

ESTTA Tracking number: **ESTTA135592**Filing date: **04/30/2024**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91290944
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK AND APPEAL BOARD

PRO-FOOTBALL LLC and
NFL PROPERTIES LLC,

Opposers,

v.

O-LINE ENTERTAINMENT LLC,

Applicant.

Serial No.: 97515385

Filed: July 22, 2022

Published: October 17, 2023

Mark: ORIGINAL HOGS

Opposition No. 91290944

OPPOSITION TO MOTION TO AMEND NOTICE OF OPPOSITION

COMES NOW the Applicant, O-Line Entertainment LLC (hereinafter “Applicant”), by and through counsel, and submits this Opposition to Opposer Pro-Football LLC’s (hereinafter “Pro-Football”)¹ Motion to Amend Cover Page to Notice of Opposition (hereinafter “Motion to Amend”) and states as follows.

INTRODUCTION

On April 16, 2024, Pro-Football filed their Motion to Amend. (ESTTA1352814.) This motion impermissibly seeks to amend the ESTTA cover page to include NFL Properties LLC (hereinafter “the NFL”) as an opposer and leave to pay the necessary filing fee, in an attempt to rectify their untimely filing.

Applicant filed for the wordmark “ORIGINAL HOGS” on July 22, 2022, under Section 1(b) of the Lanham Act. The application was published on October 17, 2023. On November 13, 2023 Pro-Football Inc., upon information and belief the predecessor to Pro-Football, and the NFL

¹ Pro-Football LLC is a Maryland based Limited Liability Company which does business as the “Washington Commanders.”

timely filed their first 90-day extension of time to oppose. (ESTTA1321711, ESTTA1321712.) Both of these initial extensions were granted. (*Id.*) On January 18, 2024, both the NFL and Pro-Football, Inc. filed requests for 60-day extensions under consent while settlement negotiations were underway. (ESTTA1334758, ESTTA1334762.) These provided a final deadline, which could not be extended, of April 14, 2024. (*Id.*) Pro-Football timely filed their Notice of Opposition on Monday April 15, 2024. (ESTTA1352282.) However, the NFL did not file an opposition and did not pay a filing fee. Pro-Football alleges that the NFL's non-filing was due to an ESTTA malfunction, which resulted in the NFL's failure to timely file an opposition. To this date the NFL has yet to properly file an opposition to this application.

STANDARD OF REVIEW

As this trademark application was submitted under Section 1(b) of the Lanham Act, Pro-Football's ability to amend their opposition is limited by Section 2.107(a), which states that a joint opposer may not be added after the deadline for filing an opposition.

Pleadings in an opposition proceeding against an application filed under section 1 or 44 of the Act may be amended in the same manner and to the same extent as in a civil action in a United States district court, *except that, after the close of the time period for filing an opposition including any extension of time for filing an opposition, an opposition may not be amended to add to the goods or services opposed, or to add a joint opposer.*

37 C.F.R. § 2.107(a) (emphasis added)

ARGUMENT

Pro-Football's Motion to Amend must be denied as it is seeking relief which is expressly barred. Granting this Motion to Amend would be in effect granting an unauthorized extension to the filing period, and this Board does not have jurisdiction over the NFL's untimely opposition.

A. 37 C.F.R. § 2.107(a) is Unambiguous and Expressly Bars the Relief Sought in Pro-Football’s Motion to Amend.

When a statute is unambiguous, “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In that regard, 37 C.F.R. § 2.107(a) unambiguously states that joint opposer may not be added after the deadline for filing an opposition:

Pleadings in an opposition proceeding against an application filed under section 1 or 44 of the Act may be amended in the same manner and to the same extent as in a civil action in a United States district court, *except that, after the close of the time period for filing an opposition including any extension of time for filing an opposition, an opposition may not be amended to add to the goods or services opposed, or to add a joint opposer.*

37 C.F.R. § 2.107(a) (emphasis added)

Per the plain language, Pro-Football’s Motion to Amend is expressly barred as the Application was submitted under Section 1(b) of the Lanham Act, the Motion to Amend was submitted after the closure of the time frame to file an opposition, and the Motion to Amend seeks to add the NFL as a joint opposer. *See* 37 C.F.R. § 2.107(a).

Pro-Football’s Motion to Amend erroneously claims that “Fed R. Civ. P. 15(a)(2) and 37 CFR § 2.107 are analogous.” This statement requires abandonment of the unambiguous language and gives credence only to the first half of Section 2.107(a), and it entirely disregards the portion most applicable to the present scenario. *See* 37 CFR § 2.107(a) (stating in part “except that, after the close of the time period for filing an opposition including any extension of time for filing an opposition, an opposition may not be amended to add to the goods or services opposed, or to add a joint opposer.”) (emphasis added).

While leave to amend pleadings may be liberally granted, Pro-Football’s Motion to Amend expressly states that “the pleading itself is not being amended.” (Mot. at 2.) Instead, Pro-Football’s

Motion to Amend is, in effect, a motion for untimely filing, in which Pro-Football seeks leave to add the NFL as an opposer to this trademark application and file an untimely fee. (Mot. at 3.)

B. Granting this Motion to Amend Would Equate to Giving the NFL an Additional Filing Extension.

Allowing Pro-Football to amend their Opposition to include the NFL would grant the NFL an impermissible extension to file. 37 C.F.R. § 2.102(c)(3) (stating in part that “[n]o further extensions of time to file an opposition will be granted under any circumstances.”); *see also The Equine Touch Foundation, Inc. v. Equinology, Inc.*, 91 USPQ2d 1943, 1945 n.6 (TTAB 2009) (“The time for filing a notice of opposition is statutory and cannot be waived by the Board”).

By properly requesting extensions to file an opposition, the NFL had until April 14, 2024, to file a notice of Opposition. As April 14, 2024, was a Sunday, the NFL had until April 15, 2024 to file. *See* 37 C.F.R. § 2.196. However, the NFL, through error of counsel or otherwise, was not included as an opposer in Pro-Football’s timely filed Notice of Opposition. To this date, the NFL has not submitted an opposition, nor have they paid the mandatory filing fee. A Notice of Opposition is not filed until the fee is paid. *See* 37 C.F.R. § 2.101(e) (stating “[t]he filing date of an opposition is the date of electronic receipt in the Office of the notice of opposition, and required fee.”); *see also Vibe Records, Inc. v. Vibe Media Group, LLC.*, 88 USPQ2d 1280 (TTAB 2008) (TTAB precedential decision dismissing an opposition as untimely when the opposition was submitted via ETSSA prior to the filing deadline but payment was not processed until after) (further discussed *infra*).

Pro-Football claims that the NFL’s failure to timely file was caused by the ESTTA system and that they would be “deprived of any opportunity to correct the error caused by the ESTTA system prior to the end of the due date.” (Mot. at 3.) However, this argument should be given no credence in light of this Board’s precedential opinion in *Vibe Records, Inc. v. Vibe Media Group*,

LLC. See Vibe Records, Inc. v. Vibe Media Group, LLC., 88 USPQ2d 1280 (TTAB 2008). In *Vibe Records*, the would-be opposer attempted to file their opposition the day prior to their filing deadline. *Id.* at *3. In support of this, the would-be opposer provided a copy of the ESTTA cover page with appropriate filing date. This Board noted that the notice of opposition stated “Validate” on the top, indicating the filing was not complete. *Id.* at *3-4. However, the filing was not completed as the USPTO did not process their payment until two days after the deadline. *Id.* at *5. This Board noted that the “‘Welcome to ESTTA’ screen where ESTTA filers begin the filing process warns filers about last-minute filings for just this type of situation[.]” *Id.* The Board accordingly held that the filing date appearing on the “Validate” screen is not the operative filing date[.]” *Id.* at *6.

In the present case, the NFL never submitted their Notice of Opposition and never submitted their fee. Pro-Football provides as Exhibit A to their Motion to Amend a similarly invalid ESTTA “Validate” screen. (*See* Mot. Ex. A.) As in *Vibe Records*, this screen has no relevance. While the ESTTA welcome screen has changed since *Vibe Records*, the top still plainly states: “**PLAN AHEAD.** Because unexpected problems can occur, you should keep filing deadlines in mind and allow plenty of time to resolve any issue which might arise.” USPTO, *Electronic System for Trademark Trials and Appeals* <https://estta.uspto.gov/> (emphasis in original). Pro-Football and the NFL were actively engaged in negotiations with the Applicant regarding this Application prior to their filing deadline. Both Pro-Football and the NFL were well aware that they had until April 14, 2024 to file their notices of opposition. As this date fell on a Sunday, they were each provided until the next business day. Pro-Football and the NFL both waited until the last possible day to file their notice of opposition.

C. The Board Lacks Jurisdiction to Consider the NFL’s Untimely Filing,

Even if this Board would be inclined to allow Pro-Football’s Motion to Amend, this Board lacks jurisdiction to hear the NFL’s opposition to this Application. *See The Equine Touch Foundation, Inc. v. Equinology, Inc.*, 91 USPQ2d 1943, 1945 n.6 (TTAB 2009) (“The time for filing a notice of opposition is statutory and cannot be waived by the Board”). *See also* TBMP § 201 n.6 (stating “The Board lacks jurisdiction to decide an untimely filed opposition.”) (citing *Renaissance Rialto Inc. v. Ky Boyd*, 107 USPQ2d 1083, 1084 (TTAB 2013) (“whether an opposition was timely filed is ‘an issue of jurisdictional significance,’ untimely filed opposition dismissed without prejudice to file a cancellation for lack of jurisdiction) [.]”).

CONCLUSION

For the foregoing reasons, Applicant O-Line Entertainment, LLC, requests that this Board deny Pro-Football LLC’s Motion to Amend Cover Page to Notice of Opposition, rule that NFL Properties LLC is not a party to this opposition, and afford such other relief as the Board deems just and proper.

Respectfully submitted,

Date: April 30, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2024, a true and correct copy of the foregoing OPPOSITION TO MOTION TO AMEND NOTICE OF OPPOSITION has been filed electronically using ESTTA and served by e-mail upon the Applicant's attorney(s):

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