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

Proceeding	91178655
Party	Defendant International Body Works Inc. d/b/a Massage Masters Massage Therapy Center
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Submission	Motion to Dismiss - Rule 12(b)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ronald M Kaluzna,

Opposer,

Opposition No. 91178655

v.

International Body Works Inc. d/b/a  
Massage Masters Massage Therapy  
Center,

Applicant.

**MOTION TO DISMISS**

Pursuant to Fed. R. Civ. P. 12(b)(6) and TBMP §503, Applicant respectfully submits this motion to dismiss Opposition No. 91178655 filed by Opposer Ronald M Kaluzna. Applicant moves to dismiss the Opposition because (1) the Opposition was not timely filed, (2) Opposer has failed to state a cause upon which relief may be granted under Fed. Rule Civ. P. 12(b)(6) and (3) Opposer has failed to properly plead the Opposition under the Rules of the Trademark Trial and Appeal Board, as well as under the Federal Rules of Civil Procedure.

I. **THE NOTICE OF OPPOSITION WAS FILED AFTER EXPIRATION OF THE OPPOSITION PERIOD.**

A. The Notice of Opposition was Received by the USPTO on July 23, 2007, Well After the End of the Opposition Period.

An opposition must be filed within 30 days from the date of publication of the mark in the Trademark Official Gazette or within any extension of time that has been requested and granted by the Board. See Trademark Rule 2.101(c). The timely filing of documents in the Office requires that the documents actually be received in the Office within the set time period unless such documents are filed in accordance with 37 CFR §§ 2.197 and 2.198 that provide for filing of papers by certificate of mailing and Express Mail, respectively. The thirty-day deadline for filing an opposition is statutory and cannot be waived. See, e.g., In re Cooper, 212 USPQ 469, 1980 WL 30191 (Comm'r Pat & Trademarks 1980) (implying that the thirty day period is statutory and cannot be waived).

In this case, the mark was published for opposition on June 19, 2007. The opposition period expired on July 19, 2007. The date Opposer mailed the Notice of Opposition is unknown, however, Opposer did not mail the Notice of Opposition to the Board prior to July 18, 2007<sup>1</sup>. According to the date stamp attached to the Notice of Opposition, the Notice of Opposition was received by the USPTO on July 23, 2007.<sup>2</sup> See

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<sup>1</sup> Opposer's cover letter is dated 7/18/2007, and the ESTTA pages Opposer included with the Notice of Opposition are dated and timed between 4:04 PM EDT and 4:10 PM EDT on 7/18/2007.

<sup>2</sup>As explained in TMEP § 303.02(b), the USPTO places a bar code label indicating the date of receipt on every document submitted to the USPTO on paper. The label is referred to as the "Office Date" label, and it establishes the date of receipt (i.e., the filing date) of any paper. In this case, the "Office Date" label establishes that the Notice of Opposition was received on 7/23/2007.

USPTO Date Stamp affixed to Notice of Opposition. Because there is no certificate of mailing, the late receipt of the Notice of Opposition is a fatal flaw.

B. The Notice of Opposition Does Not Contain a Proper Certificate of Mailing.

A proper certificate of mailing must (1) state the date of deposit or transmission, and (2) be signed (separate and apart from any signature for the piece of correspondence itself) by a person who has a reasonable basis to expect that the correspondence will be mailed or transmitted on or before the date indicated. TBMP 110.02; 37 CFR § 2.197(a).

In this case, Opposer included a cover letter which contains the following postscript note “Note: These items were mailed prior to deadline (sic) for this opposition.” See Opposer’s Cover Letter included with Notice of Opposition. This one-line note is not a proper certificate of mailing within the meaning of 37 CFR § 2.197(a). Although the letter itself is dated 7/18/07, the postscript note is not dated, therefore there is no basis to determine on which date the correspondence was mailed. Moreover, the postscript note is not signed. See TBMP 110.02 (clearly indicating that the certificate of mailing must be “signed (separate and apart from any signature for the piece of correspondence itself)”). Finally, there is no basis to conclude whether the “mail” system used was the United States Postal Service, and no basis to conclude whether the class of mail was First Class—both required elements of an acceptable certificate of mailing under 37 CFR§ 2.197.

C. Because the Opposition Was Not Timely Filed, It Must Be Dismissed With Prejudice.

Because the Notice of Opposition was not received by the USPTO until July 23, 2007, and because the Notice of Opposition does not contain a certificate of mailing, the Opposition is not timely. Accordingly, the Opposition must be dismissed with prejudice.

**II. THE NOTICE OF OPPOSITION FAILS TO STATE A CLAIM.**

Opposer has failed to state a claim upon which relief may be granted.

According to the Trademark Trial and Appeal Board, an opposer must plead a real interest in the proceedings.

Opposer has alleged no facts that suggest how it would be damaged, nor does Opposer allege any statutory basis to justify the opposition. Opposer alleges that it registered the domain name www.hypnossage.com, and that it is Opposer's future "intent" to use the mark in connection with Applicant's goods and services.

**III. THE FORM OF NOTICE FAILS TO COMPLY WITH THE RULES OF THE TTAB.**

According to the Trademark Trial and Appeal Board, the form of a complaint must meet the general requirements for submissions to the Board as set forth in 37 CFR 2.126. Under these rules, text in an electronic submission must be in at least 11-point type and double-spaced. 37 CFR 2.126©. Furthermore, the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") states that "the elements of a claim should be stated simply, concisely, and directly. However, the pleading should include enough detail to give the defendant fair notice of the basis for each claim. All averments should be made in numbered paragraphs, the content of each of which should be limited as far as

practicable to a statement of a single set of circumstances.” TBMP 309.02(a); Fed. R. Civ. P. 8(e)(1).

Complaints that fail to comply with the Federal Rules and TTAB rules of procedure are deficient. In this case, Opposer’s Notice of Opposition consists of a one page single-spaced narrative consisting of five unnumbered paragraphs, as well as ten pages printed from the ESTTA system, including ESTTA instructions and “scheduled outage notices.” Accordingly, the Notice of Opposition fails to provide Applicant with fair notice of the basis for Opposer’s claim. Moreover, in its present state, it would be exceedingly difficult for Applicant to properly answer the Notice of Opposition, because it is unreasonably difficult to differentiate between what Opposer considers to be a substantive allegation and what was merely unintentionally included as part of the ESTTA printout.

#### CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board dismiss the Opposition proceeding in its entirety. Because the Opposition was not timely filed, the dismissal must be with prejudice.

Dated August 28, 2007.

/Christopher J. Day/

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