

Goodman

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

Mailed: January 25, 2008

Opposition No. 91178655

Ronald M. Kaluzna (HYPNOSSAGE)

v.

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

Before Hairston, Grendel, and Cataldo, Administrative  
Trademark Judges.

By the Board:

This case now comes up on applicant's motion to dismiss, filed August 28, 2007, on the grounds that opposer's notice of opposition was untimely, the notice of opposition fails to state a claim, and the notice of opposition fails to comply with the Board's rules. Opposer has filed its response in opposition thereto.<sup>1</sup>

With respect to the issue of untimeliness, applicant points out that the thirty-day deadline for filing the opposition was July 19, 2007 but the notice of opposition was received by the USPTO on July 23, 2007, as evidenced by the mailroom date label affixed by the USPTO to the notice

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<sup>1</sup> Although opposer's response was untimely, having been filed two days late and without a certificate of mailing, we have exercised our discretion and considered opposer's response herein.

of opposition. Applicant further points out that the notice of opposition did not contain a proper certificate of mailing and that the cover letter accompanying the notice of opposition which contains a "postscript" does not constitute a proper certificate of mailing under Trademark Rule 2.197. Therefore, applicant asserts that the notice of opposition, lacking a proper certificate of mailing, is untimely and the proceeding should be dismissed.

In response, opposer asserts that it timely mailed the notice of opposition on July 18, 2007 by certified mail. As support, opposer has provided a copy of its certified mail receipt which shows a mailing date of July 18, 2007.

For paper correspondence, the filing date, as reflected by the mail room date label, is the date of receipt in the USPTO i.e., "the date stamped by the Post Office on the mailbags in which the correspondence is delivered" to the USPTO. Trademark Rule 2.195(a) and TBMP Section 109 (2d ed. rev. 2004); see also TMEP Section 303.01 (5<sup>th</sup> ed. 2007). If a document is mailed to the USPTO using the "certificate of mailing" procedure under Trademark Rule 2.197, the filing date is the date of receipt in the USPTO, but the Board looks to the mailing date specified in the certificate of mailing for determining timeliness of the filing. See TBMP Section 109. Under the certificate of mailing procedure, correspondence is considered to be timely, even if received

after the due date, if the correspondence was (1) deposited with the United States Postal Service as first class mail and (2) accompanied by a certificate attesting to the date of deposit or transmission. Trademark Rule 2.197. The certificate of mailing must (1) state the date of deposit in the mail, which must be a date within the set filing period and (2) be signed by a person who has a reasonable basis to expect the correspondence to be deposited in the mail on the date indicated. TBMP Section 110.02. The signature on the certificate of mailing must be separate from any signature for the correspondence being deposited. TMEP Section 305.02(c).

The certificate of mailing procedure is not the same as mailing by certified mail. TBMP Section 110.08. Therefore, correspondence sent to the Board by certified mail, and not in compliance with Trademark Rule 2.197(a) requirements for a certificate of mailing, will be stamped with the date of receipt of the correspondence in the USPTO, and that filing date will be used for all purposes, including the timeliness of the filing of the correspondence. Id.

In this case, the involved application was published for opposition on June 19, 2007, and because opposer filed no requests for extensions of time to oppose, the time for filing the notice of opposition was no later than July 19, 2007. Opposer's notice of opposition was received in the

USPTO on July 23, 2007 and did not contain a proper certificate of mailing under Trademark Rule 2.197. Opposer's statement in its cover letter "Note: These items were mailed prior to deadline for this opposition" does not satisfy the certificate of mailing procedure as it neither states the date of the deposit, nor is it signed. As stated above, opposer's mailing of the notice of opposition by certified mail cannot substitute for the certificate of mailing procedure. See TBMP Section 110.08. Therefore, the filing date of July 23, 2007 is the operative date for all purposes, including whether the notice of opposition was timely filed.

Inasmuch as the notice of opposition was filed on July 23, 2007, which was after the expiration of the opposition period, we find the notice of opposition untimely. Therefore, opposer's motion to dismiss based on untimeliness of the filing of the notice of opposition is granted.

In view of our finding that the notice of opposition is untimely, applicant's other arguments with respect to the motion to dismiss (i.e., failure to state a claim, and noncompliance with Trademark Rules) need not be addressed.

The opposition is dismissed as a nullity.<sup>2</sup> See TBMP section 119.03.

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<sup>2</sup> The opposition fee will be returned in due course. Opposer should note that its remedy in this matter lies in a timely filed petition to cancel.