

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

WINTER/DUNN

Mailed: August 24, 2007

Opposition No. 91177540

Point Mortgage

v.

OnPoint Community Credit
Union

Before Rogers, Walsh, and Mermelstein,
Administrative Trademark Judges:

By the Board:

This case now comes up for consideration of applicant's motion (filed June 21, 2007) to dismiss the opposition under Fed. R. Civ. P. 12(b)(6). Opposer, acting *pro se*, failed to file a timely response.¹ Nonetheless, because applicant's motion is potentially dispositive, we will address the merits of the motion.

The notice of opposition was filed electronically and is comprised of an informational sheet generated by the Electronic System for Trademark Trials and Appeals (ESTTA) from information supplied by opposer ("ESTTA filing form") and a letter from opposer attached thereto. The ESTTA

¹ Opposer's late response, filed July 31, 2007, will be given no consideration.

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filing form lists the opposed application Serial No. 78973431 for the mark ONPOINT MORTGAGE for "mortgage loan services for credit union members," the grounds for opposition, namely, priority and likelihood of confusion, and the "Mark Cited By Opposer As Basis For The Opposition", namely, opposer's Reg. No. 2977562, issued July 26, 2005, for the mark POINT MORTGAGE for "mortgage lending." Opposer's letter, addressed "To whom it may concern" states as follows:

Let this letter serve as a notice of opposition Point Mortgage is a License lender in the state of Florida and is pending license in the state of California.

We believe that the mark OnPoint Mortgage will have a conflict with our Mark Point Mortgage. If you have any questions regarding this matter you can contact me at the below ref[e]renced number.

To withstand a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, a notice of opposition need only allege such facts as would, if proven, establish opposer's standing to maintain the proceeding and a ground or grounds for refusing registration to applicant. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).

In moving to dismiss the notice of opposition, applicant describes the allegations in opposer's letter attached to the ESTTA filing form as "the sum total" of the notice of opposition, does not address the content of the ESTTA filing form in any way, and alleges that the

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allegations in the letter fail to plead standing or a valid ground for opposition.

For every submission filed via ESTTA, a filing form is generated. Depending on the type of filing, the filing form either stands alone and serves as the paper being filed, e.g., requests for extensions of time to file a notice of opposition, or the filing form and the attachment thereto are considered a single, integrated filing, e.g., notice of opposition.

PPG Industries Inc. v. Guardian Industries Corp., 73 USPQ2d 1926, 1928 (TTAB 2005). Accordingly, our review of the notice of opposition includes both the ESTTA filing form and opposer's attached letter.

We find that the notice of opposition is legally sufficient. Opposer's identification of its registration by registration number and filing date on the ESTTA filing form constitutes pleading of ownership of a registration. Trademark Rule 2.106(b); 35 C.F.R § 2.106(b). 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. See *King Candy Co. v. Eunice Kings's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Also, the listing of the grounds for the opposition on the ESTTA filing form, i.e., the statutory ground of priority and likelihood of confusion, constitutes sufficient notice pleading of an opposition based on Trademark Act Section 2(d).

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While the substance of the notice of opposition is legally sufficient under Fed. R. Civ. P. 8(a), its form does not comply with Fed. R. Civ. P. 10(b) which requires that "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings." To facilitate applicant's answer to the notice of opposition, the Board construes the notice of opposition as follows:

1. Opposer believes that it will be damaged by registration of applicant's mark "OnPoint Mortgage" shown in application Serial No. 78973431 for all goods and services listed therein, namely, "mortgage loan services for credit union members," and opposes registration of that mark.
2. Opposer claims ownership of U.S. Registration No. 2977562, issued July 26, 2005, for the mark POINT MORTGAGE for mortgage lending services.
3. As its ground for the opposition, opposer pleads priority and likelihood of confusion.

Applicant's motion to dismiss under Rule 12(b)(6) is

DENIED.

Based on the Board's above-referenced construction of the notice of opposition, applicant is allowed until **THIRTY DAYS** from the mailing date of this order to submit its answer.

Representation By Counsel Recommended

Opposer must note that, although Patent and Trademark Rule 10.14, 37 C.F.R. § 10.14, permits any person to represent itself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in *inter partes* proceedings before the Board to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

Strict 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.

Nature of an Opposition Proceeding

Opposer is advised that an *inter partes* proceeding before the Board is similar to a civil action in a Federal district court. There are pleadings, a wide range of possible motions, discovery (a party's use of discovery depositions, interrogatories, requests for production of documents and things, and requests for admission to ascertain the facts underlying its adversary's case), a trial, and final briefs discussing applicable law, followed by a decision on the case. The Board has limited involvement in the parties' discovery activities and does not preside at the taking of testimony.

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All discovery and testimony depositions are taken out of the presence of the Board during the assigned discovery and testimony, i.e. trial, periods. The written transcripts of testimony depositions, together with any exhibits thereto, are then filed with the Board. 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.²

Requirement for Service on Adverse Party of All Papers Filed

In addition, opposer should note that Trademark Rules 2.119(a) and (b), 37 C.F.R. §§ 2.119(a) and (b), require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board.

² The Trademark Trial and Appeal Board Manual of Procedure (TBMP) is available on the USPTO website, at the TTAB's web page: <http://www.uspto.gov/web/offices/dcom/ttab/>.

Proceedings Resumed; Dates Reset

Proceedings are RESUMED. Trial dates, including the close of discovery, are reset as follows:

DISCOVERY PERIOD TO CLOSE:	March 24, 2008
Thirty-day testimony period for party in position of plaintiff to close:	June 22, 2008
Thirty-day testimony period for party in position of defendant to close:	August 21, 2008
Fifteen-day rebuttal testimony period to close:	October 5, 2008

IN EACH INSTANCE, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party **WITHIN THIRTY DAYS** after completion of the taking of testimony. See Trademark Rule 2.125, 37 C.F.R. §2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b), 37 C.F.R. §§2.125(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. §2.129.

NOTE:

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected

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rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>