

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513**

sb/gcp

Mailed: February 17, 2010

Opposition No. 91189418

Speed Channel, Inc.

v.

Phoenix 2008 LLC

George C. Pologeorgis, Interlocutory Attorney:

This case now comes before the Board for consideration of opposer's combined motion (filed September 28, 2009) to compel discovery and to test the sufficiency of applicant's responses to opposer's requests for admission. The combined motion is fully briefed.¹

¹ On December 5, 2009, subsequent to the filing of opposer's reply brief, applicant filed a motion for leave to file a motion to strike, or in the alternative, to respond to a new issue raised by opposer's reply brief, and on December 28, 2009, opposer filed a response thereto. Trademark Rule 2.127 provides for the filing of a brief in support of a motion, a brief in response to a motion, and a reply brief, and further states that "[t]he Board will consider no further papers in support of or in opposition to a motion." Trademark Rule 2.127(a). Applicant's response to opposer's reply brief on the motion to compel and motion to test the sufficiency of applicant's responses to opposer's requests for admissions, as well as opposer's subsequent brief in response thereto, are therefore impermissible sur-replies and will be given no consideration. Moreover, to the extent that opposer's reply brief has raised a new issue, such new issue has also not been given any consideration.

For the reasons more fully set forth below, opposer's motions are denied without prejudice insofar as opposer has exceeded the page limitation for briefs set forth in Trademark Rule 2.127(a).

Twenty-Five Page Limit for Briefs

In its response to opposer's motions, applicant argued, *inter alia*, that opposer's motion should be denied because the brief submitted in support of the motions, which is 60 pages long, exceeds the page limitation set forth in Trademark Rule 2.127(a). In its reply brief, opposer contends that its motion does not exceed the page limit, and that it was merely complying with the Board's rules regarding motions to compel, as it includes each discovery request for which it seeks to compel applicant's further response, applicant's response to each of the discovery requests, and the bases for opposer's motion as to each request.

Trademark Rule 2.127(a), concerning page limitations for briefs on motions, provides in relevant part:

Neither the brief in support of a motion nor the brief in response to a motion shall exceed twenty-five pages in length in its entirety, including table of contents, index of cases, description of record, statement of the issues, recitation of the facts, argument, and summary.

Opposer's brief in support of its motions to compel and motion to test the sufficiency of applicant's responses to opposer's requests for admission, at sixty pages, clearly

exceeds the twenty-five page limit. Even if the motion to compel and motion to test the sufficiency of applicant's responses to opposer's requests for admission were considered to be two separate motions, opposer's brief still exceeds the fifty page limit that would apply for the two motions. Further, the page limitation for briefs on motions is intended to prevent the filing of unduly long briefs and consequent unnecessary burdens on the Board. The page limitation on briefs cannot be waived by action, inaction or consent of the parties. *See Saint-Gobain v. Minnesota Mining and Manufacturing Company*, 66 USPQ2d 1220 (TTAB 2005).

Although opposer is correct in that it must comply with Trademark Rule 2.120(e) and TBMP § 523.02 regarding motions to compel, it must also comply with Trademark Rule 2.127(a) with regard to the twenty-five page limit for briefs in support of a motion. It is noted that opposer could have attached as exhibits to its brief the discovery requests for which it seeks to compel applicant's further response as well as applicant's proffered responses thereto, as exhibits submitted in support of a motion are not considered part of the brief for purposes of determining the length of the brief. *See Trademark Rule 2.127(a)*.

Accordingly, we find that opposer's brief on the motions to compel and test the sufficiency of applicant's

responses to opposer's requests for admission violates the Board rule regarding page limitations for briefs on motions. In view thereof, opposer's motions are denied without prejudice.² See *The Administration of the Estate of Tupac Shakur v. Thug Life Clothing, Co.*, 57 USPQ2d 1095 (TTAB 2000); *Cooper Technologies Co. v. Denier Electric Co.*, 89 USPQ2d 1478 (TTAB 2008).

Notwithstanding the foregoing, the parties are directed to work together to resolve their discovery disputes, in the spirit of good faith and cooperation which is required of all litigants in Board proceedings. In particular, no motion to compel should be filed unless the parties are truly unable, after making their best efforts, to formulate mutually acceptable solutions to their discovery disputes without the Board's intervention and/or assistance. Finally, the parties are advised that, by rule change effective August 31, 2007, the Board's standard protective order has been made applicable to all TTAB *inter partes* cases, whether already pending or commenced on or after that date.³

² In the event opposer decides, following a good faith effort to resolve its discovery disputes with applicant, to file a renewed motion to compel and motion to test the sufficiency of responses to admission requests, opposer should file two separate motions and not combine them into a single filing/motion.

³ An electronic copy is available from the USPTO's website at <http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>.

Proceedings herein are resumed and trial dates, beginning with the deadline for expert disclosures, are reset as follows:

Expert Disclosures Due	5/16/2010
Discovery Closes	6/15/2010
Plaintiff's Pretrial Disclosures	7/30/2010
Plaintiff's 30-day Trial Period Ends	9/13/2010
Defendant's Pretrial Disclosures	9/28/2010
Defendant's 30-day Trial Period Ends	11/12/2010
Plaintiff's Rebuttal Disclosures	11/27/2010
Plaintiff's 15-day Rebuttal Period Ends	12/27/2010

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.