

ESTTA Tracking number: **ESTTA19182**

Filing date: **11/12/2004**

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

<b>Proceeding</b>	91153590
<b>Party</b>	Plaintiff THE DOW CHEMICAL COMPANY, INC. ,
<b>Correspondence Address</b>	THOMAS P. ARDEN HOLLAND & KNIGHT LLC 131 SOUTH DEARBORN STREET, 30TH FLOOR CHICAGO, IL 60603
<b>Submission</b>	Motion for Sanctions
<b>Filer's Name</b>	Thomas P. Arden
<b>Filer's e-mail</b>	thomas.arden@hklaw.com
<b>Signature</b>	/Thomas P. Arden/
<b>Date</b>	11/12/2004
<b>Attachments</b>	OpposersMotion.pdf ( 10 pages )

**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 FOR SANCTIONS FOR FAILURE  
TO COMPLY WITH BOARD'S ORDER OF SEPTEMBER 30, 2004**

Opposer, The Dow Chemical Company, pursuant to Rule 2.120(g) of the Trademark Rules of Practice and Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure, hereby moves the Board for an order sustaining opposer's opposition and refusing applicant's application on account of applicant's failure to comply with this Board's September 30, 2004 order. That order required applicant to supplement its answers to opposer's Interrogatory Nos. 1(c), 6, 10, and 12 and to answer Interrogatory No. 19(d) of Opposer's First Set of Interrogatories, but applicant has not complied with the order.

The grounds for this motion are as follows:

1. The Board on September 30, 2004, issued an order, a copy of which is attached as Exhibit 1, that gave applicant until October 30, 2004, to supplement responses to opposer's written discovery requests. Applicant has not done so.
2. On October 8, 2004, opposer's counsel sent Jim Benson, the president and owner of applicant, a letter, a copy of which is attached as Exhibit 2, setting forth what applicant was obligated to do to comply with the Board's September 30 order.

3. Opposer's counsel thereafter wrote to Mr. Benson via e-mail indicating that compliance with the order was overdue and attaching a copy of the earlier October 8 correspondence. A copy of this e-mail correspondence is attached hereto as Exhibit 3.

4. Opposer's counsel also attempted to contact applicant after the October 30 deadline but has been unable to contact applicant.

5. On October 8, 2004, opposer served a second set of interrogatories and requests for admission on applicant. Responses to the discovery were due by November 12, 2004. Opposer has received no indication from applicant that it will respond to that discovery.

6. Under Rule 2.120(g)(1) of the Trademark Rules of Practice and Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure, an order rendering judgment by default against a party who disobeys an order is a proper sanction.

WHEREFORE, opposer requests that the Board grant its motion for sanctions and enter judgment on opposer's behalf on account of applicant's failure to comply with the Board's September 30, 2004, order.

Respectfully submitted,

HOLLAND & KNIGHT LLP

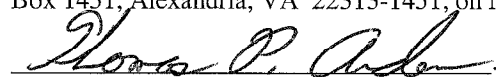
By 

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

Attorneys for Opposer

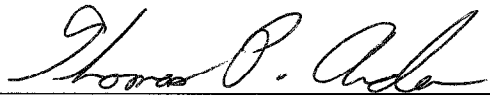
Certificate of Mailing

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, P.O. Box 1451, Alexandria, VA 22313-1451, on November 12, 2004.



**CERTIFICATE OF SERVICE**

I, Thomas P. Arden, hereby certify that a copy of the foregoing **OPPOSER'S MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH BOARD'S ORDER OF SEPTEMBER 30, 2004** was served upon Mr. Jim Benson, President, Blue Foam Insulation, P.O. Box 327, Avon, Colorado 81620, this 12th day of November, 2004, by first class mail, postage prepaid.

  
\_\_\_\_\_

# 2393151\_v1

**EXHIBIT 1**

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3514

Mailed: September 30, 2004

Opposition No. 91153590

THE DOW CHEMICAL COMPANY, INC.

v.

BLUE FOAM INSULATION

Nancy L. Omelko, Interlocutory Attorney:

Opposer's motion filed August 13, 2004 to reopen proceedings and reset discovery and trial dates is granted as conceded. Trademark Rule 2.127(a).

Proceedings are reopened and the discovery and trial dates are reset in accordance with opposer's motion.

Furthermore, applicant, per the Board's order dated November 6, 2003, is allowed **thirty days** to more fully answer opposer's interrogatory nos. 1(c), 6, 10, 12 and 19(d).

**EXHIBIT 2**

Thomas P. Arden, Esq.  
312-715-5713  
thomas.arden@hklaw.com

October 8, 2004

**VIA FACSIMILE & CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED**

Mr. James Benson  
President  
Blue Foam Insulation, Inc.  
91 Beaver Creek Place  
P.O. Box 327  
Avon, CO 81620

Re: *The Dow Chemical Company v. Blue Foam Insulation,*  
Opposition No. 91153590

Dear Jim:

As you know, we filed a motion to reopen proceedings after we discovered the TTAB had granted our motion to compel and reset trial dates back in November, 2003. The Board issued an order that grants the motion and sets the discovery and trial dates that were set forth in the motion. Specifically, the deadlines are as follows:

Discovery Period:	November 15, 2004
Testimony period for Opposer:	February 13, 2005
Testimony period for Applicant:	April 14, 2005
Rebuttal testimony period for Opposer:	May 29, 2005

The order also gives you until October 31 to comply with the order granting the motion to compel further answers to interrogatories. Enclosed are copies of the order resetting the trial dates and the order granting the motion to compel.

The following summarizes the discovery responses you are required to send us by October 31:

1. Interrogatory 1(c) (Identify each person with knowledge of applicant's consideration and selection of the mark): You mentioned when we discussed your answer to this interrogatory that a person discussed with you the possible use of "Pink Foam Insulation." A complete answer would describe the content and substance of the conversation and state the name of the person involved in the conversation or that you cannot remember the name of the person.



Blue Foam Insulation, Inc.

October 8, 2004

Page 2

2. Interrogatory 6 (Identify each mark adopted consisting of the word "Blue"): A complete supplemental answer would state "Blue Foam Insulation and Blue Foam Insulation, Inc." and that you have not adopted other names or marks consisting of or containing the word.

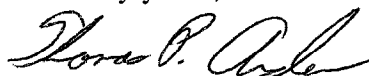
3. Interrogatory No. 10 (Identify the revenue received from the services provided under "Blue Foam Insulation").

4. Interrogatory No. 12 (Describe the channels of trade for your company's services): We need to receive a description of how you provide services or deliver them, whether to the ultimate customer directly or through others.

5. Interrogatory No. 19(d) (Identify all documents in applicant's possession or control which relate or refer to opposer, opposer's BLUE marks, or opposer's products sold under opposer's BLUE marks.)

Please contact me concerning supplementing the foregoing interrogatories. We have limited time to complete discovery. This requires that we will file a motion for sanctions against you if you ignore the new order to compel.

Sincerely yours,



Thomas P. Arden

TPA/kc

**EXHIBIT 3**

## Arden, Thomas P (CHI - X65713)

---

**From:** Arden, Thomas P (CHI - X65713)  
**Sent:** Thursday, November 04, 2004 4:42 PM  
**To:** Jim Benson (jim@bluefoam.net)  
**Subject:** The Dow Chemical Company v. Blue Foam Insulation



2251436\_1.DOC  
(43 KB)

Dear Jim:

We last contacted you by letter, a copy of which is attached, concerning the opposition proceeding before the Trademark Trial & Appeal Board. You are now overdue on your obligation to supplement your discovery responses. We believe it is in your best interests to comply with the order. Please contact us as to when you plan on supplementing your responses. Because the discovery period is scheduled to end on November 15, we have filed today a request to extend the trial dates, including an extension of the discovery deadline to January 14, 2005. We have tried to contact you for your consent but have been unsuccessful.

We believe we should arrange a time when we can discuss the issues surrounding the proceeding. Please indicate to me when you would be available. We also would appreciate knowing whether you consent to the requested extension.

Sincerely yours,

Thomas P. Arden  
Partner  
Holland & Knight LLP  
131 South Dearborn St.  
30th Floor  
Chicago, Illinois 60603  
thomas.arden@hklaw.com  
312-715-5713  
FAX 312-578-6666