

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
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Baxley

Mailed: March 24, 2011

Opposition No. 91198552

Raising Cane's USA, L.L.C.

v.

Fifty-Six Hope Road Music
Limited

Cancellation No. 92053461

Fifty-Six Hope Road Music
Limited

v.

Raising Cane's USA, L.L.C.

(as consolidated)

Andrew P. Baxley, Interlocutory Attorney:

On February 11, 2011, Raising Cane's USA, L.L.C. ("Raising Cane") filed its answer in the above-referenced cancellation proceeding. On March 23, 2011, Fifty-Six Hope Road Music Limited ("Fifty-Six") filed a motion to strike the following sentence from page 3 of that answer: "More recently, Registrant engaged in good faith discussions with Petitioner to allow for peaceful co-existence and has invested time and resources to that end." Although Raising Cane's time in which to respond to that motion has not expired, the Board, in exercising its inherent authority to

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control the conduct of its proceedings, elects to decide the motion on the merits at this time. See Trademark Rule 2.127(a); TBMP Section 502.04 (2d ed. rev. 2004).

Fifty-Six's motion to strike was due by twenty-five days after Raising Cane served its answer by mail, i.e., by March 8, 2011. See TBMP Section 506.01. Accordingly, the motion is untimely.

Further, "[m]otions to strike are not favored, often being considered 'time wasters', and will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *R.E.F. Golf Co. v. Roberts Metals Inc.*, 24 USPQ2d 1070, 1072 (M.D. Fla. 1992), quoting *Poston v. American President Lines, Ltd.*, 452 F.Supp. 568, 570 (S.D. Fla. 1978).

Contrary to Fifty-Six's assertion, the sentence at issue is merely an allegation in a pleading and does not constitute evidence. See Trademark Rule 2.122(c); TBMP Section 311.02(b). Moreover, the sentence does not reveal specific substance of the discussions and instead merely acknowledges their existence. Cf. TBMP Section 414(1) (identification of privileged documents, as opposed to the substance of those documents, is not privileged or confidential).

Rather, the Board "encourages settlement discussions at any time." *Promgirl Inc. v. JPC Co.*, 94 USPQ2d 1759, 1761

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(TTAB 2009). With the parties in opposite postures in these consolidated proceedings, the Board expects the parties to discuss co-existence as a possible means of resolving these cases. Accordingly, even if we assume that the sentence at issue is immaterial to the claims and defenses in these proceedings, the Board finds that such sentence is not prejudicial to Fifty-Six. In view thereof, the motion to strike is denied.

Because the above-captioned cancellation proceeding is the equivalent of a counterclaim in the above-captioned opposition, the Board hereby orders the consolidation of these proceedings.¹ See Fed. R. Civ. P. 42(a); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991); and TBMP Sections 313 and 511. The consolidated cases may be presented on the same record and briefs. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989) and *Hilson Research Inc. v. Society for Human Resource Management*, 26 USPQ2d 1423 (TTAB 1993).

¹ Although Raising Cane indicated at the end of its answer that it had commenced the opposition proceeding, the Board generally does not review pleadings in a case until there is a matter in the case that calls for Board personnel to review them, such as preparing for Board participation in a discovery conference or deciding a motion relating to the pleadings. Accordingly, the better practice would have been for Raising Cane to alert the Board to the existence of the opposition proceeding in a separate filing, such as a motion to consolidate. See TBMP Section 511.

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The Board file will be maintained in Opposition No. 91198552 as the "parent" case. As a general rule, from this point onward, only a single copy of any submission should be filed herein. That copy, however, should include both consolidated proceeding numbers in the caption thereof.

Despite being consolidated, each proceeding retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleading; a copy of the decision shall be placed in each proceeding file.

Dates herein are reset as follows.²

Deadline for discovery conference: ³	April 21, 2011
Discovery opens:	April 21, 2011
Initial disclosures due:	May 21, 2011
Expert disclosures due:	September 18, 2011
Discovery closes:	October 18, 2011
Raising Cane's pretrial disclosures due:	December 2, 2011
Raising Cane's 30-day testimony period as plaintiff in the opposition to close:	January 16, 2012
Fifty-Six's pretrial disclosures due:	January 31, 2012

² Although Fifty-Six contends in the motion to strike that it timely filed an answer in the opposition proceeding on March 22, 2011, no answer is yet of record.

³ The deadline for the parties' discovery conference in the cancellation proceeding was March 14, 2011. The Board presumes that such conference already took place. Unless that conference did not take place, the parties need only discuss issues unique to the opposition proceeding in the discovery conference.

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Fifty-Six's 30-day testimony period as defendant in the opposition and as plaintiff in the cancellation to close:	March 16, 2012
Raising Cane's pretrial disclosures for rebuttal in the opposition and as defendant in the cancellation due:	March 31, 2012
Raising Cane's 30-day testimony period as defendant in the cancellation and for rebuttal as plaintiff in the opposition to close:	May 15, 2012
Fifty-Six's rebuttal disclosures as plaintiff in the cancellation due:	May 30, 2012
Fifty-Six's 15-day rebutal testimony period as plaintiff in the cancellation to close:	June 29, 2012
Brief for Raising Cane as plaintiff in the opposition due:	August 28, 2012
Brief for Fifty-Six as defendant in the opposition and as plaintiff in the cancellation due:	September 27, 2012
Brief for Raising Cane as defendant in the cancellation and reply brief, if any, as plaintiff in the opposition due:	October 27, 2012
Reply brief, if any, for Fifty-Six as plaintiff in the cancellation due:	November 11, 2012

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. An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.