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

Proceeding	91161535
Party	Plaintiff Virgin Enterprises Limited Virgin Enterprises Limited 120 Campden Hill Road London, W8 7AR UNITED KINGDOM
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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VIRGIN ENTERPRISES LIMITED, Opposer, - v. - ROSENRUIST – GESTAO E SERVICOS SOCIEDADE UNIPESSOAL LDA, Applicant.	Opposition No. 91-161535

OPPOSITION TO APPLICANT'S MOTION FOR RECONSIDERATION

Virgin Enterprises Ltd. ("Opposer") respectfully opposes Applicant's Motion for Reconsideration filed September 7, 2006 (the "Sept. 7 Motion"). By this latest motion, Applicant once again asserts that the Board should strike the entire trial testimony of Opposer's witness, Neil Hobbs, on the basis that inadequate notice of the taking of Mr. Hobbs's deposition was given, notwithstanding that Applicant had 12 days prior notice of the deposition, Applicant's counsel attended the deposition, the deposition lasted approximately 10 minutes, and Applicant refused offers made on the record to bring the witness back for further examination. The motion for reconsideration is without merit and should be denied.

In its Order mailed August 7, 2006 ("August 7 Order"), the Board accurately described the events which gave rise to Application's Motion to Strike filed March 20, 2006 (the "March 20 Motion to Strike"). Notice of the disputed deposition was both mailed and faxed to Applicant's counsel's office on Friday, March 3, which was twelve (12) days prior to the return date. Applicant's motion for reconsideration does not deny that its counsel had actual knowledge of the

faxed deposition notice on March 3, and voiced no objection to it for eleven (11) days, until late in the afternoon on March 14, even though (a) the objected to deficiency appeared on the face of the deposition notice, and (b) Applicant now admits (Sept. 7 Motion at 2) that its counsel began (unbeknownst to Opposer) preparing written objections to the deposition notice as early as March 12.

The Board correctly held that "Applicant has provided no reasonable explanation why the objections were not made earlier" (August 7 Order at 4). It is evident that Applicant deliberately delayed notifying Opposer of its objections with a view to attempting to exclude Opposer's trial testimony and have this opposition resolved on grounds other than the merits. The Board acted well within its discretion in holding that Applicant's objections were not "promptly served" on Opposer, Fed. R. Civ. P. 32(d)(1), and so were waived.

The Board also correctly found that immediately upon receipt of Applicant's objections Opposer served a corrected deposition notice; Applicant's counsel attended the deposition in question; and "applicant has rejected Opposer's offers to permit further cross-examination during an extended testimony period" (August 7 Order at 3-4). Applicant takes issue with none of these findings. Further cross-examination would have alleviated any conceivable prejudice that could have resulted from the deficient notice, but Applicant sought no such relief, even in the alternative. It is evident that Applicant seeks, not relief from prejudice, but a wholly inappropriate sanction of preclusion of testimony based on nothing more than Applicant's own deliberate delay and gamesmanship in serving objections to a deposition notice. The Board acted well within its discretion in holding that Applicant's motion for such relief should be denied.

Section 518 of the TBMP provides, in relevant part, that:

> [T]he premise underlying a motion for reconsideration . . . under 37 C.F.R. § 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such a motion may not properly be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. Rather, the motion should be limited to a demonstration that based on the facts before it and the applicable law; the Board's ruling is in error and requires appropriate change.

Here, Applicant does not even begin to demonstrate that the Board's discretionary ruling on Applicant's March 20 Motion to Strike – that the motion should be denied – was "in error." The Board has broad discretion with respect to determining whether a party's objections to a deposition notice were "promptly" served. That discretion was not exceeded in this case. The Board has equally broad discretion to determine what remedy should be granted for a procedural irregularity in a deposition notice. Here again, that discretion was not exceeded.

The Board was right to deny Applicant's March 20 Motion to Strike. Applicant's motion for reconsideration should be denied.

Dated: New York, New York
September 27, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury pursuant to 28 U.S.C. § 1746 that on the 27th day of September, 2006 I caused to be served upon the following, by the methods described below, a true copy of the Opposition to Applicant's Motion for Reconsideration.

First Class Mail

Mark Lebow, Esq.
Young & Thompson
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Arlington, Virginia 22202
Attorney for Applicant

Dated: New York, New York
September 27, 2006

/Jeffrey J. Bednar/
Jeffrey J. Bednar