

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

Mailed: September 23, 2009

Opposition No. 91185498

THE TJX COMPANIES, INC.

v.

DENISE MARIE BARR

Cheryl Butler, Attorney, Trademark Trial and Appeal Board:

In accordance with the institution order dated July 30, 2008, applicant's testimony period was set to close on September 3, 2009. Applicant, on August 14, 2009, filed a document entitled "Applicant's Trial Testimony Affidavit," accompanied by nine exhibits. On August 28, 2009, opposer moved to strike such affidavit on the basis that the parties did not agree to submit evidence by way of affidavit and the evidence so submitted by applicant is not properly submitted under any available alternative method. Applicant has not filed a response. Inasmuch as each of the numbered paragraphs presents a different question, the Board addresses applicant's submission on its merits.

Paragraph No. 1

Applicant states that she received opposer's trial deposition more than thirty days after it was taken. The deposition took place on June 22, 2009, during opposer's open

testimony period (which closed on July 5, 2009). Trademark Rule 2.121(a)(1); and TBMP §703.01(c) (2d ed. rev. 2004). The record reflects that applicant did not appear to cross examine opposer's witness.¹ Applicant states that the transcript was sent to her on August 3, 2009 and submits a copy of the postmarked envelop. Exhibit 1 to Ms. Barr's affidavit. Trademark Rule 2.125 provides, in relevant part, that, when a copy of the deposition transcript is not served on the adverse party within thirty days after completion of the taking of testimony, such party's remedy is to seek a resetting of its testimony or briefing period, as appropriate and necessary. See also TBMP §703.01(k) (2d ed. rev. 2004). Applicant has not shown she is disadvantaged by the date the transcript was sent; nor has applicant asked that the Board reset her testimony period.

Accordingly, to the extent applicant is objecting to the introduction of the transcript, applicant's objection is overruled.

Paragraph No. 2

Applicant states that opposer's "main brief totals 94 pages." However, opposer has not yet filed its main brief. Opposer's main brief is due sixty (60) days after the close of opposer's rebuttal testimony period (scheduled to close on October 18, 2009). Applicant appears to confuse opposer's

¹ Applicant is not required to attend the testimonial deposition of its adversary's witness.

submission of its evidence (the transcript from the deposition of Ms. Conduah filed on August 5) 2009 with opposer's brief.

To the extent applicant is asking the Board to strike opposer's evidence on the mistaken belief that such evidence is opposer's main brief, applicant's request is overruled.

Paragraph No. 3

Applicant notes that page 30 of opposer's deposition transcript is missing and asks that the Board not consider page 30 in the event that the page is of record with the Board. (The page is not of record with the Board.) Opposer explains that page 30 is an unused continuation of the errata pages which did not include any testimony, corrections or substantive evidence.

In view of opposer's explanation, applicant's objection is moot.

Paragraph No. 4

Applicant, by way of her affidavit, attempts to introduce a TESS copy of opposer's application Serial No. 77323233; a TDR copy of the notice of suspension for such application; excerpts from opposer's website; and a TESS copy of applicant's application Serial No. 77301887. Exhibits 2, 3, 4, and 5 to Ms. Barr's affidavit.

Inasmuch as the parties did not agree to the introduction of evidence by way of affidavit, the evidence Ms. Barr attempts to introduce at Exhibits 2-5 cannot be made of record by her affidavit. See TBMP §705 (2d ed. rev. 2004) discussing the

admissibility of stipulated evidence, including introduction by way of an affidavit.

However, the TESS and TDR printouts are official records of the USPTO and may be introduced by way of a notice of reliance. Applicant has provided an index listing her exhibits. *See also* Trademark Rule 2.122(e); and TBMP §704.03(b)(2) (2d ed. rev. 2004). Accordingly, to the extent applicant's "trial testimony" may be considered a notice of reliance, opposer's motion to strike Exhibit Nos. 2, 3 and 5 is denied.

The Internet printouts purportedly from opposer's website may not be introduced by a way of a notice of reliance because they are not self-authenticating. *See* TBMP §704.08 (2d ed. rev. 2004) ("Internet evidence and other materials that are not self-authenticating"). Inasmuch as the parties did not either stipulate to the introduction of such materials or agree that such materials may be made of record by way of an affidavit, opposer's motion to strike is granted with respect to Exhibit 4 and Exhibits 4a and 4b are hereby stricken.

The Board notes in passing that much of paragraph No. 4 is argumentative in nature. Such arguments are of the type appropriate for applicant's main brief.

Paragraph No. 5

Applicant does not attempt to introduce any evidence by way of paragraph No. 5. Instead, applicant's comments therein are

argumentative in nature and are properly made in applicant's made brief.

Paragraph No. 6/Exhibit 6

Applicant attempts to introduce the Wikipedia disclaimer to show that opposer's Wikipedia evidence, introduced by its witness, is unreliable. As discussed above, a printout from the Internet is not self-authenticating and cannot be introduced by an affidavit absent an agreement between the parties to do so. Accordingly, opposer's motion to strike is granted and Exhibit 6 is hereby granted.²

Paragraph No. 6/Exhibit 7

Exhibit 7 is a printout from the website of a third-party. For the reasons discussed above concerning Internet evidence, opposer's motion to strike is granted and Exhibit 7 is hereby stricken.

Paragraph No. 8/Exhibit 8

Exhibit 8 is a TARR printout of a third party registration. The TARR database contains official records of the USPTO and may be introduced by way of a notice of reliance. Accordingly, to the extent applicant's "trial testimony" may be considered a notice of reliance, opposer's motion to strike Exhibit 8 is denied.

² The Board is aware that, even where Internet evidence is properly introduced, such evidence is probative only for what it shows on its face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters. See TBMP §704.08 (2d ed. rev. 2004) ("Internet evidence and other materials that are not self-authenticating").

Paragraph No. 7/Exhibit 9

Exhibit 9 is a copy of the Notice of Publication for applicant's application. The file record of each application against which a notice of opposition is filed forms part of the opposition record without any further action by the parties. Trademark Rule 2.122(b). Reference may be made to the file for any relevant and competent purpose. *Id.*

In view thereof, opposer's motion to strike Exhibit 9 is denied.

Dates remain as set and are repeated as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	CLOSED
30-day testimony period for party in position of plaintiff to close	CLOSED
30-day testimony period for party in position of defendant to close:	CLOSED
15-day rebuttal testimony period to close:	October 18, 2009

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129. See Section 800 of the TBMP for a further discussion with respect to a party's brief.
