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

Mailed: March 31, 2014

Opposition No. 91212768

INTS It Is Not The Same, GmbH

v.

Disidual Clothing, LLC

George C. Pologeorgis,
Interlocutory Attorney:

Disidual Clothing, LLC ("applicant") seeks to register the mark DISIDUAL, in standard characters, for "apparel, namely, t-shirts, tank-tops, shorts, hats, jackets, sweatshirts, hooded sweatshirts, beanies, socks, pants, dresses, swimsuits, knit face masks, gloves, belts" in International Class 25.[1]

INTS It Is Not The Same, GmbH ("opposer") has opposed the registration of applicant's DISIDUAL mark on the ground of priority and likelihood of confusion under Section 2(d) of the Trademark Act. In support of its asserted claim, opposer has pleaded ownership of numerous registrations for the mark DESIGUAL, including Registration Nos. 4113640 and 4269396, used in association with various home goods, including furniture items and bedding, as well as retail store services featuring clothing items.

This case now comes before the Board for consideration of applicant's motion (filed December 20, 2013) to strike any references to opposer's pleaded Registration Nos. 4113640 and 4269396 from opposer's notice of opposition. Opposer filed a timely response to applicant's motion to strike on January 23, 2014.[2]

In support of its motion, applicant argues that since the filing dates of the underlying applications of opposer's pleaded Registration Nos. 4113640 and 4269396 are subsequent to the dates of first use claimed by applicant in its involved application, i.e., June 1, 2010, opposer cannot rely on these pleaded registrations as a basis for its claim of priority of use. Accordingly, applicant requests that any references to these two registrations should be stricken from opposer's pleading since they are immaterial or impertinent matter.

In response, opposer argues that it is well-established that priority is not an issue in an opposition proceeding where opposer pleads (and later proves) it owns a registration for its pleaded marks. Additionally, opposer contends that nothing bars opposer from submitting proper evidence with regard to the two registrations at issue showing an earlier actual first use date than the dates of first use claimed by applicant. In other words, opposer maintains that simply stating that opposer's marks have a constructive first use date due to the filing

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[1] Application Serial No. 85836544, filed on January 30, 2013, based upon an allegation of use in commerce under Section 1(a) of the Trademark Act, claiming June 1, 2010 as both the date of first use and the date of first use in commerce.

[2] By order dated January 7, 2014, the Board allowed opposer until January 24, 2014 to respond to applicant's motion to strike.

date of the underlying applications does not mean that evidence of an earlier date cannot be proven.

Decision

Pursuant to Fed. R. Civ. P. 12(f), the Board may order stricken from a pleading any insufficient or impermissible defense, or any redundant, immaterial, impertinent or scandalous matter. *See also* Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a); and TBMP § 506 (3d ed. rev. 2 2013). Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. *See, e.g., Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1293 (TTAB 1999); and *Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570 (TTAB 1988). Inasmuch as the primary purpose of pleadings under the Federal Rules of Civil Procedure is to give fair notice of the claims or defenses asserted, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. *See, e.g., Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995) (amplification of applicant's denial of opposer's claims not stricken). Nonetheless, the Board grants motions to strike in appropriate instances.

In this instance, the Board finds that applicant's arguments in support of its motion to strike are not well taken. If, upon determination of the merits of this case, the evidence of record includes submission of proper status and title

copies of opposer's pleaded Registration Nos. 4113640 and 4269396, priority is not an issue with regard to these two registrations, even if the filing date of the underlying applications of the two registrations are subsequent to the dates of first use claimed by applicant in its involved application.[3] *See King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) (priority not at issue where opposer pleads registrations the validity of which is unchallenged.) Moreover, the fact that the filing dates of opposer's underlying applications are subsequent to applicant's claimed dates of first use of does not bar opposer from introducing proper evidence for the two registrations at issue showing an earlier actual first use date.

In view of the foregoing, applicant's motion to strike is **DENIED**.

Trial Schedule

Proceedings herein are resumed. Trial dates, beginning with the deadline for opposer to file an answer or otherwise respond to applicant's counterclaim field on December 20, 2013, are reset as follows:

Answer to Counterclaim Due	**April 20, 2014**
Deadline for Discovery Conference	**May 20, 2014**
Discovery Opens	**May 20, 2014**
Initial Disclosures Due	**June 19, 2014**
Expert Disclosures Due	**October 17, 2014**
Discovery Closes	**November 16, 2014**
Plaintiff's Pretrial Disclosures Due	**December 31, 2014**
30-day testimony period for plaintiff's testimony to close	**February 14, 2015**

[3] The Board notes that applicant's claimed dates of first use identified in its involved application do not constitute *prima facie* evidence of the veracity of such use dates. Applicant must prove its claimed dates of first use through the submission of appropriate evidence during the course of this proceeding.

Defendant/Counterclaim Plaintiff's Pretrial Disclosures Due	**March 1, 2015**
30-day testimony period for defendant and plaintiff in the counterclaim to close	**April 15, 2015**
Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due	**April 30, 2015**
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	**June 14, 2015**
Counterclaim Plaintiff's Rebuttal Disclosures Due	**June 29, 2015**
15-day rebuttal period for plaintiff in the counterclaim to close	**July 29, 2015**
Brief for plaintiff due	**September 27, 2015**
Brief for defendant and plaintiff in the counterclaim due	**October 27, 2015**
Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	**November 26, 2015**
Reply brief, if any, for plaintiff in the counterclaim due	**December 11, 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.l25.

Briefs shall be filed in accordance with Trademarks Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.