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

Mailed: July 12, 2018

Opposition No. 91242373
Serial No. 86513874

RICHARD J. HEPNER
Hero Nutritionals Inc
1900 Carnegie Ave Ste A
Santa Ana, CA 92705-5557

Hero AG

v.

Hero Nutritionals, Inc.

V.T. Giordano
von Maltitz Derenberg Kunin Janssen & Giordano
60 East 42nd Street
New York, NY 10165

ESTTA908969

NOTICE OF INSTITUTION

The opposer (plaintiff) identified above has filed a notice of opposition to the registration sought by applicant (defendant) in the above-identified application. This notice of institution is forwarded pursuant to Trademark Rules 2.105(b) and (c), and constitutes service of the notice of opposition on applicant. An electronic version of the notice of opposition is viewable on TTABVUE at http://ttabvue.uspto.gov/ttabvue/. *See* Trademark Rule 2.105(a). The parties should diligently monitor this proceeding via TTABVUE.

APPLICANT MUST FILE ANSWER THROUGH ESTTA

As required in the schedule below, **applicant must file an answer within forty (40) days from the mailing date of this order.** Failure to file a timely answer may result in the entry of default judgment and abandonment of the application. Regarding when a deadline falls on a Saturday, Sunday or federal holiday, *see* Trademark Rule 2.196. Applicant must file the answer through ESTTA - Electronic System for Trademark Trials and Appeals, unless ESTTA is unavailable due to

technical problems or extraordinary circumstances are present. An answer filed on paper under these limited circumstances must be accompanied by a Petition to the Director (and the required fee under Trademark Rule 2.6). *See* Trademark Rule 2.106(b)(1). In substance, applicant's answer must comply with Fed. R. Civ. P. 8(b); it must admit or deny the allegations in the notice of opposition, and may include available defenses and counterclaims. Regarding the form and content of an answer, *see* Trademark Rule 2.106(b)(2) and TBMP § 311.

DUTY TO MAINTAIN ACCURATE CORRESPONDENCE INFORMATION

Throughout this proceeding, the parties, and their attorneys or representatives, must notify the Board of any correction or update of physical address and email address, and should use the ESTTA change of address form. *See* Trademark Rule 2.18(b); TBMP § 117.

SERVICE OF ANSWER AND OF ALL SUBMISSIONS

The service of the answer, and all other submissions in this proceeding, and of all matters that are required to be served but not required to be filed in the proceeding record, **must** be by **email** unless the parties stipulate otherwise. Trademark Rule 2.119(b). In the absence of a stipulation, service may be by other means **only** under the **limited** circumstances and in a manner specified in Trademark Rule 2.119(b). Regarding the signing and service of all submissions, *see* TBMP §§ 113-113.04.

The answer, and all other submissions, **must** include proof of service. As noted in TBMP § 113.03, proof of service may be in the following certificate of service form:

> *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 forwarding said copy on (insert date of mailing), via email (or insert other appropriate method of delivery) to: (set out name, and address or email address of opposing counsel or party).*
>
> *Signature*_____
> *Date*_____

SUBMIT ALL FILINGS ONLINE VIA ESTTA

Submissions **must** be filed via ESTTA, the Board's online filing system, unless ESTTA is unavailable due to technical problems or extraordinary circumstances are present. Trademark Rule 2.126(a). Submissions may be filed in paper form **only** under the **limited** circumstances specified in Trademark Rule 2.126(b), with a required written explanation. ESTTA is accessible at the Board's web page: http://estta.uspto.gov/. The page has instructions and tips. ESTTA offers various forms, some of which may require attachments and/or a fee. For technical questions, a party may call 571-272-8500 (Mon. - Fri. 8:30 - 5:00 ET) or email

ESTTA@uspto.gov. This proceeding involves several deadlines, and due to potential technical issues, parties should not wait until the deadline to submit filings. The Board may **decline to consider** an untimely submission. Moreover, Trademark Rule 2.126 sets forth the required form and format for all submissions (*e.g.*, page limitations), and the Board may **decline to consider** any submission that does not comply with this rule, including, but not limited to motions, briefs, exhibits, and deposition transcripts.

CONFERENCE, DISCOVERY, DISCLOSURE AND TRIAL SCHEDULE

Time to Answer	8/21/2018
Deadline for Discovery Conference	9/20/2018
Discovery Opens	9/20/2018
Initial Disclosures Due	10/20/2018
Expert Disclosures Due	2/17/2019
Discovery Closes	3/19/2019
Plaintiff's Pretrial Disclosures Due	5/3/2019
Plaintiff's 30-day Trial Period Ends	6/17/2019
Defendant's Pretrial Disclosures Due	7/2/2019
Defendant's 30-day Trial Period Ends	8/16/2019
Plaintiff's Rebuttal Disclosures Due	8/31/2019
Plaintiff's 15-day Rebuttal Period Ends	9/30/2019
Plaintiff's Opening Brief Due	11/29/2019
Defendant's Brief Due	12/29/2019
Plaintiff's Reply Brief Due	1/13/2020
Request for Oral Hearing (option) Due	1/23/2020

PARTIES ARE REQUIRED TO HOLD DISCOVERY CONFERENCE

The parties are required to schedule and hold a discovery conference by the deadline in the schedule in this order, or as reset by the Board. In the conference, the parties are required to discuss, at a minimum, 1) the nature and basis of their claims and defenses, 2) the possibility of promptly settling, or at least narrowing the scope of claims or defenses, and 3) arrangements for disclosures, discovery, preserving discoverable information and introduction of evidence at trial. For guidance, *see* Fed. R. Civ. P. 26(f), Trademark Rule 2.120(a)(2)(i) and TBMP §§ 401.01 and 408.01(a).

The parties must hold the conference in person, by telephone or by a means on which they agree. A Board interlocutory attorney or administrative trademark judge will participate in the conference either upon request of any party made no later than ten (10) days prior to the conference deadline, or when the Board deems it useful to have Board involvement. *See* Trademark Rule 2.120(a)(2)(i). A request

for Board participation must be made either through ESTTA, or by telephone call to the assigned interlocutory attorney named on the TTABVUE record for this proceeding. A party requesting Board participation should first determine possible dates and times when all parties are available. A conference with a Board attorney's participation will be by telephone in accordance with the Board's instructions.

For efficiency, the parties may stipulate to various procedural and substantive disclosure, discovery and trial matters (*e.g.*, modification of deadlines and obligations) upon written stipulation and approval by the Board. Trademark Rule 2.120(a)(2)(iv) provides a non-exhaustive list of matters to which parties may stipulate. The best practice is to reduce all stipulations to writing. If email service is not practical, such as for voluminous document production in discovery, the parties should discuss in the conference how production will be made. The parties, and their attorneys or representatives, have **a duty to cooperate** in the discovery process. TBMP § 408.01.

PROTECTIVE ORDER FOR CONFIDENTIAL INFORMATION

The Board's Standard Protective Order is automatically imposed in all *inter partes* proceedings, and is available at: https://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/standard-documents-and-guidelines-0. During their conference, the parties should discuss whether they will use an alternative or modified protective order, subject to approval by the Board. *See* Trademark Rule 2.116(g) and TBMP § 412. The standard order does not automatically protect confidential information; its provisions for designating confidential information must be utilized as needed by the parties. Trademark Rule 2.126(c) sets forth the procedure for filing confidential submissions.

ACCELERATED CASE RESOLUTION (ACR)

During their conference, the parties are to discuss whether they wish to seek mediation or arbitration, and whether they can stipulate to the Board's Accelerated Case Resolution (ACR) process for a more efficient and cost-effective means of obtaining the Board's determination of the proceeding. For details, and examples of ACR proceedings, *see* TBMP § 528, and the Board's webpage: http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab.

INITIAL DISCLOSURES AND DISCOVERY

Regarding the deadline for and contents of initial disclosures, *see* Trademark Rules 2.120(a)(1) and (2)(i), and TBMP § 401.02. Regarding deadlines for serving and responding to discovery, *see* Trademark Rule 2.120(a)(3) and TBMP § 403.03. Certain provisions of Fed. R. Civ. P. 26 are applicable in modified form. Note that written discovery (interrogatories, requests for production, requests for admission) must be served **early** enough so that responses will be due **no later than** the close of discovery. Regarding the scope and limits of discovery, *see* TBMP 414; discoverable items may include documents, tangible things, and electronically stored information (ESI).

MOTIONS

Certain provisions of Fed. R. Civ. P. 11 apply to all submissions in Board proceedings. *See* TBMP § 527.02. Regarding available motions, *see* TBMP Chapter 500. Regarding applicable deadlines to respond to motions, depending on the motion filed, *see* Trademark Rules 2.127(a) and (e)(1). When a party timely files a potentially dispositive motion the proceeding is suspended with respect to all matters not germane to the motion. *See* Trademark Rule 2.127(d). In addressing motions or other filings, if it appears to the Board that a telephone conference would be beneficial, or upon request of one or both parties, the Board may schedule a conference. *See* Trademark Rule 2.120(j)(1) and TBMP § 502.06(a).

PRETRIAL DISCLOSURES, TRIAL AND BRIEFING

Regarding the procedures and deadlines for pretrial disclosures and trial, and specifically the noticing, taking, serving and submitting of evidence and testimony, *see* Trademark Rules 2.120(k), 2.121, 2.122, 2.123 and 2.125, as well as TBMP Chapter 700. The parties should review these authorities. For example: witness testimony may be submitted in the form of affidavit or declaration subject to the right to oral cross examination; transcripts of testimony depositions, with exhibits, must be served on each adverse party within thirty (30) days after completion of taking the testimony; certified transcripts and exhibits must be filed, with notice of such filing served on each adverse party; and all notices of reliance must be submitted during the submitting party's assigned testimony period and must indicate generally the relevance the evidence and associate it with one or more issues.

Main briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing is not required, but will be scheduled upon separate notice timely filed pursuant to Trademark Rule 2.129(a). Regarding briefs and oral hearings, *see* TBMP §§ 801-802.

LEGAL RESOURCES AVAILABLE AT WEB PAGE

For a general description of Board proceedings, *see* TBMP §102.03. Proceedings are governed by the Trademark Rules of Practice in Parts 2 and 7 of Title 37 of the Code of Federal Regulations. These rules, the Manual of Procedure (TBMP), infor-

mation on Accelerated Case Resolution (ACR) and Alternative Dispute Resolution (ADR), and many Frequently Asked Questions, are available on the Board's web page, at:
http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab. The parties should check the web page for important changes, announcements, etc., many of which apply to proceedings already in progress.

PARTIES NOT REPRESENTED BY COUNSEL

This proceeding is similar to a civil action in a federal district court and can be complex. The Board **strongly** advises all parties to secure the services of an attorney who is familiar with trademark law and Board procedure. The Board cannot aid in the selection of an attorney. *See* TBMP § 114.02. The Board requires strict compliance with all applicable authorities whether or not the party is represented by counsel.

NOTIFY BOARD OF ALL PENDING ACTIONS

If the parties are, or during the pendency of this proceeding become, parties in another Board proceeding or a civil action involving the same or related marks, or involving any issues of law or fact which are also in this proceeding, they shall notify the Board immediately. *See* Trademark Rule 2.106(b)(3)(i). The Board will consolidate and/or suspend related Board proceedings, as appropriate. *See* Trademark Rule 2.117(c); TBMP §§ 510 and 511.