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

Proceeding	91187204
Party	Defendant Tim Bernardy
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Attachments	Applicants Reply to Opposers Opposition-signed.pdf (6 pages)(174629 bytes)

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Brian P. Kinder

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

In the Matter of Application Serial No. 77/314393
For the Mark BAUHAUS CLOTHING
Published in the *Official Gazette* on September 30, 2008

NATHANIEL CHRISTIAN,

Opposer

v.

TIM BERNARDY,

Applicant.

Opposition No.: 91187204

**APPLICANT'S REPLY TO OPPOSER'S OPPOSITION TO MOTION TO
DISMISS / OPPOSITION TO MOTION EXTEND TIME**

Applicant is mindful of the fact that consideration of a reply brief is discretionary and that the filing of reply briefs is discouraged in general since they tend to have little persuasive value and are often a mere reargument of the points made in the main brief. *TBMP* § 502.02(b). In this regard, Applicant submits this short reply brief in order to draw the Board's attention to some glaring misstatements in Opposer's papers and to call out Opposer's further egregious conduct.

1. Opposer Ignores The Three Deadlines that Already Passed and His Bad Faith Conduct in Association Therewith

Opposer's entire opposition is premised upon the contention that Applicant's Motion to Dismiss should fail because the 30 day testimony

period had not yet passed when Opposer filed the Motion to Extend. This argument ignores the fact that the following deadlines had passed at the time of Opposer's motion:

- Deadline for Discovery Conference: April 8, 2009
- Initial Disclosures: May 8, 2009
- Expert Disclosures: September 5, 2009

Opposer has not established either good cause or excusable neglect with regard to any of these deadlines. As set forth in Applicant's moving papers, Opposer failed to prosecute his claims for a year (Opposition filed 10/28/08; Motion to Extend filed 10/2/09). It was only after Applicant's counsel finally inquired, "I would like to know if there is any reason why I should not file a motion to dismiss for failure to prosecute?" that Opposer literally **snuck in** and filed a motion to extend before Applicant had time to file the motion to dismiss. See *Kinder Decl.*, ¶ 12, Ex. F. As explained below, Opposer did not serve a copy of the Motion to Extend on Applicant, did not attempt to contact Applicant before filing, and even made outright misrepresentations to the Board in the body of the motion itself. Accordingly, there is no simply good faith at work here, no good cause for the extension, no excusable neglect, and Applicant's motion to dismiss should be granted.

2. Opposer's Misrepresentation to the Board; Unreliability of Affidavit

In his initial Motion to Extend, Opposer represented to the Board that he attempted to obtain Applicant's consent to the motion, "but received no response." See *Opposer's Motion to Extend*, ¶ WHEREFORE. In Opposition to the Motion to Extend, Applicant submitted declarations of both Applicant and Applicant's legal counsel confirming under oath that neither had received any

communication whatsoever (i.e., email, phone call, etc.) from Opposer and that Opposer's representation to the contrary was entirely false.

In a bald, self-serving declaration, Opposer now maintains that he "telephoned opposing counsel and attempted to obtain his consent for an extension of the deadlines for pretrial disclosures and the 30 day trial period, but was not successful." See *Christian Affidavit*, ¶ 10, pg. 4. Opposer does not state the date(s) he telephoned opposing counsel, how many times he telephoned, why he was not "successful" in his attempt, whether he left a voice mail that was not returned, or any other details concerning his purported efforts to "telephone opposing counsel." Opposer does not provide phone records to confirm his telephone attempt(s) nor does he provide anything else that would support this bald assertion.

Given that Opposer had submitted not one, but two declarations under oath asserting that Opposer's representations were false and that he had not made any attempt to obtain consent as he represented to the Board, one would expect Opposer to provide evidence to clear his good name – that is, if his assertion were actually true. Having provided no evidence other than the self-serving declaration, Opposer has demonstrated his willingness to not only make misrepresentations to the Board, but to then make further misrepresentations to cover up his previous misrepresentations. Accordingly, the entire Affidavit of Christian should be treated as unreliable and given no consideration whatsoever.

3. Evidentiary Objections to the Affidavit of Opposer Nathaniel Christian

Even if the Board were to consider Opposer's affidavit, which it should not given the unreliability of the Declarant discussed above, Applicant also submits that the document is chalk full of inadmissible hearsay and statements that

discuss the contents of writings that are not in evidence. Accordingly, Applicant objects to the following statements in the Affidavit of Nathaniel Christian on such grounds:

- “At this time, Mr. Dowd also informed me that his numerous calls and emails to opposing counsel over the past few months had not been returned and that based upon his non-responsiveness, it was his impressions that Mr. Bernardy was not interested in zealously pursuing his defenses and claims.” (*Christian Affidavit, paragraph 5, page 2*).
- “Mr. Dowd assured me that no further documentation or assistance was needed from me and that he was perfectly capable of attending to the matter.” (*Christian Affidavit, paragraph 6, page 3*).
- “Time and again, Mr. Dowd assured me that the case was progressing, that he was in regular contact with opposing counsel, and that my input was not, for the time being, required. Repeatedly, Mr. Dowd told me that I was not in danger of missing any deadlines.” (*Christian Affidavit, paragraph 7, page 3*).
- “I telephoned opposing counsel and attempted to obtain his consent for an extension of the deadlines for pretrial disclosures and the 30 day trial period, but was not successful.” (*Christian Affidavit, paragraph 10, page 4*).
- “...coupled with his assurances of his compliance with those instructions...” (*Christian Affidavit, paragraph 12, page 4*).
- “...contacting opposing counsel in an attempt to resolve this issue consensually...” (*Christian Affidavit, paragraph 13, page 4*).

IV. CONCLUSION

In view of his failure to demonstrate "good cause," much less "excusable neglect," Opposer's Motion To Reopen should be denied and Applicant's Motion to Dismiss should be granted.

Dated: February 3, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing APPLICANT'S REPLY TO OPPOSER'S OPPOSITION TO MOTION TO DISMISS / OPPOSITION TO MOTION EXTEND TIME was served upon Opposer/Registrant at the following by the methods indicated below:

Daniel Seidenstein, Esq.

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BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid Santa Ana, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

Executed on February 3, 2010, at Santa Ana, California.



Brian P. Kinder, Esq.