

Cadbury typo tests TTAB's patience

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Inside Counsel

Ah, human frailty!

How many times might a young associate have pulled up a previously served set of document requests, performed a search for one party's name, replaced it with another's—and missed one? Probably an incalculable number of times, and if you've worked in a larger law firm, you've surely seen it happen. It's almost a rite of passage.

Forgivable? Of course. Less forgivable—at least recently at the Trademark Trial and Appeal Board—is opposing counsel's arguing that such an innocent mistake is a reason for not responding to interrogatories and document requests in a dispute.

That's what led to the Board's recent precedential ruling in *Cadbury UK Limited v. Meenaxi Enterprise, Inc.*, Cancellation No. 92057280, in which respondent Meenaxi had served interrogatories and document requests on Cadbury in response to the latter's cancellation action. Cadbury objected to the interrogatories, but did not respond or object to the document requests.

As it turned out, in the preamble to their document requests, Meenaxi had accidentally referred to Petitioner as "Venture Execution Partners, Inc.," instead of "Cadbury UK Limited."

The document was correctly captioned. And Cadbury agreed that Meenaxi might serve corrected document requests. It also requested four separate extensions of time to respond to its "discovery," all of which Meenaxi granted.

So the dispute came down to whether Cadbury, by its complete failure to respond, had waived its right to object to those requests. Cadbury argued that the extensions of time for its responding to "discovery" did not refer to Meenaxi's document requests. It contended that Meenaxi's having mistakenly referring to Cadbury as Venture Execution Partners was a "crucial mistake," the result of which was that Meenaxi's document requests were never directed to Cadbury.

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Crucial mistake? I think not. In fact, thinking it could be so gives me the shivers (and I suspect some large firm associates are quivering as well.)

Thankfully, the Board agreed with me (in sympathy at least), finding Cadbury's claim to be "disingenuous at best." It determined there was no doubt that Cadbury knew that the document requests were served in and related to this cancellation proceeding, and held that the isolated reference to Venture Execution Partners, Inc. was clearly a typographical error and did not cause a matter of real confusion or misunderstanding for Cadbury.

It gets better for stressed associates everywhere: The Board felt that Cadbury's motion to compel was the result of Cadbury's attorney concluding, upon the discovery of the typographical error, that he had found an excuse to become "pedantic, unreasonable, and uncooperative."

So the TTAB took this case as an opportunity for a teaching moment, stating that it expects each party in every case to use common sense and reason when faced with what the circumstances clearly show to be a typographical error. It noted that if Cadbury had had any doubt, it could and should have contacted Meenaxi for clarification rather than refusing to respond. It could have objected to the document requests based upon the supposed ambiguity caused by the typographical error. At a minimum, Cadbury should have accepted Meenaxi's explanation, during the latter's good faith effort to resolve the issue, that the single reference to a different company in the document request was a typographical error.

Then the Board ruled that it would not allow one party to avoid its discovery obligations to another due to an obvious typographical error such as this one. It went further to hold that Cadbury's unreasonable position resulted in the filing of an unnecessary motion, wasting the time and resources of both parties and the Board. When there is an obvious and inadvertent typographical error in any discovery request or other filing, the Board explained—particularly where, as here, the intended meaning was clear, the parties should not require the Board's intervention to correct the mistake.

Granting the motion to compel, the Board gave Cadbury thirty days to respond to the document requests and produce the requested documents, without objection on the merits.

The Board concluded by stressing that Cadbury's conduct has not demonstrated the good faith and cooperation that the TTAB expects of litigants during discovery. Such conduct delayed the cancellation action, unnecessarily increased the litigation costs of the parties, wasted valuable Board resources, and interfered with Meenaxi's ability and, indeed, its right to take discovery.

Aside from the merits of this case, the Board's ruling shows that parties' litigation behavior and tactics do matter and can have a substantive impact on how cases are decided. It would have been interesting if the Board, like some courts have in the past, would have required Cadbury's firm to send a copy of this decision to its client and file a declaration with the Board confirming that it had done so.

A discovery dispute gone mad, and Cadbury's cad counsel's cavils come out the loser. So the next time a client asks to make a really big deal about an obviously small error, consider Cadbury's fate. Will they think it is worth it in the long run? I'm guessing that threat would have stopped this before it started.

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