

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

EJW

Mailed: May 15, 2014

Opposition No. 91214606

Jason Smith

v.

Will Heitman

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

Applicant in Default

The answer to the notice of opposition in this matter was due by March 3, 2014. Opposer filed a motion for default judgment on March 4, 2014; and applicant filed a communication on March 4, 2014. The Board also notes that applicant filed a consent motion to extend the discovery conference deadline (filed April 2, 2014).

The Board presumes that applicant's communication is intended to be his answer to the notice of opposition; however, said communication does not comply with Rule 8(b) of the Federal Rules of Civil Procedure, which is made applicable to this proceeding by Trademark Rule 2.116(a). Specifically, applicant's response

is comprised of a series of paragraphs which discuss the merits of opposer's allegations; but which do not admit or deny said allegations, as is required.¹

In particular, Fed. R. Civ. P. 8(b) provides, in part:

“(b) Defenses; Admissions and Denials.

(1) *In General*. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

...

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.”

The notice of opposition filed by opposer herein consists of five (5) paragraphs setting forth the basis of opposer's claim of damage. In accordance with Fed. R. Civ. P. 8(b), it is incumbent on applicant to answer the notice of opposition **by specifically admitting or denying the allegations contained in each paragraph**. If applicant is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, he should so state and this will have the effect of a denial.

¹The attachments to applicant's communication are also noted. Applicant should note that with the exception of a registration made of record in a manner set forth in Trademark Rule 2.122(d)(1), exhibits to pleadings are not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the assigned period for the taking of testimony. See Trademark Rule 2.122(c); TBMP (Trademark Trial and Appeal Board Manual of Procedure) § 317 (3d ed. rev.2 2013).

In view of the foregoing, applicant is allowed until **THIRTY (30) DAYS from the mailing date of this order** in which to file **and serve on opposer or counsel for opposer** an answer herein which complies in full with Fed. R. Civ. P. 8, *failing which default judgment may be entered against applicant.*²

Trial Dates Reset

Inasmuch as the pleadings are not yet at issue in this proceeding, applicant's consent motion to extend the time for conducting the parties' mandatory discovery conference is premature and is, thus, denied. Opposer's motion for default judgment is **deferred**. Accordingly, the answer due date, discovery conference, disclosure, discovery and trial dates are reset as follows:

Time to Answer	6/14/2014
Deadline for Discovery Conference	7/14/2014
Discovery Opens	7/14/2014
Initial Disclosures Due	8/13/2014
Expert Disclosures Due	12/11/2014
Discovery Closes	1/10/2015
Plaintiff's Pretrial Disclosures Due	2/24/2015
Plaintiff's 30-day Trial Period Ends	4/10/2015
Defendant's Pretrial Disclosures Due	4/25/2015
Defendant's 30-day Trial Period Ends	6/9/2015

² Applicant is in default under Fed. R. Civ. P. 55(a) because he failed to file a timely answer and to file an answer that complies with Rule 8(b).

Plaintiff's Rebuttal Disclosures Due	6/24/2015
Plaintiff's 15-day Rebuttal Period Ends	7/24/2015

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.135.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by the Trademark Rule 2.129.

Information for *pro se*³ Parties

An *inter partes* proceeding before the Board is similar to a civil action in a Federal district court. There are pleadings, a wide range of possible motions; discovery (a party's use of discovery depositions, interrogatories, requests for production of documents and things, and requests for admission to ascertain the facts underlying its adversary's case), a trial, and briefs, followed by a decision on the case. The Board does not preside at the taking of testimony. Rather, all testimony is taken out of the presence of the Board during the assigned testimony, or trial, periods, and the written transcripts thereof, together with any exhibits thereto, are then filed with the Board. **No paper, document, or exhibit will be considered as evidence in the case unless it has been introduced in evidence in accordance with the applicable rules.**

³ A *pro se* party is not represented by counsel.

While Patent and Trademark Rule 11.14 permits any person to represent itself, it is strongly advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

It is recommended that the parties be familiar with Title 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice, and which are available at the USPTO's trademarks page: <http://www.uspto.gov/main/trademarks.htm>. The Board's main webpage (<http://www.uspto.gov/web/offices/dcom/ttab/>) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).

Every motion, paper or communication filed with the Board must include proof of service of a copy on opposing counsel or party, in compliance with Trademark Rule 2.119(a) and (b). The Board may decline to consider any motion, paper or communication filed herein which does not include proof of service, such as a Certificate of Service. The Board's Manual of Procedure (TBMP) sets forth the following suggested format for a Certificate of Service:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by mailing said copy on (insert date of mailing), via First Class Mail, postage prepaid (or insert other appropriate method)

of delivery) to: (set out name and address of opposing counsel or party). See TBMP § 113.03.

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel. *See McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006). The Board's order instituting this proceeding also includes information with which applicant should be familiar.

General Information on Discovery Conferences

The parties are referred to the Board's institution order in this proceeding and to the following URL:

http://www.uspto.gov/trademarks/process/appeal/RULES08_01_07.pdf, see, e.g., pp. 42245, 42246, 42248 and 42252. During the conference, the following topics must be discussed:

- (1) the nature of and basis for their respective claims and defenses;
- (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and;
- (3) arrangements relating to disclosures, discovery and introduction of evidence at trial, should the parties not agree to settle the case.

Either party may request the participation of the Board in the discovery conference. *See* Trademark Rule 2.120(a)(2), 37 C.F.R. § 2.120(a)(2).

Information on Initial Disclosures

The parties are referred to the following web addresses to obtain information regarding initial disclosures:

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http://www.uspto.gov/trademarks/process/appeal/RULES08_01_07.pdf and to

<http://edocket.access.gpo.gov/2006/pdf/06-197.pdf> or to

http://www.uspto.gov/trademarks/process/appeal/RULES01_17_06.pdf. *See*

Notice of Final Rulemaking (“Miscellaneous Changes to Trademark Trial and

Appeal Board Rules”) in the Federal Register, 72 Fed. Reg. 147 (August 1, 2007)

and 71 Fed. Reg. 10, 2501 (January 17, 2006).

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