

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

Mailed: July 9, 2009

Opposition No. 91182064

AS Holdings, Inc.

v.

H & C Milcor, Inc., f/k/a
Aquatico of Texas, Inc.

George C. Pologeorgis, Interlocutory Attorney:

This case now comes up for consideration of applicant's motion (filed April 30, 2009 via certificate of mailing) to amend its expert disclosure so as to substitute its designated expert witness and extend time to serve opposer with the substituted expert witness' written report. The motion is fully briefed.

The Board, in its discretion, suggested that the issues raised in applicant's motion should be resolved by telephonic conference as permitted by TBMP § 502.06 (2nd ed. rev. 2004). The Board contacted the parties to discuss the date and time for holding the phone conference.

The parties agreed to hold a telephone conference at 2:00 p.m. Eastern time on Thursday, July 9, 2009. The conference was held as scheduled among Terence J. Linn, as

counsel for opposer, Dillis V. Allen, as counsel for applicant, and the above signed, as a Board attorney responsible for resolving interlocutory disputes in this case.

The Board carefully considered the arguments raised by the parties, as well as the supporting correspondence and the record of this case, in coming to a determination regarding the above matters. During the telephone conference, the Board made the following findings and determinations:

**Applicant's Motion to Substitute Expert Witness and
Extend Time to Submit Expert Witness Report**

Applicant's motion to substitute its designated expert witness and extend time to provide its expert witness report is **granted** to the extent stated below.

As background, in its initially-served expert disclosure, applicant designated three expert witnesses, namely, George Creil, Thomas Kelly and Ronald W. Resech. The Board noted, however, that the expert disclosure served upon opposer by applicant was insufficient inasmuch as the expert disclosure only identified the names and addresses of the three experts applicant intended to use but failed to include the required written report for each identified expert as contemplated under Fed. R. Civ. P. 26(a)(2)(B).

Accordingly, by order dated April 3, 2009, the Board, *inter alia*, allowed applicant thirty days in which to serve upon opposer a supplemental expert disclosure which included a written report for each identified expert.

By way of its motion, applicant now seeks to substitute Phillip D. Dregger as its expert witness inasmuch as applicant contends that the previously designated experts are no longer available to serve as expert witnesses. Specifically, applicant asserts that George Creil has refused to serve as an expert for some unknown reason, Thomas Kelly has been on travel and has not had sufficient time to review the materials in this matter in order to draft a timely report, and Ronald Resch has a legal conflict with applicant. Moreover, applicant requests additional time in which to serve opposer its expert witness's written report.

In light of the foregoing, the Board finds good cause to permit applicant to substitute its designated expert witness because, aside from a delay in the proceedings, opposer will not be prejudiced by granting applicant's requested relief inasmuch as the Board will allow opposer to take discovery on the newly designated expert witness.

Accordingly, applicant's motion is **granted** to the extent that (1) Phillip D. Dregger is hereby substituted as

applicant's expert witness and (2) applicant is allowed twenty days from the mailing date of this order in which to serve the expert witness report of Phillip D. Dregger upon opposer in accordance with Fed. R. Civ. P. 26(a)(2)(B). The Board will not, however, entertain any further requests from applicant to substitute or extend time to provide an expert report.

To the extent that applicant does provide its expert report, as ordered herein, the parties must file, within fifteen (15) days from the date of service of applicant's expert witness report upon opposer, a stipulation with the Board requesting suspension of the proceedings so that opposer may take limited discovery solely concerning applicant's expert, if opposer wishes to take such discovery. Discovery is otherwise closed in this case. Moreover, the stipulation should include the amount of time required by opposer to conduct limited discovery regarding the applicant's expert witness.

As a final matter, the Board notes and grants the parties' stipulation (filed on June 19, 2009) permitting (1) either party to use any and all discovery depositions taken in this proceeding as testimonial depositions, (2) that such depositions will be treated as having been taken during each of the parties' respective testimony periods, and (3)

photocopies of any and all depositions to be used in place of original certified copies.

Moreover, the Board notes that the evidence already filed and served by opposer during its previously set testimony period (which closed on June 30, 2009) is deemed timely submitted and, therefore, opposer is not required to resubmit copies of such evidence during its testimony period as reset below. Additionally, the Board notes that, during the telephone conference, applicant provided opposer its consent to allow opposer to attend by telephone any testimony deposition properly noticed by applicant during applicant's testimony period, as reset below.

Proceedings herein remain ongoing. Discovery is now closed except to the extent noted above. Trial dates are reset as follows:

Plaintiff's 30-day Trial Period Ends	9/20/2009
Defendant's Pretrial Disclosures	10/5/2009
Defendant's 30-day Trial Period Ends	11/19/2009
Plaintiff's Rebuttal Disclosures	12/4/2009
Plaintiff's 15-day Rebuttal Period Ends	1/3/2010

NEWS FROM THE TTAB:

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 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>