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

Proceeding	91177540
Party	Defendant OnPoint Community Credit Union
Correspondence Address	STEPHEN F. COOK BULLIVANT HOUSER BAILEY PC 888 SW 5TH AVE STE 300 PORTLAND, OR 97204-2089 UNITED STATES
Submission	Motion to Dismiss 2.132
Filer's Name	Stephen F. Cook
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Signature	/Stephen F. Cook/
Date	07/14/2008
Attachments	Onpoint - Final Motion to Dismiss for failure to prosecute.pdf (29 pages) (1382368 bytes)

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

Point Mortgage,)	Opposition No.: 91177540
)	
Opposer,)	
)	
v.)	<u>APPLICANT’S MOTION TO DISMISS</u>
)	
OnPoint Community Credit Union,)	
)	
Applicant.)	
)	

MOTION TO DISMISS

Applicant moves to dismiss this opposition under 37 CFR §2.132(a) and TBMP §534.02 due to Opposer’s failure to submit any evidence during its testimonial period.

MEMORANDUM IN SUPPORT

I. Procedural Background

A. The Application

Applicant applied on September 13, 2006 to register ONPOINT MORTGAGE in IC 36 for “mortgage loan services for credit union members.” The application was given Serial No. 78973431 and published for opposition on May 22, 2007.

B. The Opposition and First Motion to Dismiss

Appearing in propria persona, Opposer filed a short, non-conforming notice of opposition on May 29, 2007 in which it cited a registration for POINT MORTGAGE in IC 36 for “mortgage lending” (Registration No. 2977562). Applicant moved to dismiss for failure to state a claim and lack of standing. Opposer did not reply. Applicant requested, therefore, that the Board treat the motion as conceded. Opposer then filed a reply.

Disregarding Opposer’s late-filed reply, the Board nonetheless found that Opposer’s notice of opposition stated a claim and held that “if opposer's title to the registration and the current status of that registration are proven at trial, that will prove opposer's standing to oppose

registration of applicant's mark.” Board Order on Applicant’s Motion to Dismiss dated August 24, 2007 at p.3 (“Order on Motion to Dismiss”). The Board also found that Opposer’s notice did not comply with the procedural requirements of Fed. R. Civ. P. 10(b) and so construed the notice to assist Applicant in its drafting of its answer. The Board construed the notice to mean that: (1) Opposer believes it will be damaged by the registration of ONPOINT MORTGAGE, (2) Opposer claims ownership of U.S. Registration No. 2977562, and (3) Opposer pleads priority and likelihood of confusion as its grounds for opposition. *Id.* at p.4.

C. Subsequent Pleadings

Applicant filed its answer in which it denied that Opposer (1) will be damaged, (2) owns Registration No. 2977562, (3) uses or has priority in POINT MORTGAGE or can show that a likelihood of confusion will result. Applicant asserted as affirmative defenses that Opposer failed to state a claim, that Opposer lacked standing, and that Opposer’s claim was barred by unclean hands and estoppel. Although Applicant counterclaimed for cancellation of Registration No. 2977562 due to fraud in its procurement it has voluntarily dismissed these counterclaims.

D. Discovery

Fact discovery closed on March 24, 2008. No discovery depositions were taken. See Ballard Declaration in Support of Motion to Dismiss at ¶2. Applicant drafted and sent Opposer a Protective Order on April 23, 2008. *Id.* at ¶3. Opposer did not respond. *Id.* Applicant propounded certain written discovery requests. *Id.* at ¶4. Opposer failed to respond to many of the interrogatories and responded otherwise in a cursory, incomplete, and inconsistent fashion. *Id.*; Exh. B at letter dated May 8, 2008. Opposer propounded one set of interrogatories. *Id.* at ¶5; Exh. A. Through letters and e-mail exchanges, Applicant attempted to meet and confer and explain the parties’ obligation to provide discoverable evidence. *Id.* at ¶5, Exh. B. Opposer did not respond to either letter and, in a short e-mail exchange, promised to supplement its document production. *Id.* at Exh.B, e-mail from Opposer dated May 20, 2008. Opposer failed to do so. *Id.*

E. Opposer’s Testimonial Period

Opposer’s testimonial period ended on June 22, 2008. Opposer did not take any evidence nor did it enter any evidence or notices of reliance into the record. *Id.* at ¶7.

II. Argument

A. Basis For Opposition

According to the Board’s construction of the opposition notice, the sole basis plead by

Opposer to satisfy its standing and claim of priority is Registration No. 2977562. While those opposing a registration may establish standing and priority of use through common law rights,¹ Opposer in this case did not plead that it had any such rights in POINT MORTGAGE—or that it even used the phrase as a mark in commerce—and so the Board properly did not construe Opposer’s notice as alleging ownership of any common law rights.

In any event, Opposer did not enter into the record any evidence—at all—and so has no basis to support a claim that it uses POINT MORTGAGE in commerce or that it owns any common law rights in that alleged mark. Absent such evidence, Opposer is left with the disputed Registration No. 2977562 as its sole basis for opposition.

B. No Evidence Is Of Record

To make its prima facie case, Opposer must establish by a preponderance of the evidence that it owns Registration No. 2977562, that it has priority of use of POINT MORTGAGE, and that it can prevail on its likelihood of confusion claim. See *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 1370 (Fed.Cir.2002) (“The burden of proof rests with the opposer ... to produce sufficient evidence to support the ultimate conclusion of likelihood of confusion.”) (citing *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1359 (Fed.Cir.2001)).²

(i) Registration No. 2977562 not entered into evidence

Though the Board provided Opposer with clear notice that Registration No. 2977562 is the sole basis for its opposition, and Applicant made clear in its answer that the ownership and validity of that registration is in dispute, Opposer did not make—or even attempt to make—the registration of record during its testimonial period. The rules for doing so, however, are not only “simple and clear,” they are mandatory. *Hewlett Packard v. Olympus Corp.*, 931 F.2d 1551, 1554 (Fed. Cir. 1991) (discussing the introduction of registrations into evidence and affirming dismissal of an opposition under 37 CFR §2.132(a) for failure to prosecute); *Industrial Adhesive Company v. Borden, Inc.*, 218 USPQ 945, 948 (TTAB 1983) (“There can be no doubt but that

¹ See *General Motors Corp. v. Aristide & Co., Antiquaire de Marques*, Opposition No. 91167007, p.6 (April 21, 2008)(precedential).

² See also *Sanyo Watch Co. v. Sanyo Electric Co., Ltd.*, 691 F.2d 1019, 1022 (Fed.Cir.1982) (affirming dismissal of an opposition under 37 CFR §2.132(a) for failure to prosecute and noting that opposer is obligated to provide sufficient proof to negate the applicant’s right to a registration.); *Hydro-Dynamics Inc. v. George Putnam & Company Inc.*, 811 F.2d 1470, 1472 (Fed. Cir. 1987) (preponderance of the evidence standard).

these portions of the Trademark Rules of Practice providing for the introduction into evidence of a plaintiff's pleaded registrations are mandatory rather than permissive in nature.”)

(ii) No entry during rebuttal testimony period

Opposer may only introduce evidence and testimony during its *rebuttal* testimony period to deny, explain, or discredit the facts and witnesses adduced by Applicant. It may not introduce evidence relating to facts or witnesses that should have been introduced during its case-in-chief. See *Western Leather Goods Co. v. Blue Bell, Inc.*, 178 USPQ 382 (TTAB 1973). Opposer cannot, therefore, enter Registration No. 2977562 into the record as rebuttal testimony.³

(iii) No admission by Applicant

Applicant alleges that Opposer does not own Registration No. 2977562 and that Opposer does not use POINT MORTGAGE as a mark. The registration for that alleged mark cannot, therefore, be constructively made of record and the merits of Opposer's claims cannot be adjudicated based on the information contained in that registration.⁴ See *Hewlett Packard*, 931 F.2d at 1554 (opposer failed to make out a prima facie case due to its failure to introduce into evidence the registrations cited in its opposition).

(iii) No evidence by way of briefs

If history is a guide, Opposer will eventually submit a brief in response to this motion and attempt to correct its failure to adhere to the evidentiary rules of this proceeding. Opposer cannot, however, introduce by way of a brief any evidence to support any element of its claim. See TBMP §801.01 (“A brief may not be used as a vehicle for the introduction of evidence.”); TBMP §539 (“[e]videntiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony period of the offering party.”). Opposer cannot, therefore, introduce Registration No. 2977562 into evidence by way of a brief.

(iv) No judicial notice

The Board does not take judicial notice of USPTO records. See *Wright Line Inc. v. Data Safe Services Corp.*, 229 USPQ 769, 770 n.5 (TTAB 1985) (“Board does not take judicial notice

³ Applicant has voluntarily dismissed its counterclaims for cancellation of Registration No. 2977562 and so will not be entering the registration into the record.

⁴ This is not a case in which the applicant admits the opposer owns a valid and subsisting registration. See TBMP §704.03(b)(1)(A) (“A Federal registration owned by a plaintiff (including a counterclaimant) will be deemed by the Board to be of record in an inter partes proceeding if the defendant's answer to the complaint contains admissions sufficient for the purpose.”)

either of applications (or registrations) which reside in the Office, or of papers which may appear therein"). Opposer cannot introduce Registration No. 2977562 into evidence, therefore, by way of judicial notice.

In sum, Registration No. 2977562 is not of record—a record that is, in fact, wholly devoid of any evidence to support the necessary findings that Opposer has standing, priority of use of POINT MORTGAGE, and that a likelihood of confusion will result if Applicant's mark is registered. Because Opposer has not proved its ownership of Registration No. 2977562 or any prior proprietary trademark right, it cannot prevail in its opposition—which should, therefore, be dismissed.

C. Dismissal Is Appropriate

The Board's decision on whether to dismiss this opposition for failure to prosecute may be reviewed for an abuse of discretion. *Hewlett Packard*, 931 F.2d at 1552.

(i) Opposer failed to prosecute

It is not an abuse of discretion to dismiss an opposition when: (1) the opposer chooses not to hire counsel, (2) files a non-conforming notice of opposition, (3) ignores the deadline to reply to a motion to dismiss, (4) does not cooperate during discovery, and (5) neither takes nor submits any evidence during its testimonial period. In addition, Opposer did not even contact Applicant or its attorneys during, or anytime after, Opposer's testimonial period and has not sought a stipulation to extend or re-open its testimonial period. Ballard Dec. at ¶8.

This wholesale disregard for prosecuting a proceeding is inexcusable—especially in light of the fact that Opposer initiated it, the Board pointedly informed Opposer that “strict compliance” with the rules of this proceeding was expected and specifically informed Opposer 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.” See Order on Motion to Dismiss at pp. 5-6. Applicant, for its part, attempted to meet and confer with Opposer regarding discovery but was essentially ignored. Ballard Dec. at ¶6; Exh. B.

(ii) No “excusable neglect”

Opposer may argue that “excusable neglect” accounts for its failure to prosecute this proceeding. Excusable neglect is the failure to take proper steps at the proper time—not because of carelessness, inattention, or disregard of the process, but because of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel, or on

promises made by the adverse party. *Hewlett Packard*, 931 F.2d at 1553.⁵

The determination of what constitutes excusable neglect is within the sound discretion of the Board. See TBMP §§509.01, 535.02. Whether a party's neglect is excusable requires evaluating (1) the prejudice to the other party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the party's reasonable control, and (4) whether the party acted in good faith. *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997) (following *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993)).

The prejudice to Applicant in this case due to Opposer's neglect is the unnecessary delay in determining whether Applicant owns the unclouded, exclusive right to use ONPOINT MORTGAGE as a mark to brand its "mortgage loan services" and to put all others on notice of those rights. Opposer asserts that its alleged rights in POINT MORTGAGE precludes Applicant's lawful use of ONPOINT MORTGAGE. As noted in its application to register the mark, however, Applicant owns a family of "OnPoint" marks in the financial services industry, including ONPOINT (Reg. No. 3177558), ONPOINT COMMUNITY CREDIT UNION (Reg. No. 3177584), and ONPOINT COMMUNITY CREDIT UNION REAL. SMART. VALUE. (Reg. No. 3177583). Applicant's branding and marketing decisions relating to its "OnPoint" mortgage lending services are therefore only tentative, and are restricted, pending the outcome of this proceeding—which adversely affects not only Applicant's mortgage services' advertising but the company's overall marketing theme and efforts.

The length of Opposer's delay is admittedly not substantial if the delay is measured from the start of its testimonial period (May 22, 2008) to now—approximately 45 days. The more relevant time period, however, starts from when Opposer could begin to prosecute its opposition (August 24, 2007, the date the Board issued its ruling on Applicant's Motion to Dismiss) to now—approximately 320 days. During that time, the only action initiated by Opposer was to propound one set of interrogatories—which mostly sought the names of persons with discoverable information but who were not subsequently deposed or called to testify. Ballard Dec. at ¶5; Exh. A. Opposer's delay in *entering* evidence during its testimonial period is exacerbated, therefore, because it neglected to *collect* evidence that could be entered into the

⁵ See also TBMP §509.01(b)(1) ("A party moving to reopen its time to take required action must set forth with particularity the detailed facts upon which its excusable neglect claim is based; mere conclusory statements are insufficient.")

record to support its claim.

Applicant does not know the reason for Opposer's delay but notes that its failure to take any meaningful action during the past 320 days can be construed as an abandonment of its claim. As for Opposer's delay in entering evidence during its testimonial period, that is not surprising in light of the fact that it collected very little to enter. Whatever reason may be offered, moreover, needs to be tempered by the fact that the Board *informed* Opposer that strict compliance with the rules of this proceeding was expected and that all evidence must be introduced pursuant to those rules. The Board even provided Opposer with an internet address where those rules could be found. Opposer could have, at the very least, entered into evidence an appropriate copy of Registration No. 2977562—the sole basis to support its standing and claim of priority.

Opposer has not acted in good faith during this proceeding as shown by its minimal notice of opposition, its late-filed brief in opposition to the first motion to dismiss, its failure to cooperate during discovery, and its failure to seek a stipulation to extend or reopen its testimony period.

III. Conclusion

For the foregoing reasons, Applicant requests that the opposition be dismissed under 37 CFR §2.132(a) and TBMP §534.02 due to Opposer's failure to prosecute this proceeding.

Date: July 14, 2008

Respectfully Submitted,

By: /s/ Stephen F. Cook

Stephen F. Cook
Bullivant Houser Bailey PC
888 S.W. Fifth Ave., Suite 300
Portland, Oregon 97204
Attorneys for Applicant

OnPoint Community Credit Union,

Applicant.

**DECLARATION OF DANIEL N. BALLARD
IN SUPPORT OF APPLICANT'S MOTION TO DISMISS**

I, DANIEL N. BALLARD, declare as follows:

1. I am an attorney licensed to practice law in the State of California and until recently was employed by the law firm of Bullivant Houser Bailey PC, counsel for Applicant OnPoint Community Credit Union, Inc. ("Applicant"). I am now employed by Sequoia Counsel, PC and have personal knowledge with respect to the matters stated herein, and could and would testify to the same if called as a witness in this proceeding.

2. Neither Opposer Point Mortgage ("Opposer") nor Applicant conducted any discovery depositions during this proceeding.

3. I prepared and mailed to Opposer a draft Protective Order on April 23, 2008. Opposer did not respond.

4. I propounded the following written discovery on Opposer: Two sets of requests for production of documents, two sets of requests for admissions, and one set of interrogatories. Although Opposer responded, it failed to respond, at all, to Interrogatory Nos. 3, 5, 6, 7, 8, 14, and 25. Opposer produced only twelve (12) documents in response to the document requests.

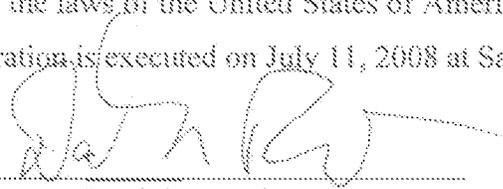
5. Opposer propounded one set of interrogatories on Applicant, many of which requested the names of persons having discoverable information. Attached hereto as Exhibit A is a true and correct copy of the interrogatories and Applicant's responses. Opposer did not take

remain by phone call. In an e-mail to me dated May 29, 2008 Opposer promised to supplement its document production. Opposer did not do so.

7. Opposer did not take any evidence nor did it enter any evidence or notices of reliance into the record during its testimony period.

8. Opposer did not contact Applicant or its attorneys during, or anytime after, Opposer's testimonial period and has not sought a stipulation to extend or re-open its testimonial period.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed on July 11, 2008 at Sacramento, California.



Daniel N. Ballard

EXHIBIT A

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

Point Mortgage,)	Opposition No.: 91177540
)	
Opposer,)	
)	
v.)	<u>RESPONSE TO OPPOSER'S FIRST</u>
)	<u>SET OF INTERROGATORIES</u>
OnPoint Community Credit Union,)	
)	
Applicant.)	

PROPOUNDING PARTY: POINT MORTGAGE.

RESPONDING PARTY: ONPOINT COMMUNITY CREDIT UNION

SET NO.: ONE

OBJECTIONS

1. OnPoint Community Credit Union (“OCCU”) objects to each Request to the extent it imposes obligations outside the scope of Rule 26 of the Federal Rules of Civil Procedure, TBMP section 405.02, or applicable case law.

2. OCCU objects to Opposer’s Instruction (G) as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. OCCU asserts this objection specifically toward the portion of the Instruction that defines the relevant time period for OCCU’s investigation into the matters for which discovery is sought as “the time beginning with the incorporation of APPLICANT to the date of response to these Interrogatories.” OCCU will not respond using that time period as the relevant period for investigation but will respond using the time period beginning from the date OCCU first began to publicly advertise its mortgage services using the ONPOINT MORTGAGE trademark.

3. These Objections are incorporated into each of the following Responses as if set

forth therein in full.

INTERROGATORY REQUEST NO. 1:

Identify by title, full name, present business and home address, and all officers, agents, employees, having any knowledge of the matters alleged in the application for registration of the mark being opposed.

RESPONSE TO INTERROGATORY NO. 1:

OCCU objects to this Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks (1) the home address of any person and (2) information about persons not associated with OCCU (such as OCCU customers and others exposed to the ONPOINT MORTGAGE trademark as used in commerce). OCCU further objects in that the Request seeks information protected by the attorney-client privilege and by the doctrine of work product immunity.

Subject to all objections, OCCU responds as follows:

Mary Jane Campbell, Sr. VP of Sales and Marketing
OnPoint Community Credit Union
c/o Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Roxanne Griffin, Chief Financial Officer
OnPoint Community Credit Union
c/o Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Joan Doherty, Marketing Services Manager
OnPoint Community Credit Union
c/o Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Daniel Ballard
Bullivant Houser Bailey PC
1415 L Street, Suite 1000
Sacramento, CA 95814

Tina Dippert
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Weber Marketing Group
425 Pontius Ave., N, Ste. 400
Seattle, WA 98109

Digital Insight
Division Headquarters
26025 Mureau Road
Calabasas, CA 91302

INTERROGATORY REQUEST NO. 2:

State the dates and total amount of revenue derived from the goods / services using the mark sought to be registered by the Applicant for the past 5 years, on a yearly basis.

RESPONSE TO INTERROGATORY NO. 2:

OCCU objects to this Request as ambiguous in that it seeks both “the dates” of revenue derived through use of the ONPOINT MORTGAGE trademark and the amount of that revenue “on a yearly basis.” This Request is, therefore, internally inconsistent and irreconcilable. OCCU further objects to the Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that the Request seeks revenue information relating to “goods” sold by OCCU under the ONPOINT MORTGAGE mark and revenue information “for the past 5 years.” As noted in the trademark registration application that

Opposer is opposing, OCCU is not using ONPOINT MORTGAGE on goods and has not used the mark in commerce “for the past 5 years.” OCCU further objects in that the Request seeks information protected by the attorney-client privilege and by the doctrine of work product immunity. OCCU further objects in that the Request seeks information that is confidential and proprietary and constitutes trade secret information.

Subject to all objections, OCCU responds as follows: OCCU cannot respond to this Request as presented but will appropriately respond to a timely amended Request that (1) resolves the ambiguity regarding the format for the Response, (2) is limited to revenue derived from OCCU’s use of the mark on services offered during the period of time it has used the mark in commerce, and (3) subject to an appropriate Protective Order. A Protective Order that is agreeable to OCCU is attached hereto as Exhibit A which OCCU invites Opposer to review, amend as mutually agreeable, and which the parties may request be entered as the Order of the Board. Please note that the attached Protective Order amends the standard Protective Order currently applicable to this proceeding.

INTERROGATORY REQUEST NO. 3:

Has APPLICANT caused any other entity or person to promote or advertise its goods/services? If so, state the names and addresses of these persons or entities.

RESPONSE TO INTERROGATORY NO. 3:

OCCU objects to the Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that the Request is not limited to information sought about only those who OCCU has caused to “promote or advertise” OCCU’s mortgage services but rather about all those who OCCU has caused to promote or advertise all of its “goods/services.” OCCU will limit its Response to only those “other” entities or persons who

OCCU has caused to “promote or advertise” OCCU’s mortgage services.

Subject to all objections, OCCU responds as follows: Yes.

Weber Marketing Group
425 Pontius Ave., N, Ste. 400
Seattle, WA 98109
Digital Insight
Division Headquarters
26025 Mureau Road
Calabasas, CA 91302

INTERROGATORY REQUEST NO. 4:

State the names, addresses and telephone numbers of all persons or entities through which Applicant has published and/ or advertised the goods/ services bearing the mark sought to be registered.

RESPONSE TO INTERROGATORY NO. 4:

Subject to all objections, OCCU responds as follows: APPLICANT has published or advertised its services using the mark sought to be registered only on applicant's website and in printed brochures distributed by applicant regarding home loan products.

INTERROGATORY REQUEST NO. 5:

State the names, addresses and telephone numbers of all persons or entities that have written, telephoned or in any way contacted Applicant requesting the goods or services of Opposer.

RESPONSE TO INTERROGATORY NO. 5:

Subject to all objections, OCCU responds as follows: None.

INTERROGATORY REQUEST NO. 6:

Identify by title, full name, present business address and home address, all persons who participate in and/ or authorize and/ or direct the promotion of APPLICANT's goods/

services?

RESPONSE TO INTERROGATORY NO. 6:

OCCU objects to this Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that the Request seeks (1) the home address of any person and (2) is not limited to information sought about only those who “participate in and/or authorize and/or direct the promotion” of OCCU’s mortgage services but rather about all those who “participate in and/or authorize and/or direct the promotion” of all of OCCU’s “goods/services.” OCCU further objects in that the terms “participate” and “authorize” are vague and ambiguous. OCCU further objects to the Request as cumulative, and therefore unduly burdensome, in light of Request Nos. 3 and 4. OCCU will limit its response to only those OCCU employees and agents who direct the marketing efforts and/or advertising for OCCU’s mortgage services.

Subject to all objections, OCCU responds as follows:

Mary Jane Campbell, Sr. VP of Sales and Marketing
OnPoint Community Credit Union
c/o Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Roxanne Griffin, Chief Financial Officer
OnPoint Community Credit Union
c/o Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Joan Doherty, Marketing Services Manager
OnPoint Community Credit Union
c/o Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

INTERROGATORY REQUEST NO. 7:

When did APPLICANT, or any of its agents, learn of the existence of OPPOSER's business?

RESPONSE TO INTERROGATORY NO. 7:

Subject to all objections, OCCU responds as follows: OCCU first learned of Opposer's business in early June 2007 when Opposer filed its Opposition with the Board.

INTERROGATORY REQUEST NO. 8:

Did APPLICANT, or any of its agents, conduct a mark search or investigation prior to the adoption of the mark being opposed by APPLICANT. If so, who conducted it, when, what were the results and whether or not a written report exists.

RESPONSE TO INTERROGATORY NO. 8:

OCCU objects in that this Request seeks information protected by the attorney-client privilege and by the doctrine of work product immunity. OCCU further objects in that the word "investigation" is vague and ambiguous and that the Request is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to all objections, OCCU responds as follows: Yes. A search for marks similar to "OnPoint" for financial services was conducted around April 1, 2005. A search report was prepared and, in that report, neither the Opposer's name "Point Mortgage Corporation" nor its "Point Mortgage" trademark was identified. No search specifically for "OnPoint Mortgage" was conducted.

INTERROGATORY REQUEST NO. 9:

State the name(s) of the person(s) responsible for adopting the mark that is the subject of the present opposition.

RESPONSE TO INTERROGATORY NO. 9:

OCCU objects in that the phrase “responsible for adopting the mark” is vague and ambiguous. OCCU further objects to this Request as cumulative, and therefore unduly burdensome, in light of Request Nos. 3, 4, and 6.

Subject to all objections, OCCU responds as follows: OCCU’s ultimate decision to market and advertise its mortgage services using the ONPOINT MORTGAGE trademark resulted from a collaborative endeavor that included those persons listed in response to Request Nos. 3, 4, and 6.

INTERROGATORY REQUEST NO. 10:

State any instances of actual confusion (misdirected checks, correspondence, telephone calls, documents, etc.) in which APPLICANT received documents or telephone calls intended for OPPOSER by describing the originator, date and document involved.

RESPONSE TO INTERROGATORY NO. 10:

Subject to all objections, OCCU responds as follows: None.

INTERROGATORY REQUEST NO. 11:

State the advertising media (radio, TV., newspapers, yellow pages, etc.) used by APPLICANT to promote its goods and/ or services by listing the names of the companies, address and duration of the advertisements.

RESPONSE TO INTERROGATORY NO. 11:

OCCU objects to this Request as wholly cumulative in light of Request Nos. 3 and 4 and is, therefore, unduly burdensome. OCCU will not respond to this Request and refers Opposer to OCCU’s responses to Request Nos. 3 and 4.

INTERROGATORY REQUEST NO. 12:

What are the names and addresses of those persons having knowledge or information about the matters asserted in APPLICANT's answer?

RESPONSE TO INTERROGATORY NO. 12:

Subject to all objections, OCCU responds as follows:

Mary Jane Campbell, Sr. VP of Sales and Marketing
OnPoint Community Credit Union
c/o Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Stephen F. Cook
Bullivant Houser Bailey PC
888 SW 5th Ave., Ste. 300
Portland, OR 97204

Johnny Margarini
President, Point Mortgage Corporation
4538 Bonita Road
Bonita, CA 91902

All employees, joint venturers, affiliates, and agents of Point Mortgage Corporation

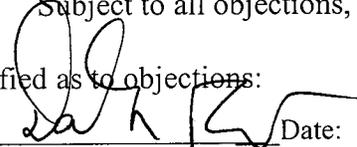
INTERROGATORY REQUEST NO. 13:

Has APPLICANT licensed, or mortgaged or assigned any interest in the mark that is the subject of this opposition proceeding? If so, list those entities and their addresses.

RESPONSE TO INTERROGATORY NO. 13:

Subject to all objections, OCCU responds as follows: No.

Verified as to objections:

By:  Date: April 23, 2008
Daniel N. Ballard
Bullivant Houser Bailey PC
1415 L St., Suite 1000
Sacramento, CA 95814
Attorneys for OCCU

Verified as to substance:

By: _____ Date: April __, 2008
Mary Jane Campbell
Sr. VP of Sales and Marketing
OnPoint Community Credit Union

EXHIBIT B

DANIEL N. BALLARD
Direct Dial: (916) 930-2568
E-mail: daniel.ballard@bullivant.com

May 8, 2008

Via E-mail (Johnny@pmcloans.com) and Regular Mail

Johnny Margarini
4538 Bonita Road
Bonita, CA 91902

Re: Point Mortgage, Inc. v. OnPoint Community Credit Union, Inc.
Trademark Opposition Proceeding

Dear Mr. Margarini:

We are in receipt of Point Mortgage's Responses to the various discovery requests propounded on your company by OnPoint Community Credit Union, Inc. ("OCCU"). Many of your Responses do not comply with the applicable discovery rules. We would like to work with you to resolve the following discovery issues informally and without resorting to motions practice before the Trademark Trial and Appeal Board.¹ If you have any questions about how to respond please call me without delay.

I. Interrogatories

A. You have chosen not to respond—at all—to **Interrogatory Nos. 3, 5, 6, 7, 8, 14, and 25**. By wholly failing to respond to these Requests you have waived all objections to them and have no bases on which to refuse to respond. Each of the Requests, moreover, seek information routinely sought in opposition proceedings during which the Applicant counterclaims to cancel the registration of the asserted trademark. In short, please immediately—and fully—respond to each of these interrogatories.

B. You have inadequately responded to **Interrogatory No. 1** which asks you to: "Describe with specificity how, where, and to whom YOU advertise YOUR mortgage services." You responded: "Realtors and the public." One issue that will be in contention in

¹ See, TBMP §408.01 ("The Board expects parties (and their attorneys or other authorized representatives) to cooperate with one another in the discovery process, and looks with extreme disfavor on those who do not.).

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this proceeding is whether your company is, in fact, using POINT MORTGAGE as a trademark. This request seeks information specifically directed to that issue—yet you have chosen not to describe how and where your company advertises its services. Please do so fully.²

C. You replied “Yes” to **Interrogatory No. 4** which asked whether “YOU have within the last three years used ‘Point Mortgage’ apart from the word ‘Corporation’ when advertising or otherwise promoting YOUR mortgage services.” However, you have not provided any documents that support your assertion even though we requested in numerous document requests that you provide copies of all the advertisements and other promotional material that contain the alleged POINT MORTGAGE trademark. Please direct us to any evidence you have produced that shows the use of POINT MORTGAGE apart from the word “Corporation.”

D. You provided identical Responses to **Interrogatory Nos. 9 and 11**. Yet those requests seek fundamentally different information. Interrogatory No. 9 seeks “the number of mortgage loans that YOU *issued* to borrowers as a ‘mortgage lender’” while Interrogatory No. 11 seeks “the number of loans that YOU *brokered* since” opening your business. A key issue in this proceeding is whether your company actually lends money to consumers or whether it simply brokers loans. While we understand from your Response to Interrogatory No. 20 that you use the terms “mortgage lending” and “mortgage brokering” interchangeably, the services described by those phrases are fundamentally different—as you noted yourself in response to Interrogatory 20. Please amend your response to one or both of these Interrogatories to distinguish between the number of loans that your company has *issued* and the number of loans that your company has *brokered*.

² See, TBMP §408.02 (“A party served with a request for discovery has a duty to thoroughly search its records for all information properly sought in the request, and to provide such information to the requesting party within the time allowed for responding to the request. A responding party which, due to an incomplete search of its records, provides an incomplete response to a discovery request, may not thereafter rely at trial on information from its records which was properly sought in the discovery request but was not included in the response thereto (provided that the requesting party raises the matter by objecting to the evidence in question) unless the response is supplemented in a timely fashion pursuant to Fed. R. Civ. P. 26(e)).



II. Document Requests

A. In **Document Request No. 1**, we sought from you “[o]ne copy of each and every print advertisement that YOU ... have made available or distributed to the public since January 2003 to the present that demonstrates, shows, evidences, or displays any use of the phrase ‘Point Mortgage.’” In response, you produced five documents which we labeled PM0001 through PM0005. We then asked you to admit that you have no other responsive documents in your possession, custody, or control. You denied that request for admission. If you have any such additional documents you are obligated to produce them immediately. If you do not, you are obligated to amend your Response to Request for Admission No. 39 to admit that you do not. Also, please identify which of the documents you have already produced that are responsive to Document Request No. 1.

B. In response to **Document Request No. 2** you responded that you would “make all reasonable efforts to locate the responsive documents and forward them to Applicant.” Please do so.

C. In **Document Request No. 3** we sought from you “[o]ne copy of each and every item of marketing material that YOU ... have made available or distributed to the public since January 2003 to the present that demonstrates, shows, evidences, or displays any use of the phrase ‘Point Mortgage.’” You objected on the grounds that the phrase “marketing material” is ambiguous. The word “marketing” is well-known, however, and its meaning certainly understood by entrepreneurs such as yourself who are responsible for their company’s promoting and advertising efforts. “Marketing” means “the process or technique of promoting, selling, and distributing a product or service.”³ In response to Document Request No. 3 you also produced, subject to your objection, five documents which we labeled PM0001 through PM0005. We then asked you to admit that you have no other responsive documents in your possession, custody, or control. You denied that request for admission and again asserted that the phrase “marketing material” is ambiguous. In light of the definition now provided, you are obligated to immediately produce all responsive documents. If no such documents exist you are obligated to amend your Response to Request for Admission No. 40 to admit that you do not. Also, please identify which of the documents you have already produced that are responsive to Document Request No. 3.

D. In **Document Request No. 4** we sought from you “[a]ny or all DOCUMENTS that demonstrate, show, evidence, or display YOUR ... use of the phrase ‘Point Mortgage’ as

³ See, merriam-webster.com.



a trademark.” In response, you produced five documents which we labeled PM0001 through PM0005. We then asked you to admit that you had no other responsive documents in your possession, custody, or control. You denied that request for admission. If you have any such additional documents you are obligated to produce them immediately. If you do not, you are obligated to amend your Response to Request for Admission No. 41 to admit that you do not. Also, please identify which of the documents you have already produced that are responsive to Document Request No. 4.

E. **Document Request Nos. 7 and 16** seek from you documents that evidence or relate to any confusion in the marketplace that has allegedly been caused by OCCU’s use of ONPOINT MORTGAGE. In response, you first asserted that “Applicant has not used ‘Onpoint Mortgage’ as a mark” and “the requested documents do not exist.” You now assert, however, that “The responsive documents have been made available for inspection.” Attached to this letter are the documents you produced in response to OCCU’s Second Request for Production of Documents. We have labeled these documents PM0006 – PM0012. Please identify which of these documents is responsive to Document Request No. 16.

F. **Document Request No. 13** seeks “[o]ne copy of each document that demonstrates, shows, or evidences that YOU directly provided money to one or more borrowers in October 2003, or by six months after that date, in exchange for a promissory note or mortgage on real property.” In response, you objected that the request was “unduly burdensome” and produced one document that we have labeled PM00012. That document, however, is dated April 21, 2008 and is therefore not responsive to Document Request No. 13. Assuming your company does actually lend money to consumers, then a follow-on issue will be whether those services were first offered in October 2003—as you declared under penalty of perjury to the Trademark Office. Therefore, if you have any documents in your possession, custody, or control that are responsive to Document Request No. 13 please produce them immediately. If not, you are obligated to amend your Response to Document Request No. 13 to admit that you do not have any such documents.

IV. Request for Admissions

A. In response to **Request No. 19** you denied that “mortgage lending and brokering mortgage loans between homebuyers and mortgage lenders are different.” Yet in response to Interrogatory No. 20, you explained that “Mortgage lending is funding a loan, Mortgage Brokering is the brokering of a loan. We can do both and we use the terms interchangeably.” It is clear that you know the difference between mortgage lending services



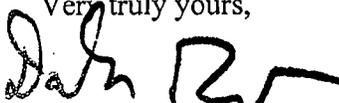
Johnny Margarini
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and mortgage brokerage services. Please amend your Response to Request No. 19 to admit that these services are different.

B. In response to Request No. 49 you denied that you have no evidence of any actual confusion occurring in the marketplace due OCCU's use of ONPOINT MORTGAGE—that denial, in effect, serves as an assertion that you do indeed have such evidence. Yet, in response to Interrogatory No. 18 asking you to disclose all the facts that support your assertion that confusion is likely due to OCCU's use of ONPOINT MORTGAGE you did not disclose any facts but simply stated that the marks are “almost identical” and the services provided by both parties are “identical.” If you do indeed have evidence of actual confusion occurring in the marketplace then please produce it. Otherwise, you must amend your Response to Request No. 49 to admit that you have no such evidence.

Please respond to these issues no later than May 15, 2008. I am available at your convenience should you wish to discuss these issues over the telephone. Moreover, the Trademark Trial and Appeal Board interlocutory attorneys may be able to assist in a resolution of these discovery issues. In any event, we need to either reach agreement on these issues before March 15, 2008 or I will have no option other than to filed a motion to compel proper responses.

Very truly yours,



Daniel N. Ballard

DNB:mpv
Enclosures

10554598.1



DANIEL N. BALLARD
Direct Dial: (916) 930-2568
E-mail: daniel.ballard@bullivant.com

May 16, 2008

Via E-mail and Regular Mail

Johnny Margarini
4538 Bonita Road
Bonita, CA 91902

Re: Point Mortgage, Inc. v. OnPoint Community Credit Union, Inc.
Trademark Opposition Proceeding

Dear Mr. Margarini:

This follows-up the proposed Protective Order that I sent to you on April 23, 2008 and my letter mailed and e-mailed to you on May 8, 2008 regarding certain discovery matters.

I sent you a proposed Protective Order for your review and comment as part of OnPoint Community Credit Union's ("OCCU") Response to your Interrogatory No. 2 seeking financial information about the company. You have yet to acknowledge receipt of the Proposed Order or provide me with any feedback on its provisions. **Please do so.** See, TBMP section 414(18) ("Annual sales and advertising figures, stated in round numbers, for a party's involved goods or services sold under its involved mark are proper matters for discovery; if a responding party considers such information to be confidential, disclosure may be made under protective order.").

You have neither acknowledged nor responded to my May 8, 2008 letter regarding the outstanding issues with your discovery Responses. In my letter, I asked you to respond by May 15, 2008 to provide us with time to resolve the issues before it becomes necessary for me to file a motion to compel your further responses. Handling these types of procedural matters informally is not only most efficient, we have an obligation to do so before we involve the Trademark Trial and Appeal Board. **Please let me know if you intend to cooperate** to resolve these discovery matters. If you are in the process of amending your discovery responses as I requested, then please let me know when those amended Responses will be provided. If you need more time to respond we can discuss a stipulation to provide you with additional time.

Merged with Bartel Eng & Schroder, October 2005

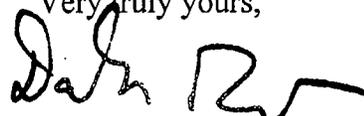
Suite 1000, 1415 L Street, Sacramento, CA 95814 • 916.930.2500 Fax 916.930.2501

www.bullivant.com | Seattle Vancouver Portland Sacramento San Francisco Las Vegas

Johnny Margarini
May 16, 2008
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It may be most efficient to discuss these matters over the telephone. I have left one voice mail message for you (at your 619-75-4040 office number) but you have not yet returned the call.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dan Ballard", with a stylized flourish at the end.

Daniel N. Ballard

DNB:mpv
10567528.1



Vida, Molly

From: Johnny [johnny@pmcloans.com]
Sent: Tuesday, May 20, 2008 11:15 AM
To: Ballard, Daniel
Subject: RE: F/U Point Mortgage trademark matter

Mr. Ballard,

I am in receipt of your letter from the May 20, 2008 and also the letter from May 8, 2008 I am in the process of gathering documents to supplement my first response.

Johnny Margarini

President
Point Mortgage

From: Ballard, Daniel [mailto:daniel.ballard@bullivant.com]
Sent: Monday, May 19, 2008 2:21 PM
To: johnny@pmcloans.com
Subject: F/U Point Mortgage trademark matter

Mr. Margarini,

Please find attached a letter to you dated May 16, 2008.

<<5-16-08 - Ltr to Margarini (2).PDF>>

Should you wish to discuss the issues raised in the letter, please contact me via my cell phone (916-607-3904).

Regards,

Dan Ballard

Daniel N. Ballard
Bullivant Houser Bailey PC
Merged with Bartel Eng & Schroder, October 2005
1415 L Street, Suite 1000
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direct dial: 916.930.2568 - fax: 916.930.2501
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Seattle . Vancouver . Portland . **Sacramento** . San Francisco . Las Vegas

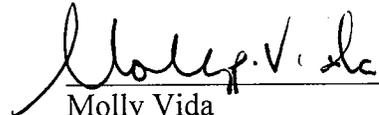
mail.bullivant.com made the following annotations

Please be advised that, unless expressly stated otherwise, any U.S. federal tax advice contained in this e-mail,

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing APPLICANT'S MOTION TO DISMISS and the DECLARATION OF DANIEL N. BALLARD IN SUPPORT OF APPLICANT'S MOTION TO DISMISS have been served on Point Mortgage, c/o Johnny Margarini by mailing said copies on July 14, 2008 via First Class Mail, postage prepaid to:

Johnny Margarini
Point Mortgage
9999 Sunset Dr., #208
Miami, FL 33173



Molly Vida