

Wolfson

THIS OPINION IS NOT A
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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: January 22, 2009

Opposition No. **91186494**

Kraft Foods Global Brands LLC

v.

Anthony Brown

Before Hairston, Rogers and Bergsman,
Administrative Trademark Judges.

By the Board:

This case now comes before the Board for consideration of the following motions:

1. Applicant's motion for summary judgment, filed November 30, 2008;
2. Applicant's "Motion For Default Judgment Against Opposer," filed December 22, 2008; and
3. Opposer's cross motion (filed December 30, 2008) to strike applicant's motion for summary judgment as being untimely.

The motions are fully briefed.¹

¹ Applicant's further motion, filed December 6, 2008, to suspend proceedings pending decision of his motion for summary judgment, is moot. Proceedings were suspended on December 30, 2008 pursuant to Trademark Rule 2.127(d), which provides for suspension of proceedings when any party files a motion for summary judgment.

Applicant's Motion for "Default Judgment"

Although styled as a motion for default judgment, a reading of applicant's motion shows that it is based on applicant's assertion that opposer failed to timely respond to the motion for summary judgment. Because opposer timely filed a response to applicant's motion, the motion is denied.

Applicant argues that opposer's response to applicant's motion, a cross motion to strike, was not a proper response. However, a motion to strike a brief filed in support of a motion is proper if brought on timeliness grounds. See TBMP § 517 (2d ed. rev. 2004). Inasmuch as the ground for striking applicant's motion for summary judgment is that it is untimely, opposer's motion to strike is considered a proper response to applicant's motion for summary judgment.

Applicant further argues that opposer's motion to strike is untimely because it did not substantively respond to applicant's motion for summary judgment, and therefore was required to be filed within 20 days of the date of service of applicant's motion for summary judgment. Applicant misconstrues Trademark Rule 2.127(e)(1), which allows a party until thirty days from the date of service of a motion for summary judgment to file a brief in response to the motion, including a cross motion to strike on timeliness grounds. Opposer's motion to strike was filed within thirty

days from the date of service. Accordingly, it is timely. Moreover, opposer also requested time to substantively respond to applicant's motion for summary judgment if the Board held that the response was improper as a motion to strike.

Applicant's Motion for Summary Judgment

We now turn to applicant's motion for summary judgment. Trademark Rule 2.127(e)(1) provides: "A party may not file a motion for summary judgment until the party has made its initial disclosures, except for a motion asserting claim or issue preclusion or lack of jurisdiction by the Trademark Trial and Appeal Board." Applicant does not contend that opposer's claims are barred by claim or issue preclusion or that the Board lacks jurisdiction to hear the claim under Section 2(d) of the Trademark Act. Thus, applicant may not bring a motion for summary judgment until he has served his initial disclosures on opposer.

In his brief in support of his motion for summary judgment, applicant does not assert that he made his initial disclosures prior to filing the motion. Likewise, in his response to opposer's motion to strike, applicant does not refute opposer's clear assertion that applicant has failed to serve his initial disclosures. Accordingly, the motion for summary judgment was filed in contravention of Trademark Rule 2.120(e)(1).

In view thereof, opposer's motion to strike applicant's motion for summary judgment is granted and applicant's motion for summary judgment is denied as untimely.

Proceedings herein are resumed and trial dates, including disclosures dates and the close of the discovery period, are reset as indicated below.

Applicant's Initial Disclosures Due ²	2/9/10
Expert Disclosures Due	6/9/10
Discovery Closes	7/9/10
Plaintiff's Pretrial Disclosures Due	8/23/10
Plaintiff's 30-day Trial Period Ends	10/7/10
Defendant's Pretrial Disclosures Due	10/22/10
Defendant's 30-day Trial Period Ends	12/6/10
Plaintiff's Rebuttal Disclosures Due	12/21/10
Plaintiff's 15-day Rebuttal Period Ends	1/20/11

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within **thirty days** after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

General Information for Applicant

Below are general guidelines to assist applicant. Applicant should note that although Patent and Trademark

² Opposer asserts, and applicant does not refute, that opposer has made its initial disclosures.

Rule 10.14 permits any person to represent itself in a Board proceeding, it is generally advisable for a person unfamiliar with the above-referenced rules to secure the services of an attorney familiar with such matters. The Office cannot aid in the selection of an attorney. If applicant does not retain counsel, applicant must familiarize himself with the rules governing this proceeding. Strict compliance with all applicable rules and Board practices during the proceeding of an *inter partes* case before the Board is expected of all parties, whether or not represented by counsel.

One rule that applicant must pay particular attention to is **Trademark Rule 2.119**. That rule requires that a party filing any paper with the Board during the course of a proceeding must serve a copy on its adversary, unless the adversary is represented by counsel, in which case, the copy must be served on the adversary's counsel. With the paper that is filed with the Board, the party filing the paper must include "proof of service" of the copy. "Proof of service" usually consists of a signed, dated statement attesting to the following matters: (1) the nature of the paper being served, (2) the method of service (e.g., first class mail), (3) the person being served and the address used to effect service, and (4) the date of service.

Applicant should note that he is responsible for ensuring that the Board has his current correspondence address. If a party fails to notify the Board of a change of address, with the result that the Board is unable to serve correspondence on the party, default judgment may be entered against the party. See TBMP § 117.07 (2d ed. rev. 2004).

Applicant should note that any paper he is required to file with the Board should not take the form of a letter; proper format should be utilized. The form of submissions is governed by Trademark Rule 2.126. See also TBMP § 106.03 (2d ed. rev. 2004). Also, applicant should note that any paper he is required to file herein must be received by the Patent and Trademark Office by the due date, unless one of the filing procedures set forth in Trademark Rules 2.197 and 2.198 is utilized. These rules are in Part One of Title 37 of the Code of Federal Regulations.

Below are guidelines as to the relevant sources of law governing the conduct of this proceeding. The Trademark Rules of Practice are codified in part two of Title 37 of the Code of Federal Regulations (also referred to as the CFR). There are other rules in Part One of Title 37, relevant to filing of papers, meeting due dates, etc., that are also applicable to this case. The CFR and the Federal Rules of Civil Procedure are likely to be found at most law

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libraries, and may be available at some public libraries. If applicant wishes to obtain a copy of Title 37 of the CFR, it may be ordered for a fee from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Applicant may access some of the materials referred to above by logging onto <http://www.uspto.gov> and making the connection to trademark materials. The files of this Board proceeding can be examined using TTABVUE, accessible at <http://ttabvue.uspto.gov>. (after entering the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format.)

Finally, the Board's manual of procedure will be helpful. The first revision of the second edition (March 2004) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at www.uspto.gov/web/offices/dcom/ttab/tbmp/.

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