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

Proceeding	91174509
Party	Plaintiff ConocoPhillips Company ConocoPhillips Company ,
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Date	07/23/2007
Attachments	Response & Brief.pdf (4 pages)(165956 bytes)

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

In Re serial No. 78/694,057
Mark: NUDIESEL
Filed: August 16, 2005
Published: August 15, 2006

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Opposition No. 91174509

CONOCOPHILLIPS COMPANY,

Opposer,

v.

DARRYL MORRIS,

Applicant.

**RESPONSE AND BRIEF TO
APPLICANT'S REQUEST TO REINSTATE APPLICATION
DUE TO USPTO OFFICE ERROR**

Opposer responds to, and contests Applicant's Request to Reinstate Application
Due to USPTO Office Error.

Background

On July 10, 2007, Applicant filed a request to reinstate its application. The request appears to be a motion to set aside a default judgment entered against the Applicant. The Board is asked to take judicial notice (as reflected by the Board's record) that the Board mailed Applicant a Notice of Default on February 14, 2007. The Notice informed Applicant that it had 30 days from the date of the order to show cause why judgment by default should not be entered against Applicant in accordance with Fed. R. Civ. P. 55(b).

Applicant ignored the Notice and a default judgment was subsequently entered against Applicant on May 17, 2007. Notwithstanding this notice and the entry of the judgment, Applicant nevertheless delayed filing the instant Request by nearly four months after Applicant was originally ordered to show cause by the Notice of Default.

Applicant has failed to meet its burden under Fed. R. Civ. P. 60(b).

Once a default judgment has actually been entered against a defendant pursuant to Fed. R. Civ. P. 55(b), the judgment may be set aside only in accordance with Fed. R. Civ. P. 60(b). This Rule states, in part, that on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b), as made applicable by 37 CFR § 2.116(a), applies to all final judgments issued by the Board, including default and consent judgments, summary judgments, and judgments entered after trial on the merits. As a practical matter, motions to vacate or set aside a final Board judgment are usually based upon the reasons set forth in subsections (1), (2) and/or (6) of Fed. R. Civ. P. 60(b). See TBMP § 312.03.

Where a motion for relief from judgment is made without the consent of the adverse party or parties, it must persuasively show (preferably by affidavits, declarations, documentary evidence, etc., as may be appropriate) that the relief

requested is warranted for one or more of the reasons specified in Fed. R. Civ. P. 60(b).
See TBMP § 544.

Applicant's request should be denied because Applicant has failed to meet its burden to persuasively show that relief is warranted under Fed. R. Civ. P. 60(b), §§ 1-6. Moreover, Applicant's submitted evidence is defective as described below.

Applicant has failed to comply with 37 CFR 2.197(b).

Assuming *arguendo* that Applicant's answer was mailed, but not received or lost by the office, Applicant has not met the burden established under 37 CFR 2.197(b). In the event that correspondence is considered timely filed by being mailed or transmitted in accordance with 37 CFR 2.197(a), but not received in the Office, and a proceeding is decided with prejudice, the correspondence will be considered timely if the party who forwarded such correspondence:

(1) informs the Office of the previous mailing or transmission of the correspondence within two months after becoming aware that the Office has no evidence of receipt of the correspondence;

(2) supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and

(3) includes a statement that attests on a personal knowledge basis or to the satisfaction of the Director to the previous timely mailing or transmission.

Clearly, Applicant has failed to meet each and every one of these requirements.

(1) Applicant was informed on or about February 14, 2007 of the notice of default judgment. It was not until nearly four months later that Applicant filed the instant Request.

(2) The documentation attached to Applicant's Request contains certificates of mailing that are not signed.

(3) Applicant has not attested to the timely mailing or transmission of the answer.

Objection to and Request to Strike Applicant's Exhibits from Evidence

Opposer objects to the documentation attached to Applicant's Request as it fails to comply with 37 CFR 2.197(b)(3). Applicant has not attested to the timely mailing or transmission of the documentation.

Opposer further objects to the documentation attached to Applicant's Request because the documentation has not been authenticated.

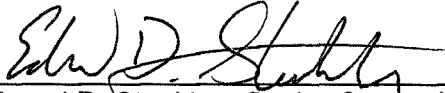
For the foregoing reasons, Opposer requests the Board to strike Applicant's exhibits.

Conclusion

Based on the foregoing, Opposer requests that Applicant's Request be denied, that the default judgment entered against Applicant on May 17, 2007 remain, that the opposition be sustained, and Applicant's registration refused.

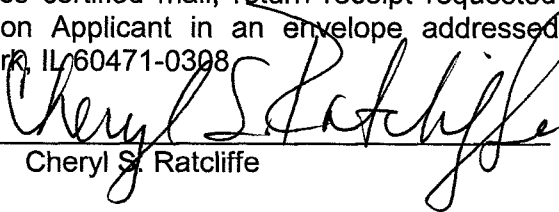
Respectfully submitted,

ConocoPhillips Company

By: 
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CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing **RESPONSE AND BRIEF TO APPLICANT'S REQUEST TO REINSTATE APPLICATION DUE TO USPTO OFFICE ERROR** was served by first class certified mail, return receipt requested on July 23, 2007 upon Applicant in an envelope addressed to Darryl Morris at P. O. Box 308, Richton Park, IL 60471-0308


Cheryl S. Ratcliffe