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

Proceeding	91187847
Party	Plaintiff The Susan G. Komen Breast Cancer Foundation, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

THE SUSAN G. KOMEN BREAST
CANCER FOUNDATION, INC.

Opposer,

v.

Opposition No. 91187847

CHRISTINE MACHLEIT and
MATILDA BEELER

Applicant

REPLY TO APPLICANTS' RESPONSE TO OPPOSER'S MOTION FOR SANCTIONS IN THE FORM OF A JUDGMENT SUSTAINING THE OPPOSITION

Pursuant to 37 C.F.R. §§ 2.120(g)(1) and 2.127(a), The Susan G. Komen Breast Cancer Foundation, Inc., d/b/a Susan G. Komen for the Cure ("Komen"), Opposer in the above-referenced opposition proceeding, respectfully submits the instant reply in further support of its motion for sanctions.

Applicants' response to Komen's motion for sanctions in the form of a judgment demonstrates why Komen's motion should be granted. Indeed, the response makes clear that Applicants:

- Do not dispute that they changed addresses without filing any change of address with the Board until October 29, 2009—approximately nine months *after* Applicants filed a change of address with the U.S. Postal Service.
- Admit that they chose to rely on the U.S. Postal Service's forwarding service, and that the copy of Komen's First Set of Interrogatories and First Requests for

Productions (collectively, the "First Requests"),[1] sent for the second time on September 15, 2009, should have been received.

- Admit that because the U.S. Postal Service's forwarding service was active, "there would be little or no reason that" any document sent by Komen to Applicants' address on file with the Board "would not be forwarded by the United States Postal Services." Response to Opposer Mtn. 2. This includes Komen's September 22, 2009 motion to compel discovery and initial disclosures, which attached yet another copy of Komen's First Requests, thus constituting the **third time** that Komen mailed its First Requests to Applicants' address on file with the Board.

- Admit that they received a copy of the Board's October 22, 2009 order on October 29, 2009.

- Admit that they took no action to respond to the First Requests that were the clear subject of the October 22 order, despite the Board's warning that Applicants would face "sanctions in the form of entry of judgment sustaining the opposition" if Applicants did not provide appropriate responses to Komen's First Requests within **30 days**. TTAB Order, attached to the Declaration of Howard S. Hogan dated Dec. 1, 2009 ("Hogan Decl."), as Ex. A. at 3-4.

- Do not dispute that they chose not to return the call from Komen's counsel on November 19, 2009.

- Do not dispute that they failed to file or serve any responses by the November 22, 2009 deadline set by the Board, despite the Board's clear order to do so.

These facts alone justify the requested relief. Applicants are not entitled to comply with the Board's orders on their own timeline. Rather, as the Board has recognized, they had an obligation to notify the Board of any change of address and bear the risk of any filings that they may not receive. *See* Hogan Decl. Ex. A; TBMP § 117.07 (2d ed. rev. 2004) (default judgment may be entered against a party that fails to notify the Board of a change in address). Moreover, Applicants' *pro se* status does not entitle them to sit back and participate in this process only

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[1] Because Applicants failed to respond to Komen's First Requests for Admissions, which were properly served on August 10, 2009 and again on September 15, 2009, those admission requests are deemed admitted under Fed. R. Civ. P. 36(a), and the responses filed in connection with Applicants' opposition have no legal standing.

when they choose. As the Board has also recognized, all applicants must comply with the Board's clear orders, such as its order in this case. *See McDermott v. San Francisco Women's Motorcycle Contingent*, 81 U.S.P.Q.2d 1212, 1216 n.2 (TTAB 2006).

Applicants' belated attempt to comply with the Court's order, prepared and filed only in response to the instant motion for sanctions, also does not provide a basis to preserve their application. Although Applicants filed documents styled as responses to Komen's First Requests on December 17, 2009—25 days after the Board's deadline—these responses simply do not comply with the Board's October 22, 2009 order directing Applicants to serve upon Komen "full and complete answers" to Komen's First Requests. Hogan Decl. Ex. A at 3. The majority of those responses are wholly inadequate, deficient and nonresponsive to the First Requests and therefore are not "full and complete." Indeed, at least six of the ten responses given by Applicants to Komen's First Request for Productions are nonresponsive, partial or incomplete. For example, Komen asked Applicants to produce "[r]epresentative documents relating to the channels of trade through which Applicants' services are sold, advertised and marketed under the mark TIME FOR A CURE." *See* Opposer's First Requests for Production to Applicants, attached as part of Hogan Decl. Ex. C. Applicants did not produce any documents in response, and instead merely state: "The original watches were sold on a contingency basis in hospitals and some limited retail stores. They were also sold online at the Time For A Cure website." *See* Applicant's Answers to First Request to Production (filed with the Board on Dec. 17, 2009). In response to Komen's request to produce "[a]ny and all documents evidencing any revenues received by Applicants under the mark TIME FOR A CURE, including but not limited to proof of donations, purchase orders, invoices, sales receipts and credit card receipts," Hogan Decl. Ex. C, Applicants submit invoices of a handful of their own expenses. *See* Applicant's Answers

to First Request to Production. Thus, Applicants have completely failed to produce their documents evidencing revenues obtained through the use of the mark in commerce.

Applicants' responses to Komen's First Set of Interrogatories are even more deficient. With the exception of arguably one response, all of the Applicants' responses are either partially or wholly unresponsive to Komen's inquiries. For example, Komen's Interrogatory No. 2 asks "When and how did you first use the mark TIME FOR A CURE?" Hogan Decl. Ex. C. Applicants' full response states: "The original watches were sold on a contingency basis in hospitals and some limited retail stores. They were also sold online at the Time For A Cure website." Applicant's Answers to First Set of Interrogatories (filed with the Board on Dec. 17, 2009). Applicants fail entirely to answer when they first used the mark TIME FOR A CURE.

Significantly, Komen's Interrogatory No. 5 asks Applicants to "[i]dentify all revenues received by Applicants for its use of the mark TIME FOR A CURE and identify how Applicant disposed of such revenues." Hogan Decl. Ex. C. In response, Applicants state that they "***receive no revenue for [their] use of mark as it is our Corporation name, not a product***." Applicant's Answers to First Set of Interrogatories (emphasis added). Thus, Applicants' discovery responses essentially claim that they are using their TIME FOR A CURE mark only as a trade name, not as a trademark. But it is well settled that "[t]he Trademark Act does not provide for registration of trade names." TMEP § 1202.01 (citing *In re Letica Corp.*, 226 U.S.P.Q. 276, 277 (TTAB 1985)). Applicants therefore have completely failed to meet their burden.

For all of these reasons, Applicants have gratuitously multiplied these proceedings, forcing Komen to bring repeated motion practice to obtain the discovery that it is entitled to, a process that continues to this day to address Applicants' continuing failures. Accordingly, entry of the requested sanction is appropriate.

Dated: January 6, 2010

Respectfully submitted,

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Reference no. 93096-00001

Opposition No. 91187847

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2010, a copy of the foregoing **REPLY TO APPLICANTS' RESPONSE TO OPPOSER'S MOTION FOR SANCTIONS IN THE FORM OF A JUDGMENT SUSTAINING THE OPPOSITION** is being deposited with the United States Postal Service as first-class mail, postage pre-paid, in an envelope addressed to:

Christine Machleit
19931 Heartwood Drive
Perris, CA 92570

Dace A. Caldwell

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