

ESTTA Tracking number: **ESTTA240744**

Filing date: **10/06/2008**

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

Proceeding	91172690
Party	Plaintiff Thierry Mugler Parfums S.A.S.
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Attachments	21776-mot-sanctions.pdf (14 pages)(402190 bytes)

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

In the Matter of Application Serial No. 78/671,246
For the Mark: ANGEL BREEZE
Filed: July 15, 2005
Date of Publication: May 9, 2006

THIERRY MUGLER PARFUMS S.A.S.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 172,690
)	
DUDLEY PRODUCTS, INC.,)	
)	
)	
Applicant.)	

OPPOSER'S MOTION FOR ENTRY OF SANCTIONS

On August 13, 2008 the Board ordered applicant to serve its responses to opposer's interrogatories within 30 days. Applicant did not comply with that order by the deadline of September 12, 2008, and continues to withhold substantive answers to opposer's first set of interrogatories in violation of the Board's order. Applicant's non-compliance makes it impossible for opposer to prepare properly for its testimony period, which is scheduled to

open in less than one month.

In view of applicant's unwillingness to cooperate with opposer and with the Board to bring this matter to a proper resolution, opposer respectfully requests that the Board enter judgment against applicant, pursuant to its discretion under 37 CFR § 2.120(g)(1). In the alternative, should the Board decide not to enter judgment against applicant at this stage of the proceeding, opposer respectfully requests that the Board enter the sanctions listed below, and such other sanctions against applicant as the Board deems appropriate. In support of its motion opposer states as follows.

STATEMENT OF FACTS

(1) Applicant's conduct regarding discovery in this matter is preventing opposer from preparing its arguments and evidence, and continues to delay the proceeding from progressing toward a decision on the merits. Opposer served its initial discovery requests on applicant on March 19, 2007, yet more than a year and a half later, applicant still has provided no substantive answers to opposer's interrogatories. Despite two separate orders by the Board directing applicant to serve responses by a certain date, applicant still refuses to comply.

(2) By and through their respective counsel, the parties initially agreed to extend the deadline for responding to each other's outstanding discovery requests until October 19, 2007. But rather than provide satisfactory responses by that stipulated date, applicant instead filed a motion with the Board seeking additional time to respond. The Board eventually granted applicant's motion; however, in its decision of January 30, 2008 the Board also specified:

Applicant is ordered to serve upon opposer responses to opposer's outstanding discovery requests within thirty (30) days from the mailing date of this order. Absent opposer's consent, no further extensions to serve responses to opposer's outstanding discovery requests will be granted. In the event applicant fails to comply with the Board's order, opposer may file a motion for sanctions pursuant to Trademark Rule 2.120(g).

More than eight months ago, applicant was first ordered by the Board to provide its discovery responses by the deadline of March 1, 2008.

(3) Contrary to the Board's order of January 30, 2008, applicant chose to withhold substantive responses to opposer's discovery requests. Instead, applicant relied on token responses that it had served on November 9, 2007, which only listed a number of general objections to opposer's interrogatories and provided no substantive answers.

(4) After several failed attempts to resolve applicant's late objections and obtain satisfactory discovery responses, opposer's only recourse was to seek the Board's intervention. Opposer filed a Motion to Compel Discovery on February 29, 2008 and the Board granted opposer's motion on August 13, 2008, finding that opposer's interrogatories were appropriate in number and required proper responses. For a second consecutive time, applicant was directed to serve its interrogatory responses within 30 days of the Board's order, this time with a deadline of September 12, 2008. But once again, applicant ignored the Board's order and provided no answers, documents, or feedback of any kind by the Board's deadline. It continues to withhold all substantive answers to opposer's interrogatories.

(5) Pursuant to the revised schedule set by the Board, opposer's testimony period currently is scheduled to open on October 22, 2008.

ARGUMENT

Rather than comply with the rules and procedures governing discovery, applicant repeatedly has refused to provide the discovery to which opposer is entitled under 37 CFR § 2.120. In fact, applicant has twice defied direct Board orders setting

specific deadlines for applicant to provide appropriate responses to opposer's discovery requests. In January 2008 the Board granted applicant additional time to respond to opposer's discovery requests, with the stipulation that applicant's responses were due by March 1, 2008 and no further extensions would be granted. That Board took care to note that applicant's failure to comply with the order would subject applicant to possible sanctions under Trademark Rule 2.120(g).

The only interrogatory answers provided by applicant within the Board's deadline were general objections to opposer's requests. When applicant persisted in refusing to provide substantive answers, opposer was forced to return to the Board for relief. The Board granted opposer's Motion to Compel on August 13, 2008, ruling that opposer's interrogatories were appropriate in number and setting a new deadline of September 12, 2008 for applicant to serve appropriate responses. That order, like the first, was ignored by applicant.

When a party fails to comply with an order of the Board -- let alone two separate orders on the same point -- the Board has discretion to impose sanctions against that party as provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure. 37 CFR §

2.120(g). Potential sanctions under Rule 37(b)(2) include:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party.

Item (v) does not apply here, because the offending party is in the position of defendant in this matter. Likewise, item (iv) is not applicable because applicant has demonstrated that it is willing to delay this proceeding by withholding discovery in direct violation of Board orders. To stay the proceeding at this point would reward applicant's disregard for the rules and the

Board's authority over this proceeding.

The remaining sanctions listed in items (i), (ii), (iii), and (vi) are warranted here, when the offending party has twice been instructed by the Board to fulfill specific discovery obligations by a specific date, and has twice failed to do so. Applicant's non-compliance is a roadblock preventing opposer from effectively preparing for the testimony and trial periods, and it has become clear that applicant's actions reflect a deliberate course of conduct in defiance of the established rules and the Board's authority. Applicant's attempt to derail this proceeding by withholding the required discovery warrants the harshest sanctions, since applicant in effect is attempting to evade a decision on the merits by declining to meet its discovery obligations even when twice ordered to do so.

REQUEST FOR RELIEF

In view of the foregoing, opposer respectfully requests that the Board exercise its discretion to render a default judgment against applicant. Applicant's conduct makes it impossible for the parties to complete discovery and proceed to further stages of the proceeding, and applicant has shown that it will not comply with direct orders by the Board. A judgment

against applicant is warranted and appropriate under the circumstances. See Baron Philippe de Rothchild S.A. v. Styl-Rite Optical Mfg. Co., 55 USPQ2d 1848, 1854 (TTAB 2000).

In the alternative, should the Board decide to impose lesser sanctions under Rule 37(b)(2), opposer requests that the Board:

1. Strike applicant's Affirmative Defenses in applicant's answer to the notice of opposition, and refuse to allow applicant to proffer evidence in support of those claims and defenses, namely "That the use and/or registration of the word 'Angel' in marks by third parties over a significant time period, for various goods, precludes the assertion of rights by the Opposer in the underlying word which the Opposer has asserted as the basis to impede the registrability of the Applicant's mark for the goods shown in the Applicant's application."
2. Prohibit applicant from introducing evidence regarding or relating to the subject matter of applicant's Affirmative Defense, a matter on which opposer has been hindered from preparing its own arguments and evidence due to applicant's failure to provide appropriate discovery.

3. With respect to Interrogatory No. 1, direct that for purposes of this proceeding applicant's date of first use and date of first use in interstate commerce of "ANGEL BREEZE," if any, shall be deemed later than opposer's registration, date of first use, and date of first use in commerce of its mark "ANGEL."

4. With respect to Interrogatory No. 2, direct that for purposes of this proceeding applicant's products/services, manner of trademark use, customer markets and channels of trade, geographic markets, and general sale price shall be deemed identical to or directly competitive with opposer's "ANGEL" goods.

5. With respect to Interrogatory No. 3, direct that for purposes of this proceeding applicant's proposed goods/services, if any, shall be deemed identical to or directly competitive with opposer's "ANGEL" goods.

6. With respect to Interrogatory No. 4, direct that for purposes of this proceeding applicant's advertising and promotion of the pertinent goods and services shall be deemed directly competitive with opposer's advertising and promotion of its corresponding goods and services.

7. With respect to Interrogatory No. 5, direct that for purposes of this proceeding applicant's distributors, retailers, resellers, and other marketing and distribution outlets shall be deemed directly competitive with those of opposer for the pertinent goods and services.
8. With respect to Interrogatory Nos. 6 and 7, direct that for purposes of this proceeding applicant's other marks or proposed marks with "ANGEL" as an element, if any, shall be deemed to have a date of first use and date of first use in interstate commerce later than opposer's registration, date of first use, and date of first use in commerce of opposer's "ANGEL" mark.
9. With respect to Interrogatory Nos. 8 and 9, prohibit applicant from relying on or introducing into evidence any federal or state registration owned by applicant for any mark that includes "ANGEL" as an element.
10. With respect to Interrogatory No. 11, prohibit applicant from relying on or introducing into evidence any trade name or assumed name registration or name reservation in support of the proposition that applicant owns rights to a term that includes "ANGEL" as an element, or that such

purported rights do not conflict with those of opposer.

11. With respect to Interrogatory No. 12, prohibit applicant from relying on or introducing into evidence any poll, survey, consumer study, or other market research in support of the proposition that applicant owns rights to a term that includes "ANGEL" as an element, or that such purported rights do not conflict with those of opposer.

12. With respect to Interrogatory No. 13, prohibit applicant from relying on or introducing into evidence any inquiry, survey, poll, credit check, or other investigation for the purpose of contesting opposer's rights to opposer's marks identified in the Notice of Opposition.

13. With respect to Interrogatory Nos. 14 and 15, prohibit applicant from relying on an absence of actual confusion, if applicable, to support the proposition that applicant owns rights to a term that includes "ANGEL" as an element, or that such purported rights do not conflict with those of opposer; or, to the extent that applicant is aware of instances of actual confusion, direct that for purposes of this proceeding such evidence shall only be considered in support of opposer's position.

14. With respect to Interrogatory No. 16, direct that for purposes of this proceeding applicant shall be deemed to have been aware of opposer's marks identified in the Notice of Opposition, at the time applicant filed U.S. Trademark Application Serial No. 78/671,246.

15. With respect to Interrogatory No. 17, direct that for purposes of this proceeding applicant shall be deemed to have been aware of opposer's marks identified in the Notice of Opposition, at the time applicant began using applicant's mark, if use has begun.

16. With respect to Interrogatory No. 18, direct that for purposes of this proceeding all evidence propounded by applicant regarding the time and manner in which applicant first became aware of opposer's "ANGEL" marks shall be considered only in support of opposer's position.

17. With respect to Interrogatory No. 19, direct that for purposes of this proceeding all evidence propounded by applicant regarding opinions received by applicant concerning a likelihood of confusion between the pertinent marks shall be considered only in support of opposer's position.

For the Board's reference, opposer notes that copies of Opposer's First Set of Interrogatories were provided to the Board earlier, as exhibits to opposer's Motion to Compel Discovery filed on February 29, 2008 as well as opposer's reply brief filed on April 3, 2008.

CONCLUSION

In view of applicant's direct and knowing violation of the rules governing discovery in this matter and two Board orders setting deadlines for applicant to respond to opposer's discovery requests, opposer requests that the Board issue a default judgment against applicant. In the alternative, opposer respectfully requests that the Board impose the above-listed sanctions against applicant and such other sanctions as the Board deems appropriate.

As opposer's testimony period is scheduled to open shortly, opposer requests that the testimony and trial periods be reset upon the Board's decision on this motion.

Respectfully submitted,

THIERRY MUGLER PARFUMS S.A.S.

Date: OCTOBER 6, 2008

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSER'S MOTION FOR ENTRY OF SANCTIONS was served on applicant's counsel by First Class Mail on October 6, 2008, addressed to:

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