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

Proceeding	91218616
Party	Plaintiff Brown Brothers Harriman & Co.
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Submission	Motion for Sanctions
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Date	10/21/2015
Attachments	Motion for Sanctions TTAB BBH v Berry (as filed).pdf(365203 bytes)

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

BROWN BROTHERS HARRIMAN & Co,

Petitioner,

v.

ROBERT BERRY,

Respondent.

CANCELLATION No. 91218616

**MOTION TO STAY PROCEEDINGS AND FOR SANCTIONS
AGAINST RESPONDENT FOR FAILURE
TO PROVIDE DATES ON WHICH HE CAN APPEAR FOR DEPOSITION**

Petitioner, Brown Brothers Harriman & Co., moves for a stay of these Proceedings given Respondent's failure to comply with his discovery obligations and the Board's Order, and for sanctions, and in support states as follows:

Background.

1. The Board entered an Order on September 15, 2015 (the "Order") granting Petitioner's Motion to Compel and instructing Respondent to provide Petitioner's counsel by October 5, 2015 (20 days following the Order) with at least three dates on which he can appear for a deposition, with said deposition to be conducted by October 29, 2015 (40 days following the Order).

2. Notwithstanding the Board's clear instructions, Respondent has not provided any information about his availability for a deposition and has not otherwise corresponded with Petitioner's counsel since April 29, 2015; i.e., prior to Petitioner's Motion to Compel.

3. Respondent's refusal to comply with the Board's Order coupled with Respondent's continuous contumacious conduct demonstrates a complete lack of respect for these proceedings; accordingly, Petitioner is forced to seek sanctions against the Respondent.

4. Respondent is not cooperative and has not demonstrated a good faith effort to comply with his obligations in this Proceedings. The fact that he appears *pro se* does not dispel this conclusion as Petitioner and the Board have been careful to advise Respondent regarding his duties and obligations. Respondent failed to appear for his deposition and his responses to Petitioner's discovery are sparse at best. Respondent has even refused to take the simple step of conferring with Petitioner with respect to discovery as required by the rules.

MEMORANDUM OF LAW

Motion for Sanctions

Petitioner's counsel has gone well beyond the minimum required in an effort to avoid the need for this Motion. *Fed.R.Civ.P. 37(a)(2)(B)*. The undersigned has attempted to resolve the outstanding discovery and deposition issues informally, as evidenced by the e-mails and other forms of communication from Petitioner to Respondent that are already of record. As a result, Petitioner was forced to file the Motion to Compel that triggered the Order.

According to Trademark Rule 2.120(g):

(1) If a party fails to participate in the required discovery conference, or if a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, including a protective order, the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board will not hold any person in contempt or award expenses to any party.

(2) If a party, or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) of the Federal Rules of Civil Procedure to testify on behalf of a party, fails to attend the party's or person's discovery deposition, after being served with proper notice and such party or the party's attorney or other authorized

representative informs the party seeking discovery that no response will be made thereto, the Board may make any appropriate order, as specified in paragraph (g)(1) of this section.

Fed.R. Civ.P. 37(b)(2) provides, inter alia, for the following remedies in the event a party

fails to comply with its obligations in a proceeding:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iv) staying further proceedings until the order is obeyed; or

(vi) rendering a default judgment against the disobedient party.

Since the inception of this proceeding, the Respondent has been uncooperative. The Board is invited to review the correspondence on record provided by the Petitioner, specifically:

- Petitioner’s Request for Production of Documents and Things dated December 1, 2014.
- Respondent’s Response dated January 2, 2015 with the phrase, “[t]he documents can be made available for inspection at 4401 W. Slauson Ave, Los Angeles, CA 90043 at a mutually time.”
- Petitioner’s Notice of Deposition dated April 23, 2015, including the request under *Fed.R.Civ.P. 34* to produce documents and tangible things at the deposition.
- Petitioner’s email and letter dated April 6 and April 16, 2015, attempting to confirm Respondent’s attendance at the noticed deposition and, in alternative, to request that Respondent propose alternative dates and times.
- Respondent’s response dated April 29, 2015, six days after his scheduled deposition, with the sole phrase, “[p]lease reschedule me.”
- Petitioner’s email and letter dated April 29, 2015 requesting Respondent’s availability during the weeks of May 11 and May 25, 2015.

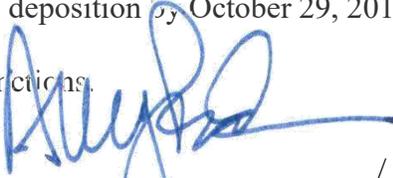
The Petitioner requests that the Board note that the Petitioner has strong factual support for its Petition for Cancellation, and as a sanction, Petitioner requests that the Board enter an Order that the facts supporting the Petitioner's claims are hereby conclusively established, which sanction is authorized under *Fed.R. Civ.P. 37(b)(2)*. "Moreover, the Board has the authority to control the disposition of cases, which necessarily includes the inherent power to enter sanctions." *Patagonia, Inc. v. Azzolini*, 109 USPQ2d1859, 1861 n.8 (TTAB 2014) *citing Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1071 (TTAB 2000). *See Benedict v. Super Bakery Inc.*, 665 F.3d 1263, 101 USPQ2d 1089 (Fed. Cir. 2011) (Board appropriately entered judgment where respondent repeatedly failed to respond to petitioner's discovery requests and the Board's discovery orders, since record supported Board's finding that respondent would not comply with his discovery obligations if given additional opportunities to do so); *MySpace Inc. v. Mitchell*, 91 USPQ2d 1060 (TTAB 2009) (petition for cancellation granted as sanction where respondent engaged in a course of delay, failing to comply with discovery requests and disregarding a Board order compelling responses to those discovery requests); *MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477 (TTAB 2000) (review of the record revealed that opposer had been engaged in dilatory tactics, including the willful disregard of the Board's orders resulting in an entry of judgment as a sanction); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000) (judgment entered against applicant for engaging in a pattern of dilatory tactics and having willfully failed to comply with Board discovery order); *Unicut Corp. v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984) (Board noted that entry of judgment as a sanction, while harsh, was justified where no less drastic remedy would be effective).

Recognizing that entering a default judgment could be construed as a drastic remedy, in the alternative, and to avoid rewarding Respondent for his dilatory conduct, Petitioner requests that the Board enter an Order prohibiting the Respondent from submitting any evidence in opposition to Petitioner's claims that the Respondent committed fraud on the USPTO.

Motion to Stay Proceedings

The Respondent has behaved in a manner that can be considered contumacious at best. Under the circumstances, Petitioner further requests the Board stay the proceedings, including its Order directing Petitioner to take Respondent's deposition by October 29, 2015, pending the Board's decision on Petitioner's Motion for Sanctions.

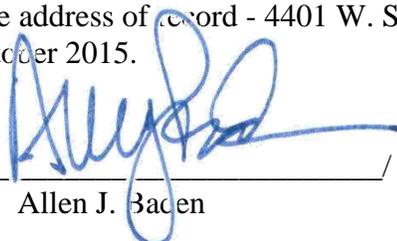
Dated: October 21, 2015

By: /  /

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail to the Respondent, Robert Berry, at the address of record - 4401 W. Slauson Ave, Los Angeles, CA 90043, on this 21st day of October 2015.

By: /  /
Allen J. Baden