

THIS OPINION IS NOT A
PRECEDENT OF THE
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

CME

Mailed: June 2, 2016

Cancellation No. 92058543

Edge Games Inc.

v.

Razer (Asia-Pacific) Pte Ltd.

Before Cataldo, Kuczma, and Greenbaum,
Administrative Trademark Judges.

By the Board:

The case now comes up on: (1) Respondent's motion for sanctions, and in the alternative, to compel, filed November 17, 2015; and (2) Petitioner's response to the Board's show cause order of January 11, 2016 (the "Show Cause Order"), filed February 9, 2016. Both filings are fully briefed.

We have carefully considered all of the parties' arguments, presume the parties' familiarity with the factual bases for their filings, and do not recount the facts or arguments here, except as necessary to explain our decision.

Respondent's Motion for Sanctions

The Board issued an order on September 25, 2015 ("Prior Order I") determining that Petitioner had waived its right to assert merit-based objections to Respondent's discovery requests and ordering Petitioner within twenty days to serve on Respondent "amended responses to Respondent's first set of interrogatories and

document requests *without objections on the merits*, failing which Petitioner may be subject to sanctions, including entry of judgment against it.”¹ 28 TTABVUE 11-13. Respondent seeks the sanction of judgment against Petitioner on the ground that Petitioner’s amended discovery responses “are still woefully inadequate and clearly demonstrate [Petitioner’s] determination not to cooperate in discovery and to deny [Respondent] the information to which it is entitled.”² 31 TTABVUE 3. We agree.

In its amended responses to Respondent’s interrogatories and document requests, Petitioner has asserted the following blanket general objections:

Petitioner objects to the definitions, instructions, and requests to the extent that they seek information or documents protected by the attorney-client privilege or by the work product doctrine, prepared in connection with settlement discussions, prepared in anticipation of litigation or for trial, or subject to any other applicable privilege, protection, immunity or restriction from discovery.

Petitioner objects to the requests to the extent that they seek information subject to confidentiality restrictions of a third party.

31 TTABVUE 30-31 and 50-51.

¹ The Board in Prior Order I denied Respondent’s motion for summary judgment, and therefore, considered and ultimately granted Respondent’s request for alternative relief, namely, that Petitioner be deemed to have waived its right to object on the merits to Respondent’s first sets of interrogatories and document requests. The Board also clarified the pleadings, allowed Respondent an opportunity to replead certain affirmative defenses, granted Petitioner’s motion to withdraw its responses to requests for admission, denied Respondent’s motion for sanctions, and granted Respondent’s motion to extend discovery.

² Respondent also argues that sanctions are warranted based on Petitioner’s “repeated pattern of obfuscation, fabrication, and misrepresentation in both this and other proceedings before the Board.” 31 TTABVUE 3. Respondent specifically references the following proceedings: (1) Cancellation No. 92051465 (decision at 7 TTABVUE 38-42); (2) *Edge Games, Inc. v. Electronic Arts, Inc.*, Case No. 10-02614, (N.D. Cal. Oct. 1, 2010) (decision at 7 TTABVUE 44-66); and (3) *Future Publishing Limited v. Edge Interactive Media Inc., et al.*, [2011] EWHC 1489, U.K. High Court of Justice Chancery Division (June 12, 2011) (decision at 7 TTABVUE 68-83). 31 TTABVUE 10. In accordance with our usual practice, we confine our decision to the facts of this case, but note that the discussions of Edge Games, Inc.’s conduct in these prior decisions are consistent with our findings here.

In addition, Petitioner has specifically objected to all but two of Respondent's interrogatories "on the grounds that [the request] asks confidential trade secret information or other privileged information." *Id.* at p. 32-48.

Such boilerplate blanket objections are fundamentally improper as a party must articulate objections with particularity. Federal R. Civ. P. 33(b)(2)(A) and (b)(4); *see also Metronic, Inc. v. Pacesetter Sys., Inc.*, 222 USPQ 80, 83 (TTAB 1984). Moreover, Board rules and procedures clearly provide that: (1) confidentiality objections are improper because the Board's standard protective order is automatically in place to govern the exchange of confidential information and documents; and (2) a party asserting a claim of privilege must describe the nature of the documents and information withheld to enable the other party to assess the claim of privilege. Fed. R. Civ. P. 26(b)(5); *Amazon Techs., Inc. v. Wax*, 93 USPQ2d 1702, 1706 n.6 (TTAB 2009). These rules and procedures are addressed in Section 402 of the Trademark Trial and Appeal Board Manual ("TBMP"), which Petitioner's Chief Executive Officer was ordered to read prior to responding to Respondent's discovery requests.³ Respondent also raised these issues with Petitioner in an attempt to meet and confer, but Petitioner maintained its confidentiality objections and failed to produce a privilege log. 31 TTABVUE 5-6, 87 and 94-115. Petitioner's blatant disregard for rules and procedures of which it was well aware demonstrates Petitioner's intent to delay

³ The Board issued an order on January 30, 2015 requiring that Petitioner read TBMP Sections 402 and 414 (16 TTABVUE 2), and Petitioner's Chief Executive Officer, Tim Langdell, filed a declaration on February 2, 2015 averring that he had done so. 17 TTABVUE.

proceedings and thwart Respondent's discovery of relevant information in violation of Fed. R. Civ. P. 26(g)(1)(B)(ii).⁴

Petitioner also did not verify its amended interrogatory responses as required by Fed. R. Civ. P. 33(b)(3). 31 TTABVUE 30-49. Nor did Petitioner produce documents. Petitioner responded only that it would produce responsive documents without specifying the date or place of production. *Id.* at pp. 51-62. Such response is effectively a merit-based objection in violation of Prior Order I. *M.C.I. Foods Inc. v. Bunte*, 86 USPQ2d 1044, 1046-48 (TTAB 2008).

Petitioner's failure to comply with Prior Order I and the Board's rules and procedures regarding discovery is egregious and warrants the sanction of judgment. Fed. R. Civ. P. 37(b)(2)(A); Trademark Rule 2.120(g)(1); *MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477, 1478-79 (TTAB 2000) (entering judgment as a sanction where opposer's discovery responses and supplemental discovery responses "demonstrate[d] opposers' intent to continue to delay [the] proceeding by setting up obstacles to applicant's receipt of clearly relevant information"). Accordingly, Respondent's motion for judgment as a sanction is **GRANTED**.⁵

⁴ Fed. R. Civ. P. 26(g)(B)(ii) provides that by signing a discovery request, response or objection, a party "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry [that the discovery requests, responses and/or objections are] "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."

⁵ In view hereof, we need not consider Respondent's motion to the extent it seeks to compel discovery.

Show Cause Order

Notwithstanding our determination that Petitioner's discovery transgressions are a sufficient basis on which to enter judgment against it, we find it necessary to address Petitioner's response to the Show Cause Order.

In an order issued January 30, 2015 ("Prior Order II"), the Board imposed a requirement that Petitioner obtain Board approval prior to filing any further unconsented motions or papers. The Board also instructed Petitioner that if it wished to file an unconsented motion or paper, "it should contact both opposing counsel and the assigned interlocutory attorney via email to schedule a mutually agreeable time for the parties and the Board to participate in a teleconference to discuss the basis for any proposed motion." 16 TTABVUE n.2. The Board expressly warned that if Petitioner failed to comply with Prior Order II, sanctions might be entered against it, including the entry of judgment. 16 TTABVUE 2.

On December 8, 2015, without Board approval, Petitioner filed a one-page addendum to its brief in opposition to Respondent's motion for sanctions and to compel requesting sanctions against Respondent (the "Addendum"). 34 TTABVUE 2. Subsequently, on January 8, 2016, Petitioner's Chief Executive Officer sent the assigned interlocutory attorney an *ex parte* email communication requesting a telephone conference to discuss the possibility of filing a motion to compel and a motion for summary judgment. 42 TTABVUE 3-4. In its *ex parte* email communication, Petitioner argued the substantive basis for its request and accused Respondent of failing to meet its discovery obligations. *Id.*

On January 11, 2016, the Board issued the Show Cause Order requiring Petitioner to show cause as to why judgment should not be entered against it for violating Prior Order II by: (1) filing the Addendum without the Board's approval to do so; and (2) sending an *ex parte* email communication to the Board regarding proposed motions.⁶ 42 TTABVUE 1-2.

It is well settled that the Board has the inherent authority to enter sanctions against a party, including the sanction of judgment. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (“[I]f in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.”); *Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1072 (TTAB 2000). In determining whether to impose sanctions under its inherent authority, the Board considers the following factors: (1) bad faith conduct; (2) willful disobedience of Board orders; (3) the length of delay or clear pattern of delay; (4) due warning that sanctions may be entered; (5) the reasons for non-compliance; and (6) the effectiveness of lesser or alternative sanctions. *See Carrini*, 57 USPQ2d at 1071-72.

With respect to bad faith and willful disobedience, Petitioner asserts that its failure to comply with Prior Order II “was entirely unintentional.” 49 TTABVUE 3-4. But the fact that Petitioner attempted to pass off its request for sanctions as merely an “addendum” to its response brief strongly suggests that Petitioner was acting

⁶ Petitioner used its reply brief to the Show Cause Order to assert many new arguments that should have been raised in its main brief. *Johnston Pump/Gen. Valve Inc. v. Chromalloy Am. Corp.*, 13 USPQ2d 1719, 1720 n.3 (TTAB 1989) (“The presentation of one’s arguments and authority should be presented thoroughly in the motion or the opposition brief thereto.”).

intentionally and in bad faith to circumvent Prior Order II. Petitioner's repeated failure to comply with Board rules and orders also belies its assertion that its actions were unintentional. In addition to failing to comply with the Board's order and rules regarding discovery, discussed *supra*, Petitioner has:⁷

- filed an untimely motion for sanctions based on Respondent's purported refusal to participate in the discovery conference, 5 TTABVUE and 8 TTABVUE 2;
- filed a motion to compel and to test the sufficiency of responses to requests for admission *before* the deadline for Respondent to respond to such discovery requests, 6 TTABVUE and 8 TTABVUE 2;
- filed an amended motion to compel notwithstanding a suspension order that prohibited such a filing, 8 TTABVUE 2, 9 TTABVUE and 12 TTABVUE 1-2;
- embedded in a filing an unconsented "request to extend discovery deadlines" without obtaining Board approval to seek such relief, 21 TTABVUE 18 and 28 TTABVUE 11, n.12;
- served interrogatories, document requests and requests for admission during a suspension of this proceeding, 24 TTABVUE 52-68 and 28 TTABVUE 14; and
- failed to include proof of service in some filings as required by Trademark Rule 2.119. *See* 10 TTABVUE and 29 TTABVUE 2-3.

Petitioner's response to the Show Cause Order also violates Board rules and orders as it: (1) is, in large part, an impermissible surreply because it contains substantial arguments regarding the merits of Respondent's fully-briefed motion for sanctions

⁷ At times, Petitioner also has not complied with the Board's formatting requirements set forth in Trademark Rule 2.126(a). *See* 10 TTABVUE, 29 TTABVUE, and 46 TTABVUE (single-spaced filings) and 22 TTABVUE (filing not paginated). These formatting deficiencies, however, do not factor into our analysis.

and to compel, 46 TTABVUE; and (2) includes, without prior Board approval, an unconsented request “for an extension of time to respond to discovery requests and a resetting of the discovery schedule, as necessary, for up to 60 days.”⁸ *Id.* at p. 3.

Petitioner argues in its reply brief that the “activities which are the subject of the Show Cause Order generated no delays in this proceeding,” but this assertion is incorrect. 49 TTABVUE 7. Proceedings were delayed several months for briefing on the Show Cause Order. In addition, Petitioner’s clear pattern of disregard for Board rules and orders has significantly delayed this proceeding, which has been pending for more than two years, frustrated Respondent’s ability to defend against Petitioner’s claim, and unnecessarily taxed the Board’s resources.

With respect to due warning, the Board expressly advised Petitioner that if it were to violate Prior Order II it might be subject to sanctions, including the entry of judgment against it. 16 TTABVUE 2.

As for its reasons for non-compliance, Petitioner asserts that: (1) “it was not its intention that its December 8, 2015 filing be processed as an unconsented motion, but rather it was a misguided attempt on Petitioner’s part to invite the Board to consider sanctioning Registrant *on the Board’s own motion*,” 46 TTABVUE 3 (emphasis in original); *see also* 49 TTABVUE 6; (2) it was “confused as to the Board’s true requirements in regard to oral contact with the Board,” and “believed that the contact it made [with the Board] was in line” with purported prior *ex parte* contact; 46

⁸ Ironically, Petitioner asserts in its brief that “all rules and orders of the TTAB will be adhered to going forward.” 46 TTABVUE 2.

TTABVUE 4 and 49 TTABVUE 7; and (3) Petitioner was acting *pro se* when it filed the Addendum and sent the *ex parte* email communication, and believed it was acting in compliance with Board rules and orders.⁹ 49 TTABVUE 3-5. These explanations are unavailing.

Prior Order II unambiguously required Petitioner to obtain Board approval prior to filing any unconsented motions or papers. Regardless of Petitioner's intention, the Addendum sets forth an unconsented "request for sanctions against [Respondent]" in direct contravention of Prior Order II. 34 TTABVUE.

Also, Petitioner's assertion that it was generally confused regarding *ex parte* communication with the Board is dubious. Prior Order II expressly advised Petitioner to "contact both opposing counsel and the assigned interlocutory attorney via email to schedule a mutually agreeable time for the parties and the Board to participate in a teleconference to discuss the basis for any proposed motion or filing." 16 TTABVUE 2, n.2. Petitioner ignored this straightforward instruction. Moreover, the fact that Petitioner argued its position and impugned Respondent's conduct in its *ex parte* email communication suggests that Petitioner purposefully sent the email in an attempt to impermissibly influence the assigned Interlocutory Attorney.

⁹ Petitioner also argues that the attorney it retained to file its response to the Show Cause Order "misled Petitioner as to his degree of experience before the Board" and did not have Petitioner's authorization to include an unconsented motion to extend in Petitioner's response to the Show Cause Order. 49 TTABVUE 5. Petitioner, however, is responsible for having selected its counsel and is not absolved from the actions of its attorney as Petitioner and its attorney shared a duty to communicate and to prosecute the case. *Gaylor Enter. Co. v. Calvin Gilmore Prods., Inc.*, 59 USPQ2d 1369, 1373, (TTAB 2000); *CTRL Sys., Inc. v. Ultraphonics of N. Am., Inc.*, 52 USPQ2d 1300, 1303 (TTAB 1999).

Petitioner's self-representation also does not excuse its failure to comply with the Show Cause Order. The Board advised Petitioner twice that strict compliance with applicable rules and procedures is required of all parties whether or not they are represented by counsel. 16 TTABVUE 5 and 28 TTABVUE 1, n.1.

Finally, in view of Petitioner's repeated and callous disregard for Board rules and orders, we conclude that entering any sanction short of judgment would be futile. *See Carrini*, 57 USPQ2d at 1072.

For these reasons, we find that Petitioner has failed to establish good cause for violating Prior Order II, and this is another reason to enter judgment against Petitioner.

Conclusion

Judgment is entered against Petitioner and the cancellation is **DISMISSED WITH PREJUDICE**.
