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

Proceeding	91166064
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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AQUENT LLC, Opposer, v. ACQUIENT LLC, Applicant.	Opposition No 91166064 Application S.N 76/568018

OPPOSER'S REPLY TO APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

Opposer AQUENT LLC submits this Reply to Applicant's Opposition to Opposer's Motion for Summary Judgment.

In its opposition brief, Applicant labors mightily but unsuccessfully in its attempt to create a genuine issue of material fact that would preclude the granting of summary judgment here. The undisputed facts, however, are that Applicant included "recruiting" services in its recitation of services when it filed the subject applicant, despite the fact that Applicant admittedly has never offered recruiting services. Thus the subject application contained a false (and verified) statement regarding Applicant's use of its mark, and the application is therefore void *ab initio* on the ground of fraud.

Applicant's *post litem* explanation of what it intended or

what it meant is both irrelevant and unbelievable. Applicant amended its application to delete "recruiting" from the recitation of services only after (1) Opposer had written a letter to Applicant asserting that Applicant's use of the mark ACQUIENT & Design for recruitment services would cause confusion with Opposer's mark AQUENT, registered for recruitment services [See Exhibit 2 to Opposer's summary judgment motion], and (2) the PTO Examining Attorney had issued an Official Action indicating that the "recruitment" services identified in Applicant's original application should be listed separately in International Class 35 [See Exhibit 2 to Applicant's Opposition Brief]. Thus the pertinent chronology is as follows:

-- December 31, 2003	Applicant files its application for "Sales training, recruiting, consulting, and management services."
-- May 18, 2004	Opposer, noting the Application, writes to Applicant stating that use of the mark ACQUIENT for recruitment services would infringe upon the AQUENT mark.
-- July 27, 2004	PTO Examining Attorney indicates that "recruitment" services fall in a separate class from consulting services and training services.
-- August 2, 2004	Applicant deletes "recruiting" and re-writes its recitation of services to read: "sales training, business consultation in the field of sales; business management services." [See Exhibit 3 to Applicant's Opposition Brief].

Faced with these facts and with the unambiguous meaning of the term "recruiting" services, and faced with Opposer's summary judgment motion, Applicant now disingenuously claims that "recruiting" meant consulting services that include advice and instructions about recruiting.

Opposer, the PTO Examining Attorney, and Applicant's CEO all knew what "recruiting" services meant. When Applicant's CEO testified unambiguously that Acquient has never provided "recruiting services," there was no hesitation and no equivocation, no doubt as to the meaning of the term. Only after Opposer filed its summary judgment motion did Applicant offer its new interpretation of the meaning of the term "recruiting services." Plainly, this desperate litigation tactic is a transparent ploy to avoid the consequences of Applicant's original false statement.

Applicant's attempt to create a genuine factual issue by distorting the clear meaning of a term brings to mind the recent citable decision in *Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, Opposition No. 91116242 (January 10, 2006). There, Opposer Standard Knitting claimed that it thought the simple phrase "use in commerce" in its trademark application meant that the product in question was "made or sold." The Board found that explanation incredible. Here it is likewise simply

incredible that Applicant believed the term "recruiting" services to mean something other than recruitment.

Of course, Applicant, like every party charged with fraud, claims innocence. But that claim is not only highly suspect but irrelevant. In *Medinol Ltd. v. Neuro VASX*, Inc., 67 USPQ2d 1205 (TTAB 2003) the Board found fraud (on summary judgment) despite the standard claim of innocence, and it cited with approval the following passage from an abandonment case, *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 14 USPQ2d 1390, 1394 (TTAB 1990):

> In every contested abandonment case, the respondent denies the intention to abandon its mark; otherwise there would be no contest. *** An averment of no intent to abandon is little more than a denial in a pleading.

Moreover, the proper inquiry here is "not into the [Applicant's] subjective intent, but rather into the objective manifestations of that intent." *Medinol*, 67 USPQ2d at 1209.

Applicant Acquient stated, in its verified application, that it was using its mark in connection with recruiting services. That statement was false. It therefore committed a fraud on the USPTO, and under the applicable case law the subject application should be declared void *ab initio*.

Applicant's belated amendment of its application cannot erase its initial fraud. See *Medinol*, 67 USPQ2d at 1208. An

Applicant must be truthful when it files an application. To allow false statement to be corrected later, when convenient, would completely undermine the trademark system. In *Standard Knitting*, the Board recently emphasized again the importance of an applicant's truthfulness as to use of its mark:

> [T]he United States Patent and Trademark Office relies on the thoroughness, accuracy and honesty of each applicant. In general, the Office does not inquire as to the use of the mark on each good listed in a single class and only requires specimens of use as to one of the listed goods, relying on applicant's declaration with regard to use on the other listed goods. TEMP Sections 806.01(a) and 904.01(a) (4th ed. 2005). Allowing registrants to be careless in their statements of use would result in registrations improperly accorded legal presumptions in connection with goods on which the mark is not used. *Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, Opposition No. 91116242 (January 10, 2006)(slip op., p. 27, n. 14).

Here, Applicant likewise was not truthful when it filed the subject application. Such false statements cannot be ignored, minimized, or explained away, nor can they be condoned.

Conclusion

For the foregoing reasons, the subject application should be deemed void *ab initio* on the ground of fraud, and this opposition should be sustained.

Aquent LLC.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney(' of record for each other party by mail ~~/hand/facsimile~~ on 2-6-06