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

wbc

Mailed: January 16, 2014

Cancellation No. **92052260**

Steven Westlake

v.

Edgar Alexander Barrera

Wendy Boldt Cohen, Interlocutory Attorney:

This case now comes up on:

1. Respondent's request for reconsideration (filed March 15, 2013) of the Board's March 5, 2013 order; and
2. petitioner's motion for sanctions in the form of default judgment (filed November 1, 2013) for respondent's failure to file initial disclosures and his delay of these proceedings.

The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for the motion and does not recount them here except as necessary to explain the Board's order.

The Board first considers petitioner's motion for default judgment for, *inter alia*, respondent's alleged

dilatory tactics and failure to file initial disclosures. Although captioned as a motion for default judgment, petitioner's motion is a motion for sanctions in the form of default judgment.

It has come to the Board's attention that the response to the November 1, 2013 motion for sanctions (filed December 2, 2013) and a second response (filed January 2, 2014) were prepared and signed by Melissa Barrera identified as "Melissa Barrera, Power of Attorney." The respondent in this proceeding is Edgar Alexander Barrera, an individual. There is no indication in the record that Melissa Barrera is an attorney as defined in Patent and Trademark Rule § 11.1 or that she is otherwise authorized to represent respondent pursuant to Patent and Trademark Rule § 11.14(b) or (c). Trademark Rule 2.127(c) requires that a power of attorney "designate by name at least one practitioner meeting the requirements of [Patent and Trademark Rule] 11.14." *See* Trademark Rule § 11.14(b) ("Individuals who are not attorneys are not recognized to practice before the Office in trademark and other non-patent matters….") and 11.14(e) ("Any individual may appear in a trademark or other non-patent matter in his or her own behalf."). In short, only a licensed attorney is authorized to represent an applicant or registrant in

trademark matters before the USPTO. Trademark Rule § 11.14(a). A non-attorney can interact with the USPTO concerning a trademark applicant or registrant only in two limited administrative support roles. A "correspondent" may "transmit and receive correspondence." TMEP § 608.01. A "domestic representative" may receive service of "process or notice of proceedings affecting the application … or registration or rights thereunder" for a foreign applicant or registrant. Trademark Rule § 3.61; *see also* TMEP § 610. These roles are administrative support functions that do not involve signing documents or otherwise representing a person before the USPTO. *See e.g.,* TMEP § 610.

Accordingly, because there is no indication that Melissa Barrera is an attorney or otherwise authorized to represent respondent before the USPTO, it was improper for Melissa Barrera to prepare and sign the December 2, 2013 and January 2, 2014 responses on behalf of respondent. *See* Patent and Trademark Rule 11.14(e) ("No individual other than those specified in paragraphs (a), (b) and (c) of this section will be permitted to practice before the Office in the trademark matters on behalf of a client."); *see also* TBMP § 106.02 (3d ed. rev.2 2013)("When an individual who is a party to a Board proceeding elects to act [o]n his or

her own behalf, the individual must sign any documents that he or she files with the Board.”).

Because the responses were improperly prepared and signed, they can be given no consideration.[1] Nonetheless, the Board, in its discretion, declines to grant the motion as conceded and will decide the motion on its merits. *See* Trademark Rule 2.127(a); *See, e.g., Boyds Collection Ltd. v. Herrington & Co.*, 65 USPQ2d 2017, 2018 (TTAB 2003); *Int’l Finance Corp. v. Bravo Co.*, 64 USPQ2d 1597, 1599 (TTAB 2002); *see also* TBMP § 502.04.

To the extent petitioner seeks sanctions for respondent’s alleged dilatory tactics, sanctions have been found to be appropriate where such tactics are coupled with a failure to comply with a Board order. *See Benedict v. Super Bakery Inc.*, 665 F.3d 1263, 101 USPQ2d 1089 (Fed. Cir. 2011) (Board appropriately entered judgment where respondent repeatedly failed to respond to petitioner's discovery

[1] The Board also notes, although not raised by petitioner, that inasmuch as respondent’s December 2, 2013 response was filed thirty-one days after service of petitioner’s motion, it is untimely. *See* Trademark Rule 2.119(c); TBMP § 502.02(b) (“A brief in response to a motion, except a motion for summary judgment, must be filed within 15 days from the date of service of the motion (20 days if service of the motion was made by first class mail, ‘Express Mail,’ or overnight courier.”)). Further, respondent’s second response filed January 2, 2014 is an impermissible surreply which the Board will give no consideration. *See* Trademark Rule 2.127(a) (one response to a motion is permitted and “[t]he Board will consider no further papers… in opposition to a motion.”); TBMP § 502.02(b).

requests and Board's discovery orders, since record supported Board's finding that respondent would not comply with his discovery obligations if given additional opportunities to do so); *MySpace Inc. v. Mitchell*, 91 USPQ2d 1060 (TTAB 2009); *MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477 (TTAB 2000) (review of the record revealed that opposer had been engaged in dilatory tactics for years, including the willful disregard of the Board's orders resulting in an entry of judgment as a sanction); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000) (judgment entered against applicant for engaging in a pattern of dilatory tactics and having willfully failed to comply with Board discovery order); *Unicut Corp. v. Unicut, Inc.,* 222 USPQ 341 (TTAB 1984).

A motion to compel is the available remedy when a party fails to comply with a discovery obligation, such as, in the case here, when an adversary has failed to make, or has made inadequate initial disclosures. *Luster Prod. Inc. v. Van Zandt*, 104 USPQ2d 1877, 1879 (TTAB 2012) (*citing* Trademark Rule 2.120(e)(1) and *Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 72 Fed. Reg. 42242, 42256 (Aug. 1, 2007)) ("A motion to compel is the available remedy when an adversary has failed to make, or has made

inadequate, initial disclosures….”); *see also* TBMP § 401.02 (“A party failing to make initial disclosures may be subject to a motion to compel, and ultimately, a motion for discovery sanctions.”). If such a motion is granted and the party does not comply with the order compelling disclosures, a motion for sanctions under Trademark Rule 2.120(g)(1) is then available. *See Luster Prod. Inc.*, 104 USPQ2d at 1879.

Accordingly, petitioner’s motion for sanctions in the form of default judgment is **DENIED**.

Notwithstanding the foregoing, respondent’s failure to cooperate in discovery and to serve initial disclosures, not to mention his numerous requests for extensions of time, is evidence of respondent’s apparent disregard for the rules applicable to this cancellation proceeding and have resulted in unnecessary delay. To avoid further delay, if the parties do not settle this case, respondent is expected to comply with the dates and commence his presentation of evidence in accordance with the schedule below. Hereafter, dates will only be reset upon agreement of the parties or upon a showing of extraordinary circumstances. *See* Trademark Rule 2.120*; see also Luster Prod. Inc.*, 104 USPQ2d at 1880. Additionally, respondent may not file any further motions to extend time or suspend

unless he first obtains the leave of the Board to so file in a telephone conference with petitioner and the Board attorney assigned to these proceedings. Respondent is further advised that failure to comply with the Board's deadlines or its orders may result in sanctions, which may include cancellation of the subject registration. *See* Fed. R. Civ. P. 37(b)(2); Trademark Rule 2.120(g)(1).

The Board now turns to respondent's request for reconsideration filed March 15, 2013. The request for reconsideration was prepared and signed by Melissa Barrera. As discussed *supra*, Melissa Barrera is not authorized to prepare or sign on behalf of Edgar Alexander Barrera and accordingly, the request for reconsideration is not properly before the Board and will be given no consideration.

Respondent is advised that any future filings before the Board must be prepared and signed by Edgar Alexander Barrera or by his attorney as defined in Patent and Trademark Rule 11.1, or someone authorized to represent respondent pursuant to Patent and Trademark Rule 11.14(b) or (c). Any filings which are not properly prepared and signed as discussed herein may not be given any consideration and may subject respondent to sanctions.

Remaining dates are reset as follows:

Expert Disclosures Due	**3/31/2014**
Discovery Closes	**4/30/2014**
Plaintiff's Pretrial Disclosures	**6/14/2014**
Plaintiff's 30-day Trial Period Ends	**7/29/2014**
Defendant's Pretrial Disclosures	**8/13/2014**
Defendant's 30-day Trial Period Ends	**9/27/2014**
Plaintiff's Rebuttal Disclosures	**10/12/2014**
Plaintiff's 15-day Rebuttal Period Ends	**11/11/2014**

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.l25.

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.l29.