

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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RSC

November 13, 2019

Opposition No. 91242958

*James Conway, Rohan Campbell, Yusuf
Boyd*

v.

Anthony L. Jones

Rebecca Stempien Coyle, Interlocutory Attorney:

This proceeding comes before the Board on Applicant's September 4, 2019, motion for judgment. The motion is contested by Opposers. Applicant did not file a reply brief in support of the motion.

1. Opposers' Submissions of September 4, 2019

Before addressing the merits of Applicant's motion, the Board turns to Opposers' submissions on September 4, 2019.¹ Opposers do not identify the nature of these submissions, however the certificate of service accompanying 18 TTABVUE identifies the submissions as "the articles for discovery." The Board notes that there was no separate proof of service for Opposers' second submission that day, at 19 TTABVUE. Accordingly, the submission can be viewed here:

<http://ttabvue.uspto.gov/ttabvue/v?pno=91242958&pty=OPP&eno=19>

¹ 18 and 19 TTABVUE.

Opposers are reminded that **all** submissions must include proof of service. Trademark Rule 2.119. Any future submission that fails to comply with the service requirement may be given no consideration.

It is unclear from Opposers' submission if these "articles for discovery" are intended to Opposers' initial disclosures, trial evidence, or in response to discovery requests served by Applicant, or if Opposers are seeking relief from the Board. Regardless, Opposers' submissions will be **given no further consideration**, because they either should not have been submitted to the Board (if they are initial disclosures or discovery responses),² are untimely (if they are trial evidence)³ or do not meet the requirements of a motion (if they are seeking relief from the Board).⁴

2. Applicant's Motion

The Board next turns to Applicant's motion for judgment. Applicant requests judgment in his favor on the grounds that Opposer did not "file" initial or expert disclosures by their respective deadlines. In response, Opposers construe Applicant's

² Written disclosures, as with requests for discovery, responses thereto, and materials or depositions obtained through the disclosure or discovery process, should not be filed with the Board except for limited circumstances set forth in Trademark Rule 2.120(k)(8); TBMP § 409 (June 2019). Opposers' submission were not filed with respect to any of the enumerated reasons.

³ The Board's schedule assigns to each party its time for taking testimony and presenting evidence. No testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, a motion granted by the Board, or upon other order of the Board. Trademark Rule 2.121(a); TBMP § 703.01(c). To the extent Opposers' submissions were intended as evidence, Opposers are advised to review the Board's requirements for introducing evidence. *See* TBMP § 700.

⁴ Every motion submitted to the Board must contain a full statement of the grounds and embody, or be accompanied by, a brief. Trademark Rule 2.127(a); TBMP § 502.02.

motion as one for summary judgment and maintain that Applicant did not serve initial disclosure and therefore cannot bring a motion for summary judgment.

Applicant does not discuss summary judgment, or otherwise indicate that his motion is one for summary judgment, and the Board declines to construe his motion as such.⁵

In his motion, Applicant refers to Opposers' failure to serve initial disclosures or expert disclosures. These failures in and of themselves are insufficient for entering judgment in Applicant's favor. Judgment may not be entered against a party who fails to make initial or expert disclosures until after a motion for discovery sanctions has been filed,⁶ but a motion for sanctions cannot be filed until the party fails to comply with an order compelling the disclosures. Trademark Rule 2.120(h); *Kairos Institute of Sound Healing, LLC v. Doolittle Gardens LLC*, 88 USPQ2d 1541, 1543 (TTBA 2008) ("A motion to compel is the available remedy when an adversary has failed to make, or has made inadequate, initial disclosures or disclosures of expert testimony. Both of these types of disclosures are made during discovery, and a motion to compel must precede a motion for sanctions. A motion for sanctions is only appropriate if a motion to compel these respective disclosures has already been granted." (quoting *Notice of Final Rulemaking, Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 72 Fed. Reg. 42256 (Aug. 1, 2007)); TBMP § 527.01(a).

⁵ See Fed. R. Civ. P. 56; TBMP § 528.

⁶ There is no indication that the exception to this requirement, the party stated it would not make the required disclosures, is applicable in this matter. Trademark Rule 2.120(h)(2); TBMP § 527.01(b).

Applicant has not prevailed on a motion to compel Opposers' initial or expert disclosures, and therefore Applicant cannot bring a motion for sanctions.⁷

To the extent Applicant is seeking judgment on the basis that Opposers have failed to prove their case or have lost interest in this proceeding, his motion is premature. *See* Trademark Rules 2.132 and 2.128(a)(3); TBMP §§ 534 and 536.

Accordingly, Applicant's motion for judgment is **denied**.

3. Petitioner's Pretrial Disclosures

Finally, the Board notes that Opposers, on September 17, 2019, filed a copy of their pretrial disclosures with the Board. Trademark Rule 2.120(k)(8) provides, in relevant part, that "[w]ritten disclosures ... should not be filed with the Board" except in limited circumstances not currently at issue. In view thereof, the Board will **give no consideration** to Opposers' filing.

4. Resetting of Schedule

The Board, pursuant to its inherent authority, will reset dates accordingly.

Plaintiff's Pretrial Disclosures Due	1/3/2020
Plaintiff's 30-day Trial Period Ends	2/17/2020
Defendant's Pretrial Disclosures Due	3/3/2020
Defendant's 30-day Trial Period Ends	4/17/2020
Plaintiff's Rebuttal Disclosures Due	5/2/2020
Plaintiff's 15-day Rebuttal Period Ends	6/1/2020
Plaintiff's Opening Brief Due	7/31/2020
Defendant's Brief Due	8/30/2020
Plaintiff's Reply Brief Due	9/14/2020

⁷ Additionally, the deadlines for Applicant to bring a motion to compel Opposers' initial disclosures or expert disclosures have passed. A motion to compel initial disclosures must be filed within thirty days of the initial disclosures deadline, and a motion to compel expert testimony disclosures must be filed prior to the close of discovery. Trademark Rule 2.120(f); TBMP § 523.03.

Request for Oral Hearing (optional) Due 9/24/2020

❖ Information for a Pro Se Litigant

The Board notes that Opposers and Applicant are currently representing themselves in this proceeding. While Patent and Trademark Rule 11.14 permits a party 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 inter partes proceedings before the Board 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. *See* TBMP § 114.02.

Trademark Rules 2.119(a) and (b) require that except for the original notice of opposition, every submission filed in a proceeding before the Board must be served upon the other party or parties, and proper proof of such service must be made before the submission will be considered by the Board. Accordingly, all submissions filed in this proceeding must be accompanied by a statement, signed by the attorney or other authorized representative, attached to or appearing on the original submission when filed, clearly stating the date and manner in which service was made, the name of each party or person upon whom service was made, and the email address or address. *See* TBMP § 113.03. Service must be made by email unless otherwise stipulated, or unless the filing party has satisfied the requirements for another method of service as set forth in Trademark Rule 2.119(b). The statement, which will be accepted as prima facie proof of service, must be signed and dated, and should take the form of a Certificate of Service as follows:

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, address, and email address of opposing counsel or party).

Signature_____

Date_____

Submissions in Board proceedings must be made via ESTTA, the Electronic System for Trademark Trials and Appeals, and must be in compliance with Trademark Rules 2.126(a) and (b). *See* TBMP § 110.01. The ESTTA user manual, ESTTA forms, and instructions for their use are at <http://estta.uspto.gov/>.

It is recommended that any pro se party be familiar with the latest edition of Chapter 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. Parties should also be familiar with the Trademark Trial and Appeal Board Manual of Procedure (TBMP), available at <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>, the TTABVUE system for viewing the record for all Board proceedings, available at <http://ttabvue.uspto.gov/ttabvue/>, and the Standard Protective Order, available at <https://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/standard-documents-and-guidelines-0>.

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is required of all parties, whether or not they are represented by counsel. *McDermott v. San Francisco Women's Motorcycle Contingent*,

81 USPQ2d 1212, n.2 (TTAB 2006), *aff'd unpub'd*, 240 Fed. Appx.865 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1109 (2008).

This inter partes proceeding is similar to a civil action in a federal district court. The parties file pleadings and a range of possible motions. This proceeding includes designated times for disclosures, discovery (discovery depositions, interrogatories, requests for production of documents and things, and requests for admission, to ascertain the facts underlying an adversary's case), a trial period, and the filing of briefs.

Trademark Rules §§ 2.122–2.125 govern the trial evidence and testimony. The Board does not preside at the taking of testimony; 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. Additionally, the testimony of witnesses in inter partes cases may be submitted in the form of an affidavit or a declaration pursuant to 37 C.F.R. § 2.20 and in conformance with the Federal Rules of Evidence, filed during the proffering party's testimony period, subject to the right of any adverse party to elect to take and bear the expense of oral cross-examination of that witness. *See* Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1). No paper, document, or exhibit will be considered as evidence unless it has been introduced in evidence in accordance with the applicable rules.

Generally, the Federal Rules of Evidence apply to Board trials. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial

phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 37 C.F.R. §§ 2.121 -2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a)