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

Proceeding	91187137
Party	Defendant Motley Crue, Inc.
Correspondence Address	David W. Grace, Melanie Howard LOEB & LOEB LLP 10100 SANTA MONICA BLVD , STE 2200 LOS ANGELES, CA 90067-4120 UNITED STATES dgrace@loeb.com, mhoward@loeb.com
Submission	Motion for Sanctions
Filer's Name	Melanie Howard
Filer's e-mail	mhoward@loeb.com
Signature	/melaniehoward/
Date	09/04/2009
Attachments	CRUEFEST Motion for Entry of Judgment.pdf (6 pages)(86115 bytes) CRUEFEST Howard Decl Mtn For Judgment.pdf (5 pages)(41196 bytes)

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

Mr. Kirk Fotakis, an individual, Opposer, v. Motley Crue, Inc., Applicant.	)	Opposition No. 91187137
Mark: CRUEFEST App. No. 77/373,768 Filed: January 16, 2008 Published: August 6, 2008	)	

APPLICANT'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AGAINST OPPOSER

Submitted by:
David W. Grace
Melanie Howard
Loeb & Loeb LLP
10100 Santa Monica Boulevard
Suite 2200
Los Angeles, California 90067
Telephone: 310-282-2000
Fax: 310-282-2200

MOTION FOR ENTRY OF JUDGMENT

Applicant Motley Crue, Inc. ("Applicant") requests an order entering judgment with prejudice against Opposer Kirk Fotakis ("Opposer") pursuant to Trademark Rule 2.120(g)(1) on the grounds that Opposer has not complied with the Board's July 29, 2009 Order in this matter.

STATEMENT OF FACTS

By Order dated July 29, 2009, the Board granted Applicant's motions to compel discovery as conceded. Opposer was allowed fifteen days (e.g. until August 13, 2009) to serve its initial disclosures on Applicant. Pursuant to that same July 29, 2009 Order, Applicant was allowed thirty days (e.g. until August 28, 2009) to: (1) serve responses to Applicant's First Set Of Interrogatories To Opposer (the "Interrogatories") and Applicant's First Set Of Document Requests To Opposer (the "Document Requests"); (2) "select, designate and identify the items, and documents, or categories of items and documents, to be produced in response thereto"; and (3) "notify [O]pposer that the selection, designation and identification of such items and documents has been completed." Finally, Opposer was ordered to appear for his previously noticed deposition, "with the parties to work out a mutually acceptable date, time and place."

Opposer has not complied with any of the requirements of the Board's July 29, 2009 Order. *See generally,* Declaration of Melanie J. Howard ("Howard Decl."). Applicant has contacted Opposer's counsel as a courtesy prior to filing this motion. (Howard Decl., ¶ 4.) Opposer has not responded to Applicant communications. *Id.* The discovery deadline as reset by the Board's July 29, 2009 Order is September 11, 2009, less than two weeks away, and Applicant has not received any discovery responses nor been permitted to take the

properly noticed deposition of Opposer. *Id.* ¶ 3. In fact, the only document filed or served by Opposer in this proceeding was the initial petition for cancellation. *Id.* ¶ 5.

AN ORDER ENTERING JUDGMENT AGAINST OPPOSER IS WARRANTED

37 C.F.R. § 2.120(e) provides that "[i]f a party fails to comply with an order of the Trademark Trial and Appeal Board relating to discovery, including a protective order, the Board may make any appropriate order, including any of the orders provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board will not hold any person in contempt or award any expenses to any party." In this case, Opposer has not complied with any of the requirements of the Board's July 29, 2009 Order. Opposer has not made any disclosures nor responded to any discovery requests. (Howard Decl., ¶ 2.) Opposer has not appeared for his properly noticed deposition. (Howard Decl., ¶ 3.)

Even though not required by law to do so (*see* Trademark Rule 2.120(g) TBMP Section 527 (2d ed. rev. 2004)), Applicant has *again* made a good faith effort to resolve these issues with Opposer's counsel prior to filing this motion. (Howard Decl., ¶ 4.) Again, Opposer has refused to respond to Applicant's communications. *Id.*

Accordingly, Applicant respectfully submits that the TTAB should issue an order entering judgment against Opposer in this proceeding. "The law is clear that if a party fails to comply with an order of the Board relating to discovery, including an order compelling discovery, the Board may order appropriate sanctions as defined in Trademark Rule 2.120(g)(1) and FED. R. CIV. P. 37(b)(2), including entry of judgment." *MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477, 1478 (TTAB 2000)(emphasis added); *see also* TBMP Section 527.01(a) (2d ed. rev. 2004), *Baron Philippe de Rothschild*

S.A. v. Styl-Rite Optical Mfg. Co., 55 USPQ2d 1848 (TTAB 2000), and *Unicut Corp. v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984).

As in *MHW v. Simex*, Opposer here is obstructing Applicant's attempts to obtain relevant information through discovery as well as willfully disregarding the Board's Order. It is now almost a full year into the proceeding and less than two weeks from the discovery deadline, and the only information Applicant has received from Opposer as to the grounds for this opposition is one sentence (seemingly part of an incomplete listing of grounds) contained in Opposer's two-paragraph petition: "The grounds for this opposition are as follows: 1) the prior use of the identical mark, with the knowledge of Applicant, in the same or similar class of goods and services." Opposer's Petition; *see also*, Howard Decl., ¶ 5.

Applicant maintains that entry of judgment with prejudice against Opposer is proper under the unambiguous (and heretofore undisputed) facts of this case. The Board's Order in this case "clearly and unambiguously stated that, if opposer failed to comply with that order, applicant's remedy would lie in a motion for sanctions under Trademark Rule 2.120(g)(1)." *HighBeam Marketing, LLC v. Highbeam Research, LLC*, 85 USPQ2d 1902 (TTAB 2008). Opposer has failed to participate at all in this proceeding, and should not be permitted to further delay registration of Applicant's mark.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Accordingly, Applicant requests that the Board enter judgment with prejudice against Opposer.

Dated: September 4, 2009

DAVID W. GRACE
MELANIE HOWARD
LOEB & LOEB LLP
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, California 90067
Tel: 310-282-2000
Fax: 310-282-2200

By: _____
Melanie J. Howard
Attorneys for Applicant, Motley Crue, Inc.

CERTIFICATE OF SERVICE AND MAILING

It is hereby certified that a copy of APPLICANT'S MOTION FOR ENTRY OF JUDGMENT and DECLARATION OF MELANIE J. HOWARD is being deposited with the United States Postal Service, first-class postage prepaid, in an envelope addressed to:

Mark F. Warzecha
525 Sycamore Street
Evansville, IN 47708

Executed this 4th day of September 2009 at Los Angeles, California.

Candace Medina

CANDACE MEDINA

LA1893277.1
007584-10002

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

Mr. Kirk Fotakis, an individual, Opposer, v. Motley Crue, Inc., Applicant.	)	Opposition No. 91187137
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DECLARATION OF MELANIE J. HOWARD

I, Melanie J. Howard, hereby declare as follows:

1. I am the attorney of record for applicant Motley Crue, Inc., a California corporation ("Applicant"). I submit this declaration in support of Applicant's for entry of judgment against opposer, Kirk Fotakis ("Opposer").

2. Opposer has not served its initial disclosures, nor has Opposer served either responses or objections to Applicant's First Set of Interrogatories to Opposer or Applicant's First Set of Document Requests to Opposer.

3. Opposer has not appeared for his deposition. Opposer's counsel has not responded to attempts by my office to schedule a mutually convenient time to take Opposer's deposition.

4. David Grace, also counsel of record for Applicant, has sent emails to counsel for Opposer as a courtesy reminder of the deadlines included in the Board's July 29, 2009 Order. We have not received any response communications. By way of example, attached hereto as Exhibit A are true and correct copies of two emails sent to Opposer's counsel on August 19, 2009 and August 26, 2009.

5. The only document filed or served by Opposer in this proceeding to date is the petition for cancellation.

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

Executed in Los Angeles, California on September 4, 2009.

Melanie J. Howard

Exhibit A

Melanie Howard

From: David Grace
Sent: Wednesday, August 19, 2009 8:54 PM
To: 'Mark F. Warzecha (mark@warzechalaw.com)'
Cc: Candace Medina; Melanie Howard
Subject: Motley Crue, Inc. V. Fotakis - Discovery - 007584-10002

Greetings Mark -

Please call me about scheduling your client's deposition. Also, we have not received his initial disclosures. Did you sent them?

Best regards, Dave

David W. Grace
Loeb & Loeb LLP
10100 Santa Monica Boulevard, Suite 2200 Los Angeles, California 90067 Tel. 1-310-282-2000
Direct 1-310-282-2108 Fax 1-310-282-2200 dgrace@loeb.com www.loeb.com

Melanie Howard

From: David Grace
Sent: Wednesday, August 26, 2009 8:30 PM
To: 'Mark F. Warzecha (mark@warzechalaw.com)'
Cc: Candace Medina; Melanie Howard
Subject: RE: Motley Crue, Inc. V. Fotakis - Discovery - 007584-10002

reminder

-----Original Message-----
From: David Grace
Sent: Wednesday, August 19, 2009 8:54 PM
To: 'Mark F. Warzecha (mark@warzechalaw.com)'
Cc: Candace Medina; Melanie Howard
Subject: Motley Crue, Inc. V. Fotakis - Discovery - 007584-10002

Greetings Mark -

Please call me about scheduling your client's deposition. Also, we have not received his initial disclosures. Did you sent them?

Best regards, Dave

David W. Grace
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