

THIS ORDER IS NOT A
PRECEDENT OF THE
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Alexandria, VA 22313-1451
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JK

Mailed: March 29, 2018

Opposition No. 91236432

NextGen Biologics, Inc.

v.

Axolotl Biologix

**Before Shaw, Gorowitz and Coggins,
Administrative Trademark Judges.**

By the Board:

Relevant Background

In lieu of filing an answer to the notice of opposition, Applicant filed and served, on October 6, 2017, a timely motion to dismiss the notice of opposition pursuant to Fed. R. Civ. P. 12(b)(6). *See* TBMP § 503 (June 2017). After expiration of the time allowed to file a brief in opposition to the motion or an amended notice of opposition, the Board noted that Opposer had filed no submission, granted Applicant's motion as conceded pursuant to Trademark Rule 2.127(a), and dismissed the opposition with prejudice.¹

¹ 6 TTABVUE.

On December 8, 2017, Opposer, through the same counsel of record who filed the notice of opposition, filed a request for reconsideration under Trademark Rule 2.127(b).² Applicant filed a brief in response thereto.

Analysis

Generally, the premise underlying a motion for reconsideration, modification or clarification under Trademark Rule 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such a motion may not properly be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. Rather, the motion should be limited to a demonstration that, based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change. TBMP § 518.

The issue presented is whether the Board erred in determining that Applicant's motion to dismiss was conceded, granting the motion, and dismissing the notice of opposition with prejudice. Relevant to this issue, Opposer states that in reviewing the motion to dismiss, it did not perceive an obligation to refute Applicant's motion or to amend its notice of opposition.³ Opposer also makes the following somewhat

² Opposer's request does not comply with Trademark Rule 2.126(a)(1) inasmuch as the text is not double-spaced. TBMP § 106.03. In addition, Opposer's certificate of service does not set forth an email address to which Opposer effected service on counsel for Applicant. 8 TTABVUE 12.

Notwithstanding these irregularities, the Board has given consideration to Opposer's request.

Opposer's March 21, 2018 submission captioned "Notice to the Board" has no bearing on the determination of Opposer's request for reconsideration.

³ 8 TTABVUE 2.

convoluted argument, seemingly in support of its election not to submit a filing in response to the motion to dismiss:

In essence, the TTAB's grant of the Applicant's Motion to Dismiss in this case operates as an amendment to 37 C.F.R. 2.127(a) requiring the filing of an Amended Pleading in response to Motion to Dismiss to avoid dismissal with prejudice. In the present case, it was the undersigned counsel's view, and remains the undersigned counsel's view, that Applicant's Motion to Dismiss did not present any evidence or arguments which, properly construed by the TTAB, would have or should have required the Plaintiff to Amend or request leave to Amend its Complaint (Notice of Opposition).⁴

It is unclear, but it appears that Opposer essentially argues that it believed that the Board would determine Applicant's motion on the merits regardless of whether Opposer responded or not, and that notwithstanding Opposer's failure to respond, the Board was obligated to invite Opposer to file an amended notice of opposition. However, this belief is not an accurate construal of Board procedure, nor does Opposer cite an authority that advances or allows this approach on the part of a plaintiff faced with a Fed. R. Civ. P. 12(b)(6) motion in a Board proceeding. More pointedly addressing Opposer's mistaken belief, the Board expects attorneys to be cognizant of their duties as officers of the court and to file proper and timely responses to motions; attorneys may not rely upon the Board to act as a surrogate advocate. *See The General Tire & Rubber Co. v. The Gendelman Rigging & Trucking Inc.*, 189 USPQ 425, 427 (TTAB 1976).

To the extent that Opposer posits that the Board was required to determine Applicant's motion on the merits because Opposer did not file an amended notice of

⁴ 8 TTABVUE 3.

opposition in response to the motion, Opposer is mistaken in its reading of TBMP § 503.03. That provision contemplates that a plaintiff has, in fact, filed some response to the motion to dismiss, *i.e.*, that the plaintiff has not conceded the motion.

Here, upon Applicant's moving to dismiss under Fed. R. Civ. P. 12(b)(6), Opposer could have availed itself of the option to file a timely brief in opposition to the motion to dismiss (Trademark Rule 2.127(a); TBMP §§ 502.02 and 502.02(b)),⁵ to file an amended notice of opposition within 21 days after service of Applicant's motion to dismiss (Fed. R. Civ. P. 15(a); TBMP § 503.03),⁶ or to file both. Opposer did not file either a brief or an amended notice of opposition. After the time to take such action had expired, and consistent with the stated authorities, as well as its ordinary practice, the Board applied Trademark Rule 2.127(a), noted that Applicant's motion to dismiss was conceded, and granted Applicant's motion. TBMP § 502.02.

To the extent that Opposer employed the request for reconsideration as a second opportunity to present arguments contesting Applicant's motion to dismiss, this is an action for which Board procedure does not allow. *See Joy Mfg. Co. v. The Robbins Co.*, 181 USPQ 408, 409 (TTAB 1974).

⁵ Trademark Rule 2.127(a) provides, in part, that "[w]hen a party fails to file a brief in response to a motion, the Board may treat the motion as conceded." In the instant case, where Opposer failed to file a brief in opposition to the motion to dismiss, the Board properly treated the motion as conceded. *See e.g., Chesebrough-Pond's Inc. v. Faberge, Inc.*, 618 F.2d 776, 205 USPQ 888, 891 (CCPA 1980) (treating motion for summary judgment as conceded was proper).

⁶ Plaintiffs in Board proceedings ordinarily can, and often do, respond to a motion to dismiss by filing an amended complaint. If a timely amended complaint is filed, the Board will deem the motion to dismiss moot and set time for the defendant to answer the amended complaint. TBMP § 503.03.

In conclusion, Opposer has not pointed to an error that the Board made in determining that Opposer had failed to respond to the motion to dismiss, in granting the motion as conceded, or in dismissing the opposition with prejudice.

In view of these findings, Opposer's request for reconsideration is **denied**. This proceeding stands dismissed with prejudice.⁷

⁷ To the extent that Opposer seeks leave to file an amended pleading, the request is denied as moot.

Applicant's Serial No. 87258948 registered on March 27, 2018. Inasmuch as the appeal period had not expired, the Board will have the inadvertently issued registration cancelled, have the application restored to pending status, and reissue the registration upon expiration of the appeal period. TBMP § 216.