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

Proceeding	91203884
Party	Plaintiff Ennis, Inc.
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Submission	Motion to Dismiss - Rule 12(b)
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Date	09/14/2012
Attachments	Registrants Reply in Support of Motion to Dismiss.pdf (7 pages)(43010 bytes)

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

In Re: Application Serial No. 85/324,443
For the Mark: COLOR WARS
Filed: May 18, 2011
Published in the Official Gazette: January 17, 2012

Ennis, Inc.)	
)	
)	
Opposer,)	
)	
)	Opposition No. 91203884
v.)	
)	
)	
Joel L. Beling d/b/a Supa Characters Pty. Ltd.,)	
)	
Applicant)	
)	

Joel L. Beling d/b/a Supa Characters Pty. Ltd.,)	
)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92055374
)	
)	
Ennis, Inc.)	
)	Registration No. 3,372,884
)	Mark: COLORWORX
Registrant.)	
)	

REGISTRANT’S REPLY IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Registrant, Ennis, Inc. (“Registrant”), by and through its undersigned counsel, and hereby files this Reply in Support of Registrant’s Motion to Dismiss and would respectfully show the Board as follows:

1. Following the filing of Registrant's Motion to Dismiss Petitioner's Second Amended Petition to Cancel [Doc. #19], Petitioner filed his Response to Petitioner's Motion to Dismiss [Doc. #12-Cancellation] (hereinafter, the "Response") contemporaneously with his Motion for Leave to Exceed Page Limit for his Response [Doc. #12-Cancellation].¹

2. Notwithstanding the Board's admonitions and directives in its Orders, Petitioner's Response should not be considered to the extent (i) the Response violates the Board's Orders and applicable Trademark Rules, and (ii) the Response is supported by inapplicable discovery requests/responses and case law.

I. RESPONSE AND CONTEMPORANEOUSLY FILED MOTION VIOLATE THIS BOARD'S ORDERS AND APPLICABLE RULES

A. Petitioner Failed to Properly Obtain Leave of Court Prior to Filing his Over-Length Response

3. Petitioner failed to obtain prior leave of Court to file his over-length Response prior to filing his Motion for Leave to Exceed Page Limit. Contrary to preferred TTAB practices and, more importantly, the Board's Order requiring the parties to comply with TTAB and Federal Civil Procedure rules, Beling filed his Response and Motion for Leave to Exceed Page Limit as the same filing [Doc. #12-Cancellation] and simply presumes that the Board will grant leave. TTAB Rules expressly mandate that motions for leave to exceed page limits are "for the benefit of the Board, and *it is only with the Board's permission, timely sought*, that a brief exceeding the page limit will be entertained." *See* 37 C.F.R. § 2.128(b); TTAB Rule 537 (emphasis added) ("[O]ne of the primary purposes of the rule is to assist the Board in managing its workload, and to encourage litigants to focus their arguments and eliminate needless verbiage.").

¹ Despite TTAB's Order directing the parties to file all documents in the consolidated Opposition No. 91203884, Beling has filed his Response to the Motion to Dismiss and his Motion to Exceed Page Limit for such Response in the Cancellation No. 92055374.

B. Petitioner Did Not Confer with Registrant's Counsel Prior to Filing his Motion for Leave

4. Petitioner failed to confer with Registrant's counsel prior to filing his Motion for Leave to Exceed Page Limits for his Response. The Board, per its Consolidated Order [Doc. #13] and Board's Communication [Doc. #6], directed Petitioner to strictly comply with TTAB rules and the Federal Rules of Civil Procedure, which require a certificate of conference to be included with all motions in accordance with Trademark Rule 2.120(e) certifying that Petitioner had discussed the nature and contents of its motions prior to filing and that, after good-faith attempts were made, no agreement could be reached. As such, the Board should not consider or grant Petitioner's Motion for Leave.

C. Petitioner Ignores the Board's Order to File his Response with the Parent Case

5. The Board's Consolidated Order expressly mandates that further filings associated with the consolidated proceedings be "filed in the parent case." *See* [Doc. #13, pg. 3]. Notwithstanding this directive, Registrant has filed both his Response and the Motion for Leave in the Cancellation Proceeding (the "child case," Cancellation No. 92055374), not the Opposition Proceeding (the "parent case," Opposition No. 91203884).

D. Petitioner's Response Exceeds the Page Limit by 30 Pages

6. Petitioner's Response to Registrant's Motion to Dismiss fails to conform to TTAB Rules setting forth exact page limits for all briefs on motions because it contains 30 additional pages in excess of the allowable limitation. Subject to applicable TTAB Rules, *all* briefs and motions are subject to page limitations. *See* 37 C.F.R. § 2.127 (emphasis added). TTAB Rule 502.02(b) expressly states that "[b]riefs in support of and *in response to a motion*

may not exceed 25 pages in length . . . The Board will consider no further papers in support of or in opposition to a motion.” 37 C.F.R. § 2.127(a) (emphasis added).²

7. By its Consolidated Order [Doc. #13] dated July 13, 2012 (hereinafter “Consolidated Order”), the Board previously expressed disdain for Petitioner’s failure to comply with applicable rules and lack of good faith effort to resolve matters in dispute. *See* [Doc. #13, pg. 8]. The Board ordered Petitioner to take note that with regard to further motions and responses to pleadings, TTAB page limits are to be “strictly enforced,” and that “[Petitioner] is ordered to refrain from duplicative filings and unnecessary enlargement of the record.” *See id.* Additionally, the Board notified Petitioner that “[a]ny papers filed which do not comply with [these requirements] will be given no consideration.” *See id.*, pg. 9

8. In light of the aforementioned violations, Registrant respectfully requests the Board to give no consideration to Petitioner’s Response or, in the alternative, give no consideration beyond page 25 of Petitioner’s Response.

II. RESPONSE OFFERS ARGUMENTS ON IRRELEVANT DISCOVERY ISSUES AND RELIES ON IRRELEVANT CASE LAW AND ANALYSIS

9. In the alternative, should the Board determine that all or parts of Petitioner’s Response is relevant and worthy of consideration for a determination of Registrant’s Motion to Dismiss, Petitioner directly violates the Board’s Consolidated Order by arguing issues of discovery and citations to wholly irrelevant case law and analysis in support of its Response.

² Per 37 C.F.R. §2.128(b), Motions for Leave to file a brief on the case in excess of the page limit are disfavored by the Board and are rarely granted. *See* 37 C.F.R. § 2.128(b); TTAB Rule 537. Such Motions are advised to be filed *before* the date the brief is due in order to obtain a ruling by the Board before presumptively filing 55-page Response briefs—otherwise the brief should be given no consideration. *See id* (emphasis added). If a party files a brief that exceeds the page limit, but does not file a timely motion for leave to file such a brief, the brief *will be stricken, without leave* to file a substitute brief that meets the page limit. *See id* (emphasis added).

A. Petitioner Treats its Response as a De Facto Motion to Compel Discovery

10. Despite the Board's strict mandate not to do so, Petitioner attempts to circumvent the Board's Consolidated Order by erroneously arguing issues concerning requests for discovery, thereby turning his Response into a de facto motion to compel discovery.

11. Per its Consolidated Order, the Board suspended all issues concerning discovery requests or any further motions to compel discovery filed by Petitioner. *See* [Doc. #13, pg. 9]. Nevertheless, Petitioner dedicated an *entire section* of his response to arguments concerning discovery issues which consume fourteen (14) pages and twenty (20) paragraphs. *See* [Doc. #12-Cancellation, ¶¶ 62-82]. It is entirely inconceivable how Petitioner pleads with this Board to grant his Motion for Leave when the pages Petitioner has utilized to extend his Response beyond the page limit comment on subjects *specifically prohibited* by the Board in its prior Consolidated Order. Registrant refuses to "take the bait" in Petitioner's de facto motion to compel discovery and entertain any notion that Registrant's proper objections and assertions of privilege to Petitioner's discovery requests, in some protracted way, have any bearing on Petitioner's unsupportable allegations of fraud with regard to the USPTO. Likewise, in accordance with the Board's Consolidated Order, Registrant hereby complies with the Board's Order and reserves all arguments concerning discovery until *after* the pleading stage suspension has been lifted.

12. Consequently, in accordance with the Board's admonishments on pages 8-9 of its Consolidated Order, Registrant respectfully requests this Board give no consideration to any of Petitioner's Response regarding issues of discovery, including but not limited to ¶¶ 7-8, 11-12, 17-19, 25-27, 60-63, 67-72, 77-78.

B. Petitioner Utilizes Wholly Irrelevant Case Law and Analogies to Substantiate its Response

13. Moreover, rather than utilizing his additional 30 pages to respond to the case law and analysis contained within Registrant's Motion to Dismiss, Petitioner attempts to "hide the ball" from the Board with citations to wholly irrelevant case law, analysis, and analogies to substantiate his Response.

14. Petitioner argues that "existing law is bad law and leads to a number of unintended and nefarious consequences for the USPTO, appellate courts at both state and federal level and current trademark owners, and accordingly, should be reversed and/or new law established." *See* [Doc. #12-Cancellation, ¶22]. Rather than provide intelligible and coherent counter-arguments in the form of policy or case law in support of his contention that "existing law is bad law," Petitioner, for the remainder of his Response, attempts to substantiate this proclamation by providing new and self-created law for allegations of fraudulent trademark procurement (¶¶ 22-29, 35), wholly inapplicable analogies for opposition proceedings initiated by owners of validly registered trademarks as against marks pending approval (accompanied by Petitioner's own adulterated marks, which Petitioner fails to realize possess no bearing on valid registrations for validly registered marks (¶¶ 30-31),³ citations to inapplicable plagiarism laws (¶¶ 35-59), and the aforementioned impermissible discovery arguments in its Response. Nothing

³Petitioner's analogies in this section completely miss the mark with respect to the current proceedings. Registrant's Motion to Dismiss pertains to the dismissal of Petitioner's Second Amended Petition to Cancel Registrant's validly registered mark—i.e., *the petition filed by Petitioner to cancel Registrant's "COLORWORX" mark*. Petitioner's analogies, on the other hand, describe situations where validly registered marks seek to *oppose* pending applications—not cancel currently registered marks. Registrant already owns a valid United States mark and initially filed the Opposition to oppose Petitioner's pending application. Registrant did not file its Motion to Dismiss to dismiss its own claims in the Opposition Proceedings—rather, Registrant filed a Motion to Dismiss *Petitioner's* Petition to Cancel. Therefore, the analogies upon which Registrant draws its arguments in this section are completely inapplicable and irrelevant to Registrant's Response.

contained within Petitioner's Response resembles an argument based on current *trademark* jurisprudence or offers permissible discussion materials per this Board's Orders.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Registrant prays that Registrant's Motion to Dismiss Petitioner's Second Amended Petition to Cancel be granted, that Petitioner's Second Amended Petition to Cancel be dismissed with prejudice, and that Registrant be awarded all other relief to which it is entitled, both at law and in equity.

Dated: September 14, 2012

Respectfully submitted,

CHALKER FLORES, LLP

By: /s/Scott A. Meyer

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REGISTRANT'S REPLY IN SUPPORT OF MOTION TO DISMISS was served on all counsel of record, this the 14th of September, 2012, by sending the same via electronically through the Electronic System for Trademark Trials and Appeal ("ESTTA") and electronic mail service.

/s/Scott A. Meyer

Scott A. Meyer