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

Proceeding	91210158
Party	Plaintiff Larry Pitt & Associates, P.C.
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Date	03/07/2016
Attachments	OPPOSITION TO MOTION FOR RECONSIDERATION.pdf(21199 bytes)

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

LARRY PITT & ASSOCIATES, P.C. Opposer, v. LUNDY LAW, LLP Applicant	Opposition No. 91210158

OPPOSITION TO MOTION FOR RECONSIDERATION

On February 17, 2016 – a day before the Board's deadline for the parties to discuss rebuttal experts, Lundy Law filed two motions: 1. for reconsideration of the Board's denial of summary judgment, and 2. for an extension of the date by which the parties must disclose their rebuttal experts. Lundy Law's motion for reconsideration should be denied. Opposer does not object to an extension of the dates for disclosure of rebuttal experts, and discovery related to the rebuttal experts, but advises the Board that Lundy Law had not sought consent to an extension of this disclosure date. Perhaps, if consent was sought, this needless motion practice could have been avoided.

Lundy Law has no legal basis for reconsideration of the Board's interlocutory order denying summary judgment. A motion for reconsideration is limited to a demonstration that, on the basis of the facts before the Board and the applicable law, the Board's ruling is in error and requires appropriate change. TMBP §518. *Guess? IP Holder L.P. v. Knowluxe LLC* 116 USPQ 2d, 2018, 2019 (TTAB 2015).

On its motion for summary judgment, Lundy Law had the burden of proof of an absence of any genuine issue as to all material facts, entitling it to judgment as a matter of law.

Copelands' Enterprises Inc. v. CNV Inc., 945 F.2d 1563, 20 USPQ 2d 1295 (Fed. Cir. 1991); TBMP §528.01. All doubts as to whether particular factual issues are genuinely in dispute were resolved against the summary judgment movant, and all inferences to be drawn from the undisputed facts were appropriately viewed in the light most favorable to the nonmoving party. *Flatley v. Trump*, 11 USPQ2d 1284, 1287 (TTAB 1989). As Lundy Law did not meet its burden with respect to at least the issue of consumer perception, summary judgment was denied. *Meyers v. Brooks Shoe, Inc.*, 16 USPQ2d 1055, 1057 (Fed. Cir. 1990).

It is a foundational requirement that a mark, phrase or symbol serve as a source designation to receive trademark protection. 15 U.S.C. §1127. The mere filing of the trademark application does not constitute enforceable rights. Lundy Law cannot simply rest on its application in suppport of its claim that the phrase is not functional.

The only evidence in the summary judgment motion record, reviewed in the light most favorable to Opposer, is that the phrase is simply used an instruction, like many other instructions in personal injury attorney advertising, to get passersby to remember the name of the Lundy Law firm. The record evidence is that this phrase, and phrases like it – are commonly used in the industry by comparable law firms as an instruction to consumers to remember the names and numbers of those firms. Marketing expert, Ross Fishman, provided evidence of third party use of comparable phrases in law firm advertising. Opposer provided its own statement that it has always used instructions in its own advertising to get consumers to remember its own name and telephone number. (Meloff Decl. §8.) Even Applicant's ***own*** marketing director stated that her job was to get potential clients to remember the name of the Lundy Law firm. (T. Sortman Dep. Tr. 20.)

There is no record that any consumers perceive this common and ordinary instruction to "remember the name" of Lundy Law as anything more than a common and ordinary instruction. Lundy Law argues that "it defies logic" that the instruction to "remember this name" is "merely informational"…because "People seeing advertisements for services of a law firm do not need to be reminded to write down and number of the advertiser of legal service they need". (Motion at 3). This is a legal argument that was already made, and considered. Revisiting a legal argument is not grounds for a motion for reconsideration. *See*, *Guess? IP Holder L.P.*, 116 USPQ 2d at 2019 (TTAB 2015).

The request for reconsideration should be denied. Applicant has used its reconsideration papers to seek additional time to determine whether it will put forth a rebuttal witness. Notably, Applicant did not seek Opposer's consent to an extension of the Board's deadlines. To date, only Opposer has disclosed a case in chief expert. Lundy Law now is only entitled to a rebuttal expert, if properly disclosed. Opposer advises the Board that it does not oppose an extension of time for the parties to discuss issues regarding any rebuttal experts, and to discuss whether submission of expert testimony may be made by affidavit.

Dated: March 7, 2016

BAKER & HOSTETLER LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2016, I caused a true and correct copy of the foregoing OPPOSITION TO MOTION FOR RECONSIDERATION to be served via First Class Mail on the following:

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