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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205896
Party	Defendant Wild Brain Entertainment, Inc.
Correspondence Address	JONATHAN D REICHMAN KENYON & KENYON LLP ONE BROADWAY NEW YORK, NY 10004 UNITED STATES jreichman@kenyon.com, wmerone@kenyon.com, nsardesai@kenyon.com, tmdocketny@kenyon.com
Submission	Opposition/Response to Motion
Filer's Name	William M. Merone
Filer's e-mail	tmdocketny@kenyon.com, tmdocketdc@kenyon.com
Signature	/William M. Merone/
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Attachments	Opposition to Motion to Strike and Suspend.pdf(28560 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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BEAU L. TARDY

Opposer,

Opp. No. 91205896

v.

WILD BRAIN ENTERTAINMENT, INC.

Applicant.

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**OPPOSITION TO OPPOSER’S MOTION TO STRIKE APPLICANT’S AFFIRMATIVE  
DEFENSES AND TO SUSPEND OPPOSER’S DISCOVERY OBLIGATIONS**

Opposer, Beau L. Tardy, is running out of arguments for why the DIZZY mark should not be registered to Applicant, Wild Brain Entertainment, Inc., for the goods covered by Applicant’s Class 9 application. Originally, Mr. Tardy based his opposition on his claim that he supposedly had priority to the mark, and that a likelihood of confusion would result given that the parties sought to register the same mark for similar goods. *See, e.g.,* D.I. 1, 9; *compare also* U.S. Serial Nos. 85509929 and 85741800. That argument, however, has gone by the wayside, as Mr. Tardy has now conceded judgment on those points. *See* D.I. 32; *cf. also* TBMP, § 601.01.

Instead, Mr. Tardy has filed a fourth amended notice of opposition, through which he asserts that registration should be refused because Wild Brain supposedly lacked a *bona fide* intent to use the mark. *See generally* D.I. 32, pp. 5-13. And although he is free to make those unfounded allegations (which Wild Brain believes can be disposed of on summary judgment),

Mr. Tardy is not free to use the withdrawal of his previous claim with prejudice as a basis for asking the Board to take the unwarranted procedural actions he is requesting here.

Specifically, Mr. Tardy, without citing a single case or applicable rule, has asked the Board to strike all of the affirmative defenses that Wild Brain raised against Mr. Tardy's third amended notice of opposition (filed as D.I. 22), and to "suspend" his obligation to respond to any of the discovery that Wild Brain served back in February. *See generally Pl. Mot.* (D.I. 33). Neither request, however, has any support or validity, and thus both should be denied.

As for Mr. Tardy's motion to strike, it is hornbook law that an amended pleading that is complete in itself (as is the case here) supersedes and replaces the pleading it modifies. *See, e.g., Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1365 (Fed. Cir. 2000) (citing authority); accord 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1476 (2d ed. 1990) ("Once an amended pleading is interposed, the original pleading no longer performs any function in the case..."). Consequently, a motion to strike affirmative defenses asserted against a superseded pleading is considered moot. *Accord Automated Transaction Corp. v. Bill Me Later, Inc.*, 2010 WL 3419282, \*1, \*4 (S.D. Fla. 2010) (motion to strike affirmative defenses that defendant asserted in an answer to the first amended complaint moot where plaintiff filed a second amended complaint).<sup>1</sup> Thus, there is no need for Wild Brain to respond to Mr. Tardy's request. And what is more, even if Mr. Tardy's motion to strike were not moot, *but see supra*, it is untimely, as the Rules plainly provide that a party that

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<sup>1</sup> Moreover, the "affirmative defenses" Mr. Tardy seeks to strike are not, strictly speaking, affirmative defenses at all (despite originally being styled as such by former counsel)—they are merely contentions as to elements (*e.g.*, standing) on which *Mr. Tardy* bears the burden of proof, and which he is unlikely to carry. *See* D.I. 19, pp. 7-9 (incorporated by reference in D.I. 31); *cf.*, *e.g., In re Rawson Food Service, Inc.*, 846 F.2d 1343, 1349 (11<sup>th</sup> Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense.").

wishes to strike material from a pleading to which no response is permitted (such as an answer) must move to do so “within 21 days after being served with the pleading” *see* Fed. R. Civ. P. 12(f); *TBMP*, § 506. Because Wild Brain served its answer on February 12<sup>th</sup>, Mr. Tardy’s deadline for taking action thus expired on March 5<sup>th</sup>. *See* D.I. 31, p. 6 (service was made by electronic means); *cf.* 37 CFR § 2.119(c) (additional time is not added for electronic service).

Mr. Tardy’s motion to “suspend” Wild Brain’s discovery requests goes one better than his belated request to strike the content of a now-moot responsive pleading. Simply put, there is no provision in this Board’s rules authorizing a party to move to suspend their obligation to respond to discovery on the ground that another motion is pending that the party believes might bear on a response. To the contrary, the Board’s rules provide that even when a party files a potentially *dispositive motion*, the Board may only find, “on a case-by-case basis,” that the motion’s filing provides “good cause” for a party not to comply with “an otherwise outstanding obligation, for example, responding to [a] discovery request.” *See TBMP*, § 528.03. The Rules do not suggest that a party can proactively and unilaterally “suspend” its discovery obligations.

Mr. Tardy contends that certain discovery sought by Wild Brain is no longer relevant because judgment is being entered against him on the issues of priority and confusion. *See* D.I. 33. Wild Brain disagrees, not for the least of which reason that the discovery sought can relate to Mr. Tardy’s claim of standing, *cf., e.g.*, D.I. 32, p. 6 (alleging that Mr. Tardy is “a competitor” of Wild Brain; that DIZZY is a “brand name” owned by Mr. Tardy; and that the mark has been used by him as “a company name” and with “merchandise, pop culture websites, cartoon character, TV show, comics, and web streamlining entertainment”), including whether he filed his own conflicting application (cited at D.I. 32, pp. 6-7) in good faith. *Cf.* U.S. Serial No.

85741800 (claiming a date of first use of December 1996 and asserting that Mr. Tardy was not aware of any party that had a superior right to use the DIZZY mark in commerce for the recited goods). This, however, is neither the time nor place to debate the propriety of Wild Brain's discovery requests or the sufficiency of Mr. Tardy's responses thereto (which are presently overdue). If Mr. Tardy refuses to provide discovery, then after the parties meet and confer, Wild Brain can seek to compel disclosure, at which time Mr. Tardy can raise whatever arguments he wishes to make. A party, however, cannot shortcut the process by unilaterally claiming that the requests in question are simply "no longer applicable to this proceeding." *Cf.* D.I. 33, p. 1.

Respectfully submitted,

Dated: March 21, 2014

/William M. Merone/  
Jonathan D. Reichman  
William M. Merone  
Natasha Sardesai-Grant  
KENYON & KENYON LLP  
One Broadway  
New York, NY 10004  
Tel.: (212) 425 – 7200  
Fax: (212) 425 – 5288

*Counsel for Applicant,  
Wild Brain Entertainment, Inc.*

**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing *Opposition To Opposer's Motion To Strike Applicant's Affirmative Defenses And To Suspend Opposer's Discovery Obligations* was served on the parties or counsel indicated below by electronic mail sent to the address(es) listed below (as agreed to by the parties):

Wendy Peterson  
NOT JUST PATENTS LLC  
P.O. Box 18716  
Minneapolis, MN 55418  
[wsp@NJPLS.com](mailto:wsp@NJPLS.com)

*Counsel for Opposer*

Dated: March 21, 2014

/William M. Merone/  
Jonathan D. Reichman  
Natasha Sardesai-Grant  
William M. Merone  
KENYON & KENYON LLP  
One Broadway  
New York, NY 10004  
Tel.: (212) 425 – 7200  
Fax: (212) 425 – 5288

*Counsel for Applicant,  
Wild Brain Entertainment, Inc.*