

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

Mailed: November 10, 2009

Opposition No. 91190878

Center Cut Hospitality, Inc.

v.

Undisputed International LLC

**Before Walters, Walsh, and Ritchie,
Administrative Trademark Judges.**

By the Board:

On September 4, 2009, the Board issued an order wherein applicant's motion (filed August 10, 2009) to strike one sentence in paragraph 4 and all of paragraph 6 of opposer's notice of opposition was granted as conceded. Thereafter, the parties' stipulation to extend opposer's time to file a response brief to applicant's motion was associated with the electronic record.¹ The parties' stipulation is hereby granted. Opposer's September 8, 2009 response brief is accepted.² In view thereof, the Board's order of September 4, 2009 is hereby vacated.³

We now take up for consideration applicant's motion to strike.

¹ We assume that this association occurred just after, if not on the same day, the assigned interlocutory attorney sent the Board's order to Board personnel for mailing.

² We have also considered applicant's brief in reply.

The following portions of the notice of opposition are at issue:

[4] Opposers have extensively, continuously and without interruption used the Opposer's Marks beginning at least as early as May 10, 1996 in promoting their goods and services....

...

[6] Additionally, Applicant's mark is primarily merely a surname. Trademarks that consist of a mark that is primarily merely a surname may not be registered absent a showing of acquired distinctiveness. Applicant has applied for registration of its mark under Section 1(b) of the U.S. Trademark Act. Upon information and belief, Applicant has not used Applicant's Mark on any related goods or services that would support a finding of acquired distinctiveness. Therefore, registration of Applicant's Mark should be found to be unregistrable under 15 U.S.C. Section 1052(e)(4).

In support of its motion, applicant contends that in paragraph 3 of the notice of opposition, opposer defines "Opposer's Marks" as being comprised of six federal registrations that it alleges to own; that three of these pleaded registrations were not allegedly used at least as early as May 10, 1996, but rather at some point later in time; and that since not all six of opposer's pleaded marks were not allegedly used at least as early as May 10, 1996, the portion of opposer's claims in paragraph 4 stating such "should be stricken as being insufficient, incorrect and contradictory to Opposer's own statement and allegations" (made elsewhere in the notice of opposition). Applicant

³ Opposer's motion for reconsideration is moot.

also contends that all of paragraph 6 of the notice of opposition should be stricken because applicant's mark, JOHN L. SULLIVAN, is clearly not primarily merely a surname and is capable of existence on the Principal Register with no showing of acquired distinctiveness.

The Board may, upon motion or by its own initiative, order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. See Fed. R. Civ. P. 12(f). Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues under litigation. See, e.g., *FRA S.p.A. v. Surg-O-Flex of America, Inc.*, 194 USPQ 42, 46 (SDNY 1976); *Leon Shaffer Golnick Advertising, Inc. v. William G. Pendil Marketing Co., Inc.*, 177 USPQ 401, 402 (TTAB 1977).

With regard to applicant's allegation in paragraph 4 regarding the use of its marks beginning at least as early as May 10, 1996, inasmuch as it is clear that not all of opposer's marks were first used at least as early as May 10,

1996⁴ and to the extent that opposer's allegation in paragraph 4 presents any ambiguity with respect to the dates of first use of its marks, we hereby strike this sentence from the notice of opposition. However, opposer has requested leave to amend its notice of opposition to clarify this point and, as indicated below, opposer is permitted time to submit such an amended notice of opposition.

With regard to paragraph 6 of the notice of opposition, we note that, to withstand this motion to strike, opposer need not prove the allegations in its pleading. It is only necessary that opposer allege facts sufficient to support a statutory ground for opposition. It has done so in paragraph 6. Whether opposer can actually prove its allegations is a matter to be determined at final hearing or upon summary judgment.

In view thereof, applicant's motion to strike is granted as to the first sentence of paragraph 4 of the notice of opposition, but denied as to paragraph 6 of the notice of opposition. Opposer is allowed until **twenty days** from the mailing date of this order to file and serve an

⁴ We note that Opposer sets forth the dates of first use for each of its pleaded marks in the ESSTA coversheet accompanying the Notice of Opposition, which is also considered a part of the notice of opposition. Opposer admits as much in its response brief: "Center Cut identified the date of first use for each of its marks in each mark's respective application. The registrations' dates of first use speak for themselves and are identified and incorporated into Center Cut's Notice of Opposition."

amended pleading with regard to the dates of first use of its pleaded registrations. If opposer files an amended pleading, applicant is allowed until **forty days** from the mailing date of this order to file and serve its answer thereto.

Proceedings are hereby resumed. Discovery and trial dates are reset as follows.

Deadline for Discovery Conference	1/25/2010
Discovery Opens	1/25/2010
Initial Disclosures Due	2/24/2010
Expert Disclosures Due	6/24/2010
Discovery Closes	7/24/2010
Plaintiff's Pretrial Disclosures	9/7/2010
Plaintiff's 30-day Trial Period Ends	10/22/2010
Defendant's Pretrial Disclosures	11/6/2010
Defendant's 30-day Trial Period Ends	12/21/2010
Plaintiff's Rebuttal Disclosures	1/5/2011
Plaintiff's 15-day Rebuttal Period Ends	2/4/2011

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 Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.1