

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

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Mailed: January 30, 2014

Opposition No. 91191371

ClearChoice Holdings, LLC

v.

Dale D. Goldschlag, D.D.S.,  
P.C.

**Before Quinn, Ritchie, and Hightower,  
Administrative Trademark Judges.**

This case now comes up for consideration of applicant's motion to strike portions of opposer's First Notice of Reliance, opposer's entire Second Notice of Reliance, and opposer's entire Third Notice of Reliance. Applicant also moves for judgment pursuant to Trademark Rule 2.132(b) because opposer has shown no right to relief. The motion is fully briefed.<sup>1</sup>

*First Notice of Reliance*

Applicant seeks to strike the copies of two registrations, namely, U.S. Registration Nos. 4250368 and 4152444, upon

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<sup>1</sup> We have considered opposer's supplemental response submitted on November 8, 2013 only to the extent it corrects opposer's earlier statement regarding the service of its pretrial disclosures. We find that while there appears to be some disagreement regarding whether service of opposer's pretrial disclosures was actually made on applicant's prior counsel on July 30, 2013, dismissal or sanctions are unwarranted on this basis.

which opposer relies because of opposer's failure to plead such registrations in its notice of opposition.

Opposer must specifically plead any registrations on which it is relying and may not rely at trial on unpleaded registrations in cases brought under Trademark Act Section 2(d). See TBMP Section 309.03(c) (3d ed. rev. 2 June 2013) (and cases cited therein). Opposer did not plead these registrations and it did not move to amend its pleading to add an allegation of ownership of these two registrations. Accordingly, the registrations are hereby stricken.<sup>2</sup>

*Second Notice of Reliance*

Applicant also moves to strike opposer's Second Notice of Reliance containing dictionary and thesaurus entries from the Internet because opposer does not identify the specific likelihood of confusion factor for which the evidence is proffered, leaving applicant with "no idea about how Opposer intends to reference this evidence in its Brief on Case, and Applicant is handcuffed in its ability to present rebuttal evidence."

For Internet documents it is not sufficient for the propounding party to broadly state that the materials are

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<sup>2</sup> In its brief, applicant further asserts that one of opposer's pleaded registrations, namely U.S. Registration No. 3181966, has been cancelled and, therefore, should not be considered by the Board. The parties should note that although an expired or cancelled registration may be made of record, such registration

being submitted to support the grounds at issue; rather the party is required to state the specific element or fact supported by the document in a group of documents. For example, in the case of a likelihood of confusion claim, the propounding party must associate the materials with a relevant likelihood of confusion factor. See TBMP 704.08(b). While opposer failed to provide this specific information in its notice, it did so in its brief on the motion and the defect is considered cured. Therefore, we see no need to strike these materials.

*Third Notice of Reliance*

We note that opposer has withdrawn the February 2011 Survey of RL Associates submitted as Exhibit A to its Third Notice of Reliance. The motion to strike with regard to this document is therefore moot.

Applicant also seeks to strike Exhibit B of the Third Notice of Reliance containing a copy of the Board's decision in *Clear Choice Holdings LLC v. Implant Direct Int'l*, Opposition No. 91190485, to the extent that there is no provision under the rules allowing a party to submit a non-precedential Board decision in a different case as evidence through a Notice of Reliance.

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is not evidence of anything except that the registration issued. See TBMP Section 704.03(b)(1)(A).

We note that while a non-precedential decision is not binding on the Board, such opinion may be cited for whatever persuasive weight to which it may be entitled. See TBMP Section 101.03 (and cases cited therein). Generally, parties cite to a non-precedential decision in their briefs and append a copy of the decision to the motion or brief in which the decision is cited. *Id.* Although opposer's election to submit the non-precedential decision via Notice of Reliance was unnecessary and not the Board's preferred practice, inasmuch as a citation in its brief would be considered sufficient, we see no need to strike it.

We turn now to applicant's motion for judgment under Trademark Rule 2.132(b).

Trademark Rule 2.132(b) reads, in relevant part, as follows:

If no evidence other than a copy or copies of Patent and Trademark Office records is offered by any party in the position of plaintiff, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground that upon the law and the facts the party in the position of plaintiff has shown no right to relief.

Inasmuch as opposer has now cured its deficiency in its Second Notice of Reliance, we find that judgment under Trademark Rule 2.132(b) should not be entered.

In view thereof, applicant's motion for judgment is denied.

Proceedings are hereby resumed. Dates are reset as follows:

Defendant's Pretrial Disclosures	3/1/2014
Defendant's 30-day Trial Period Ends	4/15/2014
Plaintiff's Rebuttal Disclosures	4/30/2014
Plaintiff's 15-day Rebuttal Period Ends	5/30/2014

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 of completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.