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

Proceeding	91175363
Party	Plaintiff Mr.RonaldM.Creatore
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Date	06/28/2008
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UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD
P.O. BOX 1451
ALEXANDRIA, VA 22313-1451

HEVUN Diversified Corporation P.O. Box 3388 Boardman, OH 44513-3388 Plaintiff/Opposer, v. Parker-Hannifin Corporation c/o Christopher H. Hunter, Esq. 6035 Parkland Boulevard Cleveland, OH 44214-4141 Defendant/Applicant	OPPOSITION NO. 91175363 **SUPPLEMENTAL RESPONSE TO APPLICANT'S OBJECTION TO OPPOSER'S MOTION FOR ENTRY OF DEFAULT FINAL JUDGMENT, OR IN THE ALTERNATIVE, FOR REOPENING OF PERIODS OF DISCOVERY AND TESTIMONY FOR THE BENEFIT OF OPPOSER** **RESPONSE TO APPLICANT'S REQUEST FOR RESET OF TRIAL SCHEDULE FOR THE BENEFIT OF APPLICANT**

Pursuant to 37 C.F.R. §2.127, Opposer hereby submits this Supplemental Response to the Applicant's objection to the Opposer's *Motion for Default Final Judgment*, as well as its Response to Applicant's *Request for Reset of Trial Schedule* for the benefit of Applicant which was filed with the TTAB on or about 06/27/2008. In response to each allegation set forth upon the Applicant's recent responsive filing, Opposer states as follows as it pertains to the representations set forth within the specific numbered paragraphs of Applicant's responsive filing [hereinafter, the "Response"]:

1. Opposer concurs with Applicant's statement within paragraph 1 of the Response, to the extent that the subject mark was published for opposition on 01/16/2007.

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2. Opposer concurs with Applicant's statement within paragraph 2 of the Response to the effect that the Opposer filed its timely Opposition on 01/16/2007.

3. As it pertains to the Applicant's statements within paragraph 3 of the Response, while Opposer acknowledges that the Applicant purportedly filed an answer to the Opposition on 03/06/2007, Opposer denies that the answer was timely for the reasons previously set forth within the Opposer's *Motion for Default Judgment*. Opposer acknowledges Applicant's admission that "*Applicant's answer was not properly served upon Opposer pursuant to 37 C.F.R. §2.119.*" Opposer admits that the issue of Applicant's assertion of ownership in the *Performance Stainless* mark is the "*subject of long-running litigation between them, currently in a case pending in the Court of Common Pleas for Mahoning County, Ohio styled PNH, Inc., et al. v. Parker Hannifin Corporation, Case Number 07-CV-3757.*" However, Applicant is less than forthcoming about the procedural history of the long-running litigation, which has its genesis in a similarly-captioned case which was filed on 01/28/2004 [case #2004-01-0545 filed in Summit County, Ohio, which was subsequently remanded upon Applicant's motion to Mahoning County, Ohio, where it was first identified as Case #05-CV-1539]. Opposer requests that the TTAB take judicial notice of the fact that the "*long-running litigation*" between Opposer and Applicant pertaining to disputes of ownership of the *Performance Stainless* mark commenced some ***17 months prior to*** the Applicant's filing of the Trademark Application for the *Performance Stainless* mark.

5. Opposer concurs with Applicant's statement within paragraph 5 of the Response that the Opposer filed its *Motion for Default Final Judgment* on 06/14/2008.

6. Opposer concurs with Applicant's statement of the law within paragraph 6 of the Response.

7. Opposer concurs with Applicant's statement of the law within paragraph 7 of the Response.

8. Opposer concurs with the Applicant's statement within paragraph 8 of the Response to the extent that on June 27, 2008, Applicant did indeed serve Opposer with a copy of its answer pursuant to 37 C.F.R. §2.119, however, Opposer denies that this service of Applicant's answer came "*less than two weeks after Applicant became aware that it had failed to properly serve Opposer.*" It is the contention of the Opposer, as will be more fully discussed within the section entitled Argument below, that in-house counsel for Applicant, Christopher Hunter, purposefully refused to provide Opposer with a timely-served copy of the Answer, and as such, was aware of his failure to properly serve Opposer as of the 03/06/2007 date that the purported answer was filed with the TTAB. Further, it is also worthwhile to note Mr. Hunter, whose signature appears upon purported answer with the TTAB on 03/06/2007, has been registered to practice before the PTO since 09/04/1990, and as such, is charged with being familiar with the rules that govern practice before the PTO and the TTAB. Neglect or incompetence in following the rules of the TTAB is not a valid excuse for failing to abide by the rules of the TTAB.

9. Opposer objects to the relief requested by Applicant within paragraph 9 of the Response.

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10. Within paragraph 10, Opposer denies that the Applicant's failure in serving its answer upon the Opposer was "*not the result of willful conduct or gross neglect on the part of the Applicant*" for the reasons which are set forth below in the section entitled *Argument*. Opposer further denies that "*the Opposer will not be substantially prejudiced by the delay caused*" by Applicant's willful conduct or gross neglect in having failed to serve the answer upon Opposer in a timely fashion. Opposer does not understand Applicant's statement ". . . *and Applicant as a meritorious defense to this Opposition*," and as such, Opposer's moves for a more definite statement by Applicant in this regard, subject to a subsequent reply from Opposer upon receipt thereof.

11. Opposer denies that the grant by the TTAB of Opposer's request for the re-opening of discovery and testimony periods for the benefit solely of the Opposer "*would be tantamount to granting Opposer's motion for default judgment*" for the reasons set forth below within the section entitled *Argument*.

12. Opposer concurs with Applicant's request within paragraph 12 of the Response to the extent that the TTAB reset the trial schedule for the benefit of the Opposer, but Opposer denies Applicant's request that the resetting of the trial schedule should confer an ability upon the Applicant to conduct any further discovery for the reasons set forth below within the section entitled *Argument*.

13. Opposer concurs with Applicant's statements as set forth within paragraph 13.

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ARGUMENT

As set forth at TBMP §312.02, entitled *Setting Aside Notice of Default*, a defendant [hereinafter referred to as the "Applicant"] who has failed to file a timely answer to the complaint must provide a satisfactory showing of good cause why default judgment should not be entered against it. Similarly, the Applicant is duty-bound to file a satisfactory showing of good cause in response to a motion by a plaintiff [hereinafter referred to as the "Opposer"] for default judgment, or in support of Applicant's own motion asking that its late or improperly-filed answer be accepted.

In the instant matter, Applicant has not provided a satisfactory showing of good cause for either its request in opposition of the *Motion for Default Final Judgment*, nor for its request that its late or improperly-filed answered be accepted. Self-serving statements from Applicant's counsel that Applicant's failure to serve timely notice of its answer upon Opposer was not due to "*willful conduct*" or "*gross neglect*," as well as counsel's statement that "*Opposer will not be substantially prejudiced*" by Applicant's failure to serve timely notice must fail for a number of reasons.

First off, Applicant provides no affidavit or sworn statement by the party who prepared the Applicant's purported answer [Attorney Christopher Hunter], stating with specificity, a good faith basis why the answer was not timely-served to Opposer. Current counsel's boilerplate statements in favor of denying the Opposer's *Motion for Final Default Judgment* cannot be considered testimony on the issue of why Mr. Hunter's failure to timely-serve the answer was not "*willful conduct*" or "*gross neglect*" by Mr. Hunter as he sought to represent the Applicant.

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Secondly, the purported answer filed by Mr. Hunter on behalf of the Applicant did not list any counterclaims against Opposer. The purported answer listed only responses to the allegations contained within Opposition, along with Affirmative Defenses thereto. As such, Mr. Hunter was not anticipating any type of further responsive pleading from the Opposer. Because Mr. Hunter was not awaiting any further responsive pleading from the Opposer, he alone was the only individual involved in this matter who possessed "perfect" knowledge that the discovery phase of the Opposition could commence now that all of the pleadings were of record. The Opposer would not have commenced discovery absent express knowledge of a timely-filed answer. Why would the Opposer have commenced discovery without knowing that all pleadings were on file with the TTAB ? Discovery, by its very nature, requires the expenditure of tremendous resources such as time and money, and the Applicant should not be expected to have commenced discovery when it was led to believe that the Applicant had not even answered the Opposition.

Mr. Hunter's failure to commence discovery after filing the purported answer speaks volumes about the true intentions of the Applicant. Mr. Hunter knew that by commencing the discovery phase he would be giving the Opposer notice of the filing of the purported answer, which is something that he had hoped to prevent when he first filed the purported answer without a certificate of service. To maintain sole possession of his "perfect" knowledge about the fact that all pleadings were of record as of 03/06/2007, Mr. Hunter purposefully chose to refrain from engaging in any attempt to conduct discovery on behalf of the Applicant for fear of alerting the Opposer that the purported

answer had been filed, which would have then enabled Opposer to proceed with proper discovery in accordance with the originally-established trial schedule.

Thirdly, knowing that all responsive pleadings were before the TTAB, the Applicant made a conscious choice not to commence the taking of any discovery on its own behalf. At a minimum, any current request by the Applicant for the re-opening of the trial schedule to the extent that the Applicant could benefit therefrom should be expressly denied given that the Applicant chose not to commence discovery pursuant to the original trial schedule, even though the Applicant possessed the "perfect" knowledge that all pleadings were on file with the TTAB, and even though the Applicant knew that the discovery period was then "ripened" for commencement.

Lastly, Opposer takes issue with Applicant's contention that the Opposer has not been prejudiced by Applicant's attempt to mislead Opposer into believing that no answer had been filed. Aside from the Opposer being prejudiced by the expiration of the original trial schedule and its related discovery and testimony deadlines, Applicant has continued on in the business of promoting products under the *Performance Stainless* mark owned by Opposer. On information and belief the Opposer believes that Applicant has enjoyed sales in excess of $1,000,000.00 from the inception of Applicant's wrongful use of the *Performance Stainless* mark owned by Opposer, through to the current date. Applicant has caused tremendous financial harm to Opposer, not to mention further delaying the Opposer's ability to market its own products under this valuable mark which was pilfered from Opposer by an agent currently employed by Opposer. Applicant has also caused tremendous harm and prejudice to Opposer by its blatant efforts to further delay the prosecution of this Opposition by the improper actions undertaken by the Applicant.

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There should be no doubt that the Opposer has been severely prejudiced as a result thereof.

PRAYER

WHEREFORE, plaintiff prays that the TTAB enter a judgment of default against defendant Parker-Hannifin Corporation, and that defendant be enjoined and restrained from being granted ownership of the mark sought within Serial No. 76642100, and a Final Judgment be filed contemporaneously with this Motion adopting as uncontestable findings of fact the statements and allegations set forth within the *STATEMENT IN SUPPORT OF OPPOSITION TO TRADEMARK FILING SERIAL #76642100* filed by the plaintiffs.

ALTERNATIVELY, plaintiffs pray that the TTAB grant a reopening of the period for the taking of discovery and testimony, solely for the benefit of the plaintiffs' and to the exclusion of the defendant, so that the plaintiffs can prepare their case now that plaintiffs are aware of the filing of the purported Answer.

AFFIDAVIT

I, Ronald M. Creatore, do hereby certify that the statements and allegations set forth in the foregoing Motion are true and accurate to the best of my knowledge and belief, and further, that a copy of this motion has been served upon the defendant as set forth upon the *Certificate of Service & Mailing* attached hereto and incorporated herein by this reference.

Respectfully submitted,

Ronald M. Creatore

Ronald M. Creatore, Individual
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CERTIFICATE OF SERVICE & MAILING

I do hereby certify that this correspondence is being deposited on June 28, 2008, with the United States Postal Service with sufficient postage as first-class mail, in an envelope addressed to:

Commissioner for Trademarks
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Arlington, VA 22202-3514

Trademark Trial And Appeal Board
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Respectfully submitted,

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