

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

MCF/apb

Mailed: May 21, 2007

Opposition No. 91175589

HVL Cyberweb Solutions, Inc.

v.

Alden J. Brown

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

On April 4, 2007, applicant, in lieu of an answer, filed a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

On April 11, 2007, the Board issued an order suspending this case pending disposition of that motion. Therein, the Board stated that "[a]ny paper filed during the pendency of this motion which is not relevant thereto will be given no consideration."

On April 20, 2007, opposer, in apparent response to the motion to dismiss, filed an amended notice of opposition. On May 14, 2007, applicant filed a submission that he captioned as a "reply brief" in support of his motion to dismiss.<sup>1</sup>

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<sup>1</sup> The "reply brief" was sent to the Board by first class mail using Certificate of Mailing procedure on May 10, 2007 and is

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The Board turns first to the amended notice of opposition. A plaintiff to a Board *inter partes* proceeding may amend its complaint once as a matter of course at any time before an answer is served. See TBMP Section 507.02 (2d ed. rev. 2004). Plaintiffs to Board *inter partes* proceedings can, and often do, respond to a motion to dismiss by filing an amended complaint.<sup>2</sup> See TBMP Section 503.03 (2d ed. rev. 2004).

Inasmuch as no answer to the original notice of opposition was filed in this case, opposer's amended notice of opposition is accepted as a matter of course and is now the operative complaint herein. See TBMP Section 507.02 (2d ed. rev. 2004). Accordingly, the motion to dismiss is moot.

However, a review of applicant's reply brief in support of his motion to dismiss indicated that such reply brief is actually a renewed motion to dismiss for failure to state a claim upon which relief can be granted wherein

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therefore timely. See Trademark Rule 2.197; TBMP Section 110 (2d ed. rev. 2004).

The Trademark Board Manual of Procedure (TBMP) is available online at <http://www.uspto.gov/web/offices/dcom/ttab/tbmp/index.html>. The Trademark Rules of Practice are available online at <http://www.uspto.gov/web/offices/tac/tmlaw2.html>.

<sup>2</sup> Accordingly, applicant's assertion that the amended notice of opposition should not be considered because it is not germane to the motion to dismiss is wrong.

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applicant alleges deficiencies in the amended notice of opposition.<sup>3</sup> The amended notice of opposition includes a copy of the amended complaint in a civil action between the parties,<sup>4</sup> which could make suspension of this case appropriate under Trademark Rule 2.117(a). See *Argo & Co. v. Carpetsheen Manufacturing, Inc.*, 187 USPQ 366 (TTAB 1975); TBMP Section 510.02(a) (2d ed. rev. 2004). However, the Board, in exercising its inherent authority to control the scheduling of cases on its docket, finds that the renewed motion to dismiss should be decided prior to consideration of whether this case should be suspended pending final determine that civil action. See Trademark Rule 2.117(b).

Opposer is allowed until twenty days from the mailing date set forth in the caption of this order to file a brief in response to the renewed motion to dismiss. Applicant's reply brief is due in accordance with Trademark Rules 2.119(c) and 2.127(a).

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<sup>3</sup> Inasmuch as the "reply brief" is actually a renewed motion to dismiss, the ten-page limit for reply briefs in support of motions in Board inter partes proceedings is not applicable. See Trademark Rule 2.127(a).

<sup>4</sup> The civil action in question is styled *HVL Cyberweb Solutions, Inc. v. Brown, et al*, Case No. 06CC04997, filed August 11, 2006 in the Superior Court of the State of California for the County of Orange.

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Proceedings herein otherwise remain suspended. Any submission which is not germane to the renewed motion to dismiss will receive no consideration.