

This Opinion is not a
Precedent of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
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wbc

Mailed: January 20, 2015

Opposition No. 91205046

Christina Sukljian

v.

Ate My Heart, Inc.

Cancellation No. 92055279

Ate My Heart, Inc.

v.

Christina Sukljian

Before Bucher, Mermelstein and Greenbaum,
Administrative Trademark Judges.

By the Board:

Christina Sukljian, appearing *pro se*, opposes registration of Ate My Heart, Inc.'s ("AMH") mark, HAUS OF GAGA in standard characters for cosmetics and other goods in Class 3¹ on the grounds of deceptiveness and false suggestion of a connection under Trademark Act § 2(a), dilution under Trademark Act § 43(c), and likelihood of confusion under Trademark Act

¹ Application Serial No. 85215017, filed January 11, 2011, pursuant to Trademark Act § 1(b). The following statements are of record, "[t]he English translation of 'HAUS' is 'HOUSE'"; and "[t]he name 'Gaga' identifies the stage name of Stefani Germanotta, a living individual whose consent is of record."

§ 2(d) with her pleaded Registration No. 2898544 for the mark GAGA PURE PLATINUM in typed form.² AMH filed a petition to cancel Ms. Sukljian's pleaded registration on the ground of abandonment. AMH also claims ownership, in the cancellation proceeding, of three registrations for the mark LADY GAGA in standard character form,³ and three pending trademark applications, including the one at issue in the opposition proceeding.

On September 20, 2012, AMH filed a motion to compel for Ms. Sukljian's failure to serve her initial disclosures and failure to respond to AMH's discovery requests in the cancellation proceeding. As Ms. Sukljian did not respond to the motion, on November 6, 2012, the Board granted the motion as conceded. Thereafter, in the opposition, AMH served Ms. Sukljian with essentially the same discovery requests that it previously had served in the cancellation. Ms. Sukljian responded to the discovery in both proceedings by objecting to all but three requests with a claim of privilege, but she did not provide a description of the privilege claimed or a description of the nature of

² Registration No. 2898544, issued November 2, 2004, for "cosmetics; namely nail polish, lipstick, lip-gloss, eye-liner, lip-liner, eye shadow, face powder, blush, mascara" in Class 3, claiming a date of first use of July 23, 2000, and first use in commerce of June 7, 2001. A § 8 affidavit was accepted June 5, 2010, and a § 15 affidavit was acknowledged. "Typed drawing" form is now known as standard character form. *See* Trademark Rule 2.52 (a): "Standard character (typed) drawing."

³ Registration No. 3695129, registered October 13, 2009, for clothing in Class 25, claiming dates of use and first use in commerce of June 2008; Registration No. 3695038, registered October 13, 2009, for entertainment services in Class 41, claiming dates of use and first use in commerce of September 1, 2006; and Registration No. 3960468, registered May 17, 2011, for various goods in Class 9. The following statement is of record in all three registrations: "Lady Gaga' identifies the stage name of Stefani Germanotta, a living individual whose consent is of record."

the documents or things which were not produced or disclosed. Proceedings were then consolidated by the Board's December 12, 2012, order.

On August 5, 2013, in response to AMH's motions to compel discovery responses in the opposition proceeding and for discovery sanctions in the cancellation proceeding, the Board ordered Ms. Sukljian to respond to AMH's discovery requests in both proceedings without objection as to the merits. Additionally, the Board warned Ms. Sukljian that failure to properly respond to AMH's discovery requests as ordered by the Board may result in sanctions, including the entry of judgment in the cancellation proceeding.

On September 26, 2013, AMH filed another motion for sanctions in the now-consolidated proceedings, alleging that Ms. Sukljian failed to comply with the Board's August 5, 2013 order because her responses to AMH's discovery requests contained numerous objections on the merits. AMH further sought sanctions on the basis that Ms. Sukljian failed to respond to AMH's notice of deposition. In its January 28, 2014 order, the Board, finding Ms. Sukljian failed to fully comply with the Board's August 5, 2013 order regarding discovery, sanctioned Ms. Sukljian by precluding her "from using as evidence at trial any information or documents that would have been responsive to AMH's discovery requests, but were not produced prior to AMH's filing of the motion for discovery sanctions." Additionally, although the Board declined to also issue sanctions for Ms. Sukljian's failure to

respond to AMH's deposition notice,⁴ the Board, giving AMH additional time to notice and conduct a discovery deposition, warned Ms. Sukljian that "failure to appear for the noticed deposition may result in entry of judgment against her." On June 12, 2014, the Board granted AMH's motion to extend its time to take the deposition of Ms. Sukljian until June 30, 2014, in Albany, N.Y., where Ms. Sukljian resides, or wherever the parties may agree, and again reminded Ms. Sukljian that failure to appear for a noticed deposition may result in judgment against her.

Now before the Board is AMH's August 12, 2014 motion for sanctions in the form of default judgment in the consolidated proceedings based on Ms. Sukljian's failure to appear for her re-scheduled deposition. The motion has been fully briefed.

As alleged by AMH in its motion, supported by a declaration of its attorney, the timeline preceding the motion for sanctions is as follows:

- June 17, 2014 at approximately 3:30 pm – AMH left a voicemail message with Ms. Sukljian's receptionist about scheduling her deposition – no return call was received by AMH;
- June 17, 2014 at approximately 4:55 pm – AMH called Ms. Sukljian again and left another voicemail message with her receptionist about scheduling her deposition – no return call was received by AMH;
- June 17, 2014 – after not receiving a return phone call, AMH served a deposition notice on Ms. Sukljian via FedEx to her address of record for 10:00 am on June 26, 2014, at the Albany Marriott in Albany, N.Y.;

⁴ The Board, citing Trademark Rule 2.120(b); Fed. R. Civ. P. 30, explained that "[w]hile *attendance* at a duly-noticed deposition is required, the applicable rules do not require any specific response to such a notice" (emphasis in original).

- June 24, 2014⁵ – AMH received a letter from Ms. Sukljian dated June 20, 2014, indicating she was unavailable for the deposition on the scheduled date but would be available in August;
- June 24, 2014 at approximately 10:28 am – AMH called Ms. Sukljian and left a message with her receptionist requesting she call him back by no later than 4:00 pm that day in view of the Board's June 30, 2014 deadline to hold the deposition – no return call was received by AMH;
- June 24, 2014 at approximately 12:11 pm – AMH sent an email to Ms. Sukljian at her address of record stating, in pertinent part:

Had you deigned to either return our calls or send an email message, we would have had more flexibility in: scheduling a deposition ... and accommodating your request to be deposed on different dates.... Now it is two days before the noticed deposition.... Unless we hear from you by close of business today to discuss an alternative deposition date in July, and agree in writing to an extension of the Board's internal deadline, which must be approved by the Board, we will appear in Albany at the designated time and place to conduct your deposition. Your failure to appear may result in sanctions.... Considering the circumstances, the only way we will consider changing the scheduled deposition date of June 26 is if you return our phone call or respond to our email before 4:00 p.m. today. If we do not hear from you by then, we will expect your attendance on June 26. We will seek sanctions against you if you fail to appear.

No return call or email was received by AMH.

- June 25, 2014 – AMH travels to Albany, N.Y. for the scheduled deposition; and
- June 26, 2014 – AMH arrives at the Albany Marriott hotel at 8:40 am and a stenographer arrive at 9:15 am. At 10:04 am and later at 11:01 am, additionally supported by a notarized deposition transcript, AMH appears on record, noting that Ms. Sukljian did not arrive for the scheduled deposition.

⁵ Ms. Sukljian alleges that her June 20, 2014 letter was delivered via USPS Priority Mail on June 23, 2014 at 3:30 pm.

In response to AMH's motion, Ms. Sukljan does not dispute⁶ that AMH attempted to contact her on June 17 and 24, 2014, but instead argues, *inter alia*, that AMH "unilaterally scheduled its notice of deposition"; that she notified AMH of her unavailability for the scheduled deposition; and that she was unable to return AMH's calls from June 17, 2014 and June 24, 2014, because she was "unavailable and out of the office."

As a matter of convenience and courtesy, parties should attempt to schedule depositions by agreement rather than unilaterally setting the deposition date. *See* TBMP § 404.01 (2014). Nonetheless, it is not unusual for a deposing party to notice a deposition and subsequently discuss alternative dates with the party deposed. *See id.* If taking a deposition on notice alone, the deposing party must give reasonable notice in writing to the adverse party. *See* Fed. R. Civ. P. 30(b)(1). Whether notice is reasonable depends on the circumstances of each case. *See Gaudreau v. Am. Promotional Events, Inc.*, 82 USPQ2d 1692, 1696 (TTAB 2007); *Duke Univ. v. Haggard Clothing Co.*, 54 USPQ2d 1443, 1444 (TTAB 2000). It is the Board's practice to apply Fed. R. Civ. P. 30(b)(1), together with Trademark Rule 2.123(c), to determine the reasonableness of notice in the case of testimony and discovery depositions. *See Gaudreau*, 82 USPQ2d at 1696; *Duke Univ.*, 54 USPQ2d at 1444.

The record indicates that the Board's June 12, 2014 order gave AMH until June 30, 2014 to schedule, serve notice of and take the deposition of Ms.

⁶ Indeed, Ms. Sukljan does not dispute any of AMH's salient factual allegations.

Sukljian. On June 17, 2014, five days after the Board's order issued, and with thirteen days left before the Board's deadline, AMH twice attempted to discuss with Ms. Sukljian the scheduling of her deposition, but Ms. Sukljian did not respond.⁷ On that same day, AMH served (by FedEx) its written notice of deposition providing the exact day, time and location of the deposition. *See* Fed. R. Civ. P. 30(b)(1).

Given that AMH had but eighteen days to schedule, serve notice and take the deposition of Ms. Sukljian, under the circumstances of this case, the Board finds that notice on June 17, 2014, for a June 26, 2014 deposition was reasonable. *See Sunrider Corp. v. Raats*, 83 USPQ2d 1648, 1653 (TTAB 2007) (six days reasonable notice for deposition). It is also clear from the record that although Ms. Sukljian indicated her unavailability for the scheduled deposition, Ms. Sukljian chose to do so by USPS Priority Mail rather than calling or emailing AMH, which left AMH with little time to reschedule. In addition, the record is clear that, AMH had not canceled the deposition and intended to conduct the deposition as planned in view of the Board's deadline, unless Ms. Sukljian contacted AMH on June 24, 2014, to discuss rescheduling the deposition and contacting the Board for prior approval. As noted above, Ms. Sukljian did not respond to this overture. Nor did Ms. Sukljian file a motion or contact the Board attorney assigned to this case to request a telephone conference. *See Gaudreau*, 82 USPQ2d at 1693 n.2; TBMP § 521. Trademark Rule 2.120(i)(1); TBMP §§ 502.06 and 521 ("When time is of the

⁷ We note that this five day period included an intervening weekend.

essence, the moving party should telephone the Board attorney to whom the case is assigned and ask that the motion be resolved by telephone conference call.”); *see also Spier Wines (PTY) Ltd. v. Shepher*, 105 USPQ2d 1239, 1240 (TTAB 2012). Instead, notwithstanding the Board’s repeated warnings that failure to appear for a properly scheduled deposition could result in judgment against her, Ms. Sukljian neither appeared for the scheduled deposition nor took any other action to resolve the matter. Having heard nothing further from Ms. Sukljian, AMH’s counsel traveled from New York City to Albany, hired a court reporter, and waited until the time scheduled for the deposition had passed.

Trademark Rule 2.120(g)(2) provides:

[i]f a party ... fails to attend the party’s or person’s discovery deposition, after being served with proper notice, ..., the Board may make any appropriate order, as specified in paragraph (g)(1) of this section.

Trademark Rule 2.120(g)(1) permits sanctions provided under Fed. R. Civ. P. 37(b)(2). The cited Federal Rule allows entry of a variety of sanctions including “dismissing the action or proceeding in whole or in part.” Fed. R. Civ. P. 37(b)(2)(A)(v). “Moreover, the Board has the authority to control the disposition of cases, which necessarily includes the inherent power to enter sanctions.” *Patagonia, Inc. v. Azzolini*, 109 USPQ2d 1859, 1861 n.8 (TTAB 2014) *citing Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1071 (TTAB 2000).

After careful consideration of the parties' arguments and explanations, in light of Ms. Sukljian's failure to appear for the scheduled deposition, and given the continuing nature of Ms. Sukljian's violations despite multiple warnings from the Board, we conclude that any sanction short of judgment would be futile and unfair to AMH. *See Patagonia*, 109 USPQ2d 1859; *MySpace Inc. v. Mitchell*, 91 USPQ2d 1060 (TTAB 2009); *MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477 (TTAB 2000); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000).

In view thereof, the sanction of judgment is hereby entered against Ms. Sukljian. The petition to cancel is **GRANTED**, and Registration No. 2898544 will be cancelled in due course; and the notice of opposition is **DISMISSED**, with prejudice. *See Fed. R. Civ. P. 37(b)(2)(A)(v)*, and Trademark Rule 2.120(g).