

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

EJW

Mailed: October 18, 2015

Opposition No. 91207770

Fricker's Progressive Concepts, Inc.

v.

Samar Haddad

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

This case now comes up for consideration of Opposer's fully briefed motion (filed June 24, 2015) to strike Applicant's evidence.¹

Applicant submitted her testimonial affidavit and supporting evidence to the Board on June 16, 2015. Opposer requests that the Board strike Applicant's testimonial affidavit and evidence on the basis that it was untimely. Specifically, Opposer argues that insofar as the testimony was taken and filed outside of Applicant's testimony period, the evidence should be stricken. In opposition, Applicant explains that she did not request an extension of time to submit testimony and evidence "due to some confusion regarding the end of the Applicant's 30-day trial period and the beginning of the Opposer's rebuttal period." In reply, Opposer argues that Applicant has not shown excusable neglect for her failure to

¹ Applicant's additional response submitted on August 5, 2015, which constitutes a sur-reply, will not be considered. See Trademark Rule 2.127(a) (after the reply brief is filed, "The Board will consider no further papers in support of or in opposition to a motion.").

timely file her evidence. In particular, Opposer points out that Applicant does not explain how or why she missed the due date for her trial period.

As last reset in the Board's order mailed on November 21, 2014, Applicant's testimony period was set to close on June 2, 2015. In view thereof, any testimony or evidence to be submitted by Applicant had to be filed with the Board no later than June 2, 2015. *See* Trademark Rule 2.121(a) ("No testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.") and Trademark Rule 2.123(l) ("Evidence not obtained and filed in compliance with these sections will not be considered"). When there is no approved stipulation, granted motion, or Board order extending the time for a party to submit its evidence, and a testimony deposition is taken after the close of the deposing party's testimony period, an adverse party may file a motion to strike the testimony deposition, in its entirety, as untimely. *See Harjo v. Pro-Football Inc.*, 45 USPQ2d 1789, 1790 (TTAB 1998) (Evidence not obtained and filed in compliance with these sections will not be considered testimonial deposition taken outside testimony period stricken); and TBMP § 533.01 (2015) ("A party may not take testimony outside of its assigned testimony period, except by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.").

Here, the operative trial schedule in this proceeding provided that Applicant's thirty-day testimony period ended on June 2, 2015. The schedule was not changed either by the parties' agreement or by order of the Board. In view thereof,

Applicant's testimonial affidavit and attached evidence, which were submitted after the close of Applicant's testimony period, are untimely. Further, Applicant is expected to be familiar with and adhere to the Board's rules and to the operative trial schedule. *See DC Comics and Marvel Characters, Inc. v. Margo*, 68 USPQ2d 1319 (TTAB 2003) ("Strict compliance with the applicable rules is expected of all parties before the Board, whether or not they are represented by counsel. The mere fact in itself that applicants decided to represent themselves does not relieve them of responsibilities and certainly does not amount to *excusable neglect*.") (emphasis original). Applicant's misunderstanding of the rules and the trial schedule does not demonstrate excusable neglect required under Fed. R. Civ. P. 6(b). *See id.* Accordingly, Opposer's motion to strike Applicant's testimonial affidavit and attached evidence is **granted** and said affidavit and evidence (submitted on June 16, 2015) are hereby **stricken** and will not be given any consideration.

Proceeding Resumed

This proceeding is resumed. Inasmuch as Applicant's evidence has been stricken, there is no need to schedule Opposer's rebuttal disclosures or rebuttal period. Accordingly, the trial schedule is reset as shown in the following schedule:

Brief for party in position of plaintiff shall be due:	December 2, 2015
Brief (if any) for party in position of defendant shall be due:	January 1, 2016
Reply brief (if any) for party in position of plaintiff shall be due:	January 16, 2016

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. § 2.129.

