

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: January 25, 2010

Cancellation No. 92048667

Jules Jurgensen/Rhapsody, Inc.

v.

Peter Baumberger

**Before Bucher, Taylor, and Mermelstein,
Administrative Trademark Judges.**

By the Board:

This case now comes up for consideration of: (1) respondent's motion to dismiss pursuant to Trademark Rule 2.132(a); (2) petitioner's motion for reconsideration¹ of the Board's order of July 6, 2009, striking the testimony deposition of Morton Clayman; and (3) petitioner's combined motion to strike as untimely respondent's combined reply brief in support of its motion to dismiss and opposition brief to petitioner's motion for reconsideration.

Motion to Strike

We first turn to petitioner's combined motion to strike as untimely respondent's combined reply brief in support of its motion to dismiss and opposition to petitioner's motion

¹ We do not consider the motion for reconsideration untimely to the extent that the Board issued an order on July 28, 2009 acknowledging petitioner's intention of filing such motion.

Cancellation No. 92048667

for reconsideration which respondent filed on September 8, 2009.

The certificate of service attached to petitioner's combined motion (Entry No. 29 in TTABVUE) for reconsideration of the Board's July 6, 2009, order and brief in opposition to respondent's motion to dismiss under Trademark Rule 2.132(a) specifically states that on August 16, 2009, copies of such document were filed with the Board and served upon counsel for respondent by e-mail and by first class mail. Respondent's reply brief in support of its motion for judgment and its brief in opposition to petitioner's motion for reconsideration were, therefore, due twenty days thereafter on September 5, 2009. Inasmuch as September 5, 2009, was a Saturday and the following Monday a holiday (Labor Day), respondent's due date, in this instance, was Tuesday, September 8, 2009. Petitioner's argument that because it served its combined motion for reconsideration and opposition to respondent's motion for judgment electronically and because the parties "by their conduct" mutually agreed to the "electronic transmission" of documents respondent had until September 1, 2009 (fifteen days after the email copy was received) to file its response is not well-taken. We are uncertain whether an agreement between the parties was actually made regarding service by e-mail. To the extent that the parties continued to serve

each other copies of filed documents by first-class mail, it would appear that there was no definitive agreement as to how documents would be served upon the other party. Thus, respondent's combined reply brief and opposition brief was timely filed.

In view thereof, petitioner's motion to strike is denied.

Motion for Reconsideration

We next consider petitioner's motion for reconsideration of the Board's July 6, 2009, order wherein the testimony deposition of petitioner's president, Morton Clayman, was stricken in its entirety for petitioner's failure to comply with Trademark Rule 2.121(e).

A motion or request for reconsideration under Trademark Rule 2.127(b) allows a party to point out any error which the Board may have made in considering the matter initially. A request for reconsideration is not to be utilized for reargument of points previously raised or for introduction of new evidence or arguments. See TBMP Section 518 (2d ed. rev. 2004).

We have carefully reviewed petitioner's arguments, but are not persuaded that the Board's decision in this case was in any way erroneous. Indeed, most of the arguments made by petitioner in its request for reconsideration have previously been considered. We note that petitioner's

Cancellation No. 92048667

introduction of additional evidence is simply devoted to a reargument of the points presented by petitioner in its response to respondent's motion to strike. Further, we note that petitioner's argument that Trademark Rule 2.123(e)(3) is preempted by Trademark Rule 2.121(e) is incorrect. Trademark Rule 2.123(e)(3) provides that a party which elects to cross-examine a witness under protest while reserving its right to object to the receipt of the testimony of evidence "shall" (after the testimony is completed) move to strike the testimony of the inadequate or improperly noticed witness. Trademark Rule 2.121(e) provides that a party "may" move to delay or reset any subsequent pretrial disclosure deadlines and/or trial periods when the adverse party fails to make required pretrial disclosures. We agree with respondent that such rules provide alternate remedies for litigants in respondent's position.

In view thereof, petitioner's request for reconsideration is denied.

Motion to Dismiss under Trademark Rule 2.132(a)

We finally turn to respondent's motion to dismiss under Trademark Rule 2.132(a).

A motion for involuntary dismissal for failure to take testimony is governed by Trademark Rule 2.132(a), which provides, in relevant part, as follows:

Cancellation No. 92048667

If the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute....

Respondent seeks to dismiss the cancellation on the ground that aside from the testimony deposition of Mr. Clayman, which is now stricken from the record, petitioner has submitted no other evidence in this proceeding. Respondent's motion is well-taken. Our review of the record reveals that petitioner has failed to submit any other evidence besides the stricken testimony of Mr. Clayman in support of its claims during its assigned testimony period.

In view thereof, respondent's motion to dismiss the proceeding under Trademark Rule 2.132(a) is granted. The cancellation is accordingly dismissed with prejudice.