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

Proceeding	91163999
Party	Defendant Thomas P. Muchisky Muchisky, Thomas P. 13250 Lakefront Drive Earth City, MO 63045
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Attachments	Reply to opposer's motion seeing additional time re applicant's summary judgment motion.pdf (5 pages)

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

SYBARITIC, INC.,	)	
	)	
Opposer,	)	Opposition No.: 91163999
	)	Serial No. 78/282,661
v.	)	
	)	
THOMAS P. MUCHISKY,	)	
	)	
Applicant.	)	

APPLICANT'S REPLY TO OPPOSER'S MOTION AND MEMORANDUM SEEKING ADDITIONAL TIME PURSUANT TO FEDERAL RULE 56(f) TO CONDUCT DISCOVERY AND TO RESPOND TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT

Opposer has requested that Applicant's Motion for Summary Judgment be denied, or in the alternative, that Opposer be granted an extension of time (60 days) to conduct discovery (after relevant documents are produced by Applicant), and for an extension of time thereafter (30 days) to respond to Applicant's Summary Judgment Motion. Applicant objects to Opposer's request and Motion on the following grounds:

Applicant's Use of Trademark

Applicant has briefly described the origin of its trademark (paragraphs 2-4 of Muchisky Declaration). However, the grounds set forth by Opposer concerning use and ownership of Applicant's mark were not pleaded in Opposer's Notice of Opposition or Amended Notice of Opposition. Applicant's use and ownership of its trademark were not raised in any of the pleadings. Moreover, Opposer has not alleged that it is using, or intends to use, a trademark that is the same as, or similar to, Applicant's trademark. Therefore, priority of use is not in issue. Therefore, Opposer is not entitled to conduct discovery concerning Applicant's use and ownership of its trademark.

Yearly Sales

As already stated in Applicant's application and in its Motion for Summary Judgment, Applicant's total sales of its applicator are more than $195,000 per year. Moreover, the fact that "documents produced in the federal litigation relating to the sales of different applicators appear to show sales significantly below the sales Muchisky attributes to the different applicator in question here" (paragraph 21 of Opposer's Motion) is irrelevant in this proceeding since the "federal litigation" involves trademarks other than the trademark here at issue. Additional discovery concerning Applicant's sales is therefore not needed.

Yearly Advertising

Applicant has already stated in its trademark application and in its Motion for Summary Judgment that the cost of its advertising of the applicator involved in this proceeding is more than $104,000 per year, and that Applicant has also advertised its applicator on the Internet for the last five years. The fact that Applicant's advertising expenditures "account for more than fifty percent (50%) of his gross sales" (paragraph 28 of Opposer's Motion) is clearly irrelevant to the issues in this proceeding. Therefore, no additional time for discovery is needed.

Availability of Alternative Designs

Information concerning the use of competitors'designs having the "same intended function" as Applicant's applicator certainly is not calculated to lead to the discovery of admissible evidence. Applicant's rights reside in the composite design of the applicator that is involved in the present proceeding. Other designs may provide the same function as Applicant's configuration, but they do not use, or need to use, Applicant's design.

Moreover, since Opposer has alleged that it markets and sells hand-held massagers (paragraph 2 of Amended Notice of Opposition), Opposer is undoubtedly aware of hand-held massagers sold by others in the industry and can readily acquire such information from competitive publications and from the Internet. An investigation by Applicant is not necessary. Additional time for discovery is therefore not necessary.

Method of Manufacture

There is no evidence in the record that Applicant's design results from a comparatively simple or inexpensive method of manufacture than other designs available to competitors. In fact, the record demonstrates that others in the industry can compete effectively without adopting Applicant's design. Therefore, there is no need for additional discovery time.

Conclusion

It is clear from Opposer's request that summary judgment be denied and its motion for additional time to obtain discovery that Opposer is attempting to find some evidence that might tend to support its opposition. Moreover, Opposer waited until the final date on which its response to Applicant's summary judgment motion was due to file its Rule 56(f) motion and to request that Applicant's summary judgment motion be denied, and now seeks additional discovery time. The record clearly demonstrates that additional time for discovery is not needed. As evident from Applicant's Motion for Summary Judgment, Applicant has used its design as a trademark, and has met the requirements for distinctiveness and secondary meaning Therefore, Applicant's Motion for Summary Judgment should be granted and Opposer's request and motion should be denied.

Respectfully Submitted,

By: /Lionel L. Lucchesi/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of APPLICANT'S REPLY TO OPPOSER'S MOTION AND MEMORANDUM SEEKING ADDITIONAL TIME PURSUANT TO FEDERAL RULE 56(f) TO CONDUCT DISCOVERY AND TO RESPOND TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT is being served via first class U. S. Mail, postage prepaid, this 1st day of February, 2006, upon the following:

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