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

Proceeding	91244034
Party	Plaintiff Sean Griffin and GriffinWorx, Inc.
Correspondence Address	TODD A NELSON GABLEGOTWALS 100 WEST 5TH ST STE 1100 TULSA, OK 74103 UNITED STATES iplaw@gablelaw.com 918-595-4800
Submission	Motion for Sanctions (Other)
Filer's Name	Todd A. Nelson
Filer's email	tnelson@gablelaw.com
Signature	/todd a. nelson/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: 87/237,986
Filed: November 15, 2016



Mark:
Published: April 17, 2018

SEAN GRIFFIN, and
GRIFFINWORX, INC.,

Opposers,

v.

FENOX VENTURE CAPITAL, INC. DBA
FENOX VENTURE CAPITAL,

Applicant.

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Opposition No. 91244034

**OPPOSERS' MOTION FOR SANCTIONS
AND/OR OTHER RELIEF WITH BRIEF IN SUPPORT**

Sean Griffin and Griffinworx, Inc. (“Opposers”), hereby submit their motion for sanctions and/or other relief against Fenox Venture Capital, Inc. DBA Fenox Venture Capital (“Applicant”), pursuant to Trademark Rule § 2.120(h)(1). In support of their motion, Opposers state as follows:

I. INTRODUCTION

Opposers have used the marks STARTUP CUP and WORLD STARTUP CUP in connection with their business training in the field of entrepreneurship, including arranging and conducting competitions among start-up businesses, since at least 2011. Opposer Griffin is the owner and Griffinworx is the licensee of the following U.S. registrations and applications:

- U.S. Application Serial No. 87/917,283 for STARTUP CUP filed in IC 035 for online business competitions (principal register). Application suspended due to these proceedings;
- U.S. Registration No. 5,642,389 for STARTUP CUP filed in IC 041 with a first use date at least as early as 2011 (principal register);
- U.S. Registration No. 4,140,496 for STARTUP CUP in IC 035 with a first use date at least as early as 2011 (supplemental register); and
- U.S. Registration No. 4,603,445 for STARTUP CUP in IC 041 with a first use date at least as early as 2011 (supplemental register).

Applicant's affiliated party previously filed U.S. Application Serial No. 87/004,627 for the standard character mark STARTUP WORLD CUP. In an Office Action dated August 2, 2016, the trademark examining attorney asserted Opposers' U.S. Registration Nos. 4,140,496 and 4,603,445 as a basis for rejection of Applicant's application on the stated grounds that, pursuant to the Trademark Act § 2(d), there is a likelihood of confusion. Application 87/047,627 was abandoned.

Applicant then filed the subject application on November 15, 2016 for a stylized version of Start Up World Cup. The subject, Application Serial No. 87/237,986, was filed as a use-based application with a stated date of first use being January 1, 2016. Applicant, among other things, argued over an initial refusal by the USPTO Examining Attorney based on §2(d) likelihood of confusion grounds which again cited Opposers' registrations, and the application published for opposition.

The following table depicts the mark as-filed, the mark as improperly broadened and the mark currently used in commerce by Applicant:

The stylized mark Applicant applied to register:	The mark as improperly amended/broadened by Applicant:	The mark as presently used by Applicant:
		

Opposers initiated these proceedings based on priority of use and likelihood of confusion (with extensive actual confusion) and Applicant’s improper broadening/altering of the subject mark during the application process. Although the date of first use is presently unknown to Opposers, upon information and belief, Applicant began using the present mark subsequent to the initiation of these proceedings.

II. DISCOVERY AND PROCEDURAL HISTORY

In proceeding with this opposition, on or about April 5, 2019, Opposer submitted the following to Applicant:

1. First Request for Production of Documents (1-26); and
2. First Set of Interrogatories (1-20).

The requests and interrogatories are hereinafter collectively referred to herein as the “Discovery Requests.” Applicant failed to cooperate, refused or otherwise was unable to comply with the most basic discovery provisions contained in the rules of the TTAB and the Federal Rules of Civil

Procedure. Even with an extension of time, Applicant failed to timely respond to the Discovery Requests. When Applicant eventually responded, the responses and document production were woefully deficient. Applicant produced only a few pages of documents, and not even a single email. Opposers filed their Motion to Compel regarding the Discovery Requests on August 7, 2019 (Dkt. No. 7). On August 8, the Board entered an Order suspending these proceedings pursuant to TBMP § 510.03(a). The Board's Order provides, "The parties may not serve any additional discovery until the period of suspension is lifted or expires by or under order of the Board." (Dkt. No. 8).

Notwithstanding the Board's Order, Applicant served its first set of interrogatories and requests for production of documents while the proceedings were suspended. The requests which were served during the suspension period constituted the only discovery by Applicant during these proceedings. Applicant refused to withdraw the requests, and Opposers were required to file a Motion for Protective Order. (Dkt. No. 12).

On December 11, 2019, the Board granted both Opposers' Motion for Protective Order and Opposers' Motion to Compel. As the Board stated in its Order,

In summary, Opposer's motion to compel is granted. Applicant is allowed until **twenty (20) days from the date of this order** to serve supplemental responses to Request for Production Nos. 1, 2, 3 and 4; and Interrogatory Nos. 2, 3, 4, 6, 8, 14, 19 and 20, to include its production of documents in supplementation to its responses to document requests that correlate with or support its answers to the interrogatories.

In the event that Applicant fails to serve responses as directed herein, a remedy lies in a motion for sanctions, as appropriate, pursuant to Trademark Rule 2.120(h)(1).

(Emphasis in original) (Dkt. No. 13).

The deadline provided for in the Order passed and Applicant has not served any supplemental responses or produced any of the documents required by the Order. Applicant has

also not requested additional time or otherwise communicated in any manner. In short, Applicant has wholly failed and refused to comply with the Board's Order.

III. ARGUMENT AND AUTHORITIES

TBMP § 527.01(a) provides in part as follows:

If a party fails to comply with an order of the Board relating to discovery, including a protective order or an order compelling discovery, the Board may enter appropriate sanctions, as defined in 37 CFR § 2.120(h)(1)....

The sanctions that may be entered by the Board include, inter alia, striking all or part of the pleadings of the disobedient party; refusing to allow the disobedient party to support or oppose designated claims or defenses; prohibiting the disobedient party from introducing designated matters in evidence; and entering judgment against the disobedient party . . .

Trademark Rule 2.120(h)(1) (37 C.F.R. § 2.120(h)(1)) similarly provides as follows:

1) If a party fails to participate in the required discovery conference, or if a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, including a protective order, the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board will not hold any person in contempt or award expenses to any party. The Board may impose against a party any of the sanctions provided in Rule 37(b)(2) in the event that said party or any attorney, agent, or designated witness of that party fails to comply with a protective order made pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. . .

Rule 37(b)(2) of the Federal Rules of Civil Procedure is incorporated into Rule 2.120(h)(1) and provides that sanctions may include, among other things, “rendering a judgment by default against the disobedient party.” Opposers submit that the appropriate sanction or other remedy in these proceedings, particularly considering Applicant's repeated and willful failure and refusal to 1) move these proceedings forward, 2) cooperate in discovery, 3) abide by the Board's order staying

the proceedings, and 4) comply with the Board's Order compelling discovery, is judgment by default against Applicant.

In view of Applicant's failure and refusal to cooperate in discovery (as detailed in Dkt. Nos. 7 and 11) and failure and refusal to comply with at least two separate Orders of the Board in these proceedings (Dkt. Nos. 8 and 13), judgment by default is warranted. "The Courts have held that, although default judgment is a harsh remedy, it is justified where no less drastic remedy would be effective and there is a strong showing of willful evasion." *Unicut Corp. v. Unicut, Inc.*, 222 U.S.P.Q. 341, 344 (TTAB 1984). See *Benedict v. Superbakery Inc.*, 665 F.3d 1263, 101 USPQ2d 1089, 1093 (Fed. Cir. 2011) (affirming Board's entry of judgment as a discovery sanction for failures to comply with Board's reasonable orders), *aff'd* 96 USPQ 1134 (TTAB 2010). See also, *MHW Ltd. v. Simex*, 59 U.S.P.Q.2d 1477, 1478 (TTAB 2000) (entry of judgment as sanction).

III. CONCLUSION

For the reasons set forth herein and as set forth in the prior motions and orders in these proceedings, Opposers, Griffinworx, Inc. and Sean Griffin, respectfully request that the Board enter its order granting their motion for sanctions and/or other relief against Applicant, Fenox Venture Capital, Inc. DBA Fenox Venture Capital, namely, judgment by default against Applicant and/or such other and further relief as the Board deems just and proper. In the event the Board orders a lesser sanction than judgement by default, Opposers request they be granted an opportunity to file a motion for summary judgment.

Date: January 10, 2020

Respectfully Submitted,

/todd a. nelson/

Todd A. Nelson

Paul E. Rossler, Reg. No. 60409

Scott R. Zingerman, Reg. No. 35422

GABLEGOTWALS

100 West Fifth Street, Suite 1100

Tulsa, OK 74103

Telephone: (918) 595-4800

Facsimile: (918) 595-4990

Attorneys for Opposers,

Griffinworx, Inc. and Sean Griffin

CERTIFICATE OF TRANSMITTAL - ESTTA

Date of Deposit January 10, 2020

I hereby certify that this correspondence is being transmitted to the UNITED STATES PATENT AND TRADEMARK OFFICE via the ESTTA system on January 10, 2020.

/todd a. nelson/

Todd A. Nelson

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Motion to Sanctions and/or Other Relief has been served on Applicant, via email and by mailing said copy on January 10, 2020, via First Class Mail, postage prepaid to:

Herbert Patty, Esq.
The Law Office of Herbert T. Patty
1625 The Alameda, Ste 407
San Jose, California 95126

/todd a. nelson/

Todd A. Nelson