

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

BUO

Mailed: October 3, 2014

Opposition No. 91200643

Dille Family Trust

v.

Nowlan Family Trust

Benjamin U. Okeke, Interlocutory Attorney:

This case now comes up on applicant's motion, filed May 27, 2014, to strike certain portions of opposer's notice of reliance. Applicant moves to strike exhibit nos. 1-13 of the notice of reliance filed March 26, 2014, at docket entry no. 39 in TTABVUE.¹ The motion is fully briefed.

It is the policy of the Board not to read trial testimony or examine other trial evidence prior to final decision. *See* TBMP § 502.01 (2014). Thus, if a motion to strike cannot be resolved simply by reviewing the face of the notice of reliance and attached documents, but instead would require a review of testimony or other evidence, determination of the motion will be deferred by the Board until final hearing. *Carl Karcher Enters. Inc. v. Carl's Bar & Delicatessen Inc.*, 98 USPQ2d 1370, 1371-72 n.2 (TTAB 2011).

¹ TTABVUE is the Board's electronic case file system. *See* <http://ttabvue.uspto.gov>.

Evidence timely and properly introduced by notice of reliance under the applicable Trademark Rules of Practice generally will not be stricken, but the Board will consider any objections thereto in its evaluation of the probative value of the evidence at final hearing. *See M-Tek Inc. v. CVP Sys. Inc.*, 17 USPQ2d 1070, 1073 & n.2 (TTAB 1990).

For purposes of this order, the Board presumes the parties' familiarity with the pleadings and the arguments submitted with respect to the subject motion. Therefore, the Board will only recount the arguments and facts as necessary to discuss the determination.

Taking applicant's objections in turn, the Board makes the following findings and determinations:

Initially, the Board finds that applicant's motion to strike was timely filed, inasmuch as opposer contacted the assigned Board interlocutory attorney on May 15, 2014, to indicate that it had been served with the motion. *See* Dkt. # 42. Applicant indicated that it served its motion on opposer on April 24, 2014, prior to the close of opposer's testimony period and less than thirty days after the filing of the challenged notice of reliance. As required, it appears applicant's motion to strike was made "promptly." *See* TBMP § 707.02(a). Accordingly, opposer cannot claim that it was prejudiced by the corrected filing of the motion with the Board.²

² Indeed, it would be duplicitous of opposer to now claim prejudice where opposer, in contradiction of the Board's January 17, 2014 order, has operated on its own proposed trial schedule outlined in its motion for extension filed December 26, 2013, despite the denial of that motion by the Board's January 17 order. However, inasmuch as applicant has been

I. Paragraphs 1-2 and Corresponding Exhibits

Paragraphs 1 and 2 relate to printouts from the USPTO's Trademark Electronic Search System ("TESS"), and are thus considered "official records" in accordance with Trademark Rule 2.122(e). Accordingly, these documents need not be certified to be offered in evidence, as they are considered self-authenticating. However, pursuant to Trademark Rule 2.122(e), the reference in the notice of reliance should have specified the pages to be read and indicated the general relevance of the material being offered. *See* Trademark Rule 2.122(e); *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031 (TTAB 2010). *See also* TBMP § 704.07. Therefore, these documents have not been properly made of record by opposer's notice of reliance.

II. Paragraph 3 and Corresponding Exhibits

This paragraph relates to documents allegedly filed by opposer with the State of Pennsylvania. However, "official records" are the records of public offices or agencies, or records kept in the performance of duty by a public officer, not those prepared by a party and merely filed with a public agency or notarized by a notary public. *See Conde Nast Publ'n Inc. v. Vogue Travel, Inc.*, 205 USPQ 579, 580 n.5 (TTAB 1979) (official records are records prepared by a public officer). *See also* Fed. R. Evid. 902(4). Therefore, the documents

complicit in operating under the trial schedule and has not raised an objection, the Board will take no further action. Applicant could have simply consented to opposer's motion for an extension of time. In any event, the parties are cautioned that ***strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, and adherence to the dates set forth in the Board's orders, is expected of all parties appearing before the Board.***

corresponding to paragraph 3 are not “official records” and are thus, without further qualification, not properly made of record by notice of reliance, as they are not self-authenticating and have not been previously authenticated.³

Accordingly, these documents are **STRICKEN** from the notice of reliance.

III. Paragraph 4 and Corresponding Exhibits

Applicant’s motion is **GRANTED in part** as conceded, with respect to paragraph 4 and its corresponding exhibits, because opposer failed to respond to this portion of applicant’s motion. Trademark Rule 2.127(a); *Central Mfg., Inc. v. Third Millennium Tech., Inc.*, 61 USPQ2d 1210 (TTAB 2001).⁴

Accordingly, these documents are **STRICKEN** from the notice of reliance.

IV. Paragraphs 5-12 and Corresponding Exhibits

Opposer alleges that the exhibits submitted in correspondence with paragraphs 5-12 are admissible inasmuch as “these documents were previously produced as responses to Applicant’s interrogatories.” However, and in general, an answer to an interrogatory may be submitted and made part of the record only by the inquiring party. Trademark Rule 2.120(j)(5); *See Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1218 (TTAB 2011) (“an answer to an interrogatory may be submitted and made part of the record only by the inquiring party, [thus] this item would

³ Additionally, opposer again failed to indicate the general relevance of the material being offered. *See* Trademark Rule 2.122(e); *Safer*, 94 USPQ2d 1031.

⁴ Nonetheless, these documents, similar to those identified in paragraph 3, are not “official records” inasmuch as they were filed by opposer with the State of Pennsylvania and not documents that were prepared or kept as part of the duty of a state official. Additionally, opposer again failed to specify the general relevance of the material being offered. *Id.*

normally not be considered.”). The exception to this rule occurs where the inquiring party introduces into evidence fewer than all of the answers to a set of interrogatories, or fewer than all of the admissions, wherein the responding party may introduce, under a notice of reliance, any other answers to interrogatories, or any other admissions that should be considered so as to avoid an unfair interpretation of the responses offered by the inquiring party. *See* Trademark Rule 2.120(j)(5); *Heaton Enter. of Nev. Inc. v. Lang*, 7 USPQ2d 1842, 1844 n.5 (TTAB 1988).

Moreover, a party so filing should also file a copy of the interrogatory and the answer thereto, with any exhibit made part of the answer, or a copy of the request for admission and any exhibit thereto and the admission (or a statement that the party from which an admission was requested failed to respond thereto), together with its notice of reliance thereon. *See* Trademark Rule 2.120(j)(3)(i); *M-Tek Inc. v. CVP Sys. Inc.*, 17 USPQ2d 1070, 1073 (TTAB 1990) (notice of reliance must specify and be accompanied by the interrogatory to which each document was provided in lieu of an answer).

Inasmuch as opposer did not indicate that these documents were produced in response to its interrogatories, and indeed states in its response brief that “these documents were previously produced as responses to Applicant’s Interrogatories;” and inasmuch as applicant has not submitted any portion of the interrogatory responses (since its testimony period has not opened); and further because no copies of the interrogatories were submitted, these

documents are not properly made of record by notice of reliance under the circumstances presented, but may be introduced by way of testimony deposition. In light of the foregoing, applicant's motion to strike is **GRANTED in part** with respect to paragraphs 5-12 and the corresponding exhibits.

Accordingly, these portions of the notice of reliance are **STRICKEN**.

V. Paragraph 13 and Corresponding Exhibits

The exhibits identified by paragraph 13 of opposer's notice of reliance purport to be copies of "pages from Previews November 2012 edition featuring Buck Rogers comic books and books for sale." However, in order to properly introduce a printed publication into evidence by notice of reliance the notice must specify the printed publication, including information sufficient to identify the source and the date of the publication, and the pages to be read; and indicate generally the relevance of the material being offered. *See* Trademark Rule 2.122(e); *Panda Travel Inc. v. Resort Option Enter. Inc.*, 94 USPQ2d 1789, 1793 (TTAB 2009) (statement that documents are introduced to show use of opposer's marks sufficient to indicate relevance). To meet the requirement that the notice of reliance indicate the general relevance of material being offered, the offering party should associate the materials with a relevant likelihood of confusion factor or a specific fact relevant to determining a particular issue. *See Safer*, 94 USPQ2d at 1039-40.

While the notice of reliance and accompanying exhibits identify the publication and the date it was published, *see Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856, 1857 (TTAB 2007) (article from a trade magazine is admissible under Trademark Rule 2.122(e) because “[o]n its face, it identifies the publication and the date published”), opposer failed to specify the general relevance of this material to the proceeding. *Cf. Panda Travel*, 94 USPQ2d at 1793. For example, if printed materials introduced through a notice of reliance are submitted to show the relatedness of the goods and services, the similarity of the channels of trade, and the strength of the mark, *the propounding party should identify which of the documents support each element or fact. See Safer*, 94 USPQ2d at 1040.

Although opposer will have an opportunity to explain its exhibits in its trial brief, applicant is entitled to know prior to its testimony period which documents adduced assertedly support which likelihood of confusion factors. *See TBMP § 704.02* (“a notice of reliance ... serves ... to notify opposing parties that the offering party intends to rely on the materials submitted thereunder in support of its case”). Accordingly, inasmuch as opposer’s notice of reliance fails to indicate the relevance of the proffered evidence, the documents referenced by paragraph 13 are not properly made of record by opposer’s notice of reliance.

Nonetheless, the defects of paragraphs 1-2 and 13 are errors that can be cured by the offering party as soon as it is raised by any adverse party. *See*

Safer, 94 USPQ2d at 1040. Therefore, inasmuch as these errors in filing are correctable, opposer is allowed until **FIFTEEN DAYS** from the mailing date of this order to submit to the Board a revised notice of reliance that cures the cited deficiencies for the exhibits submitted in connection with paragraphs 1-2 and 13.

Accordingly, applicant's motion to strike is **DENIED in part** with respect to paragraphs 1-2 and 13. However, if opposer fails to file an amended notice of reliance in the allowed time, those paragraphs and their corresponding exhibits will stand stricken.

This proceeding is resumed. Inasmuch as applicant's motion is being considered and was served on April 24, 2014, the proceeding stands as suspended as of that date. Therefore, opposer's testimony period, which was set to close on April 25, 2014, is open for **ONE DAY** following the mailing date of this order. The remaining trial dates, commencing with applicant's testimony period, are reset as shown in the following schedule:

Defendant's 30-day Trial Period Ends	11/15/2014
Plaintiff's Rebuttal Disclosures	11/30/2014
Plaintiff's 15-day Rebuttal Period Ends	12/30/2014

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 after completion of taking of testimony. Trademark Rule 2.125.

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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.