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

Proceeding	91177156
Party	Plaintiff H-D Michigan, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>H-D MICHIGAN, INC.,</p> <p style="text-align:right">Opposer</p> <p style="text-align:center">v.</p> <p>BRYAN BROEHM,</p> <p style="text-align:right">Applicant.</p>	<p>Opposition No.: 91177156</p> <div style="text-align:center"></div> <p>Mark: Serial No.: 78896325 Filed: May 30, 2006</p>
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**OPPOSER'S REPLY IN SUPPORT OF ITS  
MOTION TO STRIKE APPLICANT'S EVIDENCE AS UNTIMELY  
AND IMPROPER FOR SUBMISSION UNDER NOTICE OF RELIANCE**

Opposer submits this Reply to Applicant's Rebuttal to the Opposer's Motion to Strike Applicant's Evidence as Untimely and Improper for Submission Under Notice of Reliance, filed on September 25, 2008. Applicant's entire argument is premised on his admitted failure to understand and follow the Trademark Rules, and is wholly insufficient to overcome the issues raised in Opposer's Motion.

First, Applicant asks the Board to accept his late and un-served filing of Applicant's Submission of Evidence to be Referenced in Final Pleading ("Applicant's Submission") because he believed that he actually had until 30 days *after* the close of his testimony period to do so, citing 37 CFR 2.125. That Rule, however, pertains only to the filing and service of *testimony depositions and their exhibits* taken in accordance with Rule 2.123, and Applicant did not take any testimony depositions during his testimony period. And while Applicant may be correct in stating that Opposer filed its "testimonial documentation" after its testimony period ended on June 26, 2008, those

materials were timely filed as part of a testimony deposition taken in accordance with Rule 2.123.<sup>1</sup>

Second, Applicant urges the Board to accept his evidence even though it was not proper for submission under a notice of reliance, because he did not believe it was “justifiably reasonable” to depose himself for purposes of authenticating and introducing the evidence.

Applicant argues that the rules and regulations “are very challenging to fully comprehend and understand” and that “Applicant has made a good faith effort” to comply with the rules and regulations throughout this proceeding, “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.” However, Applicant’s ignorance of the rules do not justify his untimely filing and failure to take action during the prescribed time period. *See Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997) (noting that ignorance of the rules usually does not constitute excusable neglect). Moreover, to the extent Applicant seeks to submit declaration testimony and/or affidavit evidence (in lieu of his deposition), Trademark Rule 2.123(b) provides that testimony of a witness may be submitted in the form of an affidavit only on consent of the adverse party or motion granted by the Board. In this case, Opposer does not consent to such submission. Further, Applicant has not filed a timely motion seeking such relief.

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<sup>1</sup> Applicant also states in his brief that Opposer has requested and received extensions of time “at every juncture in all of the proceedings,” apparently in an effort to encourage the Board to forgive his late filing. Applicant is wrong on several counts. Contrary to Applicant’s suggestion, Opposer has not sought an extension “at every juncture” in this case. Telling, Opposer sought an extension to accommodate Applicant (with respect to his discovery deposition) and to review Applicant’s supplemental discovery responses which were served late in the proceeding. Further, Applicant has not sought any extensions of time to take or submit testimony or to reopen his testimony period in order to submit his evidence.

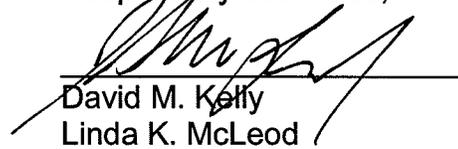
Significantly, the Board has already advised Applicant at least *three times* that strict compliance with the Trademark Rules would be expected of him, even though he is not represented by counsel. In its June 20, 2007 Order, the Board advised Applicant to seek counsel to assist him with the technical and procedural aspects of the Trademark Rules, and then stated that “[s]trict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.” Months later, during its January 28, 2008 telephone conference with the parties and in its order of that same date, the Board ruled that the Applicant’s unfamiliarity with the Trademark Rules could not excuse his untimely response to Opposer’s motion to extend the discovery period. The Board’s January 28th order then states that **“[n]o 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.”** (Emphasis in original.)

Applicant’s continued reliance on his pro se status and his unfamiliarity with the Trademark Rules simply cannot excuse his failure to comply with those Rules, especially at this late stage in the proceeding and after the Board’s numerous clear warnings that strict compliance would be required.

For these reasons, and those set forth in Opposer’s Motion, 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: October 14, 2008

Respectfully submitted,



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David M. Kelly  
Linda K. McLeod  
Jonathan M. Gelchinsky

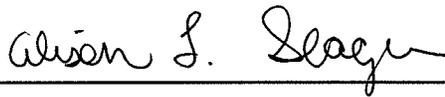
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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing OPPOSER'S REPLY IN SUPPORT OF ITS 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 14th day of October 2008, upon Bryan Broehm at the following address:

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

  
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