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

WINTER

Mailed: September 12, 2008

Cancellation No. 92048847

Safeway Inc.

v.

Eat Right Foods Limited

and

Cancellation No. 92049105

Eat Right Foods Limited

v.

Safeway Inc.

Rogers, Administrative Trademark Judge:

These cases now come up for consideration of petitioner Safeway's motion (filed May 12, 2008) to strike respondent Eat Right's answer in Cancellation No. 92048847 and of Safeway's motion (filed on May 12, 2008) in Cancellation No. 92049105 to suspend that cancellation proceeding pending the final outcome of Cancellation No. 92048847. Eat Right Foods Limited, acting *pro se* (*i.e.*, without counsel), filed timely briefs in response to each motion, but said responses were improperly served on Safeway Inc.[1]

[1] The submissions of Eat Right Foods Limited (Eat Right) in response to the filings of Safeway do not show proof of service on Safeway's counsel as required under Trademark Rule 2.119(b).

Safeway's Motion to Strike the Answer in Cancellation No. 92048847

The Board, on motion or upon its own initiative, may order stricken from a pleading any insufficient or impermissible claim or defense, or any redundant, immaterial, impertinent or scandalous matter. *See* Fed. R. Civ. P. 12(f); Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a). 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, 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* TBMP § 506.01 (2d ed. rev. 2004). Nonetheless, the Board grants motions to strike in appropriate instances.

Rather, the submissions indicate that the party itself was served. Service of papers (not including the petition for cancellation) must be on the attorney of the party if there is one. *See* Trademark Rule 2.119(b). Nonetheless, because Safeway filed a reply brief in response to Eat Right's opposition brief regarding the motion to strike in Cancellation No. 92048847, Safeway's counsel is clearly aware of the response. It may be presumed that Safeway is similarly aware of Eat Right's response to the motion to suspend in Cancellation No. 92049105. Even if Safeway's counsel is not aware of this response, it does not warrant a reply brief in further support of the motion to suspend, as the response consists only of two sentences. It is also noted that while Safeway's filings have been made by its counsel, counsel listed Safeway's address as the correspondence address on the ESTTA coversheet for the filings in Cancellation No. 92049105. It is therefore understandable that Eat Right would have concluded it appropriate to forward service copies to that address. Nevertheless, inasmuch as these proceedings are consolidated *infra*, Eat Right should hereafter serve Safeway's counsel as designated in Cancellation No. 92048847. Further, Eat Right is reminded that it must comply with the Board's service rules for any future filings with the Board.

In Cancellation No. 92048847, Safeway requests that the Board strike Eat Right's answer because it does not comply with the requirements of Federal Rule 8(b) (made applicable to this proceeding by Trademark Rule 2.116(a)) and Trademark Rule 2.114(b)(1), specifically, that a party shall "admit or deny the averments" and "if the respondent is without knowledge or information sufficient to form a belief as to the truth of an averment, respondent shall so state." Eat Right argues that "substance should dominate over form and in its answer the Respondent has provided substance in this case."

Fed. R. Civ. P. 8(b) provides, in part:

> A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

However, instead of either admitting or denying the allegations in the petition for cancellation, Eat Right's "answer" sets forth factual allegations and arguments. Thus, the submission is more in the nature of a brief on the case, rather than a responsive pleading to the petition for cancellation. Further, Eat Right uses the wording "And

Counterclaims" in the title of the document, but there are no statements in the answer supporting a counterclaim and there is no record that Eat Right paid the requisite fee for a counterclaim.[2] The Board also notes that Eat Right has submitted numerous exhibits in conjunction with its answer.[3]

The petition for cancellation filed by Safeway consists of eleven paragraphs setting forth the basis of its claim of damage. In accordance with Fed. R. Civ. P. 8(b), it is incumbent on Eat Right to answer the petition for cancellation by admitting or denying the allegations contained in each paragraph. Ordinarily, the respondent will use the same paragraph numbering format found in the petition for cancellation, *i.e.* in this case, the answer should have eleven paragraphs, like the petition. If Eat Right is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial.

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[2] It is acknowledged that Eat Right has filed a separate petition for cancellation of Safeway's registration for the mark EATING RIGHT (Reg. No. 3395214), which is the subject of referenced proceeding No. 92049105. While such filing is permissible under the Trademark Rules of Practice (see Trademark Rule 2.114(b)(2)), the better practice would have been for Eat Right to file an actual counterclaim in Cancellation No. 92048847, rather than merely allude to a counterclaim in its answer and then file a separate petition for cancellation. *See* TBMP §§ 313.01 and 313.05 (2d ed. rev. 2004).

[3] Evidentiary matters should not be addressed in a pleading, and evidence should not be attached to an answer. Submission of evidence is a matter for trial, not for pleading. *See McCormick & Co., Inc. v. Hygrade Food Products Corp.*, 124 USPQ 16, 17 (TTAB 1959) (while applicant may in due course introduce any evidence

In view of the foregoing, Safeway's motion to strike Eat Right's "answer and counterclaim" is granted and Eat Right is allowed **FORTY DAYS** from the mailing date of this order to submit a proper answer as directed herein.

Proceedings Consolidated

An answer has been filed in Cancellation No. 92049105, however, as discussed, a proper answer has not been filed in Cancellation No. 92048847. Nonetheless, the Board may, in its discretion, order cases consolidated prior to joinder of issue, *i.e.* the filing of an answer. *See* Trademark Rule 2.104(b), 37 C.F.R. § 2.104(b); TBMP § 511 (2d ed. rev. 2004). Moreover, it is clear even from Eat Right's informal answer in Cancellation No. 92048847 that it contests that petition for cancellation.

On review of the petitions for cancellation in the subject proceedings, the Board notes that the proceedings involve common issues of law and fact. Specifically, in connection with Cancellation No. 92048847, Safeway brings a claim of likelihood of confusion against respondent's registered mark EATRIGHT (and design), U.S. Reg. No. 3045314, in connection with Safeway's pleaded pending applications for the marks EATING RIGHT (and green/white design) (Serial No. 76666322) and EATING RIGHT (and blue/white design) (Serial No. 76659783). Similarly, in the petition for cancellation in

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which it considers to be relevant to its case, statements as to

Cancellation No. 92049105, Eat Right seeks cancellation of Safeway's EATING RIGHT mark (U.S. Reg. No. 3395214) based on a claim of likelihood of confusion with Eat Rights's registered mark EATRIGHT (and design) (U.S. Reg. No. 3045314). Because the parties are the same and the two proceedings involve common issues of law and fact, the Board believes that the interest of judicial economy will be served by consolidation of Cancellation Nos. 92048847 and 92049105. *See* Fed. R. Civ. P. 42(a) and TBMP § 511 (2nd ed. rev. 2004).

Accordingly, the Board hereby orders these proceedings consolidated. Eat Right must, as explained above, file an amended answer in Cancellation No. 92048887, and that answer should bear only that cancellation proceeding number in its caption. However, thereafter Cancellation Nos. 92048847 and 92049105 may be presented on the same records and briefs. The record will be maintained in Cancellation No. **92048847** as the "parent" case, but all papers filed in these cases should include both proceeding numbers in the caption, in ascending order, as illustrated by the first page of this order. *See* Fed. R. Civ. P. 42(a); and TBMP § 511 (2d ed. rev. 2004).

Safeway's Motion to Suspend Cancellation No. 92049105

In Cancellation No. 92049105, Safeway seeks to suspend said proceeding pending a final outcome of related proceeding No. 92048847. Inasmuch as these related proceedings have been

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proposed evidence are not proper matters for pleading).

consolidated and both proceedings will be put on the same trial schedule *infra*, Safeway's motion is moot and will not be given further consideration.

Nature of a Cancellation Proceeding

Eat Right, as a party proceeding *pro se* (i.e., without counsel), is advised that an *inter partes* proceeding before the Board is similar to a civil action in a U.S. Federal district court. There are pleadings, a wide range of possible motions; discovery (a party's use of discovery depositions, interrogatories, requests for production of documents and things, and requests for admission to ascertain the facts underlying its adversary's case), a trial, and briefs, followed by a decision on the case. The Board does not preside at the taking of testimony. Rather, all testimony is taken out of the presence of the Board during the assigned testimony (aka, trial) periods, and the written transcripts thereof, together with any exhibits thereto, are then filed with the Board. **No paper, document, or exhibit will be considered as evidence in the case unless it has been introduced in evidence in accordance with the applicable rules.**

Legal Representation is Strongly Encouraged

It should also be noted that while Patent and Trademark Rule 10.14 permits any person (or legal entity) to represent itself, it is generally advisable for a person (or legal

entity) not acquainted with the technicalities of the procedural and substantive law involved in an opposition or cancellation proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

If an attorney is not retained, the party representing itself must nonetheless comply with all applicable procedural rules. Eat Right may refer to The Trademark Trial and Appeal Board Manual of Procedure (TBMP) and the Trademark Rules of Practice, both available on the USPTO website, *www.uspto.gov*.

Again, strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, *whether or not they are represented by counsel.*

All Parties Must Comply with Board Deadlines

While it is true that the law favors judgments on the merits wherever possible, it is also true that the Patent and Trademark Office is justified in enforcing its procedural deadlines. *Hewlett-Packard v. Olympus*, 18 USPQ2d 1710 (Fed. Cir. 1991).

Order; Dates Reset

As previously stated, Eat Right is allowed until **FORTY DAYS** from the mailing date of this order to file an answer to

the petition for cancellation in Cancellation No. 92048847. Accordingly, answer is due **October 22, 2008**.

These proceedings are CONSOLIDATED as discussed and the consolidated cases shall proceed on the same schedule as a case involving a counterclaim.

Discovery, conferencing, disclosure and trial dates are reset as follows:

Answer to Petition for Cancellation in Cancellation No. 92048847 Due	**October 22, 2008**
Deadline for Discovery Conference	**November 21, 2008**
Discovery Opens	**November 21, 2008**
Initial Disclosures Due	**December 21, 2008**
Expert Disclosures Due	**April 20, 2009**
Discovery Closes	**May 20, 2009**
Plaintiff's Pretrial Disclosures	**July 4, 2009**
30-day testimony period for plaintiff's testimony to close	**August 18, 2009**
Defendant/Counterclaim Plaintiff's Pretrial Disclosures	**September 2, 2009**
30-day testimony period for defendant and plaintiff in the counterclaim to close	**October 17, 2009**
Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due	**November 1, 2009**
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	**December 16, 2009**
Counterclaim Plaintiff's Rebuttal Disclosures Due	**December 31, 2009**
15-day rebuttal period for plaintiff in the counterclaim to close	**January 30, 2010**
Brief for plaintiff due	**March 31, 2010**
Brief for defendant and plaintiff in the counterclaim due	**April 30, 2010**

Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	**May 30, 2010**
Reply brief, if any, for plaintiff in the counterclaim due	**June 14, 2010**

Following each trial period, copies of the transcripts of any testimony taken during that period, together with copies of documentary exhibits, must be served on the adverse party WITHIN THIRTY DAYS after completion of the taking of testimony. *See* Trademark Rule 2.125. In addition, any party taking testimony must promptly file corrected transcripts of such testimony, with exhibits, with the Board. *Id.*

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing is not required but will be scheduled upon request filed as provided by Trademark Rule 2.129.

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NEWS FROM THE TTAB:

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address: http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm