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

Mailed: September 27, 2016

Opposition No. 91227888

Cackalacky, Inc.

v.

Terrell T. Rhodes

Michael Webster, Interlocutory Attorney:

On August 15, 2016, the Board issued an order allowing Applicant thirty (30) days to show cause why judgment should not be entered against Applicant based on his failure to participate in the mandatory discovery conference scheduled by the Board for August 11, 2016.[1] On September 15, 2016, Applicant filed a motion titled "Motion to Dismiss the Notice of Opposition." The following day, Opposer filed a motion requesting entry of discovery sanctions in the nature of judgment.

A motion to dismiss under Rule 12(b)(6) is solely a test of the sufficiency of a complaint. *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993). However, whether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an

[1] In the order to show cause the Board erroneously referred to the possible judgment sanctions as "default judgment."

opportunity to submit evidence in support of their respective positions. *Advanced Cardiovascular Systems, supra,* 26 USPQ2d at 1041.

Upon review of Applicant's motion, the Board finds that Applicant's motion is based entirely on the merits of Opposer's claims. Because Applicant's motion is based solely on the merits of the claims and not the legal sufficiency of the pleading, the Board construes Applicant's motion as one for summary judgment. *See* TBMP § 503.04 (2016). A motion for summary judgment, however, may not be filed until the moving party has provided its initial disclosures to the opposing party, except if the motion is based upon claim or issue preclusion or that the Board lacks jurisdiction to entertain the case. *See* Trademark Rule 2.127(e)(1). Inasmuch as Applicant's motion is not based upon claim or issue preclusion or that the Board lacks jurisdiction to entertain Opposer's claims and because Applicant has not served his initial disclosures on Opposer prior to or concurrently with the filing of its motion to dismiss or participated in a discovery conference, Applicant's motion is deemed *premature* and will be given NO CONSIDERATION.

Additionally, Applicant's filing does not in any way address the substance of the Board's order to show good cause why judgment should not be entered against him for loss of interest. Accordingly, the show cause order is **not discharged**.

However, because it is the policy of the law to determine cases on their merits, *see*, *Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1902 (Comm'r Pat. 1990); *Int'l Painters and Allied Union and Indus. Pension Fund v. H.W. Ellis Painting Co., Inc.*, 288 F. Supp.2d 22, 25 (D.D.C. 2003), and Applicant, by his motion, has

shown that he has not lost interest in the case, judgment is not entered against Applicant.

In view of the above, Applicant is allowed **until October 1, 2016** to contact Opposer and schedule the parties' mandatory discovery conference.[2] Further, the discovery conference must be held by October 7, 2016.[3] In addition, because Applicant has not responded to the show cause order, Applicant is allowed until **FIFTEEN (15) DAYS** from the mailing date of this order to respond to the show cause order and file an explanation as to why, as of this date, he has not participated in the mandatory discovery conference. *The burden of complying with this order is on Applicant.* If Applicant fails to comply with any part of this order, judgment will be entered against Applicant upon request by Opposer. In view of the above, Opposer's motion for judgment sanctions has not been considered but may be renewed by Opposer if Applicant fails to comply with this order.

Proceedings are resumed. Dates are reset as follows.

Deadline for Discovery Conference	**10/7/2016**
Discovery Opens	**10/7/2016**
Initial Disclosures Due	**11/6/2016**
Expert Disclosures Due	**3/6/2017**
Discovery Closes	**4/5/2017**
Plaintiff's Pretrial Disclosures	**5/20/2017**
Plaintiff's 30-day Trial Period Ends	**7/4/2017**
Defendant's Pretrial Disclosures	**7/19/2017**
Defendant's 30-day Trial Period Ends	**9/2/2017**
Plaintiff's Rebuttal Disclosures	**9/17/2017**

[2] Inasmuch as the original deadline for the conference has passed, the Board will NOT participate in the discovery conference.

[3] The parties are advised to refer to the Board's May 16, 2016 institution order and TBMP § 401.01 for the subjects to be discussed during the conference.

Plaintiff's 15-day Rebuttal Period Ends **10/17/2017**

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.

***Pro Se* Information**

Although Patent and Trademark Rule 11.l4 permits an entity to represent itself, 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 system[4] at http://estta.uspto.gov, and TTABVUE, for case status and prosecution history at http://ttabvue.uspto.gov/ttabvue.

[4] The Board strongly encourages parties to file all papers through ESTTA, which operates in real time and provides a tracking number that the filing has been received. For assistance in using ESTTA, call 571-272-8500.