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

Proceeding	91228289
Party	Plaintiff Padraic C. McFreen
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Date	06/19/2018
Attachments	McFreen MIVU Response to Mitac MIVUE Second Motion for Sanctions 2.20180619.pdf(104550 bytes)

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

Padraic McFreen. *Opposer,* v. MITAC International Corp. *Applicant.*	Opposition No. 91228289

OPPOSER'S MOTION FOR PERMISSION TO CORRECT THE RECORD

Opposer moves this Board for permission to correct the record. Opposer, in response to Applicant's Motion For Sanctions and Motion To Extend, Opposer filed its Response with this Board in the confidential manner, as the Response contained Opposer's Exhibit 1, which contained documents produced by Applicant that were identified as Attorneys Eyes Only. Subsequent its filing, Opposer noted Applicant's filing of like documents. Applicant had filed in the non-confidential manner. Alarmed, Opposer immediately sent an email to Applicant with instructions concerning required corrections. Subsequent this email, Opposer considered the possibility of its own error.

As Applicant's counsel is a former official with the USPTO and an experienced Opposition Attorney, Opposer believed he, then, had made an error. Opposer communicated this fact to Applicant via a second email.

Opposer attempted to communicate with Applicant; however, without a response, Opposer assumed Applicant had indeed filed the documents correctly. As a result, Opposer re-filed its Response in the like non-confidential manner. After several days without a response from Applicant, Opposer discovered that both parties had indeed filed in error. Opposer acted immediately by contacting this Board's office and measures were taken to temporarily protect both Parties filings.

This instant Motion accompanies Opposers non-confidential version of its Response to Applicants two instant motions. The present version does not contain Applicant's confidential documents.

Respectfully submitted,

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ELECTRONIC MAILING CERTIFICATE

I hereby certify that the foregoing Motion is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board ("ESTTA") and docket@lawabel.com, leabelman@lawabel.com, jbseyler@lawabel.com on this 19th day of June, 2018.

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

Padraic McFreen. *Opposer,* v. MITAC International Corp. *Applicant.*	Opposition No. 91228289

OPPOSER'S RESPONSE IN OPPOSITION OF APPLICANT'S MOTION FOR SANCTIONS AND MOTION TO EXTEND

Opposer respectfully opposes Applicant's second Motion For Sanctions and Motion To Extend, based upon its claim that Opposer failed to timely and properly respond to its Discovery. Need Opposer remind this Board and Applicant of the fact that this Board has already sanctioned Opposer for failing to timely and properly respond to Discovery. Rather than adhere to this Board's rules concerning the authentication of documents by admission[1], Applicant is proposing that this Board apply a Double-Sanction Theory upon Opposer for the very same alleged behavior of Opposer for which it sought and obtained sanctions. Another Motion For Sanctions and a Motion To Extend are railroading attempts by Applicant to avoid trial. This

[1] This Board has already dealt with the issue of authentication. Specifically, under 37 C.F.R. § 2.120(i), a party may serve one comprehensive request for admission of any adverse party that has produced documents for an admission authenticating specific documents or specifying which documents cannot be authenticated…Thus, the identification of "specific documents" may require details, including the Bates Number, date, author, and subject matter of a document to be authenticated (e.g., "Admit that each of the following documents is a true and accurate reproduction of a genuine original and authentic for purposes of admission...").

is improper and abusive. Perhaps due to the fact Opposer is self-represented and Applicant has long standing relationships with this Board, Applicant believes this Board harbors a bias in its favor, and the mere filing of motions is enough to dispose with Opposer's action.

As this Board has already dealt with the issue of customer information raised by Applicant, Applicant's motions are essentially Motions For Reconsideration, since the underlying rationale provided by Applicant is its exhaustive efforts to have this Board overlook its own rules and policies concerning customer information. Applicant obviously does not have confidence in the competence of this Board. The question concerning customer information is settled law—as reiterated by this Board in its June 1, 2018 Order. It is too late for Applicant to raise a legitimate legal basis for continuing to request this Board to violate policy in its favor. To prevent Applicant from driving the costs of these proceedings even higher, Applicant should be prevented from filing any additional motions without the prior approval of this Board.

In its June 1, 2018 Order, this Board instructed Opposer to provide responses to the requests for which Applicant sought and was granted sanctions. This Board did remain silent concerning the timing of Opposer's supplementation of its responses. Applicant never provided its requirements to Opposer, nor did it make an effort to schedule or cooperate with Opposer on the delivery of Opposer's supplements. This Board has denied motions for sanctions in instances when the movant sought sanctions, but failed to make an affirmative effort to work with the

adverse party.[2] The sanctions Applicant seeks here are unwarranted and unjust as Applicant is simply attempting to avoid trial and have this Board hold Opposer to a standard by which it itself is not being held. Applicant is attempting to have its cake and eat it too—again.

Applicant, yet again, advances a Motion For Sanctions absent rules of law and a legitimate legal basis for moving this Board for sanctions—and an expansion of time. In this instant motion, Applicant doesn't even provide this Board with a legitimate legal basis for its claim that it is being "systematically prejudiced" by Opposer—simply because Opposer follows the rules established by this Board. Opposer did not set the calendared dates for these proceedings, this Board did. As a result, this Board cannot sanction Opposer for adhering to its own Order, and for responding within the time frame it unilaterally set for these proceedings. If Applicant had an issue with this Board's calendaring practices, Applicant could have communicated its concerns with Opposer and Parties could have mutually moved this Board for an expansion of time. However, Applicant did not intend to coordinate with Opposer in any way. Applicant laid in wait for Opposer to respond—if at all—then, it sprang into its predetermined action to move this Board. Applicant's behavior is not appropriate. Applicant is misleading this Board. Applicant's motions should be denied.

Need Opposer remind this Board of the fact that it denied Opposer's Motion For Sanctions, because Opposer failed to provide rules of law and for failing to state

[2] *Guthy-Renker Corp. v. Boyd*, 88 USPQ2d 1701, 1704 (TTAB 2008) (Movant's Motion For Sanctions Denied, because movant could have made additional efforts to coordinate with adverse party, but failed to do so.)

precisely how Opposer was being prejudiced.[3] A survey of the instant Motion, will net this Board zero rules of law and absolutely no legal basis for the sanctions and expansion of time requested by Applicant—as well as an absence of precisely how Applicant is being prejudiced by Opposer following stated trademark rules and policies and the Order of this Board. For these reasons alone, Applicant's motions should be denied. If not, there is another set of rules Opposer should be consulting—one in which Applicant is obviously operating from here. This Board is obligated to provide such guidance to both Parties. It is obvious by Applicant's blatant disregard of this Board's rules, policies and Order, that it is obviously operating from a discreet set of rules–to which Opposer has not been granted access.

Inasmuch as Discovery for Applicant closes on June 15, 2018, Applicant made absolutely no attempt to coordinate its discovery with Opposer between June 1 and June 15, 2018. Applicant's demand that Opposer respond within its stated four-hour window of time, cannot be construed as an attempt to cooperate with Opposer. Applicant's demands violate every trademark and Federal Rule of Civil Procedure rule relating to Discovery. Can this Board actually support such behavior? Applicant's motions should be denied.

This Board's Order was provided to Parties on June 1, 2018. Applicant did not communicate with Opposer concerning its now stated need of additional time to authenticate Opposer's document production. Additionally, Applicant now claims Opposer's adherence to this Board's Order and the rules and policies relating to customer information is sanctionable—while Applicant itself adhered to these very

[3] *See.* This Board's June 1, 2018 Order, (44 TTABVUE 1-9)

same rules and policies when it produced invoices and other documents to Opposer containing redacted customer names and redacted invoice numbers. The rules apply to Applicant, but not Opposer? These documents have been provided to this Board for its review.[4][5] Indeed, Applicant is requesting that this Board sanction Opposer for producing documents in the very same manner that it has. It is requesting Opposer be sanctioned for following the rules, policies and Order of this Board. It cannot succeed on this path. If Opposer is to be sanctioned, then, Applicant and every other party to an opposition proceeding that adheres to these rules and policies, must be sanctioned as well. As this Board can clearly see for its self, Applicant should be sanctioned for misleading this Board and for making costly needless motions. Applicant's Motion for Sanctions and Motion To Extend, should be denied.

Opposer previously produced to Applicant documents it believed satisfied Applicant's need to ascertain Opposer's volume of sales. Opposer reiterated this fact in its response in opposition to Applicant's first motion for sanctions. There has never been an issue concerning the fact that Opposer has used its marks in commerce and indeed has sales. Opposer had previously demonstrated its use in commerce and the significance of its sales through the documents it produced to Applicant previously. Again, Opposer believed this was sufficient.

[4] Applicant produced invoices to Opposer with redacted customer names and redacted invoice numbers, Bates ranged MITAC#4 to MITAC#56, more than twice the number of invoices Opposer produced to Applicant. Opposer never requested to authenticate Applicant's invoices—even though Applicant stated unequivocally in its Answer that it has not made use of its Applied-For Mark in commerce. Invoices clearly show Applicant mislead this Board and Opposer in its Answer. It is not clear to Opposer what scheme Applicant is undertaking by it actions here. Obviously, Applicant's credibility should be questioned and its motions should be denied.

[5] Opposer's Exhibit 1.

This Board disagreed with Opposer, and ordered Opposer to respond by providing the exact documents requested by Applicant. Opposer provided these documents to Applicant twelve days later. If the expectation of the Board was for Opposer to provide said documents within a set number of hours or days following its Order, this Board did not communicate this fact to Parties. Applicant has not stated how Opposer has prejudiced it by providing invoices substantiating previously produced documentation in response to this Board's Order.

To be clear, Opposer's production allowed enough time for Applicant to serve Opposer with its Request For Admission concerning the authenticity of the documents produced. Had Applicant coordinated and cooperated with Opposer, Parties could have coordinated the Request For Admission. Alternatively, Applicant did not respond until the thirteenth day following this Board's Order. In its response, Applicant demanded that Opposer violate this Board's Order within four hours, rather than follow this Board's guidance concerning authentication.

Applicant desires to undertake its own unsanctioned authentication measures, and has failed to share its intentions with Opposer or this Board. Applicant hasn't provided case law to support its requested deviation from this Boards guidance concerning authentication. Applicant, yet again, provides nothing at all in support of its position. Applicant expects this Board to support its position of deviating from this Boards rules and policies concerning customer information and authentication. Applicant is operating under the assumption these rules and

policies do not apply to it. This is unreasonable and a gross waste of economic resources. Applicant's motions should be denied.

Had Applicant informed Opposer of its demands prior to June 13, 2018, Parties could have avoided needless and costly motions practice. Opposer would have reminded Applicant of this Board's guidance concerning authentication. However, Applicant's election to file additional motions is a product of its own doing, and not that of Opposer. Opposer rightfully responded to Applicant's demands by reminding Applicant of this Board's Order, and stated rules and policies concerning customer information.

These rules, policies and this Board's Order are not the fault of Opposer, and Opposer should not be sanctioned for adhering to policies it did not create. This is simply Applicant's attempt to avoid trial. Applicant's motion practice is abusive and burdensome on Opposer. It is obvious Applicant planned to file a motion for sanctions no matter how Opposer responded following this Board's June 1, 2018 Order.

Had Opposer not supplemented its responses, Applicant would have moved this Board for sanctions of dismissal, because Opposer failed to provide Board ordered supplemented responses. Now that Opposer has supplemented its responses, Applicant moves this Board, because—even though the Board set the June 15, 2018 closing date for Applicant's Discovery—any supplemented response would necessitate an expansion of time, thus delaying trial even further. However, the deviation requested by Applicant violates this Boards rules, policies and Order.

This fact alone should cause Applicant's motions to be denied. If this Board cannot adhere to its own guidance, then, what is the point of this Board? If Applicant can influence this Board to violate its own Orders and guidance concerning customer information and authentication, then, this entire process is an embarrassment.

Opposer informs this Board that Opposer is eager to proceed with these opposition proceedings, and that it is Applicant's motions practice that is the root cause for the added delay and expense. Opposer, having rested on the belief concerning sufficiency and relying on this Board's Order, trademark rules and associated policies concerning undiscoverable information is far from obstructionism, and Double Sanctions is without merit. Applicant's motions should be denied.

Applicant draws this Board's attention to an affirmative defense of abandonment that Applicant never makes. Applicant has never raised this defense and has not made an effort to amend its answer to include any affirmative defenses. Even now, with this instant motion, having introduced this defense, Applicant still did not move this Board to amend its Answer. Applicant's statements concerning abandonment should not be considered by this Board as Applicant has slept on its requirement to amend its Answer and has not followed this Board's guidance concerning same. Again, Applicant appears to operate from a different set of rules from the set of rules that apply to Opposer.

Opposer previously provided customer names as the identity of the customers was readily available to the general public. Those customers identified by Opposer

and highlighted by Applicant in this instant motion are customers of advertising services which is clearly articulated by Opposer in the documents Applicant references herein. Opposer's confirming the identity of customers readily available to the general public on a separate Opposer owned website should not be construed as a waiver. Moreover, this Board was well aware of these facts when it provided its guidance in its Order on June 1, 2018. Applicant's motions should be denied.

For the reasons set forth above, specifically the fact that Applicant has produced invoices with redacted customer names and invoice numbers to Opposer which adhere to this Boards rules and policies concerning customer information—the very reason Applicant files the instant motions—and Applicant is clearly attempting to mislead this Board by asking it to hold Opposer to standards it itself is not being held to in these proceedings, Applicant's motions should be denied and Applicant should be sanctioned, preventing it from filing any further motions without prior approval from this Board.

Respectfully submitted,

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ELECTRONIC MAILING CERTIFICATE

I hereby certify that the foregoing Motion is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board ("ESTTA") and docket@lawabel.com, leabelman@lawabel.com, jbseyler@lawabel.com on this 16th day of June, 2018.

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EXHIBIT 1