

ESTTA Tracking number: **ESTTA713383**

Filing date: **12/08/2015**

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

Proceeding	92060849
Party	Defendant Sunkiss Thermoreactors Inc.
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Attachments	Opp.Motion.Strike.Untimely.Sanctions.Motion.120815.pdf(20487 bytes)

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

FINAM,)	
)	
Petitioner,)	
)	Cancellation No. 92/060,849
v.)	
)	Reg. No. 1,200,333
Sunkiss Thermoreactors, Inc.,)	
)	Mark: SUNKISS
Registrant.)	
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)	

**REGISTRANT’S OPPOSITION TO
PETITIONER’S MOTION TO STRIKE REGISTRANT’S UNTIMELY MOTION**

The Registrant, Sunkiss Thermoreactors, Inc. (“Registrant” or “TSI”), submits this opposition to Petitioner’s Motion to Strike Registrant’s Untimely Motion (Dkt. 24) (“Petitioner’s Motion to Strike”). The Petitioner’s Motion to Strike is based on an incomplete argument that can be quickly dispatched.

The Petitioner’s lone basis for its Motion to Strike is that the Board suspended the proceedings in this matter on October 15, 2015, which was prior to when the Registrant’s Motion for Sanctions Under FED. R. CIV. P. 11, 37 C.F.R. § 11.18, and TBMP 527.02 (Dkt. 22, “Motion for Sanctions”) was filed with the Board. *See* Dkt. 24, p. 2. However, the Petitioner’s Motion to Strike ignores the special nature and timing of a motion for sanctions, namely, the requirement that a party moving for sanctions must first serve a copy of the motion at least 21 days prior to filing with the Board. *See* FED. R. CIV. P. 11(c)(2) and TBMP 527.02.

This “safe harbor” requirement necessarily impacts the timing of when the motion may be filed with the Board. As a result, a party may serve its motion for sanctions on the opposing party while the proceedings before the Board are “active,” but then the Board suspends the proceedings before the movant’s ability to file with the Board. The Board has previously held

that in such a situation a party may timely file its motion for sanctions even though the proceedings are otherwise be suspended.

Though the motion for sanctions was filed after the suspension order, it had originally been served on plaintiff concurrently with service of the motion to dismiss or for summary judgment. Filing with the Board was delayed because of the “safe harbor” provision of FRCP 11. Plaintiff was put on notice of defendant’s intent to file the Rule 11 motion before suspension was ordered and, therefore, we do not consider the filing of the motion to have been barred by the Board’s suspension order.

Superstars of Wrestling (WWA Superstars), Inc. v. Titan Sports, Inc., 1999 TTAB LEXIS 417, at *4 (TTAB Aug. 12, 1999).

Here, the Registrant served its Motion for Sanctions on the Petitioner prior to the suspension of the proceedings on September 21, 2015. *See* Dkt. 22, p. 1. The Parties then exchanged correspondence on the issues raised in the Motion for Sanctions but did not resolve the issue. *See* Dkt. 22, Addendum and Exhibits 17-20 thereto. Prior to the conclusion of the Parties’ exchanges, the Board suspended the proceedings pending the outcome of the Petitioner’s motion to amend the pleadings and the Registrant’s motion to quash a notice of written deposition. Dkt. 16. Just as in *Superstars of Wrestling*, the Motion for Sanctions was served, and the Petitioner was put on notice of Registrant’s intent to file the Motion for Sanctions **before** the suspension of the proceedings.

The filing of the Motion for Sanctions was delayed because of the “safe harbor” provision and the Registrant’s efforts to address its issues with the Petitioner without filing the Motion. Indeed, the “safe harbor” provision did not expire until October 17, 2015,¹ which was after the Board’s suspension of the proceedings. Therefore, just as in *Superstars of Wrestling*,

¹ The Parties have not agreed to electronic service, so an additional 5 days were added to the 21-day “safe harbor” provision.

the filing of the Registrant’s Motion for Sanctions should not be barred by the Board’s suspension order, and the Plaintiff’s Motion to Strike should therefore be denied.

The Petitioner’s Footnote “Requesting” Extension of Time Should Be Denied

In a cursory footnote the Petitioner asks for an extension of time to file its opposition to the Registrant’s Motion for Sanctions, if its Motion to Strike is denied. The Registrant questions the propriety of seeking an extension of time for briefing in a footnote without any citations to the applicable rules or supporting law.

Pursuant to 37 C.F.R § 2.127(a) the time for responding to a motion is fifteen days² “unless . . . the time is extended by stipulation of the parties approved by the Board, or upon motion granted by the Board, or upon order of the Board. If a motion for an extension is denied, the time for responding to the motion remains as specified under this section, unless otherwise ordered.” If a party moves for an extension of time for filing a response brief, that party must meet certain requirements, as set forth in TBMP 509.01(a):

A motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient. Moreover, a party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party’s own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor. The Board will “scrutinize carefully” any motion to extend time, to determine whether the requisite good cause has been shown.

² As the Parties have not agreed to electronic service the Petitioner had 20 days to respond to the Motion for Sanctions.

The Petitioner's response to the Registrant's Motion for Sanctions was due on November 29, 2015. No response to the motion was filed, and the Petitioner appears to rely on its improper, and unsupported, footnote request for an extension of time to respond.³

The Petitioner has set forth no fact to constitute good cause for its requested extension, which appears as an after-thought in a footnote. The Petitioner also fails to demonstrate that its "requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor." Indeed, the Petitioner filed its Motion to Strike at the very end of its time period to respond to the Registrant's Motion for Sanction, sixteen days after the Motion for Sanctions was filed.

The Petitioner's Motion to Strike is barely two pages, and it is based entirely on the timing of the Board's suspension of the proceedings and when the Registrant's Motion for Sanctions was filed with the Board, both of which occurred prior to the Motion to Strike. There is nothing in the Motion to suggest that the Petitioner was not in a position to file its Motion to Strike, with its requested "extension," days after the Motion for Sanctions was filed. In short, there is no reason for the Petitioner to wait more than two weeks to file its Motion. This hurried, last-minute impression is augmented by the fact that counsel for the Petitioner never reached out to counsel for the Registrant regarding its requested "extension."

³ Perhaps the Petitioner assumes its Motion to Strike and/or "request" for an extension relieved it of its obligations to respond to the Registrant's Motion for Sanctions. Any such assumption is in error. The rules are clear that if a motion to extend is denied, the original date may apply. Similarly, the TBMP states that "[t]he filing of [] a potentially dispositive motion does not, in and of itself, operate to suspend a case; until the Board issues its suspension order, all times continue to run." TBMP 510.03(a). The Petitioner has established a pattern of making an ill-advised motion, then relying on a presumption that the Board will do "X" (i.e., suspend the proceedings or grant an extension), and thereby unilaterally ignoring the deadlines issued by the Board.

The Petitioner has not met the requirements for seeking an extension of time, and its “request” for one should therefore be denied.⁴

Respectfully submitted,

December 8, 2015
Date

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⁴ The Petitioner’s basis for its Motion to Strike and its “request” for an extension are further examples of the Petitioner’s pursuit of baseless claims in this proceeding.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing REGISTRANT'S OPPOSITION TO
PETITIONER'S MOTION TO STRIKE REGISTRANT'S UNTIMELY MOTION was served
this date by first class mail, postage prepaid, on the Petitioner's attorneys as follows:

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December 8, 2015
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