

ESTTA Tracking number: **ESTTA314087**

Filing date: **10/29/2009**

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

Proceeding	91187350
Party	Defendant Philip Madison Jones
Correspondence Address	KEN DALLARA LAW OFFICES OF KEN DALLARA 2259 WARD AVE STE 100 SIMI VALLEY, CA 93065-1895 UNITED STATES kdallara@dallaralaw.com
Submission	Motion to Dismiss 2.132
Filer's Name	Ken Dallara
Filer's e-mail	kdallara@dallaralaw.com
Signature	/ken dallara/
Date	10/29/2009
Attachments	Motion to Dismiss and exhibits.pdf ( 22 pages )(279095 bytes )

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

In Re Application Serial Number : 77/399,884  
Application Filing Date : February 19, 2008  
Opposition Filing Date: November 5, 2008  
Opposition Number : 91/187350  
Applicant's Proposed Mark : MAJESTIC FORCE  
Date of Publication : July 8, 2008

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IMAGEWEAR APPAREL CORP,  
a Delaware Corporation

Opposer,

v.

PHILIP MADISON JONES,  
an Individual

Applicant,

---

**APPLICANT'S MOTION  
TO DISMISS UNDER  
37 C.F.R. 2.132(a)  
FAILURE TO PROSECUTE**

Commissioner for Trademarks  
Attention : Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**APPLICANT'S MOTION TO DISMISS UNDER TRADEMARK RULE 2.132(a)  
FAILURE TO PROSECUTE OPPOSITION**

Applicant, **Philip Madison Jones**, pursuant to Trademark Rule 2.132 hereby moves for an order dismissing this Opposition for failure to prosecute. Opposer has not provided any Disclosures pursuant to FRCP 26(a)(1) in this matter and has failed to submit Discovery or submit evidence during his testimony period in support of his opposition to Applicant's Mark.

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

**FACTS**

A) Opposer filed this Notice of Opposition on November 5, 2008. Applicant filed a timely answer on December 15, 2008. Opposer not taken any discovery nor has submitted any evidence during its testimony period. Opposer also failed to provide Initial Disclosures Document.

B) The scheduling Order issued by the Board on November 5, 2008 sets out the following deadlines:

Initial Disclosures Due : February 13, 2009

Close of Discovery: July 13, 2009

Close of Opposer's Testimony: October 11, 2009

C) Opposer served no discovery requests and took no discovery depositions in this matter. Moreover, Opposer took no testimony and provided no evidence in support of its Opposition during Opposer's Testimony Periods.

D) Applicant submitted his Initial Disclosure to Opposer on March 29, 2009 after it was clear that negotiations had completely broken down and that Opposition's Counsel was not communicating with Applicant's Counsel. (Exhibit A)

E) Applicant and Opposer began to exchange communications through Electronic Mail regarding the Discovery Conference on January 14-15, 2009. (Exhibit B)

F) Applicant and Opposer began Settlement Negotiations through voice and Electronic Mail on January 19, 2009, where Applicant initially held interest in a more narrowly crafted Identification of Goods which was suggested by both parties. Opposer did not file a Notice of Suspension as he stated that he

would do on February 13, 2009, as was reminded to do so later. Communications quickly broke down as Opposer, using a myriad of excuses why the Settlement was not communicated nor the Suspension filed, did not reply to any form of communication after March 3, 2009. (Exhibit C)

G) Applicant formally wrote to Opposer on May 27, 2009 after 10 weeks of no contact, response, or corresponding communication from Opposer. (Exhibit D)

**1) OPPOSER HAS FAILED SUBMIT EVIDENCE TO SUPPORT IT'S POSITION OF  
OPPOSITION TO APPLICANT'S APPLICATION**

Trademark Rule 2.132(a) provides that a motion for dismissal for failure to prosecute may be made by a defendant if a plaintiff's testimony period has expired and that party has neither taken any testimony nor offered any evidence in support of its case. *HKG Industries Inc. v. Perma-Pipe Inc.* (TTAB) 49 USPQ2d 1156 (10/16/1998). As stated above, Opposer (Plaintiff) has not submitted any testimony in support of his Opposition and the time has expired for him to do so. In this case, Opposer has provided no admissible evidence to support any portion of its Notice of Opposition.

Opposer's grounds for opposition assert that Applicant's mark is will cause a likelihood of confusion for the consumer. Likelihood of confusion under the Lanham Act, 15 U.S.C. § 1502(d), is a legal determination based upon factual underpinnings. *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1084 (Fed. Cir. 2000). The court reviews the factual underpinnings for that legal conclusion, that is, the DuPont factors, for *substantial* evidence. *Dickinson v. Zurko*, 527 U.S. 150, 156 (1999); *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1370 (Fed. Cir. 2002). Evidence is substantial if "a reasonable person might find that the evidentiary record supports the agency's conclusion." *On-Line Careline*, 229 F.3d at 1085. Opposer has failed to submit *any* evidence from which the Board is able to conduct this Opposition nor has Applicant been given any opportunity to refute any of the contentions of

the Opposer.

Opposer's failure to submit admissible evidence in support of its Notice of Opposition constitutes a failure to prosecute the Opposition. And as the Board is not allowed to give any consideration to evidence submitted in pleadings *TBMP § 705.02 (citing Maytag v. Luskin's, Inc., 228 USPQ 747 (TTAB 1986)*, the Opposer cannot sustain its Notice of Opposition, and the Board can not make a finding upon Opposer's Opposition, without the submission of competent and admissible evidence that is made of the record in a proper manner.

### CONCLUSION

Opposer has not prosecuted his own Opposition Proceeding. Applicant, though under no affirmative duty (*Hewlett-Packard Company v. Olympus Corporation 931 F.2d 1551, 18 U.S.P.Q.2d 1710*), has attempted to move the Proceeding along without success. The Board does not have sufficient evidence under which to base a ruling. It is therefore prayed;

WHEREFORE, it is respectfully requested that Board dismiss this Opposition with prejudice for failure to prosecute and take evidence.

Respectfully submitted,

/Ken Dallara/

Ken Dallara, Esq,  
Attorney for Applicant, Philip Madison Jones

Dated : October 28, 2009

Law Office of Ken Dallara  
4052 Eagle Flight Drive  
Simi Valley, California 93065  
661-255-8285  
661-310-0449 Fax  
kdallara@dallaralaw.com

**CERTIFICATE OF SERVICE**

1) I hereby certify that a copy of the MOTION TO DISMISS was caused to be transmitted to the Trademark Trial and Appeal Board via the ESTTA electronic filing system on October 28, 2009.

2) I hereby certify that a copy of the MOTION TO DISMISS was served upon foregoing counsel by depositing it with the United States Post Office, postage prepaid, on October 29, 2009 via First Class Mail to the following recipient:

Mr. Christopher M. Turk, Esq.  
Assistant Secretary  
Imagewear Apparel Corporation  
3411 Silverside Road  
Wilmington, Delaware 19810

By :     /ken dallara/      
Ken Dallara, Esq - Attorney for Applicant – Philip Madison Jones

**EXHIBIT A**

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

In Re Application Serial Number : 77/399,884  
Application Filing Date : February 22, 2008  
Opposition Number : 91/187,350  
Applicant's Proposed Mark : MAJESTIC FORCE  
Date of Publication : July 8, 2008

---

<b>IMAGEWEAR APPAREL CORP.</b>	}	<b>INITIAL DISCLOSURES</b>
Opposer/Petitioner,	}	
	}	
v.	}	
	}	
<b>PHILIP MADISON JONES,</b>	}	
	}	
Respondent/Applicant,	}	
	}	
	}	

---

Pursuant to Rule 2.120(a) of the Trademark Rules of Practice, Respondent/Applicant Philip Madison Jones makes its initial disclosure of individuals and documents relevant to discoverable information, documents and things. Respondent/Applicant does so without waiver of any privilege or objection to the admissibility of said disclosure.

**Individuals and Business Entities  
and Location of Documents and Things**

Entity	Address	Subjects of Information
Philip Madison Jones, Individual	c/o Law Offices of Ken Dallara, 2052 Eagle Flight Drive, Simi Valley, California	Adoption, use, creation, background, description, ownership, licensing and development of Majestic Force Mark; the use, creation, background, description, development, design, marketing, promotion, industry applicability/competition, industry background, and all forms of advertising, including internet, of the products associated with the Mark; physical location of some of the documents supporting the above information

Respectfully submitted,

Ken Dallara, Esq,  
Attorney for Respondent, Philip Madison Jones

Dated : March 27, 2009

Law Office of Ken Dallara  
4052 Eagle Flight Drive  
Simi Valley, California  
Telephone : 661-255-8285  
Facsimile : 661-310-0449  
Email – kdallara@dallara.com



CERTIFICATE OF SERVICE

1) I hereby certify that a copy of the INITIAL DISCLOSURE was served upon Opposer's counsel by depositing it with the United States Post Office, postage prepaid, on March 29, 2009 via First Class Mail to the following recipient:

Mr. Christopher M. Turk, Esq.  
Assistant Secretary  
Imagewear Apparel Corporation  
3411 Silverside Road  
Wilmington, Delaware 19810

By : \_\_\_\_\_  
Ken Dallara, Esq - Attorney for Applicant – Philip Madison Jones

## **EXHIBIT B**

Subject: RE: Opposition No. 91187350 / Mark: MAJESTIC FORCE  
From: kdallara@dallalaraw.com  
Date: Thu, Jan 15, 2009 3:43 pm  
To: Chris\_Turk@vfc.com

Perfect! I will call you at your Phone Number (302) 477-3930 ext. 232!

Ken Dallara, Esq.  
Law Offices of Ken Dallara  
2259 Ward Ave, Suite 100  
Simi Valley, California 93065  
661-255-8285  
661-310-0449 Fax  
WWW.SOCALIPLAWYER.COM

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----- Original Message -----

Subject: RE: Opposition No. 91187350 / Mark: MAJESTIC FORCE  
From: Chris\_Turk@vfc.com  
Date: Thu, January 15, 2009 1:30 pm  
To: kdallara@dallalaraw.com

Ken,

how is 1:30 PST?

- Chris

Christopher Turk  
Senior Counsel  
Imagewear Apparel Corp.  
3411 Silverside Road  
Wilmington, DE 19810 U.S.A.

Email: [chris\\_turk@vfc.com](mailto:chris_turk@vfc.com)  
Phone: (302) 477-3930 ext. 232  
Fax: (302) 477-3932

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[kdallara@dallara.com](mailto:kdallara@dallara.com)  
aw.com  
To  
01/15/2009 12:57 Chris\_Turk@vfc.com  
PM cc

Subject  
RE: Opposition No. 91187350 / Mark:  
MAJESTIC FORCE

Chris,

Thanks for returning my email. Friday is great, what time is best for you?  
Remember I am on the West Coast...please.

Ken

Ken Dallara, Esq.  
Law Offices of Ken Dallara  
2259 Ward Ave, Suite 100  
Simi Valley, California 93065  
661-255-8285  
661-310-0449 Fax  
WWW.SOCALIPLAWYER.COM

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----- Original Message -----

Subject: Re: Opposition No. 91187350 / Mark: MAJESTIC FORCE  
From: Chris\_Turk@vfc.com  
Date: Wed, January 14, 2009 1:21 pm  
To: kdallara@dallara.com

Ken,

I'm available most of tomorrow and Friday. I have to leave around 1:45 PST tomorrow, but am available any time earlier.

- Chris

Christopher Turk  
Senior Counsel  
Imagewear Apparel Corp.  
3411 Silverside Road  
Wilmington, DE 19810 U.S.A.

Email: chris\_turk@vfc.com  
Phone: (302) 477-3930 ext. 232  
Fax: (302) 477-3932

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kdallara@dallaralaw.com  
01/14/2009 02:30 PM  
To  
Chris\_Turk@vfc.com  
Please respond to cc  
kdallara@dallaralaw.co  
m Subject  
Re: Opposition No. 91187350 / Mark:  
MAJESTIC FORCE

Chris

Chris,

I am glad to see your email. I am in a very boring meeting today and probably tomorrow but would like to speak with you possibly finding a

simple middle ground that would be acceptable for you and your company without spending large sums of money on legal fees. Can we speak later this week prior to calling in outside counsel?

Thanks

-----Original Message-----

From: Chris\_Turk@vfc.com

To: kdallara@dallaralaw.com

Sent: Jan 14, 2009 8:31 AM

Subject: Opposition No. 91187350 / Mark: MAJESTIC FORCE

Dear Mr. Dallara,

I am in-house counsel for Imagewear Apparel Corp. I am in the process of bringing outside counsel up to speed on this matter, though there is a discovery conference deadline of today that I am e-mailing to address. I am available later today to discuss. Please let me know if there is a time that works for you; in the alternative, our outside counsel can handle it later this week. Please advise.

Regards,  
-Chris

Christopher Turk  
Senior Counsel  
Imagewear Apparel Corp.  
3411 Silverside Road  
Wilmington, DE 19810 U.S.A.

Email: chris\_turk@vfc.com  
Phone: (302) 477-3930 ext. 232  
Fax: (302) 477-3932

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Sent via BlackBerry from T-Mobile

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## EXHIBIT C

Chris,

I have not heard from you in a long time and you have not suspended the proceedings and the clock is ticking. I thought we had a settlement on the burner but ...???

Ken Dallara, Esq.  
Law Offices of Ken Dallara  
4052 Eagle Flight Drive  
Simi Valley, California 93065  
661-255-8285  
661-310-0449 Fax  
WWW.SOCALIPLAWYER.COM

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----- Original Message -----

Subject: RE: Majestic Force Mark Registration Application - UNDER FRE  
408 -Settlement negotiation  
From: KDALLARA@DALLARALAW.COM  
Date: Tue, April 21, 2009 11:01 pm  
To: CHRIS\_TURK@VFC.COM

Chris,

Thought this picture might jog your memory of what is going on with this opposition. This is my son in one of your Majestic Shirts.



What going on with this opposition? I realize that this is probably not your only iron in the fire, but...

By the way, I never received word of the suspension. Maybe I should check!

Ken

Ken Dallara, Esq.  
Law Offices of Ken Dallara  
4052 Eagle Flight Drive  
Simi Valley, California 93065  
661-255-8285  
661-310-0449 Fax  
WWW.SOCALIPLAWYER.COM

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----- Original Message -----

Subject: RE: Majestic Force Mark Registration Application - UNDER FRE  
408 -Settlement negotiation  
From: KDALLARA@DALLARALAW.COM  
Date: Mon, March 02, 2009 10:36 am  
To: CHRIS\_TURK@VFC.COM

Hey Chris,

If you made it into your office today, have you received any word from your corporate people. Did you file for the suspension?? I have not received a copy.

Ken

Ken Dallara, Esq.  
Law Offices of Ken Dallara  
2259 Ward Ave, Suite 100

Simi Valley, California 93065  
661-255-8285  
661-310-0449 Fax  
WWW.SOCALIPLAWYER.COM

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----- Original Message -----

Subject: Re: Majestic Force Mark Registration Application - UNDER FRE  
408 -Settlement negotiation  
From: CHRIS\_TURK@VFC.COM  
Date: Fri, February 13, 2009 9:13 am  
To: KDALLARA@DALLARALAW.COM

Dear Ken,

I've been playing phone tag (and e-mail tag) with our corporate attorney responsible for the MAJESTIC brand to make sure I have the business side of things down. Our initial disclosures are due today. Would you agree to either a suspension of the proceedings or at least allow us until next week to provide the disclosures?

Thanks,  
-Chris

Christopher Turk  
Senior Counsel  
The H.D. Lee Company, Inc.  
3411 Silverside Road  
Wilmington, DE 19810 U.S.A.

Email: CHRIS\_TURK@VFC.COM  
Phone: (302) 477-3930 ext. 232  
Fax: (302) 477-3932

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KDALLARA@DALLARALAW.COM  
01/26/2009 05:27 PM

Please respond to  
KDALLARA@DALLARALAW.COM

To: CHRIS\_TURK@VFC.COM  
cc

Subject: Re: Majestic Force Mark Registration Application - UNDER FRE 408 -Settlement negotiation

Thanks. I was feeling forgotten!

Ken  
Sent via BlackBerry from T-Mobile

-----Original Message-----

From: CHRIS\_TURK@VFC.COM

Date: Mon, 26 Jan 2009 16:56:15

To: <KDALLARA@DALLARALAW.COM>

Subject: Re: Majestic Force Mark Registration Application - UNDER FRE 408 - Settlement negotiation

Ken,

I have not forgotten this matter - just trying to work some things out with our business unit. I'll be in touch shortly.

- Chris

Christopher Turk  
Senior Counsel  
The H.D. Lee Company, Inc.  
3411 Silverside Road  
Wilmington, DE 19810 U.S.A.

Email: CHRIS\_TURK@VFC.COM  
Phone: (302) 477-3930 ext. 232  
Fax: (302) 477-3932

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kdallara@dallara1  
AW.COM

01/20/2009 02:06  
AM

CHRIS\_TURK@VFC.COM

To

cc

Subject

Majestic Force Mark Registration  
Application - UNDER FRE 408 -  
Settlement negotiation

This correspondence to you is made under FRE 408 - Settlement negotiation.

Chris,

Thank you for speaking with me on Friday. I know that you were racing to get out of your office and freeze, so I appreciate the time you spent with me. I also appreciate your candor in clarifying your intentions and concerns.

I have contacted my client ( who was feverishly preparing to produce the Commander-n-Chief's Inaugural Ball in DC - proud when a client gets some accolades ) and he agreed with the assessment that I mentioned to you.

He is willing to change his Identification of Goods to read;

Boxer briefs, Costumes for use in role-playing games, Halloween costumes, Halloween costumes with headgear and masks sold in connection therewith, sleeping garments, night shirts, nightwear, sleepwear, undergarments and underwear in International Class 025.

Should this meet with your requirements, I can formalize this in a letter to you, whereby he changes his identification of goods in exchange for your dropping of the opposition proceedings to the registration of his Mark.

Please tell me if this will satisfy all of your parties and we shall put this puppy to bed!

Thanks and I hope this morning temperatures are at least in the double digits!

Ken Dallara, Esq.  
Law Offices of Ken Dallara

2259 Ward Ave, Suite 100  
Simi Valley, California 93065  
661-255-8285  
661-310-0449 Fax  
WWW.SOCALIPLAWYER.COM

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## **EXHIBIT D**

Law Offices of Ken Dallara  
**Ken Dallara**  
4052 Eagle Flight Drive  
Simi Valley, California 93065  
Email : KDALLARA@DALLARALAW.COM Phone: 661-255-8285 Fax : 661- 310-0449  
California State Bar Number - 207480 United States Patent Attorney Number - 51,118  
Offices in Ventura and Simi Valley

May 27, 2009

Mr. Christopher M. Turk, Esq.  
Assistant Secretary  
Imagewear Apparel Corporation  
3411 Silverside Road  
Wilmington, Delaware 19810

VIA POSTAL AND ELECTRONIC MAIL ([Chris\\_Turk@vfc.com](mailto:Chris_Turk@vfc.com))

Re : Opposition Proceeding against Philip Madison Jones "MAJESTIC FORCE" Opposition Number 91/187350

Dear Mr. Turk,

I am writing to you more formally as it is obvious that my latest batch of emails have gone unanswered. We started this process off on a good note of cooperation and settlement but it has recently turned to silence and disobliging. After a couple of phone calls and emails, it seemed that we had made the progress necessary to bring this matter to a conclusion. Subsequent emails of February 13, March 2 and April 21, all of 2009, have gone unanswered.

It is acknowledged that we never had a discovery conference, and I come to find out know that you never have applied for nor received a suspension of the proceeding, as you have alluded to several times, and the clock it ticking.

As we last spoke, the offer on the table was that my client had agreed to limit his identification of goods to be :

*Boxer briefs, Costumes for use in role-playing games, Halloween costumes, Halloween costumes with headgear and masks sold in connection therewith, sleeping garments, night shirts, nightwear, sleepwear, undergarments and underwear in International Class 025.*

I have also sent by Postal Mail and attached to this email, an initial disclosure document, now that I can see that we are going to carry this opposition out to the bitter end. The time period for discovery will be closing soon and I see no reason to waste our client's money on something that we could agree upon in the short run.

I urge you to contact me so that we can hopefully conclude this proceeding and let our respective clients go and develop new ideas.

Respectfully Submitted,

Ken Dallara  
Law Offices of Ken Dallara  
Attorney for Applicant/Respondent Philip Madison Jones