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

Proceeding	91186494
Party	Plaintiff Kraft Foods Global Brands LLC
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Attachments	Opposer's Response to Motion for Default Judgment (2).pdf ( 4 pages )(14023 bytes )

UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77355857: KOOL  
Published in the *Official Gazette* of July 22, 2008, in International Class 32

KRAFT FOODS GLOBAL BRANDS LLC,

Opposer,

v.

ANTHONY BROWN,

Applicant.

Opp. No. 91186494

**OPPOSER’S RESPONSE TO  
APPLICANT’S MOTION FOR DEFAULT JUDGMENT**

Kraft Foods Global Brands LLC (“Opposer” or “Kraft”) asks the Board to deny Applicant’s motion for default judgment as baseless. In his December 22, 2008, motion, Applicant argues that Opposer’s response to Applicant’s motion for summary judgment was past due. Yet, Opposer’s response was in fact due on January 5, 2009,<sup>1</sup> and Opposer timely filed its response on December 30, 2008. In any event, Applicant’s motion for summary judgment should itself be denied as untimely, as it was filed before the parties exchanged initial disclosures.

Applicant does not dispute that it never served its initial disclosures and never responded to Opposer’s attempt to schedule a discovery conference. Thus, by rule, Applicant’s motion for summary judgment is untimely. CFR 2.127(e)(1). (“A party may not file a motion for summary judgment until the party has made its initial disclosures.”)

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<sup>1</sup> Applicant filed his Motion on November 30, 2008. According to the Motion’s certificate of service, Applicant served the Motion by mail on December 1. Thus, Opposer’s response—if the Board does not strike the Motion—would be due on January 5, 2009. See TBMP 528.02 (requiring the filing of a response within thirty days of the filing of a summary judgment motion); TBMP 113.05 (expanding due dates by five days for motions served by mail).

Accordingly, in its December 30, 2008, filing, Opposer requested that the Board strike Applicant's motion. Applicant argues that this request should be treated as a motion to strike, which would make it subject to the 20-day deadline for filing (15 days plus 5 days for service by mail) instead of the 35-day deadline for responses to motions for summary judgment (30 days plus 5 days for service by mail).

Whether this request is styled as a motion to strike or a response is really beside the point. Applicant's motion for summary judgment fails to satisfy its precondition – serving initial disclosures – and is thus an improper attempt to skirt its discovery obligations. And the Board has frequently exercised its discretion to treat motions to strike as responses to motions for summary judgment. *See, e.g., Desnoes & Geddes Ltd. v. Schweicker*, 1998 TTAB LEXIS 30 (not citable) (treating motion to strike as a response to cross-motion for summary judgment and denying the latter as untimely). Likewise, the Board should treat Opposer's motion as a response to Applicant's motion for summary judgment and deny the motion for summary judgment as untimely.<sup>2</sup>

Even if the Board does not treat Opposer's motion to strike as a response to Applicant's motion for summary judgment, the Board should still, on its own initiative, deny that motion for summary judgment as untimely. To allow Applicant's motion for summary judgment to stand would contravene the letter and spirit of the rule mandating the parties' exchange of information prior to filing a motion for summary judgment. In the event that the Board does not deny Applicant's motion for summary judgment based on the failure to exchange information prior to filing, Opposer requests that the Board grant its timely filed request to extend time to prepare a substantive response.

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<sup>2</sup> Moreover, Opposer notes that its filing included not only a request to strike the motion for summary judgment as untimely but also, in the alternative, a request to extend time for Opposer to prepare a substantive response. There can be no dispute that this request for more time was timely.

For these reasons, Applicant's motion for summary judgment should be denied, or, in the alternative, Opposer's motion for additional time to respond to the motion for summary judgment should be granted. In addition, Applicant's motion for default judgment should be denied.

KRAFT FOODS GLOBAL BRANDS LLC

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this paper has been served upon Applicant at his address of record by First Class Mail today, January 12, 2009.

/marycarragher/