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

Proceeding	91213597
Party	Defendant Tigercat International Inc.
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Attachments	Applicants Opposition and Memorandum to Combined Motion for Reconsideration with Certificate of Service.pdf(666844 bytes) EXHIBIT 1 TO APPLICANTS OPPOSITION TO COMBINED MOTION FOR RECONSIDERATION.PDF(1591622 bytes) EXHIBIT 2 TO APPLICANTS OPPOSITION TO COMBINED MOTION FOR RECONSIDERATION.PDF(1729250 bytes)

compel/for sanctions, and its disregard of its good-faith meet-and-confer obligations, the Board should decline to reward Caterpillar's gamesmanship with a further delay of this proceeding.

Background/Chronology

The relevant chronology will aid the Board in its assessment of Opposer's Combined

Motions:

- April 13, 2015 – the deadline for expert disclosure¹. Both parties served expert disclosures on this date. Applicant served the expert report and survey of Mr. Berger regarding the likelihood of confusion using the *Squirt* methodology. Opposer did not disclose any survey expert report.
- December 23, 2015 – the date for expert disclosure as reset by the Board Order of December 22, 2015. Opposer did not disclose any survey expert report.
- **March 3, 2016**- *Opposer took the discovery deposition of Tigercat's survey expert, Mr. Berger.*
- April 4, 2016 - Opposer served the rebuttal expert report of Mr. Hal Poret. The Poret report contained two parts: a critique of Mr. Berger's survey, and an entirely new likelihood of confusion survey which employed an *Ever-Ready* methodology.
- April 25, 2016 – Tigercat sought Opposer's consent to file its motion for leave to serve a sur-rebuttal report, in response to that of Mr. Poret with respect to the newly produced survey. Tigercat offered to provide Mr. Kramkowski's expert rebuttal report to Opposer within thirty (30) days of the disclosure of Mr. Poret's report and to make Mr. Kramkowski available for deposition prior to the close of discovery.
- April 28, 2016 – Opposer informed Tigercat that it would not consent to Tigercat's Motion for Leave.
- May 4, 2016 - Applicant filed its Motion for Leave to Disclose and Rely on a rebuttal expert to Opposer's expert report.
- **May 4, 2016** - *Tigercat provided Opposer with a copy of the rebuttal expert report of Mr. Kramkowski Tigercat intends to disclose and rely on, if granted leave by the Board to do so.*
- **May 19, 2016** – *Caterpillar filed its opposition to Applicant's motion for leave to serve a sur-rebuttal report.*
- June 3, 2016 – Applicant filed a reply brief in support of its motion for leave.
- **August 18, 2016** - *the Board entered its Order, granting Tigercat leave to serve and rely upon a sur-rebuttal expert report which solely rebuts and or critiques the methodology of the survey conducted by Mr. Poret, as well as the analysis of the data resulting from the survey.*
- **August 29, 2016** – *Caterpillar filed the instant Combined Motions.*

¹ A motion was before the Board to suspend proceedings before the deadline for expert disclosures, but no order had issued and the parties disclosed expert reports on that date.

Caterpillar makes no claim in connection with its discovery motion directed to Mr. Berger's further deposition that it sought to meet and confer with Tigercat before making its motion, and cannot make any such claim.

Argument

Caterpillar's Combined Motions lack merit.

1. **Opposer's Motion for Reconsideration Should Be Denied. The Board did not Err in Granting Tigercat's Motion for Leave to File a Sur-Reply Rebuttal Report**

Requests by parties for reconsideration of a Board Order are governed by 37 C.F.R. § 2.127(b). *See, also*, TBMP §518. Caterpillar's motion, while timely, fails in all other respects to meet the applicable standard for reconsideration. TBMP §518 provides in pertinent part:

Generally, the premise underlying a motion for reconsideration. . . under 37 CFR § 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such a motion may not properly be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. Rather, the motion should be limited to a demonstration that based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change. . . .

Caterpillar offers no explanation as to how the Board's original order was in error. Its motion for reconsideration is essentially a repetition of arguments the Board has already considered and rejected. *See, Vignette Corp. v. Marino*, 77 U.S.P.Q.2d (BNA) 1408 (TTAB 2005) ("Because we find no error in our consideration of the Marino Declaration in determining opposer's motion for summary judgment, opposer's request for reconsideration is denied. *See* Trademark Rule 2.127(b)."); *Swiss Natural Foods, Inc. v. Country Club Indus.*, 91094939, 1999 TTAB LEXIS 548 (TTAB Sept. 16, 1999).

Opposer reiterates its arguments concerning the applicability of the *Newegg* case.

Caterpillar continues to insist that the holding of *Newegg* does not extend to sur-rebuttal expert reports, offered by a different expert. The most Caterpillar can muster to argue is:

While not specifically addressed in *Newegg*, the factual situation underlying the Board's finding of timeliness involved the submission of a sur-rebuttal expert report by the original expert. The Board's August 18, 2018 [sic] Order does not specifically address this point, other than indicating that *Newegg* is not limited to its particular facts and that the Board has discretion to allow a sur-rebuttal expert report under the appropriate circumstances.

Dkt. 71, Opposer's Combined Motions, at p. 3. Opposer does not dispute the Board's discretion.

Opposer does not show in any way that the Board erred in the exercise of its discretion.

Opposer again argues that:

Neither the Board's August 18, 2016 scheduling order nor the TBMP provides an appropriate testimony period for sur-rebuttal testimony to be introduced. Opposer respectfully requests the Board's clarification on this issue.

Dkt. 71, Opposer's Combined Motions, at p. 4. Opposer raised the same issue before in opposing Tigercat's motion for leave to file a sur-rebuttal report. Dkt. No. 67, at pp. 9-10. The timing and any other logistics of Mr. Kramkowski's anticipated deposition is something that counsel for the parties could have addressed with a telephone call. Whatever Opposer hopes to achieve by raising this point, it does not amount to demonstration of Board error, or otherwise warrant reversal of the Board's sound exercise of its discretion.

In seeking reconsideration, Opposer appends and cites Mr. Kramkowski's report, *which it had approximately 2 weeks before it filed its opposition to Tigercat's motion for leave to file a sur-rebuttal expert report*, claiming that Mr. Kramkowski's report bolsters that of Mr. Berger, Applicant's survey expert. Specifically, Caterpillar first imperfectly describes Mr. Berger's control for the survey that he conducted, and then claims that Mr. Kramkowski's criticism of Mr.

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