



December 2010 counter offer on separate occasions. See De Luca Declaration, paras. 2-4.

More specifically, at the discovery conference of March 7, 2011, Onsharp's counsel informed Sharp's counsel that Onsharp would not agree to Sharp's proposal of September 2010. In response, Sharp informed Onsharp that Sharp could not agree to Onsharp's counter-proposal of December 2010, (i.e., it was a "non-starter") at which time Onsharp's counsel indicated that he believed the parties would probably need to go forward with this case and let the TTAB decide it. No further settlement proposals were discussed after that time and the proceeding went forward per the Board's scheduling order, including Sharp's service of discovery requests and request for the Board's intervention to obtain the discovery sought. The December 2010 counter-offer ended the parties' settlement negotiations. See De Luca Declaration, paras. 4-5.

In March 2012, when Sharp contacted Mr. Joe Sandin, President of Onsharp for an extension of the discovery period (which was necessary because Onsharp had not yet received any discovery as ordered by the Board's February 23, 2012), Sharp indicated that, if any settlement discussions were to be reopened, they would have to be along the lines of the initial settlement agreement, before Onsharp hired outside counsel. See De Luca Declaration, para. 6.

On April 16, 2012, Sharp communicated to Ms. Toni Sandin that any settlement discussion would need to be along the lines of the settlement offer in September 2010. Sharp also indicated to Ms. Sandin, that their Answer to the Amended Notice of

Opposition and their discovery responses, were past due at that point. See De Luca Declaration, para. 7.

To date, Onsharp still has not provided any of the discovery responses ordered by the Board's February 23, 2012 order (in response to Sharp's Motions to compel). Nor has Onsharp requested any extensions of time to Answer or respond to discovery. See De Luca Declaration, para. 8. This failure to comply with a Board Order constitutes further clear evidence that Onsharp is not acting in good faith in this matter.

Because the parties did not hold any substantive settlement discussions after the December 2010 counter-offer, Sharp simply could not understand the allegations of good faith negotiations postulate in Onsharp's motion of June 5, 2012. As a result, Sharp asked Onsharp to identify the settlement offer referred to in its motion. See De Luca Declaration, para. 9

Sharp counsel was extremely surprised to learn that Onsharp took the position that its Motion referred to the counter-settlement agreement proposed in December 2010 through its previous counsel, Westman, Champlin & Kelly, P.A., which was expressly rejected by Sharp many times prior to the filing of Onsharp's motion. See De Luca Declaration, para. 10.

In that regard, Sharp notes that Onsharp's motion nevertheless alleged that its motion should be granted for "good cause to allow the parties to conclude settlement efforts (Onsharp's Brief at 1). Onsharp further indicates that "During the Extensions of Time and thereafter, the parties have been negotiating and Onsharp believes that the parties have come quiet [sic] close to an agreed settlement of the present Opposition."

(Onsharp's Br. at 1). Onsharp also represented to the Board that it "failed to file its Answer due to on-going settlement discussions. . ." (Onsharp's Br. at 1). As pointed out above, there is absolutely no reasonable basis for Onsharp to believe that an agreement based on the rejected counter-offer of December 2010 put the parties anywhere near settlement. See De Luca Declaration, para. 11.

Onsharp also misleads the Board to believe that the parties have been "working together on an agreement" since December 2010 (Onsharp's Br. at 4), which is simply untrue. For example, Onsharp's December 2010 counter-offer was rejected by Opposer in both January 2011 and March 2011. Moreover, no new settlement offers have taken place since the rejection of the counter-offer in March 2011. See De Luca Declaration, para. 12.

Sharp's willingness to restart settlement discussions, as indicated to Onsharp's president in March and April 2012, was contingent on settlement based on Sharp's initial September 2010 agreement. Thus, Onsharp's statement to the Board that the "the parties have been negotiating a consent agreement, which Onsharp believes is close to completion" (Onsharp's Br. at 4) is not credible and it is hard to believe that it could have been made in good faith. See De Luca Declaration, para. 13.

Further, the claim of "inadvertence" and that Onsharp was "waiting to be served the Amended Pleading" is highly implausible and/or grossly negligent. Onsharp acknowledged that the "Response due date was set" in the Board's February 23, 2012 order. (Onsharp's Br. at 2).

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There was no reason for Onsharp to believe that no action was needed due to the changes made to the Amended Notice of Opposition, particularly when the Board instructed them that they had a 20 day response due date. If Onsharp, who is represented by an attorney, Ms. Toni Sandin, did not understand the rules of procedure, it should have hired outside counsel (or retained its prior outside counsel). Even a lay person should be able to understand an unambiguous 20 day response due date. Moreover, if Onsharp believed the same responses as it made to Opposer's initial complaint were appropriate, it could have simply plead those same responses.

In addition and as noted above, Onsharp has not complied with this Board's Order to provide discovery responses to the interrogatories, document requests and admissions. This is another indicia that Onsharp has not acted in good faith in this case.

Significantly, because Onsharp has not responded to the discovery as ordered by the Board, if the motion to set aside default is granted, Opposer plans to file a motion for sanctions. Admissions that were the subject of Sharp's discovery motion should be deemed admitted for Onsharp's failure to comply with the Board's order.

The failure to answer was the result of willful conduct and gross neglect. This case is similar to *DeLorme Publishing Co v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000) (willful conduct shown where although applicant may not have intended that proceedings be resolved by default, applicant admittedly intended not to answer for six months). As in *DeLorme*, the Board's February 23, 2012 order was unambiguous. It is inconceivable that Onsharp misunderstood in good faith (especially, at anytime after April 16, 2012) that they did not have to respond to the Response date set very clearly in

the Board's communication of February 23, 2012.<sup>1</sup> It is puzzling to why Onsharp misconstrued the Board's order to indicate that upon receipt of service of the Notice of Opposition, they would need to respond. The instruction in the October 25, 2011 suspension (that "The parties should not file any paper which is not germane to these motions") was moot when the Sharp's motion was granted in February 23, 2012.

Onsharp consciously chose to ignore the Board's order granting Sharp's motion to amend its amended notice of opposition. *See, CJC Holdings Inc. v. Wright & Lato Inc.*, 979 F.2d 60, 25 USPQ2d 1212, 1215 (5th Cir. 1992) (defendant's failure to read certified letter containing complaint and summons prior to leaving on vacation held willful); *Marziliano v. Heckler*, 728 F.2d 151, 156 (2d Cir. 1984) (finding of willfulness is supported by a knowing failure to timely respond). *Cf. Gucci America Inc. v. Gold Center Jewelry*, 158 F.3d 631, 48 USPQ2d 1371, 1374 (2d Cir. 1998) (finding of bad faith not required; default need only be supported by a finding that the defendant acted deliberately).

As outlined above, Onsharp had a number of options available if it truly believed that service of the notice of opposition was required. However, Onsharp's admittedly intentional choice not to respond in any way for several months evidences an objective intent not to defend this opposition, or at the very least, amounts to gross neglect.

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<sup>1</sup> The Board very clearly granted Sharp's motion for an amended pleading and stated: "Applicant is allowed until TWENTY DAYS from the mailing date of this order to file its answer thereto."

Here, as in *DeLorme*, the applicant, Onsharp, elected not to act, in this case to provide no response to discovery, to be uncommunicative about the protective order and, strikingly, to take no action to respond to the amended complaint.

As in *DeLorme*, at the very least, Onsharp could have contacted the Board or opposer by telephone or in writing to inquire as to whether Onsharp needed to serve anything further in view of the Board's February 23, 2012 order. Instead, Onsharp did nothing.

As in *DeLorme*, in addition to the formal notice provided by the Board's February 23, 2012 order, the undersigned held a telephone conversation with Mr. Sandin, the president of Onsharp in order to request an extension of the discovery period. At that time, the undersigned mentioned that the Board granted Sharp's motion for an amended notice of opposition and Sharp looked forward to its response. See De Luca Declaration, para. 6.

Nonetheless, several months passed before Onsharp filed its motion and proposed answer. As in *DeLorme*, Onsharp itself had personal notice of grant of Sharp's motion to amend its complaint and the need to take action for over three months before filing the instant motion.

Furthermore, Onsharp did not make any effort to determine whether their present motion was accurate, e.g., by contacting Sharp. Instead, it submitted the motion with

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multiple untruthful and/or misleading statements. The submission of false information is actionable.<sup>2</sup>

Also, the fact that Sharp sent Onsharp a protective order is evidence that Opposer was diligent in moving the case along the prescribed schedule and prosecuting its case, rather than having any relevance to settlement. The requirement to file the protective order with the Board was set out in the Board's February 23, 2012 order. Sharp sent its signed copy to Onsharp for signature, but, Onsharp to date has not returned it to Sharp or filed it with the Board. This is additional evidence of a lack of good faith.

Further, Onsharp stated that they understand that "Opposer wished to compel discovery and Onsharp understood this as requiring action separate from an answer to a motion to any amended pleading." Despite this knowledge, they still have not complied with the Board's discovery order by providing any responsive discovery. For reasons of this noncompliance alone, the notice of default should not be set aside.

In summary, Onsharp has failed to establish the requisite "good faith" to evade the entry of a default judgment or to set such a judgment aside. As demonstrated above,

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<sup>2</sup> The signature of an authorized representative who signs a document, and then files it with the Board on behalf of a party, constitutes a certification of the elements specified in 37 CFR § 11.18(b), and that a knowing violation of the provisions of that rule by an attorney or other authorized representative will leave him or her open to disciplinary action. 37 CFR § 11.18. *Cf.* Fed. R. Civ. P. 11. *See also Clorox Co. v. Chemical Bank*, 40 USPQ2d 1098, 1100 n.9 (TTAB 1996) (accuracy in factual representations is expected). Pro se parties are also bound by 37 CFR § 11.18. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 547 (1991); and *Central Manufacturing Inc. v. Third Millennium Technology Inc.*, 61 USPQ2d 1210, 1213 (TTAB 2001) (authority to sanction pro se party "is manifestly clear.").

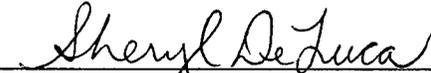
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(i) Onsharp has misrepresented the status of the parties' settlement negotiations, (ii) it has failed to comply with the Board's Order compelling discovery responses and (iii) it has ignored clear actions and statements by Sharp indicating that the proceedings were not stayed.

Respectfully submitted,

SHARP KABUSHIKI KAISHA, a/t/a  
SHARP CORPORATION

Dated: June 25, 2012.

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

SHARP KABUSHIKI KAISHA, a/t/a	)	Attorney Ref.: 790-2052
SHARP CORPORATION,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91190899
	)	Mark: ONSHARP
ONSHARP, INC.,	)	Application No. 77/645,273
	)	
Applicant.	)	

**DECLARATION OF SHERYL DE LUCA**

I, Sheryl L. De Luca, declare as follows:

1. I am a member of Nixon & Vanderhye P.C. and a member of the Commonwealth of Virginia. I make this declaration based on personal knowledge as to the matters set forth below, in support of the Opposition of Sharp Kabushiki Kaisha, a/t/a Sharp Corporation (“Sharp”) to Applicant, Onsharp, Inc.’s (“Onsharp”) Motion to Set Aside Notice of Default and Answer to Amended Pleading in this proceeding.

2. In September 2010, Sharp provided Onsharp with a proposed settlement agreement. However, Onsharp obtained new outside counsel at Westman, Champlin & Kelly, P.C. and then provided Sharp with a counter-offer to settle the case in December 2010. The December 2010 counter-offer significantly differed from Sharp’s September 2010 agreement. Sharp rejected Onsharp’s December 2010 counter offer on separate occasions.

3. On January 28, 2011, I received a telephone call from one of Onsharp’s counsel at Westman, Champlin & Kelly who inquired about the status of Sharp's response to their counter proposal. I told them it was a “non-starter.”

4. Also, at the discovery conference of March 7, 2011, Onsharp's counsel informed me that Onsharp would not agree to Sharp's proposal of September 2010. In response, on behalf of Sharp, I informed Onsharp that Sharp could not agree to Onsharp's counter-proposal of December 2010, (i.e., it was a "non-starter) at which time Onsharp's counsel indicated to me that he believed the parties would probably need to go forward with this case and let the TTAB decide it.

5. No further settlement proposals were discussed after that time and the proceeding went forward per the Board's scheduling order, including Sharp's service of discovery requests and request for the Board's intervention to obtain the discovery sought. The December 2010 counter-offer ended the parties' settlement negotiations.

6. On March 14, 2012, on behalf of Sharp, I contacted Mr. Joe Sandin, President of Onsharp for an extension of the discovery period (which was necessary because Onsharp had not yet received any discovery as ordered by the Board's February 23, 2012), and I told Mr. Sandin that, if any settlement discussions were to be reopened, they would have to be along the lines of the initial settlement agreement, before Onsharp hired other outside counsel. At that time, the I also mentioned that the Board granted Sharp's motion for an amended notice of opposition and Sharp looked forward to its response.

7. On April 16, 2012, I communicated to Ms. Toni Sandin that any settlement discussion would need to be along the lines of the settlement offer in September 2010. I also indicated to Ms. Sandin that Onsharp's Answer to the Amended Notice of Opposition and its discovery responses were past due at that point.

8. To date, Onsharp still has not provided any of the discovery responses ordered by the Board's February 23, 2012 order (in response to Sharp's Motions to compel). Nor has Onsharp requested any extensions of time to Answer or respond to discovery.

9. Because the parties did not hold any substantive settlement discussions after the December 2010 counter-offer, Sharp simply could not understand the allegations of good faith negotiations postulate in Onsharp's motion of June 5, 2012. As a result, I asked Onsharp to identify the settlement offer referred to in its motion.

10. I was extremely surprised to learn that Onsharp took the position that its Motion referred to the counter-settlement agreement proposed in December 2010 through its previous counsel, Westman, Chaplin & Kelly, P.A., which was expressly rejected by Sharp many times prior to the filing of Onsharp's motion.

11. As pointed out above, there is absolutely no reasonable basis for Onsharp to believe that an agreement based on Onsharp's rejected counter-offer of December 2010 put the parties anywhere near settlement as Onsharp indicated in its Motion at p. 1.

12. Onsharp also misleads the Board to believe that the parties have been "working together on an agreement" since December 2010 (Onsharp's Br. at 4), which is simply untrue. For example, Onsharp's December 2010 counter-offer was rejected by Opposer in both January 2011 and March 2011. Moreover, no new settlement offers have taken place since the rejection of the counter-offer in March 2011.

13. Sharp's willingness to restart settlement discussions, as I indicated to Onsharp in March and April 2012, was contingent on settlement based on Sharp's initial

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September 2010 agreement. Thus, Onsharp's statement to the Board that the "the parties have been negotiating a consent agreement, which Onsharp believes is close to completion" (Onsharp's Br. at 4) is not credible and it is hard to believe that it could have been made in good faith.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: June 25, 2012

By:   
Sheryl De Luca

**CERTIFICATE OF SERVICE**

I hereby certify that on June 25, 2012, the foregoing **OPPOSER'S**  
**OPPOSITION TO APPLICANT'S MOTION TO SET ASIDE NOTICE OF**  
**DEFAULT AND ANSWER TO AMENDED PLEADING and DECLARATION OF**  
**SHERYL DE LUCA** were served on Applicant via first-class mail to:

Mr. Joe Sandin, President  
Onsharp, Inc.  
474 45th Street South  
Fargo, ND 58103

**NIXON & VANDERHYE, PC**

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