This decision is not a TTAB precedent.

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December 13, 2018

Cancellation No. 92061976

Hollywood Vodka LLC

v.

Hollywood Group

Before Bergsman, Wellington and Hightower,
Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of Petitioner's renewed motion (filed July 6, 2018) for entry of judgment as a "terminating sanction[]" under Trademark Rule 2.120(h)(1) for Respondent's failure to comply with the Board's November 27, 2017 order relating to discovery, 58 TTABVUE, in connection with discovery requests that Petitioner served on May 16, 2017.[1] Respondent, who is appearing *pro se*, filed a brief in opposition thereto.

In the November 27, 2017 order, the Board granted Petitioner's motion to compel discovery, 53 TTABVUE, and allowed Respondent until December 12, 2017 to serve

[1] Trademark Board Manual of Procedure (TBMP) Chapter 500, which discusses motion practice in Board *inter partes* proceedings, does not refer to "terminating sanctions." However, Petitioner's motion is clearly one for entry of judgment as a sanction under Trademark Rule 2.120(h)(1) for failure to comply with a Board discovery order. *See* TBMP § 527.01(a) (2018).

responses without objection to Petitioner's discovery requests. After Respondent failed to serve responses in compliance therewith, Petitioner, on December 14, 2017, filed a motion for entry of judgment as a sanction for failure to comply with the November 27, 2017 order, 61 TTABVUE. In a March 12, 2018 order, 67 TTABVUE, the Board denied that motion and allowed Respondent until April 11, 2018 to comply with the November 27, 2017 order.[2] After Respondent filed a series of submissions, 68, 70, 71, 73, and 75-76 TTABVUE, the Board, in an April 23, 2018 order, allowed Respondent until May 11, 2018 to comply with the November 27, 2017 order.[3] After Respondent failed to serve any discovery, Petitioner sought -- and the Board convened -- a telephone conference to seek leave to file a renewed motion for entry of sanctions.[4]

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[2] In the March 12, 2018 order, the Board stated in relevant part as follows:

> [T]he record herein convinces us that Respondent has not made a good faith effort to satisfy petitioner's discovery needs but rather has deliberately sought to evade and frustrate Petitioner's attempts to secure discovery. Respondent's conduct tries the Board's patience and has delayed this proceeding unnecessarily. The Board's November 27, 2017 order unequivocally directed Respondent to respond to Petitioner's discovery requests without objection and to produce documents by December 12, 2017. Proceedings herein were not suspended following the issuance of that order. As such, it was incumbent upon Respondent to comply fully with that order, notwithstanding that Petitioner sent a settlement offer on December 7, 2017.

67 TTABVUE 4.

[3] In the April 23, 2018 order, the Board stated in relevant part as follows:

> Any further pretrial submissions from Respondent must include an affirmative statement made under oath that it has complied fully with the Board's November 27, 2017 order, i.e., that it has responded fully and without objection to Petitioner's interrogatories and document requests and that it has served all responsive documents.

74 TTABVUE 9.

[4] Previously, the Board, in a March 10, 2016 order, required each party to contact the Board when it filed an unconsented motion to extend or suspend proceedings so that such motion could be resolved by telephone conference. 18 TTABVUE 11. In that order, the Board also required the parties, prior to filing a motion to compel discovery, to contact the assigned interlocutory attorney to convene a telephone conference to discuss whether the movant had made the requisite good faith effort to resolve the parties' discovery dispute. 18 TTABVUE

After a May 24, 2018 conference, the Board granted such leave in a May 29, 2018 order. 78 TTABVUE. The present motion followed.

In response to Petitioner's motion, Respondent contends that the motion for sanctions is not properly before the Board. In particular, Respondent asserts that the email in which Petitioner served that motion (1) contained "no reference to it being a Proof of Service and no reference to what the subject was;" (2) was unsigned, and (3) was also sent to Antonia Bebar, a non-party, at her email address. 83 TTABVUE 3. Ms. Bebar signed certificates of service of various filings of Respondent's in this case, but her title or role has not been identified. *See, e.g.,* 73 TTABVUE 5, 83 TTABVUE 7, and 84 TTABVUE 2.

We note initially that a determination of sufficiency of service is generally based on the statements in the certificate of service and not on the content of the service email. *See* Trademark Rule 2.119. Respondent has not alleged any deficiencies in the certificate of service of the motion for sanctions itself and has not alleged nonreceipt of that motion. The certificate of service of that motion, 79 TTABVUE 12, states the date, manner of service, and email addresses to which the motion was served. The certificate of service therefore complies fully with Trademark Rules 2.119(a) and (b). Moreover, the July 6, 2018 email at issue, 83 TTABVUE 8, directs Respondent to "the attached document filed today with the" Board and includes a block of identifying information for the sender of that email, Petitioner's attorney Douglas Lipstone.

10 n. 8. In addition, in a January 23, 2017 decision denying Respondent's petition to disqualify Petitioner's attorney, Respondent was "required to obtain leave of the assigned Interlocutory Attorney in order to file any future submissions in this case." 45 TTABVUE 5.

Thus, that email contained clear indicia of the nature and sender of the document at issue and that the email was sent to Respondent at his email addresses of record.[5] Ultimately, Petitioner's service on Ms. Bebar appears to be merely a courtesy copy on a person who was signing certificates of service on behalf of Respondent. Petitioner's service of the renewed motion for sanctions was proper. Respondent's request that the Board to strike any reference to Ms. Bebar from the certificate of service of Petitioner's motion is denied.

Respondent further contends that Petitioner's attorneys committed "perjury" by stating that they "lack any information" concerning Respondent's efforts to hire an attorney in this case.[6] 83 TTABVUE 4. Even if we assume that Respondent sought to retain an attorney at various points in this case, this would not excuse Respondent's continued noncompliance with the November 27, 2017 order. Respondent was advised at least twice in this case to seek counsel, 1 TTABVUE 5 and 18 TTABVUE 2 n.3, and its principal expressed interest in hiring an attorney during a December 7, 2017 telephone conference discussed in the Board's December 12, 2017 order. 60 TTABVUE 3. Notwithstanding that Respondent has appeared *pro se* throughout this case, the Board expects all parties appearing before it, regardless of whether they are

[5] Because the Board granted Petitioner leave to file a renewed motion for sanctions, 78 TTABVUE, Respondent should have reasonably expected to be served a renewed motion for sanctions.

[6] Respondent's stated efforts that it sought counsel are vague. Respondent stated generally its brief in response to Petitioner's motion to compel, 55 TTABVUE 9 and 83 TTABVUE 10, and in a December 7, 2017 telephone conference, 60 TTABVUE 3, that its principal has been seeking counsel to assist in this case.

The record also indicates that Respondent sent brief inquiry emails to two attorneys on December 12 and 26, 2017, but does not indicate Respondent's contact with either attorney went any further. 62 TTABVUE 7 and 83 TTABVUE 9 and 11.

represented by counsel, to comply with applicable rules and Board orders. *See McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, 1212 n.2 (TTAB 2006).

Respondent also alleges that Petitioner's attorney Shanen Prout falsely stated that he is "counsel of record," when he is only Petitioner's co-counsel. 83 TTABVUE 5. Mr. Prout is one of Petitioner's attorneys of record. Whether he is counsel or co-counsel is a matter of labor division between those attorneys and is irrelevant to this case.

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. *See Patagonia, Inc. v. Azzolini,* 109 USPQ2d 1859, 1862 (TTAB 2014); *Unicut Corp. v. Unicut, Inc.*, 222 USPQ 341, 344 (TTAB 1984). We believe that situation exists here.

Petitioner brought this action more than three years ago. Respondent was required in the November 27, 2017 order to serve responses without objection to Petitioner's discovery requests by not later than December 12, 2017, and received two extensions of time to comply with that order. 67 TTABVUE 4-5 and 74 TTABVUE 9-10. However, in response to the renewed motion for sanctions, Respondent did not dispute that it has failed to serve any discovery responses in this case and instead raised meritless arguments in an apparent attempt to divert the Board's attention from this failure. Respondent was clearly warned of the consequences of failing to comply with the November 27, 2017 order. 58 TTABVUE 6 and 67 TTABVUE 4-5. By papering the record of this case with dubious filings instead of complying with that

order, Respondent has repeatedly and willfully acted in a manner to evade Petitioner's properly attempted discovery requests and compliance with the November 27, 2017 order. Respondent's willful failure to comply with that order of the Board after having been advised repeatedly of the possible consequences warrants entry of judgment.

For the aforementioned reasons, Petitioner's renewed motion for sanctions is granted, judgment is hereby entered against Respondent, the petition for cancellation is granted, and Registration No. 3469935 will be cancelled in due course.