

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Baxley

Mailed: May 17, 2004

Opposition No. **91156666**

Opposition No. **91158331**

Optimize Technologies, Inc.

v.

Wicom GmbH

(as consolidated)

Andrew P. Baxley, Interlocutory Attorney:

On April 27, 2004, the Board issued an order wherein it granted both applicant's consented motion (filed March 2, 2004) for leave to amend its answer and opposer's motion (filed March 19, 2004) to consolidate proceedings herein and reset appropriate dates herein.

Opposer's reply brief in connection with its motion to consolidate apparently crossed in the mail with the April 27, 2004 order. The Board will treat opposer's reply brief as a request for reconsideration. See Trademark Rule 2.127(b).

The premise underlying a request for reconsideration under Trademark Rule 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.

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Opposer contends that applicant's brief in opposition to the motion to consolidate should not be considered because it was untimely filed and that the motion to consolidate should be granted as conceded.

The Board disagrees. The Board has discretion to consider on the merits a motion to which no timely brief in opposition has been filed. See Trademark Rule 2.127(a).

Further, the Board notes that, despite the fact that opposer, by its motion, sought to consolidate two proceedings, it listed only the junior proceeding in the captions of both its motion and its reply brief. The motion to consolidate and opposer's reply brief in connection therewith should have listed both proceeding numbers with the senior proceeding number listed first. See TBMP Section 511.

The Board notes in addition that Opposition No. 91156666, the senior of the consolidated oppositions, had been suspended by the Board in a March 12, 2004 order pending disposition of applicant's motion for leave to amend its pleading and that, in the March 12, 2004 order, the Board stated that any paper which is not relevant to that motion would receive no consideration. Because opposer's motion to consolidate involved Opposition No. 91156666 and was not relevant to the motion for leave to amend the

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pleading, applicant may have believed that it could not file a brief in opposition to the motion to consolidate until its motion for leave to amend its answer had been decided.¹

Thus, under the circumstances, the Board finds that granting opposer's motion to consolidate as conceded without considering applicant's brief in response thereto would have been plainly unfair and that opposer has failed to show that the April 27, 2004 order was in error.

In view thereof, the request for reconsideration is hereby denied. The April 27, 2004 order stands as put. Discovery and trial dates remain as reset therein.

¹ Moreover, under the circumstances, it also would have been appropriate for the Board to grant applicant's consented motion for leave to amend its pleading, defer consideration of opposer's motion to consolidate and reset applicant's time to respond to the motion to consolidate.