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

Proceeding	91210559
Party	Defendant East Coast Network Services, LLC
Correspondence Address	RUSSELL LOGAN 2735 WESTMINSTER RD ELLICOTT CITY, MD 21043-3599 UNITED STATES russell.logan@gmail.com
Submission	Reply in Support of Motion
Filer's Name	Russell Logan
Filer's e-mail	russell.logan@gmail.com
Signature	/Russell Logan/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

NetCloud, LLC
Opposer

v.

East Coast Network Services, LLC
Applicant

Opposition No. 91210559

**APPLICANT'S REPLY IN SUPPORT OF APPLICANT'S MOTION
FOR RECONSIDERATION OF FINAL DECISION**

In its response to Applicant's motion for reconsideration Opposer makes several unsupported contentions to which Applicant responds below.

I. Opposer's Contention that it is not Required to Properly Plead its Case.

At the outset, it is particularly objectionable that Opposer accuses Applicant of "lying." It is Opposer who failed to properly plead its case and there is nothing untruthful or otherwise improper about objecting to evidence which is beyond the scope of the pleadings as being irrelevant. *See Wright Line Inc. v. Data Safe Services Corp.*, 229 U.S.P.Q. 769, 769 n.4 (TTAB 1985).

Further, the Board did not err in striking Opposer's own initial disclosures and discovery responses that Opposer improperly attached to its reply brief. If a party objects to certain evidence as being beyond the scope of the pleadings, the only relevant documents to determining the merits of that objection are the pleadings themselves. Opposer's initial disclosures and discovery responses form no part of the pleadings and are completely irrelevant to determining the scope of the pleadings.

Additionally, the Trademark Rules provide remedies for all of the hypothetical scenarios posed by Opposer. For non-disclosure of a witness, a party may move to quash or strike the witness's deposition. TBMP § 521, n.9; TBMP § 533.02(b) (2014). For lack of service of initial disclosure, a party may be subject to a motion to compel, and ultimately, a motion for discovery sanctions. TBMP § 401.02 (2014). An objection relating to non-disclosure of documents during discovery is one of the five circumstances where a party may file discovery responses with the Board. TBMP § 704.10 (2014).

For evidence which is beyond the scope of the pleadings, the remedy is to exclude such evidence as irrelevant. *See Wright Line Inc. v. Data Safe Services Corp.*, 229 U.S.P.Q. 769, 769 n.4 (TTAB 1985). Opposer's initial disclosures and discovery responses do not form any part of the pleadings and the Board did not err in striking them from Opposer's reply brief, and for the reasons stated in its trial brief and its motion for reconsideration the Board should also strike all evidence purporting to show use by any individual or entity other than NetCloud, LLC.

Applicant also notes that Opposer also did not explain how Applicant would plead affirmative defenses to use by Viradia or Satasia that was not pleaded in the Notice of Opposition, nor did Opposer explain why its initial disclosures are inconsistent with the evidence that Opposer later presented.

Opposer's insistence that its initial disclosures and discovery responses provided “actual notice” demonstrate that the Notice of Opposition itself did not provide any such fair notice of the basis of its claims. Further, Opposer has cited no authority whatsoever that supports Opposer's theory that its purported “actual notice” may be substituted for the fair notice required to be provided in the complaint.¹

II. Opposer's Contention that Decisions of Circuit Courts of Appeals are not Binding Authority

Opposer makes the extraordinary claim that decisions of the U.S. Circuit Courts of Appeals are not binding on the Board. Decisions of the Board may be appealed to U.S. District Courts in all judicial circuits, which in turned are bound by the decisions of their respective circuit courts of appeals, and thus decisions of all regional circuits are binding on the Board. The Board routinely cites decisions of the regional circuit courts as binding precedent. *See, e.g., Fram Trak Industries, Inc. v. Wiretracks LLC*, 77 U.S.P.Q.2d 2000, 2005 n. 8 (TTAB 2006), citing the Ninth Circuit case *Brookfield Comms., Inc. v. West Coast Ent. Corp.*, 50 U.S.P.Q.2d 1545, 1555 (9th Cir. 1999) as binding authority that acquisition of a domain name does not constitute trademark use.

Thus decisions of the Second, Third and Ninth Circuits, as well as all other regional circuit courts, are binding authority that the Board may not ignore.

¹ Applicant reiterates that Opposer's initial disclosures and discovery responses did not provide any such “actual notice” and were in fact deceptively misleading for the reasons stated in its motion.

III. Opposer's Novel and Unsupported Theories Regarding *Bona Fide* Trademark Use

Opposer theorizes about hypothetical situations where either (1) “only a tiny fraction of the purchasing public would ever have the need for a particular product/service,” or (2) “perhaps the type of product/service is so new and unfamiliar that it takes a significant period of time to introduce the product/service to the public and to build a substantial customer base.” 21 TTABVue 4.

However, Opposer has not cited any authority where such situations have been held to constitute *bona fide* trademark use, nor has Opposer explained how such hypothetical scenarios apply to the facts of this case.

Opposer criticizes Applicant's apples-to-apples comparison of the facts of this case to the fact patterns of prior decisions but fails to explain how the facts of this case are distinguishable from the facts of those cited cases or why existing case law should not apply to the facts of this case.

Opposer also makes the even more ridiculous claim that Applicant “completely ignores what really matters under the Lanham Act, which is whether there is a *bona fide* use of the mark in the ordinary course of trade, and not made merely to reserve a right in the mark.” 21 TTABVue 4. Opposer's contention is absurd because the issue squarely before the Court in each of the cited cases was what constitutes *bona fide* use for the purpose of establishing common law trademark rights.

Opposer feebly argues that the cases cited by Applicant “may not even be factually similar to the instant case” while failing to distinguish in any way the facts of those cases with the facts of this case.

Unlike Opposer, who has not cited any authority for any of its contentions, Applicant has cited directly relevant and binding case law which shows that (1) there is a *de minimis* level of use that is so inconsequential that it does not constitute *bona fide* trademark use, and (2) use by Opposer's purported predecessors-in-interest falls within this *de minimis* level of use.

IV. Conclusion

In conclusion, Applicant respectfully requests that the Board enter judgment in favor of Applicant, dismiss the Opposition, and permit Applicant's registration to issue.

Dated this 26th day of April, 2015.

/Russell Logan/
Russell Logan, Esquire
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **REPLY IN SUPPORT OF APPLICANT'S MOTION FOR RECONSIDERATION OF FINAL DECISION** has been served on NetCloud, LLC by emailing said copy on 4/26/2015, to Morris E. Turek, counsel for Opposer, at morris@yourtrademarkattorney.com.

/Russell Logan/
Russell Logan, Esquire
Attorney for Applicant