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

Proceeding	91195527
Party	Defendant Alice Dendinger Alliance Group, L.L.C.
Correspondence Address	JUSTIN M WELCH BLAZIER CHRISTENSEN BIGELOW & VIRR PC 221 WEST 6TH STREET, SUITE 2000 AUSTIN, TX 78701 UNITED STATES jwelch@blazierlaw.com
Submission	Opposition/Response to Motion
Filer's Name	Justin M. Welch
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Signature	/justin m. welch/
Date	11/09/2010
Attachments	MOTIONS FOR SANCTIONS - RESPONSE.pdf (5 pages)(173937 bytes) EXH A - MOTION FOR SANCTIONS--RESPONSE.pdf (2 pages)(49766 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of: Alice Dendinger Alliance Group, L.L.C.

Serial No.: 76/697692.

Filed: June 1, 2009.

Mark: TIMELINE TRAINING.

Published for Opposition: April 27, 2010.

EVERETT W. JAMES, *Opposer,*	§	
	§	OPPOSITION NUMBER:
v.	§	
	§	91195527
ALICE DENDINGER ALLIANCE GROUP, L.L.C., *Applicant,*	§	

SUPPLEMENTAL RESPONSE TO OPPOSER'S MOTION FOR SANCTIONS

COMES NOW, APPLICANT, Alice Dendinger Alliance Group, L.L.C. ("Dendinger"), and files this her Supplemental Response to Opposer's Motion for Sanctions filed by Everett W. James ("James"), and in support will show as follows:

I. ARGUMENT & AUTHORITY.

1. Applicant respectfully requests that the Board consider this supplement to its Response, filed in rebuttal to Opposer's reply brief. As grounds for allowing the supplement, Applicant notes below that Opposer has misrepresented facts to the Board which must be rebutted.

i. Decision on Merits Preferred to Decision by Default.

2. When considering dismissal of an action under Rule 37(b)(2), a court should consider (1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; and (3) the culpability of the litigant.[1] "Only when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits is dismissal an appropriate sanction."[2]

3. Here, Opposer's counsel stridently argues that because Applicant failed to timely engage in a discovery conference, "sanctions, including entry of a default judgment against Applicant, are appropriate."[3]

4. As noted by the Board's July 1st scheduling order, the discovery conference is to cover the following topics:

> "(1) the nature of and basis for their respective claims and defenses, (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and (3) arrangements relating to disclosures, discovery and introduction of evidence at trial."

Although the conference may assist in resolving the case, or saving settlement, streamline the discovery process, there is nothing that affects resolution of the case on its merits. Stated differently, there is nothing that would prejudice a party or interfere with presentation of the case on its merits if the conference were not held. Nor has Opposer noted any such prejudice or interference.

5. Rather, Opposer seeks to win by technical default as opposed to presenting his opposition on its merits.

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[1] ***Meade v. Grubbs***, 841 F.2d 1512, 1521 n.7 (10th Cir.1988).
[2] ***Id.***
[3] *See* p.4 of Mot. for Sanctions.

ii. No Return Call by Opposer's Counsel.

6. Opposer's preference for a technical default is further evidenced by the failure of its counsel to respond to the undersigned's call on October 27th. Specifically, as noted in Applicant's Response, the undersigned called Opposer's counsel on October 27th to either (a) hold the discovery conference, or (b) set a teleconference to do so. For the last two weeks, he has failed to return the call.

7. Instead, he filed a Reply brief in which he accused the undersigned of trying to "misle[a]d" the Board with an "artfully crafted contention that Applicant's counsel called Opposer's counsel . . . 'to rectify the situation.' "

8. The undersigned did not try to mislead the Board. Rather, the undersigned's statement was simply that he had called Opposer's counsel on October 27th to hold the scheduling conference, and rectify the failure to do so earlier.

9. More importantly, Opposer's counsel, Martin E. Hsia, has dissembled. He claims that the undersigned represented to the Board "that Applicant has been trying to 'rectify the situation' for some time," and that this representation "is misleading because, in reality, Applicant's counsel only called once."[4] The undersigned never said that he had tried "to 'rectify the situation' for some time." On the contrary, the undersigned said he had tried to call Mr. Hsia once:

> "Applicant has, as of the date of this filing, taken steps to rectify the situation. Specifically, the undersigned has left a phone message with Mr. Martin Hsia, Opposer's counsel, to schedule the conference, and get him anything he feels he is entitled to, and has not received."[5]

10. Federal Rule of Procedure 11 provides that every pleading signed by counsel constitutes a representation that the factual representations therein are supported by evidence.

[4] *See* pp.3-4 of Opposer's Reply.
[5] *See* ¶2 of Applicant's Response.

Rule 11(c) allows a court to impose sanctions on counsel for misrepresenting facts. If the Board feels sanctions are warranted here, Applicant requests that they be levied on Mr. Hsia.

iii. Opposer's Failure to Serve Initial Disclosures.

11. Opposer has similarly failed to adhere to the Board's scheduling order. Specifically, Opposer's initial disclosures under Rule 26(a) were due October 9, 2010. However, he has yet to serve them, unlike Applicant that has served its disclosures.

12. And, unlike a scheduling conference, the failure to serve the disclosures can actually prejudice Applicant's case. Specifically, the disclosures require, among other things, the identification of fact witnesses, and a description of the location of relevant documents. These items are necessary to prepare Applicant's case.

iv. Conclusion.

13. As opposed to proceeding with Opposer's sophomoric and wasteful requests for the equivalent of a technical knockout, Applicant respectfully asks the Board to order the parties to hold the discovery conference by a date certain, and that they proceed with the discovery process.

PRAYER

WHEREFORE, Applicant prays that its Response and this Supplement be well taken, and that Applicant's motion be denied.

Respectfully submitted,

By: _____

Justin M. Welch
State Bar No. 24003876
Attorney for Applicant

a member of the Firm of:

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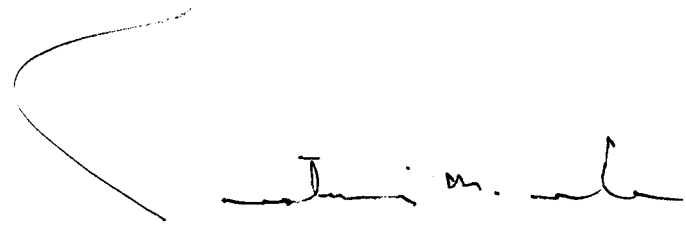
CERTIFICATE OF SERVICE

The undersigned represents that a true and correct copy of the foregoing document was transmitted to those individuals set forth below pursuant to TBMP 311.01(c) on this the 9th day of NOVEMBER, 2010, by electronic notification or in the manner so indicated.

Martin E. Hsia
Cades Cschutte, L.L.P.
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
Via facsimile to 808.540.5011



Justin M. Welch

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AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who swore on oath that the following facts are true:

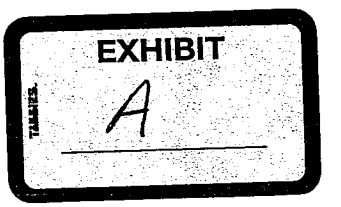
"1. My name is Justin M. Welch. I am over the age of 18 and am fully competent to testify to, and have personal knowledge of the facts contained herein.

"2. I am Applicant's counsel.

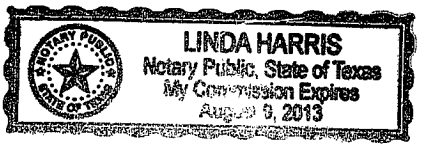
"3. Opposer has failed to serve its initial disclosures under Rule 26(a) which were due October 9, 2010.

"4. Opposer's counsel, Mr. Hsia, has failed to return my phone call on October 27th, or contact me for any reason.

"5. Further affiant sayeth not."



Justin M. Welch

SIGNED AND SWORN to before me on this the 9th day of November, 20 10.

Notary Public, State of Texas