

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

THE DOW CHEMICAL COMPANY,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91153590
)	
BLUE FOAM INSULATION,)	
)	
Applicant.)	

**OPPOSER'S MOTION TO REOPEN TRIAL DATES
AND FOR NEW ORDER ON MOTION TO COMPEL**

Opposer, The Dow Chemical Company, in accordance with Rule 6(b) of the Federal Rules of Civil Procedure, hereby requests that the trial dates in this proceeding be reopened and that the Board issue a new order incorporating the terms of its November 6, 2003, order granting Opposer's Motion to Compel.

The grounds for this motion are as follows:

1. On August 28, 2003, the Board suspended proceedings herein pending disposition of a motion to compel filed by opposer. However, by an order that recently appeared on the USPTO Trademark Trial and Appeal Board Inquiry System (TTABIS), the motion was granted on November 6, 2003, and trial dates were reset. This order was not mailed to either opposer or applicant.

2. The order appearing on TTABIS states that the discovery period would expire on January 15, 2004. The last testimony period was scheduled to expire on July 28, 2004.

3. After this proceeding was suspended, opposer's counsel sent to the Board attachments to the motion to compel that were lost before the motion was entered in the case file; the attachments were forwarded on October 23 and 28, 2003, via facsimile. After this time,



08-16-2004

opposer's counsel checked the status of the case on TTABIS, and the last listed order appearing thereon was the August suspension order.

4. Opposer's counsel discovered the existence of the November 6, 2003, order on TTABIS when he again checked the status of this proceeding on August 12, 2004.

5. On August 13, 2004, opposer's counsel contacted applicant's president, James Benson, to inquire whether he had received the November 6 order. Mr Benson stated he had not heard anything about it.

6. As of the date of this motion, applicant has not yet supplemented its responses to its discovery requests as required by the November 6 order, presumably because he did not receive the order.

7. The parties have broached the subject of settlement since November 6, 2003. During discussions, both were under the impression that this proceeding was still suspended.

8. Because opposer's failure to take action under the trial schedule set forth in the November 6 order was due to the lack of any notice of the new schedule and grant of the motion to compel, opposer is innocent of wrongdoing. The failure to act was not willful or negligent but resulted from lack of notice. *See General Motors Corp. v. Cadillac Club Fashions Inc.*, 22 U.S.P.Q.2d 1933, 1935 (T.T.A.B. 1992); *Djeredjian v. Kashi Co.*, 21 U.S.P.Q.2d 1613, 1614 (T.T.A.B. 1991)

9. Applicant would not be unfairly prejudiced by reopening the trial dates. Applicant has not complied with the order to compel answers to interrogatories and has not suffered the loss of evidence or witnesses. *Pumpkin Ltd. v. The Seed Corps*, 43 U.S.P.Q.2d 1582, 1587 (T.T.A.B. 1997). *See also Djeredjian v. Kashi Co.*, 21 U.S.P.Q.2d 1613, 1614 (T.T.A.B. 1991).

10. Pursuant to the policy of the Board to decide cases on their merits, opposer should be allowed to litigate its claim. *Paolo's Associates Ltd. Partnership v. Bodo*, 21 U.S.P.Q. 2d 1899, 1902 (Comm'r 1990).

11. Opposer needs to receive the information from applicant that the November 6 order required, take follow-up discovery, and present testimony before the Board before this case may be decided on the merits.

This motion is supported by the attached Declaration of Thomas P. Arden.

WHEREFORE, opposer requests that the Board grant its motion to reopen the trial dates in this proceeding and issue a new order to the following effect:

a. Applicant should fully answer Interrogatory Nos. 1(c), 6, 10, 12, and 19(d), as stated in the November 6 order, within thirty days.

b. Discovery and testimony period should be reset as follows:

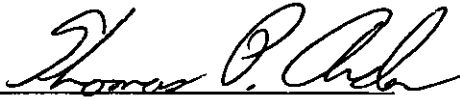
THE PERIOD FOR DISCOVERY TO CLOSE: November 15, 2004

Testimony period for party in
position of plaintiff to close
(opening thirty days prior thereto): February 13, 2005

Testimony period for party in
position of defendant to close
(opening thirty days prior thereto): April 14, 2005

Rebuttal testimony period to close
(opening fifteen days prior thereto): May 29, 2005

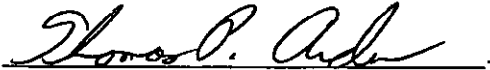
Respectfully submitted,
HOLLAND & KNIGHT LLP

By 

Thomas P. Arden
131 South Dearborn Street
30th Floor
Chicago, IL 60603
(312) 715-5713

Attorneys for Opposers

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: United States Patent and Trademark Office, Trademark Trial and Appeal Board, Box TTAB No Fee, 2900 Crystal Drive, Arlington, Virginia, 22202-3513, and is being filed via facsimile to FAX number 703-746-7111 on August 13, 2004.



CERTIFICATE OF SERVICE

I, Thomas P. Arden, hereby certify that a copy of the foregoing **OPPOSER'S MOTION TO REOPEN TRIAL DATES AND FOR NEW ORDER ON MOTION TO COMPEL** was served upon Mr. Jim Benson, President, Blue Foam Insulation, P.O. Box 327, Avon, Colorado 81620, this 13th day of August, 2004, by first class mail, postage prepaid.


Thomas P. Arden

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

THE DOW CHEMICAL COMPANY,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91153590
)	
BLUE FOAM INSULATION,)	
)	
Applicant.)	

**DECLARATION OF THOMAS P. ARDEN IN SUPPORT OF OPPOSER'S MOTION
TO REOPEN TRIAL DATES AND FOR NEW ORDER ON MOTION TO COMPEL**


I, Thomas P. Arden, state and declare as follows:

1. I am a partner with Holland & Knight LLP, and represent the opposer, The Dow Chemical Company, in this proceeding. I have personal knowledge of the facts set forth in the foregoing Opposer's Motion to Reopen Trial Dates and for New Order on Motion to Compel and confirm they are true.

2. Attached hereto are fax cover sheets concerning the attachments to the motion to compel that were lost before the motion was entered in the case file and were forwarded to the Board on October 23 and 28, 2003, via facsimile.

3. Attached hereto is the Board's November 6, 2003, order, which I first saw as a result of checking on the case status on the TTABIS on August 12, 2004.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of August, 2004, at Chicago, Illinois.



Thomas P. Arden

HOLLAND & KNIGHT LLC

500 West Madison Street
40th Floor
Chicago, Illinois 60661-2511

312-715-5700
312-993-9350 FAX

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TO:

NAME	COMPANY/FIRM	FAX NUMBER
Ms. Nancy Imelko	US PTO	703-746-7111
CITY	STATE	(TELEPHONE NUMBER)
		703-308-9330 x239

FROM: 312-715-5713
Thomas P. Arden

NAME	TELEPHONE	TOTAL PAGES (Including Cover Sheet)
		10

FOR THE RECORD:

DATE: October 22, 2003	URGENCY:	<input type="checkbox"/> SUPER RUSH	<input type="checkbox"/> RUSH	<input type="checkbox"/> REGULAR
USER ID #: 2274	FILE #: 527433-11	CLIENT NAME:		
FAXED BY:	CONFIRMED: <input type="checkbox"/> YES <input type="checkbox"/> NO	NAME:	TIME:	

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MESSAGE:

Dear Ms. Imelko:

I received your message concerning the Motion to Compel in the *Dow Chemical Company v. Blue Foam Insulation* case, Opposition No. 91153590 and its reference to a copy of Opposer's First Set of Interrogatories. Attached is a copy of the interrogatories, as you requested. I trust that you have the responses of the applicant, which were also referenced in and attached to the motion.

Sincerely yours,
Thomas P. Arden

312-928-6022

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Ms. Nancy Imelko	US PTO/ TTAB	703-746-7111
CITY	STATE	(TELEPHONE NUMBER)
		703-308-9330 x239

FROM:	312-715-5713	
Thomas P. Arden		
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USER ID #: 2274	FILE #: 527433-11	CLIENT NAME:		
FAXED BY:	CONFIRMED: <input type="checkbox"/> YES <input type="checkbox"/> NO	NAME:	TIME:	

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MESSAGE:

Dear Ms. Imelko:

Attached is a copy of Applicant's Response to Opposer's First Set of Interrogatories to Applicant, which was attached to the Motion to Compel in the *Dow Chemical Company v. Blue Foam Insulation* case, Opposition No. 91153590.

Sincerely yours,
Thomas P. Arden

Search:

Opposition

Number: 91153590

Filing Date: 10/10/2002

Status: Pending

Status Date: 11/26/2002

Interlocutory Attorney: NANCY L OMELKO

Defendant

Name: BLUE FOAM INSULATION

Correspondence: JIM BENSON
BLUE FOAM INSULATION
PO BOX 327
AVON, CO 81620-0327

Serial #: 76347067

Application Status: Opposition Pending

Mark: BLUE FOAM INSULATION 'KEEP THE ENERGY'

Plaintiff

Name: THE DOW CHEMICAL COMPANY, INC.

Correspondence: THOMAS P. ARDEN
HOLLAND & KNIGHT LLC
131 SOUTH DEARBORN STREET, 30TH FLOOR
CHICAGO, IL 60603

Prosecution History

#	Date	History Text	Due Date
<u>11</u>	11/06/2003	<u>P'S MOT TO COMPEL GRANTED/TRIAL DATES RESET</u>	
<u>10</u>	08/28/2003	<u>SUSPENDED PENDING DISP OF OUTSTNDNG MOT</u>	
<u>9</u>	08/18/2003	<u>PL'S MOTION TO COMPEL</u>	
<u>8</u>	06/18/2003	<u>DEF'S RESPONSE TO PL'S REQUEST FOR DISCOVERY</u>	
<u>7</u>	06/24/2003	<u>EXTENSION GRANTED</u>	
<u>6</u>	06/16/2003	<u>P'S MOT FOR EXTEN. OF TIME W/ CONSENT</u>	
<u>5</u>	01/21/2003	<u>NO PROOF OF SERVICE</u>	
<u>4</u>	01/07/2003	<u>ANSWER</u>	
<u>3</u>	11/26/2002	<u>PENDING, INSTITUTED</u>	
<u>2</u>	11/26/2002	<u>NOTICE AND TRIAL DATES SENT; ANSWER DUE:</u>	01/05/2003
<u>1</u>	10/10/2002	<u>FILED AND FEE</u>	

Search:

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mailed: November 6, 2003

Opposition No. 91153590

THE DOW CHEMICAL COMPANY, INC.

v.

BLUE FOAM INSULATION

This case now comes up on opposer's combined motion (filed August 18, 2003) to compel applicant to supplement its answers to Interrogatory Nos. 1(c), 6, 10, 12 and to answer Interrogatory No. 19(d) of opposer's first set of interrogatories and to extend the discovery and testimony periods. Applicant has failed to file a brief in response to petitioner's motions. See Trademark Rule 2.127(a).¹

In view of the circumstances set forth in opposer's motion to compel, and because applicant has not responded to the motion, opposer's motion to compel discovery is hereby granted. See Trademark Rules 2.120(e). Applicant is compelled to fully answer Interrogatory Nos. 1(c), 6, 10, 12 and to answer Interrogatory No. 19(d) of opposer's first set of interrogatories. See TBMP §407.01 and cases cited therein.

¹ Trademark Rule 2.127(a) reads, in relevant part, as follows:
"When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded."

Accordingly, petitioner's motion to compel is granted, and respondent is allowed until **thirty days** from the mailing date stamped on this order to respond to applicant's first set of interrogatories and first set of requests for production of documents and things.

Proceedings are resumed and discovery and testimony periods are reset as follows:

DISCOVERY PERIOD TO CLOSE:	January 15, 2004
30-day testimony period for party in position of plaintiff to close:	April 14, 2004
30-day testimony period for party in position of defendant to close:	June 13, 2004
15-day rebuttal testimony period to close:	July 28, 2004

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.

TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.

Parties should also be aware of changes in the rules affecting trademark matters, including rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003) Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003). Notices concerning the rules changes are available at www.uspto.gov.