

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

M3 GIRL DESIGNS, LLC
a Texas Limited Liability Company
Plaintiff,

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vs.

CIVIL ACTION NO. 3-09CV2390-F

BLUE BROWNIES, LLC
and KRISTA DUDTE,
Defendants.

**DEFENDANTS’ FIRST MOTION TO COMPEL AND
FIRST MOTION FOR SANCTIONS UNDER RULE 37**

Defendants Blue Brownies, LLC (“Blue Brownies) and Krista Dudte and Robert Dudte (collectively “Defendants”) file this motion to compel Plaintiff M3 Girl Designs, LLC (“M3 Girl”) to produce documents and provide complete answers to interrogatories, and file this motion for sanctions pursuant to FRCP 37.

INTRODUCTION

This case concerns the production and sale of craft bottle cap magnet jewelry. Bottle cap magnets and jewelry are very old and are not proprietary or protectable in general. Craft kits for making bottle cap magnets and jewelry have been and are being sold nationwide since at least 2005, and the parties, M3 Girl and Blue Brownies are two competitors among many who have since entered the bottle cap jewelry market. There are other competitors that predate 2005. M3 Girl claims to have started a bottle cap magnet and jewelry business in 2006. M3 Girls business has been very successful and is believed to generate revenues of over \$1,000,000.00 per year.

M3 Girl filed this action to try and enjoin Blue Brownies from competing in the bottle cap magnet jewelry market and, in particular, from selling choke necklaces with a metal disk for releaseably attaching bottle cap magnets. Among other things, M3 Girl initially alleged that

Defendants infringed M3 Girls' trademark and copyrights, and asserted related federal and state law claims. Dkt. 1. The Court dismissed the state law claims. Dkt. 42. M3 Girl has replaced its dismissed claims with new counts, Dkt. 52, and is now incredibly trying to preclude competitors from selling bottle cap magnets and necklaces based on the claimed proprietary "trade dress" including, "(1) a slim choker necklace, colored or white fabric (2) an attachment having a metallic sheen tied in a knot at the front of the choker necklace, (3) a conventional soft-drink bottle cap with crowned ridges around the edge, (4) the crowned ridges of the bottle cap positioned outwardly on the choker necklace with the internal surface of the bottle cap exposed, and/or (5) a raised projection having a geometric shape on the top surface of the bottle cap."

After causing Defendants to incur many tens of thousands of dollars to defend against the untenable federal copyright claims and related state law claims, Plaintiff amended the complaint to substitute vague federal and state trade dress claims in place of the federal copyright claims and related state law claims. Dkt. 52. Defendants filed a First Amended Original Answer, Dkt. 53, alleging, among other things, that Plaintiff's claims of copyright – claims formerly alleged in this suit and claims made separately in advertisements – were false. Defendants filed counterclaims against M3 Girl in connection with its false copyright claims, seeking damages for false advertising and unfair competition, and for attorney fees as the prevailing party in a copyright action. Plaintiff's latest escalation tactic, which Defendants consider as going "nuclear," is to attempt to amend the complaint to add Defendants' largest customers as Defendants. Dkt. 54.

On January 13, 2011, Defendants served M3 Girl with Defendants' First Set of Interrogatories (App., Ex. A), and with Defendants' First Set of Document Requests (App., Ex. B).

On February 10, 2011, Defendants granted Plaintiff's request for a two week extension to respond to the discovery requests. (*See* App., Ex. E, Ltr from Mr. Hemingway to Mr. Hanor, Feb. 10, 2011.) On February 26, 2011, Defendants failed to timely respond to its discovery responses.

On March 1, 2011, Defendants received Plaintiff's belated and improper interrogatory responses (App., Ex. C), and Plaintiff's belated and improper document request responses (App., Ex. D).

Defendants granted Plaintiff until April 1, 2011 to produce documents. This motion covers matters that are currently at issue. Defendants anticipate that this is not the only discovery matter the Court will have to decide.

After conferring on the issues set forth herein, on March 21, 2011 Defendants received Plaintiff's Supplemental Initial Disclosures (App., Ex. F). Plaintiff entitled these supplemental materials as also being "Supplemental Responses to Interrogatory No. 4 and Nos. 6 and 7," but this designation is improper. Plaintiff did not verify its supplemental disclosures, so the information cannot be considered an answer to an interrogatory. FRCP 33(b)(3). Additionally, Plaintiff did not specify which portion of the supplemental disclosures applies to Interrogatory Nos. 4, 6 or 7. Defendants cannot be expected to make assumptions as to which information answers a particular interrogatory. Plaintiff's failure to file proper supplemental interrogatory responses also obscures whether Plaintiff withdraws its improper interrogatory objections.

For the reasons stated below, the Court should order Plaintiff to produce all requested documents and answer interrogatories, and sanction Plaintiff under Rule 37.

ARGUMENT

Motion to Compel Standard

“[P]arties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense” or “appears reasonably calculated to lead to the discovery of admissible evidence.” FRCP 26(b)(1). A party moving for an order to compel bears the burden of showing that the request seeks discoverable information. *Export Worldwide, Ltd. V. Knight Aerospace Prods., Inc.*, 241 F.R.D. 259 (W.D. Tex. 2006). A party objecting to discovery must “articulate specifically” the basis for its valid objections. *Id.*

Discovery Objections Must Be Specific and Timely

Objections to discovery must be timely and “must be stated with specificity,” or they are “waived unless the court, for good cause, excuses the failure.” FRCP 33(b)(4); *see Enron Corp. Sav. Plan v. Hewitt Assocs. L.L.C.*, 258 F.R.D. 149, 153, n.1 (S.D. Tex. 2009) (Rule 33 requirements of timeliness and specificity apply to both interrogatory and document request objections, equally).

“Boilerplate objections are not acceptable; specific objections are required in responding to a Rule 34 request.” *Enron Corp.*, 258 F.R.D. at 159 (internal quotations and citations omitted). Generic objections not specific to each request are insufficient. *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990). As the court explained in *S.E.C. v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006):

In order to satisfy its burden, the objecting party must make a specific detailed showing of how a request is burdensome. . . . A mere statement by a party that a request is ‘overly broad and unduly burdensome’ is not adequate to voice a successful objection. . . . Broad-based, non-specific objections are almost impossible to assess on their merits, and fall woefully short of the burden that must be borne by a party making an objection to an interrogatory or document request.

It is a “general rule” that untimely objections are waived, absent good cause for the delay. *In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1986); *Ordoyne v. McDermott, Inc.*, U.S. Dist. LEXIS 12075 (E.D. La. 2000) (finding objections waived because they were twenty-two days

late). In determining whether good cause exists for an untimely objection, courts consider the circumstances of the delay to determine “whether it was inadvertent, defiant, or part of a larger calculated strategy of noncompliance. . .” *RE/MAX Int’l Inc. v. Trendsetter Realty, LLC*, 2008 U.S. Dist. LEXIS 38101 (S.D. Tex. 2008); *see Hall v. Sullivan*, 231 F.R.D. 468, 473-74 (D. Md. 2005) (identifying particular factors to consider). In lieu of waiver, courts may consider “any lesser appropriate sanction.” *RE/MAX*, 2008 U.S. Dist. LEXIS 38101, at *5.

Plaintiff’s Response to Defendants’ Requests for Production Are Utterly Deficient

Plaintiff’s Untimely and Generic Objections Are Waived

Plaintiff asserted identical, generic objections to each and every request for production:

M3 Girl Designs incorporates by reference the foregoing reservation of rights and general objections as if fully set forth herein. M3 Girl Designs objects to this Document Request to the extent it calls for the disclosure of information or documents that are Privileged Materials. No Privileged Materials will be produced. Furthermore, M3 Girl Designs objects to this Document Request because to the extent it seeks information or documents that are not relevant to any party's claim or defense, or seeks information or documents that are not reasonably calculated to lead to the discovery of admissible evidence.

M3 Girl Designs also objects to the Document Request to the extent it is overly broad, unduly burden, vague and harassing. M3 Girl Designs also objects to the Document Request to the extent it attempts to impose duties upon M3 Girl Designs that are greater than those required by the Federal Rules of Civil Procedure, the Northern District of Texas' Local Rules and/or the Court's Order(s). Subject to the General and foregoing objections, the Plaintiff M3 Girl Designs responds as follows.

Plaintiff’s objections, other than the objections on privilege, are not specific to any one of the requests for production, and therefore, the basis asserted for each of the objections is waived. Defendants are unable to address the merits of the objections or amend their requests for production, because the bases are not specifically explained.

Plaintiff’s Refusal to Produce Documents Relating to Defendants’ Copyright Claim is Improper

Plaintiff refuses to produce documents in response to Request Nos. 6-7, 19-21, 37-39, 41-42, 47-51, 53-62, and 127. These requests seek information relating to Plaintiff's copyright claims, i.e., claims made in its advertisements and claims formerly asserted against Defendants. This information is relevant to Defendants' counterclaims for attorney fees and for false advertising and unfair competition.

Plaintiff's objection that there is no pending copyright claim is misleading. Plaintiff delayed filing its discovery responses three days beyond the already extended deadline so that in the interim, on February 28, 2011, Plaintiff could file its First Amended Complaint that substitutes "trade dress" claims for its copyright claims. However, Plaintiff's dismissal of its copyright claims does not render Defendants' discovery requests irrelevant to this action, because the information requested is relevant to Defendants' counterclaims.

Plaintiff also refused to produce documents in response to Request No. 18, which seeks information related to the "derivation of any of the Plaintiff's bottle cap jewelry products." Plaintiff responded by stating that "M3 Girl does not understand what is meant by the word 'deviation,' and therefore objects to this Request for Production on that basis." Plaintiff's objection is improper, because Request No. 18 does not use the word "deviation." The word, "derivation" is easily understood, however, as it is a well-known term of art used in copyright law.¹ Request No. 18 seeks information relating to Plaintiff's copyright claims to show the claims were baseless and that Defendants are entitled to appropriate damages.

Plaintiff's Refusal to Produce its Fee Agreement is Improper

¹ See, e.g., 17 U.S.C. § 101 ("A 'derivative work' is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'.")

Plaintiff refuses to produce its fee agreement in response to Request No. 130. Plaintiff improperly asserts the agreement is privileged, despite a long history of courts ruling oppositely. *Weslaco Holding Co. v. Crain, Caton & James, P.C.*, 2007 U.S. Dist. LEXIS 43522 (S.D. Tex. 2007) (“[T]he attorney client privilege does not encompass such nonconfidential matters as the terms and conditions of an attorney’s employment, the purpose for which an attorney has been engaged, or any of the other external trappings of the relationship between the parties.”) (collecting cases); see *In re Grand Jury Proceedings*, 33 F.3d 1060 (9th Cir. 1994); *In re Grand Jury Subpoena*, 742 F.2d 61 (2nd Cir. 1984).

Plaintiff also incredibly asserts that the requested fee agreement, which includes information relating to Plaintiff’s retention of counsel for prosecuting this action, is somehow not relevant to this action. The objection is baseless, and the fee agreement should be produced. Defendants are entitled to know what attorney fees are being requested so it may consider this in evaluating settlement. It should not be a surprise after the case is tried.

Plaintiff’s Vague Responses Are Incomplete And Inadequate

In response to the remainder of the Requests, Plaintiff responded as follows:

To the extent understood, M3 Girl Designs will conduct an investigation to determine if the requested documents exist or can be located, and if located and can be produced without an unreasonable burden, the Plaintiff M3 Girl Designs has produced or will produce any relevant and responsive non-privileged documents.

These statements are not responsive to the requests, but instead, generally recite Plaintiff’s discovery obligations. These responses provide no substantive guidance as to whether documents exist or do not, and whether they will be produced or withheld.

Plaintiff should be compelled to amend the responses to state whether documents exist or do not, and whether documents will be produced or withheld.

Plaintiff's Interrogatory Answers Are Utterly Deficient

Plaintiff Failed to Verify its Interrogatory Answers

Plaintiff failed to answer Defendants' interrogatories under oath, as required by Rule 33(b)(3). An order compelling Plaintiff to provide proper answers is appropriate. Rule 37(a)(3)(B)(iii); see *Booker v. Anderson*, 83 F.R.D. 272, 282 (N.D. Miss. 1979); *Van Heerden v. Bd. Of Supervisors of La. State Univ.*, 10-155-D-M2, 2011 U.S. Dist. LEXIS 7956, at *6-7 (M.D. La., Jan. 27, 2011).

Plaintiff's Untimely and Generic Interrogatory Objections Are Waived

Plaintiff asserted identical, generic objections to each and every interrogatory:

M3 Girl Designs incorporates by reference the foregoing reservation of rights and general objections as if fully set forth herein. M3 Girl Designs objects to this Interrogatory to the extent it calls for the disclosure of information or documents that are Privileged Materials. No Privileged Materials will be produced. Furthermore, M3 Girl Designs objects to this Interrogatory to the extent it seeks information that is not relevant to any party's claim or defense, nor information sought reasonably calculated to lead to the discovery of admissible evidence.

M3 Girl Designs also objects to the Interrogatory to the extent it is overly broad, unduly burden [sic], vague and harassing. M3 Girl Designs also objects to the Interrogatory to the extent it attempts to impose duties upon M3 Girl Designs greater than those required by the Federal Rules of Civil Procedure, the Northern District of Texas' Local Rules and/or the Court's Order(s).

Plaintiff's objections are not specific to any one of the interrogatories, and therefore, the basis asserted for each of the objections is waived. Defendants are unable to address the merits of the objections or amend their interrogatories, because the bases are not specifically explained.

Plaintiff's Should Be Compelled to Answer Interrogatory Nos. 1-3

Plaintiff maintains that Interrogatory Nos. 1-3 seek irrelevant information, because "no copyrighted works are being asserted in this action." For the reasons stated above regarding Plaintiff's misleading and improper objections to the copyright-related requests for production,

Plaintiff's objections to Interrogatory Nos. 1-3 should be similarly overruled, and Plaintiff should be compelled to provide complete answers thereto.

Plaintiff's Should Be Compelled to Answer Interrogatory Nos. 6-9

Interrogatory Nos. 6-9 are standard interrogatories used in nearly every case, and request damages information in addition to that which is required by the initial disclosures. Interrogatory No. 8 seeks a privilege log; and No. 9 seeks the fee arrangement. They plainly request relevant and discoverable information, and Plaintiff's objections are without merit.

Moreover, to the extent Plaintiff provided some information, the answers are incomplete. In response to Interrogatory Nos. 6-7, Plaintiff merely summarized what kinds of damages are generally available in all trademark cases without any specific reference to the facts and circumstances of this case. Plaintiff provided no monetary amounts, no calculations, or description of how Defendants purportedly harmed Plaintiff.

CONCLUSION

For the reasons stated above, the Court should order Plaintiff to produce documents, answer interrogatories and revise its discovery responses giving general objections, and sanction Plaintiff under Rule 37.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the Defendants request that the Court:

- A. strike the generic objections Plaintiff repeated for every request to produce;
- B. find that Plaintiff has waived all objections to requests to produce that are grounded on the bases stated in the generic objections;
- C. strike the copyright-related objections Plaintiff asserted in response to Request Nos. 6-7, 18-21, 37-39, 41-42, 47-51, 53-62, and 127;
- D. strike the privilege and relevancy objections Plaintiff asserted in response to Request No. 130 on Plaintiff's fee arrangement with its attorney;

- E. order Plaintiff to produce all of the relevant documents in digital format;
- F. strike the generic objections Plaintiff repeated for every interrogatory;
- G. find that Plaintiff has waived all objections to interrogatories that are grounded on the bases stated in the generic objections;
- H. order Plaintiff to provide complete and proper answers to the interrogatories;
- I. award Defendants sanctions against Plaintiff for its discovery violations in an amount to be determined; and
- J. award Defendants any other relief to which they have shown themselves entitled.

CERTIFICATE OF CONFERENCE

Counsel for Defendants has conferred with counsel for Plaintiff over the phone on several occasions to discuss these issues, and conferred again via email and facsimile on March 21, 2011, but the parties have been unable to resolve the issues set forth above.

Respectfully submitted,

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s/ charles w hanor

By _____
Charles W. Hanor
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ATTORNEYS FOR DEFENDANTS

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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M3 GIRL DESIGNS, LLC
a Texas Limited Liability Company
Plaintiff,

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Defendants.

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CIVIL ACTION NO. 3-09CV2390-F

**ORDER GRANTING DEFENDANTS' FIRST MOTION TO COMPEL AND
FIRST MOTION FOR SANCTIONS UNDER RULE 37**

BEFORE THE COURT are Defendants' First Motion to Compel and First Motion for Sanctions Under Rule 37. After considering the briefs and applicable law, the Court GRANTS Defendants' First Motion to Compel and First Motion for Sanctions Under Rule 37, and it is hereby ORDERED that:

- A. The generic objections Plaintiff repeatedly asserted in response to every request to produce are stricken;
- B. Plaintiff has waived all objections to requests to produce that are grounded in the bases stated in the generic objections to Defendants' requests to produce;
- C. The copyright-related objections Plaintiff asserted in response to Request Nos. 6-7, 18-21, 37-39, 41-42, 47-51, 53-62, and 127 are stricken;
- D. The privilege and relevancy objections Plaintiff asserted in response to Request No. 130 are stricken;
- E. Plaintiff must produce all of the relevant documents in digital format;
- F. Plaintiff must designate the request that documents are being produced for;
- G. The generic objections Plaintiff asserted in response to every interrogatory are stricken;
- H. Plaintiff has waived all objections to interrogatories that are grounded on the basis stated in the generic objections to each of Defendants' interrogatories;

- I. Plaintiff must provide complete and proper answers to the interrogatories;
- J. Plaintiff must file amended discovery responses conforming with this order by _____, 2011; and
- K. Plaintiff is ordered pay Defendants the reasonable cost of the attorneys' fees incurred in filing and prosecuting Defendants' First Motion to Compel and First Motion for Sanctions.

It is so Ordered.

SIGNED this ____ day of _____, 2011.

Royal Furgeson
Senior United States District judge

CERTIFICATE OF SERVICE

Per Fed.R.Civ.P. 5(b), I certify that on the 23rd day of March, 2011, I electronically filed per Local Rule 5.1(d) of the Northern District of Texas the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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s/charles w hanor

Charles W. Hanor