UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

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Mailed: August 14, 2002

Opposition No. 108,769

Bacou USA Safety, Inc. by merger with Uvex Safety, Inc.

v.

S Industries, Inc. and Central Mfg., Inc. joined as party defendant

Before Cissel, Quinn and Holtzman, Administrative Trademark Judges.

By the Board:

The Board, on November 21, 2001, issued an order that disposed of several motions brought by applicant. The Board, inter alia, denied applicant's motion for judgment on the pleadings as untimely and denied applicant's motion for judgment for failure to take testimony, inasmuch as opposer had taken testimony. The Board then stated:

> However, we note that, to date, applicant has filed several questionable papers, including a motion for judgment for failure to prosecute after applicant attempted to evade service of process for a testimony deposition and opposer filed its own testimony deposition, a motion to suspend pending the appointment of a new Director based on a Writ of Mandamus which had already been denied as known by applicant, a motion which cites precedent for the opposite proposition, an

> untimely motion for judgment, two petitions to the Commissioner, and two requests for reconsideration of the Commissioner's decision. This pattern of conduct leads to the inference that applicants' motivation to file these motions is to delay the proceedings and/or increase the cost of the proceeding...
>
> As noted above, applicant has filed several motions that are without merit and merely serve to delay and increase the cost of this proceeding. In view thereof, applicant is advised that any further motions filed by applicant that the Board deems meritless or misrepresent Board case law may result in judgment being entered against applicant...Further, applicant has continuously filed papers in violation of Trademark Rule 2.127(a). Applicant is advised that all motions and briefs filed with the Board must be double-spaced. (emphasis added)

The Board then reset the testimony periods.

Thereafter, on December 10, 2001, applicant filed a motion for reconsideration of the November 21, 2001 order with respect to the denial of the motion for judgment on the pleadings and on December 31, 2001 applicant filed a "Fourth Motion For Judgment Under Rule 2.132(a)."

Once again, these papers are not in compliance with Trademark Rule 2.127(a) inasmuch as they are not double-spaced. More importantly, they are both wholly without merit.

Turning first to the motion for reconsideration, the Board, in denying the motion for judgment on the pleadings as untimely, stated:

> A motion for judgment on the pleadings must be filed after the pleadings are closed, but prior to the opening of the first testimony period, as

> originally set or as reset. See TBMP section 504.01 and cases cited therein. Plaintiff's testimony period originally opened on June 12, 1998 and has been reset and reopened on several occasions. Inasmuch as applicant cited the above-noted section of the Board manual, we must presume that applicant read it and in spite of the clear statement knowingly filed an untimely motion. (emphasis added)

In support of its motion for reconsideration applicant states, "[a]pplicant currently [sic] motion for judgment is timely based upon the Board's order dated Nov. 21, 2001 resetting the first testimony period which is now set to close on 12/20/01...The Board in it's [sic] order of Nov. 21, 2001 re-opened and re-set the Plaintiff's testimony period to close on 12/20/01. Applicant's motion for judgment on the pleading is timely."

Although applicant refers to the closing date, presumably applicant's argument is that because the testimony period was "reopened," applicant's motion for judgment is now timely. A reading of TBMP Section 504.01 and the case law cited therein makes it eminently clear that a resetting of dates cannot serve to make timely a motion which was untimely when first filed. *La Maur, Inc. V. Bagwells Enterprises, Inc.*, 193 USPQ 234 (Comm'r 1976). For further clarification Section 528.02 of the manual, also cited by applicant, states "[o]nce the first trial period commences, however, any summary judgment motion filed thereafter is untimely, even if it is filed prior to the

opening of a rescheduled testimony period-in-chief for plaintiff." There is absolutely no basis on which this motion for reconsideration could have been filed and it is denied.

We turn now to applicant's fourth motion for judgment under Trademark Rule 2.132(a). In the November 21, 2001 order the Board stated, "[i]nasmuch as opposer took a testimony deposition during opposer's testimony period as previously set, applicant's motion to dismiss for failure to take testimony is denied."

In support of its motion, applicant states that it "moves for dismissal of this opposition...[b]ased upon opposer's failure to take testimony or offer any valid evidence, into the record during the period set by the trademark trial and Appeal Board in its ruling of Nov. 21, 2001...the Board issued an order on Nov. 21, 2001 setting the close of opposer's testimony period on 12/20/02." Applicant fails to mention opposer's testimony deposition. Opposer addresses this omission in its response. In reply, applicant changes its strategy and attacks the substance of the deposition, stating that the deposition "does not support opposer's case" and was "merely submitted ...as a procedural maneuver to delay this case."

The Board has ruled on three prior motions filed by applicant under Trademark Rule 2.132. Most recently, on

November 21, 2001 the Board denied applicant's motion under Trademark Rule 2.132, stating that testimony had been taken, namely the testimony of Richard Sustello. Applicant nonetheless filed this motion after the warning by the Board not to file any further meritless motions, and glaringly omitted any mention of the prior ruling or the testimony taken by opposer. There is no question that this motion is completely without merit, serves only to harass opposer and delay proceedings, and is in direct violation of the November 21, 2001 order. Applicant's fourth motion for judgment under Trademark Rule 2.132 is denied.

Applicant, on several occasions, has brought meritless motions and petitions before the Board and the Commissioner in this proceeding. A review of applicant's pattern of behavior in this litigation reveals a deliberate strategy of delay, evasion and harassment towards opposer, implied threats to the Commissioner, and now a direct violation of a Board order.[1]

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[1] Applicant's litigation strategy of delay, harassment and falsifying documents in other cases is well documented. See *S Industries Inc. v. Lamb-Weston Inc.*, 45 USPQ2d 1293 (TTAB 1997), (petitioner's certificate of mailing on a motion to extend found to be fraudulent). See also *S Industries, Inc. v. Centra 2000 Incorporated*, 249 F.3d 625 (7th Cir. 2001) (affirming award of attorney's fees against S Industries, noting a pattern of abusive and improper litigation, specifically citing S Industries' sole shareholder, Leo Stoller); *S Industries v. Diamond Multimedia Sys., Inc.*, 17 F. Supp.2d 775 (N.D. Ill. 1998) (awarding attorneys fees based on plaintiff's frivolous claims); *S Industries, Inc. v. Stone Age Equipment, Inc.*, 12 F. Supp.2d 796 (N.D. Ill. 1998) (awarding attorneys fee for oppressive suit where plaintiff offered highly questionable and perhaps

On September 1, 1998, the Board granted opposer's motion to extend the testimony period. Applicant filed a petition with the Commissioner to reverse that order. On April 5, 1999, the Commissioner denied that request stating, inter alia:

> It is noted that on November 30, 1998, Petitioner [applicant] submitted a communication to the Commissioner in which it argued that Opposer's failure to submit a brief in reply to the Petition should be construed as an admission that the Petition should be granted. This argument is without merit. Although 37 C.F.R. § 2.146(e)(1) permits Opposer to file a brief in response to the Petition, it does not require the submission of a brief. (emphasis added)

Applicant then filed a request for reconsideration of the Commissioner's decision which was denied on September 23, 1999. Applicant then filed a second request for reconsideration to which opposer filed a "cross-petition." Applicant's response to opposer's cross-petition included the following passage:

> The representative of the Opposer, Leo Stoller will not stand by nor tolerate any attorney and/or governmental official who chooses to violate and/or chooses to not strictly enforce the rules by which these proceedings are conducted.

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fabricated documents and testimony from its principal that was inconsistent, uncorroborated, and in some cases, demonstrably false); *S Industries, Inc. v. Hobbico, Inc.*, 940 F. Supp. 210 (N.D.Ill. 1996) ("S Industries, Inc. ('S') appears to have entered into a new industry – that of instituting federal litigation. …[A]nd this court has had occasion to note a proliferation of other actions brought by S…."). Moreover, Mr. Stoller, applicant's representative, has also recently been sanctioned, individually, for making material misrepresentations to the Board regarding an applicant's consent to extensions of time. *Central Mfg., Inc. v. Third Millenium Technology Inc.*, 61 USPQ2d 1210 (TTAB 2001).

With the accompanying footnotes:

> Leo Stoller is also the National Director of Americans for the Enforcement of Judicial Ethics (AEJE), a watch dog group that was formed to bring misconduct charges of corrupt government officials, judges, prosecutors, lawyers who do not follow the Code of Judicial Conduct, Federal Rules of Civil Procedure etc., and in general violate their oath of office. AEJE is dedicated to bringing these types of corrupt governmental employees to justice in order to keep the America [sic] Government the best in the world.
>
> Such a decision by the Commissioner [i.e., denying applicant's request for reconsideration] would be intolerable violation of the applicant's procedural due process...and demonstrate that a Commissioner who fails in it's oath and obligation to enforce the said rule evenly. If the [sic] such a Commissioner should choose to reward, as in the case at bar, the rule violators, the Opposer, by denying the relief requested by the applicant in it's original petition, the applicant would assert again respectfully, that such a Commissioner who would fails [sic] in it's strict obligation to enforce the said rules, that it has sworn to up hold, should not be sitting in that governmental position.

The Commissioner denied applicant's second request for reconsideration stating, inter alia, that applicant's "argument is frivolous." Thereafter, applicant filed a petition with the Commissioner for review of an August 29, 2000 Board order. This petition was denied on February 6, 2002. Against this backdrop, opposer attempted on several

occasions to take a testimony deposition of applicant. [2] See November 21, 2001 order.

The Board has inherent authority to impose sanctions against a litigant for disregarding Board orders and/or for "contempt of the Board." *Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067 (TTAB 2000). See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27, rehearing denied, 501 U.S. 1269, 112 S.Ct. 12, 115 L.Ed.2d 1097 (1991); *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991), citing *Chambers*, 501 U.S. at 49 (A court's inherent power to sanction those before it "stems from the very nature of courts and their need to be able to manage their own affairs

[2] The most recent attempt has now spawned further motions in this case: (1) opposer's motion (filed December 26, 2001) to extend testimony; and (2) applicant's motion and supplement (filed January 29, 2002 and April 22, 2002) for Rule 11 sanctions. Opposer served a notice of testimony deposition on Mr. Stoller on December 6, 2001 for December 20, 2001. Mr. Stoller claims that he did not receive that notice until December 24, 2001 as evidenced by the United States Postal Stamp affixed to the envelope in which the notice was mailed. We note that the envelope was mailed from New York and has a United States Postal Office cancellation dated December 6, 2001 out of New York. While the envelope also has a stamp from the Elmwood Branch in Illinois dated December 24, 2001 (18 days later) we note that United States Post Offices do not stamp mail being received; only outgoing mail is stamped or "cancelled." That puts into question how that United States Postal Stamp showing an alleged receipt date became affixed to that envelope. At a minimum, the stamp alone, without a verified explanation from the Elmwood Branch, has no probative value. With regard to the drama that ensued as a result of opposer's unsuccessful attempt to serve a subpoena on applicant, that issue is for the United States District Court for the Northern District of Illinois to handle, which it apparently did.

so as to achieve the orderly and expeditious disposition of the cases.").[3]

When sanctionable conduct is found, either under Rule 11 or the Board's inherent authority, the Board has authority to enter appropriate sanctions, up to and including the entry of judgment. *See Carrini Inc. v. Carla Carini S.R.L., supra*; *Central Mfg., Inc. v. Third Millenium Technology, Inc.,* 61 USPQ2d 1210 (TTAB 2001). See also Trademark Rule §2.116(a) and authorities cited in TBMP §529.01.

The Board has discretion to tailor sanctions appropriate to the violations and bad faith conduct and may consider any measure designed to serve this purpose. *See Central Mfg. Inc. v. Third Millenium Technology, Inc., supra* and cases cited therein. *See also Carrini, Inc. v. Carla Carini S.R.L., supra.*

In determining whether to impose sanctions under the Board's inherent authority, the Board considers the following factors: (1) bad faith conduct; (2) willful disobedience of Board orders; (3) length of delay or clear pattern of delay; (4) due warning that sanctions may be entered; (5) reasons for non-compliance; and (6)

[3] The Supreme Court has held that conduct in the course of litigation may constitute bad faith. *Hall v. Cole*, 412 U.S. 1, 15, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

effectiveness of lesser or alternative sanctions. *Carrini, Inc. v. Carla Carini S.R.L., supra*.

In this case, applicant has filed several meritless papers establishing a pattern of deliberate delay and harassment. Further, on November 21, 2001, the Board issued an order prohibiting the filing of any further meritless motions and warning applicant that a violation of that order could result in judgment against applicant. In flagrant disregard of that order, applicant filed two more meritless motions. No sanctions other than entry of judgment in favor of opposer sustaining the opposition and refusing registration to applicant will effectively halt the reckless and dilatory conduct displayed by applicant in this case. *See Carrini v. Carini, supra;* and *Giant Food, Inc. v. Standard Terry Mills, Inc.,* 231 USPQ 626 (TTAB 1986). Accordingly, judgment is hereby entered against applicant, the opposition is sustained and registration to applicant is refused.[4]

[4] In view of the above, opposer's motion (filed December 26, 2001) to extend testimony and applicant's motion (filed January 29, 2002) for sanctions are moot.