12-22-08 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

TTAB

The Lutheran Church - Missouri Synod)
)
Opposer,)
v.)
) Opposition No. 91187891
Harry B. Madsen)
) Serial No. 77487948
Owner)

NOTICE OF FILING

To Thomas A. Polcyn
Thompson Coburn LLP
One US Bank Plaza
St. Louis, Missouri 63101

Please take notice that I have this date filed the following instrument, a copy of which is enclosed for your attention:

MOTION TO STRIKE BY OWNER HARRY B. MADSEN AS TO
THE NOTICE OF OPPOSITION BY
THE LUTHERAN CHURCH - MISSOURI SYNOD, OPPOSER

By placing a copy in the U S Mails, with proper first class postage affixed, addressed to:

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P. O. Box 1451
Alexandria, VA 22313-1451

Harry B. Madsen

I, Harry B. Madsen, state under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that a copy of the foregoing was served upon the persons above named at the addresses shown by depositing copies in a sealed envelope with proper postage affixed, in the U.S. Mail before 5 p.m. in Arlington Heights, Illinois, or by personal delivery, on the 22nd day of December, 2008, and is so certified on the same said date.

Harry B. Madsen

Harry B. Madsen
1850 Surrey Park Lane
Arlington Heights IL 60005
847-368-0500

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

The Lutheran Church - Missouri Synod	)	
	)	
Opposer,	)	
v.	)	
	)	Opposition No. 91187891
Harry B. Madsen	)	
	)	Serial No. 77487948
Owner	)	

MOTION TO STRIKE BY OWNER HARRY B. MADSEN AS TO
THE NOTICE OF OPPOSITION BY
THE LUTHERAN CHURCH - MISSOURI SYNOD, OPPOSER

Now comes Harry B. Madsen, (Madsen), Owner, pro se, and moves to strike Opposition No. 91187891 of The Lutheran Church - Missouri Synod (LCMS), Opposer, against Owner's Trademark Serial No. 77487948 in that the filed instrument denominated to be a Notice of Opposition meets the requirements of neither

Section 1 Specific USPTO rulings under this heading, nor

Section 2 Logic, nor

Section 3 Law, and states as follows

:

SECTION 1 FAILURE TO MEET SPECIFIC USPTO RULINGS UNDER THIS HEADING

1A The entire body of the Trademark Rules (TR) of Practice, set forth in Title 37, part 2 of the Code of Federal Regulations is applicable in this cause.

1B TR § 2.116 (a) imports "wherever applicable and appropriate...the Federal Rules of Civil Procedure" (FRP) which are thereby likewise a controlling standard throughout this cause

including the LCMS filing and this response thereto.

1C Thus the construction to be placed upon any individual part thereof must be made so as to be consistent with all other parts the TR and applicable FRP.

1D FRP 12 (f) Motion To Strike provides:

> Upon motion made by a party before responding to a pleading or if no responsive pleading is permitted by these rules, upon motion made by a party withing 20 days after service of the pleading upon the party or upon the court's initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

1E The mark Issues, Etc. was published in the Official Gazette on Nov 4, 2008 referencing Madsen as Owner subject to an opposition filing within 30 days, presumably terminated at midnight Dec 4, 2008 in Alexandria, VA.

1F The instrument captioned "Notice of Opposition" (NOO) was received by Madsen in an envelope postmarked December 2, 2008, but was not received until December 4, 2008.

1G In the interim, between the December 2 mailing and the December 4 "service of the pleading, " the NOO, the United States Patent and Trademark Office (USPTO) issued a ruling on December 3, 2008 (Received by Madsen December 5, 2008) which said in part:

> See Trademark Rules 2.101 (a), (b) and (d) (4), and 2.119. A Notice of opposition filed without the required proof of service does <u>not</u> result in the commencement of an opposition. Because proof of service is mandatory, the notice of opposition will not be considered. However, if time remains in the opposition period or any approved extension of that period, then opposer may be able to file a new notice of opposition with the appropriate fee and proof of service.

1H Thus, both by the rules, and by the written and posted notice of USPTO the December 2, 2008 NOO not received by Madsen until December 4, 2008, was already dead in the water at some unknown hour of December 3, 2008, because of the ruling, "will not be considered" coupled with the then future opportunity for the opposer to,

(1). "if time remains in the opposition period," or

(2). if time remains in any "approved extension of that period,"

(3). "then to file a new notice of opposition with the appropriate fee and proof of service."

1I The record shows Extension of Time Granted to Date: 12/03/2008 which was presumably stimulated by the USPTO receipt in Alexandria on 12/03/08 of the NOO posted on 12/02/08, a copy of which was not received by Madsen until 12/04/08. The time of the grant of this extension is unknown, but it had to have been after the ruling in the foregoing paragraph on the same date to which it referred.

1J Irrespective of the hours, minutes or seconds between the two USPTO 12/03/2008 rulings, first that "the notice of opposition will not be considered", and second that LCMS was granted leave to "file a new notice of opposition," the file status was officially clear. The file awaited a "new notice of opposition." What came was an old NOO dated 12/02/2008 that was neutered by the "will not be considered" order of 12/03/2008.

1K No analysis of the extension date of 12/03/2008, being within the original filing termination date of 12/04/2008 is needed, but the provision for filing a "new" NOO is applicable. That ruling was in force instantly upon the entry of the first 12/03/2008 ruling, and LCMS failed

to ever file a new NOO.

1L LCMS had a remedy to extricate itself from this dilemma. LCMS could have filed a motion to vacate the first USPTO order of 12/03/2008 and rely on its 12/02/2008 mailing which arrived within the time period ending 12/04/2008. That relief is provided by RCP 50 under Alternative Motions. However such motions must be filed within 10 days and that time has expired.

1M Madsen's first awareness of any of the foregoing transactions was on 12/04/2008 when it became clear to Madsen that prior to 12/02/2008 there had been considerable communications and filings EXPARTE by LCMS addressed to USPTO concerning Serial Number 77487948 which was appropriately arrested by USPTO ruling of 12/03/2008. Had LCMS from the outset followed the dictates of common courtesy, or TR rules, and copied Madsen with its multiple pre 12/03/2008 EXPARTE communications, without being forced to do so by the USPTO ruling, it would not have stumbled into a trap generated entirely by its own communications.

CONCLUSION AS TO SECTION 1 The numerous exparte communications of LCMS with USPTO resulted in a ruling on 12/03/2008 requiring it to file a new opposition thereafter which it failed to file, and it also failed to file a timely motion to vacate the ruling by which it is bound, and therefore the NOO mailed 12/02/2008 and apparently received by USPTO on 12/03/2008 should be stricken.

SECTION 2 FAILURE TO MEET THE LOGIC TEST

2A. Madsen incorporates by reference the entirety of Section 1 as part of Section 2.

2B. TR § 2.2 (b) which lists definitions, states, "Entity as used in this part includes both natural and juristic persons."

3. LCMS is not a natural, but a juristic person.

4. Juristic persons are empowered by law to engage in many acts of which they are not naturally capable, such as being parties to contracts; being able to sue and be sued; and being able to apply for trademarks and to oppose trademark registrations.

5. However, the law fails to endow juristic persons with all the attributes of natural persons, and specifically in this case, LCMS is not capable of **belief.** (Bold type here and throughout is added for emphasis.)

6. Yet repeatedly the LCMS filing here states:

In the preamble:	LCMS "**believes** it will be damaged,"
in ¶ 5	"Upon information and **belief**,"
in ¶ 11	"Upon information and **belief,**" and in the
close	"This is **believed** to be."

Actually Opposer's second, third and fourth uses of "**belief**" are redundant because the entirety of the LCMS recitations in ¶ 1-12 are grammatically subsumed beneath its single all encompassing **belief** in the preamble which is the fount from which all that follows flows as confirmed by Opposer's specific words, "Opposer **hereby** alleges as follows."

7. The very use of "**belief**" and "**it**" side by side ought to have rung the inconsistency bell.

8. TR § 2.101 does indeed state that the opposition "must be signed by the opposer **or** the opposer's attorney." The attorney may, as in regular court proceedings under the FRP **speak** for the client. However counsel is a "**mouthpiece**" not a "**brainpiece**," and since juristic persons are brainless as well as voiceless, if counsel wishes to allege **belief** he must do so by way of the verified affidavit of the chief executive officer of juristic person or another with specific authority from such executive.

9. TR § 2.101 does indeed further state the "opposition **need** not be verified." That is not the equivalent of the "opposition **may** not be verified." Of course, even verification would not cure this filing because the attribution of **belief** to an inanimate entity would still be a defect.

10. Counsel could well have filed an unverified opposition with the recitation of facts only, as he did in some of his paragraphs intervening among the several "**beliefs**" by just foregoing **belief** allegations, but he did not do this.

11. Just as counsel attempted a usurpation of the Creator's turf by his futile effort to animate

corporate clay, so he also endeavored twice to render a natural person inanimate in his ¶ 3 and ¶ 5 by referring to Madsen as an "**it.**"

CONCLUSION TO SECTION 2 Logically and grammatically the LCMS filing is a nullity which should be returned for failing to constitute a cognizable "notice of opposition" as required by TR ¶ 2.101, just as the earlier 11-24-08 exparte LCMS filing was returned for failure of LCMS to provide required notice to Madsen. Both times one could guess what the president of LCMS may have intended, but in both cases TR requirements were not met.

SECTION 3 FAILURE TO MEET THE LAW TEST

12. Madsen incorporates by reference the entirety of Sections 1 and 2 as a part of this Section 3.

13. The essence of statutory law and regulations thereunder is the abrogation of common law. The presence of either is the absence of the other. The LCMS reference to the slim reed of common law in ¶ 2, coupled with total silence as to ever having applied for the Issues, Etc. trademark, is a de facto and de jure admission that they have no rights under Trademark Law which has been in force for many decades.

14. TR § 2.116 provides procedure and practice is governed by the *Federal Rules of Civil Procedure*. Thus the Notice of Opposition is for LCMS as a Complaint in court to which Madsen's response is as an Answer in Court. The complaint and answer scenario is a TR and

FRP mandated dialogue to establish either accord or issue on each allegation. As already set out in Section 1 the LCMS filing does not constitute a "Notice of Opposition" so there is no "complaint" to answer. Under FRP 12 (f) A party may request the court delete insufficient defenses or immaterial, redundant statements from an opponent's pleading. In this case LCMS filing insufficiencies noted in Section 2 alone are so pervasive that the entire filing is irredeemable. To that will be added strike motion grounds in this Section 3.

15. As Madsen approached this LCMS complaint, intent on a response to every assertion of fact, Madsen was immediately confronted with a non sequitur in the second line of the preamble — a corporation with a **belief** system. That preamble would have met muster had LCMS been a natural person, but the body of the complaint would still have been defective because beliefs given as grounds for a belief is circular reasoning from which it is impossible to compile a complaint. Madsen can neither admit nor deny such **beliefs**.

16. FRP Rule 8 (a) calls for "a short and plain statement." That calls for facts, not conjecture. TR § 2.104 calls for "a short plain statement showing **why** the opposer **believes**," not "**what** the opposer **believes.**" In pleading practice an answer to "**Why** do you **believe**?" always gives rise to a fact that can be pled, whereas an answer to "**What** do you **believe**?" leaves the grist for issue or agreement in limbo until some further exchanges might eventually extract a fact.

17. There is abundant opportunity and demand for **belief** in litigation. Expert witnesses are specifically recruited to express their beliefs. The job of a judge is to give his opinion which is a synonym of **belief**. But LCMS files neither as an expert witness, nor as a judge, but as a

litigant initiating a controversy which it has here failed to do.

18. In anticipation of a possible response to this motion claiming that TR § 2.104 (a) says:

> The opposition must set forth a short and plain statement showing why the opposer believes he, she or it would be damaged by the registration of the opposed mark and state the grounds for opposition.

And then point out further that within that TR is a clear basis for LCMS as an Opposer may show, "why the opposer...believes...it would be damaged." So say the words, but not the law.

19. It is not the law, because it could not be the law. The word "**it**" encompasses not only corporations, but political entities such as municipalities, states, the country and foreign countries. The clear implication is that "**believes**" in the case of an "**it**" is in reference to the mental impression of the president or other head of state of the entity involved, or of a specifically authorized spokesman on behalf of such a natural person. While that could be the attorney such a dual function would tread on very thin ethical ice, and would be so rare that an affidavit would be necessary to clearly document such authority.

20. For a simple test as to whether the **belief** of LCMS, as presented in this filing is adequate, flash forward to the trial with no pleadings but this LCMS Complaint filing and Madsen's general denial Answer. How is Madsen going to question or cross examine LCMS on these allegations? There is no natural person to confront. And if a natural person is provided for confrontation, by what questions does Madsen determine whether LCMS really **believes** what it alleged in the complaint? And if by masterful advocacy Madsen could establish such a **belief**, or lack of it, what difference would it make? As Sergeant Friday used to say long ago on TV that I have not watched since about 1985: "The facts Mam. I just want the facts."

21. Under the FRP 12 (f) category of "impertinent" is the obvious casual indifference of LCMS to this matter by a lack of courtesy, candor and diligence in one or more of the following:

A. Initiating the filing without the courtesy of copy notice to a principal involved, and/or

B. Initiating the filing without a review of the readily available regulations; and/or

C. The use of inappropriate **belief** language throughout the filing indicating a prior draft that called for the voice of a natural person and not taking care to edit out natural person specific language when such person so named declined to be referenced, and/or

D. The double use of "on information and belief" which is almost exclusively affidavit language, indicating an affidavit context of an earlier draft which was revised deleting the affidavit without editing out the affidavit language; and/or

E. Twice referring to Madsen as an "**it**"which does not cause the least offense, but does strongly indicate that the NOO. was not thoughtfully composed, but was boiler plate lifted bodily out of another file where the applicant-owner was not a natural person, and sufficient care was not taken to convert the language to apply to a natural person; and/or.

F. Advancing a pretense of enhancing and maintaining the dignity of the trademark LSMS not only abandoned but sought to destroy as they have already destroyed a considerable body of Issues, Etc. history; and/or

G. Falsely proclaiming goodwill where the actions of the unnamed natural person behind the NOO filing is to erase goodwill even as much of Issues, Etc. document history has already been destroyed; and/or

H. Where previous attempted gag orders failed, to use the NOO as a backdoor attempt to implement and ensnare former employees of LCMS into a restraint on free speech under the banner of Issues, Etc., a daily radio show of Lutheran Public Radio, Inc,

to which the owner has issued a license to use the trade mark, Issues, Etc., and/or

I. To have the audacity to equate fair free-speech commentary about the actions of particular individuals as comments about a church body of over a million worshipers of which only a tiny percentage are "members" of the non-church corporation with the name of Lutheran Church- Missouri Synod.

J. To dismiss the fact that despite the attempt of natural persons within LCMS to destroy both the Issues, Etc., trademark and the program, that it continues to feature in its programs pastors and laymen from LCMS churches as well as Seminary professors and executives of LCMS, and/or

K. To dismiss the fact that Lutheran Public Radio, Inc. although an entity totally independent of LCMS has no directors, officers or employees who are not members of LCMS churches and has a charter with a purpose clause identical to language in the LCMS constitution and has specifically provided that in the event of dissolution that its net assets are to be distributed to LCMS.

22. Should this cause, or any similar action, advance to the point of pleading, briefs and argument these themes will be documented with hard evidence and thousands of supporters not against the church body, and not, in essence, against the corporation that bears the name of Lutheran Church - Missouri Synod, which may, regretfully, be the nominal opponent. The real thrust of any such defense will be in opposition to named individuals in the administrative hierarchy who would have precipitated such unfortunate litigation. May it never come to pass, but should it, Madsen is prepared to be involved.

WHEREFORE, Madsen prays

1. That the LCMS filing mailed 12/02/2008 be stricken for

   (1) Failing to meet specific USPTO rulings under the heading of this cause.

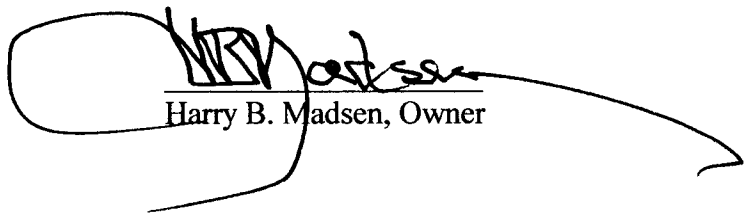
   (2) Failing to present a logical or sustainable argument on behalf of a juristic person.

   (3) Failing to follow the law

2. That the proceedings scheduled in the USPTO letter of December 11, 2008 be cancelled.

3. That USPTO issue Harry B. Madsen a Notice of Allowance for the trademark Issues, Etc.

Respectfully submitted,



Harry B. Madsen, Owner

Harry B. Madsen
1850 Surrey Park Lane
Arlington Heights IL 60005
847-368-0500