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

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| Proceeding | 91177156 |
| Party | Plaintiff<br>H-D Michigan, Inc. |
| Correspondence Address | LINDA K. MCLEOD<br>FINNEGAN, HENDERSON, FARABOW<br>GARRETT & DUNNER LLP, 901 NEW YORK AVENUE NW<br>WASHINGTON, DC 20001-4413<br>UNITED STATES |
| Submission | Motion to Strike |
| Filer's Name | Linda K. McLeod |
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| Signature | /Linda K. McLeod/ |
| Date | 09/11/2008 |
| Attachments | Opposer's Motion To Strike Applicant's Evidence As Untimely and Improper.pdf ( 7 pages )(274787 bytes ) |

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

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| H-D MICHIGAN, INC.,<br><br>Opposer<br><br>v.<br><br>BRYAN BROEHM,<br><br>Applicant. | Opposition No.: 91177156<br><br>Mark: <br>Serial No.: 78896325<br>Filed: May 30, 2006 |

**OPPOSER'S MOTION TO STRIKE APPLICANT'S EVIDENCE AS UNTIMELY AND IMPROPER FOR SUBMISSION UNDER NOTICE OF RELIANCE**

Pursuant to the Trademark Rules of Practice, the Federal Rules of Civil Procedure, and Section 532 of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), H-D Michigan Inc. ("Opposer") respectfully moves the Board to strike Applicant's Submission of Evidence to be Referenced in Final Pleading, filed on August 27, 2008 ("Applicant's Submission").

As detailed below, Applicant's Submission was filed on August 27, 2008, after the close of Applicant's testimony period on August 26, 2008, was not served on Opposer, and did not contain a Certificate of Service. Moreover, Applicant's Submission seeks to introduce evidence that is not the proper subject matter for introduction through a notice of reliance.

## I. Background

On May 7, 2008, the Board reset the testimony periods in this proceeding, with Applicant's testimony period set to close on August 26, 2008. On August 27, 2008, one day after the close of his testimony period, Applicant filed Applicant's Submission

through the Board's ESTTA system.[1] Applicant's Submission does not contain a signed certificate of service as required by Trademark Rule 2.119. Moreover, while Applicant's Submission was filed with the Board, it was not served on Opposer. Opposer learned of the filing by monitoring the status of the proceeding on TTABVUE.

In fact, this is not the first time that Applicant submitted untimely filings with the Board in this proceeding. As stated in the Board's January 28, 2008 order with reference to Applicant's untimely written objections to Opposer's November 21, 2007 motion for extension of the discovery period:

> As discussed during the conference, applicant's filings were not considered because *inter alia* they were not timely filed. Correspondence required to be filed in the Office within a set period of time will be considered as being timely filed on the date of deposit in the mail (if filed on or before the due date) if accompanied by a certificate of mailing. The actual date of receipt by the Office will be used for all other purposes, including electronically filed documents.

Moreover, this is not the first time that Applicant filed documents with the Board and failed to include proof of service on Opposer. The Board warned Applicant to ensure proper service of all filings pursuant to Rule 2.119 in its June 20, 2007 order regarding Applicant's Answer. During the January 28, 2008 telephone conference with the parties, and in its order of that same date, the Board addressed Applicant's failure to include any proof of service on Opposer of its written objections to Opposer's motion to extend the discovery period. The Board once again very clearly reminded Applicant of its obligations to strictly comply with the Trademark Rules and Federal Rules of Civil

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[1] The identical document appears to have been filed through ESTTA twice, once categorized as "Other Motions/Papers" and the second time as "Testimony for Defendant." The two filings contain consecutive ESTTA tracking numbers. Opposer did not receive a service copy of either of these filings. Moreover, both submissions were untimely filed on August 27, 2008, one day after the close of Applicant's testimony period on August 26, 2008.

Procedure, including providing proof of service of all papers filed with the Board:

> The Board also advised applicant that strict compliance with the Trademark Rules of Practice and, where applicable, the Federal Rules of Civil Procedure, is expected of him, even though he is not represented by counsel. The Board specifically advised applicant to use a certificate of service, more fully discussed infra, to show proof of service on opposer of submissions filed with the Board and recommended use of the Board's electronic filing systems (ESTTA). . . . No paper, document, or exhibit will be considered as evidence in the case unless it has been introduced in evidence in accordance with the applicable rules. . . . Consequently, copies of all papers which applicant may subsequently file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made. Strict compliance with Trademark Rule 2.119 is required in all further papers filed with the Board. (Emphasis added.)

Though not titled as one, Applicant's Submission takes the form of a notice of reliance, and purports to introduce into evidence: (a) images of clothing obtained from a third-party website; (b) images of designs that Applicant states he "desires to market under the 'Holy-DivineSon' mark"; and (c) images that were obtained from various third-party websites and from photographs taken by the Applicant. Applicant did not conduct any testimonial depositions during his testimony period, and there is no stipulation between the parties regarding the admission of the evidence attached to Applicant's Submission.

For the reasons discussed below, Applicant's evidence is untimely and improper under the Rules, and thus should be stricken from the record and given no consideration.

## II. Argument

### A. Applicant's Submission is Untimely

Trademark Rule 2.121 states that the Board will set each party's time for taking testimony, including the time for the Opposer to present its case in chief, and the time

for Applicant to present its case in response. The parties are permitted to submit evidence during their respective testimony periods through the testimony depositions of witnesses and the filing of notices of reliance. TBMP § 702.

Applicant's testimony period closed on August 26, 2008. Applicant filed Applicant's Submission on August 27, 2008, as shown on the ESTTA filing receipts and date stamps at Docket Nos. 77 and 78 in TTABVUE. Applicant's Submission does not contain any Certificate of Mailing stating that Applicant's Submission was mailed on or before August 26, 2008.[2] As such, Applicant's Submission and the evidence attached thereto is untimely, and for that reason alone should be stricken from the record and disregarded by the Board.

### B. Applicant Failed to Include the Required Certificate of Service and to Serve Applicant's Submission on Opposer

Not only is Applicant's Submission untimely, but Applicant also failed to comply with Trademark Rule 2.119 requiring that all filings be served upon Opposer and include a statement that the filing was served. Applicant was already admonished by the Board on two earlier occasions in June 2007 and January 2008 for failing to comply with Rule 2.119. Those two Board orders very clearly advised Applicant of the service requirements, and informed him that strict compliance with the Rules would be required for all future papers filed in this proceeding. Applicant thus cannot rely on his status as a pro se litigant or on any alleged unfamiliarity with the Rules as an excuse for failing to comply with the Rules at this stage in the proceeding.

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[2] The Board's January 28, 2008 order indicates that a Certificate of Mailing (even if there was one) would not control if the document is filed electronically as it was in this case, in which case the actual date of receipt by the office -- August 27, 2008 -- is considered the filing date.

For this additional reason, Applicant's Submission should be stricken from the record.

### C. Applicant's Evidence is Not Appropriate for Submission Under Notice of Reliance

Even if the Board finds Applicant's Submission to have been timely filed, it must be stricken because the evidence cannot be admitted under a notice of reliance.

A notice of reliance may be stricken if the proffered materials are not the proper subject matter for introduction by notice of reliance. TBMP § 532. Such a defect is considered a procedural issue, not a substantive issue, as the defect can be determined from the face of the notice of reliance and the attached documents themselves, and thus the Board can strike such improper evidence before final hearing. TBMP § 707.02(b)(2); Boyds Collection Ltd. v. Herrington & Co., 65 USPQ2d 2017 (TTAB 2003) (striking evidence as improper subject matter for submission through notice of reliance, and noting that such a determination is procedural and not substantive).

Evidence in a Board proceeding generally must be introduced through witness testimony. TBMP § 702. However, the Rules permit the submission of certain specific types of evidence directly through notices of reliance without a witness' testimony, such as discovery depositions, answers to interrogatories, and admissions (Rule 2.120(j)); registrations owned by a party (Rule 2.122(d)(2)); and specified types of printed publications and official records (Rule 2.122(e)).

Applicant's evidence does not fall into any of the categories of evidence that may be submitted under notice of reliance, and without a witness' testimony under the Rules. Applicant's evidence consists of images copied from third-party websites, and images of designs that Applicant claims to intend to use that contain the mark HOLY-DIVINESON.

Such evidence requires a witness' testimony to lay the foundation for its admissibility (e.g., how was it obtained, when was it obtained, by whom was it obtained, etc. with an opportunity for cross examination), but no such testimony has been taken by Applicant in this proceeding. Thus, the evidence attached to Applicant's Submission is improper and cannot be submitted under notice of reliance alone, it lacks any foundation, is inadmissible, and should be stricken from the record.

## III. Conclusion

For these reasons, Opposer respectfully requests that the Board strike Applicant's Submission and the evidence attached thereto, and exclude it from further consideration in this proceeding.

Dated: September 11, 2008

Respectfully submitted,

David M. Kelly
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## CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing OPPOSER'S MOTION TO STRIKE APPLICANT'S EVIDENCE AS UNTIMELY AND IMPROPER FOR SUBMISSION UNDER A NOTICE OF RELIANCE was served by first class mail, postage prepaid, on this 11th day of September 2008, upon Bryan Broehm at the following address:

Bryan Broehm
331 Gazetta Way
West Palm Beach, FL 33413-1053