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

Proceeding	91192645
Party	Plaintiff Trummer Bar, LLC, Heather Tierney, Christopher Tierney and Eric Lopez
Correspondence Address	MICHAEL J PAMPALONE III COLUCCI & UMANS 218 EAST 50TH STREET NEW YORK, NY 10022 UNITED STATES mpampalone@colucci-umans.com
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Signature	/Michael Pampalone/
Date	01/09/2012
Attachments	APOTHEKE COMBINED REPLY AND RESPONSE PAPERS.pdf ( 13 pages ) (749544 bytes )

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

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TRUMMER BAR, LLC, HEATHER TIERNEY, CHRISTOPHER TIERNEY and ERIC LOPEZ,	:	
	:	Opposition No. 91,192,645
Opposers,	:	Serial No. 77/584,448
	:	
v.	:	
	:	
ALBERT TRUMMER,	:	
	:	
Applicant.	:	
	:	

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**OPPOSERS' COMBINED REPLY AND RESPONSE TO APPLICANT'S OPPOSITION  
TO OPPOSERS' MOTION TO COMPEL AND EXTEND DISCOVERY AND CROSS  
MOTIONS TO COMPEL AND EXTEND DISCOVERY**

By and through their attorneys, Opposers, TRUMMER BAR, LLC, HEATHER TIERNEY, CHRISTOPHER TIERNEY and ERIC LOPEZ ("Opposers"), hereby reply to Applicant's Response to Opposer's Motion to Compel and Extend Discovery and Respond to Applicant's Cross Motion to Extend Discovery and Trial Dates, filed on December 19, 2011 and Applicant's Cross Motion to Compel and Extend Discovery ("Opposers' Response"). Opposers also submit the Supplemental Declaration of Michael J. Pampalone, III, in support of Opposers' Response, which is included below.

**I. Introduction and Background**

In light of Applicant's false representation to the contrary, it is important for the Board to initially note that Applicant is no longer a member of Trummer Bar, LLC, does not hold any ownership interest in Trummer Bar, LLC

and currently has no connection to the APOTHEKE business or its operation, whatsoever. Moreover, Trummer Bar, LLC's name has been formally changed to Apotheke, LLC.

It is well documented in Opposers' initial moving paper that they have repeatedly, and in good faith, attempted to contact Applicant's attorneys to schedule all outstanding noticed depositions, i.e., the deposition of Albert Trummer and the deposition of Heather Tierney (who will be providing testimony in her individual capacity and as Apotheke, LLC's designated Rule 30(b)(6) witness).<sup>1</sup> Moreover, on November 15, 2011, Opposers made it clear to Applicant that they would proceed to file a motion to compel if Applicant failed to provide a response. (Pampalone Decl., ¶ 5, Ex. 4) Accordingly, on December 2, 2011, having received no response from Applicant and with the discovery deadline looming, Opposers proceeded to file their motion, which seeks to move the Board to compel Applicant to produce himself for deposition by a date certain and to extend discovery for this purpose ("Opposers' Motion").

Applicant's counsel's purported excuses for failing to respond to Opposers' repeated good faith attempts to complete discovery, namely, citing counsel's "other casework" and "inability to communicate with Applicant" are

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<sup>1</sup> Applicant tries to mislead the Board by alleging that Opposers have not provided available dates for the deposition of Ms. Tierney to take place. Opposers have repeatedly provided available dates for Ms. Tierney's deposition and scheduled Ms. Tierney's deposition on those dates, only to have Applicant cancel her deposition in the days leading up to it. Most recently, in an effort to accommodate Applicant's counsel's schedule, Opposers advised Applicant that Ms. Tierney would appear for her deposition on "any other available date as necessary". (Pampalone Decl., ¶ 5, Ex. 4) It was Applicant's counsel's repeated failure to respond to Opposers good faith efforts to schedule all noticed depositions that necessitated the filing of Opposers' Motion.

transparent and unpersuasive.<sup>2</sup> If Applicant's counsel had simply provided a response of any kind to Opposers, the present motion practice would not have been necessary. Applicant, instead, chose to ignore Opposers' efforts and, in doing so, left Opposers no choice but to unilaterally move the Board and incur the expenses associated therewith.

It was not until after Opposers' Motion was filed that Applicant responded to Opposers, proposing dates that fall over a month after the close of discovery and seeking to, once again, further extend the discovery period. Having become all too familiar with this cycle of events and Applicant's delaying tactics, Opposers proposed a compromise to Applicant. On December 12<sup>th</sup> Opposers offered to withdraw their Motion if Applicant would agree to stipulate to a Board Order requiring that Mr. Trummer and Ms. Tierney's depositions be completed by a date certain. (Supplemental Pampalone Decl., ¶¶ 3-4, Ex. 1)

Applicant, once again, did not respond to Opposers' proposed compromise and now attempts to mislead the Board by conveniently failing to mention Opposers' proposal in Applicant's motion papers. Tellingly, while accusing Opposers of engaging in "abusive motion practice", Applicant now seeks to obtain "relief" through cross motion that is identical to Opposers' proposed compromise of December 12<sup>th</sup> (i.e., that the Board issue an Order requiring that Mr. Trummer and Ms. Tierney be produced for deposition by a date

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<sup>2</sup> Opposers note that Applicant falsely contends that Opposers' have demanded that Ms. Tierney's deposition occur "back-to-back" with Mr. Trummer's deposition. As Applicant knows, this scheduling arrangement was agreed upon by the parties as a matter of convenience and accommodation.

certain). The only plausible reason that Applicant would refuse Opposers' proposal and then move the Board in order to obtain the identical outcome is to improperly cause a further delay of the Opposition Proceeding. Absent the Board's intervention and an Order requiring that Applicant produce himself for deposition by a date certain, Opposers have no reassurance that Applicant will ever produce himself for deposition and these dilatory tactics will continue indefinitely.

## **II. Applicant's Opposition and Cross Motion**

It is evident that Applicant's gamesmanship knows no bounds. Applicant's Cross Motion amounts to nothing more than a retaliatory tactic to "get the upper hand" and portray Opposers' good faith efforts to timely complete discovery in an unfavorable light before the Board. It is also a blatant example of Applicant's continuous efforts to delay the present Opposition Proceeding at every turn in order to maintain the shadow that is being cast over Opposers' ownership of the APOTHEKE mark by Applicant's fraudulent application.

As discussed above, the "relief" that Applicant seeks by way of cross-motion is identical to the compromise that Opposers proposed to Applicant on December 12<sup>th</sup>. Accordingly, in order to prevent Applicant from continuing to delay his deposition indefinitely, Opposers willingly stipulate and respectfully request that the Board issue an Order requiring that the depositions of both Albert Trummer and Heather Tierney take place by a date certain and extending the discovery period and trial dates to the extent necessary for this purpose.

This will allow the Opposition Proceeding to move forward, enable Opposers to prove the claims made in the Notice of Opposition and establish Apotheke, LLC's clear rights to the APOTHEKE trademark.

**III. Applicant's Motion to Extend Discovery and Trial Dates**

On December 19, 2011, Applicant also filed a motion to extend the discovery and trial dates.<sup>3</sup> To the extent that this motion sets forth any intelligible basis for relief, Opposers respectfully request that the Board deny this motion as moot in light of Opposers' Motion, Applicant's Cross-Motion and Opposers' willingness to stipulate to the entry of an appropriate Board Order as set forth herein.

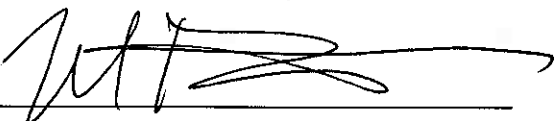
**IV. Conclusion**

For all of the reasons set forth above, Opposers respectfully request that the Board issue an order requiring that Albert Trummer and Heather Tierney be produced for deposition by a date certain and that the discovery period and trial dates be extended as necessary for this purpose.

Dated: New York, New York  
January 9, 2011

**COLUCCI & UMANS**

By: \_\_\_\_\_

  
Michael J. Pampalone, III  
218 East 50<sup>th</sup> Street  
New York, NY 10022  
Telephone: 212-935-5700  
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[mpampalone@colucci-umans.com](mailto:mpampalone@colucci-umans.com)

*Attorneys for Opposers*

<sup>3</sup> While Applicant's motion references an opposition proceeding that Applicant has purportedly brought against Opposers, Opposers are not aware of any such opposition proceeding and assume that this representation was made in error.

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

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	:	Opposition No. 91,192,645
Opposers,	:	Serial No. 77/584,448
	:	
v.	:	
	:	
ALBERT TRUMMER,	:	
	:	
Applicant.	:	
	:	

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**SUPPLEMENTAL DECLARATION OF MICHAEL J. PAMPALONE, III, IN SUPPORT  
OF OPPOSERS' COMBINED REPLY AND RESPONSE TO APPLICANT'S  
OPPOSITION TO OPPOSERS' MOTION TO COMPEL AND EXTEND DISCOVERY  
AND CROSS MOTIONS TO COMPEL AND EXTEND DISCOVERY**

Pursuant to 28 U.S.C. § 1746, Michael Pampalone declares under penalty of perjury as follows:

1. I am an associate of the law firm of Colucci & Umans, counsel for opposers, TRUMMER BAR, LLC, HEATHER TIERNEY, CHRISTOPHER TIERNEY and ERIC LOPEZ ("Opposers"). I am fully familiar with the facts hereinafter set forth of my own personal knowledge.
2. A true and accurate copy of a chain of e-mail correspondence between Applicant's counsel and I that was exchanged between December 7, 2011 and December 12, 2011 is attached hereto and incorporated herein as Exhibit 1.
3. Included in this chain of correspondence is an e-mail that I sent to Applicant's counsel on December 12, 2011, in which I proposed that "the parties agree

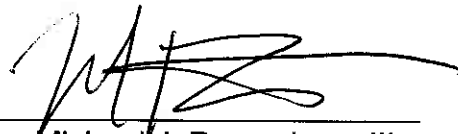
to have the Board enter and Order by which both Mr. Trummer's deposition and Ms. Tierney's deposition (in her capacity as an individual and Rule 30(b)(6) designee) are to be completed by a date certain or the non-complying party will be subject to a motion for entry of judgment."

4. My December 12<sup>th</sup> e-mail to Applicant's counsel was sent as a good faith attempt to reach a compromise with opposing counsel that would allow Opposers to withdraw their Motion to Compel and Extend Discovery filed on December 2, 2011.

5. Applicant failed to provide any response to my December 12<sup>th</sup> e-mail or the proposed compromise set forth therein.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9<sup>th</sup> day of January, 2012 at New York, New York.



Michael J. Pampalone, III

# **EXHIBIT 1**

**Michael Pampalone**

**From:** Michael Pampalone  
**Sent:** Monday, December 12, 2011 4:49 PM  
**To:** 'Cameron Reuber'  
**Cc:** Sergey A. Lysenko; Yuval Marcus  
**Subject:** RE: Trummer Bar LLC v. Albert Trummer Opposition No. 91192645

Cameron -

We accept your apology and have no intention of making this matter unnecessarily contentious. However, in light of past experience, opposers require more than familiar representations in order to assure them that Mr. Trummer's deposition will go forward in a timely manner. As you know, it was your client's repeated failure to respond to our communications that necessitated the filing of opposers' motion to compel and, having been forced to prepare and file the motion (and incur the related expense), opposers decline to withdraw the motion absent an Order from the Board requiring that Mr. Trummer's deposition take place by a date certain. Contrary to the allegations contained in your December 7<sup>th</sup> e-mail, the issues presented by opposers' motion are not moot and opposers are entitled to avoid being subjected to any further last minute cancellations and extended re-scheduling delays.

If your client would prefer not to respond to opposers' motion to compel, we propose that the parties agree to have the Board enter an Order by which both Mr. Trummer's deposition and Ms. Tierney's deposition (in her capacity as an individual and Trummer Bar, LLC's Rule 30(b)(6) designee) are to be completed by a date certain or the non-complying party will be subject to a motion for entry of judgment. Otherwise, you are entitled to proceed as you deem appropriate.

Regards,

Michael

**Michael Pampalone****Colucci & Umans**

218 East 50th Street | New York, New York 10022-7681  
 Tel. No.: (212) 935-5700 | Fax: (212) 935-5728  
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**From:** Cameron Reuber [mailto:Reuber@leasonellis.com]  
**Sent:** Wednesday, December 07, 2011 7:45 PM  
**To:** Michael Pampalone  
**Cc:** Sergey A. Lysenko; Yuval Marcus  
**Subject:** RE: Trummer Bar LLC v. Albert Trummer Opposition No. 91192645

Michael:

Your alternative proposal is rejected. Under the circumstances, it is hardly a reasonable compromise. The Board is not likely to grant the requested relief and, as such, we are not inclined to stipulate to it. Your clients are entitled to take Mr. Trummer's deposition on a date certain and no more. We have supplied you with ten prospective dates to choose from – all of them BEFORE your below-suggested

1/6/2012

January 31, 2012 deadline. We suggest that you pick a date, take the deposition, and stop wasting time and resources with pointless motion practice. Requiring the Board to hear and decide what is now a moot issue is, at best, an improper attempt to solicit unnecessary (and unmerited) relief. At worst, it is a gratuitous (and transparent) attempt to lodge petty grievances.

If Mr. Trummer fails to appear in January, you can seek whatever appropriate sanction you will from the Board. Until then, there is no dispute here that warrants the Board's time, attention, and resources. As such, we again ask that you withdraw your motion. Failure to do so will compel us to respond appropriately, including a request sanctions attendant to vexatiously litigating a moot issue. This is your opportunity to meet-and-confer regarding such a request.

Moreover, while you are free to make this matter as contentious as you wish, we would thank you to refrain from misstating the record when doing so. That is, before you again allege that Mr. Trummer is "unnecessarily drag[ging] out the discovery process" we invite to consider the record in its entirety. Therein you will find that the purported diligence and urgency you now attribute to your clients is easily disprovable pretense, as is Mr. Trummer's alleged obstructionism. Indeed, we note that EVERY stay and extension in this matter has been by mutual consent. Accordingly, we ask that you avoid further attempts to memorialize inaccurate rhetoric as fact.

We again ask that you accept our sincere apology, take the deposition as proffered, and withdraw the mooted motion. If the motion is still pending by close of business on Monday, December 12th, we will prepare and file a timely response. By that time, please also provide available dates for Heather Tierney and the Trummer Bar LLC corporate representatives to be deposed here in White Plains (something which you failed to do prior to moving to compel). If Ms. Tierney is the only corporate representative, we will likely need her availability for that deposition as well. Failure to provide the requested information will result in our cross-moving to compel. This is your opportunity to meet-and-confer regarding such a request.

Regards,

Cameron S. Reuber  
LEASON ELLIS,  
T.914.821.3075

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**From:** Michael Pampalone [mailto:MPampalone@Colucci-Umans.com]  
**Sent:** Wednesday, December 07, 2011 4:33 PM  
**To:** Yuval Marcus  
**Cc:** Cameron Reuber; Sergey A. Lysenko  
**Subject:** RE: Trummer Bar LLC v. Albert Trummer Opposition No. 91192645

Yuval –

We have repeatedly contacted you to schedule these depositions prior the close of discovery and you refused to even provide us with the courtesy of a response, until now, with the close of discovery looming and after it was necessary for us to file a motion to compel. Your attempts to construe the facts in a different light are unconvincing and not well taken.

As we have made clear over the past year (e.g., see our e-mail correspondence of July 18<sup>th</sup>) we are unwilling to allow your client to continue to unnecessarily drag out the discovery process in this opposition. Moreover, your contention that we have "insisted" that Ms. Tierney's deposition take place on the day preceding Mr. Trummer's is plainly false, as evidenced by our e-mail of November 15<sup>th</sup>. As you know, this scheduling arrangement was initially agreed upon between the parties as a matter of convenience. Please note, again, that barring any prior commitments that cannot be re-scheduled, Ms. Tierney will make herself available for deposition on any mutually convenient date.

In light of the past difficulties that have surrounded the scheduling and taking of Mr. Trummer's deposition, and in order to avoid any further delays, we decline to withdraw our motion to compel his deposition by a date certain. As an alternative, we suggest that Mr. Trummer consent to our motion and allow the Board to enter an order whereby he will be required to produce himself for deposition by no later than January 31, 2012 or be subject to a motion for entry of judgment pursuant to Trademark Rule 2.120(g)(1). Please let us know if your client is willing to do so.

Regards,  
Michael

**Michael Pampalone**

**Colucci & Umans**

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**From:** Yuval Marcus [<mailto:Marcus@leasonellis.com>]  
**Sent:** Wednesday, December 07, 2011 12:30 PM  
**To:** Michael Pampalone  
**Cc:** Cameron Reuber; Sergey A. Lysenko  
**Subject:** Trummer Bar LLC v. Albert Trummer Opposition No. 91192645

Dear Michael:

I left you a message yesterday. I received a copy of your motion.

We have been having some problems with our email system. I did not receive any telephone messages from you prior to your filing the motion.

I am sorry for not getting back to you with dates for the depositions. It was a combination of not being about to contact Mr. Trummer who was both out of the country and in the hospital since we last corresponded and the fact that I have been extremely busy with some other cases. Part of the difficulty in scheduling the deposition of Mr. Trummer is your insistence that the deposition of Heather Tierney must take place the day preceding his deposition. With time needed for preparation, this effectively means having to find three consecutive days that coincide with our clients' and our schedules. Just as you were unable to find that time in November when you had other matters to attend to, we have not been able to find that block of time in December, but are available for any two dates of your choosing during the weeks of January 16-20 and 23-27. Please advise which two dates are good on your end and we can schedule the two depositions and avoid wasting the Board's time.

Please confirm that you will withdraw the motion and consent to an extension of the discovery deadline for purposes of taking these two depositions and follow up discovery relating to information disclosed during the depositions.

Thank you,

Yuval

1/6/2012

Please note our new address

Yuval H. Marcus  
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**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing "Opposers' Combined Reply And Response To Applicant's Response To Opposers' Motion To Compel And Extend Discovery And Cross Motions To Extend And Compel Discovery And Trial Dates" and "Supplemental Declaration of Michael Pampalone in Support of Opposers' Combined Reply and Response to Applicant's Response to Opposers' Motion To Compel And Extend Discovery And Cross Motions To Compel And Extend Discovery" have been forwarded *via* First Class Mail, postage prepaid, to Applicant's Attorneys, Yuval H. Marcus, Cameron S. Reuber, Leason Ellis LLP, One Barker Avenue, Fifth Floor, White Plains, New York 10601-1526, this 9<sup>th</sup> day of January 2012.



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Teresa Kiernan