

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Baxley

Mailed: November 5, 2008

Opposition No. 91169231

Barbara J. Schell M.D. PLLC

v.

Graham D. Simpson

**Andrew P. Baxley, Interlocutory Attorney:**

On November 4, 2008, opposer filed a copy of the parties' trademark usage agreement. In that agreement, opposer consented to a concurrent use registration of the mark in applicant's involved application and agreed not to oppose involved application Serial No. 76619613.<sup>1</sup>

In view of that agreement, opposer is allowed until thirty days from the mailing date of this order to show cause why this opposition should not be dismissed in accordance therewith.<sup>2</sup>

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<sup>1</sup> In the agreement, the parties indicate that opposer shall have the right to expand its use of the mark into "the same territories that [applicant] is using his marks." Such right, however, may preclude applicant from being granted a concurrent use registration for its involved mark. See *Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 3 USPQ2d 1306 (Fed. Cir. 1987).

<sup>2</sup> As the Board noted in the August 6, 2008 order, applicant's involved application cannot be amended to a concurrent use application at this time because the application is based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. Section 1051(b). In addition, applicant cannot convert the application into a use-based application by filing a statement of use until a notice of

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Proceedings herein otherwise remain suspended.

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allowance is issued in the involved application. That is, applicant cannot file a statement of use while the above-captioned proceeding is pending. See Trademark Rule 2.77.