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

CME

Mailed: March 2, 2016

Opposition No. 91214578

LeMans Corporation

v.

LeMar Xavier Lewis

By the Trademark Trial and Appeal Board:

The Board's order at 56 TTABVUE is **VACATED** and should be disregarded. The Board issues this order in its place, which corrects some typographical errors.[1]

This case now comes up on Opposer's combined motion for sanctions and to compel, filed August 7, 2015. As addressed in Section IB below, the Board gives no consideration to Applicant's papers filed in response to Opposer's motion because such filings do not include proof of service. Nevertheless, because Applicant attempted to respond, we do not treat Opposer's motion as conceded, but rather consider the motion on its merits.

I. Procedural Issues

As an initial matter, the Board addresses two procedural issues.

[1] The Board apologizes for any confusion caused by the issuance of the order at 56 TTABVUE.

A. Applicant's Failure to Maintain an Accurate Correspondence Address

Five Board orders mailed to Applicant in this proceeding have been returned as undeliverable. *See* 12 TTABVUE[2], 17 TTABVUE, 33 TTABVUE, 45 TTABVUE and 50-53 TTABVUE. As the Board has previously advised Applicant, he has a duty to maintain a current address of record in this proceeding, and default judgment may be entered against him for failure to do so. 21 TTABVUE 2 and 31 TTABVUE 2; *see also* TBMP § 117.07 (2015). Applicant's failure to comply with this simple and straightforward requirement is exhausting the Board's patience. Applicant is allowed ***one final opportunity*** – until **FIFTEEN DAYS** from the mailing date of this order – to file an accurate correspondence address with the Board. If any of the following occur, the Board will issue an order to show cause as to why judgment should not be entered against Applicant:

- Applicant fails to file a change of correspondence address within ***fifteen days***;
- Applicant files a change of correspondence address using an address to which papers in this proceeding previously have been returned as undeliverable;[3] or
- Applicant files a change of correspondence address and any Board order or paper served by Opposer to this address is returned as undeliverable.

---

[2] Citations to the record in this order are to TTABVUE, which is the Board's electronic docket system that can be accessed here: http://ttabvue.uspto.gov/ttabvue.

[3] Papers mailed to Applicant at the following addresses have been returned as undeliverable: (1) 1655 Cresthaven Drive, Orlando, Florida 32811; (2) 33 West Trade Street, Unit 100, Charlotte, North Carolina 27708; and (3) 33 West Trade Street, Unit 2100, Charlotte, North Carolina 27708.

Cf. Patagonia, Inc. v. Azzolini, 109 USPQ2d 1859, 1862 (TTAB 2014) (petition to cancel granted where respondent exhibited a continued pattern of dilatory behavior, including failure to comply with applicable rules).

B. Applicant's Failure to Comply with Trademark Rule 2.119

The Board also has advised Applicant on numerous occasions that "every paper filed in the United States Patent and Trademark Office in *inter partes* cases … must be served upon the other parties. Proof of such service must be made before the paper will be considered by the Office." Trademark Rule 2.119; *see* 15 TTABVUE, n.1, 18 TTABVUE 2-3, 21 TTABVUE 1-2 and 5, and 28 TTABVUE 3-4 and 39 TTABVUE. Notwithstanding these reminders, Applicant has repeatedly failed to comply with Trademark Rule 2.119 in responding to Opposer's combined motion.

On August 14, 2015, the Board issued an order refusing consideration of Applicant's filings of August 8, 2015 and August 12, 2015 because the papers do not include proper proof of service. *See* 41 and 43-44 TTABVUE. Applicant's filing of November 4, 2015 (54 TTABVUE) also will be given no consideration because it lacks proof of service.[4]

Applicant's repeated failures to comply with Trademark Rule 2.119 in the face of the Board's numerous warnings suggests that Applicant is acting in bad faith.[5] If

---

[4] In view hereof, Opposer's filings of October 13, 2015 and November 9, 2015 (49 and 55 TTABVUE) are moot and will be given no further consideration except to the extent set forth herein.

[5] In addition, Opposer has notified the Board that even though Applicant's change of correspondence address, filed September 28, 2015 (47 TTABVUE), includes proof of service, Opposer never received a service copy of the filing and only "learned of the filing through a status check of the Board's online records." 49 TTABVUE.

Applicant files another paper without proper proof of service, the Board may issue an order to show cause as to why judgment should not be entered against Applicant for failure to comply with Trademark Rule 2.119. *Cf. Patagonia, Inc. v. Azzolini,* 109 USPQ2d at1862.

II. Opposer's Combined Motion

A. Motion for Sanctions

On January 30 2015, the Board issued an order ("Prior Order I") granting as conceded Opposer's motion, filed December 17, 2014, to compel Applicant to respond to Opposer first set of interrogatories and document requests. 26 TTABVUE. On April 16, 2015, the Board issued an order ("Prior Order II") modifying Prior Order I. Specifically, in Prior Order II, the Board ordered Applicant within twenty days to serve on Opposer: (1) written and verified supplemental responses to Opposer's first set of interrogatories, without objections on the merits; (2) written supplemental responses to Opposer's first set of document requests without objections on the merits; and (3) all responsive documents by copying them at Applicant's own expense and delivering them to Applicant. 31 TTABVUE 2-3 (emphasis omitted).

Opposer seeks the sanction of judgment based on Applicant's failure to comply with Prior Order II. In the alternative, Opposer requests that: (1) "Applicant not be allowed to introduce or rely upon facts or documents in this case that were encompassed by [Opposer's first set of interrogatories or document requests]"; and (2) "Applicant be barred from now introducing any evidence, including documents or

testimony that would have been responsive to Opposer's Second Set of Interrogatories [or Document Requests]." 40 TTABVUE 7-8.

Under the circumstances of this proceeding, notably that Applicant has attempted to comply and has at least partially complied with Prior Order II, sanctions in the form of judgment would be disproportionate. Accordingly, Opposer's motion for sanctions has been given no consideration to the extent that it seeks entry of judgment against Applicant. *See No Fear Inc. v. Rule,* 54 USPQ2d 1551, 1553 (TTAB 2000). In addition, "discovery sanctions under Trademark Rule 2.120(g)(1) are available only if the [party on whom discovery was served] has violated a discovery order issued by the Board, such as an order compelling discovery."[6] *Nobelle.com LLC v. Qwest Commc'n Inter'l Inc.*, 66 USPQ2d 1300, 1302-03 (TTAB 2003); *see also* TBMP § 527.01(a). No discovery order has yet issued with respect to Opposer's second set of interrogatories and document requests, and therefore, Opposer's motion is procedurally improper and will be given no further

---

[6] Opposer sent an email to Applicant on August 4, 2015 indicating that it would be proceeding with a motion to compel responses to its second set of interrogatories and document requests. 40 TTABVUE 6 and 107. Applicant responded "'Do what you have to do, and we will do the same…." 40 TTABVUE and 109. Opposer asserts that Applicant's response "clearly reflected the intent of Applicant not to respond to the outstanding discovery requests." 40 TTABVUE 6.

Trademark Rule 2.120(g)(2) provides that a party may seek sanctions where its adversary fails to serve discovery responses and informs the party seeking discovery that no responses will be made. The Board does not construe Applicant's statement "Do what you have to do, and we will do the same" as an affirmative statement that Applicant will not serve discovery responses, and as such, Trademark Rule 2.120(g)(2) is not applicable. *Cf. Kairos Inst. of Sound Healing LLC v. Doolittle Gardens LLC*, 88 USPQ2d 1541, 1543 (TTAB 2008) ("The sanctions provided for under Trademark Rule 2.120(g)(2) may be ordered even in the absence of a prior Board order affirming or reiterating the party's obligation to make disclosures, but require that the party bearing the obligation affirmatively state that disclosures will not be forthcoming").

consideration to the extent it seeks sanctions based on Applicant's failure to respond to Opposer's second set of interrogatories and document requests.

The Board now considers the remainder of Opposer's motion for sanctions. Applicant has served four sets of responses to Opposer's first set of interrogatories and document requests. 25 TTABVUE 9-34 (served December 18 and 19, 2014), 40 TTABVUE 11-58 (served May 5, 2015 and May 7, 2015), 40 TTABVUE 85-91 (served July 20, 2015), and 55 TTABVUE 6-23 (served October 29, 2015). In its motion, Opposer enumerates the following deficiencies in Applicant's responses to Opposer's first set of interrogatories and document requests:

1. Applicant's interrogatory responses are not verified, 40 TTABVUE 61;
2. Applicant has not provided the address, "place of employment or last known business affiliation" for the persons identified in his responses to Interrogatory No. 2., *id* and 55 TTABVUE 3;
3. Applicant has not provided the specific date or dates on which the advertisements identified in response to Interrogatory No. 3 "were printed, the relevant station and means of broadcast," *id.;*
4. Applicant has not responded to Interrogatory No. 13, *id.*;
5. Applicant has failed to identify the specific document requests to which each produced document is responsive, *id.*;
6. In response to Document Request Nos. 7, 8, 10, 11, 12, 16, 17, 23, 24 and 25, Applicant has stated that "the requested documentation is not currently available at this time" or "none available at this time" rather than

unequivocally stating that no such documents exist or stating that responsive documents exist and producing them, *id.*;

7. Applicant's response to Document Request No. 19 is "internally conflicting" because it is made "without waiving any objections," indicates that responsive documents "will be made available for inspection and copying" and says to "see attached document," *id.*;
8. Applicant's response to Document Request No. 26 is made subject to objections and Applicant has not produced responsive documents, but rather has indicated that responsive documents "will be made available for inspection and copying," *id.*; and
9. Applicant's produced documents "are mostly undated and provide no information as to the place or context of the photos." *Id.*

In his third and fourth sets of responses, served July 20, 2015 and October 29, 2015, Applicant has rectified may of the deficiencies in his prior two sets of responses; however, deficiencies remain with items 1, 2, 5 and 9. *See* 55 TTABVUE 3.

Applicant was under an obligation to ***timely and fully comply*** with Prior Order II, which was clear and unambiguous in all respects. Applicant's failure to do so is troubling and has caused Opposer to expend time and resources in motions practice, taxed the Board's limited time and resources, and unnecessarily delayed this proceeding. Accordingly, Opposer's motion for sanctions is **GRANTED** to the extent that:

1. Applicant is ordered within **THIRTY DAYS** of the mailing date of this order to: (a) re-serve his interrogatory responses of May 5, 2015, May 7, 2015, July 20, 2015 and October 29, 2015 ***under oath***,[7] *see* Fed. R. Civ. P. 33(b)(3); (b) supplement his interrogatory responses ***under oath*** providing the address and place of employment or last known business affiliation for Diondre Lewis,[8] Jason Alphonso,[9] Rasheed Wiggins and Charlie Lewis; (c) specify for each document produced the document request to which the document is responsive; and (d) identify the date, place and context for each photo Applicant has produced or state that such information is unavailable if that is the case;
2. The Board will accept as authentic and admissible any documents or things that are produced by Applicant, which are introduced by Opposer at trial;
3. Applicant is prohibited at trial from introducing or relying at trial on any documents or information requested by Opposer during discovery but not produced by Applicant in accordance with the Board's orders; and
4. The Board will grant no extension of time to Applicant to comply with this order ***absent exceptional circumstances***.

---

[7] Applicant's initial responses to Opposer's first set of interrogatories are verified. *See* 25 TTABVUE 17 ("I declare under penalty of perjury that the foregoing is true and correct. Executed on December 18, 2014."). Accordingly, Applicant should review his initial responses for an example of how to verify interrogatories.

[8] Applicant has identified Diondre Lewis as an investor and provided an address for him, but Board records show that the address is "vacant." 33 TTABVUE 5 and 40 TTABVUE 86. Accordingly, Applicant must provide an updated address for Mr. Lewis.

[9] Applicant has identified Mr. Alphonso as a consultant, but Applicant must provide Opposer with Mr. Alphonso's address, which remains outstanding. *See* 40 TTABVUE 86.

B. Opposer's Motion to Compel

Opposer seeks an order compelling Applicant to respond to Opposer's second set of interrogatories and document requests.[10] As an initial matter, the Board finds that Opposer made a good faith effort to resolve its discovery dispute with Applicant prior to filing the instant motion.

Opposer has attached to its motion copies of its second set of interrogatories and document requests served June 10, 2015 via email pursuant to an agreement between the parties. 40 TTABVUE Exhibit 4; 21 TTABVUE 2. Responses to these discovery requests were due July 10, 2015. *See* Trademark Rule 2.120(a)(3). The record reflects that Applicant has not served any responses to these discovery requests.

Accordingly, Opposer's motion to compel is **GRANTED** and Applicant is ordered within **THIRTY DAYS** of the mailing date of this order to serve on Opposer: (1) ***verified*** written responses, without objections on the merits,[11] to Opposer's second

---

[10] Opposer includes in its motion a request that the Board "deem as admitted each of the unanswered requests in Opposer's First Set of Requests for Admission." 40 TTABVUE 2. Such request is unnecessary and will be given no further consideration as requests for admission are deemed admitted by operation of law where the party on which the requests were served fails to timely respond thereto. Fed. R. Civ. P. 36(a)(3); *Fram Trak Indus. v. Wiretracks LLC*, 77 USPQ2d 2000, 2005 (TTAB 2006) (requests for admissions deemed admitted by respondent's failure to respond to petitioner's requests for admissions); *Pinnochio's Pizza Inc. v. Sandra Inc.*, 11 USPQ2d 1227, 1228 n.5 (TTAB 1989) (same). TBMP § 407.03(a).

[11] "Objections going to the merits of a discovery request include those which challenge the request as overly broad, unduly vague and ambiguous, burdensome and oppressive, as seeking non-discoverable information on expert witnesses, or as not calculated to lead to the discovery of admissible evidence. In contrast, claims that information sought by a discovery request is trade secret, business-sensitive or otherwise confidential, is subject to attorney-client or a like privilege, or comprises attorney work product, goes not to the

set of interrogatories; (2) written responses, without objections on the merits, to Opposer's second set of document requests; and (3) all responsive documents by copying them at Applicant's own expense and delivering them to Opposer. *No Fear*, 54 USPQ2d at 1556; TBMP § 406.04(b). Pursuant to Fed. R. Civ. P. 34(b)(2)(E)(i), Applicant must identify the document request(s) to which each produced document is responsive.

III. Compliance with this Order

The Board expects that Applicant will comply with each and every requirement of this order. If Applicant fails to comply with this order, the Board will entertain a renewed motion for sanctions, including the possible entry of judgment against Applicant. *See* Trademark Rule 2.120(g); Fed. R. Civ. P. 37(b)(2). That Applicant is appearing *pro se* will be no excuse if Applicant does not comply with the requirements set forth herein. *See* 21 TTABVUE 5 (citing *San Francisco Women's Motorcycle Contingent,* 81 USPQ2d 1212 n.2 (TTAB 2006)); *see also Patagonia*, 109 USPQ2d at 1862 ("*Pro se* or not, respondent, as he has been repeatedly warned, bears responsibility for following the rules and Board requirements, including the schedule set by the Board. The Board has patiently informed respondent of his obligations many times, but our patience is now exhausted.").

Proceedings remain suspended for **THIRTY DAYS** from the mailing date of this order and will resume on the following schedule:

Discovery Closes **4/15/2016**

---

merits of the request but to a characteristic or attribute of the responsive information." *No Fear Inc. v. Rule*, 54 USPQ2d at 1554.

Plaintiff's Pretrial Disclosures Due	**5/30/2016**
Plaintiff's 30-day Trial Period Ends	**7/14/2016**
Defendant's Pretrial Disclosures Due	**7/29/2016**
Defendant's 30-day Trial Period Ends	**9/12/2016**
Plaintiff's Rebuttal Disclosures Due	**9/27/2016**
Plaintiff's 15-day Rebuttal Period Ends	**10/27/2016**

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.

***