

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: April 30, 2014

Opposition No. 91214338

Under Armour, Inc.

v.

Vernon J. Smith

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

This case now comes up for consideration of applicant's fully briefed motion (filed February 18, 2014) for a ninety-day extension of time to file an answer in this proceeding.

By way of background, in accordance with the Board's institution order mailed on January 8, 2014, answer was due in this proceeding on February 17, 2014.¹ Applicant seeks an extension of ninety days to file an answer. However, applicant failed to provide any reason or good cause for his request. In opposition, opposer argues that applicant's motion should be denied because he has failed to show good cause for such a lengthy extension of time or that the requested extension of time is not due to applicant's lack of diligence or unreasonable delay. Opposer also mentions that applicant has

¹ Inasmuch as Monday, February 17, 2014, was a Federal holiday, the answer was actually due on Tuesday, February 18, 2014. *See* Trademark Rule 2.196. Therefore, applicant's motion to extend time is timely.

filed another trademark application with the assistance of counsel, which shows that applicant has access to counsel, should he choose to get such assistance. Alternatively, opposer requests that applicant only be allowed a thirty-day extension of time.

Because applicant filed his motion to extend time on the date the answer was due, the standard applicable to his motion is “good cause.” *See* Fed. R. Civ. P. 6(b) and TBMP § 509.01(a) (3d ed. rev.2 2013). The Board is generally liberal in granting extensions before the period to act has lapsed, so long as the motion sets forth with particularity facts that constitute good cause for the requested extension, *Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQd 1479, 1480 (TTAB 2000), and the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. *See, e.g., SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 USPQ2d 1372, 1375 (TTAB 2001); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000); and *American Vitamin Products, Inc. v. DowBrands Inc.*, 22 USPQ2d 1316 (TTAB 1992).

Here, applicant has failed to provide any reason whatsoever for failing to timely file an answer or for needing a ninety-day extension of time to file an answer. In view of his failure to show good cause for the requested extension of time, applicant’s motion for an extension of ninety days to file his answer is **DENIED**. Accordingly, applicant is in default of his obligation to file an answer in this proceeding. *See* Fed. R. Civ. P. 55(a); Trademark Rule

2.116(a). Nevertheless, being mindful that default judgments for failure to timely answer the complaint are not favored by the law, and noting the passage of time since the filing of the subject motion, applicant is allowed until **TWENTY-ONE (21) DAYS** from the mailing date of this order, that is until **May 21, 2014**, to file an answer in this proceeding, failing which default judgment may be entered against him for failure to file a timely answer.

In view of the foregoing, trial dates in this proceeding are reset as shown in the following schedule:

Time to Answer	5/21/2014
Deadline for Discovery Conference	6/20/2014
Discovery Opens	6/20/2014
Initial Disclosures Due	7/20/2014
Expert Disclosures Due	11/17/2014
Discovery Closes	12/17/2014
Plaintiff's Pretrial Disclosures Due	1/31/2015
Plaintiff's 30-day Trial Period Ends	3/17/2015
Defendant's Pretrial Disclosures Due	4/1/2015
Defendant's 30-day Trial Period Ends	5/16/2015
Plaintiff's Rebuttal Disclosures Due	5/31/2015
Plaintiff's 15-day Rebuttal Period Ends	6/30/2015

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. *See* Trademark Rule 2.125, 37 C.F.R. § 2.125.

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.



The following information is provided to applicant as a courtesy:

Nature of a Opposition Proceeding

An *inter partes* proceeding before the Board is similar to a civil action in a Federal district court. There are pleadings, a wide range of possible motions; discovery (a party's use of discovery depositions, interrogatories, requests for production of documents and things, and requests for admission to ascertain the facts underlying its adversary's case), a trial, and briefs, followed by a decision on the case. The Board does not preside at the taking of testimony. Rather, all testimony is taken out of the presence of the Board during the assigned testimony, or 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 in the case unless it has been introduced in evidence in accordance with the applicable rules.**

Legal Representation Is Strongly Encouraged

It should also be noted that while Patent and Trademark Rule 10.14 permits any person to represent him or herself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition or cancellation proceeding 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.

It is recommended that applicant obtain a copy of the latest edition of Title 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. These rules may be viewed at the USPTO's trademarks page: <http://www.uspto.gov/main/trademarks.htm>. The Board's main webpage, <http://www.uspto.gov/web/offices/dcom/ttab/>, includes information on the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to The Trademark Trial and Appeal Board Manual of Procedure (the TBMP).

Further, all Board proceedings and other information regarding the Trademark Trial and Appeal Board may be accessed at the following URLs:

<http://ttabvue.uspto.gov/ttabvue/> and

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>.

Form of Answer

Applicant must file an answer in response to the notice of opposition.

Said answer must comply with Federal Rule 8(b). Fed. R. Civ. P. 8(b) provides, in part:

A party shall state in short and plain terms the party's defenses to each claim asserted and shall **admit or deny** the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith

to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

The notice of opposition filed by opposer herein consists of **29** numbered paragraphs setting forth the bases of opposer's claim(s) of damage. In accordance with Federal Rule 8(b), applicant must answer the notice of opposition by admitting or denying the allegations contained in each paragraph. Ordinarily, the applicant (or defending party) will use the same paragraph numbering format found in the complaint (notice of opposition), *i.e.* in this case, one through twenty-nine (1-29). If applicant is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, he should so state and this will have the effect of a denial.

Requirement for Service on Adverse Party of All Papers Filed

Trademark Rules 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board.

Consequently, copies of all papers which applicant may file in this proceeding (including for applicant, the answer required herein) must be accompanied by "proof of service" of a copy on the adverse party or the adverse party's counsel if one is appointed.

"Proof of service" usually consists of a signed, dated statement attesting to the following matters: (1) the nature of the paper being served, (2) the method of

service (e.g., first class mail), (3) the person being served and the address used to effect service, and (4) the date of service. This written statement should take the form of a “certificate of service” which should read as follows:

The undersigned hereby certifies that a true and correct copy of the foregoing [insert title of document] was served upon opposer by forwarding said copy, via first class mail, postage prepaid to: [insert name and address].

The certificate of service must be signed and dated.

All Parties Must Comply with Board Deadlines

While it is true that the law favors judgments on the merits wherever possible, it is also true that the Patent and Trademark Office is justified in enforcing its procedural deadlines. *Hewlett-Packard v. Olympus*, 18 USPQ2d 1710 (Fed. Cir. 1991).

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.

Mailed Submissions to the Board; Using ESTTA is Encouraged

Correspondence required to be filed in the Office within a set period of time will be considered as being timely filed on the date of deposit in the mail if accompanied by a certificate of mailing (see sample in footnote²). The actual

² Certificate of Mailing

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as

date of receipt by the Office will be used for all other purposes, *including electronically filed documents*.

The Board encourages the use of Electronic System for Trademark Trials and Appeals (ESTTA), available through the USPTO website, for the filing of all documents with the Board. See the following URL: <http://estta.uspto.gov/>.

General Information on Discovery Conferences

Applicant is referred to the Board's institution order in this proceeding and to the following URL:

http://www.uspto.gov/trademarks/process/appeal/RULES08_01_07.pdf, see, e.g., pp. 42245, 42246, 42248 and 42252. During the conference, the following topics must be discussed:

- (1) the nature of and basis for their respective claims and defenses;
- (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and;
- (3) arrangements relating to disclosures, discovery and introduction of evidence at trial, should the parties not agree to settle the case.

Either party may request the participation of the Board in the discovery conference. See Trademark Rule 2.120(a)(2), 37 C.F.R. § 2.120(a)(2).

first-class mail in an envelope addressed to:

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

on _____ (Date)

_____ (Signature)

_____ (Typed or printed name)

Information on Initial Disclosures

The parties are referred to the following web addresses to obtain information regarding initial disclosures:

http://www.uspto.gov/trademarks/process/appeal/RULES08_01_07.pdf and to

<http://edocket.access.gpo.gov/2006/pdf/06-197.pdf> or to

http://www.uspto.gov/trademarks/process/appeal/RULES01_17_06.pdf. *See*

Notice of Final Rulemaking (“Miscellaneous Changes to Trademark Trial and

Appeal Board Rules”) in the Federal Register, 72 Fed. Reg. 147 (August 1, 2007)

and 71 Fed. Reg. 10, 2501 (January 17, 2006).

