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BY FIRST CLASS MAIL

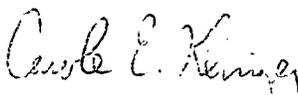
Commissioner for Trademarks
P.O. Box 1451
Arlington, Virginia

Re: *L.C. Licensing, Inc. v. Cary Berman*
Opp. No. 91162330
Our Ref.: 019200/25101

Dear Sir or Madam:

Enclosed for filing in connection with the above-referenced opposition proceeding is Opposer L.C. Licensing, Inc.'s Memorandum In Response To Applicant's Motion To Dismiss Opposition. Please acknowledge receipt on the enclosed postcard.

Very truly yours,


Carole E. Klinger

Enclosures

cc: Mr. Cary Berman



11-01-2005

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #64

as Applicant's evidence is wholly inadequate and Applicant has failed to utilize the procedural devices afforded him by the Statutes and Rules. Despite these failures and absent any Order by the Board which has not been adhered to by Opposer, Applicant now seeks the remedy of default judgment. This motion is clearly baseless, and accordingly Opposer requests that this motion be denied.

First, if Applicant had questions regarding Mr. Shellman's relationship with Opposer, or his role in the adoption of Opposer's ENYCE mark, Applicant had the option of seeking further discovery through the issuance of a subpoena of Mr. Shellman. FED. R. CIV. P. 45; T.B.M.P. § 404.01 ("A discovery deposition generally may be taken of any person, whether or not the person is a party..."); T.B.M.P. § 404.03(a)(2). Indeed, far from somehow hiding Mr. Shellman as asserted by Applicant, Opposer **provided** Mr. Shellman's current address to Applicant at Mr. Felix's deposition on April 6, 2005, twelve days prior to the close of the discovery period, and certainly sufficient enough time to serve a subpoena upon Mr. Shellman. Additionally, in its ruling on Opposer's motion to compel issued on August 24, 2005, the Board extended the discovery period in this proceeding until September 20, 2005. Quite telling is that during this period Applicant again failed to subpoena Mr. Shellman, thereby undercutting the notion that such testimony was of importance to Applicant. Thus, Applicant has no basis for his contentions regarding his failure to obtain testimony from Mr. Shellman.

Moreover, Applicant ignores that his version of the facts is disputed and fails to cite any legal authority supporting its claim that Tony Shellman is an employee of Enyce, L.L.C. Rather, Applicant relies upon inadmissible materials. Specifically, Applicant's supporting "evidence" on this issue consists of inadmissible Internet printouts, (Exhibits 7, 8 to Applicant's Motion.) which are not generally considered self-authenticating. T.B.M.P. § 704.08. As

Applicant has failed to present the testimony of a person who can authenticate and identify the materials, they cannot be made of record.¹ Further, Applicant has also failed to explain why IRS guidelines are relevant to the issue presented here. Simply stated, Opposer and Mr. Shellman believe that Mr. Shellman is an independent contractor and he is treated as such by Opposer. While Opposer does not believe this to be the case, even if under IRS regulations Opposer might not be permitted to treat Mr. Shellman as an independent contractor for tax purposes, he is nevertheless an independent contractor for business purposes. Further, even if the materials were admissible, since Opposer's witnesses have testified that Mr. Shellman is not an employee, this would have been an issue of fact to be resolved by the Board if it were to have been timely and properly presented.

Similarly, if Applicant had questions regarding the "name or structure" of Opposer or any related entities, Applicant had the option of seeking further discovery on that issue during the discovery period. Applicant did not seek any further discovery on this issue during the discovery period even though he had sufficient time to do so, and therefore should not be permitted to seek sanctions regarding same.

Additionally, Applicant has not – and cannot – demonstrate that Opposer is "hiding evidence" regarding the corporate structure of Opposer. First, Mr. Davis and Mr. Felix were produced to testify regarding the adoption of the ENYCE mark. If the deponents were unable to answer certain of Applicant's questions regarding corporate structure, Applicant had ample time to use other devices to obtain such information, and his failure cannot be transformed

¹ "Even if properly made of record, however, Internet printouts", such as those attached as Exhibit 8 to Applicant's Motion "would only be probative of what they show on their face, *not for the truth of the matters contained therein*, unless a competent witness has testified to the truth of such matters." T.B.M.P. § 704.08 (emphasis added).

into Opposer's withholding of evidence, and Applicant's contentions relating thereto are meritless.

Second, Applicant's evidence on this point consists of the uncertified discovery deposition transcripts of Mr. Rolando Felix and Evan T. Davis. (Exhibits 4-5 to Applicant's Motion.) Applicant's discovery deposition testimony is inadmissible for the following reasons: (1) the deposition transcripts have not been certified, (2) neither of the deponents are officers of Opposer, nor were they produced under Fed. R. Civ. P. 30(b)(6) or 31(a); and (3) their testimony is not offered in a manner that reflects its accuracy. See 37 C.F.R. § 2.120(j). Since proper procedures were not adhered to, Applicant's evidence should not be considered.

CONCLUSION

In view of the foregoing, as Applicant failed to pursue the proper procedures available to him during the discovery period and in any event has no basis for the conclusory allegations set forth in his motion, Opposer respectfully requests that Applicant's Motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2005 I caused one true copy of Opposer's Memorandum In Response To Applicant's Motion To Dismiss Opposition to be served by first class mail upon Applicant Cary Berman by causing a true and correct copy thereof to be deposited in the United States mail, postage prepaid, addressed to Applicant as follows:

Cary Brett Berman
1917 Lafayette Road
Gladwyne, PA 19035

