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

coggins

Mailed: March 3, 2010

Cancellation No. 92049862

David J. Long Jr.

v.

Review Publishing Limited Partnership

Before Bucher, Taylor, and Mermelstein, Administrative Trademark Judges

By the Board:

This case now comes up on respondent's motion (filed August 19, 2009) for discovery sanctions. The motion is fully briefed.[1]

Procedural Issue

As a preliminary matter, the Board notes that petitioner's brief in opposition to the motion is late. As respondent argues in its brief in reply to the motion for sanctions, petitioner's brief was due September 8, 2009, but it was not filed until September 9, 2009.

Respondent has neither demonstrated nor argued that it would be prejudiced by the one-day delay, and such a short delay has, under the circumstances of this case, virtually

[1] On September 29, 2009, the Board issued an order noting that inasmuch as petitioner's sur-reply and motions to amend and for summary judgment were improperly filed, they would be given no consideration. In view

no impact on this proceeding. Inasmuch as we have given no consideration to petitioner's sur-reply, petitioner has not had the opportunity to explain the reason for his delay; but, there is no indication in the record that petitioner acted in bad faith by filing his brief one day late. Moreover, we note that petitioner's brief sheds some light on the issue to be determined and respondent is seeking entry of judgment. Accordingly, we find that petitioner has demonstrated excusable neglect and we exercise our discretion to consider petitioner's late brief and to determine the outstanding motion for sanctions on its merits. *See Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993); and *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

Motion for Sanctions

By order dated July 13, 2009, the Board granted respondent's earlier-filed motion to compel as conceded and ordered petitioner to answer respondent's interrogatories, document requests, and requests for admission by August 12, 2009. By way of the current motion, respondent seeks a Board order entering judgment against petitioner for petitioner's failure to provide any additional response to respondent's discovery requests.

In opposition to the motion, petitioner claims that he has been disabled since 2002, he and his family were victims

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thereof, respondent's motion to strike (filed September 29, 2009, but

of a traumatizing criminal violence on October 16, 2008, and because he focused on the criminal case (which resulted in a judgment on September 3, 2009) he has been unable to fully manage his affairs in this proceeding. Petitioner also argues that the discovery requests which were at issue in the motion to compel were not germane to this proceeding.

In reply, respondent notes that the criminal violence did not stop petitioner from filing seven other papers in this proceeding in the time between the violence and the motion to compel, and although petitioner has contested the motion for sanctions - and even attempted to file an amended complaint and a motion for summary judgment after the motion for sanctions was filed - as of the date of respondent's reply brief, petitioner still has not provided any supplemental discovery responses to respondent. Moreover, respondent notes that although the parties have spoken and corresponded since the date of the violence, petitioner had never mentioned the attack until now.

Inasmuch as petitioner was ordered by the Board to provide timely and complete discovery responses in view of respondent's earlier-filed motion to compel, the issue in the motion for sanctions is whether petitioner complied with the Board's order to provide timely and complete responses – not whether the discovery request were germane to this proceeding. The time for arguing against the relevancy of the discovery requests was during the briefing period of the

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after the Board issued the order) is moot.

motion to compel – a briefing which petitioner chose to ignore. Moreover, petitioner was put on notice in the Board's order granting the motion to compel that, should petitioner fail to provide the ordered responses, then respondent's remedy will lie in a motion for entry of sanctions, in the form of entry of judgment denying the petition for cancellation.

Trademark Rule 2.120(g)(1) provides that if a party fails to comply with an order of the Board relating to discovery, the Board may make any appropriate order, including prohibiting the disobedient party from introducing designated matters in evidence. *See* Fed. R. Civ. P. 37(b)(2)(A)(ii).

When a party, without substantial justification, fails to disclose information required or fails to amend or supplement a prior response as required, that party may be prohibited from using as evidence the information not so disclosed. *See* Fed. R. Civ. P. 37(c)(1); and TBMP § 527.01(e) (2d ed. rev. 2004) and cases cited therein.

The Board is not unsympathetic to petitioner's disability, but petitioner has not explained how his disability related to the failure to provide the discovery responses ordered by the Board. And, while the Board understands that the criminal trial with which petitioner was associated may demand petitioner's time, the Board notes that petitioner brought this cancellation proceeding and he therefore has obligations to keep up with this proceeding

and to cooperate with discovery to provide for respondent's reasonable discovery needs. *See generally* TBMP § 408 (2d ed. rev. 2004).

Petitioner has failed, without substantial justification, to comply with the Board's July 13, 2009, order granting respondent's motion to compel. Accordingly, respondent's motion for sanctions is granted to the extent modified herein. Petitioner is prohibited from introducing any evidence asked for but not produced with his original responses to respondent's discovery requests.

As to testamentary evidence, petitioner may not introduce in evidence any statements that otherwise would have been responsive to respondent's interrogatories except for the following statements:

> Since 1999, the Taste of South Jersey has operated as a periodical innthe [sic] field of restaurants & dining, and multi-media published intellectual property. A state of NJ reg. Trade name since 1999; and
>
> Petitioner first used the mark TASTE OF SOUTH JERSEY in commerce as early as 1999 and 2000.

As to documentary evidence, petitioner may not introduce in evidence any document that otherwise would have been responsive to respondent's document requests except for copies of a New Jersey state certificate for the trade name The Taste of South Jersey, and the handwritten application therefore, both dated June 21, 1999.

We note that respondent's requests for admission to petitioner are deemed admitted under Fed. R. Civ. P. 36(a)(3).

Requests are deemed admitted and a forfeiture of the right to object occurs automatically by operation of the rules when answers, responses, or objections are not timely. *See Id.*

Continued Warning to Petitioner

Petitioner did not properly respond to the original discovery requests, petitioner did not respond to the motion to compel, petitioner was late with his brief in opposition to the motion for sanctions, and petitioner has filed many unnecessary papers in this proceeding. Petitioner has demonstrated that he is unfamiliar with the procedural and substantive law involved in this inter partes proceeding.

Petitioner has previously been warned four times[2] that, although he may represent himself in this proceeding, it is advisable for him, as a person who is not acquainted with the technicalities involved in inter partes proceedings before the Board, to secure the services of an attorney who is familiar with such matters, and that strict compliance with Board practice, the Trademark Rules of Practice, and where applicable, the Federal Rules of Civil Procedure, is expected of petitioner whether or not he is represented by counsel. We once again warn petitioner that it is advisable for him to

[2] The warnings were issued (1) in the Board's September 29, 2009, order informing the parties that petitioner's inappropriately filed sur-reply and motion for summary judgment would be given no consideration, (2) during a November 18, 2008 telephone conference with the Board, (3) in the November 20, 2008, written order memorializing that telephone conference, and (4) in an August 22, 2008, order in Cancellation No. 92049029, between the same parties to this proceeding, in which the Board dismissed that cancellation as a nullity for petitioner's failure to properly serve the petition on respondent. (The instant cancellation proceeding was filed by petitioner the following day.)

secure the services of an attorney who is familiar with such matters.

In view of our previous warnings and the reminder herein, petitioner should note that he must comply with Board practice, the Trademark Rules of Practice, and where applicable, the Federal Rules of Civil Procedure, for the remainder of this proceeding. Petitioner is further advised that the Board may look with extreme disfavor on any further breach of the rules (including any additional delay or untimely response) by petitioner.

Schedule

Proceedings are resumed. Dates are reset on the following schedule.

Discovery Closes	**3/19/2010**
Plaintiff's Pretrial Disclosures	**5/3/2010**
Plaintiff's 30-day Trial Period Ends	**6/17/2010**
Defendant's Pretrial Disclosures	**7/2/2010**
Defendant's 30-day Trial Period Ends	**8/16/2010**
Plaintiff's Rebuttal Disclosures	**8/31/2010**
Plaintiff's 15-day Rebuttal Period Ends	**9/30/2010**

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.