

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Baxley

Mailed: July 10, 2014

Opposition No. 91212849

LeeEllen Achten

v.

Exercise Alternatives

By the Trademark Trial and Appeal Board:

In a January 13, 2014 order, the Board granted applicant's motion (filed November 16, 2013) to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and allowed opposer until February 2, 2014 to file an amended notice of opposition.

The January 13, 2014 order is hereby modified as follows: footnote 2 on page 2 of that order is deleted and replaced by the following.

Opposer's brief in response to the motion to dismiss does not include proof of service upon applicant, as required by Trademark Rule 2.119(a). However, because applicant timely filed a reply brief, the Board presumes that opposer received a copy of the brief in response, and the Board will consider the brief in response. Nonetheless, opposer is advised that the Board will not consider any further filings from her that do not include proof of service upon applicant.

In addition, in footnote 5 on page 7, in the second sentence, substitute "opposer" for "applicant." That order otherwise stands.

On January 30, 2014, opposer filed an amended notice of opposition. As proof of service, opposer included a copy of an envelope addressed to

applicant's attorney with a certified mail sticker. However, merely submitting a copy of an envelope in which one intends to send a copy of a filing to an adversary party is not acceptable proof of service because it is not accompanied by a signed statement indicating the date and manner in which such service was made. *See* Trademark Rule 2.119(a); TBMP Section 113 (2014). Rather, as the Board stated in the January 13, 2014 order:

Trademark Rules 2.119(a) and (b) state that every paper filed in this proceeding must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all papers which [opposer] may subsequently file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made, e.g., by mail. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service.

January 13, 2014 order at 7 fn. 5. That is, the service requirement for opposer means that: (1) she must send a copy of any submission that she files with the Board to applicant's attorney; and (2) in that submission, she should include the following statement:

I hereby certify that a true and complete copy of this submission has been served on applicant Exercise Alternatives by mailing said copy on (insert date of mailing), via First Class Mail, postage prepaid to: **Krista A. Wittman, Cascadia Intellectual Property, 12360 Lake City Way NE, Suite 501, Seattle WA 98101** (or the name and address of any attorney that applicant may later appoint in this case).

/signature/ _____
LeeEllen Achten
(insert date)

Notwithstanding the foregoing, the Board, in a March 8, 2014 order, accepted opposer's amended notice of opposition and reset dates herein

commencing with the due date for applicant's answer. Concurrently with applicant's answer, applicant filed a motion to dismiss based on opposer's failure to serve her filings in this case. Opposer filed a brief in response thereto.

In view of the January 13, 2014 order, the amended notice of opposition should not have been accepted in the March 8, 2014 order because it did not include proof of service. Accordingly, that order is vacated.

Nonetheless, applicant's motion is not well-taken. Contrary to applicant's assertion, opposer's failure to include acceptable proof of service in her amended notice of opposition, while frustrating and contrary to Trademark Rule 2.119, does not provide a basis for dismissal of this case.¹

Opposer filed an amended notice of opposition on January 30, 2014 in accordance with the January 13, 2014 order. Although the amended notice of opposition does not include proper proof of service, the record herein clearly indicates that service was attempted and that attempted delivery of the service copy failed. Moreover, when a document is filed without proof of service, the Board generally notes the absence of proof of service and to requires the filing party to perfect service and to submit proof of such service.

¹ However, had opposer failed to serve the original notice of opposition, such failure would have provided a basis for dismissal of this case. *See* Trademark Rule 2.101(a); *Springfield Inc. v. XD*, 86 USPQ2d 1063 (TTAB 2008). Applicant does not allege herein that opposer failed to serve the original notice of opposition and did not file a motion to dismiss based on lack of Board jurisdiction in response to the original notice of opposition.

In view thereof, applicant's motion to dismiss is without basis and therefore denied. Opposer is allowed until **ten days** from the mailing date set forth in this order to serve a copy of the amended petition to cancel upon applicant and to file proof of such service with the Board. Proceedings herein otherwise remain suspended.