

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

Mailed: March 6, 2012

Opposition No. 91203146

Cool Cat Cafe LLC,
Cool Cat Cafe SLO, LLC

v.

The Gregory Group

Jennifer Krisp, Interlocutory Attorney:

Pursuant to Fed. R. Civ. P. 26(f) and Trademark Rules 2.120(a)(1) and (2), the parties held a timely discovery and settlement conference on March 5, 2012. See TBMP § 401.01 (3d ed. 2011). At opposers' request, a member of the Board participated in the conference. Participating were opposers' counsel Seth M. Reiss, Esq., applicant's counsel J. Calhoun Watson, Esq., and the assigned interlocutory attorney.

The Board apprised the parties of various procedural rules and guidelines that govern this proceeding, including the Board's liberal granting of motions to suspend for settlement efforts, and the automatic applicability of the Board's Standard Protective Order pursuant to Trademark Rule 2.116(g). The Board also noted that more detailed information regarding these and other matters is set forth in its December 27, 2011 order instituting this proceeding.

Turning to the pleadings,¹ to state a claim under Trademark Act Section 2(d), opposers must sufficiently allege 1) standing; 2) they have registered or previously used a mark; and 3) contemporaneous use of the parties' respective marks on or in connection with their respective goods or services would be likely to cause confusion, mistake or to deceive consumers. See *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001). The Board noted that the notice of opposition sufficiently sets forth the grounds of priority and likelihood of confusion under Trademark Act Section 2(d).

The Board may strike from a pleading any insufficient defense, or any redundant, immaterial, impertinent or scandalous matter. See Fed. R. Civ. P. 12(f). Any such matters may be discussed and stricken by the Board during the parties' discovery and settlement conference. See TBMP § 506.02 (3d ed. 2011).

The Board noted that applicant's answer asserts the affirmative defense that the notice of opposition fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Inasmuch as opposers have, as indicated above, sufficiently pled standing and a statutory ground for

¹ The Board notes that the notice of opposition does not include page numbers, as required by Trademark Rule 2.126(a)(5). All motions and papers filed with the Board must be paginated.

opposition, this affirmative defense is stricken from applicant's answer as insufficient.

Insofar as the answer asserts that the claims "are barred by the doctrine of unclean hands or other applicable equitable principles" (answer, para. 32), applicant sets forth no specific allegations of conduct on which it bases this theory or which, if proved, would raise an unclean hands defense and prevent opposers from prevailing on their claims. The Board informed the parties that most equitable defenses are generally unavailable or are severely limited in opposition proceedings before the Board. *See National Cable Television Ass'n., Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1427 (Fed. Cir. 1991); *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1292 n.14 (TTAB 2007).

The remaining assertions which are set forth under "Affirmative Defenses" are not true affirmative defenses, but rather are merely amplifications of applicant's affirmative denials made elsewhere in its answer, or are factual assertions going to the merits of various elements of opposers' claims and to which applicant is left to its proofs and evidence at trial.

Counsel discussed with the Board various means by which they have considered or will consider settlement of this proceeding.

The Board noted examples of various procedural and substantive stipulations to which the parties can agree, in

order to streamline and focus discovery and/or trial, in the event that this opposition does not settle. The Board clarified the procedure for filing any proposed amendment to the application; for example, any amendment to the identification of goods or to the applied-for mark must comply with all applicable rules and statutory provisions, and must be filed with the Board. See Trademark Rules 2.71 - 2.75; see also TBMP § 514.01 (3d ed. 2011). A request to amend an application which is the subject of a Board inter partes proceeding should bear at its top both the number of the subject application, and the Board proceeding number and title. In addition, the request should include proof of service of a copy thereof upon every other party to the proceeding. *Id.*

The parties stipulated to the exchange of service copies, of motions and papers filed with the Board, by electronic mail, and confirmed that they each have exchanged and used working email addresses. See Trademark Rule 2.119(b)(6); TBMP § 113.05 (3d ed. 2011). The parties stipulated to the exchange of documents during discovery by either CDROM, or by the emailing of files in PDF format.

The Board briefly explained the availability of and features of the "accelerated case resolution" ("ACR") process, and referred the parties to the Board's web page, as well as *Federal Register*, Volume 72, for further information. The Board directed the parties to either file a consented motion or

telephone the assigned interlocutory attorney, in the event that they stipulate to pursue resolution by ACR.

Schedule

The parties stipulated to a 30-day suspension period in order to continue settlement efforts. Accordingly, discovery and trial dates are reset as follows:

Discovery Opens	4/5/2012
Initial Disclosures Due	5/5/2012
Expert Disclosures Due	9/2/2012
Discovery Closes	10/2/2012
Plaintiff's Pretrial Disclosures due	11/16/2012
Plaintiff's 30-day Trial Period Ends	12/31/2012
Defendant's Pretrial Disclosures due	1/15/2013
Defendant's 30-day Trial Period Ends	3/1/2013
Plaintiff's Rebuttal Disclosures due	3/16/2013
Plaintiff's 15-day Rebuttal Period Ends	4/15/2013

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 2.129.