TTAB

12-17-2001
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #76

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

ANHEUSER-BUSCH, INCORPORATED,	)	
	)	
Opposer,	)	
	)	
v.	)	**Opposition No. 107,854**
	)	**BUSH RANGER**
COLD STEEL, INC.,	)	
	)	
Applicant.	)	

OPPOSER'S MOTION FOR SANCTION OF DEFAULT JUDGMENT

In accordance with Fed. R. Civ. P. 37 and Rule 2.120(g) of the Trademark Rules of Practice, Opposer, Anheuser-Busch, Incorporated, moves the Board to impose the sanction of default judgment upon Applicant. This sanction is appropriate due to Applicant's failure to comply with the Board's order compelling discovery. In support of its motion, Opposer states:

On January 19, 1999, after several attempts to obtain discovery from Applicant, Opposer moved to compel discovery.[1] Applicant ignored Opposer's motion to Compel. On February 12, 1999, the Board issued an order allowing Applicant twenty days in which to respond to Opposer's motion. Applicant ignored the Board and did not respond.

On July 8, 1999, the Board granted Opposer's motion and ordered Applicant to answer the discovery requests within thirty days. In its order, the Board cautioned that: "In the event that applicant fails to comply with this Board order compelling discovery, the Board may entertain a formal motion for sanctions."

I hereby certify that this Motion for Sanction of Default Judgment is being mailed to the Assistant Commissioner for Trademarks, Box "NO FEE", 2900, Cry
22202-3513, on December 13, 2001.

[1] Opposer's efforts included a letter to Applicant's counsel under Rule 2.120(e) of the Trademark Rule of Practice, a proposed protective order and a follow-up letter. (Frohling Decl. ¶¶ 2-3). Applicant ignored these efforts. (Frohling Decl. ¶ 4).

Applicant's deadline to comply with the Board's order was August 7, 1999. Again, Applicant completely ignored the Board. (Frohling Decl., ¶ 5). To date, Applicant has never provided Opposer with responses to its discovery requests. (Frohling Decl., ¶ 5).[2] Clearly, Applicant simply decided to ignore Opposer's discovery and to disobey the Board's order.

Under these circumstances the sanction of default judgment is appropriate. *Virgin Enterprises Limited v. Urban Ingenuity International Records Corp.*, 2001 TTAB LEXIS 514 (July 11, 2001). It is black letter law that where a party fails to obey an order to provide discovery, the Board may render a judgment by default against the disobedient party. Rule 2.120(g)(1) of the Trademark Rules of Practice and Fed. R. Civ. P. 37(b)(2)(C); *Virgin*, 2001 TTAB LEXIS 514 at *4 (entering judgment against applicant that willfully failed to comply with the Board's order compelling discovery); *See also Unicut Corp. v. Unicut, Inc., 222 U.S.P.Q. 341* (T.T.A.B. 1984). The evidence here clearly shows Opposer's good faith attempts to secure answers to its discovery requests before seeking a motion to compel. Applicant ignored Opposer's discovery requests and motion, and then ignored the Board's order, all at great cost to Opposer and no apparent cost to Applicant. Moreover, Applicant consciously flaunted the Board's authority in the face of the Board's expressed warning that non-compliance could result in judgment being entered against Applicant pursuant to Trademark Rule 2.120(g)(1). *See Virgin*, 2001 TTAB LEXIS 514 at *4.

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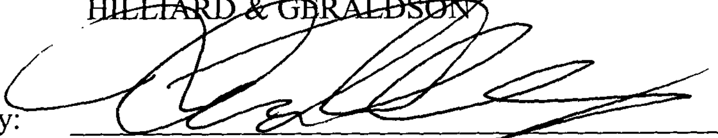
[2] Between the fall of 1999 and October 25, 2001 this proceeding was suspended several times for settlement discussions, and Opposer held off bringing this motion for judgment (Frohling Decl., ¶ 6). However, these suspensions in no way affected Applicant's obligation to respond to discovery pursuant to the Board's July 8, 1999 Order. Applicant never requested an extension of its time to comply with, or other relief from, the Board's order, and Opposer never granted any such relief (Frohling Decl., ¶ 7).

WHEREFORE, Opposer respectfully requests that the Board enter the sanction of default judgment against Applicant for its refusal to comply with the Board's July 8, 1999 order compelling Applicant to answer Opposer's discovery requests.

Respectfully submitted,

PATTISHALL, McAULIFFE, NEWBURY, HILLIARD & GERALDSON



By: ______________________

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Daniel D. Frohling
311 South Wacker Drive, Suite 5000
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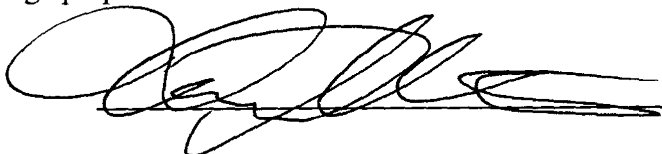
Attorneys for Opposer

CERTIFICATE OF SERVICE

I, Daniel D. Frohling, an attorney for Opposer, certify that a copy of the foregoing **OPPOSER'S MOTION FOR SANCTION OF DEFAULT JUDGMENT** and **DECLARATION OF DANIEL D. FROHLING,** have been served upon Marvin E. Jacobs, Koppel & Jacobs, 2151 Alessandro Drive, Suite 215 Ventura, CA 93001 by first class mail, on this 13th day of December, 2001, postage prepaid.



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COLD STEEL, INC.,	)	
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DECLARATION OF DANIEL D. FROHLING

I, Daniel D. Frohling, hereby declare:

1. I am a member of the law firm of Pattishall, McAuliffe, Newbury, Hilliard & Geraldson, counsel of record for Opposer, Anheuser-Busch, Incorporated in this action. I have personal knowledge of the matters herein referred to.

2. On May 5, 1998 Kathryn E. Ross, then a lawyer in my firm, working under my direction, sent Applicant's counsel a letter requesting that Applicant respond to Opposer's document requests and interrogatories, and enclosing a proposed protective order to meet Applicant's confidentiality concerns.

3. On June 2, 1998, Ms. Ross sent Applicant's counsel a follow-up letter, again requesting that Applicant provide more fulsome responses to its discovery requests.

4. Applicant did not respond to either letter, and Opposer subsequently filed a Motion to Compel, which the Trademark Trial and Appeal Board ("Board") granted on July 8, 1999.

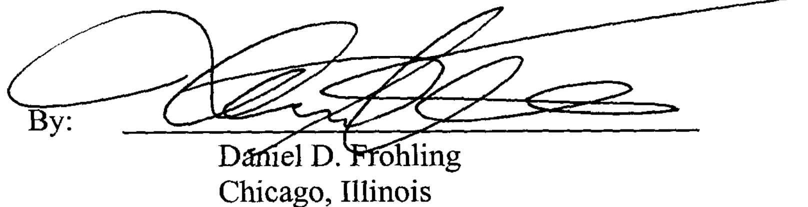
5. The Board's July 8, 1999 Order compelling discovery gave Applicant thirty days (until August 7, 1999) to provide discovery responses. However, Applicant did not

answer Opposer's discovery requests by the deadline and, to date, Applicant has not provided Opposer with the requested information and documents.

6. Although Applicant did not comply with the Board's July 8, 1999 Order compelling discovery, Opposer did not immediately file a motion for judgment. Opposer forbear from this action due to the commencement of active settlement negotiations. The parties made various attempts to settle the matter between the fall of 1999 until the fall of 2001.

7. Throughout the settlement discussions, Applicant never requested an extension of its time to comply with, or other relief from, the Board's order, and Opposer never granted any such relief.

I declare under penalty of perjury that the foregoing facts are true and correct and that this Declaration was executed on December 6, 2001 in Chicago, Illinois.



By: ______________________
Daniel D. Frohling
Chicago, Illinois