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

Mailed: August 19, 2014

Opposition No. 91211530 (parent case)
Cancellation No. 92056491

J-Lynn Entertainment, LLC

v.

William T. Odonnell
DBA Odonnell Entertainment

Jennifer Krisp, Interlocutory Attorney:

These consolidated proceedings are before the Board for consideration of J-Lynn Entertainment, LLC's (opposer) 1) May 7, 2014 motion for an extension of time, 2) May 8, 2014 motion to strike, 3) May 12, 2014 motion for an extension of time, and 4) May 12, 2014 motion to compel discovery. The motions are fully briefed.

The Pleadings

As an initial matter, upon review of the pleadings in this proceeding, the Board notes that 1) the notice of opposition sufficiently pleads one ground[1] for opposition, namely, the claim that William T. Odonnell DBA Odonnell Entertainment ("applicant") had not used the applied-for mark as of the

[1] In its notice of opposition, opposer does not plead the claims listed in the ESTTA electronic filing cover sheet (immoral or scandalous matter, and deceptiveness, under Trademark Act Section 2(a); fraud on the USPTO). Mere identification of

November 22, 2012 filing date of the application, on the goods identified in said application, and 2) the petition for cancellation sufficiently pleads one ground[2] for cancellation, namely, the claim that applicant has never used the mark in commerce, on the goods identified in the registration.

Opposer's motion to strike

Opposer requests that the Board strike applicant's First Set of Admissions to Opposer.

The record reflects that applicant timely served the written discovery requests at issue in the motion. Opposer was, and remains, under an obligation to respond to said discovery in the manner and within the time allowed under applicable authorities. It is generally inappropriate for a party to respond to discovery requests by filing a motion attacking them, such as a motion to strike, a motion to suppress, a motion for a protective order, etc. The proper and expected action, consistent with the Board's expectation that the parties will fully cooperate with each other in the discovery process, is to answer those requests that the party believes to be proper and to clearly state its objections to those requests that it believes to be improper. *See* TBMP § 410 (2014). Opposer failed to follow this directive.

Opposer's motion to strike is <u>denied</u>.

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grounds on the filing cover sheet does not constitute a pleading of the required elements of the grounds.

[2] In its petition for cancellation, opposer does not plead the claims listed in the ESTTA electronic filing cover sheet (fraud on the USPTO; abandonment under Trademark Act Section 14). Again, mere identification of grounds on the filing cover sheet does not constitute a pleading of the required elements of the grounds.

Opposer's motion to compel discovery[3]

Trademark Rule 2.120(e)(1) provides, in pertinent part,

> … A motion to compel discovery shall include a copy of the request for designation or of the relevant portion of the discovery deposition; or a copy of the interrogatory with any answer or objection that was made; or a copy of the request for production, any proffer of production or objection to production in response to the request, and a list and brief description of the documents or things that were not produced for inspection and copying.

In its motion, opposer states that it seeks a motion compelling applicant to serve responses to its "second request for a written discovery (Fig 2) served July 30, 2013" (motion, p. 1). The exhibit[4] that is designated "Fig 2" is captioned "Request for Written Discovery" and appears to be a second or supplemental request for the production of documents and things; however, this request is dated May 12, 2014.

On this record, the Board construes the exhibit designated "Fig 2" as a copy of the document requests at issue. Applying this construction, opposer has complied with the requirement of Trademark Rule 2.120(e)(1) that is set forth above.

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[3] Applicant's brief in opposition to opposer's motion to compel and motion to extend or reopen opposer's discovery period, is untimely. *See* Trademark Rule 2.127(a). Applicant's brief has been given consideration only insofar as necessary as an aid to the Board in adjudicating the motion to compel, given the sparse, incomplete and inarticulate nature of the motion to compel.

[4] The remaining exhibits filed with the motion are 1) "opposer's first set of admissions to applicant" which do not include applicant's responses thereto, and which are dated May 12, 2014, and 2) opposer's responses to applicant's request for admissions, which are not pertinent to opposer's motion to compel (and the relevance of which is not otherwise set forth in the motion).

Trademark Rule 2.120(e)(1) *also* provides, in pertinent part, that a motion to compel discovery

> … must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion but the parties were unable to resolve their differences.

Thus, opposer was under an obligation to make sufficient good faith efforts, prior to filing its motion, to resolve the discovery issues which it ultimately brought before the Board for resolution, and to set forth such efforts in support of the motion.

Opposer failed to satisfy this requirement. Opposer has merely stated in its motion that applicant did not respond to the discovery at issue, which is insufficient. Opposer's motion is plainly deficient with respect to this requirement. *See, e.g.*, *Hot Tamale Mama…and More, LLC v. SF Invs., Inc.*, 110 USPQ2d 1080 (TTAB 2014); *Amazon Technologies, Inc. v. Wax,* 93 USPQ2d 1702, 1705 (TTAB 2009); *Sentrol, Inc. v. Sentex Systems, Inc.*, 231 USPQ 666 (TTAB 1986).

Accordingly, opposer's motion to compel discovery is <u>denied</u>.

In the interest of avoiding future discovery disputes, the Board notes that the parties each, individually, have a duty to cooperate in the discovery process, and a duty to correct or supplement their discovery responses. *See* Fed. R. Civ. P. 26(e); TBMP § 408 (2014). If either party fails to produce or supplement information or documents properly sought in discovery, that

party, upon timely objection by its adversary, may be precluded from introducing or relying upon the information or documents as trial evidence. *See* Fed. R. Civ. P. 37(c)(1).

Also, the Board notes that applicant included, in its brief in opposition to the motion to compel, written responses and objections to certain of opposer's requests. In the event that either party files a motion to compel discovery upon resumption (as indicated below) of these proceedings, the motion must set forth in detail the good faith effort(s) which the movant has made - subsequent to the mailing date of this order - by conference or correspondence, to resolve the issue(s) being brought before the Board for resolution. To be clear, the movant must demonstrate that its good faith efforts which it undertook subsequent to the mailing date of this order fulfill the good faith effort provision of Trademark Rule 2.120(e)(1). Any motion which does not comply with this directive will be denied.

Opposer's motions to extend

Opposer's May 7, 2012 motion, requesting a thirty-day extension of time "for disclosure of" certain documents is construed by the Board as a motion for an extension of time for opposer to respond to applicant's first set of written discovery requests served April 18, 2014. Inasmuch as the Board suspended proceedings pending the resolution of the various pending motions, opposer's

motion is granted to the extent that it is allowed until thirty days from the mailing date of this order to serve said responses.[5] *See* Trademark Rule 2.127(a).

Turning to opposer's May 12, 2014 motion, requesting an extension of the discovery period "for the Opposer to submit further requests for documents" (motion, p. 1), said motion was filed after the discovery period had closed on April 18, 2014. As a result, it is a motion to reopen discovery. Such motions are governed by the excusable neglect standard of Fed. R. Civ. P. 6(b) as applied by the Board to *inter partes* proceedings. *See* Fed. R. Civ. P. 6(b); *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993); *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). *See also* TBMP § 509.01(b) (2014).

Opposer did not include in its motion any arguments or demonstration that its request for relief is the result of excusable neglect. Accordingly, opposer's motion is denied.

Schedule

These consolidated proceedings are resumed. Trial dates are reset as follows:

Plaintiff's Pretrial Disclosures	**10/6/2014**
Plaintiff's 30-day Trial Period Ends	**11/20/2014**
Defendant's Pretrial Disclosures	**12/5/2014**
Defendant's 30-day Trial Period Ends	**1/19/2015**
Plaintiff's Rebuttal Disclosures	**2/3/2015**
Plaintiff's 15-day Rebuttal Period Ends	**3/5/2015**

[5] In any event, opposer has been and remains under an obligation to serve responses to applicant's discovery requests.

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.

Information for pro se party

From the nature of opposer's filings, it is evident that opposer is unfamiliar with the procedural and substantive authorities that govern *inter partes* proceedings before the Board. Accordingly, the Board notes that, although a party may represent itself (s*ee* Patent and Trademark Rule 11.l4), it is strongly advisable for persons who are not acquainted with the technicalities of the procedural and substantive law involved in *inter partes* proceedings before the Board to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney, and as an impartial judicial tribunal, the Board may not provide legal advice.

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is required of all parties, whether or not they are represented by counsel. *See McDermott v. San Francisco Women's Motorcycle Contingent,* 81 USPQ2d 1212, n.2 (TTAB 2006). A proceeding before the Board is similar to a civil action in a Federal district court. The parties file pleadings and may file a wide range of possible

motions, as appropriate. The process of discovery (serving of interrogatories, requests for production of documents and things and requests for admission, as well as depositions) is followed by a testimony (trial) period, after which final briefs on the case are filed. The Board does not preside at the taking of testimony; all testimony is taken out of the presence of the Board during the parties' assigned testimony (trial) periods, and the written transcripts thereof, together with any exhibits thereto, are then filed with the Board. No paper, document, or exhibit will be considered as evidence unless it has been introduced in evidence in accordance with the applicable rules.