

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Baxley

Mailed: April 28, 2014

Opposition No. 91205896

Beau L. Tardy

v.

Wild Brain Entertainment, Inc.

By the Trademark Trial and Appeal Board:

The following motions are pending before the Board: (1) opposer's motion (filed March 12, 2014) for leave to file a fourth amended notice of opposition; and (2) opposer motion (filed March 12, 2014) to strike affirmative defenses from applicant's answer to the third amended notice of opposition and to suspend opposer's time to respond to applicant's discovery requests. Applicant filed a brief in response to the motion to strike and suspend.

Opposer's motion for leave to file a fourth amended notice of opposition is granted as conceded and as well-taken. *See* Trademark Rule 2.127(a); Fed. R. Civ. P. 15(a); TBMP Section 507 (3d ed. rev.2 2013). The fourth amended notice of opposition is the operative complaint herein. Applicant is allowed until **thirty days** from the mailing date set forth in this order to file an answer thereto.¹

¹ In applicant's answer to the third amended notice of opposition, applicant incorporated by reference the affirmative defenses set forth in applicant's answer to the second amended notice of opposition. So incorporating is improper. Rather,

In the fourth amended notice of opposition, opposer opposes registration of applicant's mark solely on the ground of no bona fide intent to use the mark in commerce. In the preamble thereof, opposer expressly withdraws his priority/likelihood of confusion claim under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), that was included in the original notice of opposition and the first three amended notices of opposition. Because an answer is of record and the motion for leave to file a fourth amended notice of opposition was filed without applicant's written consent, the Section 2(d) claim is dismissed with prejudice. *See* Trademark Rule 2.106(c). *Cf.* Trademark Rule 2.135; TBMP Section 602.01 (in an opposition to an application having multiple classes, if the applicant files a request to amend the application to delete an opposed class in its entirety, the request for amendment is, in effect, an abandonment of the application with respect to that class and requires the written signature of the opposer to avoid entry of judgment).

As noted *supra*, the third amended notice of opposition is no longer the operative complaint herein. Accordingly, opposer's motion to strike affirmative defenses from applicant's answer to the third amended notice of opposition and to suspend time to serve discovery responses is moot.

Regarding opposer's motion to suspend its time to serve discovery responses, opposer contends that applicant's discovery requests are all

each pleading should be complete in itself without reference to earlier pleadings. *See* TBMP Section 507.02.

related to the now-withdrawn Section 2(d) claim and are no longer applicable to this proceeding. The Board agrees with applicant that opposer's motion is inappropriate. Opposer should respond to the discovery requests that applicant served on February 12, 2014 by providing the information sought in those portions of the request that he believes to be proper, and stating his objections to those which he believes to be improper. *See* TBMP Section 526. That is, opposer should answer discovery requests that relate to the remaining issues herein, including but not limited to the factual allegations upon which he relies in asserting his standing.²

The Board treats the filing of opposer's motions as having tolled the running of dates herein. Proceedings herein are resumed. The parties are allowed until thirty days from the mailing date set forth in this order to serve

² In pleading his standing, opposer alleges that he is a business competitor who owns the DIZZY brand name, which "has been a company name, merchandise, pop culture websites, cartoon character, TV show, comics, and web streaming entertainment" and that he filed intent-to-use application Serial No. 85741800 to register the mark DIZZY for "Digital materials, namely, CDs featuring television programs, cartoons, music in the field of entertainment; Digital media, namely, prerecorded video cassettes, digital video discs, digital versatile discs, downloadable audio and video recordings, DVDs, and high definition digital discs featuring animation; Digital media, namely, DVDs, downloadable audio and video recordings, downloadable files featuring television programs, cartoons, music in the field of entertainment; Downloadable videos and downloadable audio visual recordings featuring television programs, cartoons, music in the field of entertainment via the internet and wireless devices; Prerecorded digital video disks featuring television programs, cartoons, music in the field of entertainment; Prerecorded video cassettes featuring television programs, cartoons, music in the field of entertainment" which was refused registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), because of a likelihood of confusion with the subject pending application.

responses to any outstanding discovery requests.³ Remaining dates are reset as follows.

Expert Disclosures Due	7/26/2014
Discovery Closes	8/25/2014
Plaintiff's Pretrial Disclosures Due	10/9/2014
Plaintiff's 30-day Trial Period Ends	11/23/2014
Defendant's Pretrial Disclosures Due	12/8/2014
Defendant's 30-day Trial Period Ends	1/22/2015
Plaintiff's Rebuttal Disclosures Due	2/6/2015
Plaintiff's 15-day Rebuttal Period Ends	3/8/2015

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

³ This statement merely resets time to serve discovery responses and is not an order relating to discovery as contemplated by Trademark Rule 2.120(g)(1). *See* TBMP Section 527.01(a). If either party fails to serve discovery responses in compliance with the order, its adversary's remedy is to file a motion to compel discovery, after having made a good faith effort to resolve the parties' discovery dispute. *See* Trademark Rule 2.120(e)(1); TBMP Section 523; *Hot Tamale Mama...and More, LLC v. SF Invs., Inc.*, 110 USPQ2d 1080 (TTAB 2014).