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

IN THE MATTER OF Application Ser. No. 76/302,551 for the trademark RED RAVE

RED BULL GMBH,)
)
Opposer,) **Opposition No. 91152588**
)
v.)
)
CARL COCHRAN,)
)
Applicant.)

APPLICANT'S REPLY IN SUPPORT OF MOTION TO QUASH OPPOSER'S TRIAL TESTIMONY DEPOSITION, OR
IN THE ALTERNATIVE TO STRIKE OPPOSER'S TRIAL TESTIMONY

Applicant respectfully submits this reply brief in support of his Motion to Strike Trial Testimony ("Motion").

BACKGROUND FACTS

The relevant facts, which are mostly undisputed, were set forth in the Motion. Aside from the Opposer's attempt to spin them in the best possible light, the fundamental facts stated by Opposer in its brief generally concur with those presented by Applicant. Applicant nevertheless must provide the following clarifications and additional details:

1. Opposer's first telephonic inquiry regarding its testimony period was a "voice mail" message left on undersigned counsel's phone at 10:30 a.m. June 4, 2003. Undersigned counsel for Applicant certifies, however, that he did not review the content of the message until sometime after noon that day.

2. Undersigned counsel further affirms that the following is the *verbatim* content of Opposer's June 4 voice mail message[1]:

> Hi Rod, Neil Greenstein. I'm calling for my brother Marty on the Red Bull versus Carl Cochran, uh, opposition. Marty is in Africa right now, and I wonder if you could give me a call. I need to talk with you regarding, um, scheduling of a testimony deposition, um, and we were going to schedule that for early next week. Umm, having some scheduling problems. If we need to we can, but wanted to talk with you about that, see if you'd be willing to, uh, continue dates out a little bit. Um, if you could let me know today, I'd appreciate it. 408-280-2228, again Neil Greenstein. Thanks a lot.

Thus, the June 4, 2003, telephone message did *not* mention "Monday" or any date or place for the deposition. The thrust of the message was to solicit a waiver of the June 8 testimony period deadline due to "scheduling problems" apparently stemming from Opposer's attorney's trip to Africa.

3. Applicant responded to the foregoing message by Federal Express® courier, rather than fax, because he anticipated that the present Motion would be vigorously contested; counsel for Applicant avoided any controversy about the content of his message and whether it was received.

4. Counsel for Applicant was preoccupied with other litigation during Opposer's June 5-6 panic period, but he did *not* intentionally "refuse to take any calls" from Opposer's attorneys. The undersigned attorney had a live telephone conversation with Neil Greenstein, attorney for Opposer, on the afternoon of June 5, 2003, in which the former mentioned his unavailability and confirmed his intention to file the present Motion, and the latter indicated Opposer's intention to conduct the deposition anyway. See Exhibit 2 to Opposer's Opposition brief.

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[1] A true and correct sound recording of the foregoing message is available on request.

ARGUMENT

The deficiencies in both the manner and timing of the Notice of Taking Testimony Deposition are plain. Opposer's effort to manufacture proper notice out of its last-minute phone calls and e-mails should be rejected, and all testimony taken pursuant to the tardy Notice should be stricken.

To be properly evaluated, the Motion should be placed in its equitable context. First, it should be noted that Opposer is a multi-national corporate conglomerate. Its products and trade dress allegedly "have been extensively advertised in the United States and throughout the world." See Notice of Opposition, ¶ 6. In marked contrast, Applicant is an individual struggling to start a new business, and as such has limited resources to devote to litigation such as this.

And while Opposer deems "irrelevant" the fact that it failed to respond to discovery, such abject failure not only is germane, it directly bears upon the merit of the present Motion. Had Opposer been as "communicative" about discovery as it was in its hasty effort to notice the deposition, the need to file this Motion may never have arisen.

Method of Service

Applicant admits that a "courtesy" copy of the Notice was transmitted by telephone facsimile at around 7:00 o'clock p.m. (Albuquerque time) on the night of June 4. The use of facsimile transmissions, however, is completely optional with the sender, and cannot substitute for proper service. T.B.M.P. §113.04. Undersigned counsel certifies, as a matter of fact, that Opposer's mailed Notice was received in Albuquerque office on June 9, 2003 – probably after the deposition had already started. To argue that the legally proper service was "due" defies common sense.

Due Notice

On the morning of June 5, Applicant had actual notice, for the first time, of the details of the noticed deposition. This fact is uncontested. June 5 was a Thursday, and the deposition was

noticed for the following Monday. Under any reasonable standard, and certainly under the circumstances of the present case, this is undue and unreasonable notice. Further, as a strictly legal matter, under Federal Rules of Civil Procedure, Rule 6(a), the day a notice is received is not counted in any time computations. And for pertinent time periods of less than 11 days – the situation here – intermediate Saturdays and Sundays likewise are excluded from time calculations. Fed. R. Civ. P. 6(a). From a purely technical standpoint, Opposer is advocating that one day, Friday June 6, constituted "due" notice.

Opposer rationalizes at length regarding its overtures to Applicant seeking a stipulated extension of Opposer's testimony period. Opposer also accuses counsel for Applicant of refusing to return its calls, and engaging in other discourtesies, regarding the Notice of Deposition. Wrong. The overriding discourtesy here was Opposer's months of total silence regarding this Opposition, followed by its galling expectation that Applicant suddenly drop everything to permit Opposer to press its case.

Discovery Dispute

This Motion is not an attempt to litigate Opposer's admitted failure to comply with discovery. The time for that has passed, and Applicant is not seeking a motion to compel. But the Opposer's misconduct in that regard, by itself, justifies granting the relief sought by this Motion to Strike. In effect, Opposer now requests the indulgence of the Board to overlook the prejudice to Applicant wrought by Opposer's unreasonable notice. But Opposer never responded to Applicant's discovery requests, let alone asked for more time to comply. Opposer thus comes to the Board with unclean hands – asking for leniency, but utterly failing to deserve it. Applicant urges the Board not to condone Opposer's cavalier attitude, if not contempt, for the rules of discovery by excusing Opposer's apparent disregard for the testimony periods set by the Board in its order of August 22, 2002.

Moreover, only industrial-strength self-righteousness can explain how Opposer could flout Applicant's discovery requests, and yet have the audacity to feign outrage when Applicant

declined Opposer's plea for an extended testimony period. Had Opposer been courteously forthcoming with the obligatory discovery responses, Applicant may have reciprocated with a deadline waiver. But for Applicant compliantly to cooperate with Opposer's time request, after Opposer had so abused Applicant, would be self-destructive folly on Applicant's part. In sum, Applicant was well within his rights to refuse to re-schedule the deposition outside the pertinent testimony period. All of Opposer's griping about Applicant's supposed "discourtesy" is specious.

Inconvenience to Applicant

Opposer attempts to minimize Applicant's costs to comply with the tardy notice. As the basis of its argument, Opposer compares the airfare from Albuquerque to Los Angeles for booking on June 10 a flight on June 14 versus a flight on June 11. (Both June 11 and 14 were outside Opposer's testimony period.) This contention misses the point. A proper comparison would have been booking on, say, *May 23* and June 10. Counsel for Applicant makes use of Southwest Airlines, it being the principal carrier out of Albuquerque. Upon information and belief, Applicant states that round trip flights to Los Angeles via Southwest Airlines can be had for as little as about $150, if booked at least fourteen days in advance. Opposer's dilatory notice deprived Applicant, without cause, of the reduced fares available with reasonable notice.

Opposer also gives no consideration to the fact that Applicant, as well as his attorney, reasonably could be expected to make the trip to Santa Monica. This is especially so since Opposer evidently expected Applicant to prepare for the deposition *en route* thereto. All last-minute expenses, therefore, would have been doubled to account for two travelers.

Both Applicant and his attorney are busy men. On June 5, the undersigned had barely returned from Washington, D.C., where he participated in the appellate oral argument of a multi-million dollar patent infringement case.[2] After preparing for and participating in that argument,

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[2] *Medical Instrumentation and Diagnostics Corp. v. Elekta AB, et al.*, U.S. Court of Appeals for the Federal Circuit, No. 03-1032 (argued June 2, 2003).

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