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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 OnPoint Community Credit Union 2701 NW Vaughn St., Ste. 800 Portland, OR 972083750
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Submission	Motion to Dismiss - Rule 12(b)
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Date	07/18/2007
Attachments	OnPoint Reply to Non-Opp to Motion to Dismiss.pdf (3 pages)(13935 bytes)

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

Point Mortgage, Opposer, v. OnPoint Community Credit Union, Applicant.	)))))))))	Opposition No.: 91177540 **APPLICANT'S REPLY TO OPPOSER'S FAILURE TO RESPOND TO THE MOTION TO DISMISS**

INTRODUCTION

Applicant filed a Motion to Dismiss this opposition proceeding in light of Opposer Point Mortgage's failure to state a claim for which relief could be granted. The Motion was served by first class mail on June 21, 2007. A copy of the proof of service was filed concurrently with the Motion. Opposer was obligated, therefore, to respond to the Motion no later than July 11, 2007.[1] Opposer has not responded.[2]

ARGUMENT

I. The Motion to Dismiss Should Be Treated as Conceded

When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded. 37 C.F.R. §2.127(a); TBMP §502.04; *Central Manufacturing Inc. v. Third Millennium Technology, Inc.*, 61 USPQ2d 1210, 1211 (TTAB 2001) (motion to dismiss treated

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[1] TBMP § 502.02(b) (citing 37 C.F.R. § 2.119(c) and stating that a brief in response to a motion must be filed within 20 days from the date of service of the motion if service of the motion was made by first class mail).

[2] The purpose of filing this Reply Brief is to bring Opposer's failure to respond to the Board's attention and to present Applicant's objection to Opposer's untimeliness should Opposer file a response in the future. See, *Western Worldwide Enterprises Group Inc. v. Qinqdao Brewery*, 17 USPQ2d 1137, 1139 n.6 (TTAB 1990) (failure to object to the untimely filing of a memorandum opposing a motion is a waiver of the objection).

as conceded). Opposer has chosen not to file a brief in response to the Motion within the time prescribed by the rules.

Opposer's failure is inexcusable because the Motion, in fact and by its very nature, describes the deficiencies in the Notice of Opposition which, if corrected, would have saved it from a finding that it fails to state a claim for which relief could be granted. Even assuming the Board may liberally apply the rules to parties who are not represented by counsel—such as Opposer in this case—there is no justification for doing so when the Opposer fails in all respects to present a compliant Notice of Opposition and then fails to timely amend the Notice when shown how to do so.

Opposer is clearly not motivated to prosecute this opposition. The Board should, therefore, treat the Motion to Dismiss as conceded.

II. The Board May Consider the Motion on its Merits

The Applicant acknowledges that notwithstanding the absence of a brief in opposition to its Motion, the Board nonetheless has the discretion to consider the merits of the Motion. *The Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 (TTAB 1984).

In considering the merits, however, the Board should refuse to consider any late-filed response by Opposer. *Coach House Restaurant v. Coach and Six Restaurant*, 223 USPQ 176, 177 (TTAB 1984) (refusing to consider late-filed brief in opposition to motion because petitioner failed to show "excusable neglect for its failure to file its brief and supporting affidavit within the time provided by the rules of practice.")

On the merits, Applicant's Motion to Dismiss should be granted for the reasons provided in its Memorandum in Support.

CONCLUSION

The Motion to Dismiss should be granted and the opposition dismissed with prejudice.

Date: July 18, 2007

Respectfully Submitted,

By: /s/ Stephen F. Cook

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing REPLY TO OPPOSER'S FAILURE TO RESPOND TO THE MOTION TO DISMISS has been served on Point Mortgage c/o Johnny Margarini by mailing said copy on July 18, 2007, via First Class Mail, postage prepaid to:

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

/s/ Linda Jones
Linda Jones