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

Proceeding	92055426
Party	Defendant Augusto Lodi dba American Muscle
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of

February 7, 2013

U.S. Trademark Registration No. 1,962,898
For the mark AMERICAN MUSCLE
Registered on the Principal Register on March 19, 1996

Cancellation No. 92055426

Run It Consulting, LLC, Petitioner,
vs.
Augusto Lodi, Registrant.

**OPPOSITION TO MOTION TO SERVE PRETRIAL DISCLOSURES LATE
AND/OR FOR AN EXTENSION OF TRIAL DATES**

Registrant Leander Lodi successor-in-interest to Augusto Lodi (“Registrant”) provides the following opposition to Petitioner’s Motion to Serve Pretrial Disclosures Late and/or for an Extension of Trial Dates. Registrant respectfully submits that both forms of alternate relief requested in Petitioner’s motion should be denied by the Board.

A. Request to Serve Pretrial Disclosures Late

At the heart of Petitioner’s motion, Petitioner is attempting to address its failure to timely serve its pretrial disclosures of witnesses, expected areas of testimony, and types of documents and things that may be introduced as exhibits during such testimony. See 37 CFR §§2.121(e). Petitioner’s motion states that its failure to timely serve such pretrial disclosures has resulted from “Petitioner’s inability to get back to counsel in a timely manner.” However, there is no factual assertion, declaration or other evidence supporting Petitioner’s alleged “inability” to grant authorization to its counsel to serve its pretrial disclosures.

The rules of the TTAB, specifically 37 CFR §2.121(e), provide that “no later than fifteen days prior to the opening of each testimony period . . . the party scheduled to present evidence must

disclose” each witness, a summary of expected testimony subjects, and types of exhibits to be introduced during testimony. The rule also provides for an alternate disclosure schedule as may be provided by the Board. Registrant submits that such provision contemplates prior authorization rather than the *post hoc* relief sought by Petitioner.

In its motion, Petitioner admits that its pretrial disclosures were due no later than January 24, 2013. Petitioner alleges that it granted authorization for its counsel to serve its pretrial disclosures after the close of business on January 24, 2013. In its argument that good cause exists, Petitioner argues that the delay was not caused fault of its counsel and simply states “Petitioner’s inability to get back to its counsel in a timely manner.” Petitioner does not expand on this alleged “inability” or otherwise explain why it could not get back to its counsel before the established deadline. An allegation of an “inability” needs more facts behind it to allow Registrant and this Board to weigh the claim. Registrant submits that Petitioner’s submissions, allegations and unsupported conclusions are insufficient to establish “good cause” to grant the requested relief.

Petitioner and its counsel have been on notice of this pretrial disclosure deadline since at least as early as April 4, 2012 when this Board issued the order setting the pretrial schedule for this matter. Despite having been on notice of this filing deadline for almost ten months, Petitioner was allegedly unable to get back to its counsel in a timely manner. Given the amount of notice to Petitioner, Registrant submits good cause must be established by something more than conclusory statements of Petitioner’s “inability” and must be supported by specific factual statements.

Furthermore, the undersigned counsel for Registrant communicated with counsel for Petitioner on December 27, 2012 and again on January 11, 2013 regarding proposed settlement terms and the status of this matter. In the December 27, 2012 communication, Registrant specifically refused Petitioner’s request for consent to an enlargement of the trial dates. Counsel

for Petitioner did not respond to either communications. In the January 11, 2013 communication, the undersigned specifically requested if the lack of response indicated that Petitioner had decided to move forward with the petition to cancel. Again – no response was received.

Beyond the allegation that it occurred “after the close of business on January 24, 2013”, Petitioner’s motion does not provide any detail on when its counsel received authorization to make its pretrial disclosures. Despite this allegation that authorization was delivered possibly as early as close of business on February 24, 2013, Petitioner does not provide any explanation for why its proposed pretrial disclosures were not served until February 5, 2013 – three days before Petitioner’s testimony period was scheduled to open.

In addition, despite serving its proposed pretrial disclosures **twelve days** after the long established deadline, Petitioner explicably served its disclosures by FedEx Express Saver, which provides for delivery by the third business day, as opposed to a faster method of delivery. Counsel for Petitioner has the undersigned’s email address, fax number, and other means of communications that could have delivered at least the pretrial disclosures almost instantaneously.¹ Petitioner’s proposed pretrial disclosures also included voluminous documents, which are not required to be disclosed under the rules, and could have been served by other means.

B. Request to Extend Remaining Trial Dates

In the alternative, Petitioner requests that the Board reset the trial dates to make its untimely pretrial disclosures timely. Petitioner suggests that TBMP § 702.01 provides for such relief. However, TBMP §702.01 provides such relief in the context of a party in the position of Registrant requesting such resetting of the trial dates when a party in the position of Petitioner fails

¹ Indeed, Registration still has not received the service copy of the instant motion and was only made aware of the same when checking the TTABVUE website upon receiving Petitioner’s late pretrial disclosures.

to make timely pretrial disclosures. Petitioner has reversed the roles and seeks to reset the trial dates to cure its own failure as opposed to that of an adversary.

Registrant has already rejected a proposed resetting or enlargement of the trial dates over one month ago. Registrant does not want a resetting or enlargement of the trial dates now. Nothing was to be gained by an enlargement of the trial dates one month ago and Registrant receives no benefit from a resetting of the trial dates now. The only party that benefits from a resetting of the trial dates at this time would be Petitioner. Petitioner would receive an immense benefit in that its untimely pretrial disclosures would suddenly become timely if the trial dates were reset as requested by Petitioner.

Petitioner's *post hoc* request for a resetting of the trial dates does not address the central issue here –Petitioner's failure to timely serve its pretrial disclosures. Registrant does not want the trial dates to be reset. Registrant wants the instant proceeding to come to a conclusion and Petitioner's requested resetting of the trial dates would delay such conclusion. Such delay would result in prejudice to Registrant.

Over one month ago, Petitioner sought Registrant's consent to an enlargement of the trial dates, which consent was reasonably refused. Petitioner's long-established deadline for serving its pretrial disclosures came and went on January 24, 2013. Petitioner then waited another twelve days after the long-established deadline before serving its proposed pretrial disclosures and requesting the instant relief. Despite this clearly established sequence of factual events, Petitioner can provide no explanation beyond a conclusory allegation of an "inability" to get back to its counsel in a timely manner. Good cause does not exist to permit Petitioner to late serve its pretrial disclosures or, in the alternative, to reset the trial dates.

C. Conclusion

Based upon the foregoing, Registrant submits that the instant motion should be denied – both as to the requested leave to serve Petitioner’s pretrial disclosures late and as to the request to reset the trial dates.

Respectfully submitted this 7th day of February, 2013

KELLY & KELLEY, LLP

/Michael A. DiNardo/

Michael A. DiNardo
Attorney for Registrant

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the attached OPPOSITION TO MOTION TO SERVE PRETRIAL DISCLOSURES LATE AND/OR FOR AN EXTENSION OF TRIAL DATES to be served on this date via U.S. first class mail, postage prepaid, upon counsel for Petitioner, as follows:

Matthew H. Swyers, Esq.
344 Maple Avenue West, Suite 151
Vienna, VA 22180

Dated: February 7, 2013

/Nancy Hoover/
NANCY HOOVER