

ESTTA Tracking number: **ESTTA1396070**Filing date: **11/15/2024**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91290125
Party	Plaintiff KB Home
Correspondence address	LEE B BENNIN LATHROP GPM LLP 80 SOUTH 8TH STREET 3100 IDS CENTER MINNEAPOLIS, MN 55402 UNITED STATES Primary email: lee.bennin@lathropgpm.com Secondary email(s): sheldon.klein@lathropgpm.com, trademark@lathropgpm.com 612-632-3203
Submission	Motion for Discovery Sanctions
Filer's name	Lee B. Bennin
Filer's email	lee.bennin@lathropgpm.com
Signature	/Lee B. Bennin/
Date	11/15/2024
Attachments	Opposers Motion for Discovery Sanctions.pdf(317752 bytes) Declaration of Lee Bennin in Support of Motion for Sanctions.pdf(271901 bytes)

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

KB HOME,

Opposer,

v.

OM IMPORTS INC.,

Applicant.

Opposition No. 91290125

Serial No. 97858466

Mark:



OPPOSER’S MOTION FOR DISCOVERY SANCTIONS

Pursuant to Federal Rule of Civil Procedure 37, TBMP § 527.01, and 37 C.F.R. 2.120, Opposer KB Home (“Opposer”) moves the Board to impose sanctions against Applicant OM Imports Inc. (“Applicant”) in the nature of judgment against Applicant, sustaining the opposition, and declaring the subject application abandoned.

FACTUAL BACKGROUND

Opposer initiated this Opposition proceeding on March 5, 2024. (1 TTABVUE). Counsel for the parties held a discovery conference on April 26, 2024. (5 TTABVUE at 7, ¶ 2). On July 23, 2024, Opposer served a First Set of Interrogatories (“Interrogatories”) seeking information about Applicant’s conception, adoption, and use of the mark that is the subject of this proceeding (“Applicant’s Mark”); the goods or services Applicant offers under Applicant’s Mark; Applicant’s advertising or promotional materials that utilize Applicant’s Mark; and more. (5 TTABVUE at 10–17). Opposer also served a First Set of Requests for Production of Documents (“Document Requests”) seeking documents about many of the same categories of information. (5 TTABVUE at 19–24).

Applicant failed to respond to the Interrogatories and Document Requests or seek an extension of time within which to respond. (*See* 5 TTABVUE at 26–28). Opposer therefore moved to compel discovery. (5 TTABVUE). Applicant did not respond to the motion. On October 11, 2024, the Board granted Opposer’s motion to compel. (7 TTABVUE). The Board ordered:

Accordingly, Applicant is **directed** to serve, **by November 14, 2024**, responses to Opposer’s interrogatories and document requests. Applicant must respond in full and without objection on the merits thereof inasmuch as Applicant failed either to timely respond or to object to said discovery requests.

(7 TTABVUE at 2 (emphasis unchanged)). The order further stated that, “[i]n the event that Applicant fails to serve full responses as ordered herein, Opposer’s remedy may lie in a motion for sanctions, as appropriate.” (*Id.*).

Applicant’s deadline to respond to discovery has now passed. Applicant *still* has not served responses to the Interrogatories or Document Requests. (Bennin Decl. ¶ 2). More than that, Applicant has not even contacted Opposer about the discovery or any other topic. (Bennin Decl. ¶ 3). Applicant’s last contact with Opposer was more than two months ago. (Bennin Decl. ¶ 3). Opposer therefore requests that the Board sanction Applicant for its continuing, willful violations of the rules governing this proceeding, including the Trademark Rules of Practice, 37 C.F.R. §§ 2.1 *et seq.*, the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), and the Board’s order compelling discovery.

ARGUMENT

“If a party fails to comply with an order of the Board relating to discovery, including . . . an order compelling discovery, the Board may enter appropriate sanctions, as defined in 37 C.F.R. § 2.120(h)(1).” TBMP § 527.01. That rule allows authorizes the Board to “make any appropriate order [sanctioning a party], including those [sanctions] 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.” 37 C.F.R. § 2.120(h)(1). Rule 37(b)(2), in turn, authorizes the Board to “render[] a default judgment against the disobedient party.” Fed. R. Civ. P. 37(b)(2)(vi). The TBMP further states that the Board may “enter[] judgment against the disobedient party.” TBMP § 527.01(a).

“Default judgment is a harsh remedy, but may be justified where no less drastic remedy would be effective and there is a strong showing of willful evasion.” *Id.* A pattern of dilatory conduct showing a willful disregard of Board procedures and orders is sufficient to warrant entry of judgment. *See Benedict v. Superbakery Inc.*, 665 F.3d 1263, 101 USPQ2d 1089, 1093 (Fed. Cir. 2011); *MySpace Inc. v. Mitchell*, 91 USPQ2d 1060, 1062 (TTAB 2009) (sustaining consolidated opposition and cancellation proceedings and entering default judgment in the opposer-petitioner’s favor due to the applicant-respondent’s “course of delay” in responding to discovery and complying with Board orders); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1854 (TTAB 2000).

Applicant has demonstrated that it is not willing to participate in this proceeding. Since the discovery conference in April, Applicant has completely shirked its responsibilities as a litigant and ignored the Board’s orders and deadlines. Applicant did not respond to Opposer’s discovery requests, did not respond to Opposer’s motion to compel discovery, and did not comply with the Board’s order compelling discovery responses by November 14, 2024. Applicant has not contacted Opposer to explain why it is not participating in discovery. (Bennin Decl. ¶ 3). Also, Applicant has not served any of its own discovery requests on Opposer. (Bennin Decl. ¶ 4). In short, Applicant has wholly withdrawn from this proceeding and made its intention obvious that it does not wish to participate.

“The Board expects parties (and their attorneys or other authorized representatives) to cooperate with one another in the discovery process, and looks with *extreme disfavor* on those who do not.” TBMP § 408.01 (emphasis added). “Each party and its attorney or other authorized representative has a duty not only to *make a good faith effort to satisfy the discovery needs of its adversary*, but also to make a good faith effort to seek only such discovery as is proper and relevant to the issues in the case.” *Id.* (emphasis added). Applicant’s repeated failures violate this foundational principle of proceedings before the Board. *See Hot Tamale Mama...and More, LLC v. SF Investments, Inc.*, 110 U.S.P.Q.2d 1080, 1081 n.1 (TTAB 2014) (a party’s conduct was “clearly inconsistent with the Board’s expectation that the parties and their attorneys cooperate with one another in the discovery process” when it “simply ignored the deadline to either serve discovery responses or seek from applicant an extension of time in which to do so”).

Applicant has already had multiple chances to cure its ongoing and egregious discovery violations. It has failed to do so. Applicant’s unwillingness to participate in this case—or even communicate with the Board or Opposer—warrants the entry of default judgment in Opposer’s favor and abandonment of Applicant’s application. That is the only appropriate remedy.

CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board impose sanctions against Applicant in the nature of judgment against Applicant sustaining the opposition.

Dated: November 15, 2024

Respectfully submitted,

LATHROP GPM LLP

By: /Lee B. Bennin/
Sheldon H. Klein
The Watergate—Suite 700
600 New Hampshire Avenue, NW
Washington, DC 20037
Tel: (202) 295-2200
Fax: (612) 632-4444
sheldon.klein@lathropgpm.com
trademark@lathropgpm.com

Lee B. Bennin
80 South 8th Street
3100 IDS Center
Minneapolis, MN 55402
Telephone: (612) 632-3000
Fax: (612) 632-4444
lee.bennin@lathropgpm.com

Attorneys for Opposer KB Home

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2024, a true and correct copy of the foregoing OPPOSER’S MOTION FOR DISCOVERY SANCTIONS was served via email upon Applicant’s counsel at the following:

Ran He
THC Lawyers
100 Wellington St. W, Suite 2130
Toronto, Canada M5K1K7
300 Cadman Plaza West
12th Floor
Brooklyn, New York 11201
rhe@thclawyers.ca

/Lee B. Bennin/
Lee B. Bennin

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

KB HOME,

Opposer,

v.

OM IMPORTS INC.,

Applicant.

Opposition No. 91290125

Serial No. 97858466

Mark:



**DECLARATION OF LEE B. BENNIN IN SUPPORT OF
OPPOSER’S MOTION FOR DISCOVERY SANCTIONS**

I, Lee B. Bennin, declare as follows:

1. I am an attorney with the law firm of Lathrop GPM LLP, counsel for Opposer KB Home (“Opposer”) in the above-captioned matter. I submit this declaration in support of Opposer’s motion for discovery sanctions. I have personal knowledge of the matters stated herein and, if called upon, could testify competently thereto.

2. As of the date of this declaration, Applicant has not served responses to Opposer’s First Set of Interrogatories or Opposer’s First Set of Requests for Production of Documents, nor has Applicant produced any documents responsive to Opposer’s First Set of Requests for Production of Documents.

3. Applicant has not contacted Opposer since before Opposer filed its Motion to Compel Discovery and before the Board issued the Order granting Opposer’s Motion to Compel Discovery (7 TTABVUE). Applicant’s last contact with Opposer was on September 10, 2024.

4. As of the date of this declaration, Applicant has not served any discovery requests on Opposer.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated: November 15, 2024

By: /Lee B. Bennin/
Lee B. Bennin
80 South 8th Street
3100 IDS Center
Minneapolis, MN 55402
Telephone: (612) 632-3000
Fax: (612) 632-4444
lee.bennin@lathrogpm.com