

ESTTA Tracking number: **ESTTA239120**

Filing date: **09/25/2008**

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

Proceeding	91177156
Party	Defendant Bryan Broehm
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Date	09/25/2008
Attachments	Rebuttal.pdf ( 14 pages )(367692 bytes )

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

<p>H-D MICHIGAN, INC. OPPOSER</p> <p>V.</p> <p>BRYAN BROEHM, APPLICANT</p>	<p>Opposition No.: 91177156</p>  <p>Mark: Serial No.: 78896325 Filed: May 30, 2006</p>
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**APPLICANT'S REBUTTAL TO THE 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 the applicable portions of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), Bryan Broehm ("Applicant") respectfully moves the Board to deny the Opposer's Motion to Strike Applicant's Evidence as Untimely and Improper for Submission Under Notice of Reliance which was submitted on September 11, 2008.

**I. Background**

Opposer has contended in three separate arguments that the Applicant's submission of exhibits to be considered for reference during the Applicant's final, closing brief was untimely, was not served upon the Opposer and without a Certificate of Service, and improper in form to be considered as a Notice of Reliance.

The Opposer's arguments are listed below and each one is immediately followed by the Applicant's rebuttal to those individual arguments.

## **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.<sup>2</sup> 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.

#### **APPLICANT'S REBUTTAL TO PARAGRAPH II-A:**

In the Applicant's defense of his rebuttal to this allegation, Applicant respectfully wishes to refer to the following from the **Trademark Trial and Appeal Board Manual of Procedure (TBMP) Second Edition - June 11, 2003, First Revision - March 12, 2004:**

#### **703.01(m) Service of Deposition**

**37 CFR § 2.125 Filing and service of testimony. (a)** *One copy of the transcript of testimony taken in accordance with § 2.123, together with copies of*

*documentary exhibits and duplicates or photographs of physical exhibits, shall be served on each adverse party within thirty days after completion of the taking of that testimony. If the transcript with exhibits is not served on each adverse party within thirty days or within an extension of time for the purpose, any adverse party which was not served may have remedy by way of a motion to the Trademark Trial and Appeal Board to reset such adverse party's testimony and/or briefing periods, as may be appropriate. If the deposing party fails to serve a copy of the transcript with exhibits on an adverse party after having been ordered to do so by the Board, the Board, in its discretion, may strike the deposition, or enter judgment as by default against the deposing party, or take any such other action as may be deemed appropriate.*

One copy of the transcript of trial testimony, together with copies of documentary exhibits and duplicates or photographs of physical exhibits, must be served on each adverse party within 30 days after completion of the taking of the testimony, or within an extension of time for the purpose.<sup>83</sup>

The requirement that a copy of the transcript, with exhibits, be served on every adverse party within the time specified in 37 CFR § 2.125(a) is intended to ensure that each adverse party will have the testimony before it has to offer its own evidence, or, if the testimony in question is rebuttal testimony, to ensure that each adverse party will have the testimony before it has to prepare its brief on the case.<sup>84</sup> If a copy of the transcript, with exhibits, is not served on each adverse party within that time, any adverse party that was not served may have remedy by way of a motion to the Board to reset its testimony and/or briefing periods, as may be appropriate.<sup>85</sup>

If a party that took a deposition fails to serve a copy of the transcript, with exhibits, on an adverse party after having been ordered to do so by the Board, the Board, in its discretion, may take any of the actions mentioned in 37 CFR § 2.125(a).

Applicant makes reference to the requirement that “*One copy of the transcript of trial testimony, together with copies of documentary exhibits and duplicates or photographs of physical exhibits, must be served on each adverse party within 30 days after completion of the taking of the testimony.*” Applicant understood this to mean that all testimony, or in the case of the Applicant’s submission – the documentary exhibits, was to be collected or obtained during the allotted Testimony Period and that collection was to be completed by the expiration of that designated period, and that the Applicant had thirty days from that date to file the documents with the Trademark Trial and Appeal Board (TTAB), along with the Certificate of Service of providing those to the adverse party within the allotted thirty days. Apparently, as the Opposer asserts, Trademark Rule 2.119 requires the Certificate of Service to accompany all filings. It would reason then, if the Applicant is allowed thirty days from the close of the Testimony Period to serve the documents upon the adverse party, the Opposer, and is not permitted to file those same documents with the TTAB without the Certificate of Service, then the Applicant would also be allowed thirty days from the completion of the Testimony Period to file the documents with the TTAB. If this requirement was intending to mean that the copies of the testimony or documentary exhibits had to be filed and served upon the adverse party prior to the end of the Applicant’s Testimony period, then it would have stated, rather than requiring that the copies of the submitted documentary exhibits be served upon the adverse party “*within 30 days after completion of the taking of the testimony,*” that instead they also would be due prior to the expiration of the Testimony Period, as the Opposer is contending.

Furthermore, the Applicant is a lay person and is not represented by an attorney nor is one himself. Interpretation of the TTAB Rules and the TBMP is challenging to say the least, even for a person such as the Applicant who, is a fairly educated person and because of the Applicant's basic legal experience as resulting from the Applicant's career in law enforcement, has some capability of reading and attempting to decipher such writings. Even as such, many of the rules and regulations as they are written in regard to this Trademark process are very challenging to fully comprehend and understand. The Applicant can only put forth his best effort to do everything in the Applicant's ability to comply as fully as possible with those rules and regulations as the Applicant is able to understand them. The Applicant has made a good faith effort to do that throughout this process, despite some of the errors that may have been committed by the Applicant as a result of his lack of complete comprehension of the guidelines, and never as an intentional act or omission, nor with a willful disregard for the authority of the USPTO and the TTAB.

In contrast, the Opposer is represented by very experienced and knowledgeable attorneys who specialize in matters such as this. The Applicant would anticipate that their expertise would dictate that they would fully comprehend and understand how to fully comply in an accurate manner with the rules and regulations as set forth in the TBMP. Taking that into consideration, the Applicant observed that the Opposer had filed the majority of their testimonial documentation well after, as much as thirty days after, their Testimony Period had ended on June 26<sup>th</sup>. As a result, based upon the Applicant's observation of the Opposer's actions, which were presumed to be accurate and in compliance with the TTAB Rules and Regulations and the TBMP because of their expertise, the Applicant concluded that the assessment of the same was accurate and that the Applicant would also thereby be in compliance.

Furthermore, although the Applicant was not yet prepared to send a copy of the filed documents to the Opposer in order to abide by that requirement and thereby accompany the

filing with the Certificate of Service, on August 26, 2008 the Applicant began the submission of the documentary exhibits in order to show that the Applicant obtained the contents of those exhibits prior to the completion of the Testimony Period. The Applicant began the submission of those documents on August 26<sup>th</sup>. Due to circumstances beyond the Applicant's control, the Applicant was met with Internet service issues and, the final transmission of those documents was not able to be completed until shortly after 12 a.m. on August 27<sup>th</sup>, within a little more than an hour of the completion of the Applicant's Testimony Period. Again, because the Applicant was not absolutely able to determine the exact format and under what title those documents should have been submitted as, the Applicant submitted the documents twice. Once under 'Other Documents' and once as 'Testimony for the Defendant.'

It should be noted that the Opposer has requested and received an extension at every juncture in all of the proceedings as it relates to the opposition of my Trademark application.

**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.

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

**APPLICANT'S REBUTTAL TO PARAGRAPH II-B:**

As discussed in my rebuttal to Paragraph II-A, based upon the reasoning described, the Applicant assessed that the TTAB Rules and Regulations, and the TBMP, allowed the Applicant thirty days after the completion of the Applicant's Testimony Period to comply with requirement to submit copies of the documentary exhibits to the Opposer and file those documents with the required Certificate of Service. On September 16, 2008, and within the thirty day allowable time period following the August 26, 2008 completion of the Applicant's Testimony Period, the Applicant served copies of those documents to the Opposer via USPS Priority Mail, and filed them via the ESTTA on September 22, 2008, along with the accompanying Certificate of Service.

**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); Boyd's 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.

**APPLICANT'S REBUTTAL TO PARAGRAPH II-C:**

Applicant did not submit the documentary exhibits as a Notice of Reliance, but rather as **'APPLICANT'S SUBMISSION OF EVIDENCE TO BE REFERENCED IN FINAL PLEADING.'** Again because of the Applicant's difficulty in completely comprehending the TTAB Rules and Regulations and the rules as set forth in the TBMP, the Applicant made the best educated conclusion that the Applicant could in reference to the type of materials that were to be submitted. Based upon the Applicant's assessment of the applicable rules, the exhibits to be submitted were not acceptable under the requirements for a 'Notice of Reliance.' Applicant reviewed the following TBMP guideline that was in reference to the type of materials the Applicant was submitting:

**Internet evidence and other materials that are not self-authenticating.** Certain printed publications qualify for submission by notice of reliance under Trademark Rule 2.122(e) because they are considered essentially self-authenticating.<sup>205</sup> That is, permanent sources for the publications are identified and the nonoffering party is readily able to verify the authenticity of the documents.<sup>206</sup> The element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed

out from the Internet.<sup>207</sup> Internet postings are transitory in nature as they may be modified or deleted at any time without notice and thus are not "subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered."<sup>208</sup> For this reason, Internet printouts cannot be considered the equivalent of printouts from a NEXIS search where printouts are the electronic equivalents of the printed publications and permanent sources for the publications are identified.<sup>209</sup>

Materials that do not fall within 37 CFR § 2.122(e), that is, materials that are not self-authenticating in nature and thus not admissible by notice of reliance, may nevertheless be introduced into evidence through the testimony of a person who can clearly and properly authenticate and identify the materials, including identifying the nature, source and date of the materials.<sup>210</sup> Even if properly made of record, however, such materials, including Internet printouts, would only be probative of what they show on their face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters.

The Applicant specifically applied the following from that rule: "Materials that do not fall within 37 CFR § 2.122(e), that is, materials that are not self-authenticating in nature and thus not admissible by notice of reliance, may nevertheless be introduced into evidence through the testimony of a person who can clearly and properly authenticate and identify the materials, including identifying the nature, source and date of the materials."

In doing so, the Applicant's intent was to submit those exhibits as Testimony for the Defendant, by and from the Defendant/Applicant as "the testimony of a person who can clearly

and properly authenticate and identify the materials, including identifying the nature, source and date of the materials.” The Applicant did not depose himself, the Applicant, in order to obtain that testimony, as such a concept is not justifiably reasonable. Therefore no Notice of Deposition or Taking of Testimony was filed or submitted to the adverse party, the Opposer. It was the Applicant’s findings that the TTAB Rules and Regulations, and the TBMP, do not clearly define how an Applicant who is representing himself and relying upon the Applicant’s own testimony to do so within the requirements pertaining to the obtaining and filing such Testimony. The Applicant gave his best effort to apply the best judgment he could to the particular situation and filed the documentary exhibits in the manner that they were submitted.

**III. Conclusion**

For these reasons, the Applicant respectfully requests that the Board deny the **OPPOSER'S MOTION TO STRIKE APPLICANT'S EVIDENCE AS UNTIMELY AND IMPROPER FOR SUBMISSION UNDER NOTICE OF RELIANCE**. Thank you.

Dated: September 25, 2008

Respectfully Submitted,



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Applicant

# **CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing **APPLICANT'S REBUTTAL TO THE OPPOSER'S MOTION TO STRIKE APPLICANT'S EVIDENCE AS UNTIMELY AND IMPROPER FOR SUBMISSION UNDER NOTICE OF RELIANCE** was served by Priority Mail, postage prepaid, on this 25<sup>th</sup> day of September 2008 upon the Attorneys for the Opposer, at the following address:

**Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P.**

**901 New York Avenue N.W.**

**Washington, D.C. 20001**



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**Bryan C. Broehm**