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

MBA

Mailed: August 7, 2012

Cancellation No. 92055673

Biomass Energy, LLC

v.

William Louis Stone and Karen Devin Miller

Michael B. Adlin, Interlocutory Attorney:

On August 6, 2012, at petitioner's request, the Board participated in the parties' telephonic discovery conference mandated under Fed. R. Civ. P. 26(f) and Trademark Rules 2.120(a)(1) and (a)(2). Thomas J. Mango appeared on petitioner's behalf, Joseph T. Brown appeared on respondent Karen Devin Miller's behalf and the interlocutory attorney assigned to this proceeding participated on the Board's behalf.

At the outset of the conference, the Board pointed out that while the involved registration is apparently co-owned by joint registrants William Louis Stone and Ms. Miller, who purport to together comprise a Virginia "joint venture," Mr. Stone has not signed Ms. Miller's answer filed July 6, 2012, or otherwise appeared, through counsel or pro se. Accordingly, respondents are currently in default. See e.g., Trademark Rules 2.17(c)(2), 2.19(a) and 2.193(e); TMEP

§ 611.06(c) (8th ed. 2011). However, Ms. Miller's counsel indicated during the conference that he was recently authorized to represent Mr. Stone as well, and accordingly, respondents are allowed until **August 16, 2012** to file an amended answer, through their counsel or otherwise, failing which a notice of default will issue as appropriate.

During the conference, the parties indicated that they are unaware of any related proceedings, marks or third party disputes, but they are currently and have in the past been involved in unrelated proceedings involving their employment relationship and perhaps other issues. The parties have not initiated settlement discussions, but both expressed a willingness to at least discuss settlement. The parties agreed to accept service of papers by e-mail under Trademark Rule 2.119(b)(6).

The parties discussed the pleadings in this case. The Board pointed out the extreme difficulty petitioner will face in proving its fraud claim given its apparent lack of prior use of OLD DOMINION, respondents' prior Supplemental Registration and In re Bose Corp., 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009). In addition, petitioner's apparent claim of nonownership does not appear to be supported by any allegations that petitioner has prior rights in OLD DOMINION. More specifically, to the extent that petitioner may have intended to plead "use analogous to trademark use,"

there is no allegation that any such use was "of such a nature and extent as to create public identification of the target term with the [petitioner's] product or service." T.A.B. Systems v. PacTel Teletrac, 77 F.3d 1372, 37 USPQ2d 1879, 1881 (Fed. Cir. 1996) (emphasis supplied). As pointed out during the teleconference, to the extent that petitioner contends that respondents had some contractual, employment-based or fiduciary duty to not seek registration of the involved mark, such a claim would be more appropriately brought before a court or other tribunal. Petitioner has not argued that the Board may recognize any such claim.

In any event, because petitioner relies on a single intent to use application, there is only one involved registration, and the relevant facts appear to be quite limited, this is an uncomplicated case. Accordingly, the Board strongly suggested that this case appears particularly well-suited for accelerated case resolution ("ACR") or other methods to increase the efficiency of this proceeding. The parties were encouraged to consider this possibility throughout the case, and both agreed to do so. The Board's ACR procedures, which are extremely flexible, are addressed here:

http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution__ACR__notice_from_TTAB_webpage_12_22_11.pdf

http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution_(ACR)_FAQ_updates_12_22_11.doc

http://www.uspto.gov/trademarks/process/appeal/ACR_Case_List_01_9_11).doc

The Board also discussed the parties' option to stipulate to limits on discovery, abbreviated procedures for submission of evidence and other ways to expedite resolution of this case. See, Target Brands Inc. v. Hughes, 85 USPQ2d 1676 (TTAB 2007). The parties expressed interest in considering and employing these options, if they are unable to settle. Similarly, the Board discussed the possibility of the parties making greater reciprocal disclosures than required by Fed. R. Civ. P. 26(a)(1), in lieu of formal discovery. See, "Miscellaneous Changes to Trademark Trial and Appeal Board Rules," 71 Fed. Reg. 2498 (January 17, 2006). The parties also indicated a willingness to consider this option. The parties should seriously consider the cost and time savings these options would yield, without impacting either party's rights.

The Board's standard protective order, made applicable herein by operation of Trademark Rule 2.116(g), is available here:
http://www.uspto.gov/trademarks/process/appeal/guidelines/stndagmnt.jsp

The parties and their counsel are encouraged to acknowledge their obligations under the protective order in writing, and may utilize the following form: http://www.uspto.gov/trademarks/process/appeal/guidelines/ackagrmnt.jsp

The parties were reminded that neither discovery requests nor motions for summary judgment may be served until after initial disclosures are made. Given that respondents anticipate filing an amended answer, and it is not anticipated that a notice of default will become necessary, disclosure, discovery, trial and other dates are reset as follows:

Compliant Answer Due	**August 16, 2012**
Initial Disclosures Due	**October 15, 2012**
Expert Disclosures Due	**February 12, 2013**
Discovery Closes	**March 14, 2013**
Plaintiff's Pretrial Disclosures	**April 28, 2013**
Plaintiff's 30-day Trial Period Ends	**June 12, 2013**
Defendant's Pretrial Disclosures	**June 27, 2013**
Defendant's 30-day Trial Period Ends	**August 11, 2013**
Plaintiff's Rebuttal Disclosures	**August 26, 2013**
Plaintiff's 15-day Rebuttal Period Ends	**September 25, 2013**

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 Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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