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

Proceeding	91201995
Party	Plaintiff Mendias & Milton, LLC
Correspondence Address	DEBORAH L LIVELY THOMPSON & KNIGHT LLP 1722 ROUTH STREET SUITE 1500 DALLAS, TX 75201 UNITED STATES deborah.lively@tklaw.com, douglas.heuvel@tklaw.com
Submission	Other Motions/Papers
Filer's Name	Deborah L. Lively
Filer's e-mail	deborah.lively@tklaw.com
Signature	/deborah l. lively/
Date	10/23/2012
Attachments	(15) Motion to Compel Discovery 10-23-2012.pdf (18 pages)(3694976 bytes)

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

In re Application of:	Fitfast, LLC.
Serial No.:	85/017519
Filed:	April 19, 2010
Trademark:	FITFOOD
Int'l Classes:	43
Published:	September 13, 2011

Mendias & Milton, LLC,		§	
	Opposer,	§	
		§	
v.		§	Opposition No. 91201995
		§	
Fitfast, LLC,		§	
	Applicant.	§	
		§	
		§	

OPPOSER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INTERROGATORY ANSWERS

Mendias & Milton, LLC ("Opposer"), a limited liability company of Texas, having a corporate address of 7700 San Felipe, Suite 490, Houston, Texas 77063, files its Motion to Compel Production of Documents and Interrogatory Answers and states:

1. On October 11, 2011, Opposer, filed a Notice of Opposition against Applicant's application, U.S. Ser. No. 85/017,519, for the mark FITFOOD, for which the Trademark Trial and Appeal Board ("Board") set the time to answer as November 20, 2011.

2. On November 21, 2011, FitFast, LLC. ("Applicant") filed its Answer to the Notice of Opposition.

3. The Board reset the deadlines for this proceeding following the Board's denial of Opposer's Motion for Default Judgment.

4. Following the discovery/settlement conference held between the parties in the presence of the interlocutory attorney on March 20, 2012, the parties requested a thirty-day suspension of the proceeding for settlement discussions. Accordingly, on March 22, 2012, the Board issued a new Scheduling Order, notifying parties hereto that the required Initial Disclosures for both parties would be due on April 23, 2012 and that the Discovery period would close on September 20, 2012. *See* Exhibit A, showing the scheduling order issued by the Board on March 22, 2012.

5. Following the discovery/settlement conference, Applicant and Opposer's counsel communicated on several occasions but the parties were unable to reach a settlement.

6. Opposer served its required Initial Disclosures to Applicant on April 23, 2012. *See* Exhibit B showing the service of Initial Disclosure via email, per agreement of the parties.

7. Since that date, Applicant has neither requested any extension of time to serve its required Initial Disclosures on Opposer, nor has Applicant served its Initial Disclosures on Opposer.

8. Opposer served its first set of discovery requests on Applicant on July 17, 2012. *See* Exhibit C showing the service of discovery requests via email. These requests included Opposer's First Requests for Admission to Applicant, Opposer's First Set of Interrogatories to Applicant, and Opposer's First Requests for Production to Applicant.

9. Since that time, Applicant has neither responded to any of Opposer's discovery requests nor has Applicant requested any extension of time to respond to any of Opposer's discovery requests, despite Opposer's attempt to prompt Applicant's response

prior to the close of Discovery. *See* Exhibit D showing correspondence to Applicant requesting a response.

10. Discovery closed on September 20, 2012, and since that date, Applicant has failed to respond to any discovery requests of Opposer.

11. Opposer has made a good faith effort, by telephone communication and written correspondence, to resolve and settle this matter with Applicant; however, the parties have been unable to reach a mutually agreeable resolution.

Given the above, Opposer respectfully requests that the Board issue an order compelling production of Applicant's responses to Opposer's First Requests for Production and to Opposer's First Set of Interrogatories.

Dated: October 23, 2012

Respectfully submitted,

THOMPSON & KNIGHT LLP
ATTORNEYS FOR OPPOSER

Deborah L. Lively

One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1700
(214) 969-1751 (Fax)

Certificate of Service

I hereby certify that a true and complete copy of the foregoing Motion to Compel has been served on Fitfast, LLC by email, per agreement of the parties, with a courtesy copy via First Class mail to:

Fitfast, LLC.
402 Heywood Ave.
Orange, New Jersey 07050

on this 23rd day of October 2012.

Signed: _____
Deborah L. Lively

EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MBA

Mailed: March 22, 2012

Opposition No. 91201995

Mendias & Milton, LLC

v.

Fitfast, LLC

Michael B. Adlin, Interlocutory Attorney:

On March 20, 2012, at opposer's request, the Board participated in the parties' telephonic discovery conference mandated under Fed. R. Civ. P. 26(f) and Trademark Rule 2.120(a)(1) and (a)(2). Deborah L. Lively appeared on opposer's behalf, applicant appeared pro se through its "founder," Duke Richman, who asserted that he is authorized to act on applicant's behalf, and the interlocutory attorney assigned to this proceeding participated on the Board's behalf.

Applicant indicated that it does not currently have concrete plans to hire an attorney to represent it. The Board advised applicant that it is generally recommended that parties retain experienced trademark practitioners to represent them in Board proceedings.[1] The Board also

[1] Information for parties representing themselves pro se is provided at the end of this order.

indicated that applicant will be expected and required to comply with all applicable rules and procedures, including those relating to service of papers, as set forth in 37 C.F.R. § 2.119, regardless of whether or when applicant retains counsel. During the teleconference, the parties agreed to accept service of papers by e-mail, pursuant to Trademark Rule 2.119(b)(6). The parties are not aware of any related proceedings, marks or third party disputes.

The parties have not had substantive discussions thus far, and have not discussed settlement. The parties are strongly encouraged to work together to resolve this proceeding, including by exchanging information and/or documents informally, so as to better evaluate their respective claims and defenses prior to the case advancing to discovery or trial. At the end of the teleconference, the parties agreed to suspend this proceeding for 30 days for the purpose of exploring settlement.

The parties discussed the pleadings, including opposer's claims of priority and likelihood of confusion and dilution. The Board noted that opposer has pleaded ownership of a registration, and assuming that opposer properly introduces the registration into evidence, because applicant has not counterclaimed to cancel opposer's pleaded registration, it appears that priority may not be at issue at trial. Trademark Rule 2.122(d)(1); Penguin Books Ltd. v.

Eberhard, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). While applicant claims in its answer that confusion is unlikely because the parties operate in distinct geographic territories, the Board pointed out that this is not a concurrent use proceeding, and that opposer owns an unrestricted registration, just as applicant seeks an unrestricted registration. The Board also informed the parties that opposer's dilution claim is inadequate because opposer has not alleged that its mark became famous prior to applicant's priority date. See, Toro Co. v. ToroHead Inc., 61 USPQ2d 1164, 1174 and n. 9 (TTAB 2001).

In any event, whether or not opposer perfects its dilution claim and whether or not priority is ultimately at issue, it is clear that this case is quite straightforward, and the relevant facts appear quite limited. Therefore, the Board reminded the parties of their option to stipulate to limits on discovery, abbreviated procedures for submission of evidence and other ways to expedite resolution of this case. See, Target Brands Inc. v. Hughes, 85 USPQ2d 1676 (TTAB 2007). The Board also discussed the possibility of the parties making greater reciprocal disclosures than required by Fed. R. Civ. P. 26(a)(1), in lieu of formal discovery. See, Miscellaneous Changes to Trademark Trial

and Appeal Board Rules, 71 Fed. Reg. 2498 (January 17, 2006). The parties agreed to consider these possibilities.

On a related note, the Board indicated that this case appears particularly appropriate for Accelerated Case Resolution ("ACR"). While the parties were not willing to agree to ACR during the teleconference, they agreed to also consider resolving this case by ACR, and are directed to:

http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution_ACR_notice_from_TTAB_webpage_12_22_11.pdf

http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution_(ACR)_FAQ_updates_12_22_11.doc

http://www.uspto.gov/trademarks/process/appeal/ACR_Case_List_01_9_11).doc

The Board's standard protective order is applicable herein by operation of Trademark Rule 2.116(g) and available here:

http://www.uspto.gov/trademarks/process/appeal/guidelines/stndagmnt.jsp

The parties are encouraged to acknowledge their obligations under the protective order in writing, and may utilize the following form:

http://www.uspto.gov/trademarks/process/appeal/guidelines/ackagrmnt.jsp

Finally, the parties were reminded that although discovery is open pursuant to the schedule set forth in the Board's order of February 3, 2012, neither discovery

requests nor motions for summary judgment may be served until after initial disclosures are made. In any event, proceedings herein are suspended for 30 days for the purpose of settlement negotiations, and disclosure, conferencing, discovery, trial and other dates are reset as follows:

Proceedings Resume	**April 23, 2012**
Initial Disclosures Due	**April 23, 2012**
Expert Disclosures Due	**August 21, 2012**
Discovery Closes	**September 20, 2012**
Plaintiff's Pretrial Disclosures	**November 4, 2012**
Plaintiff's 30-day Trial Period Ends	**December 19, 2012**
Defendant's Pretrial Disclosures	**January 3, 2013**
Defendant's 30-day Trial Period Ends	**February 17, 2013**
Plaintiff's Rebuttal Disclosures	**March 4, 2013**
Plaintiff's 15-day Rebuttal Period Ends	**April 3, 2013**

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.

Pro Se Information

Applicant is reminded that it will be expected to comply with all applicable rules and Board practices during the remainder of this case. The Trademark Rules of Practice, other federal regulations governing practice before the Patent and Trademark Office, and many of the Federal Rules of Civil Procedure govern the conduct of this opposition proceeding. The parties should note that Patent and Trademark Rule 10.14 permits any person or legal entity to represent itself in a Board proceeding, though it is generally advisable for those unfamiliar with the applicable rules to secure the services of an attorney familiar with such matters.

If applicant does not retain counsel, then it will have to familiarize itself with the rules governing this proceeding. The Trademark Rules are codified in part two of Title 37 of the Code of Federal Regulations (also referred to as the CFR). The CFR and the Federal Rules of Civil Procedure are likely to be found at most law libraries, and may be available at some public libraries. Finally, the Board's manual of procedure will be helpful.

On the World Wide Web, applicant may access most of these materials by logging onto <http://www.uspto.gov/> and making the connection to trademark materials.

The parties must pay particular attention to Trademark Rule 2.119. That rule requires a party filing any paper

with the Board during the course of a proceeding to serve a copy on its adversary, unless the adversary is represented by counsel, in which case, the copy must be served on the adversary's counsel. The party filing the paper must include "proof of service" of the copy. "Proof of service" usually consists of a signed, dated statement attesting to the following matters: (1) the nature of the paper being served; (2) the method of service (e.g., e-mail, first class mail); (3) the person being served and the address used to effect service; and (4) the date of service. Also, the parties should note that any paper they are required to file herein must be received by the Patent and Trademark Office by the due date, unless one of the filing procedures set forth in Trademark Rules 2.197 or 2.198 is utilized. These rules are in part two of Title 37 of the previously discussed Code of Federal Regulations.

Files of TTAB proceedings can now be examined using TTABVue, accessible at http://ttabvue.uspto.gov. After entering the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format.

The third edition (2011) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at

http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp

***

EXHIBIT B

Lively, Deborah

From: Lively, Deborah
Sent: Monday, April 23, 2012 6:04 PM
To: 'fitfast@gmail.com'
Cc: Welch, Justin
Subject: FITFOOD Opposition
Attachments: (1) Opposer's Initial Disclosures 4-23-12.pdf

Dear Mr. Richman,

I look forward to receiving samples of your logo so that I may discuss a possible settlement with my client, which my client is still willing to consider.

Until then, however, I'm providing you with the Initial Disclosures which are due today, according to the revised scheduling order issued by the TTAB. As you may recall, we agreed in our telephone conference to service by email.Please let me know if you have any questions.

Sincerely,

Debbie Lively
Partner

Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
ph: (214) 969-1767
fax: (214) 999-1506

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EXHIBIT C

Lively, Deborah

From: Lively, Deborah

Sent: Tuesday, July 17, 2012 2:41 PM

To: Duke Richman

Subject: FITFOOD opposition

Attachments: (6) Opposer's First Set of Admissions to Applicant 7-17-12.pdf; (4) Opposer's First Set of Requests for Production to Applicant 7-17-12.pdf; (5) Opposer's First Set of Interrogatories to Applicant 7-17-12.pdf

Dear Mr. Richman,

Please see the attached discovery requests, which are being served electronically through this email. I am also sending you courtesy copies by mail.

My client would like to propose that you withdraw your application and that you file new application and include the "FIT FAST" mark and logo to show "FIT FAST FITFOOD" and design. Otherwise, our client has concerns about the application for FITFOOD alone and intends to move forward with this opposition. If you have an alternative suggestion, my client is willing to consider this as well.

Sincerely,

Debbie Lively
Partner

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Dallas, Texas 75201
ph: (214) 969-1767
fax: (214) 999-1506

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This message is confidential and may be attorney-client privileged. If received in error, please do not read. Instead reply to me that you have received it in error and then delete the message. Thank you.

EXHIBIT D

THOMPSON & KNIGHT LLP

ATTORNEYS AND COUNSELORS

DEBORAH L. LIVELY

DIRECT DIAL: (214) 969-1767
EMAIL: Deborah.Lively@tklaw.com

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AUSTIN
DALLAS
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FORT WORTH
HOUSTON
NEW YORK

ALGIERS
LONDON
MONTERREY
PARIS

September 10, 2012

Via First Class Mail and Email: fitfast@gmail.com

Mr. Duke Richman
FitFast LLC
402 Heywood Ave.,
Orange, New Jersey 07050-2007

Re: FITFOOD Opposition

Dear Mr. Richman:

We served you with Discovery Requests on July 17, 2012, responses to which were due within thirty (30) days. We have still not received your responses, and accordingly, are requesting that you provide us with your responses no later than Monday September 17, 2012.

Sincerely,

Deborah L. Lively

/DLL