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

Proceeding	91221325
Party	Defendant JORDI NOGUES, S.L.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>RED BULL GMBH,</p> <p>Petitioner/Opposer,</p> <p>v.</p> <p>JORDI NOGUES, S.L.</p> <p>Registrant/Applicant.</p>	<p>Consolidated Proceeding No.: 91/221,325¹</p> <p>Cancellation No: 92/061,202 (Child) Registration No.: 4,471,520 Trademark: BADTORO (and Design)</p> <p>Opposition No.: 91/221,325 (Parent) Serial No.: 86/324,277 Trademark: Bull Design</p>
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**REGISTRANT / APPLICANT JORDI NOGUES, S.L.’S
REPLY MEMORANDUM IN FURTHER SUPPORT OF THE
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Pursuant to Trademark Rule 2.127(a), Registrant / Applicant Jordi Nogues, S.L. (hereinafter, collectively, “Registrant”), by and through undersigned counsel, hereby respectfully files this Reply Memorandum in Further Support of Registrant’s Motion to Dismiss or, in the Alternative, for Summary Judgment (14 TTABVUE, the “Motion to Dismiss”).²

¹ (See 13 TTABVUE at 2. Unless otherwise specified, all subsequent references or citations to TTABVUE docket entries refer to docket entries within the parent Opposition proceeding.)

² Unless subsequently stated otherwise, all capitalized terms used herein are defined as set forth within the Motion to Dismiss.

ARGUMENT

I. Registrant’s Motion to Dismiss Must be Resolved Before Petitioner’s Motion for Judgment on the Pleadings is Considered

Petitioner does not dispute that Registrant’s Motion to Dismiss is relevant and related to Petitioner’s pending Motion for Judgment on the Pleadings. (*See* 18 TTABVUE at 1-2.) Moreover, Petitioner does not dispute that the question of Petitioner’s standing to maintain this action is a threshold jurisdictional issue which must be resolved before the Motion for Judgment on the Pleadings is examined. (*Id.*) Thus, the parties apparently agree that while the above-captioned consolidated proceedings are suspended pending the resolution of Petitioner’s Motion for Judgment on the Pleadings, Registrant’s Motion to Dismiss must be resolved first. *E.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998).

II. On the Undisputed Facts and Unopposed Legal Standards, Petitioner Lacks Standing to Maintain this Action and Registrant is Entitled to Judgment as a Matter of Law

Similarly, Petitioner’s response neither addresses nor disputes *any* of the facts or legal authorities set forth within the Motion to Dismiss. (*See* 18 TTABVUE at 1-2.) “If a party ... fails to properly address another party’s assertion of fact ..., the court may ... consider the fact undisputed for purposes of the motion” or “grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it....” FED. R. CIV. P. 56(e)(2)-(3); *see also* TBMP § 528.01 (“If the moving party ... has supported its motion with affidavits or other evidence which if unopposed would establish its right to judgment, the nonmoving party may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence, by affidavit or as otherwise provided ..., showing that there is a genuine factual dispute for trial.”) Similarly, once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. *E.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

In view of Petitioner’s failure to respond, there is not, nor can there be, any dispute that Petitioner’s responses to Registrant’s RFAs were due on November 12, 2015. (*E.g.*, 14 TTABVUE

at 3-5; 13 TTABVUE at 3 (“This suspension order does not toll the time for [Petitioner] to respond to any outstanding discovery...”); FED. R. CIV. P. 36(a)(3); 37 CFR § 2.120(a)(3); TBMP §§ 403.02 and 407.03(a). Indeed, Petitioner’s November 12, 2015 deadline even accounts for three weeks of extensions already afforded Petitioner. (*E.g.*, 14 TTABVUE at 3-5.) Moreover, there is no dispute that an admission of Registrant’s RFAs constitutes an admission that the marks on which Petitioner’s Complaints are premised are generic. (*Id.*) Finally, there is no dispute that the genericness of Petitioner’s asserted marks strips Petitioner of standing and deprives the Board of jurisdiction or otherwise entitles Registrant to judgment as a matter of law. (*Id.* at 6-1).

Notwithstanding the foregoing, there is no dispute that Petitioner failed to respond to the RFAs by November 12, 2015, and still has not responded to the RFAs. (*Id.*) Indeed, not only has Petitioner failed to timely respond, Petitioner has taken no procedural steps whatsoever to rectify its admissions, such as seeking an extension of time, establishing good cause and excusable neglect, or seeking to withdraw and amend the admissions. Under such circumstances, the RFAs are admitted by operation of law and the associated facts are conclusively established for purposes of litigation. *See* Fed. R. Civ. P. 36(a)(3) (“A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.”); Fed. R. Civ. P. 36(b) (“A matter admitted under this rule is conclusively established” unless withdrawal is later permitted); TBMP §§ 411.03 (“If a party on which requests for admission have been served fails to file a timely response thereto, the requests will stand admitted....”), 523.01 (same), and 524.01 (same).

In lieu of actually responding to the Motion to Dismiss, Petitioner instead points to the Board’s amended suspension order to justify its continued refusal to acknowledge Registrant’s RFAs. (18 TTABVUE at 1-2 relying on 16 TTABVUE.) However, for reasons more fully set forth in Registrant’s pending motion to reconsider (17 TTABVUE, incorporated herein by this reference in its entirety, including all exhibits attached thereto), Petitioner’s wholesale reliance on the amended

suspension order is misplaced. Simply put, for reasons set forth at length in Registrant’s incorporated motion to reconsider, the so-called amended suspension order was entered in error and in violation of due process. Indeed, the hearing that resulted in the amended suspension order was not supposed to even “involve the merits of any pending motion” and any “discussion of the merits of any pending motion[.]” was supposed to trigger a prompt adjournment of the hearing. (*See* 17 TTABVUE at Ex. A.) Nevertheless, Petitioner’s response to the merits of Registrants Motion to Dismiss is limited solely to the outcome of that hearing. At bottom, Federal Rule of Civil Procedure 36 is clear: “A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter” Accordingly, Petitioner’s failure to respond constitutes an admission of Registrants’ RFAs by operation of law.

In view of the foregoing, Registrant is entitled either to summary dismissal of Petitioner’s Complaints or judgment thereon as a matter of law. Accordingly, Registrant respectfully requests that the Motion to Dismiss be granted.

III. Petitioner’s Undeveloped and Unsupported Request for an Extension of Time Should be Denied

As an afterthought, Petitioner’s response “contingently requests an extension” of time to respond to the Motion to Dismiss. (*See* 18 TTABVUE at 2.) Even assuming the Board acknowledges this threadbare request,³ it should be denied. To begin with, Petitioner has been given every opportunity to make its arguments and authorities known but routinely refuses to do so. (*E.g.*, 17 TTABVUE at 3-5.) The same is true here; Petitioner has been given a full and fair opportunity to oppose the Motion to Dismiss on the merits and has knowingly and willfully neglected to substantively do so. At a minimum, Petitioner could have thoroughly opposed the Motion to Dismiss in the alternative, setting forth all relevant arguments simultaneously. Petitioner chose not to do so. (*See* 18 TTABVUE.) More

³ *See* TBMP § 502.02(b) (“all motions should be filed separately, or at least be captioned separately, to ensure they receive attention” and “[a] party should not embed a motion in another filing that is not routinely reviewed by the Board upon submission.”)

importantly, however, Petitioner cites no authority supporting its open-ended extension request, let alone providing an analysis of the relevant facts. (*See* 18 TTABVUE at 2.) For example, it is unclear whether Petitioner's request is premised on Federal Rule of Civil Procedure (the "Rule" or "Rules") 6, Rule 56(d), or on some other unspecified basis for an extension. (*Id.*) What is clear, however, is that Petitioner has neglected to set forth or establish the prerequisite requirements for an extension regardless of any assumed legal basis therefore. (*Id.*)

For example, an extension sought under Rule 6 must be premised on "good cause." FED. R. CIV. P. 6(b)(1)(A); *see also, e.g.*, TBMP § 509.01(a) ("A motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient. Moreover, a party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allowed therefore. The Board will 'scrutinize carefully' any motion to extend time, to determine whether the requisite good cause has been shown." (internal citations omitted)). Petitioner's response does not even suggest, let alone establish, good cause. (*See* 18 TTABVUE at 2.) Rule 56(d) is even more exacting, requiring an affidavit that, for specific reasons, facts essential to oppose a motion are unavailable without further discovery. FED. R. CIV. P. 56(d); *see also, e.g.*, TBMP § 528.06. Petitioner has not met this or any standard justifying an extension of time, whether under Rule 6 or 56(d). Accordingly, Petitioner's request should be summarily denied.

CONCLUSION

In view of the foregoing, the Board should dismiss Petitioner's Complaints. The admitted generalness of Petitioner's asserted marks strips Petitioner of standing and deprives the Board of subject-matter jurisdiction. Accordingly, on the undisputed facts, Registrant is entitled to judgment as a matter of law.

Respectfully submitted on January 11th, 2016.

By: /James T. Burton/

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CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of January, 2016, I served a copy of the foregoing **REGISTRANT / APPLICANT JORDI NOGUES, S.L.'S REPLY MEMORANDUM IN FURTHER SUPPORT OF THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** on the attorney for Petitioner / Opposer, as designated below, by placing said copy in the United States Mail, first class, postage prepaid, with an advance copy via email, addressed as follows:

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