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

Proceeding	91200643
Party	Defendant Nowlan Family Trust
Correspondence Address	JOHN J OMALLEY VOLPE AND KOENIG PC 30 S 17TH STREET, UNITED PLAZA PHILADELPHIA, PA 19103 UNITED STATES jomalley@vklaw.com
Submission	Motion to Strike
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Signature	/John J. O'Malley/
Date	08/10/2012
Attachments	Motion to Strike.pdf (7 pages)(544858 bytes)

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

In the Trademark Opposition of: Mark: BUCK ROGERS Appln. No. 77/650082 Filed: January 15, 2009 Published: June 14, 2011 Dille Family Trust, Opposer v. Nowlan Family Trust, Applicant.	Opposition No.: 91200643 Date: August 10, 2012

APPLICANT, NOWLAN FAMILY TRUST'S, MOTION TO STRIKE OPPOSER'S AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL INITIAL DISCLOSURES

COMES NOW the Applicant, Nowlan Family Trust, by and through their undersigned attorney, pursuant to 37 CFR § 2.127(a) and 37 CFR § 2.119(c), moves this Honorable Court for the entry of an order striking Opposer's Affidavit in Support of Motion to Compel Initial Disclosures and as grounds therefore would state as follows:

1. On August 6, 2012, Opposer filed an Affidavit in Support of Motion to Compel Initial Disclosures.

* * *

Certificate of Service and Mailing

I hereby certify that this correspondence is being filed online via ESTTA to: Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313-1451, on August 10, 2012.

I further certify that this correspondence is being deposited with the U.S. Postal Service as First Class Mail in an envelope addressed to Vincent G. LoTempio, Kloss, Stenger & LoTempio, 69 Delaware Avenue, Suite 1002, Buffalo, NY 14202, on August 10, 2012.

8/10/12
Date of Signature

John J. O'Malley

2025012-2

2. Pursuant to 37 CFR § 2.127(a) and 37 CFR § 2.119(c), Opposer's Affidavit in Support of Motion to Compel Initial Disclosures is not timely and should be stricken and not considered by the Board.
3. Pursuant to CFR 2.127(a) Opposer's Affidavit in Support of Motion to Compel Initial Disclosures is improper and should be stricken and not considered by the Board because it is not a reply brief.
4. Applicant respectfully moves to strike Opposer's Motion to Compel Initial Disclosures.

WHEREFORE, Applicant hereby respectfully requests that this Honorable Court enter an order striking Opposer's Affidavit in Support of Motion to Compel Initial Disclosures.

Respectfully submitted,

Nowlan Family Trust,

Date: 8/10/12

By _____

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

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APPLICANT NOWLAN FAMILY TRUST'S BREIF IN SUPPORT OF MOTION TO STRIKE OPPOSER'S AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL INITIAL DISCLOSURES

I. INTRODUCTION

Applicant, Nowlan Family Trust ("Applicant"), hereby submits a motion to strike Dille Family Trust's ("Opposer") Affidavit in Support of Motion to Compel Initial Disclosures.

Opposer filed a Motion to Compel Initial Disclosures on June 13, 2012 in the Opposition Proceeding noted above. Applicant filed a timely Response to Opposer's Motion to Compel Initial Disclosures on July 3, 2012. Opposer then replied on August 6, 2012 by filing an untimely Affidavit in Support of Motion to Compel Initial Disclosures.

II. LEGAL STANDARD

A. Motion to Strike Brief on Motion

If a brief in opposition to a motion, or a reply brief in support of the motion, is not timely filed, it may be stricken, or given no consideration, by the Board. See TBMP § 517.

B. Timeliness of a Reply Brief

Under 37 CFR § 2.127(a), a reply brief, if filed, shall be filed within fifteen (15) days from the date of service of the brief in response to the motion, except as provided in 37 CFR § 2.119(c), which confers and additional five (5) days.

C. Affidavit Form of Reply is Improper

37 CFR § 2.127(a) only provides for the filing of (1) a brief in support of a motion, (2) a brief in response to the motion and (3) a reply brief, if filed. No other further papers in support of or in opposition to a motion will be considered by the Board. Id.

III. ARGUMENT

A. Opposer's Affidavit in Support of Motion to Compel Initial Disclosures Is Untimely and Should be Stricken

Opposer's Affidavit in Support of Motion to Compel Initial Disclosures is not timely. Any reply brief, if filed, must be filed within the same fifteen (15) days, plus five (5) for service by regular mail, that govern responding to a motion. 37 CFR § 2.127(a) and 37 CFR § 2.119(c).

Opposer filed its Motion to Compel Initial Disclosures on June 13, 2012. Applicant filed a timely Response to Opposer's Motion to Compel Initial Disclosures on July 3, 2012. Opposer then replied on August 6, 2012 by filing an untimely Affidavit in Support of Motion to Compel Initial Disclosures. Opposer's reply was not filed within twenty (20) days,[1] but rather was filed thirty one (31) days after Applicant's response was filed, making Opposer's reply nine (9) days late.

Opposer did not seek an extension of time for filing its reply. 37 CFR § 2.127(a) and Fed. R. Civ. P. 6(b) provides several ways to obtain an extension, yet Opposer did not pursue any. No motion for an extension was filed. No other timeframe for filing the reply was specified by the Board. No extension of time was stipulated by the parties. Opposer did not provide the Board with a motion for good cause or a motion showing excusable neglect. Instead, Opposer filed what was in essences an untimely reply.

Opposer's reply, Affidavit in Support of Motion to Compel Initial Disclosures, was untimely filed and should be stricken. See also Tequila Cuervo La Rojena S.A. de C.V. v. Cointreau Corp., 2000 TTAB LEXIS 95 (Trademark Trial & App. Bd. 2000) (nonprecedential) (applicant filed a motion to strike opposer's reply brief on the grounds that it was untimely—filed 2 days late—and it exceeded the page limitation; no consideration was given to opposer's reply brief).

[1] According to 37 CFR § 2.127(a) "a reply brief, if filed, shall be filed within fifteen days from the date of service of the brief in response to the motion." However, in this case, 37 CFR § 2.119(c) applies, giving Opposer an additional five (5) days to file because service of a Applicant's Response to Opposer's Motion to Compel Initial Disclosures was made by first-class mail.

B. Opposer's Affidavit in Support of Motion to Compel Initial Disclosures Is Improper and Should be Stricken

Opposer's Affidavit in Support of Motion to Compel Initial Disclosures is improper. Surreplies and any other filings, no matter how titled, will not be considered. See No Fear Inc. v. Rule, 54 U.S.P.Q.2d 1551, 1553 (TTAB 2000) (reply brief read but given no weight; surreply returned to filer).

It is unclear why Opposer has filed an "Affidavit" in Support of Motion to Compel Initial Disclosures in place of a Reply Brief. "Specific provision is made in the Trademark Rules of Practice for the filing of a brief in support of a motion, a brief in opposition to a motion, and a reply brief in further support of the motion." TBMP § 517. *See also* TBMP § 502.02(b). Under 37 CFR § 2.127(a), the Board will *only* consider (1) a brief in support of a motion, (2) a brief in opposition to a motion from the non-moving party, and (3) a reply brief in further support of the motion. Opposer has not submitted a reply brief in further support of its motion to compel, and thus Opposer's affidavit should be stricken.

IV. CONCLUSION

For the foregoing reasons, Opposer's Affidavit in Support of Motion to Compel Initial Disclosures should be stricken.

Respectfully submitted,

Nowlan Family Trust,

Date: 8/10/12

By_____
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