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Filing date: **05/30/2016**

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

Proceeding	92063494
Party	Plaintiff Prospector Capital Partners, Inc.
Correspondence Address	ROD UNDERHILL PROSPECTOR CAPITAL PARTNERS INC PO BOX 1238 JULIAN, CA 92036 UNITED STATES MP3Rod@aol.com
Submission	Other Motions/Papers
Filer's Name	Rod Underhill
Filer's e-mail	MP3Rod@aol.com
Signature	/RodUnderhill/
Date	05/30/2016
Attachments	Corrected Counter Motion.pdf(207170 bytes)

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

In re Registration No. 4,859,780 (TRUMP)
Registered November 24, 2015
In re Registration No. 4,874,427 (TRUMP)
Registered December 22, 2015
In re Registration No. 4,813,593 (TRUMP)
Registered September 15, 2015
In re Registration No. 4,087,954 (TRUMP)
Registered January 17, 2012
In re Registration No. 4,462,986 (Stylized) (TRUMP)
Registered January 7, 2014
In re Registration No. 3360783 (Stylized) (TRUMP)
Registered December 25, 2007
In re Registration No. 3687022 (TRUMP)
Registered September 22, 2009

Prospector Capital Partners, Inc,)	
)	
Petitioner,)	Cancellation No. <u>92063494</u>
)	
v.)	
)	
DTTM Operations, LLC.)	
)	
Last Listed Owner.)	
_____)	

**COUNTER MOTION TO STRIKE RESPONDENT’S PLEADING(S) AND ENTER
RESPONDENT’S DEFAULT**

CORRECTED AS TO LINE SPACING

COMES NOW, Prospector Capital Partners, Inc, who counter moves the Board to strike the Respondent’s pleading(s) and enter the Respondent’s default on the following grounds:

1. Violation of Protective Order.
2. Violation of the Second Circuit’s Local Rule 33.1(e) (Mandatory confidentiality regarding court ordered mediation.)

3. Violation of F.R.E. 408 & 501.

INTRODUCTION

Application Serial No. 86/116,800, resulted in a Notice of Opposition styled “Donald J. Trump v. Trump Your Competition, Inc.” “Trump Your Competition, Inc.” is the former name of the now named Prospector Capital Partners, Inc. (“TYC”) and the Opposition is referred to herein as the “Prior TTAB Proceeding.”

Donald J. Trump, the individual plaintiff and registrant in the prior TTAB proceeding, was subpoenaed by TYC to testify during the course of that proceeding.

The attached declaration by attorney NETRA SREEPAKASH, legal counsel for TYC, provides, in part, the following information:

“When Mr. Trump refused to appear for deposition, even after being served with the subpoena, we moved to compel Mr. Trump’s deposition. Judge Hellerstein of the Southern District Court of New York denied our motion in a summary order, without citing any supporting authority. I believe that decision was wrong as a matter of law.”

“We took steps to appeal that decision to the Court of Appeals for the Second Circuit. As part of the Second Circuit’s Civil Appeal Mediation Program (“CAMP” or the “Mediation Program”), TYC and Mr. Trump were ordered to appear before a court-appointed mediator to “discuss the legal merit of each issue on review before this Court and how to narrow, eliminate, or clarify issues on appeal where appropriate.”

“On March 16, 2016, counsel and representatives for Mr. Trump and TYC met with the court-appointed mediator. The mediator insisted that the parties discuss settlement of their underlying trademark dispute. She thereafter communicated to me and TYC’s representative an offer from Mr. Trump, delivered by his representative, Mr. Garten. TYC rejected the offer.”

“The Second Circuit’s Local Rule 33.1(e) provides as follows:

(e) Confidentiality. Information shared during a CAMP proceeding is confidential and is not included in court files or disclosed to the judges of this court except to the extent disclosed by an order entered as a result of a CAMP proceeding. The attorneys and other participants are prohibited from disclosing what is said in a CAMP proceeding to anyone other than clients, principals or co-counsel, and then, only upon receiving due assurance that the recipient will honor confidentiality.”

“Because of this and other rules protecting settlement discussions, I was surprised that Mr. Trump recently divulged in a Trademark Trial and Appeal Board Filing the nature and content of settlement discussions he had with TYC. In any event, Mr. Trump’s description of the settlement discussions is misleading.” (Emphasis added.)

The same law firm that represented Mr. Trump at mediation represents Mr. Trump and DTTM Operations, LLC in the instant litigation. The same attorney who was attorney of record for Donald J. Trump in the prior TTAB matter is attorney of record for Respondent in the instant matter.

ARGUMENT

1. THE RESPONDENT SHOULD BE SANCTIONED FOR VIOLATION OF THE STANDARD PROTECTIVE ORDER.

The standard protective order protects the confidentiality of any confidential information

provided between parties during the course of a Board proceeding. The attorney of record for the Respondent and the Respondent's lawyer in the instant matter knew very well that the confidential information they approved to be disclosed in the Respondent's initial pleading in the instant matter was protected as confidential by the laws and rules set forth herein.

The Plaintiff cannot correct the misleading nature of the unfortunate disclosure of confidential information without it itself violating the rules and laws set forth herein. Accordingly, the self-serving falsity of the Respondent's unauthorized and forbidden disclosure is unfair and puts the Plaintiff at an improper disadvantage. Therefore, the Plaintiff has no way by which it can send the public the true and correct version of the events that took place in mediation without violation of the CAMP mediation rules regarding confidentiality. Nor does the Plaintiff desire to release confidential information in any manner, regardless.

The Order shall apply to the parties and to any nonparty from whom discovery or testimony may be sought in connection with TTAB proceedings and who desires the protection of this Order.

The Order applies to any "informal" discovery. "Informal" discovery was provided to Mr. Trump during the course of the above-mentioned mediation, as cited by Attorney Sreepakash. Confidential communications during court ordered mediation between the parties, including documents shared, is a form of informal discovery.

The Respondent and his attorney were both put on actual and constructive notice of the confidentiality of the mediation.

The Board may impose sanctions against a party in the event that the party fails to comply with the protective order relating to discovery. Trademark Rules 2.120(g)(1), 2.125(e), 37 CFR § § 2.120(g)(1), 2.125(e). This includes informal discovery.

2. THE APPROPRIATE SANCTION IS TO STRIKE THE RESPONDENT’S PLEADING AND ENTER THE RESPONDENT’S DEFAULT.

When sanctions are warranted, the Board has broad discretion in fashioning appropriate relief.

The available relief includes the entry of judgment by default against the disobedient party.

Benedict v. Super Bakery, Inc., 101 USPQ2d 1089, 1090 (Fed Cir. 2011).

Due to the egregious nature of the Respondent’s disobedience, the Plaintiff argues that a lesser sanction would not be effective nor would it benefit the public. The Respondent should have refrained from disclosing even the existence of prior settlement discussions to the Board and public, let alone a (misleading) version of the same. The “effectiveness” of potential sanctions necessarily includes the need to reassure the public that confidentiality of mediation related inter-party communications is sacrosanct.

There is no available “exception” to the Respondent as a valid defense to the Respondent’s violation of the Order or other related laws and rules set forth herein.

3. THE RESPONDENT IS IN VIOLATION OF THE SECOND CIRCUIT’S LOCAL RULE 33.1(e)

There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened

judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications.

Local Rule 33.1(e) provides: “*Information* shared during a CAMP proceeding *is confidential and is not included in court files* or disclosed to the judges of this court except to the extent disclosed by an order entered as a result of a CAMP proceeding.” (Emphasis added.)

The Trademark Trial and Appeal Board (TTAB) encourages parties to consider alternative dispute resolution as a means of settling the issues raised in any opposition or cancellation proceeding. According to the TTAB, consideration of alternative dispute resolution techniques early in a proceeding can produce a quicker, mutually agreeable resolution of a dispute or might, at least, narrow the scope of discovery or the issues for trial. In either circumstance, alternative dispute resolution might save parties time and money.

The public deserves to be reassured that participation in either TTAB sponsored mediation or mediation in a related federal court matter provides proper confidentiality. The Board should provide the strictest sanction in this matter. The mere striking of the offending material is not sufficient, as the offending material has been released to the public, and in a way that was so improperly colored as to be highly misleading and damaging in nature.

The appellate court found dismissal with prejudice to be a recognized sanction for violation of local court rules regarding the confidentiality of communications in mediation. Reed v. Bennett, 312 F.3d 1190, 1195 (10th Cir. 2002). That court understood that there is an overwhelming public policy to protect the sanctuary of mediation related confidentiality.

4. THE RESPONDENT IS IN VIOLATION OF FEDERAL RULES OF EVIDENCE 408

AND 501.

Federal Rule of Evidence 408 prohibits the use of conduct or statements made during compromise negotiations in subsequent and prior litigation. Accordingly, the Respondent's inclusion of alleged details of both parties' conduct and statements during the course of settlement negotiations is in direct violation of Rule 408. Mere exclusion of the forbidden information is insufficient as a proper sanction in this matter for the reasons set forth herein.

Federal Rule of Evidence 501 "protect(s) the confidentiality of communications, either written or oral, made during the course of a mediation." Chester Cty. Hosp. v. Independence Blue Cross, No. 02-2746, 2003 U.S. Dist. LEXIS 25214 at *7-8 (E.D. Pa. Nov. 7, 2003) (holding the mediation privilege protects disclosure of information shared during mediation.)

5. THIS LEGAL DISPUTE HAS THE ATTENTION OF NATIONAL MEDIA.

Due to the high public profile of Donald J. Trump, national news media have already reported on this litigation. News organs who have provide reports in the press and online include the *New York Post*, the *Wall Street Journal*, and *Newsweek*:

<http://blogs.wsj.com/law/2015/12/16/marketing-firm-pursues-donald-trump-in-trump-your-competition-trademark-dispute/> (retrieved May 28, 2016)

<http://nypost.com/2015/12/20/sales-firm-sues-donald-after-he-objects-to-use-of-trump-name/> (retrieved May 28, 2016)

<http://www.newsweek.com/donald-trump-gop-republicans-trademark-dispute-internet-marketing-company-412495> (retrieved May 28, 2016.)

Alan Garten, Counsel for the Respondent, freely discusses active litigation with the press. Counsel for Plaintiff refrains from doing so.

Thus the public has a greater chance to be exposed to the Respondent's violation of both the Local Rules providing for confidentiality as well as the related violation of the Standard Protective Order, and the confidential information released via USPTO.gov.

Through the improper actions of both counsel for the Respondent and the Respondent, "a bell has been rung that cannot be un-rung." But the Board does have the opportunity to send the proper message to the Respondent so that members of the public will accept that such violations are rare and that the Board understands that strict discipline is meted out in such cases so as to ensure that further violations by the Respondent or others who take part in mediation on other matters will be kept at a minimum for the protection of both the public and the beneficial procedure of alternate dispute resolution.

The Respondent released confidential information for personal gain. It was an improper attempt to bias the Board against the Plaintiff.

6. THE PLAINTIFF HAD NO DUTY TO "PERFECT" CONFIDENTIALITY.

The Respondent made no effort to provide the stated confidential information to the Board under seal.

The Respondent was on prior notice that the information released was confidential as per the Local Rule.

Respondent's experienced attorney is well aware that pursuant to Trademark Rule 2.116(g), the standard protective order ("Order") is automatically imposed on Board proceedings.

The Respondent did not alert the Plaintiff of the Respondent's intention to violate confidentiality and as such, gave the Plaintiff no opportunity to seek the assistance of the Interlocutory Attorney prior to the disclosure.

The Plaintiff had no duty to request that information provided via CAMP mediation is or was sealed in order to protect ongoing confidentiality.

CONCLUSION

Mediators and counsel involved in alternative dispute resolution—particularly mediation—agree that confidentiality is one of mediation's cornerstones. The Respondent's violation of the standard protective order, as well as the other rules and laws set forth herein, is clear and egregious in nature.

Accordingly, the Plaintiff respectfully requests that the Respondent be defaulted.

Respectfully submitted,

Date: May 30, 2016

By: 

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
COUNTER MOTION TO STRIKE RESPONDENT'S PLEADING(S) AND ENTER
RESPONDENT'S DEFAULT

is being served on May 30, 2016 by first class mail upon listed owner
as follows:

Daniel H. Weiner
One Battery Plaza
New York, New York 10003

Dated: Julian, California
May 30, 2016



Rod Underhill

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

In re Registration No. 4,859,780 (TRUMP)
Registered November 24, 2015
In re Registration No. 4,874,427 (TRUMP)
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Registered September 15, 2015
In re Registration No. 4,087,954 (TRUMP)
Registered January 17, 2012
In re Registration No. 4,462,986 (Stylized) (TRUMP)
Registered January 7, 2014
In re Registration No. 3,360,783 (Stylized) (TRUMP)
Registered November 24, 2015
In re Registration No. 3,687,022 (TRUMP)
Registered September 22, 2009

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:
PROSPECTOR CAPITAL PARTNERS, INC., : Cancellation No. 92063494
:
Petitioner, :
:
-v- :
:
DTTM OPERATIONS LLC, :
:
Registrant. :
----- x

DECLARATION OF NETRA SREEPRAKASH

I, NETRA SREEPRAKASH, hereby declare, pursuant to 28. U.S.C. § 1746, as follows:

1. I am senior counsel with Kleinberg, Kaplan, Wolff & Cohen, P.C. (“Kleinberg Kaplan”), which was retained to represent Trump Your Competition, Inc. (“TYC”) in connection with its efforts to depose Donald J. Trump, the opposer in the Trademark Trial and Appeal Board Proceeding, regarding the mark “TRUMP YOUR COMPETITION,” in the Matter of

Application Serial No. 86/116,800, styled “Donald J. Trump v. Trump Your Competition, Inc.” (the “Prior TTAB Proceeding”).

2. On behalf of TYC, Kleinberg Kaplan issued a subpoena to take the deposition of Mr. Trump, the sole opposer in the Prior TTAB Proceeding, after Mr. Trump refused to appear for a deposition on notice. When Mr. Trump refused to appear for deposition even after being served with the subpoena, we moved to compel Mr. Trump’s deposition. Judge Hellerstein of the Southern District of New York denied our motion in a summary order, without citing any supporting authority. I believe that decision was wrong as a matter of law.

3. We took steps to appeal from that decision to the Court of Appeals for the Second Circuit.

4. As part of the Second Circuit’s Civil Appeal Mediation Program (“CAMP” or the “Mediation Program”), TYC and Mr. Trump and their counsel were ordered to appear before a court-appointed mediator to “discuss the legal merit of each issue on review before this Court and how to narrow, eliminate, or clarify issues on appeal where appropriate.”

5. On March 16, 2016, counsel and representatives for Mr. Trump and TYC met with the court-appointed mediator. The mediator insisted that the parties discuss settlement of their underlying trademark dispute. She thereafter communicated to me and TYC’s representative an offer from Mr. Trump, delivered by his representative, Alan Garten. TYC rejected the offer.

6. The Second Circuit’s Local Rule 33.1(e) provides as follows:

(e) Confidentiality. Information shared during a CAMP proceeding is confidential and is not included in court files or disclosed to the judges of this court except to the extent disclosed by an order entered as a result of a CAMP proceeding. The attorneys and other participants are prohibited from disclosing what is said in a

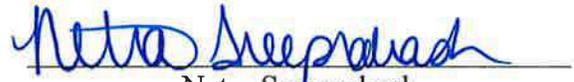
CAMP proceeding to anyone other than clients, principals or co-counsel, and then, only upon receiving due assurance that the recipient will honor confidentiality.

7. Because of this and other rules protecting settlement discussions, I was surprised that Mr. Trump recently divulged in a Trademark Trial and Appeal Board Filing the nature and content of settlement discussions he had with TYC. In any event, Mr. Trump's description of the settlement discussions is misleading.

8. Five days before TYC's appellate brief was due, Mr. Trump voluntarily withdrew his opposition to TYC's application to register its mark, and the Prior TTAB Proceeding—and our appeal from Judge Hellerstein's ruling—became moot.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 25, 2016


Netra Sreeprakash