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

Proceeding	91165792
Party	Plaintiff PHASE FORWARD INCORPORATED
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Attachments	Response to Motion to Strike.PDF (7 pages)

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

PHASE FORWARD INCORPORATED	:	
	:	
Opposer,	:	Opposition No.: 91165792
	:	
v.	:	Serial No. 78/433,790
	:	
PHASEDATA CORP.,	:	
	:	
Applicant.	:	

OPPOSER’S RESPONSE TO APPLICANT’S MOTION TO STRIKE

Opposer PHASE FORWARD INCORPORATED, hereby responds to Applicant PHASE DATA CORP.’s Motion to Strike Opposer’s Motion for a Continuance of the Disposition or Denial of Applicant’s Motion for Summary Judgment.

I. INTRODUCTION

Applicant clearly ignores the rules provided in the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) for calculating the numbers of days in which to respond to Motions and intentionally misapplies the Board’s purpose in issuing its Order Suspending Proceedings. Applicant’s failure to acknowledge the rules and its continued filing of wholly inappropriate Motions have forced Opposer to expend significant resources in responding to Applicant’s baseless claims and factually devoid arguments. Opposer is again forced to educate Applicant of the rules which it chooses to ignore, and has wasted both Opposer and the Board’s time in responding. This is now the third time (see Applicant’s Motion to Compel, Motion for

Summary Judgment, and Motion to Strike) where Applicant has wasted the parties and the Board's resources (even after an explanation of where to locate the rules was provided in the Board's denial of Applicant's Motion to Compel).

Below, Opposer shall attempt to set the record straight and explain why Applicant's Motion to Strike is without merit and should be denied.

II. RESPONSE TO APPLICANT'S MISINTERPRETATION OF THE RULES

A. APPLICANT'S MISAPPLICATION OF THE SUSPENSION OF PROCEEDINGS ORDER.

Applicant's contends that as a result of the Board's Order suspending proceedings pending the disposition of the Motion for Summary Judgment, Opposer is thereby precluded from filing a response to Applicant's Motion for Summary Judgment (or in that alternative, where insufficient facts are available to respond, a Federal Rule of Civil Procedure 56(f) Motion is likewise precluded). This argument is both illogical and an apparent misunderstanding of the Board's intention.

The Order suspending proceedings is to prevent the wasted time and effort of the parties in continuing with Discovery while the Summary Judgment Motion is being considered. Opposer has readily acknowledged that Applicant's Fed.R.Civ.P. 30(b)(6) Deposition scheduled for January 4, 2006 would be indefinitely suspended, and sought in its Motion, additional time (after disposition of the pending motion), to allow time for the Deposition thereafter. See Opp. Mem. of Law in Supp. of Fed.R.Civ.P. 56(f) Mot. This acknowledgement was with the understanding that the Board would issue the standard Suspension of Proceedings Order and thus discovery would be halted.

Applicant however, fails to read the second line of the Board's Order which clearly states that "[a]ny paper filed during the pendency of this motion *which is not relevant thereto* will be given no consideration." TTAB Order of Dec. 20, 2005 (emphasis added). Opposer's Response filed December 27, 2005, is clearly relevant and is in fact the appropriate response to a Motion for Summary Judgment proscribed under the rules.

It is thus Applicant's frivolous attempt to misapply the Order in its Motion to Strike, where if granted: 1) would deny Opposer the right granted under the TTAB and Federal Rules of Civil Procedure to respond to the Motion for Summary Judgment (even assuming *arguendo* that Opposer is allowed the exact thirty (30) day time period), since Opposer would thereby be precluded from filing a Response on December 20, 2005 or December 21, 2005 (both within the thirty (30) day time period); and 2) would evidence a prejudice by the Board against Opposer by precluding its right to respond to Applicant's factually void and unsupported claims in its Motion for Summary Judgment. 37 CFR §2.127(e)(1). Opposer does not contend that this was the intent of the Board and acknowledges that the Order simply places a hold on further Discovery. Thus any claim that Opposer's Response to Applicant's Motion for Summary Judgment should be struck as a result of the Board's Suspension Order is inappropriate.

B. APPLICANT'S FAILURE TO CALCULATE THE CORRECT NUMBER OF DAYS IN WHICH OPPOSER MAY RESPOND.

Applicant apparently misinterprets what is meant by the sentence "[t]he time for filing a motion under Rule 56(f) will not be extended." 37 CFR § 2.127(e)(1). As a *pro se* party to this action, Applicant is clearly unaware of the general practices of litigation and the common courtesies often granted an adversary party in seeking and obtaining extensions of time in which to respond to Motions ranging from a few days to thirty (30) to sixty (60) day extensions. See Appl. Mot. to Compel Disc. and Bd. Denial Order. Applicant narrowly views the terms "will not

be extended” to assume Opposer’s filing was an attempt to extend the time period in which it may file its Response or 56(f) Motion. Applicant simply fails to read the additional Trademark Rules which apply to service of papers in inter-party proceedings. Applicant simply ignores 37 CFR § 2.119(c), titled Service and Signing of Papers which states that:

When service is made by first-class mail, "*Express Mail*," or overnight courier, the date of mailing or of delivery to the overnight courier will be considered the date of service. Whenever a party is required to take some action within a prescribed period after the service of a paper upon the party by another party and the paper is served by first-class mail, "*Express Mail*," or overnight courier, *5 days shall be added to the prescribed period.*

37 CFR § 2.119(c), TBMP 113(c), (emphasis added). Opposer acknowledges the thirty (30) day time period in which to respond to Applicant’s Motion for Summary Judgment is artificially set at December 21, 2005. However, as a result of Applicant’s Motion for Summary Judgment being served by OVERNIGHT COURIER, as Certified to in Applicant’s Certificate of Service, an additional five (5) days are added to the prescribed period. Thus, contrary to Applicant’s contention that Opposer’s Motion for Continuance of the Disposition or Denial of Applicant’s Motion for Summary Judgment was untimely filed thirty-six (36) days after date of service of Applicant’s Motion for Summary Judgment, as a result of Applicant’s means of service, Opposer is granted not thirty (30) but thirty (35) days.

There are no exceptions or inclusions within the rule providing that under certain circumstances, this additional five (5) days shall not be applied. In fact, it is the opposite clearly stating that “[w]henever a party is required to take some action within a prescribed period after the service of a paper ... 5 days shall be added to the prescribed period.” Id. Thus, there is no “extension” applied, and the time period in which to respond is simply thirty-five (35) days.

Calculating from November 21, 2005, Opposer's Rule 56(f) Motion, or any other response to Applicant's Motion for Summary Judgment was due December 26, 2005.

Further, Applicant, likewise again ignores 37 CFR § 2.196 (see Board Denial of Applicant's Motion to Compel Discovery) by failing to acknowledge that Monday December 26, 2005 was a Federal Holiday¹. The Federal Rules clearly address expiration of time occurring on Federal Holidays:

Whenever periods of time are specified in this part in days, calendar days are intended. When the day, or the last day fixed by statute or regulation by or under this part for taking any action or paying any fee in the Office falls on a Saturday, Sunday or Federal holiday within the District of Columbia, the action may be taken, or the fee paid, on the next succeeding day that is not a Saturday, Sunday or a Federal holiday.

37 CFR § 2.196, TBMP 112. Thus, since it is was neither appropriate nor possible for Opposer to file its Response on December 26, 2005, Opposer, pursuant to 37 CFR § 2.196, filed its response on the next day.

III. CONCLUSION.

As a result of Applicant's failure to acknowledge the rules, both concerning what may be filed in response to a Motion for Summary Judgment and the time period in which to respond, each rule clearly stated in the Trademark Trial and Appeal Board Manual of Procedure, Opposer respectfully requests the Board Strike or Deny Applicant's Motion to Strike Opposer's Rule 56(f) Motion for a Continuance of the Disposition or Denial of Applicant's Motion for Summary Judgment as its Motion is wholly without merit and must not be considered by the Board.

¹ See United States Office of Personal Management list of 2005 Federal Holidays, as provided by Executive Order No. 11582 of February 11, 1971 – Observance of Holidays by Government Agencies; see also 5 U.S.C. §6103.

Respectfully submitted
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DATED:

1/11/05

CERTIFICATE OF SERVICE

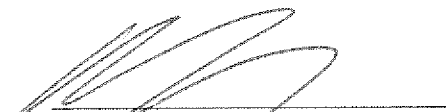
I hereby certify that on the 11th day of January, 2006, I caused the foregoing:
OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO STRIKE, to be served via
Overnight Courier, postage prepaid, in an envelope addressed to:

Anthony Maza, President
PhaseData Corporation
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with copy to:

Anthony Maza, President
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DATED: 1/11/06