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

Proceeding	91169740
Party	Defendant CINGULAR WIRELESS II, LLC CINGULAR WIRELESS II, LLC 5565 GLENRIDGE CONNECTOR, N.E. ATLANTA, GA 30342
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Attachments	Cingular's Opposition to Sprint's Motion to Compel.PDF ( 13 pages )(426966 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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SPRINT COMMUNICATIONS COMPANY L.P.,	)	
	)	
	)	
Opposer,	)	Opposition No. 91169740
	)	
v.	)	Serial No. 78/490,750
	)	
CINGULAR WIRELESS II, LLC,	)	
	)	
Applicant.	)	

**CINGULAR’S OPPOSITION TO SPRINT’S MOTION TO RESET TESTIMONY PERIODS AND TO COMPEL DISCOVERY RESPONSES**

Applicant Cingular Wireless II, LLC (“Applicant” or “Cingular”) hereby opposes the Motion to Reset Testimony Periods and to Compel Discovery Responses filed by Sprint Communications Company L.P. (“Opposer” or “Sprint”).

**I. INTRODUCTION**

The motion to reset testimony periods and to compel discovery responses filed by Sprint is a mere subterfuge, and nothing more than a dilatory tactic to further delay the opposition proceedings. As such, it is a waste of the Board’s time and resources. Cingular has responded to Sprint’s discovery requests and has supplemented those responses in light of the parties’ Rule 37 telephone conference on June 21, 2007. There is no reason to reset the testimony periods in this action and further delay this opposition.

**A. Sprint’s Motion is Merely an Attempt to Delay the Opposition.**

As the plaintiff in this proceeding, Sprint should be prepared to present its case and move forward. Instead, it repeatedly has requested to extend this opposition. Eventually, Cingular tired of consenting to extensions to prolong this opposition against its application.

Contrary to Sprint's assertions, the parties have not been engaged in settlement negotiations for many months. In fact, Sprint has made only one disingenuous "settlement offer" to Cingular, on April 26, 2007, that Cingular abandon its application to register the mark MORE BARS IN MORE PLACES, and Sprint would not object to a new application for the mark MORE BARS IN MORE PLACES THAT'S OUR GOAL. In other words, Sprint wanted Cingular to concede this opposition.

At no time did Cingular or its counsel advise Sprint or its counsel that the offer was likely to be accepted; in fact, at the time Sprint's counsel extended the "proposal," Cingular's counsel advised that the offer was not likely to be accepted (but would of course be conveyed to Cingular). On May 23, 2007, Sprint's counsel reiterated the settlement proposal and requested another thirty-day extension of all deadlines. On May 24, 2007, Cingular's in-house counsel advised Sprint's in-house counsel that the settlement proposal would not be acceptable. On May 25, 2007, Cingular's outside counsel advised Sprint's counsel that Cingular did not wish to further delay resolution of this opposition. Sprint immediately demanded a further extension due to its claimed "surprise" at learning that Cingular would not abandon its application. Although Cingular did not wish to further delay the opposition, it consented to an additional two-week extension out of professional courtesy.

The parties' written discovery requests initially had been served on September 29, 2006 (Sprint's requests) and October 2, 2006 (Cingular's requests). Thus, when Cingular advised Sprint that it was prepared to move forward, both parties' discovery requests had been pending for approximately **eight months**. Because of the multiple extensions already sought and agreed upon in this proceeding, both parties' responses to outstanding written

discovery requests were due May 30, 2007. Each party had equal time to prepare and serve discovery responses. Moreover, as the plaintiff and the party that initiated this proceeding, Sprint should have been prepared to move forward. Nonetheless, Cingular consented to Sprint's request for a further extension until June 13, 2007, and both parties served written responses. Sprint's counsel immediately wrote a letter on Tuesday, June 19, 2007, claiming that Cingular's responses were not sufficient and threatening to move to compel on Thursday, June 21, 2007. At the time Cingular's counsel received Sprint's letter, it had not even received Sprint's discovery responses, which turned out to be extremely deficient. Nevertheless, Cingular responded to Sprint's concerns and provided Sprint's counsel with further information in the telephonic discovery conference on June 21, 2007, and delivered copies of its responsive documents to Sprint's counsel on June 22, 2007. Cingular subsequently has produced additional documents that fully respond to Sprint's objections to the sufficiency of Cingular's responses. At no time during the June 21, 2007 telephone conference between the parties' counsel did Sprint's counsel request an extension of the trial dates or indicate that a motion to reset the testimony periods would be filed.

Sprint previously has brought an action against Cingular based on its use of MORE BARS IN MORE PLACES before the National Advertising Division of the Council of Better Business Bureaus, Inc. (the "NAD Case"). Sprint, consequentially, previously has presented whatever evidence it has to support this opposition in another forum.<sup>1</sup> That proceeding was decided in Cingular's favor. Cingular can only surmise that Sprint simply is attempting to delay registration of Cingular's mark as long as possible by prolonging this opposition.

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<sup>1</sup> Indeed, Sprint's principal complaint about Cingular's discovery responses was that Cingular referred to, rather than produced, the record of the NAD Case, to which both parties had access. To render that issue moot, Cingular produced the NAD Case documents on June 22, 2007.

**B. Sprint's Motion Has Been Filed in Violation of Trademark Rule 2.120(e)(1).**

The Board should deny Sprint's motion not only because it is a mere dilatory tactic, but also because the motion is untimely under Trademark Rule 2.120(e)(1).

The Board's original scheduling order set a December 29, 2006 deadline for the first testimony period to close, making the opening of that period November 29, 2007. As a result of stipulated extensions, under the current scheduling order, Sprint's testimony period is set to close July 11, 2007, and opened on June 11, 2007. Sprint's motion filed on June 25, 2007 therefore should be denied for failure to comply with the deadline set by Trademark Rule 2.120(e)(1), which provides in relevant part that:

if a party...fails to answer...any interrogatory, or fails to produce and permit the inspection and copying of any document of thing, the party seeking discovery may file a motion before the Trademark Trial and Appeal Board for an order to compel...production and an opportunity to inspect and copy.  
**The motion must be filed prior to the commencement of the first testimony period as originally set or as reset.**

37 C.F.R. § 2.120(e)(1) (emphasis added). Sprint's motion is merely yet another tactic to suspend this proceeding while the Board examines its motion, and therefore is a waste of the Board's time and resources. As the plaintiff in this action, Sprint should be held to the dates as currently scheduled, and should not be entitled to benefit from any further extensions or delay.

**C. Sprint's Motion is Misleading and Distorts the Facts.**

Sprint's moving papers present a misleading description of events leading up to the filing of its motion. First, Sprint states that "the parties conducted settlement discussions for

many months and, as a result, the time for responding to discovery and trial periods were extended on several occasions.” As discussed above, this is not true.

In support of the allegation that Cingular’s discovery responses are insufficient, Sprint cites Cingular’s responses to certain document requests that “documents ‘will’ be produced.” For some reason, Sprint has interpreted Cingular’s assurance that it “will” produce documents as meaning that it “will not” produce documents. Cingular already has produced the responsive documents, served on June 22, 2007 pursuant to Sprint’s counsel’s further requests in the discovery conference conducted on June 21, 2007 by telephone. Cingular subsequently has produced additional representative examples of use of its mark.

Despite objecting to Cingular’s assurances that it would produce responsive documents, if any, Sprint has made the same assurances to Cingular. When the parties’ counsel discussed the discovery responses on June 21, 2007, Sprint’s counsel revealed that there are in fact responsive documents which had not yet been produced. Sprint’s counsel advised Cingular’s counsel that it would produce these documents on “Monday or Tuesday” (June 25 or June 26). Cingular still has not received any supplemental production.

As another example, despite Sprint’s contention that Cingular’s reference to the NAD Case was improper, in response to Cingular’s request to identify “all legal proceedings of which you are aware related to Applicant’s Opposed Mark or Applicant’s use of ‘More Bars in More Places’” in Interrogatory No. 7 – which certainly encompasses the NAD Case – Sprint merely objected on the basis that such information “are [sic] more likely to be known to Applicant,” and the interrogatory was burdensome and harassing. However, the interrogatory specifically requested information regarding the legal proceedings “of which

you are aware,” and the inquiry seeking knowledge of Sprint’s awareness therefore cannot be evaded by claiming that Cingular is “more likely” to be aware of the relevant legal proceedings.

**D. Cingular Already Has Responded to Sprint’s Discovery Requests and Fully Supplemented Those Responses as Requested by Sprint’s Counsel.**

**1. Interrogatory No. 5**

Cingular responded to this interrogatory, which expressly referenced Interrogatory No. 1; however, Sprint claims that Cingular should have been aware that Sprint meant to reference Interrogatory No. 4, not Interrogatory No. 1. Cingular’s counsel advised Sprint’s counsel on the telephone conference regarding discovery on June 21 that it would respond upon receiving a revised interrogatory, and Sprint’s counsel agreed to that proposal. Instead of receiving a revised interrogatory, Cingular learned, from reviewing the Trademark Trial and Appeal Board web site, that Sprint had filed a motion to compel. Sprint apparently does not intend to serve a revised interrogatory, contrary to its assurances that it would do so.

Despite the typographic error, Cingular attempted to respond to the interrogatory to the best of its ability, responding that “Applicant’s Mark was first used in advertising for Cingular’s products and services in late 2004; Cingular further responds that it would be impossible to identify the first purchasers who encountered Applicant’s Mark.”

**2. Interrogatory No. 18**

Sprint notes Cingular’s assurance that it would produce representative examples of advertising, and that during the June 21, 2007 call, Cingular’s counsel advised Sprint’s counsel that it still was in the process of locating additional representative examples of advertising. Sprint objects on the basis that it is “disingenuous” to exercise the option to

produce business records and then “to state that no business records are available.” Again, Sprint has distorted the facts. Despite acknowledging Cingular’s assurance that the “search is continuing,” Sprint mischaracterizes the assurance as stating “that no business records are available.” Cingular in fact has located additional examples of representative advertising, which it has produced to Sprint.

**3. Interrogatory No. 20**

Sprint objects to Cingular not providing the specific page numbers of the NAD Case documents in response to the interrogatory; however, Cingular in fact has directed Sprint’s counsel to the specific page numbers. Attached as Exhibit A is a copy of the June 22, 2007 letter from Cingular’s counsel, Maria Baratta, to Sprint’s counsel, Marie-Anne Mastrovito.

**4. Document Request No. 3 / Document Request No. 7**

Cingular has advised Sprint that it does not maintain archived or historical records of its advertising. Such documents are neither lost nor destroyed; they simply are not maintained. Cingular does not deny that it has advertised using the MORE BARS IN MORE PLACES mark, only that it does not have historical records of all such materials.

As previously stated, Cingular has located additional examples of representative advertising, which it has produced to Sprint.

**5. Document Request No. 4**

Sprint has requested that Cingular “[p]rovide documents sufficient to show the names, titles and addresses of each and every person who participated in the Applicant’s selection, design and adoption of Applicant’s Mark, including, specifically, the name(s) of the person and persons who first suggested that Applicant adopt and use Applicant’s Mark for



Applicant's goods," and now objects to Cingular's response in which Cingular objected to the interrogatory on the basis that Sprint's request seeks documents that [Cingular] believes do not presently exist in the form requested." According to Sprint, no specific form has been requested. To clarify its response, Cingular believes that the documents Sprint seeks do not presently exist.

#### **6. Document Request No. 23**

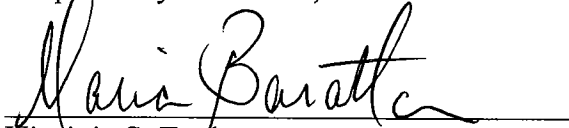
Sprint repeatedly has insisted that Cingular has failed to produce a privilege log concerning documents protected from discovery. Cingular's responded to this document request as follows: "Subject to these objections, Cingular responds that it will produce a privilege log concerning **any** documents protected from discovery by the attorney-client privilege, the work product doctrine, or Fed. R. Civ. P. 26(b) withheld from production, **if any.**" (emphasis added) Cingular confirmed to Sprint's counsel on June 21, 2007 that there are no privileged documents responsive to Sprint's discovery requests, and therefore there is no need for a privilege log. Sprint acknowledged this statement, yet still cites Cingular's failure to produce a privilege log as a basis for its motion to compel and to reset the testimony periods. Of all the "issue[s]...still to be resolved" upon which Sprint has based its motion, this is by far the most tenuous, and reveals that Sprint's motion is nothing but a mere subterfuge and yet another dilatory tactic to postpone the proceeding that Sprint initiated.

## **II. CONCLUSION**

Sprint's motion to reset the testimony periods and to compel discovery responses is merely an attempt to further prolong this opposition. It contains incorrect and moot

arguments, and fails procedurally to comply with the applicable rule. Sprint's motion is based principally on its allegations that Cingular has failed to produce the NAD Case documents and documents showing Cingular's use of the mark, which Cingular has produced and supplemented. Cingular therefore respectfully requests that the Board deny Sprint's motion.

Respectfully submitted,



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Attorneys for Applicant

## **EXHIBIT A**

June 22, 2007

direct dial 404 532 6937  
direct fax 404 541 3120  
MBaratta@KilpatrickStockton.com

**Via E-Mail (Confirmation Copy by First Class Mail)**

Marie-Anne Mastrovito, Esq.  
Abelman Frayne & Schwab  
666 Third Avenue  
New York, NY 10017-5612

Re: Opposition No. 91169740  
*Sprint Communications Company LP v. Cingular Wireless II, LLC*  
U.S. Trademark Application Serial No. 78/490,750  
For the Mark MORE BARS IN MORE PLACES  
Our Reference: 46414/327545

Dear Marie-Anne:

Please find enclosed Cingular Wireless II, LLC's ("Cingular") documents responsive to Opposer's First Document Requests to Applicant and Opposer's First Interrogatories to Applicant.

Bates Nos. CIN 000001-CIN 000070 are documents filed in Case No. 4508 before The National Advertising Division of the Council of Better Business Bureaus, Inc., styled as *Sprint Nextel Corporation v. Cingular Wireless Corporation* ("NAD Case"). We have designated these documents as confidential pursuant to the confidentiality provisions of the NAD Case and in anticipation of a protective order in this Opposition proceeding. While both parties to this Opposition have equal access to the documents filed in the NAD Case, we are continuing to investigate whether our client can locate any of the exhibits and attachments referenced in the enclosed documents, and we will provide you with copies of any such documents that can be found.

With respect to Cingular's responses to Interrogatory Nos. 1(a) and (b), please see Cingular's January 25, 2006 response to the Complaint filed in the NAD Case (Bates Nos. CIN 000014 - CIN 000034). In particular, we would like to direct your attention to Cingular's discussion of its adoption of the MORE BARS IN MORE PLACES trademark starting on page 11 (Bates No. CIN 000024).

Marie-Anne Mastrovito, Esq.  
June 22, 2007  
Page 2

We trust that this correspondence and the enclosed responsive documents resolve all of your concerns raised in our June 21, 2007 telephone conference regarding Cingular's responses to Sprint's discovery requests.

Best regards.

Sincerely,



Olivia Maria Baratta

Enclosures

Cc: Virginia S. Taylor, Esq.  
Alicia Grahn Jones, Esq.

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	)	
Applicant.	)	

**CERTIFICATE OF SERVICE**

A true and correct copy of the attached document has been served on counsel for  
Sprint via First Class Mail addressed as follows:

Marie-Anne Mastrovito  
Abelman, Frayne & Schwab  
666 Third Avenue  
New York, NY 10017

Dated: June 29, 2007

  
Olivia Maria Baratta