “explain[ing] the difference” between these two concepts, and then asks the Board to require TSDC to provide answers to a six-part interrogatory that was not asked at all, as set forth on the carryover from pages 4 to 5 of Sigler’s Supplement.

Sigler then nests a complaint about document production into its criticism of TSDC’s interrogatory response, premised on its implied, but baseless, assertion that TSDC is in possession of responsive documents that it has not produced – much less the dubious proposition that the phrase “I FIGHT LIKE A GIRL WANNA SEE” could not constitute a use of the trademark FIGHT LIKE A GIRL. TSDC’s motion with respect to these issues should be denied.

iii) Interrogatory 39 – Secondary meaning

Sigler complains, per its original motion, that Interrogatory 39 was not answered adequately because TSDC failed to identify “the goods and/or services with respect to which the secondary meaning is alleged to have been acquired as well as the date when secondary meaning was allegedly acquired.” With respect to “the goods and/or services,” TSDC respectfully submits that the requested information, taken in the context of the

facts already known to Sigler by way of the papers filed in this action and the discovery produced, is duplicative and burdensome, for reasons not necessary to detail here.

Sigler's demand for a "specific date when secondary meaning was allegedly required" is meritless. As the Federal Circuit recently explained in *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356 (Fed. Cir. 2012), the acquisition of secondary meaning is a complicated fact question.

To establish secondary meaning, or acquired distinctiveness, an applicant must show that in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself. To determine whether a mark has acquired secondary meaning, courts consider: advertising expenditures and sales success; length and exclusivity of use; unsolicited media coverage; copying of the mark by the defendant; and consumer studies. Acquired distinctiveness is a question of fact which is reviewed under the clearly erroneous standard.

Id. at 1379 (internal citations and quotes omitted). Similarly, in *Zobmondo Entm't, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1114 (9th Cir. 2010), the Ninth Circuit acknowledged:

In distinguishing between suggestive and descriptive marks, we are aware that "[d]eciding whether a mark is distinctive or merely descriptive is far from an exact science and is a tricky business at best." *Lahoti v. VeriCheck, Inc.*, 586 F.3d 1190], 1197 (9th Cir.2009) (quotation marks omitted); 2 McCarthy § 11:66 ("The descriptive-suggestive borderline is hardly a clear one"), § 11:71 (observing that the descriptive-suggestive dichotomy is not "some kind of concrete and objective classification system").

The "date" on which secondary meaning is acquired is not some precise moment in time which can be proved by a date-stamped receipt showing that from that instant, but not before then, a mark has acquired distinctiveness. Sigler would very much like TSDC to box itself in by asserting such a date, but cites no authority for the proposition that TSDC must do so, or that any applicant could.

iv) Interrogatory 44 – Associations

Sigler states that TSDC's supplemental answer is "still unclear and inadequate." TSDC submits that its response, contained in Sigler's submission is, to the contrary, substantive and more than adequate. Its motion should be denied in connection with Interrogatory 44.

III. Responses to Document Demands

Sigler is correct that a written response to the subject document demands was (erroneously) not served in a timely fashion. As indicated in the Declaration filed herewith, that deficiency has been made good. Sigler has not suffered any prejudice and, it is submitted, all responsive documents have long ago been produced except to the extent that those sought by Sigler are duplicative or comprise an unreasonably broad and burdensome request.

GOETZ FITZPATRICK LLP

By: 
Ronald D. Coleman (RC 3875)

One Penn Plaza—Suite 4401
New York, NY 10119
(212) 695-8100
rcoleman@goetfitz.com
Attorneys for Applicant
TDSC, LLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing APPLICANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS was served on this 4th day of January, 2012 by email, per stipulation of counsel, on the following attorneys for Opposer:

Robert W. Hoke
Sarah J. Gayer
Nyemaster, Goode, West, Hansell & O'Brien, P.C.
625 1st St SE, Suite 400
Cedar Rapids, IA 52401
rwhoke@nyemaster.com
sjgayer@nyemaster.com



Ronald D. Coleman