

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: September 29, 2014

Opposition No. 91214960

Cobra Golf Incorporated

v.

Jonathan Myers

Christen M. English, Interlocutory Attorney:

Pursuant to Fed. R. Civ. P. 26(f) and Trademark Rule 2.120(a)(1) and (2), the Board held a telephonic discovery conference in this proceeding on September 26, 2014. Anne Naffziger and Michelle Zimmermann appeared on Opposer's behalf, Applicant appeared *pro se* and the assigned Interlocutory Attorney, Christen English, participated on behalf of the Board.

Applicant indicated that at this time he intends to continue to represent himself in this proceeding. The Board advised Applicant that it is generally recommended that parties retain experienced trademark practitioners to represent them in Board proceedings. The Board also indicated that Applicant will be expected and required to comply with all applicable rules and procedures, including those relating to service of papers, as set forth in

Trademark Rule 2.119, regardless of whether Applicant retains counsel to enter an appearance in this proceeding.¹

The parties agreed to accept formal service of papers by email pursuant to Trademark Rule 2.119(b)(6) and further agreed that the receiving party will send a return email acknowledging receipt of any served paper. Opposer's email address for service is anaffziger@leydig.com and Applicant's email address for service is johnnywmyers@gmail.com. Applicant also agreed as a courtesy to serve papers on Opposer's co-counsel Ms. Zimmermann at mzimmermann@leydig.com.²

The parties confirmed that there are currently no pending related Board proceedings, court actions, or third-party disputes.

The parties have engaged in initial settlement discussions and remain willing to further pursue settlement negotiations. The Board strongly encourages the parties to work together to amicably resolve this matter, if possible.

The Board next addressed the pleadings noting that Opposer has sufficiently alleged its standing and claims for priority and likelihood of confusion and dilution. Assuming that Opposer properly introduces one or more of its pleaded registrations into evidence, priority will not be an issue at trial unless Applicant asserts counterclaims to cancel Opposer's pleaded

¹ Information for parties representing themselves *pro se* is provided at the end of this order.

registrations. *See Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). In such circumstances, standing also will not be an issue as Opposer's pleaded registrations will establish its standing to bring these claims.

The Board construes Applicant's filing of March 20, 2014 as his answer and a general denial of the salient allegations in the notice of opposition.

The Board next discussed ways to streamline this proceeding by using Accelerated Case Resolution ("ACR") or ACR-like efficiencies such as the possibility of the parties taking testimony by declaration, subject to the right of either party to cross examine, if desired. Applicant expressed a willingness to utilize ACR efficiencies and Opposer's counsel agreed to discuss the issue with her client. The parties are directed to the following materials, which they may find helpful in considering whether to adopt certain ACR-efficiencies:

1. General description of ACR:

<http://www.uspto.gov/trademarks/process/appeal/Accelerated Case Resolution ACR notice from TTAB webpage 12 22 11.pdf>;

2. FAQs on ACR:

[http://www.uspto.gov/trademarks/process/appeal/Accelerated Case Resolution \(ACR\) FAQ updates 12 22 11.doc](http://www.uspto.gov/trademarks/process/appeal/Accelerated Case Resolution (ACR) FAQ updates 12 22 11.doc); and

² Pursuant to Opposer's request during the teleconference, Ms. Zimmermann's email address has been added to Opposer's correspondence address of record.

3. Cases employing ACR-like efficiencies:

Chanel, Inc. v. Makarczyk, 106 USPQ2d 1774 (TTAB 2013) and 110 USPQ2d 2013 (TTAB 2014) and cases listed at: [http://www.uspto.gov/trademarks/process/appeal/ACR_Case_List_\(10-23-12\).doc](http://www.uspto.gov/trademarks/process/appeal/ACR_Case_List_(10-23-12).doc).³

The Board's standard protective order is applicable herein by operation of Trademark Rule 2.116(g) and available here:

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

The parties are encouraged to acknowledge their obligations under the protective order in writing, and may utilize the following form:

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

The Board indicated that it is available for future telephone conferences to resolve contested matters, address scheduling issues, assist the parties in developing stipulations of fact or negotiating an ACR plan, and to address other issues, as necessary, to move this case forward efficiently.

The Board also reminded the parties that neither discovery requests nor motions for summary judgment may be served until after initial disclosures are made.

Lastly, Opposer's motion to compel initial disclosures, filed June 13, 2014, is **GRANTED** as conceded because Applicant failed to respond thereto.

³ It may be helpful for the parties to review the docket entries and filings for these cases (accessible through TTABVue at <http://ttabvue.uspto.gov/ttabvue/>) to see the types of ACR and ACR-like efficiencies that parties have utilized in Board proceedings.

Trademark Rule 2.127(a). Applicant is allowed until **THIRTY DAYS** from the mailing date of this order to serve his initial disclosures.⁴ In the event Applicant fails to serve initial disclosures as ordered herein, Applicant may be subject to sanctions, potentially including entry of judgment against him. Fed. R. Civ. P. 37(b)(2); Trademark Rule 2.120(g).

Dates are reset as follows:

| | |
|---|------------------|
| Discovery Opens | 9/29/2014 |
| Expert Disclosures Due | 2/26/2015 |
| Discovery Closes | 3/28/2015 |
| Plaintiff's Pretrial Disclosures Due | 5/12/2015 |
| Plaintiff's 30-day Trial Period Ends | 6/26/2015 |
| Defendant's Pretrial Disclosures Due | 7/11/2015 |
| Defendant's 30-day Trial Period Ends | 8/25/2015 |
| Plaintiff's Rebuttal Disclosures Due | 9/9/2015 |
| Plaintiff's 15-day Rebuttal Period Ends | 10/9/2015 |

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. 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.

⁴ Applicant acknowledged during the teleconference that he still has not served his initial disclosures.

Pro Se Information

Although Patent and Trademark Rule 11.14 permits a person to represent himself, it is strongly advisable for a party who is 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 United States Patent and Trademark Office (USPTO) cannot aid in the selection of an attorney. As the impartial decision maker, the Board may not provide legal advice; it may provide information solely as to procedure.

Any party who does not retain counsel should be familiar with the authorities governing this proceeding, including the Trademark Trial and Appeal Board Manual of Procedure (TBMP), and the Trademark Rules of Practice (37 C.F.R. Part 2), both accessible directly from the Board's web page: <http://www.uspto.gov/trademarks/process/appeal/index.jsp>. Also on the Board's web page are links to ESTTA, the Board's electronic filing system⁴ at <http://estta.uspto.gov>, and TTABVUE, for case status and prosecution history at <http://ttabvue.uspto.gov/ttabvue>.

Trademark Rules 2.119(a) and (b) require that every paper filed in the USPTO 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. Proof of service must be made before the paper will be considered by the Board. Accordingly, copies of all papers filed in this proceeding must be accompanied by a signed

statement indicating the date and manner in which such service was made. See TBMP § 113.03. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service, must be signed and dated, and should take the form of a certificate of service as follows:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by mailing said copy on (insert date of mailing), via First Class Mail, postage prepaid (or insert other appropriate method of delivery) to: (name and address of opposing counsel or party).

Signature _____

Date _____

Strict compliance with the Trademark Rules of Practice, and the Federal Rules of Civil Procedure (where applicable), is required of all parties before the Board, whether or not they are represented by counsel. See *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006).

This *inter partes* proceeding is similar to a civil action in a federal district court. The parties file pleadings and a range of possible motions. This proceeding includes designated times for disclosures, discovery (discovery depositions, interrogatories, requests for production of documents and things, and requests for admission, to ascertain the facts underlying an adversary's case), a trial period, and the filing of briefs. The Board does not preside at the taking of testimony; all testimony is taken out of the presence of the Board during the assigned testimony, or trial, periods, and the written transcripts

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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.
