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

Proceeding	91224413
Party	Plaintiff Eveden Inc.
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Date	12/17/2015
Attachments	Motion to Strike Answer (USTTAB Opposition No. 91224413).pdf(746826 bytes)

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

In the Matter of Application Serial No. 86616450
Mark: FANTASA
Published: September 22, 2015

Eveden Inc.,)
A Massachusetts corporation)
)
Opposer,)
)
v.) Opposition No. 91224413
)
Jiang, Li,)
a China individual)
)
Applicant.)

Box TTAB
FEE

MOTION TO STRIKE APPLICANT’S ANSWER

Opposer Eveden Inc. hereby files its Motion to Strike Applicant’s Answer

In the alternative, in the event the Board decides not to strike Applicant’s Answer as requested herein, Opposer moves the Board to order Applicant to file an amended answer that is responsive to Opposer’s Notice of Opposition.

On October 19, 2015, Opposer filed its Notice of Opposition to Application Serial No. 86616450. On November 12, 2012, Applicant Jiang, Li filed her Answer. Service of said Answer has not been made on Opposer, because Applicant failed to effect service in any manner permitted by U.S. Trademark Trial and Appeal Board Manual 37 CFR § 2.119(b), which requires service in accord with 37 Code of Federal Regulations § 2.119(b). In any event, Applicant’s Answer was non-responsive to the Notice of Opposition, for the following reasons.

Paragraphs 6 through 8 of the Notice of Opposition allege:

“6. Upon information and belief, Applicant made no use of the mark in Application Serial No. 86616450 on or before February 18, 1999, the filing date of Opposer’s application which resulted in U.S. Trademark Registration No. 2447377.

“7. Upon information and belief, Applicant made no use of the mark in Application Serial No. 86616450 on or before June 17, 2004, the filing date of Opposer’s application which resulted in U.S. Trademark Registration No. 3133514.

“8. Upon information and belief, Applicant made no use of the mark in Application Serial No. 86616450 on or before February 1, 2015, the claimed a date of first use and use in U.S. commerce of the mark in said application.

In her Answer, Applicant answered these allegations as follows:

“6. Applicant admits that the application filing date for U.S. Trademark Registration No. 2447377 was February 18, 1999. Applicant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 6 and, on that basis, denies the same.

“7. Applicant admits that the application filing date for U.S. Trademark Registration No. 3133514 was June 17, 2004. Applicant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 7 and, on that basis, denies the same.

“8. Applicant admits that the claimed date of first use and use in U.S. commerce for U.S. Trademark Application Serial No. 86616450 was February 1, 2015. Applicant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations in paragraph 8 and, on that basis, denies the same.”

On December 15, 2015 Opposer’s attorney of record sent Applicant’s attorney of record a letter, a true and complete copy of which attached to this Motion as Exhibit A. Opposer’s letter pointed out in clear and specific terms that Applicant’s Answer as filed is nonresponsive.

Specifically, paragraphs 6 through 8 of the Answer are nonresponsive.

Paragraphs 6 through 8 of the Notice of Opposition allege, upon information and belief, that Applicant made no use of the mark in Application Serial No.

86616450 on or before four specific dates, each of which are highly relevant to this opposition case, as they bear on the issue of the respective parties' priority of use of their respective marks.

The Answer evades answering each of paragraphs 6 through 8 of the Notice of Opposition, stating that Applicant lacks sufficient knowledge or information to form a belief as to the truth or falsity of these allegations, and on that basis denies them. The Answer is unresponsive, because Applicant certainly must have sufficient knowledge and information to form a belief as to whether or not Applicant's mark was in use on or before each of the four dates specified.

Given the non-responsiveness of the Answer, Opposer's counsel requested that Applicant file a responsive amended answer. Opposer's counsel advised Applicant's counsel that if Applicant failed to comply with the request, Opposer would file a motion to strike the Answer as non-responsive.

On December 16, 2015, Applicant's counsel sent Opposer's counsel a reply letter, a true and complete copy of which attached to this Motion as Exhibit B, refusing to file an amended Answer.

Confusingly, in his reply, Applicant's counsel stated that his client is "lacking sufficient information and knowledge concerning her actual first date of use in the U.S. or elsewhere." He further stated that "at this time, the actual first date of use of Defendant's trademark remains unclear. My client filed the Application herself and claimed first use of her trademark as "at least as early as 02/01/15' under a penalty of perjury. She claimed this date as it was the earliest date she believed she could demonstratively claim first use anywhere or in U.S.

commerce.” He states further that: “this does not necessarily mean that such date was her actual date of first use, either in U.S. commerce or otherwise. Determining the actual first date of use of my client’s trademark is a question of fact that can only be determined upon an evaluation of all of the information and knowledge in hand. Without a full assessment of such information and knowledge, my client had no other choice but to deny in good faith the rest of Paragraphs 6-8 of the Complaint’s allegations based on a lack of knowledge or information.”

Applicant’s reply letter contended that the relevant paragraphs of the Notice of Opposition are “confusingly ambiguous in reference to ‘use of the mark.’”

In the Notice of Opposition, it is clear that the phrase “use of the mark” in paragraphs 6, 7 and 8, in the wording “Applicant made no use of the mark in Application Serial No. 86616450 on or before” each of the three specifically alleged dates, means use in U.S. commerce, which is the predicate controlling the issue of priority in an opposition grounded on likelihood of confusion. It is extraordinary, and extraordinarily evasive, that the Applicant would profess to be unable straightforwardly to admit or deny allegations that a mark was not in use as of each specific date.

Since Applicant’s counsel has flatly and categorically refused to file an amended answer, Opposer is unjustly hampered in its efforts to pursuing this Opposition in a fair, effective and efficient manner.

As such, Opposer now moves the Board to strike Applicant’s Answer as non-responsive under Federal Rule of Civil Procedure §12(f). In the alternative, Opposer requests that the Board require Applicant to file a more definite answer

under Federal Rule of Civil Procedure §12(e).

Federal Rule of Procedure §§ 12(e) and (f) state as follows:

“(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

- (1) on its own; or
- (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

Fed. R. Civ. P. 12.

Although motions to strike are as a general matter disfavored, Applicant’s refusal to file an amended answer is unreasonable and wholly unjustified, and warrants such a remedy.

In the alternative, Opposer moves the Board to order Applicant to file an amended answer that is responsive to Opposer’s Notice of Opposition, given that Applicant’s Answer as filed does not respond to the allegations clearly and properly pled in Opposer’s Notice of Opposition.

WHEREFORE, Opposer prays that this Motion be granted.

EXHIBIT A

William J Seiter

From: William J Seiter <williamjseiter@seiterlegalstudio.com>
Sent: Tuesday, December 15, 2015 3:24 PM
To: 'lsmichels@ironmarklaw.com'
Cc: kiran@seiterlegalstudio.com; 'marni@seiterlegalstudio.com'
Subject: USTTAB Opposition No. 91224413 (against U.S. Trademark Application Serial No. 86616450 for "FANTASA" in Class 25)

Tracking:	Recipient	Read
	'lsmichels@ironmarklaw.com'	
	kiran@seiterlegalstudio.com	Read: 12/15/2015 5:35 PM
	'marni@seiterlegalstudio.com'	

**VIA EMAIL ONLY
PLEASE CONFIRM RECEIPT BY RETURN EMAIL**

Lucas S. Michels, Esq.
Ironmark Law Group, Pllc
Seattle

Dear Mr Michels

We are in receipt of your Answer, filed November 12, 2015, in the above-referenced opposition on behalf of your client Applicant Jiang, Li, and your email message regarding settlement / discovery conference..

The current deadline for us to conduct a settlement / discovery conference is December 28, 2015.

However, before doing so, I wish to point out that your Answer as filed is nonresponsive, unacceptably so.

Specifically, paragraphs 6 through 9 of the Answer are nonresponsive. The corresponding paragraphs 6 through 9 of our Notice of Opposition filed on behalf of our client Opposer Eveden Inc. allege upon information and belief that Applicant made no use of the mark in Application Serial No. 86616450 on or before four specific dates which are highly relevant to this opposition case, as they bear on priority of use. The Answer evades answering each of paragraphs 6 through 9, stating that Applicant lacks sufficient knowledge or information to form a belief as to the truth or falsity of these allegations, and on that basis denies them. This is wholly unresponsive. Applicant certainly must have sufficient knowledge and information to form a belief as to whether or not Applicant's mark was in use on or before each of the four dates specified.

Given the non-responsiveness of the Answer, we hereby demand on behalf of Opposer that you file an amended answer no later than Friday, December 18, 2015, which is responsive.

If Applicant complies with our demand, I will then schedule the discovery / settlement conference call with you for on or before December 28.

If Applicant fails to comply with our demand, we intend to file a Motion to Strike Applicant's Answer as non-responsive and we will refrain from discussing discovery or settlement with Applicant's counsel until after the Board rules on our motion.

I look forward to hearing from you as soon as possible, preferably with confirmation of your filing of a satisfactory amended answer.

This message is written without prejudice to any and all rights and remedies at law or in equity which Eveden Inc. and/or its affiliates have or may have, in the above-referenced opposition case or otherwise, all of which are reserved.

Sincerely,

William J. Seiter



2500 Broadway, Bldg F, Suite F-125

Santa Monica, California 90404

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Email: williamjseiter@seiterlegalstudio.com

Website: www.seiterlegalstudio.com

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EXHIBIT B

December 16, 2015

Lucas S. Michels
Email: lsnichels@ironmarklaw.com

VIA E-MAIL

William J. Seiter
SEITER LEGAL STUDIO
2500 Broadway, Building F, Suite F-125
Santa Monica, California 90404
williamjseiter@seiterlegalstudio.com

Re: TTAB Opposition Proceeding No. 91224413 (Eveden Inc. v. Jiang)

Mr. Seiter,

I am in receipt of your correspondence from December 15, 2015 entitled "USTTAB Opposition No. 91224413 (against U.S. Trademark Application Serial No. 86616450 for "FANTASA" in Class 25" (*Email*).

While I appreciate your and your client's eagerness to establish the facts of this proceeding, your assertion that my client's responses in the Answer to the Complaint were unacceptably unresponsive are unfounded. As you are likely aware, a defendant in a TTAB action that does not intend in good faith to controvert all of the allegations contained in a complaint may make its denials as specific denials of designated allegations or paragraphs, or may generally deny all the allegations except those designated allegations or paragraphs which are expressly admitted. TBMP § 311.02(a); Fed. R. Civ. P. 8(b)(3)-(4). Further, a party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial. Fed. R. Civ. P. 8(b)(5).

In examining your allegations, it is clear that my client's responses in the Answer are fully responsive and in compliance with TBMP § 311.02(a) and Fed. R. Civ. P. 8(b).

In paragraphs 6-8 of the Answer, Defendant affirmatively admits these paragraphs' allegations concerning the dates of the Application, and your client's filing dates and trademark registrations, while lacking sufficient information and knowledge concerning her *actual* first date of use in the U.S. or elsewhere. This is properly responsive for multiple reasons. First, at this time, the actual first date of use of Defendant's trademark remains unclear. My client filed the Application herself and claimed first use of her trademark as "at least as early as 02/01/15" under a penalty of perjury. She claimed this date as it was the earliest date she believed she could demonstratively claim first use anywhere or in U.S. commerce. However, as you are

well aware, this does not necessarily mean that such date was her *actual* date of first use, either in U.S. commerce or otherwise. Determining the actual first date of use of my client's trademark is a question of fact that can only be determined upon an evaluation of all of the information and knowledge in hand. Without a full assessment of such information and knowledge, my client had no other choice but to deny in good faith the rest of Paragraphs 6-8 of the Complaint's allegations based on a lack of knowledge or information pursuant to Fed. R. Civ. P. 8(b)(4)-(5).

Further, paragraphs 6-8 of the Complaint are confusingly ambiguous in reference to "use of the mark." Paragraphs 5-8 of the Complaint reference allegations that my client made no "use of the mark" at certain dates related to your client's trademark applications and registrations without any indication of what type of "use" your client was referring to (e.g., use in U.S. commerce, use in foreign commerce, use in intrastate commerce, etc.). Due to the ambiguity of these allegations, my client had no other choice but to admit that they lacked sufficient information and knowledge to answer such allegations, and therefore denied the same pursuant to Fed. R. Civ. P. 8(b)(4)-(5).

Finally, with regards to paragraph 9, I am frankly baffled at how you find Defendant's response unresponsive. Defendant admitted the filing date of its trademark application (Serial No. 86616450; the *Application*), and denied the rest of Paragraph 9. As my client claimed in the Application a first use date anywhere and in U.S. commerce "at least as early as 02/01/15," this would naturally deny your client's allegation in Paragraph 9 that my client had not yet used their mark in U.S. commerce three months after such date on May 1, 2015. As such there is no way this response can be considered unresponsive.

In short, my client believes that its responses in the Answer are fully responsive and in compliance with TBMP § 311.02(a) and Fed. R. Civ. P. 8(b). We believe that any motion to strike such responses will be unsuccessful and serve only to unduly delay this proceeding.

I am happy to further discuss these issues at your convenience and await the scheduling of our discovery conference prior to **December 28, 2015**.

Very truly yours,

IRONMARK LAW GROUP, PLLC



Lucas S. Michels

LSM:lm
CC: Jiang, Li