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

Proceeding	91185103
Party	Defendant Tiffany Adams
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CERTIFICATE OF MAILING: I hereby certify that this paper is being electronically deposited with the U.S. Trademark Trial and Appeal Board via uspto.gov on May 11, 2009:

Date: 5/11/09 By: Lori A. Ciccio

Lori A. Ciccio

Attorney Docket No: 63288.200OPP01

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Cherokee Nation,	)	
	)	
Opposer	)	**Opposition No. 91,185,103**
v.	)	
	)	**[Serial Nos. 78/748,323]**
Tiffany Adams	)	
	)	
Applicant	)	

MOTION TO STRIKE; REQUEST FOR ISSUE OF EVIDENCE PRECLUSION SANCTIONS AND REQUEST TO DENY OPPOSER'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FRCP 56(f)

Applicant, Tiffany Adams ("Applicant") hereby submits this Motion to Strike, Request for Issue and Evidence Preclusion Sanctions and Request to Deny Opposer's Motion for Summary Judgment Pursuant to FRCP 56(f).

I. Introduction

It is black letter law that a decision on the merits is the favored disposition of any legal dispute. *See, e.g., Schiavone v. Fortune,* 477 U.S. 21, 106 S.Ct. 2379 (1986)("The spirit and inclination of the rules favo[r] decisions on the merits, and rejec[t] an approach that pleading is a game of skill in which one misstep may be decisive."), *citing, Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). Apparently recognizing the utter lack of merit of its opposition, Opposer has, in obvious bad faith, attempted to exploit a procedural trick in an effort to prevail in a matter in which both facts and law would otherwise doom its case. The purpose of the Federal Rules, as well as the rules of this Board, is, *inter alia*, to preclude litigation by surprise. Opposer has shown contempt for these rules, as well as for Applicant and the Board itself, by engaging in litigation by ambush. Applicant respectfully requests that the Board reject

this obvious and improper tactic by denying Opposer's ill-taken Motion for Summary Judgment and, further, that sanctions appropriate to such conduct be imposed.

II. Procedural History

Opposer filed the instant Opposition on July 9, 2008. From that date until approximately two weeks prior to the close of the discovery period, Opposer took no steps whatsoever to advance prosecution of the Opposition. No initial disclosures were made, no discovery was served, no depositions were noticed and not one substantive communication with Applicant's counsel was attempted.

On or about March 3rd, approximately two weeks prior to the close of discovery, Opposer's counsel called Applicant's counsel and requested extensions of both the initial disclosure period, which had already expired five months earlier on October 17, 2008, as well as the discovery period, calendared to close on March 16, 2009. *See*, Exhibit A to the Declaration of Anna M. Vradenburgh (hereafter, the "Vradenburgh Decl."), ¶ 2. Opposer's counsel claimed that the purported purpose of the extension was to accommodate settlement discussions. *Id.* After due consideration, Applicant's counsel advised Opposer's counsel that an extension would be prejudicial and she could not agree to any extension unless Opposer presented some form of an initial good faith settlement proposal in support of its purported reasoning for the extension request, and further, confirmed her client's interest in discussions. *Id.* at ¶ 3.

Despite the request for a preliminary settlement proposal, nothing further was heard from Opposer until the day of discovery cut-off, March 16, 2009, on which date Opposer filed its Motion for Summary Judgment and mailed-served its delinquent initial disclosures accompanied by extensive written discovery requests. *Id.* at ¶ 4.

III. Opposer's Actions are in Bad Faith and Violative of the Federal Rules of Civil Procedure

A. The Timing of Opposer's Initial Disclosures was Intentionally Calculated to Deprive Applicant of Discovery

The purpose of the initial disclosure requirement imposed by Fed. R. Civ. P. 26(a) is to "accelerate the exchange of basic information" that is "needed in most cases to prepare for trial

or make an informed decision about settlement." *City and County of San Francisco v. Tutor-Saliba Corp,* 218 F.R.D. 219, 221 (N.D.Cal. 2003), *citing,* 1993 advisory committee notes. Though this Board has, traditionally, taken a lenient approach with respect to the timing of the initial disclosures (which, in the instant matter, were due on October 17, 2008), that leniency should not extend to a calculated and deliberate effort to deprive a party of the ability to take <u>any</u> discovery. By serving its Rule 26(a) disclosure on the last day of discovery, Opposer succeeded in hiding the identity of the witnesses on which it relies in its cynically-timed Motion for Summary Judgment. Applicant thus has no ability to depose any of these witnesses, who appear through affidavit only, and without being subject to any cross-examination.

It is black letter law that, on summary judgment, a triable issue of fact may not be created by filing affidavits that contradict deposition testimony. *Cleveland v. Policy Management Systems Corp.,* 526 U.S. 795, 119 S.Ct. 1597 (1999) ("[A] party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity." [citations omitted]) Here, Applicant never had an opportunity to notice, much less take, a deposition, allowing Opposer to submit, improperly, testimony by affidavit that is untested and unexamined either for probity or accuracy.

Similarly, Opposer has submitted approximately 458 pages of documentary exhibits in support of its motion that were never disclosed to Applicant. Virtually all of these documents constitute hearsay and are unauthenticated with respect to underlying facts which Opposer claims they support. By serving its initial disclosures <u>after</u> filing and serving its motion, Opposer effectively cuts off any opportunity of Applicant to test the authenticity of these documents.

Not coincidently, Opposer's Initial Disclosures, mail served and thus received after the filing and service of its Motion for Summary Judgment, contains a detailed catalogue of every single document and witness affidavit proffered by Opposer in support of its motion.

It is tempting to speculate on Opposer's motivation in engaging in this tactic. Opposer <u>claimed</u> it was interested in settlement two full weeks before its initial disclosures were served and the discovery period closed. As the stated purpose of Rule 26(a) is to facilitate settlement,

Opposer's actions in this regard beg the question: why were these disclosures not served sooner? Of course, Opposer never did (and still has not) expressed any interest in settlement beyond proffering of settlement as some kind of justification for granting it an otherwise unsupported and prejudicial extension of the discovery period. It is not clear whether Opposer's intent was to remedy its negligence in failing to prosecute its Opposition, to "punish" Applicant for its refusal to undertake the prejudice of a discovery period extension, or whether this cheap trick was a planned "strategy" from the inception. Regardless of its motivation, however, Opposer's intent is crystal clear: Opposer has moved, simultaneously, to "suspend" all proceedings, thereby cutting of Applicant's ability to take testimony depositions. Clearly, Opposer's intent in this tactic is simply to preclude Applicant from challenging its one-sided, untested, and never disclosed "evidence." It is obvious that such abuse of the Federal Rules of Civil Procedure, the rules of this Board and the opposition procedure is in bad faith.

B. Opposer was Required to Serve its Initial Disclosure Prior to the Filing of a Motion for Summary Judgment

Rule 2.120(a)(3) and 2.127(e)(1) provide that initial disclosures must be served *prior* to the service of discovery, and *prior* to the filing of a Motion for Summary Judgment. In the present matter, initial disclosures were not served *prior* to serving discovery or the filing of the Motion for Summary Judgment. At best, they were served on the same day, namely, the last day of discovery. Since the discovery was served by first class mail, discovery documents were not received by Applicant until after the close of discovery. The milestones of this Board, as well as the entire Federal Court System, are calculated in <u>days</u>, not minutes, hours or seconds. *See*, Fed. R. Civ. P. 6. Accordingly, Opposer's cynical tactic does not comply with literal requirement of the rules. For Opposer to even pretend that it was in compliance, its initial disclosures would have had to been served on March 15, 2009, the day <u>before</u> discovery closed. By serving both on the same day, Opposer has failed to meet the requirement of service of the Initial Disclosures prior to service of discovery. Accordingly, the discovery served on Applicant is untimely since it would have been required to have been served on March 17, 2009, which would have been after the close of discovery.

C. Rule 56(f)

As Opposer's improper actions effectively deprived Applicant of the ability to take discovery depositions, its only opportunity to obtain needed evidence is through testimony depositions. Rule 56(f) provides, *inter alia*:

> If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order.

Here, the Affidavit of Anna Vradenburgh establishes that (a) Applicant cannot present facts essential to justify its opposition, (b) those specific facts are in the possession of Opposer as well as the witnesses who provided Opposer's affidavits, and (c) Applicant's lack of prior access to this information is the specific and direct result of Opposer's manifest bad faith. "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). Accordingly, this Board should deny the instant motion as intentionally ill-timed and premature.

IV. Sanctions Should Issue

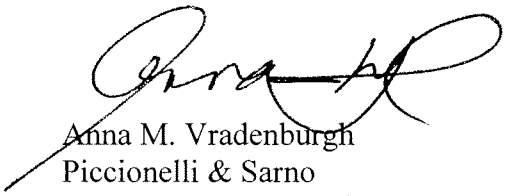
As previously discussed, it is impossible to know Opposer's motivations in engaging in this cynical and prohibited conduct. Perhaps this was Opposer's strategy all along, perhaps Opposer was trying to cover its negligence in failing to advance, in any way, its opposition.

Regardless, Opposer's actions in this regard not only are impermissible but, of greater importance, demonstrate undeniable bad faith – Opposer has attempted to prevail by employing a variety of tactics that, it thought, would permit it to obtain summary judgment without Applicant having any ability whatsoever to test, challenge and contradict its so-called "evidence." This is contrary to both the spirit and the letter of the law in this regard. Accordingly, pursuant to both Rule 2.120(a)(3) and 2.127(e)(1), and Fed. R. Civ. P. 56(f), Opposer's shrewdly timed Motion for Summary Judgment should be either struck or simply denied. However, Opposer's manifest bad faith in this disregard supports the imposition of both issue and evidence preclusion sanctions directed towards the intentionally-suppressed and hidden "evidence" offered in support of the motion.

Applicant therefore respectfully requests that Opposer's Motion for Summary Judgment be denied, the evidence offered in support thereof be struck, and sanctions be imposed precluding all issues and evidence addressed by the improvident motion. Further, Applicant respectfully requests that the discovery requests served simultaneously with the initial disclosures be deemed untimely, and barred by the close of discovery.

Respectfully submitted,

Date: May 11, 2008



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Attorneys for Applicant

AMV/

DECLARATION OF ANNA M. VRADENBURGH

The undersigned, Anna M. Vradenburgh, declares the following:

1. I am an attorney licensed to practice law in the State of California and licensed before the United States Patent and Trademark Office. I am an attorney with the firm of Piccionelli & Sarno, the current attorneys of record for the Applicant Tiffany Adams in Opposition No. 91,185,103.

2. On or about March 3rd, approximately two weeks prior to the close of discovery, Opposer's counsel called the undersigned and requested extensions of both the initial disclosure period, which had already expired five months earlier on October 17, 2008, as well as the discovery period, calendared to close on March 16, 2009. Opposer's counsel claimed that the purported purpose of the extension was to accommodate settlement discussions.

3. After due consideration, the undersigned advised Opposer's counsel that an extension would be prejudicial and she could not agree to any extension unless Opposer presented some form of an initial good faith settlement proposal in support of its purported reasoning for the extension request, and further, confirmed her client's interest in discussions.

4. Despite the request for a preliminary settlement proposal, nothing further was heard from Opposer until the day of discovery cut-off, March 16, 2009, on which date Opposer filed its Motion for Summary Judgment and mailed-served its delinquent initial disclosures accompanied by extensive written discovery requests.

The undersigned, Anna M. Vradenburgh, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated: May 11, 2009 By: _____
Anna M. Vradenburgh

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 2801 Townsgate Road, Suite 200, Westlake Village, California 91361.

On May 11, 2009, I served the following document(s) described as MOTION TO STRIKE; REQUEST FOR ISSUE OF EVIDENCE PRECLUSION SANCTIONS AND REQUEST TO DENY OPPOSER'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FRCP 56(f) on the interested parties in this action by placing □ the original ■ a true copy thereof enclosed in a sealed envelope addressed as follows:

Anthony J. Jorgenson
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
320 South Boston Avenue, Suite 400
Tulsa, OK 74103

■ BY MAIL: I caused such envelope to be deposited in the mail at Westlake Village, California. I am "readily familiar" with the office's practice of collection and processing correspondence for mailing. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

□ BY PERSONAL SERVICE: I delivered such envelope by hand to the offices of the addressee(s) listed above.

□ BY FACSIMILE: I caused the above document(s) to be transmitted to the office of the addressee(s) listed above.

□ BY EXPRESS MAIL: I caused the document(s) to be delivered by overnight Express Mail via the United States Postal Service "Express Mail Post Office to Addressee" to the addressee(s) listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 11, 2009, at Westlake Village, California.

Lori A. Ciccio