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

Proceeding	91210379
Party	Plaintiff Atlas Brewing Company, LLC
Correspondence Address	PERRY GATTEGNO FUKSA KHORSHID LLC 70 W ERIE, 2ND FLOOR CHICAGO, IL 60654 UNITED STATES lema@fklawfirm.com, robert@fklawfirm.com
Submission	Rebuttal Brief
Filer's Name	Perry Gattegno
Filer's e-mail	perry@fklawfirm.com, lema@fklawfirm.com
Signature	/perry gattegno/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of:
Application Serial No. 85642549
For the mark of "ATLAS"
Published in the *Official Gazette*
December 25, 2012

ATLAS BREWING COMPANY, LLC,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91210379
	)	
ATLAS BREW WORKS, LLC,	)	MARK: ATLAS
f/k/a VOLSTEAD BEER WORKS LLC,	)	
f/k/a ATLAS BEER WORKS LLC	)	
	)	
Applicant.	)	

OPPOSER'S REPLY BRIEF

Lema A. Khorshid
Thomas Carroll
Perry Gattegno
FUKSA KHORSHID, LLC
70 W Erie, 2nd Floor
Chicago, IL 60654
Telephone: (312) 266-2221
Facsimile: (312) 266-2224

Attorneys for Opposer,
Atlas Brewing Company, LLC

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DESCRIPTION OF THE RECORD

This brief is submitted in accordance with Rule 2.128 of the Trademark Rules of Practice, 37 C.F.R. §2.128 and T.B.M.P. §801.03. The evidence of record consists of the following:

I. Opposer's pending federal application for the following mark:

ATLAS BREWING COMPANY, U.S. Serial No. 85/762,603 for: "Beer, ale, lager, stout, porter, shandy" in International Class 032, filing date of October 24, 2012 based upon §1(a) use in commerce with a first date of use as July 19, 2012.

II. Applicant's pending federal application for the following mark: ATLAS, U.S. Serial No. 85/642,549 for: "Beer" in International Class 032, filing date of June 4, 2012, based on §1(b) intent to use with no first date of use made of record.

III. Notices of Reliance, which were submitted to the Trademark Trial and Appeal Board as follows:

a. Opposer's Notice of Reliance submitted on September 4, 2014, upon official records of Opposer's Public Way Application to the City of Chicago Department of Business Affairs and Consumer Protection Public Way Use Unit and of Opposer's Public Way Permit granted by the City of Chicago

b. Applicant's Notice of Reliance submitted on December 17, 2014, upon Opposer's Responses to Applicant's First Set of Interrogatories, Opposer's Responses to Applicant's First Set of Admission Requests, and Opposer's Responses to Applicant's Second Set of Admission Requests.

IV. Depositions:

a. Opposer has made of record the deposition transcript of Mr. John Saller, and exhibits thereto, submitted on September 11, 2014.

b. Opposer has made of record the deposition transcript of Mr. Dale Steven Soble, and exhibits thereto, submitted on September 17, 2014.

c. Applicant has made of record the deposition transcript of Mr. Justin Cox, and exhibits thereto, submitted on December 9, 2014.

V. A Joint Motion to Entry of Evidence into the Record, as stipulated by both parties on November 11, 2014, entering Applicant's Exhibits 35-48

VI. A Joint Motion for Entry of Evidence into the Record, as stipulated by both parties on December 3, 2014, submitting Opposer's Motion for Summary Judgment, Applicant's Brief in Opposition to Opposer's Motion for Summary Judgment, Applicant's Confidential Exhibit Nos. A-9, A-10, A-13 and A-14 to the Declaration of Justin Cox in Support of Applicant's Opposition to Opposer's Motion for Summary Judgment, and Opposer's Reply Brief in Support of Its Motion for Summary Judgment.

STATEMENT OF THE ISSUE

1) Whether Applicant's mark, when used in connection with the Applicant's goods as listed in Application Serial No. 85/642,549, is likely to cause confusion, deception or mistake as to (a) the affiliation, connection or association of Applicant with Opposer, and/or (b) the original sponsorship or approval by Opposer of Applicant's goods or commercial activities associated with those goods under 15 U.S.C. §1052(d), based at least in part upon Opposer's mark, which is the subject of Application Serial No. 85/762,603?
2) Whether Applicant's mark, when used in connection with the Applicant's goods as listed in Application Serial No. 85/642,549, is primarily geographically descriptive of the place from where the goods originate, rendering it incapable of registration on the Principal Register without a showing of acquired distinctiveness or secondary meaning?

INTRODUCTION

Opposer utilizes this Reply Brief simply to rebut Applicant's misstatements of fact and law as they relate to Opposer's prior use of the ATLAS mark and to the primarily geographical descriptiveness of Applicant's mark. Opposer stands on its arguments in its Trial Brief and respectfully requests that the Board enter judgment in its favor by refusing registration to Applicant.

ARGUMENT

Based on the facts disclosed by Applicant in discovery and the testimony by both parties, the Board should reject Applicant's Application because: 1) Applicant's ATLAS mark is confusingly similar to Opposer's ATLAS mark, 2) Opposer's mark has priority due to its prior use, 3) Applicant's ATLAS mark is primarily geographically descriptive of the location from where the goods or services originate, and, as a result, 4) no suitable register exists for registration of Applicant's ATLAS mark.

1) Opposer is the Senior User of the ATLAS Mark.

Both the testimonial and documentary evidence on the record indicate that Opposer began using the ATLAS mark in connection with its goods prior to the June 4, 2012, constructive use date that Applicant has set forth. Accordingly, Opposer is the senior user of the ATLAS mark and thus can prevent Applicant from using its confusingly similar mark on similar goods and services.

a. Opposer's Analogous Use of the ATLAS Mark Occurred Prior to Applicant's Constructive Use Date.

Opposer's Trial Brief, Dkt. #37, sets forth the argument that its pre-production and pre-sales activity constitute analogous use because it used the ATLAS mark in connection with steps required by law and business reality to begin selling ATLAS-branded beer. While Applicant argued that Opposer's uses of ATLAS prior to June 4, 2012, were not sufficient to create trademark rights, it does not dispute that Opposer made use of the ATLAS mark prior to that date. Moreover, Applicant asserted that its own similar activities constitute part of the process of accruing its own rights.

As evidence of Applicant's use of its mark, it lists an amendment of corporate name with the Delaware Secretary of State, the purchase of brewing supplies and materials, the search and eventual lease agreement for a physical location, license applications to regulatory bodies and an agreement with a branding company to develop a logo. *See* Applicant's Trial Brief ("App. Tr. Br."), Dkt. #38, p. 6-7. These are precisely the same types of use that, as cited by Opposer, Applicant considered "not directed at potential purchasers, but instead directed to potential investors, suppliers, and government agencies." *Id.* at p. 12. Applicant argues that Opposer's actions did not amount to analogous use because such actions, directed at the audiences Applicant listed, "failed to reach more than a negligible share of potential consumers" and "did not have a substantial impact on the purchasing public." Yet Applicant's own argument contradicts itself: Applicant would have the Board rule that its own preparatory activities *were* indicative of trademark use but that Opposer's identical activities were insufficient to create proprietary rights. Such an interpretation cannot stand, and Opposer reasserts that its pre-sales activities created trademark rights in the ATLAS name for beer.

b. Opposer's Public Uses of the ATLAS Mark in Marketing Contracts, Management Agreements, Public Way Use Grants, Signage, Media Placements and Social Media Accounts Were Sufficiently Public to Establish Use of the ATLAS Mark in Commerce Prior to Applicant's Constructive Use Date.

Opposer made several uses of the ATLAS mark in several public contexts prior to Applicant's constructive use date of June 4, 2012, creating proprietary rights in the ATLAS mark before Applicant had even conceived the name, much less began using it in commerce.

First, Opposer executed and began to perform the Rewards Network ("RNES" or "RN") Dining Program Credits Agreement (Dkt. #19, Ex. 9) (the "RNES Agreement") as of May 22, 2012. Applicant misrepresents the nature and meaning of the RNES Agreement. Applicant refers to §9(g) of the RNES Agreement and states that "the agreement is not effective until payment is received by RNES from Opposer." App. Tr. Br., p. 17. This statement is patently untrue. In fact, the Agreement, after §9(g), states as follows: "This Agreement will be binding upon the parties hereto as of the date RN approves this Agreement and makes the Payment." Dkt. #19, Ex. 9, p. 4. The obligation to pay that was a condition precedent to the RNES Agreement belonged to RNES, *not* to Opposer.

Opposer's principal, Dale Steven Soble ("Soble"), testified as to the nature of the payment obligation in the RNES Agreement. *See* Deposition of Dale Steven Soble, Dkt. #19 ("Soble Dep.") at 27:18-23 ("So what they do -- it's a marketing program along with a financing program, so they basically give me -- in this case, *the contract said they give me $50,000. And then I give them back $75,000* in dining credits from their dining members.") [emphasis added]. Soble's testimony clearly states that RNES, not Opposer, had the payment obligation. His testimony also states that the contractual obligations between the parties were not only performed, but so successfully that the parties voluntarily re-engaged for additional terms. *See Id.* at 29:24-30:4 (the term of the RNES Agreement "goes on until you basically pay back the dining credits, which we already did. And then we signed up again, and we're at the end of our -- we're ending that actually now, two years later.")[1] Soble's testimony reveals the level of success Opposer had in reaching its customer base very quickly. Applicant's arguments regarding

[1] Soble's testimony illustrates that even if Applicant could prove that the RNES Agreement was not fully executed or facially valid, Opposer and RNES both performed their obligations under the RNES Agreement beginning at a date prior to Applicant's constructive use date. *See Loeb v. Gray*, 475 N.E.2d 1342, 1346 (5th Dist. 1985), *infra* p. 8. As such, Opposer's use of the ATLAS mark in connection with the RNES Agreement began prior to Applicant's constructive use date.

Opposer's bank statements, the validity of the agreement in general, or its effective date are unmerited and irrelevant.

Moreover, the RNES Agreement on its face states the RNES Agreement was indeed a binding legal agreement between the parties, despite Applicant's arguments to the contrary:

> §9(b): Each party represents that (a) it has the full power and authority to enter into this Agreement and to perform its obligations under this Agreement and (b) this Agreement *has been duly executed and delivered by it and is its legal, valid and binding obligation enforceable against it in accordance with its terms...* [emphasis added]

Dkt. #19, Ex. 9, p. 4.

Opposer submitted unchallenged deposition testimony from Soble regarding the nature of Opposer's relationship with RNES, the performance of the RNES Agreement and the effect this relationship had on Opposer's business. *See generally,* Soble Dep. p. 26:20-30:12. Soble testified that the Agreement was executed under Illinois law on May 22, 2012. *See id.* at 27:07; *see also* §H.7., Dkt. #19, Ex. 9, p. 3. In Illinois, a contract illustrating "mutual assent" via either signatures or performed actions is valid and enforceable. *See, e.g., Loeb v. Gray*, 475 N.E.2d 1342, 1346 (5th Dist. 1985) ("It is elementary that in order to constitute a contract between two parties there must be mutual assent by the contracting parties on the essential terms and conditions of the subject about which they are contracting."). The May 22, 2012, date listed on the top of the RNES Agreement as the "Date of Agreement" was prior to Applicant's constructive first use date of June 4, 2012. *See* Dkt. #19, Ex. 9, p. 1.

The RNES Agreement was a valuable mechanism for Opposer to reach a wide audience quickly as it ramped up its business efforts. Soble describes the wide reach of the RNES audience as being "a lot...across the country, probably in the millions." *See* Soble Dep. at p. 28:22-24. This testimony, again unchallenged, completely controverts Applicant's argument that

Opposer's use of the ATLAS mark did not reach more than a negligible share of potential customers or have a substantial impact on the purchasing public. App. Tr. Br., p. 12. Applicant's citations to *T.A.B. Systems*, 37 U.S.P.Q.2d at 1883, and *Westrex Corporation*, 83 U.S.P.Q.2d at 1219, may be apropos in other contexts, like those when the company at bar failed to make any real market penetration. But when a new company contracts to reach an audience of "millions" of customers and successfully pulls in a minimum of $75,000 per year in dining credits as a result, this use is precisely the type of use that "would expose [the ATLAS mark] to the purchasing public prior to Applicant's filing date." Dkt #38, p. 18. In fact, the RNES Agreement served just that purpose.

The RNES Agreement was not a mere agreement with a "supplier of prospective services." *Id.* at 17. Instead, RNES provided a conglomeration of prospective customers to whom Opposer publicized its ATLAS mark. *See* Soble Dep. at p. 29:16-21 ("I could see their Rewards Network website and saw that we were there. And they were broadcasting that we were part of the network.") Opposer's actions were thus proportional to those of the petitioner in *Martahus*, who established prior rights in a trade name through advertising its services to the public under the name and negotiating a contract with a single customer under the name. *See Martahus v. Video Duplication Services, Inc.*, 27 U.S.P.Q.2d 1846 (1993); *see also* App. Tr. Br., p. 15. The biggest distinction between *Martahus* and the case at bar is that the successful petitioner in *Martahus* contracted with a single customer, whereas Opposer established access to "millions" of them.

Second, Applicant ignores Opposer's evidence of a management agreement between Opposer and Lucky Strike Corporation dated January 1, 2012, prior to Applicant's constructive date of first use. Dkt #19, Ex. 8. Since it involved the liquor license owned by Lucky Strike

Corporation, this agreement was filed with the City of Chicago for liquor license compliance purposes. This is a second instance of Opposer's use of the ATLAS mark in a contract geared towards operating and publicizing the ATLAS mark in connection with a brewery and beer.

Opposer's evidence of record relating to its business activities prior to June 4, 2012, includes far more than just "mere incorporation" or a single "private agreement," as the RNES Agreement and Management Agreement both indicate. Applicant cites to two non-precedential cases, *Blast Blow Dry Bar LLC v. Blown Away LLC d/b/a Blast Blow Dry Bar,* No. 91204769, 2014 WL 108522 at *7 (for the principle that "the mere act of incorporation, in itself, does not establish such priority of use") and *Herbko Int'l. Inc. v. Kappa Books, Inc.,* 64 U.S.P.Q.2d 1375 (2002) (for the principle that a solitary lease is a "private agreement" that does not constitute "public use" of a mark).[2] *Herbko* states that activities, to create an association between a mark and a product, "must reasonably be expected to have a substantial impact on the purchasing public" before the mark owner can claim proprietary rights. *Herbko,* 64 U.S.P.Q. at 1378. Opposer created access to the ATLAS mark for "millions" of RNES members, per Soble's testimony. *See* Soble Dep. at p. 28:22-24. The contracts Opposer has placed into the record show the large impact Opposer made on its customer base in a very short period of time.

Third, Applicant does not challenge Opposer's evidence of its contract to create and display signs on Lincoln Avenue in Chicago using the ATLAS mark in front of Opposer's business location, nor Opposer's Public Way Use grant from the City of Chicago to display the signs. *See* Dkt. #19, Ex. 19 (contract dated April 27, 2012, prior to Applicant's constructive use date) *and* Ex. 20-21 (grant application dated April 27, 2012, and grant issued by City to Seven Ten/**Atlas**, [emphasis added], dated May 2, 2012, both prior to Applicant's constructive use date); *see generally* Soble Dep. p. 42:18-44:09 (describing Lincoln Avenue, where signage with

[2] The Board does not encourage citation to non-precedential cases. TMBP §801.03.

ATLAS mark is displayed, as a "highly traveled street" with "a lot of traffic," Soble Dep. p. 43:15-16). The signs – one "eight or ten feet long" and another that is "three feet by four feet" – went up on Lincoln Avenue in May 2012 when Opposer was opening its business, prior to Applicant's constructive use date.[3] *See* Soble Dep. p. 42:22-43:04; 44:13. These signs are yet another type of outreach that Opposer made to its consumer base and speak to the type of activities countenanced by *Martahus* as establishing rights in a name or mark. Applicant argues that in light of *Herbko* use of a mark must be "public use" to establish trademark rights; to the extent this type of use is required, Opposer posits that a sign with the ATLAS mark on a highly traveled street with heavy traffic that is displayed pursuant to a Public Way Use grant is the very nature of the "public use" Applicant desires.

Applicant fails to rebut Opposer's evidence of its public relations efforts with relevant publications, Soble Dep. p. 100:24-101:03, and Opposer's social media pages, specifically those available on Facebook and Twitter, or to consider the impact that those efforts had on Opposer's consumer base. Applicant concedes that Opposer established a publicly viewable and searchable Twitter feed on April 30, 2012, and a similarly public Facebook page on May 23, 2012, both prior to Applicant's constructive use date. Without citing to any case law, statute or regulation, Applicant states that there was no evidence "of what the social media pages looked like" nor "data to show how many persons viewed or were exposed" to them before June 4, 2012, concluding that such activity was "de minimus" [sic]. App. Tr. Br., p. 18. Applicant reaches for authority by citing to a non-precedential case for the principle that "registration of a domain

[3] Opposer notes that it, as Seven Ten/Atlas, opened for business on May 4, 2012, and in so doing began to sell food and beverages (including beer manufactured by third parties) to public customers at that time. *See, e.g.*, Dkt. #18, Deposition of John Saller, Ex. 1 (a Tweet from May 4, 2012, stating that the business "reopens tonight!"). The evidence propounded from Interrogatory No. 24, *see* App. Tr. Br., p. 8, paints an incomplete picture insofar as Opposer was doing business in commerce under a trade name including the term "ATLAS" at the site where the Atlas Brewing Company would soon begin its operations as well in a space shared with the Seven Ten Lounge.

name does not by itself constitute use for purposes of establishing priority of use." *The PNC Financial Services Group, Inc. v. Keith Alexander Ashe d/b/a Spendology and Spendology LLC*, No. 91207409, 2013 WL 5820850 at *3 (T.T.A.B. Oct. 15, 2013) (not precedential). This argument mischaracterizes Opposer's position.

Opposer has not argued that solely its purchase or use of a domain name has provided it trademark rights. Instead, it is arguing that social media pages updated regularly by Opposer's staff, *see* Soble Dep. p. 103:07-09, are part of the overall effort to brand its company and attract new customers, who can search for and access Opposer's ATLAS mark from anywhere in the world while surfing the Internet. Trademarks, social media pages and domain names are not the same things. *See, e.g., Timberstone Mgmt. LLC v. Idaho Golf Partners, Inc.*, No. 2014-CV-5502 at *2-3 (N.D. Ill. 2014) (Delineating Plaintiff's various properties, the Court discussed that Plaintiff offered a Web site under a domain name and "also maintains numerous social media platforms on Facebook and Twitter, incorporating the...mark.") Opposer's social media pages represent tangible, documented outreach to relevant consumers under the ATLAS mark, helping to establish Opposer's rights in the ATLAS mark.

c. Opposer's Lawful Use of the ATLAS Mark Prior to Applicant's Constructive Use Date Establishes Opposer as the Senior User of the ATLAS Mark.

Applicant also attempts to frame Opposer's analogous use of the ATLAS mark as "unlawful use" by citing to regulations of the Federal Tax and Trade Bureau ("TTB"). Opposer wholeheartedly denies the implication that it broke or "flaunted" Federal law in any way in the preparation of launching its business or selling its goods. *See* App. Tr. Br., p. 15. It also states that this Opposition will decide which party first accrued trademark rights in the ATLAS mark. Nevertheless, Applicant's argument focuses on the concept of "actual use" of the ATLAS mark. *Id.* at p. 13. The agreements, marketing campaigns and other evidence that Opposer has placed on the record throughout this Opposition specifically rebut Applicant's assertion that Opposer made no actual use of the mark. The long list of ATLAS mark uses that it made, whether analogous or otherwise, was sufficient to accrue trademark rights in the ATLAS mark.

d. Opposer's Use of the ATLAS Mark Prior to Applicant's Constructive Use Date Was Sufficient to Establish Rights Senior to Those of Applicant.

The foregoing examples of use, including analogous use, of the ATLAS mark are sufficient to establish trademark rights in a name as it relates to later, junior users, especially users who first asserted rights via §1(b) of the Lanham Act. *See Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536 (T.T.A.B. 2007) (finding that Congress did not intend to "prohibit a party from asserting priority by analogous use vis-à-vis an intent-to-use applicant"). Moreover, "an applicant in a use-based application can rely, for purposes of priority ... upon use (including use analogous to trademark use) prior to the filing date of its application, or even prior to its claimed use dates." *See Fair Indigo*, quoting *Corporate Document Services, Inc. v. I.C.E.D. Management, Inc.*, 48 U.S.P.Q.2d 1477, 1479 (T.T.A.B. 1998). Applicant argues that the "only persons who were exposed to the ATLAS BREWING COMPANY mark were the appropriate local, state, and federal agencies issuing the proper credentials and the vendors supplying the necessary support and equipment." *See* App. Tr. Br., p. 18. This statement neglects to account for evidence illustrating that Applicant itself, through its CEO Justin Cox ("Cox"), knew of Opposer's use of the ATLAS mark prior to launching its own operations. *See, e.g.,* Soble Dep. p. 104:08-111:06.

> Q: "And how did they react when you told them that you were Atlas Brewing Company?"
> A: "Well, that was interesting. I asked -- I said to them, I said, I had no idea you guys existed. Did you search for us. And they said, yeah, we knew you were there. And I said, well, why didn't you reach out to me. Why didn't you -- you knew we were there. And they said, we didn't know what you were going to be. And I said, I don't know what that means. We have Atlas Brewing Company.

> What do you mean, what we were going to be. And they said, well, we thought maybe you could have been a craft beer bar or something like that. And I said -- well, I mean, who knows what someone means. But that's crazy. We're Atlas Brewing Company. We were there. We made no secret about who we were."
>
> *Id.* at 109:23-110:16.

Opposer, through the RNES Agreement, Management Agreement, public signage, media placements, marketing efforts, equipment purchase orders, social media outlets, a meeting with Applicant, branding efforts with professional logo designers, and all of the other evidence and testimony buttressing all of these pieces of evidence, has proven its burden to show use of the ATLAS mark prior to Applicant's constructive use date of June 4, 2012. No reasonable interpreter of the facts could conclude that Opposer had not established itself as the owner and senior user of the ATLAS mark for goods and services related to the manufacture and sale of beer. Accordingly, Opposer respectfully requests that the Board find that it is the senior user of the ATLAS mark and sustain its Opposition to Applicant's mark.

2) Applicant's Mark is Primarily Geographically Descriptive.

Applicant's arguments about whether its mark is primarily geographically descriptive contain numerous misstatements of fact and mischaracterizations of evidence in the record. Contrary to Applicant's assertions, 1) the Atlas District is a generally known geographical area for Washington, D.C.-area consumers and Applicant's own evidence shows that those consumers associate the mark primarily with the geographical area, 2) Opposer's goods and services originate in *or near* the geographical area, and 3) purchasers would be likely to, and do in fact, associate the goods and services with the geographical area. There is also substantial evidence that creating such a goods/place association was Applicant's primary intention right up to the point in time when Opposer asserted geographical descriptiveness as a defense in this action. Given the opportunity to state its reasons for choosing the ATLAS mark in the early stages of this Opposition, Applicant cited the geographical location as inspiration, and did not cite any of the dictionary definitions of "atlas" that it now promotes. See App. Ex. 7, Cox. Dep., p. 111:11-112:15.

Rather than rebutting the substance of Opposer's arguments to this effect, Applicant has chosen to misstate facts, acting as if it used certain logos in the marketplace that it never used, and ignoring its own CEO's testimony that his customers associate the ATLAS mark with the Atlas District of Washington, D.C. *See* App. Tr. Br., p. 24 (where Applicant states outright that its "logo is Atlas from Greek mythology" – presumably referencing an Atlas [the Greek titan] tap-handle design that was *never* displayed to the public or used in commerce *in any form*. *See* Deposition of Justin Cox, Dkt. #32 ("Cox Dep."), p. 97:20-98:17, excerpted:

> Q: Opposer's Attorney: "But you didn't end up going with that [Titan Atlas] tap handle design; correct?"
> A: Cox: "Correct."
> Q: "You didn't end up going with anything similar to that; correct?"
> A: "Correct."
> Q: "And you didn't eventually use the titan Atlas in any of your goods to the public; is that correct?"
> A: "Correct."
>
> *Id.* at 98:8-17.

Applicant has never asserted that it uses an Atlas the Greek Titan logo, and Cox expressly denied ever using one in commerce. Cox. Dep., p. 95:19-96:2; *see also* Cox Dep., p. 76:5-77:18. Applicant even goes so far as to say that "the nickname 'Atlas District' is not generally known or well known in Washington, D.C." App. Tr. Br., p. 21; *contra* Cox Dep. p. 75:23-76:4 (Q: "Does it surprise you that people are referring to H Street Northeast as Atlas District?" A: "No. . . I mean it's a term that people use.").

Presumably, Opposer chose to mislead the reader in its brief because it recognizes that the Atlas District is well known to the average D.C. consumer, and that Applicant itself has done nothing to create an association in consumer minds between the dictionary definitions of "atlas" and its mark, while admittedly seeking to create a goods/place association between the ATLAS mark and the Atlas District of Washington, D.C. *See* App. Exs. 7 & 10. The good news for Applicant is that its efforts to associate its ATLAS mark with the Atlas District have worked. Applicant's CEO, Cox, testified that the "major two" associations consumers make with the ATLAS mark are with the Atlas District in Washington, D.C., and the Ayn Rand book Atlas Shrugged (which no one contends is the primary definition of the word Atlas or the mark's reason for being). Cox Dep., p. 77:18. The bad news for the Applicant is that primarily geographically descriptive marks are not generally registrable on the Principal Register. *See In re Loew's Theatres, Inc.*, 769 F. 2d 764, 226 U.S.P.Q. 865 (Fed. Cir. 1985).

The cases Applicant cites to rebut Opposer's claim of primary geographical descriptiveness are distinguishable. *In re Int'l Taste Inc*. stands for the premise that the mark's meaning must primarily denote a geographical location to be primarily geographically descriptive, but *In re Societe des Eaux Minerales de Vittel S.A.* makes it clear that the correct point of reference for determining how a mark will be understood is the perspective of the public to whom the mark is directed – *i.e*., the target consumers. *See In re Int'l Taste*, 53 U.S.P.Q. 2d 1604 (T.T.A.B. 2000); *In re Societe*, 824 F. 2d 957 (Fed. Cir. 1987) ("In dealing with all of these questions of the public's response to word symbols, we are dealing with the supposed reactions of a segment of the American public, in this case the mill-run of cosmetics purchasers..."). Given that Applicant targets and intends to continue targeting the Washington, D.C. beer-drinker market, it is very likely that the average consumer will recognize "ATLAS" as a geographical region from which the product originates. *See* App. Ex. 12, ATLAS 405; Cox Dep., p. 120:9-121:9.

There is both direct and indirect evidence, all originating from Applicant, to support the view that the public perceives a goods/place association between Applicant's mark and the Atlas District. The indirect evidence that the public perceives a goods/place association is that Applicant – which is owned and run by a long-time D.C. resident – set out to create such an association in the first place. Applicant's answers to interrogatories and internal investor correspondences proposing the Atlas name both reveal its intention to associate its mark with the Atlas District. *See* App. Ex. 7 & 10. They also reveal that at least one long-term D.C. resident (Cox) recognizes the Atlas District as a place, and believes that one could reasonably create a goods/place association between its mark and the Atlas District in the minds of D.C. consumers.

One may reasonably assume that Cox would not have cited the Atlas District as an inspiration for the name if he did not believe anyone would understand the reference or associate the mark with the Atlas District, whether because the Atlas District is not generally known or because Applicant really wished to capitalize on the dictionary definition image of "atlas." Applicant cemented this assumption by deciding not to associate its mark or products with the dictionary definition of Atlas, primarily by declining to use the "Greek" Atlas tap-handle design concept in any of its products or marketing. *See* Cox Dep., p. 97:20-98:17. In fact, none of Applicant's products or marketing feature images of the titan Atlas. *See* Cox Dep. p. 95:19-96:2.

> Q: "Have you used any logos incorporating the Titan Atlas in regards to your company's beer?"
> A: "'Used,' meaning?"
> Q: "Have you used any picture images of the Titan Atlas on any of the beer products that you've put into the marketplace?"
> A: "No."

Id.; see also p. 17, *supra* (Applicant never used titan on publicly available goods.)

Applicant does use what it describes as a book-of-maps Atlas on one of its t-shirts, though a quick examination of the cited image reveals that it is not even an obvious depiction of a book, much less a book of maps. *See* App. Ex. 14 (bates-stamped “ATLAS 040”); *see also* Cox Dep., p. 27. If Applicant had stated its intention to associate the ATLAS mark with the Atlas District (as it did), then proceeded to cover its products with depictions of Greek titans or map imagery, its arguments might hold water. However, given that the average consumer of its products has no reason to associate Applicant’s mark with titans or maps other than the dictionary definition of the word “atlas,” Applicant’s intention to associate its mark with the Atlas District is important evidence of the mark’s anticipated impact on the consumer public.

There is also direct evidence of the goods/place association in the public mind between Applicant’s mark and the Atlas District. Cox himself testified that customers entering Applicant’s brewery tend to associate the ATLAS mark with the Atlas District. Cox Dep., p. 76:8-77:18.

> Q: “How many people come into your brewery on a weekly basis?”
> A: “Depends on the week, but I'd say somewhere around 500 people come through.”
> Q: “Do those people ever -- do they ever ask you about your name with respect to the geographic area known as the Atlas District?”
> A: “They do.” [. . .]
> Q: “So you get asked about your name with respect to the Atlas District. Do you get asked about your name with respect to anything else?”
> A: “We do. We get people asking questions if it's somehow related to Ayn Rand and the Atlas Shrugged book.”
> Q: “Okay. Anything else?”
> A: “Those are the major two.”
>
> *Id.*

Cox gave these answers in response to questions from his own attorney. There is no reason to suppose that his answers were inaccurate or uncertain.

Cox’s testimony provides direct evidence that individual customers of his brewery frequently associate Applicant’s mark with the Atlas District in Washington, D.C. In fact, the *only* evidence in the record concerning the D.C. consumer market’s view of the ATLAS mark indicates that the market associates the mark ATLAS with the Atlas District. There is no evidence that it associates the mark with Greek titans or books of maps. Applicant's protests to the contrary, including the assertion that the Atlas District is not even a recognized geographical area in D.C., are wholly disingenuous, and there is virtually nothing in the record to support them.

The existence of evidence about Applicant's own intention to associate its mark with the Atlas District and the public's own perception of such an association distinguishes this case from those Applicant cites in its defense. *In re Mankovitz*, 90 U.S.P.Q. 2d 1246 (T.T.A.B. 2009), *In re John Harvey & Sons Ltd*., 32 U.S.P.Q. 2d 1451 (T.T.A.B. 1994), and *In re Gayle Hayman Inc*., 15 U.S.P.Q. 2d 1478 (T.T.A.B. 1990), were all *ex parte* appeals from adverse decisions by an examining attorney in which there was little to no evidence of primary geographical descriptiveness beyond dictionary definitions of place names and, in *Mankovitz* and *Hayman*, the fact that the applicant lived or had offices near the place name. *See id*. The *In re Mankovitz* decision also reveals that the products need not originate in the geographical location itself to be primarily geographically descriptive, undoing Applicant's argument that its mark cannot be primarily geographically descriptive because it is located in "Ivy City" 1.3 miles away from the Atlas District. *See In re Mankovitz*, 90 U.S.P.Q. 2d at 1246 *et seq*; *see also* App. Tr. Br., p. 23. Applicant's products originate 1.3 miles from the Atlas District, and consumers associate its products with Atlas the geographical location. *See Id*.; *see also* Cox. Dep., p 76-77.

Applicant set out to create a goods/place association between its products and the Atlas District. *See* App. Exs. 7 & 10; Cox Dep., p. 21:4-6. It succeeded in creating such an association in the eyes of the consumer public. *See* Cox Dep., p. 76-77. There is no question that the Atlas District is a known geographical region in the D.C. area. Cox Dep. p. 72:21-25. Applicant all but admitted that its mark is primarily geographically descriptive in the preliminary stages of the opposition, and now wishes to curb the effects by effectively denying what it has already admitted. *See* App. Ex. 7. Even if Opposer could not show prior use of a confusingly similar mark (which it has), Applicant's mark is primarily geographically descriptive, thus unsuited for registration on the Principal Register. Applicant's application must be denied.

CONCLUSION

Opposer began use of the ATLAS mark prior to any use made by Applicant. In the first-to-use federal trademark system, Opposer's use created trademark rights in the ATLAS name. Accordingly, Opposer's senior use disqualifies Applicant's junior use of a confusingly similar name from registration on the Principal Register.

Even if the Board finds that Applicant's use of the ATLAS mark was senior to Opposer's, Applicant's mark is still not capable of registration because it is primarily geographically descriptive of the area from which Applicant's goods originate. Primarily geographically descriptive marks are not registrable on the Principal Register. Nor are intent-to-use applications like Applicant's registrable on the Supplemental Register, at least until a valid allegation of use or statement of use has been filed. As Applicant has not filed either, its mark cannot be registered on the Supplemental Register. With neither of the two trademark registers available to it, the same conclusion as above applies: Opposer is the senior user of the ATLAS mark, and its Opposition should be sustained.

Respectfully submitted,

FUKSA KHORSHID, LLC
Lema A. Khorshid
Thomas Carroll
Perry Gattegno
70 W. Erie, 2nd Floor
Chicago, IL 60654
(312) 266-2221

ATLAS BREWING COMPANY, LLC

/perry gattegno/
Perry Gattegno, Attorney of Record

Date: May 22, 2015

CERTIFICATE OF SERVICE

I, Perry Gattegno, hereby certify that I caused a true and complete copy of the foregoing Opposer's Trial Brief to be served upon Applicant's attorney of record via first class postal and electronic mail on this 22nd day of May, 2015, at the following address:

Banner & Witcoff, Ltd.
c/o Anna L. King, Esq.
10 S Wacker Drive
Suite 3000
Chicago, Illinois 60606
aking@bannerwitcoff.com

/perry gattegno/

Perry Gattegno, Attorney of Record

CASES CITED IN OPPOSER'S REPLY BRIEF NOT CITED IN UNITED STATES PATENT QUARTERLY

131 Ill. App.3d 793 (1985)
475 N.E.2d 1342

HERMAN L. LOEB et al., Plaintiffs-Appellants,
v.
WILMA GRAY et al., Defendants-Appellees.

No. 5-84-0172.

Illinois Appellate Court — Fifth District.

Opinion filed February 27, 1985.

794 *794 John F. Borden, of Gosnell, Benecki, Borden & Enloe, Ltd., of Lawrenceville, for appellants.

A. Ben Mitchell and John J. Flood, both of Musick & Mitchell, of Mt. Vernon, for appellees Wilma Gray and Leah Cornwell.

No brief filed for appellees William R. Conyers and Sohio Supply Company.

Judgment affirmed.

PRESIDING JUSTICE JONES delivered the opinion of the court:

The plaintiffs, Herman and Betty Loeb, appeal the dismissal with prejudice of their amended complaint in an action for reformation of a contract for the sale of real estate and for specific performance of the contract as reformed. We affirm.

In their complaint, which was verified, the plaintiffs sought specific enforcement by the defendants Wilma Gray and Leah Cornwell of an alleged contract for the sale of real estate. The complaint was in four counts, in the others of which the plaintiffs sought from certain other of the defendants an accounting for oil and gas produced from the premises, from the defendants Gray and Cornwell damages in the amount of $1,000,000, and from the defendant Sohio Supply Company the impoundment of all funds representing the proceeds of the sale of oil and gas produced from the premises. Attached to the complaint as exhibit A was the "Real Estate Listing Agreement," a form signed by the defendants Gray and Cornwell as owners and Hugh B. Miller for Curran Miller Auction and Realty, Inc., the realtor. The real estate listing agreement was entered into on October 10, 1980. Under the real estate listing agreement the owners granted to the realtor the sole and exclusive right to sell the real estate in question for a period of three months following the date of the agreement and agreed, among other things, to pay the realtor a commission of 6% of the sale price. After the printed words "Mineral Rights" on the real estate listing agreement, the following appears in handwriting: "The sellers shall reserve 1/4 of the mineral rights to each seller for their [*sic*] natural lifetime."

795 Attached to the complaint as exhibit B is the "Real Estate Purchase *795 Agreement," also a form, signed by Herman Loeb as "Purchaser." Paragraph 12 of the real estate purchase agreement states as follows:

> "Acceptance: This offer shall remain open for acceptance by the Owners, by their signatures affixed hereto, at or prior to 12:00 o'clock, noon, on the 25 day of October 1980. If accepted within such time, this agreement shall be in full force and effect."

The real estate purchase agreement was executed by the "Purchasers" on October 11, 1980.

Paragraph 14 of the real estate purchase agreement provides "FURTHER CONDITIONS" as follows:

> "Sellers, Wilma Gray and Leah Cornwell, each respectively reserves for herself, for and during the period of her natural life, an undivided 1/4 interest in and to the oil, gas and other minerals, in, under and that may be produced from the above lands, subject to any rights now or hereafter existing in and

> to any lessee or assignee under any valid and subsisting oil and gas lease heretofore or hereafter executed. *Purchaser shall have full power and authority to lease all of said lands for oil, gas and other minerals, and Sellers' signatures shall not be required to effect said leases.* 1980 taxes due and payable in 1981 shall be deducted from the purchase price to be paid by Sellers for said premises, the deduction to be estimated on the basis of 1979 taxes paid in 1980." (Emphasis added.)

The realtor's signature appears beneath the following words on the real estate purchase agreement:

> "RECEIPT BY REALTOR:
>
> I, hereby, acknowledge receipt of deposit of $25,000.00 in CASH - Check."

At the bottom of the real estate purchase agreement appear these typewritten words: "SUBJECT TO THE TERMS, CONDITIONS AND MODIFICATIONS SET FORTH IN THE ADDENDUM ATTACHED HERETO." Beneath these typewritten words are the printed words, with the date supplied in handwriting: "ACCEPTED by Owners, this 21st day of October 1980." Beneath appear the signatures of Leah Cornwell and Wilma Gray, each as "Owner."

Attached to the complaint as exhibit B-1 is the "ADDENDUM TO REAL ESTATE PURCHASE AGREEMENT." The addendum states, "This Addendum to that certain Real Estate Purchase Agreement dated October 11, 1980, executed
796 by Herman L. Loeb shall constitute the acceptance by the undersigned of the terms and conditions *796 of said Real Estate Purchase Agreement subject to the following terms, conditions and modifications," paragraph four of which provides:

> "Paragraph 14 shall be modified and clarified as follows:
>
> Sellers Wilma Gray and Leah Cornwell each respectively reserves for herself, for and during the period of her natural life an undivided one-quarter (1/4) interest each in and to the oil, gas and other minerals in, under and that may be produced from the subject property. *Sellers shall each respectively be entitled to, for and during the period of her natural life, one-quarter (1/4) of all proceeds received by lessor of the subject property pursuant to existing and future oil and gas leases. In the event that Purchaser produces oil or gas directly rather than under lease, Sellers shall each respectively, for and during the period of her natural life, receive one-quarter (1/4) of the gross proceeds derived therefrom.* All payments shall be made quarterly and Purchaser shall furnish with each of said payments an accounting for the manner in which the amount of said payment is determined. *Purchaser shall have full power and authority to lease all of said lands for oil, gas and other minerals and Sellers' signatures shall not be required to effect said leases.* 1980 taxes due any payable in 1981 shall be deducted from the purchase price to be paid by Sellers for said premises, the deduction to be estimated on the basis of the 1979 taxes paid in 1980. In the event that the amount deducted is insufficient to pay the entire taxes due for 1980, Sellers shall pay to Purchaser the balance upon demand. In the event that the amount deducted exceeds the actual taxes due for 1980, Purchaser shall refund to Sellers the amount of the overpayment at the time of payment of the 1980 tax bill." (Emphasis added.)

This sentence follows immediately: "That certain Real Estate Purchase Agreement dated October 11, 1980 is accepted by the undersigned on the terms, conditions, modifications, and clarifications set forth hereinabove." The addendum is signed by Wilma Gray and Leah Cornwell beneath the words, "EXECUTED by owners this 21st day of October, 1980, at El Cajon, California."

In their complaint the plaintiffs alleged, *inter alia,* "the acceptance by plaintiffs of [defendants'] offer to sell said premises upon the terms set out in said Real Estate Listing Agreement" and that the "Addendum constituted an
797 attempt on the part of defendants, WILMA GRAY and LEAH CORNWELL, to change the terms of *797 their offer and plaintiffs' acceptance thereof by increasing the reservation of mineral rights beyond the 1/4th each for their lifetimes proposed by them and accepted by plaintiffs." Upon the motion of the defendants to dismiss the complaint, the trial court found "[t]hat the documents attached to the complaint do not indicate that the parties at any time entered into a

written binding contract for the sale of the real estate described in the complaint" and ordered the complaint dismissed with prejudice.

Thereafter, on August 6, 1982, the plaintiffs filed a motion to vacate the order dismissing the complaint with prejudice or, in the alternative, for leave to file an amended complaint. The trial court granted the motion to vacate and granted the plaintiffs leave to file an amended complaint. An amended complaint, likewise verified, appears in the record together with the plaintiffs' motion to vacate or for leave to file an amended complaint. However, it bears no file mark. An amended complaint, also verified, but differing from the other amended complaint in the record, was filed on December 27, 1982.

In the amended complaint of December 27, 1982, the plaintiffs alleged that they

> "made an oral offer to defendants through Hugh B. Miller, of Curran Miller Auction & Realty Company, sellers' agent, to purchase [the real property in question] on the following terms: Plaintiffs to acquire said real estate by warranty deed for the sum of $110,000.00; defendants, Wilma Gray and Leah Cornwell, each to reserve an undivided one-fourth of the oil, gas, and other minerals in and under said land for their respective natural lives; the conveyance to be subject to any lease of record covering and affecting said lands; and plaintiffs to have the right to lease said lands for oil and gas purposes without defendants' signatures."

The plaintiffs alleged further that "[u]pon being notified of plaintiffs' offer defendants, Wilma Gray and Leah Cornwell, both orally accepted same," subject to modifications concerning tenants' rights and 1980 taxes. The plaintiffs alleged that on or about October 10, 1980, they approved these modifications and "orally advised such defendants through Hugh B. Miller, their agent, of such approval and acceptance." Thereafter, according to the plaintiffs' allegations, Miller, as the agent of the defendants, prepared the real estate listing agreement, which "specifically authorized Curran Miller Auction & Realty to sell the described real estate on the terms plaintiffs and defendants had previously agreed upon." On or about the same date, according to the plaintiffs' allegations, Miller, as the agent of the defendants, prepared
798 *798 the real estate purchase agreement, which,

> "(except as noted hereafter), stated the terms of the sale and purchase previously agreed [*sic*] between plaintiffs and defendants, Wilma Gray and Leah Cornwell. It specifically authorized Curran Miller Auction & Realty to enter into a written contract for such sale on behalf of sellers. Plaintiff Herman L. Loeb, on behalf of purchasers, executed said agreement and paid $25,000.00 to Hugh B. Miller, as agent for sellers, who thereupon executed said contract."

The plaintiffs alleged that the language in paragraph 12 of the real estate purchase agreement and the language concerning the receipt by the realtor, which we have already described,

> "was included in the standardized preprinted real estate purchase agreement form, and because of a mutual oversight and mutual mistake of the parties and the mistake of the scrivener was not stricken or amended, although the parties had already agreed that the sellers would sell and the purchasers would purchase the real estate on the terms detailed in paragraphs 3, 4 and 5 above [of this amended complaint], and said Hugh B. Miller's signature constituted the acceptance by the sellers.
>
> It was the intent of the parties that paragraph 12 and the acceptance language (the last sentence with signature lines) be stricken and that the receipt paragraph be worded as follows:
>
> `Receipt and acceptance by owners' agent: I, hereby, acknowledge receipt of deposit of $25,000.00 check and accept this contract.'"

The plaintiffs alleged that the real estate listing agreement and the real estate purchase agreement as prepared by Miller were forwarded "on or about October 10, 1980" by Miller to defendants Gray and Cornwell, who signed the real estate listing agreement and returned it to Miller. The plaintiffs sought reformation of the real estate purchase agreement "by deleting paragraph 12 and the last sentence with lines for signature [by the owners], and correcting the receipt language as indicated above, to reform and correct said contract to the actual agreement made by the parties." In addition, the plaintiffs sought specific performance by the defendants Gray and Cornwell of the contract as reformed.

In the other three counts of the amended complaints, the plaintiffs sought, as they had in their complaint, an accounting, damages, and impoundment of funds. Attached to the amended complaint as exhibit A is the real estate
799 listing agreement and, as exhibit B, the real estate purchase agreement. The copy of the real estate purchase *799 agreement serving as exhibit B to the amended complaint, however, does not bear the owners' signatures or in any way refer to the addendum. It does contain the "FURTHER CONDITIONS" of paragraph 14, which we have set forth above.

The defendants, Gray and Cornwell, moved to dismiss the amended complaint asserting, *inter alia,*

> "[t]hat Plaintiffs have failed to plead a proper cause of action for reformation of a contract for the reason that there can be no reformation where there has not already been a meeting of the minds and further, this Court has already ruled that there was no meeting of the minds between the parties and that at no time did the parties enter into a binding contract for the sale of the subject property."

In its order the trial court found that the amended complaint should be dismissed with prejudice,

> "that the amended Complaint as filed, together with the prior verified Complaint, and all the documents as attached to the verified Complaints, conclusively establish that no agreement was entered into between the parties which resulted in a document evidencing the agreement being duly signed by the Defendants, Wilma Gray and Leah Cornwell, or an agent duly authorized on their behalf, and accordingly, the alleged contract is therefore unenforceable and the action barred by the Statute of Frauds, Ill. Rev. Stat., Ch. 159, sec. 2."

From this order dismissing the amended complaint with prejudice the defendants appeal.

• 1-3 It is elementary that in order to constitute a contract between two parties there must be mutual assent by the contracting parties on the essential terms and conditions of the subject about which they are contracting. (*Bank of Marion v. Robert "Chick" Fritz, Inc.* (1973), 9 Ill. App.3d 102, 291 N.E.2d 836, *aff'd* (1974), 57 Ill.2d 120, 311 N.E.2d 138.) For a contract to exist there must be an offer and acceptance, and to create a binding contract the acceptance must comply strictly with the terms of the offer. (*Zeller v. First National Bank & Trust Co.* (1979), 79 Ill. App.3d 170, 398 N.E.2d 148.) An acceptance requesting modification or containing terms that vary from those offered constitutes a rejection of the original offer and becomes a counterproposal that must be accepted by the original offeror before a valid contract is formed. (*Zeller v. First National Bank & Trust Co.* (1979), 79 Ill. App.3d 170, 398 N.E.2d 148.) Similarly, when one accepts an offer conditionally or introduces a new term into the acceptance, no acceptance
800 occurs; rather, there is a counterproposal *800 requiring acceptance by the offeror before a valid contract is formed. *Arthur Rubloff & Co. v. Drovers National Bank* (1980), 80 Ill. App.3d 867, 400 N.E.2d 614.

• 4 In the case at bar the plaintiffs state in their amended complaint filed on December 27, 1982, that the real estate listing agreement specifically authorized the realtor to sell the real estate in question "on the terms plaintiffs and defendants had previously agreed upon." As we have already indicated, certain terms are set forth in the real estate listing agreement, among them the reservation by the sellers of "1/4 of the mineral rights to each seller for their [*sic*] natural lifetime." The real estate purchase agreement, which, according to the plaintiffs in the amended complaint "stated the terms of the sale and purchase previously agreed [*sic*] between plaintiffs and defendants," provided, however, that the "[p]urchaser shall have full power and authority to lease all of said lands for oil, gas and other minerals, and Sellers' signatures shall not be required to effect said leases." Of the rights of an owner of a mineral estate, the defendants maintain in their brief, as they did in the trial court, that the owner of a mineral interest has the right not only to drill for and to produce oil and gas but also to execute leases to a third person as well as to receive bonuses, delay rentals, and royalties under any such oil and gas lease. As stated in 1 Williams & Meyers, Oil & Gas Law sec. 301, at 433 (1983), the owner of the mineral estate

> "has the right to execute oil and gas leases to operators to secure the exploration and development of the minerals. Leasing is the typical arrangement between landowner and operator for the exploitation of the mineral estate. The right to lease is called here the *executive right* or the *leasing right.*"

In discussing the creation and characteristics of the executive right the authors define that right as "the exclusive power to execute oil and gas leases." (2 Williams & Meyers, Oil & Gas Law sec. 338, at 193 (1983).) Thus, the terms concerning "Mineral Rights" as expressed in the real estate listing agreement differ from those in paragraph 14 under "FURTHER CONDITIONS" as expressed in the real estate purchase agreement. Under the terms of the real estate listing agreement, the defendants, as sellers, would have the exclusive power to execute oil and gas leases with respect to the property in question, whereas under the terms of the real estate purchase agreement, the plaintiffs as buyers would have full power and authority to do so. As between the real estate listing agreement and the real estate purchase agreement, there is no indication of mutual assent on the part of the plaintiffs and the defendants concerning
801 the power to execute *801 oil and gas leases with regard to the property in question.

• 5 As we have stated, the plaintiffs do not refer in their amended complaint of December 27, 1982, to the addendum to the real estate purchase agreement. In paragraph four of the addendum, the defendants provide with regard to the power to lease in the same way as was done in the real estate purchase agreement, that is, that the "Purchaser shall have full power and authority to lease all of said lands for oil, gas and other minerals and Sellers' signatures shall not be required to effect said leases." Although, in effect, the matter of the power to lease is resolved in the addendum in favor of the plaintiffs, elsewhere in that same paragraph in the addendum the defendants specify that

> "Sellers shall each respectively be entitled to, for and during the period of her natural life, one-quarter (1/4) of all proceeds received by lessor of the subject property pursuant to existing and future oil and gas leases. In the event that Purchaser produces oil or gas directly rather than under lease, Sellers shall each respectively, for and during the period of her natural life, receive one-quarter (1/4) of the gross proceeds derived therefrom."

Although the parties do not address the matter, we consider significant certain general rules concerning principal and income as applied to an oil and gas lease. As stated in 3A W. Summers, The Law of Oil & Gas sec. 613, at 502-04 (1958),

> "Where the life tenant and remainderman or reversioner join in a lease for oil and gas purposes, or where such a lease is executed by a trustee having power to do so, it is [*sic*] well settled rule that the cash bonus, delay rentals, oil and gas royalties and gas well rentals are corpus of the estate and that the life tenant is entitled only to the interest thereon for the period of his life. This rule does not apply, however, if the life tenant and remainderman have agreed upon a different division of the returns from the lease, or such a lease is made by a trustee under an express power and the settlor has indicated a different division."

In the instant case, the defendants as life tenants sought not merely the interest upon the proceeds of the lease but the proceeds themselves. Such an apportionment departs from that provided for under the generally prevailing rule. (See also sections 10 and 11 of the Principal and Income Act, which relate to trusts (Ill. Rev. Stat. 1983, ch. 30, pars. 510, 511); *Central Standard Life Insurance Co. v. Gardner* (1959), 17 Ill.2d 220, 161 N.E.2d 278 (royalties and
802 bonuses paid under *802 oil and gas leases of the trust property were the considerations for sale of a portion of the real property belonging to the trust, represented a return of capital, and should have been credited to the trust).) As between the real estate purchase agreement and the addendum thereto, there is, then, no indication of mutual assent between the plaintiffs and the defendants concerning the disposition of the proceeds from production of oil and gas either pursuant to or in the absence of a lease.

• 6 The plaintiffs state correctly that a motion to dismiss admits all facts well pleaded and a cause of action should not be dismissed upon its pleadings unless it plainly appears that no set of facts can be proved under the pleadings that will entitle the plaintiffs to recover. (*Pennington v. Jones* (1977), 46 Ill. App.3d 65, 360 N.E.2d 566.) The provisions contained in the real estate listing agreement and the real estate purchase agreement with regard to the power to execute a lease reveal that no meeting of the minds of the parties occurred concerning this essential term of the alleged contract. Hence, these two documents show that no contract was formed at that time. Although the plaintiffs do not invite us to examine the addendum to the real estate purchase agreement, if it is considered, it suggests, as we have said, that the difficulty concerning the power to lease was resolved in favor of the plaintiffs but that a new term was introduced, namely, the disposition of the proceeds of oil and gas production. That term was never accepted; hence, no contract was formed.

We conclude that the plaintiffs could not possibly prove any set of facts under the pleadings that would entitle them to recover. Therefore, the trial court was correct in dismissing the amended complaint with prejudice.

The plaintiffs contend that the trial court erred in considering the prior verified complaint and documents attached thereto. However, we see no error in the court's having done so in view of the rule that where the original pleading is verified, as opposed to being unverified, it remains a part of the record upon the filing of an amended pleading (*Yarc v. American Hospital Supply Corp.* (1974), 17 Ill. App.3d 667, 307 N.E.2d 749.) Furthermore, the result would have been no different had the trial court not considered the earlier pleading.

• 7 We are cognizant that plaintiffs seek in their amended complaint reformation of the contract alleged. However, there can be no reformation where there has not already been a meeting of the minds (*Harden v. Desideri* (1974), 20 Ill. App.3d 590, 315 N.E.2d 235). Since no meeting of the minds occurred here, there is nothing to reform.

803 In their reply brief plaintiffs invite us to find that the defendants *803 are bound by a concession in their brief that the amended complaint, considered in and of itself, states no cause of action. We decline the invitation, however, because, first, the concession alleged was not clearly made and, second, the issue relates to a matter of law; defendants will not be held to have conceded a point of law that, as conceded, is erroneous.

Affirmed.

KASSERMAN and KARNS, JJ., concur.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TIMBERSTONE MANAGEMENT LLC,	)	
	)	
Plaintiff,	)	
v.	)	2014-CV-5502
	)	
IDAHO GOLF PARTNERS, INC,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Now before the Court is Defendant Idaho Golf Partners, Inc.'s ("Idaho Golf") motion to dismiss under Federal Rule of Civil Procedure 12(b)(2). For the following reasons, Idaho Golf's motion is granted.

BACKGROUND[1]

Plaintiff TimberStone Management, LLC's ("TimberStone") is an Illinois limited liability company, which owns and operates the TimberStone Golf Course in Iron Mountain, Michigan (the "Michigan TimberStone Golf Course"). TimberStone maintains its corporate headquarters in Chicago, Illinois. TimberStone's management is centered in their Chicago office, which also serves as a repository for virtually all of their corporate records.

[1] The Court accepts the uncontested allegations in TimberStone complaint as true and resolves all genuine factual disputes in TimberStone's favor. *Purdue Research Found v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782-83 (7th Cir. 2003).

Idaho Golf is an Idaho domestic company located and doing business in Caldwell, Idaho. Idaho Golf owns and also operates the TimberStone golf course in Caldwell, Idaho (the "Idaho TimberStone Golf Course"). Idaho Golf opened the Idaho TimberStone Golf Course in July 2011.

TimberStone owns the United States Trademark Registration for the "TIMBERSTONE" mark to be used for its golf course (the "TIMBERSTONE Registration"). The TIMBERSTONE Registration was filed on January 12, 2012 and was formally registered on June 11, 2013. The TIMBERSTONE Registration notes that the owner of the Trademark is TimberStone.

Since June 1996, TimberStone has used the "TIMBERSTONE" moniker (the "TIMBERSTONE Mark") in commerce to identify and distinguish the Michigan TimberStone Golf Course, which opened to the public on June 1, 1997. Since then, the TIMBERSTONE Mark has been continuously used in association with the Michigan TimberStone Golf Course and through TimberStone's licensees on various golf-related items. Since its inception, TimberStone has engaged in an extensive national advertising campaign of the Michigan TimberStone Golf Course and has been recognized as one of the preeminent golf course in the United States.

Since October 1997, TimberStone has operated its website under the domain name www.timberstone.com (the "TIMBERSTONE Website"). The TIMBERSTONE Website provides information about the Michigan TimberStone Golf Course, its pricing structure, news, events, offers and indirect sales, and accommodates reservation requests from prospective visitors to the Michigan TimberStone Golf Course. TimberStone also maintains numerous social media platforms on Facebook and Twitter, incorporating the TIMBERSTONE Mark.

Without prior authorization from TimberStone to use the TIMBERSTONE Mark, in February 2011, Idaho Golf obtained and assumed the business name "TimberStone Golf Course" from the Idaho Secretary of State. After the acquisition of the name, Idaho Golf began using the name to promote the Idaho TimberStone Golf Course. In April 2011, Idaho Golf registered the domain name www.playtimberstone.com. In June 2011, Idaho Golf opened the Idaho TimberStone Golf Course.

On April 4, 2012, TimberStone discovered Idaho Golf's usage of the TIMBERSTONE Mark and immediately sent a cease and desist letter to Idaho Golf. The cease and desist letter identified TimberStone as the owner of Michigan TimberStone Golf Course and was sent from its counsel in Chicago, Illinois. On April 19, 2012, Idaho Golf responded to the cease and desist letter and sent a letter to TimberStone in Chicago, Illinois.

Between April 2012 and July 2013, counsel for Idaho Golf in Idaho engaged in multiple telephone conversations with TimberStone in Illinois. In the course of these discussions Idaho Golf was again informed of TimberStone's common law rights to the TIMBERSTONE Mark. Idaho Golf refused to discontinue its use of the TIMBERSTONE Mark.

On July 19, 2013, TimberStone became aware of Idaho Golf's Facebook page advertising the "TimberStone Golf Course" in Caldwell, Idaho. TimberStone immediately reported the unauthorized use of the TIMBERSTONE Mark to Facebook, which removed the content. On August 2, 2013, TimberStone sent Idaho Golf a copy of the TIMBERSTONE Registration. Despite Idaho Golf's knowledge of the federal registration for the TIMBERSTONE Mark, Idaho Golf did not discontinue its use of the term. Instead on August 19, 2013, Idaho Golf began the process of registering the TIMBERSTONE Mark with the Idaho Secretary of State.

After Idaho Golf's previous Facebook page had been removed, Idaho Golf created a new Facebook ("Idaho Golf's Second Facebook Page") page advertising the Idaho TimberStone Golf Course. Idaho Golf's Second Facebook Page was in use between July 2013 and April 2014. When TimberStone discovered Idaho Golf's Second Facebook Page in April 2014, Facebook was made aware of the infringement and immediately removed the page for the second time. Shortly after Idaho Golf's Second Facebook Page was removed by Facebook, Idaho Golf's counsel sent an e-mail to TimberStone in Illinois, offering TimberStone $1,000 to acquire the limited use of the TIMBERSTONE Mark. TimberStone rejected the offer and again demanded that Idaho Golf cease its use of the TIMBERSTONE Mark. Idaho Golf has continued to use the TIMBERSTONE Mark to market the Idaho TimberStone Golf Course.

On July 14, 2014, Idaho Golf filed an action under the Lanham Act and other federal claims in conjunction with state law causes of action in Idaho federal court. *Idaho Golf Partners v. TimberStone Management, LLC et al.*, No. 14 cv 233 (D. Idaho 2014). On July 18, 2014, TimberStone filed the instant complaint in the United States District Court for the Northern District of Illinois. TimberStone's complaint alleges seven causes of action: (1) federal trademark infringement; (2) unfair competition and false designation of origin; (3) federal trademark dilution; (4) cybersquatting; (5) violation of Illinois deceptive practices act; (6) common law trademark and trade name infringement; and (7) intentional interference with prospective economic advantage. On August 11, 2014, Idaho Golf submitted the instant motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). In response to Idaho Golf's motion to dismiss, TimberStone has submitted a request to engage in jurisdictional discovery if the Court sees fit to grant Idaho Golf's motion.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(2) provides for dismissal where a court lacks personal jurisdiction over a party. Fed. R. Civ. P. 12(b)(2). Once the defendant moves to dismiss the complaint under Rule 12(b)(2) the plaintiff bears the burden of establishing personal jurisdiction. *Citadel Group, Ltd. v. Wash. Reg'l Med. Ctr.*, 536 F.3d 757, 761 (7th Cir. 2008). Where there is no evidentiary hearing held, as in this case, the plaintiff must make only a *prima facie* case of personal jurisdiction based on the submission of written materials. *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 714 (7th

Cir. 2002). The plaintiff "is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record." *Purdue Research Found. v. Sanofi–Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003) (internal citations and quotations omitted).

DISCUSSION

Timberstone contends that exercising jurisdiction over Idaho Golf is proper. Conversely, Idaho Golf contends that it does not have the requisite minimum contacts with Illinois to be subject to personal jurisdiction.

TimberStone asserts claims under both federal and state law, therefore this Court's jurisdiction rests on federal question, 28 U.S.C. § 1331, and supplemental jurisdiction, 28 U.S.C. § 1367. With respect to the federal claims, none of the claims contain a special federal rule for personal jurisdiction. Therefore, we look to the law of the forum for the governing rule. *See* FED. R. CIV. P. 4(k)(1)(A). The Illinois long-arm statute permits a court to "exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." 735 ILCS 5/2–209(c). Because "there is no operative difference" between the Illinois Constitution and the United States Constitution for purposes of personal jurisdiction, a district court needs to only analyze whether the exercise of personal jurisdiction would be contrary to federal due process. *Hyatt Int'l Corp.*, 302 F.3d at 715–16 (internal citations omitted).

Personal jurisdiction may be exercised in accordance with due process if the defendant has sufficient "minimum contacts" with Illinois "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Hyatt Int'l Corp.*, 302 F.3d at 716; (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Such contacts must not be fortuitous. *Id.* Rather, the defendant must have purposely established minimum contacts with the forum state such that he "should reasonably anticipate being haled into court" there. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Thus, the Court will determine if it is "fair and reasonable to call the defendant into the state's courts to answer the plaintiff's claim." *uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 426 (7th Cir. 2010) (citing *Int'l Shoe*, 326 U.S. at 317). This is because "[p]otential defendants should have some control over—and certainly should not be surprised by—the jurisdictional consequences of their actions." *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997).

Personal jurisdiction can be either general or specific. *Daimler AG v. Bauman*, 134 S.Ct. 746, 754-55 (2014). TimberStone does not allege general jurisdiction. General jurisdiction exists where the defendant has "continuous and systematic" business contacts with the forum state, so that the defendant is subject to any action, regardless of whether the action is related to the defendant's contacts. *Felland v. Clifton*, 682 F.3d 665, 673 (7th Cir. 2012). Timberstone solely seeks to establish that this Court has specific jurisdiction over Idaho Golf.

Courts apply a three-part test to determine if whether specific jurisdiction exists: "(1) the defendant must have purposefully availed himself of the privilege of conducting business in the forum state or purposefully directed his activities at the state; (2) the alleged injury must have arisen from the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with traditional notions of fair play and substantial justice." *Felland*, 682 F.3d at 673.

1. Activity Purposefully Directed at Illinois

Faced with Idaho Golf's lack of outright contacts with Illinois, TimberStone focuses on the intentional nature of Idaho Golf's actions towards TimberStone. TimberStone has alleged an Illinois state law cause of action for intentional interference with prospective economic advantage, an intentional tort. *O'Fallon Dev. Co. v. City of O'Fallon*, 356 N.E.2d 1293, 1301 (Ill. App. Ct. 1976). In pleading an intentional tort, TimberStone seeks to avail themselves of the "expressly aiming" test enunciated in *Calder v. Jones*, 465 U.S. 883, 789 (1984).

The plaintiff in *Calder* alleged that she was libeled by a newspaper article written and edited by the defendants in Florida. *Calder*, 465 U.S. at 783. The plaintiff sued the defendants in California, where she lived and worked, and where the article was circulated, among other places. *Id.* Although the defendants' other contacts with California were minimal, the Supreme Court concluded that they were subject to personal jurisdiction in California. The Court held:

> [Petitioners'] intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of the injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.

Id. at 789-90 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Where, as here, the plaintiff alleges an intentional tort, the purposeful-direction inquiry "focuses on whether the conduct underlying the claims was purposefully directed at the forum state." *Tamburo v. Dworkin*, 601 F.3d 693, 702 (7th Cir. 2009) (citing *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008)). The Seventh Circuit has "distilled three requirements from *Calder* for determining whether conduct was 'purposefully directed' at the forum state: '(1) intentional conduct (or 'intentional and allegedly tortious' conduct); (2) expressly aimed at the forum state; (3) with the defendant's knowledge that the effects would be felt--that is, the plaintiff would be injured- in the forum state." *Felland v. Clifton*, 682 F.3d 665, 674-75 (7th Cir. 2012) (quoting *Tamburo*, 601 F.3d at 703).

We accordingly take up the first element of the "purposefully direct" inquiry from *Tamburo*. TimberStone has alleged that Idaho Golf utilized the TIMBERSTONE Mark with the intent or design to disrupt TimberStone's prospective economic advantage arising from advertising and providing golf course services.

TimberStone asserts that Idaho Golf knew of TimberStone's ownership of the TIMBERSTONE Mark and its operation of the Michigan TimberStone Golf Course. TimberStone continues that Idaho Golf's usage of the TIMBERSTONE Mark was an intentional act designed to disrupt TimberStone's prospective economic advantage. TimberStone's intentional tort allegations are sufficient to meet the "intentional and allegedly tortious" element. *See Tamburo*, 601 F.3d at 704.

The second element, whether the conduct was expressly aimed at the forum state "overlaps with [the third element, which asks] whether the defendant knew the plaintiff would suffer the injury in the forum state, so [the court will] consider the two requirements together." *Tamburo*, 601 F.3d at 704. In *Walden v. Fiore*, - U.S.-, 134 S.Ct. 1115, 1122 (2014) the Supreme Court stressed that for specific jurisdiction to exist, the defendant's relationship with the forum must arise out of the contacts that 'defendant himself' creates with the forum state. *Id.* at 1122. The Court went on to highlight that "a defendant's relationship with the plaintiff or third party, standing alone, is an insufficient basis for jurisdiction. *Id.*; *see also Advanced Tactical Ordinance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) (*Walden* made clear that "the plaintiff cannot be the only link between the defendant and the forum."). This remains true even when the plaintiff, as a forum resident, sustains an injury in the forum as a result of an intentional tort. *Walden*, 134 S.Ct. at 1125. "[M]ere injury to a forum resident is not a sufficient connection to the forum . . . [t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.*

Returning to the facts of the case at bar, TimberStone contends that Idaho Golf's intentional infringement on the TIMBERSTONE Mark sufficiently establishes that Idaho Golf 'expressly aimed' their conduct at TimberStone in Illinois. However, TimberStone's allegations concerning Idaho Golf's conduct fails to establish that Idaho Golf purposefully directed their activity towards Illinois. Initially, Idaho Golf's contacts with Illinois are extremely limited. The only contacts with Illinois that Idaho Golf had engaged in has been with TimberStone directly. The complaint only mentions three occasions where Idaho Golf sent communication to TimberStone in Illinois. In April 2012, TimberStone sent a cease and desist letter to Idaho Golf after learning of their use of the TIMBERSTONE Mark. Also, shortly after receiving the cease and desist letter, Idaho Golf sent a letter back to TimberStone. Over the course of the next few months Idaho Golf called TimberStone on several occasions to resolve the dispute over the use of the TIMBERSTONE Mark. Finally, in April 2014, Idaho Golf sent an e-mail to TimberStone, after TimberStone moved to have Idaho Golf's Second Facebook Page taken down, and offered a monetary sum for use of the TIMBERSTONE Mark. In every instance which Idaho Golf contacted TimberStone in Illinois, Idaho Golf was responding to an action initiated by TimberStone. Moreover, Idaho Golf only made contact with TimberStone in Illinois for the limited purpose of dealing with the usage of the TIMBERSTONE Mark as opposed to engaging in a purely business activity like selling Idaho golf packages to Illinois residents. Idaho Golf's limited communications with TimberStone in Illinois fail to establish that they have sufficient minimum contacts in Illinois. *See Felland v. Clifton*, 682 F.3d 665, 679 (7th Cir. 2012) (noting that telephone, emails and written communication can be relevant factors in determining minimum contacts, but they are not by themselves sufficient to establish specific jurisdiction).

In applying the "expressly aiming" inquiry, the Court must not limit our consideration to only Idaho Golf's contacts with Illinois, but must also consider its targeted conduct towards Illinois. TimberStone asserts that due to Idaho Golf's knowledge that TimberStone was the owner of the TIMBERSTONE Mark, that Idaho Golf's unauthorized usage sufficiently establishes that Idaho Golf expressly aimed their tortious conduct towards Illinois. "There is an important distinction between intentional activity which foreseeably causes injury in the forum and intentional acts specifically targeted at the forum." *TechnoLines, LP v. GST AutoLeather, Inc.*, 799 F.Supp.2d 871, 878 (N.D. Ill. 2011) (citing *Narco Avionics, Inc. v. Sportsman's Market, Inc.*, 792 F.Supp. 398, 408 (E.D. Pa. 1992)). The complaint is absent of any indication that Idaho Golf purposefully directed its activities at Illinois in its usage of the TIMBERSTONE Mark. Even reading the complaint in a light most favorable to TimberStone, the allegations suggest that Idaho Golf was operating the Idaho TimberStone Golf Course in isolation from any Illinois contacts or TimberStone interest. While TimberStone has an interest in the TIMBERSTONE Mark, Idaho

Golf's conduct does not demonstrate that they specifically targeted TimberStone or Illinois. It is not alleged that Idaho Golf was taking Illinois customers familiar with the Michigan TimberStone Golf Course or offered travel packages to Illinois residents so they could travel half way across the country to play golf in Idaho. Nor is it alleged that TimberStone suffered any economic or reputational injury by customers mistakenly booking a trip to the Idaho TimberStone Golf Course as opposed to the Michigan TimberStone Golf Course.

TimberStone briefly argues that Idaho Golf's interactive website, which can be used by customers in Illinois to view the Idaho TimberStone Golf Course, can establish Idaho Golf's jurisdiction in Illinois. The Seventh Circuit has cautioned courts "in resolving questions about personal jurisdiction involving online contacts to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state, even if it is interactive." *Advanced Tactical Ordinance Sys.*, 751 F.3d at 803; (quoting *be2 LLC v. Ivanov*, 642 F.3d 555, 558-59 (7th Cir. 2011)). Therefore, "our inquiry boils down to this: has [defendant] purposefully exploited the [Illinois] market beyond simply operating an interactive website . . .?" *be2 LLC*, 642 F.3d at 558-59. TimberStone does not allege that Idaho Golf has targeted customers in Illinois through its website or that Illinois residents have utilized the website to book rounds of golf in Idaho. The mere fact that Idaho Golf operated an interactive website that could be accessed by Illinois customers is not enough for the Court to exercise jurisdiction over Idaho Golf.

TimberStone has not established that Idaho Golf purposefully directed its activities towards Illinois.

We conclude that the tenuous relationship between TimberStone's claims and Idaho Golf's Illinois contacts is not sufficient to subject Idaho Golf to specific jurisdiction in Illinois.

CONCLUSION

For the aforementioned reasons, the Court grants Idaho Golf's motion to dismiss for lack of personal jurisdiction. TimberStone's request to engage in jurisdictional discovery is denied.

Charles P. Kocoras
United States District Judge

Dated :11/6/2014