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

Proceeding	91190169
Party	Defendant Susino USA, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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Date	09/19/2009
Attachments	Susino USA Motion to Strike - Opp. No. 91190169.pdf (7 pages)(37881 bytes)

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

In The Matter of App. Ser. No. 77/355,544)	
)	
)	
SUSINO UMBRELLA CO., LTD.)	
)	
Opposer,)	
)	
v.)	Opposition No. 91190169
)	
SUSINO USA, LLC)	
)	
Applicant,)	

**APPLICANT’S MOTION TO STRIKE ALL OR IN PART AND RESPONSE TO
OPPOSER’S CORRECTED RESPONSE TO APPLICANT’S MOTION TO
DISMISS NOTICE OF OPPOSITION AND MEMORANDUM OF LAW**

Pursuant to Rule 12(f)(2) of the Federal Rules of Civil Procedure, Applicant Susino USA, LTD (“Applicant”) or (“Susino USA”) through it is undersigned representative, submits this motion to strike all or in part Opposers’ Corrected Response to Applicant’s Motion to Dismiss Notice of Opposition and Memorandum of Law and states:

OPPOSER’S ATTACHED EXHIBITS SHOULD BE STRICKEN

- 1) On September 14, 2009 Opposer filed a response to applicant’s motion to dismiss with attached exhibits.
- 2) On the same day Applicant received from Opposers’ counsel via e-mail a courtesy copy of the response to Applicant’s motion to dismiss.

3) Opposer attached exhibits to their response but does not identify the source of the documents appearing to be alleged copies of unknown origin in Chinese, and alleged translation into English.

4) On September 15, 2009 applicant's representative responded to Opposers' counsel by return e-mail advising specific misleading and inaccurate statements contained in Opposers' response, including but not limited to the attached exhibit 1.

5) On September 15, 2009, Opposer filed Opposers' Corrected Response to Applicant's Motion to Dismiss Notice of Opposition and Memorandum of Law making only one correction, as specifically identified to Opposers' counsel in an e-mail on September 15, 2009 prior to the corrected response. Opposer never states why they are filing the corrected response, however it is still repeat with errors, misquotes, and misspellings. As example and just by way of example, in paragraph 18 it is stated, "Opposers Motion and Brief appears to be missing a page", however they are the Opposer in this instant case.

6) The exhibits attached appear to be of foreign origin with an accompanying translation which do not adhere to Rule 44(2)(a)(ii) Proving an Official Record of foreign origin, "the record — or a copy — that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties" and Rule 44(2)(b) "Final Certification of Genuineness. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation;

by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.”

7) A Court does not weigh evidence in a motion to dismiss as per *Aguila Records, Inc. v. Federico, No. 07 C 3993, Slip Op. (N.D. Ill. Oct. 10, 2007)* stating a Rule 12(b)(6) motion was not appropriate vehicle for evaluating the strength of the evidence. Clearly Opposer is attempts to enter unsubstantiated evidence within their Response which is clearly outside the scope of a Rule 12(b)(6) Motion to Dismiss proceeding. Therefore all the exhibits should be stricken from Opposers’ pleadings.

**OPPOSER PROFFERS HEARSAY EVIDENCE OF TRANSLATIONS AS
FACT**

8) Opposer attempts to proffer hearsay evidence to support some alleged claims in its’ Notice of Opposition by phonetically describing certain words and their translation.

9) These statements also violate Rule 33(2)(a)(ii) by offering hearsay evidence of translation of certain foreign words.

10) Same as with the exhibit, Opposer attempts to proffer hearsay evidence outside of the scope in a Motion to Dismiss proceeding and the entire Response should be stricken.

**OPPOSER CONTINUES TO RELY ON ANOTHER ENTITIES
VOLUNTARILY ABANDONDED APPLICATION**

11) Opposer continues to ignore the facts that the Notice of Opposition relies wholly on an abandoned application as attached in Applicant’s Motion to Dismiss. See

Notice of Abandonment dated April 15, 2005 in Exhibit A of Applicants' Motion to Dismiss.

12) From April 15, 2005 until May 12, 2009 to the date of Notice of Opposition is more than 4 years and characterizes this as a short period of time of nonuse, even though a Notice of Abandonment was issued where it prescribes and details the time frame and steps to revive the application. Additionally there is no evidence or record in the application substantiating a transfer, assignment of rights, or date of priority from Jinjiang Hengshun Gingham to Susino Umbrella within the application. Nor is there any evidence within the application where Opposer can show any attempt to revive the application as per 37 CFR § 1.181(a) and (b) or as prescribed methods in the Notice of Abandonment. Opposer states in paragraph 25 of its' response "Susino Umbrella just did not respond to the Office Action"¹, but fails to state neither Susino Umbrella, the Opposer, or Jinjiang Hengshun Gingham, original applicant, neglected to respond to the Notice of Abandonment. Nor has there been any other efforts by Opposer to correctly identify the true identity of Jinjiang Hengshun Gingham as alleged in Opposers' Notice of Opposition, there are no assignments, transfers, or name changes, request for corrections of the Opposers' name as alleged in the Notice of Opposition. One can conclude Jinjiang Hengshun Gingham voluntarily abandoned the application referenced in the Notice of Opposition, which is why there is no remedy of law and thus Opposer has failed to state a claim in the Notice of Opposition.

13) All Opposer can do is prey this Board will ignore the lack of responsibility of the Opposer to diligently use reasonable efforts within a 4-year period of time, which is

¹ In Opposers original response dated September 14, Opposer stated it was the Applicant, Susino USA. Applicant informed Opposers' counsel of this error which resulted in a corrected Response as stated in paragraph 5 of this brief.

outside the time limit for failing to respond to a Notice of Abandonment, which clearly sets forth a six-month response period.

14) Further more Opposer is attempting to revive and assign an abandoned application and use this Notice of Opposition proceeding as a vehicle to reestablish priority rights that have long been extinguished by its' own negligence, inaction, and/or voluntarily abandonment. In *Compagnie Gervais Danone v Precision Formulations LLC* (Oppositions 91179589 and 91184174, January 5, 2009), in a precedential opinion, the Trademark Trial and Appeal Board (TTAB) has held that information available to it from its own records could be relied upon to determine whether an allegation in an opposition had been well pleaded for the purposes of determining a motion to dismiss. The TTAB explained that, on a motion to dismiss for failure to state a claim, it cannot consider evidence outside of the pleading.

"facts not subject to proof, and the [TTAB] may look to office records for such facts to determine if a party's allegations are well pleaded."

Using this sensible approach, the TTAB held that Precision's allegations were not well pleaded and granted Danone's motion to dismiss. This is the exact set of circumstances the Applicant is raising in their Motion to Dismiss procedure and thus the TTAB should dismiss the Notice of Opposition.

CONCLUSION

For the forgoing reasons, the Board should strike the entire response of the Opposer or in the alternative strike the portions of the response and the exhibits that violate the rules. Additionally in the Applicants response it is evident the application the Opposer

is relying on supports the claims that Susino USA has priority with respect to the mark as the application referred to Opposers' allegation as abandoned, which it is.

WHEREFORE, Susino USA, Applicant, request this board to strike the entire response of Opposer or on the alternative strike the portions violating the rules as cited and deem the application Opposer is relying on as abandoned, and grant Applicants Motion to Dismiss and proceed with Applicants registration of the mark.

Respectfully Submitted:

By: /s/ /Todd Nadrich/

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Certificate of Service

I hereby certified that the above and forgoing APPLICANT'S MOTION TO STRIKE ALL OR IN PART AND RESPONSE TO OPPOSER'S CORRECTED RESPONSE TO APPLICANT'S MOTION TO DISMISS NOTICE OF OPPOSITION AND MEMORANDUM OF LAW was served upon Opposers by depositing a copy of same in the United States Mail, first class postage prepaid, on this 19 day of September, 2009, addressed to:

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/s/ /Todd Nadrich/
Todd Nadrich