

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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August 28, 2018

Cancellation No. 92068216

Future Pipe Industries Limited

v.

Kent G. Anderson

Geoffrey M. McNutt, Interlocutory Attorney:

On March 26, 2018, Future Pipe Industries Limited (“Petitioner”) filed a petition for cancellation of Kent G. Anderson’s (“Respondent”) Registration No. 5223362.

Respondent’s answer to the petition for cancellation was due by May 7, 2018. *See* 2 TTABVUE 3.¹

1. Respondent’s Submission

On May 14, 2018, after the deadline for Respondent to file his answer had expired, Respondent filed a request for an extension of time with approximately 890 pages of extraneous documents and materials. *See* 4 TTABVUE, 5 TTABVUE, and 6 TTABVUE.

The extension request was filed in paper form, rather than by ESTTA, the Board’s electronic filing system. 4 TTABVUE 2. Additionally, Respondent indicated that he

¹ TTABVUE is the Trademark Trial and Appeal Board’s (“TTAB”) public database of TTAB docket information and files, available online at <http://ttabvue.uspto.gov>.

served a copy of the submission on the attorney for Petitioner by U.S. mail, not email. *Id.*, at 3. In the submission, Respondent requested that all communications be conducted by postal mail, not email. *Id.*, at 2.

The form of Respondent's submission and service of the extension request are improper. Absent technical problems or extraordinary circumstances, all submissions to the Board (including exhibits) must be filed via ESTTA, the Board's electronic filing system.² Trademark Rule 2126(a)–(b), 37 C.F.R. § 2.126(a)–(b); *see also* Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) Section 110.01(a) (June 2018). Absent certain exceptions, not applicable in this instance, a submission in paper form must include a written explanation of the technical problems or extraordinary circumstances, or it will not be considered. Trademark Rule 2126(b).

Similarly, absent technical problems or extraordinary circumstances, “[s]ervice of submissions filed with the Board and any other papers served on a party not required to be filed with the Board, must be on the attorney or other authorized representative of the party if there be such ... and must be made by email, unless otherwise stipulated[.]” Trademark Rule 2.119(b), 37 C.F.R. § 2.119(b). Proof of service must be made before the submission will be considered by the Board. Trademark Rule 2.119(a), 37 C.F.R. § 2.119(a).

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*,

² ESTTA is the acronym for the “Electronic System for Trademark Trials and Appeals,” available at <http://www.uspto.gov>.

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). Here, Respondent's extension request was not filed through ESTTA; was not served on Petitioner's attorney via email; and did not provide any explanation of technical problems or extraordinary circumstances that necessitated submitting the extension request by paper filing and serving it on by postal mail. Accordingly, Respondent's extension request has been given no consideration. Moreover, and in any event, the "extension request" was filed after Respondent's deadline to file an answer already had expired.

2. Notice of Default

In view of Respondent's failure to timely file either an answer to the petition for cancellation or a proper motion for an extension of his time to answer, notice of default is hereby entered against Respondent under Fed. R. Civ. P. 55(a).

Accordingly, proceedings are suspended. Respondent is allowed until **THIRTY DAYS** from the date of this order to show cause why judgment by default should not be entered against him in accordance with Fed. R. Civ. P. 55(b)(2).

The failure to file a timely answer tolls all deadlines, including the discovery conference, until the issue of default is resolved. *See* Trademark Rule 2.114(a).

The schedule for the discovery conference, initial disclosures, discovery and trial will be reset in the event that the Board resumes proceedings.

3. Form and Content of Answer

If Respondent files a response to this notice of default, he should also file his proposed answer to the petition for cancellation.

The form and content of an answer are governed by Fed. R. Civ. P. 8(b)³ and Trademark Rule 2.114, 37 C.F.R. § 2.114.

Fed. R. Civ. P. 8(b) provides, in part:

(b) Defenses; Admissions and Denials.

(1) *In General*. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party. ...

(2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation. ...

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial. ...

(6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

See also Trademark Rule 2.114(b)(1); TBMP § 311(a).

The petition for cancellation in this case consists of seven numbered paragraphs setting forth the pleaded grounds for cancellation. Respondent must answer the petition by specifically admitting or denying the allegations contained in each paragraph. If Respondent is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, he should so state in his

³ Fed. R. Civ. P. 8(b) is made applicable to this proceeding by Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a).

answer to the corresponding allegation and this will have the effect of a denial. Fed. R. Civ. P. 8(b)(5); Trademark Rule 2.114(b)(2).

Additionally, Respondent should note that although exhibits to an answer are not prohibited, they will not function as evidence on behalf of Respondent unless they subsequently are properly identified and introduced in evidence as exhibits during the time for taking testimony.⁴ *See, e.g., Home Juice Co. v. Runclin Cos.*, 231 USPQ 897, 898 (TTAB 1986); *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 155 n.3 (TTAB 1985); TBMP § 317.

4. Information for a Pro Se Litigant

Finally, the Board notes that Respondent currently is representing himself in this proceeding. The Board further notes that Respondent is no stranger to inter partes proceedings at the Board, having been involved in multiple opposition and cancellation proceedings since 2003.

While Patent and Trademark Rule 11.14 permits a person to represent himself, 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 notice of opposition and petition for cancellation, every submission filed in a proceeding before the Board

⁴ The only exhibits attached to a pleading that will be considered as evidence are printouts from the USPTO database relating to the current status and title of a plaintiff's pleaded registration. *See generally* TBMP § 317.

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 Respondent, 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 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/>.

The Board also uses email when sending decisions, orders, or other notices to the parties. The Board will send email to the parties at the addresses they have provided,

so it is essential that the parties promptly update their email and street addresses with any change. It is the parties' responsibility to take any necessary steps to ensure that papers from opposing counsel or the Board are not rejected by their spam filters. The Board presently does not have an email address for Respondent. **Respondent should provide an active email address to the Board, and to Petitioner's counsel, as soon as possible**, and no later than in connection with his response to the notice of default.

If Respondent represents himself in this proceeding, he is expected be familiar with the latest edition of Chapter 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. Respondent 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.