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Filing date: **08/08/2008**

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

Proceeding	92049496
Party	Plaintiff Walgreen Co.
Correspondence Address	Cary M. Pumphrey, Attorney, Int. Prop. Walgreen Co. 104 Wilmot Road MS #1425 Deerfield, IL 60015 UNITED STATES cary.pumphrey@walgreens.com, kate.collins@walgreens.com
Submission	Motion to Strike
Filer's Name	Mark A. Niede
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Signature	/Mark A. Niede/
Date	08/08/2008
Attachments	264141 Motion to Strike.pdf (31 pages)(1764281 bytes)

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

WALGREEN CO.,)
Petitioner,)
) Registration Number 2,507,831
v.)
) Cancellation No. 92049496
OSTEON, INC,)
Respondent.)

PETITIONER'S MOTION TO STRIKE
RESPONDENT'S RESPONSE

Petitioner Walgreen Co., by its attorneys and pursuant to the Trademark Trial and Appeal Board Manual of Procedure Rule 507, the Federal Rules of Civil Procedure Rule 12(f), moves to strike Respondent Osteon, Inc.'s ("Osteon") "Response to Petition for Cancellation" and deem all allegations of Petitioner's Petition to Cancel that have not been properly denied to be admitted .

On June 12, 2008, Walgreen filed a Petition to Cancel Osteon's Registration Number 2,507,831 for the mark CALCICREMES. In its simplest terms, Walgreen Co, bases the Petition to Cancel on what appears to be an abandonment of the mark by Respondent, since Walgreen Co. has been unable to find any concrete evidence of continued use of the CALCICREMES mark. See Petition to Cancel, Paragraph 3. In response thereto, Respondent filed a document with the TTAB which purports to be a "Response to Petition for Cancellation." A copy of said document is attached hereto as Exhibit A.

Under 37 CFR 2.106(b)(1), Rule 8(b) of the Federal Rules of Civil Procedure is applicable to answers in TTAB proceedings. Rule 8(b) provides, "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." Osteon's "response" does not admit or deny any

allegations of Petitioner's Petition to Cancel in short and plain terms. Specifically, Osteon fails to admit or deny whether it continues to use the mark or has abandoned same. See Respondent's Response, Paragraph 3. On the whole, the Response is a rambling, argumentative document that fails to meet the requirements of Rule 8(b). Accordingly, the Board should strike the Response.

Further, Osteon's "Response" is filled with unfounded allegations about Petitioner's business practices that are not only patently false, but also entirely irrelevant to this Cancellation action. See Paragraph 4 of Respondent's Response. Such argumentative narration not only fails to admit or deny any of the allegations of Paragraph 4 of the Petition to Cancel but also wholly fails to meet the standards of Rule 8(b).

Indeed, the entire "Response" document, is nothing more than argument, conjecture and a premature brief on the case. This document falls well short of the requirements of Rule 8(b). See e.g., *Quintessential Chocolates Co., Inc. v. Wright*, (T.T.A.B. 2007) Opposition No. 91163336, 2007 WL 878354; *Dream Merchant Company, Kft. v. Fremonster Theatrical*, (T.T.A.B. 2004), Opposition No. 91152686, 2004 WL 1427397; *Children's Hospital Of Philadelphia v. Children's Memorial Hospital*, (T.T.A.B. 2003), Opposition No. 124,739, 2003 WL 1862154. (Copies of these decisions are attached hereto as Exhibit B).

Accordingly, Petitioner respectfully requests the Board enter an Order striking Respondent Osteon's Response to Petition to Cancel and deem all allegations of Petitioner's Petition to Cancel that have not been properly denied to be admitted.

Respectfully submitted,

Date: Aug 8, 2003

By: _____
Mark J. Liss
Mark A. Niede
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Chicago, Illinois 60601
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Attorneys for Opposer

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that a copy of the attached Motion To Strike Respondent's Response to Petition to Cancel was electronically filed with the Trademark Trial and Appeal Board's Electronic System for Trademark Trials and Appeals, "ESTTA," on the date shown below:

Dated: August 8, 2008



CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Motion To Strike Respondent's Response to Petition to Cancel was served on Applicant via United States Postal Service First Class Mail, postage prepaid, on the date indicated below to the following address:

Steven Resnick
President
Osteon, Inc.
P.O. Box 101
Somers, NY 10589
mail@osteon.com

Dated: August 8, 2008

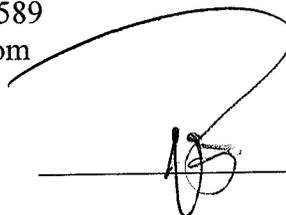


EXHIBIT A

7-10-08

Sent Certified U.S. Mail in Duplicate

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

In the matter of Registration of 2,507,831- Calci cremes

Re: Mark: CALCICREMES

Walgreen Co. vs. Osteon Inc.

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

Response to Petition for Cancellation

Dear Commissioner:

Osteon Inc., a corporation duly organized and existing under the laws of Delaware, hereby respectfully responds to Walgreen Co, the Petitioner, regarding Petition for Cancellation of registered mark "Calci cremes". A copy of our response has been sent to the Petitioner at the address below.

Response to Petition for Cancellation:

1. With regard to Petition for Cancellation, Paragraph 1, we express concern, just as the Trademark office has, regarding the stated intent of the Petitioner to use a proposed mark CALCIUM CREAMIES for calcium supplements, which would clearly cause confusion in the market place and result in damage to our company.

2. Paragraph 2, assuming that the Petitioner has been denied an attempt to register a proposed mark, "CALCIUM CREMIES", we completely agree with the Trademark office, that allowing this registration would be inappropriate, and would in fact result in damage to Osteon Inc., should such a similar registration be allowed to occur, as we have indicated above.
3. Paragraph 3, Osteon Inc. continues to use and market this product using this mark as registered. A copy of our current promotional website for this product at our dedicated website, calcicremes.com, as well as calcicreams.com, is attached as Exhibit A. Further please note we have also registered and use the dedicated website. <http://calcicremes.com/>, which is evidence of the overlap and similarity between our mark, and the proposed mark, calcium creamies, which not only sounds similar, but in fact, uses similar spelling, as indicated by our having registered this additional domain name, "calcicreams.com", which we have had to use making both products available, to deal with the very confusion due to the similarity of the names, "calcicremes" and "calcicreams", which the Petitioner would now create, if they are successful in registering their proposed mark.
4. Paragraph 4, we are particularly concerned with the Petitioner's claim that THEY will be damaged by our rightful protection of intellectual property, when in fact it would be the respondent that will be the party damaged by allowance of registration of Petitioner's mark. Further, it is with great concern that more than 10 years after our intellectual property creation, that the Petitioners actions give the appearance that they are using the Trademark office to takeover our creation, which we have rightfully protected for many years, rather than creating a new idea or working with our company to bring this product to their retail stores, which is what they are generally known for, as they do with many other products, as

opposed to using the trademark office to take over our product and creation, as opposed to negotiating a business agreement with the creator of this product. Further, we are even more concerned that there is also the appearance that this extremely powerful corporation compared to our extremely small company, is using the trademark office to crush us to avoid any possible competition or costs, as opposed to going through normal business channels

In summary, Osteon Inc. responds, and states that the discontinuation of our mark, Calcicremes, is inconsistent with our rights, and will result in damage to our company, as outlined, but not limited to, the comments made above. Accordingly, we respectfully request that this Petition to Cancel is denied and pray you find in favor of the Registrant, Osteon Inc.

Respectfully submitted,



Steven M. Reznick
President, Osteon Inc.

Please address all future correspondence to the address below
Steven Reznick
c/o Osteon Inc.
P.O. Box 101
Somers, NY 10589
E mail: mail@osteon.com

Cc: Walgreen Co. Law Department
Attn: Cary M. Pumphrey
Attorney, Intellectual property
104 Wilmot Road, MS #1425
Deerfield, IL 60015
P: 847-315-4582
F 847-315-4826
Cary.pumphrey@walgreens.com
Kate.collins.@walgreens.com

Certificate of Service

I hereby certify that a true copy of the foregoing Response to Petition to Cancel was served on counsel for Petitioner, this 10th day of July, 2008, by sending same via First Class mail, postage prepaid, to the following

Walgreen Co. Law Department
Attn: Cary M. Pumphrey
Attorney, Intellectual property
104 Wilmot Road, MS #1425
Deerfield, IL 60015

Certificate of Mailing

I hereby certify that the foregoing was sent certified mail with the US Postal Service in an envelope addressed to United States Patent and Trademark Office; Trademark Trial and Appeal Board; P.O. Box 1451; Alexandria, Virginia 22313-1451 on this 10th day of July, 2008.



Steven Reznick
President, Osteon Inc.

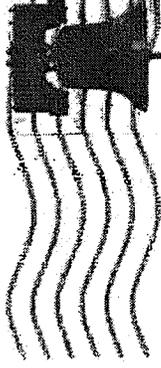
Exhibit A

<http://calcicremes.com/>



Calcicremes are now available. Please contact us at mail@osteon.com for more information. Calcicremes is a registered Trademark of Osteon Inc.

USA Mail & Air Mail

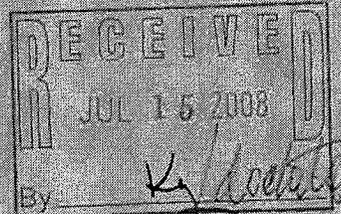
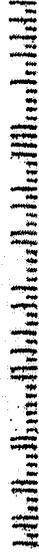


WESTCHESTER NY 105

10 JUL 2008 PM 3 T

Walgreen Co. Law Department
Attn: Cary Pumphrey Property
Attorney, Intellectual Property
104 Wilmot Road, MS # 1425
Deerfield, IL 60015

60015+5121



Oskan Inc.

Do Not lol

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EXHIBIT B

H

2004 WL 1427397 (Trademark Tr. & App. Bd.)

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE TTAB

Trademark Trial and Appeal Board
Patent and Trademark Office (P.T.O.)

THE DREAM MERCHANT COMPANY, KFT.

v.

FREMONSTER THEATRICAL

Opposition No. 91152686

June 17, 2004

Before Simms, Bucher and Rogers
Administrative Trademark Judges

By the Board:

On August 4, 1999, Fremonster Theatrical ("applicant") filed an application (Serial No. 78088051) to register the mark CIRQUE DE FLAMBE for "entertainment in the nature of circuses" in International Class 41. The application alleges a date of first use anywhere and in commerce on March 9, 1999. The application also contains a disclaimer of the term "CIRQUE" and a statement that the English translation of the proposed mark is "ring of fire."

On August 6, 2002, the application was published for opposition in the Official Gazette.

On August 13, 2002, The Dream Merchant Company, Kft. ("opposer") filed its notice of opposition to registration of applicant's proposed mark on the grounds of likelihood of confusion and dilution. Specifically, opposer alleges, *inter alia*, that it and its predecessors in interest and related companies have marketed, and continue to market, entertainment and theatrical services and a wide variety of associated merchandise in the United States, commencing at least as early as 1987; that it is the owner of the following registrations for the mark CIRQUE DU SOLEIL: Registration Nos. 1883432, 1888436, 1888385, 1884981, 1887187, 1883632, 1888561, 1885382, 1947480, 1947481, 1959271, 1959272, 1964559, 2006591, 1947479, and 1885095; that it is the owner of the following registrations for the mark CIRQUE DU SOLEIL and Design: Registration Nos. 1887079, 1925400, 2027426, 1947478, 1895119, 1885062, 1947477, 1959269, 1959270, and 2072102; that it is the owner of Registration No. 2442014 for the mark CIRQUE DU MONDE; that the aforementioned registrations owned by opposer "cover entertainment and theatrical services and a wide variety of associated merchandise"; that it has "actively and extensively used

and promoted [the aforementioned marks] in the United States for many years prior to the filing date of Applicant's application (October 12, 2001) and Applicant's claimed first use of the mark in commerce in the United States (March 9, 1999)"; that the aforementioned marks were "famous prior to the filing of applicant's application on October 12, 2001, and prior to applicant's claimed first use of the mark CIRQUE DE FLAMBE in commerce in the United States on March 9, 1999"; that applicant's proposed mark "so resembles opposer's [aforementioned marks as] to be likely to cause confusion, or to cause mistake, or to deceive"; and that applicant's proposed mark "dilutes the distinctive quality of opposer's famous marks."

*2 Status and title copies of opposer's pleaded registrations were not filed with the notice of opposition.

On October 7, 2002, applicant filed a paper captioned "answer" without any proof of service of a copy thereof on opposer. Essentially, the paper contained arguments on the merits of this case and did not specifically admit or deny the allegations in the notice of opposition. While applicant's communication contained numbered paragraphs, they did not correspond in substance to the numbered paragraphs in the notice of opposition.

On November 21, 2002, the Board issued an order finding that applicant's October 7, 2002 "answer" did not comply with Fed. R. Civ. P. 8(b) and allowed applicant time to file an answer that complies with the rule. In the order, we informed applicant that the notice of opposition "consists of eight (8) paragraphs setting forth the basis of opposer's claim of damage" and that "it is incumbent on applicant to answer the notice of opposition by admitting or denying the allegations contained in each paragraph."

On December 10, 2002, applicant filed an answer wherein it admitted or denied the allegations in the notice of opposition. Specifically, applicant's answer contains admissions as to paragraph nos. 1-3 and 5, and denials as to paragraph nos. 4 and 6-8 of the notice of opposition. The answer contained proof of service on opposer. Also, in a cover letter attached to this answer, applicant states, in part:

"Thank you for the opportunity to represent our answer to the claims made by the opposer. We have attempted to reply in the manner prescribed, but as of yet, we have not found a copy of Title 37 of the Code of Federal Regulations to guide us. We are ordering one by email now.

We are seeking legal counsel to continue this application and we will hopefully, be presenting an attorney soon, to take over our application process. If we can request a 30-day extension to this filling or the next filling [sic], we wish to do so now, to allow any new attorney to catch up on the issues involved."

At trial, neither opposer nor applicant introduced evidence.^[FN1] Also, neither opposer nor applicant filed a trial brief.^[FN2]

On February 10, 2004, the Board issued an order allowing opposer time to show cause why the Board should not treat its failure to file a brief as a concession of the case under Trademark Rule 2.128(a)(3).

On March 11, 2004, opposer filed a response to the Board's show cause order and a motion to reopen discovery and the testimony periods. In its response and in support of its motion, opposer states that its "failure to submit testimony and a brief in this case did not result from willful conduct or gross neglect, but was instead the result of [opposer's] reliance on applicant's explicit request for an extension of time to file an answer and obtain counsel, and [opposer's] good faith belief that applicant had not submitted a proper answer to the notice of opposition, and was planning on abandoning its mark." In support of its motion, opposer filed the declaration of its counsel, Monica R. Talley, Esq.

*3 Turning to the Board's show cause order, we accept opposer's response as establishing that it has not lost interest in this matter. Accordingly, the show cause order is hereby discharged.

We now turn to opposer's motion to reopen discovery and reset testimony periods. Under Fed. R. Civ. P. 6(b)(2), the moving party on a motion to reopen must show that its failure to act during the time previously allotted therefor was the result of excusable neglect. See TBMP § 509.01(b) (2d ed. June 2003), including cases and authorities cited therein. Although we found that opposer has not lost interest in this case, we do not find that opposer has made the necessary showing that its failure to take discovery, testimony or otherwise file a trial brief in this case was the result of excusable neglect. See Gaylord Entertainment Co. v. Calvin Gilmore Productions Inc., 59 USPQ2d 1369, 1372 (TTAB 2000).

The analysis to be used in determining whether a party has shown excusable neglect was set forth by the Supreme Court in Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993), discussed by the Board in Pumpkin Ltd. v. The Seed Corps, 43 USPQ2d 1582 (TTAB 1997). These cases hold that the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.

It has been held that the third *Pioneer* factor, i.e., "the reason for the delay, including whether it was within the reasonable control of the movant," may be deemed to be the most important of the *Pioneer* factors in a particular case. See Pumpkin Ltd. v. The Seed Corps, *supra* at n.7 and cases cited therein. See also Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co., 55 USPQ2d 1848, 1851 (TTAB 2000). In this case, opposer's stated reasons for failing to take any discovery or testimony are not well taken and do not rise to the excusable neglect standard.

In her declaration, Ms. Talley avers that opposer "reasonably believed that Applicant did not consider the submission to be an answer, but merely a request for an extension of 30 days in which to obtain counsel who would file a proper answer." Opposer also argues that the answer filed on December 10, 2002, was like applicant's previous attempt to file an answer and "once again contained additional discussion and argumentative language." Ms. Talley states that, as counsel for

opposer, she therefore docketed the case "to monitor for the filing of a proper answer by counsel, or issuance of a Notice of Default." As to the length of time that passed, Ms. Talley further states that it took the Board sixteen months to enter a default judgment in a different proceeding involving opposer and "it therefore did not strike me as unusual for the Board to take a number of months to issue a notice of default in a case such as this, in which the applicant has sought an extension of time to file an answer, but then failed to do so."^[FN3]

*4 As noted previously, a review of applicant's answer (filed December 10, 2002) reveals that, unlike its first attempt to answer the notice of opposition, it contains admissions and denials of the allegations contained in the notice of opposition. Thus, it complies with Rule 8(b), and we do not see how opposer could conclude it was not, at least, a much better attempt at making an answer. The Board in fact concluded it was an acceptable answer. Furthermore, a review of applicant's attached cover letter (pertinent language recited above) reveals that it is not an "explicit" extension request for additional time to file its answer, as characterized by opposer. Instead, a more logical reading of this cover letter is that applicant is requesting additional time to find legal counsel, and making a contingent request that, if any other filing deadline should be imminent that it be extended. In any case, it is certainly not responsible for opposer to receive a paper captioned as "ANSWER" [all capital lettering in original], filed by applicant within the time (as reset by the Board) for filing an answer, that contains admissions/denials of the allegations in the notice of opposition, and, in view of these circumstances, to construe this paper as not being an answer but "merely a request for an extension of time..."^[FN4]

As to the length of delay, opposer's motion to reopen was filed nearly one year after discovery closed and was in response to the Board's show cause order. Certainly, during this time, opposer could have inquired as to the status of this case and/or viewed the Board's online proceeding status website. Had it done the latter, it would have noticed that applicant's pleading was entered in the proceeding docket by the Board as an "answer", unlike applicant's previous attempt which was entered as an "informal answer."

Turning to the other two factors for determining whether opposer has made the necessary showing of excusable neglect to reopen discovery and testimony periods, even if we conclude that applicant will not be substantially prejudiced by the delay and that opposer acted in good faith, these factors do not overcome the aforementioned factors which are not in opposer's favor; nor do they otherwise demonstrate excusable neglect.

Accordingly, opposer's motion to reopen discovery and its testimony period is hereby denied. Also, allowing the parties to file briefs at this point would be of little value in view of the scant record before us.

We therefore decide this case on the merits as follows.

We first address the record of evidence before us in this case. As noted previously, opposer did not submit current status and title copies of its pleaded registrations with its notice of opposition, and thus did not make them of record under Trademark Rule 2.122(d)(1). Nor did it make them of record during its

testimony period by notice of reliance, under Trademark Rule 2.122(d)(2). See 37 CFR § 2.122(d); see also *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991); *Philip Morris Inc. v. Reemtsma Cigarettenfabriken GmbH*, 14 USPQ2d 1487 (TTAB 1990); and *Floralife, Inc. v. Floraline International Inc.*, 225 USPQ 683 (TTAB 1984).

*5 Notwithstanding opposer's failure to submit status and title copies of the pleaded registrations, we note that applicant's answer to the complaint contains admissions that obviate opposer's need to prove the admitted matters. See TBMP § 704.03(b)(1)(A) (2d ed. June 2003) and cases cited therein. Specifically, applicant has admitted the following: that opposer and its predecessors in interest and related companies have marketed, and continue to market, entertainment and theatrical services and a wide variety of associated merchandise in the United States since at least as early as 1987 [Answer, ¶ 1]; that opposer is the owner of the pleaded registrations [Answer, ¶ 2]^[FN5]; that opposer's mark CIRQUE DU SOLEIL is famous [Answer, ¶ 2]; that opposer's mark CIRQUE DU SOLEIL was in use prior to applicant's mark and, consequently, opposer has priority [Answer, ¶ 5]; and that opposer's marks "were famous prior to the filing of applicant's application on October 12, 2001, and prior to applicant's claimed first use of the mark CIRQUE DE FLAMBE in commerce in the United States on March 9, 1999."^[FN6]

Although applicant also admitted that opposer is the owner of its pleaded registrations, the Board finds this admission alone to be insufficient for purposes of considering these registrations to have been stipulated into the record. See TBMP § 704.03(b)(1)(A) (2d ed. June 2003) and cases cited therein. Specifically, the admission does not establish the pleaded registrations' current status necessary to make them of record. That is, applicant had not admitted that opposer's registrations are still in existence.

Thus the record before us consists solely of the pleadings, including the particular admissions we have discussed, and the file of the involved application which is automatically of record under Trademark Rule 2.122(b).

In view of applicant's aforementioned admissions in its answer, priority is not in issue and we can now turn to the opposer's likelihood of confusion claim. In determining the issue of likelihood of confusion, we must analyze all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Because the evidence of record before us is limited to the application file and applicant's admissions in its answer, we have no evidence which bears on certain of the factors. Nonetheless, the two key considerations in any likelihood of confusion analysis are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the parties' services, they are, in part, identical. Applicant has admitted that opposer's services include "entertainment and theatrical services" and the application covers "entertainment in the nature of circuses." Because of the identical nature of the services, and the absence of any restrictions in the recitation of the involved application, they must also be deemed to be offered in the same channels of trade to the same groups of consumers. *Octocom Systems, Inc.*

v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

*6 In comparing the parties' marks, we note the fact that opposer's mark CIRQUE DU SOLEIL is translated from French into English as "circus of the sun", and applicant's mark CIRQUE DE FLAMBE is translated from French into English as "circus of fire" or "circus of blaze." CASSELL'S FRENCH-ENGLISH ENGLISH-FRENCH DICTIONARY (fifth edition, 1959).^[FN7] As to the identical term that the parties' marks have in common, "cirque," we note that this word is synonymous in English with the word "circus." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) 410 (1993).^[FN8] Given the parties' self-described nature of the services rendered in connection with their marks, the term "cirque" is descriptive, if not generic. Indeed, as noted previously, applicant disclaimed in its application any exclusive right to use the term "cirque," apart from its mark. Applicant's disclaimer was in response to a Trademark Office Action (dated February 14, 2002) wherein the examining attorney stated the word "cirque" is descriptive because "it is the term for 'circus', which is the generic name for the services rendered [by applicant]." Although a descriptive portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997) (holding that DELTA is the dominant portion of the mark THE DELTA CAFÉ where the disclaimed word "café" is descriptive of applicant's services); In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and In re Appetito Provisions Co. Inc., 3 USPQ2d 1553 (TTAB 1987). See also Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ 2d 1001 (Fed. Cir. 2002); Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); In re El Torito Rests. Inc., 9 USPQ2d 2002 (TTAB 1988); In re Equitable Bancorporation, 229 USPQ 709 (TTAB 1986). We find that the dominant portions of the parties' respective marks are the terms "DU SOLEIL" and "DE FLAMBE," which again are translated as meaning "of the sun" and "of fire" or "of blaze," respectively. The dominant portions of the marks clearly provide a different sound, appearance and meaning which help distinguish the marks as a whole. While a substantial number of Americans are familiar with the French language, we recognize that most are not and may not immediately make the proper translation of the dominant portions of the marks. However, whether consumers are able to translate the marks or not, they will certainly be able to discern between the two significantly different dominant portions of the marks. In other words, without the benefit of a translation, the dominant portions are easily distinguishable in sound and appearance. Furthermore, if consumers are able to translate the dominant portions of the marks, the differences are even greater because consumers will perceive opposer's mark as having a solar or celestial connotation while applicant's mark connotes a connection with fire, flames or torches.

*7 When viewed as a whole, opposer's mark CIRQUE DU SOLEIL and applicant's mark CIRQUE DE FLAMBE may be perceived by consumers as consisting of the same descriptive or generic term, CIRQUE, but also consisting of the two very different terms, DU SOLEIL and DE FLAMBE, and referring to two different sources of

entertainment services.

The fact that opposer's mark is famous, as admitted by applicant, is certainly a probative factor in our likelihood of confusion analysis. *In re E. I. du Pont de Nemours & Co.*, supra. However, while opposer's mark is entitled to a broad scope of protection in view of this admission, we must also realize that the only identical element of the marks is the descriptive, if not generic term, "cirque." Thus, notwithstanding this factor, or that the parties' services are identical, or that the parties presumptively use the same channels of trade and market to the same classes of consumers, we do not find a likelihood of mistake, confusion or deception of consumers. See, e.g., *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) (The Board, in finding no likelihood of confusion between mark "CRYSTAL CREEK" for wine and marks "CRISTAL" for wine and "CRISTAL CHAMPAGNE" for champagne, did not err in relying solely on dissimilarity of marks in evaluating likelihood of confusion and failing to give surpassing weight to other *du Pont* factors, all of which favored a likelihood of confusion; court noted that "we have previously upheld Board determinations that one DuPont factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks"); and *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (differences in marks dispositive of question of likelihood of confusion).

Finally, we turn to opposer's second ground for opposition, i.e., that under Section 43(c) of the Lanham Act, the use of opposer's mark CIRQUE DE FLAMBE would cause dilution of the opposer's famous mark, CIRQUE DU SOLEIL.

The Board has previously allowed plaintiffs alleging dilution to proceed on a theory of likelihood of dilution, when the subject application was not based on use in commerce, i.e., was based on intent-to-use in commerce or Section 44 of the Lanham Act. *The Nasdaq Stock Market, Inc. v. Antartica, S.R.L.*, 69 USPQ2d 1718 (TTAB 2003). However, we have not had occasion in a case involving a use-based application to rule whether the plaintiff may make the likelihood of dilution showing or must make the arguably more difficult showing of actual dilution.^[FN9] We need not, however, make such a determination in this case, notwithstanding that the involved application is based on use in commerce, because plaintiff's claim would fail regardless of the showing required. Specifically, plaintiff has not proven other elements necessary for it to prevail on the ground of dilution.

*8 Although applicant has conceded the fame of plaintiff's mark prior to applicant's filing date, there is no concession regarding any blurring or tarnishment or any sort of lessening of the distinctiveness of plaintiff's famous mark, and nor is there proof of this. See *Nasdaq*, supra; and *Toro Co. v. ToroHead, Inc.*, 61 USPQ2d 1164 (TTAB 2001), regarding elements required to establish a dilution ground. Moreover, the Board has previously held that the parties' marks must be virtually identical, which they are clearly not in this case, in order for a plaintiff to prevail on the dilution ground. *Id.*

In view of the above, the dilution claim must fail. Trademark Act Section 43(c)(1); See also *Toro Co.*, supra.

Because opposer is the plaintiff herein, it is the party who bears the burden of proof in this proceeding. In this respect, opposer has failed to prove its allegations in the notice of opposition (which have been denied by applicant) by a preponderance of the evidence. Consequently, it is adjudged that the notice of opposition fails on both claims.

Decision: The opposition is dismissed.

FN1. Opposer's testimony period closed on June 16, 2003 and applicant's testimony period closed on August 15, 2003.

FN2. On January 26, 2004, applicant filed a status request letter with the Board. The letter does not contain proper proof of service, as required under Trademark Rule 2.119, but contains a "carbon copy" line that indicates a copy was sent to counsel for opposer.

FN3. Although not relevant to this proceeding, the Board notes that opposer refers to opposition proceeding no. 91124365 and has misrepresented the occurrence of events. Specifically, in that proceeding, on August 6, 2003, a withdrawal of application, dated September 5, 2002, was filed by applicant with the Board for the first time. On January 28, 2004, the Board noted the withdrawal, noted the absence of opposer's written consent, and entered judgment against applicant pursuant to Trademark Rule 2.135. Thus it was not a default judgment situation and did not take the Board sixteen months to take action.

FN4. In its motion to reopen, opposer states that it had concluded applicant was planning to abandon its mark. There is utterly no indication of this in applicant's answer or cover letter therefor. Moreover, we do not see how opposer could have concluded both that applicant was seeking an extension of time to obtain counsel who would file a better answer and that applicant was planning on abandoning its mark.

FN5. In its answer and with reference to this admission, applicant states that it "reserves the right to challenge this in any later hearing." Applicant has not filed a withdrawal of this admission and, consequently, the allegation stands admitted.

FN6. Applicant did not deny these allegations which were contained in opposer's notice of opposition. Accordingly, the averments are deemed admitted under Fed. R. Civ. P. 8(d).

FN7. The Board may take judicial notice of the dictionary definition of a word. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). As noted previously, applicant provided a translation of its mark in the prosecution of the application as "ring of fire." Given applicant's identified services, we find the more appropriate definition to be "circus of fire (or blaze)."

FN8. *Id.*

FN9. We are mindful of the Supreme Court's decision that the Federal Trademark Dilution Act, 15 U.S.C. § 1127, "unambiguously requires a showing of actual dilution, rather than a likelihood of dilution." Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 123 S. Ct. 1115, at 1124; and the Federal Circuit's decision, Nitro Leisure Products, L.L.C. v. Acushnet Co., 341 F.3d 1356 (Fed. Cir. 2003) [affirming district court's denial of preliminary injunction based on trademark dilution because there was no basis to conclude that moving party met the requirement of "a showing of actual dilution," citing *Moseley*].

2004 WL 1427397 (Trademark Tr. & App. Bd.)
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2007 WL 878354 (Trademark Tr. & App. Bd.)

THIS DISPOSITION IS NOT A PRECEDENT OF THE T.T.A.B. ✓

Trademark Trial and Appeal Board
Patent and Trademark Office (P.T.O.)

QUINTESSENTIAL CHOCOLATES CO., INC.
v.
SHELLEY B. WRIGHT

OPPOSITION 91163336 TO APPLICATION SERIAL 78256728 FILED ON JUNE 2, 2003

March 9, 2007

Steven B. Lehat of Customs, International Trade, and Administrative Law Practice
for Quintessential Chocolates Co., Inc.

Shelley B. Wright, pro se

Before Quinn, Bucher and Zervas
Administrative Trademark Judges
Opinion by Quinn
Administrative Trademark Judge:

An application was filed by Shelley B. Wright to register the mark shown below



for "retail chocolate shop services specializing in
hand-crafted chocolates" in International Class 35.^[FN1]

Quintessential Chocolates Co. Inc., doing business as Chocolat, opposed registration of the mark. The "notice of opposition" is a poorly drafted pleading, signed by Lecia Duke, opposer's president, that would have been dismissed had it been challenged for failure to state a claim upon which relief can be granted.^[FN2] Be that as it may, the paper states that opposer is opposed to the registration sought and that it is entitled to relief. Opposer alleges that it specializes "in the creation and production of American made Liqueur Praline (liquid center chocolates)," and that opposer opened "a retail store" under the name CHOCOLAT. Opposer claims that its mark is the subject of a copyright registration and is

identical to the logo mark sought to be registered by applicant. Opposer further claims that it first used the designations in November 2002. Opposer's paper concludes with the following: "My company would suffer more serious damage to our unique business if that application is completed. I respectfully submit this plea for opposition, requesting that our common law prior use of this trademark be considered and I request that this (#78256728) application be cancelled or withdrawn."

We are construing opposer's statements as encompassing a pleading of prior use of the designations CHOCOLAT and CHOCOLAT and design (identical to the logo mark sought to be registered) for retail candy store services. Further, although a claim of likelihood of confusion under Section 2(d) was not pleaded, opposer indicates in its final brief that the issue is exactly that.

Applicant, for her "answer," filed a rambling, detailed narrative, contending that she "created and commercially used the Logo for my own benefit and profit." The answer does not comply with Fed. R. Civ. P. 8(b); this failure, however, was brought on by opposer's poor pleading. See TBMP §§ 311.01-311.02(d) (2d ed. rev. 2004). In any event, the gist of applicant's allegations is that she, and not opposer, is the owner of the mark. Several exhibits accompany this "answer."

*2 The record consists of the pleadings and the file of the involved application. In addition, opposer filed a notice of reliance on twenty-seven documents comprising advertisements, articles from printed publications, and copies of official records. According to opposer, the parties did not conduct any discovery. Neither party took testimony or introduced any other evidence. Both parties filed briefs.^[FN3]

Before turning to the merits, we first address some evidentiary points. As indicated above, applicant attached several exhibits to its "answer." Trademark Rule 2.122(c) provides that except in a limited situation that does not apply here, an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced as an exhibit during the period for the taking of testimony. Hard Rock Café Intl. (USA) Inc. v. Elsea, 56 USPQ2d 1504, 1511 (TTAB 2000). Thus, the documents attached to the answer are not of record and, accordingly, have not been considered. TBMP § 317 (2d ed. rev. 2004).

Further, statements made in pleadings cannot be considered as evidence in behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. Times Mirror Magazines, Inc. v. Sutcliff, 205 USPQ 656, 662 (TTAB 1979); and TBMP § 704.06(a) (2d ed. rev. 2004).

Applicant likewise attached several exhibits to her final brief on the case; opposer has objected to this evidence as being improperly submitted. Evidentiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony of the offering party. Plus Products v. Physicians Formula Cosmetics, Inc., 198 USPQ 111, 112 n.3 (TTAB 1978); and TBMP § 539 (2d ed. rev. 2004). Because applicant neither took testimony nor introduced any other evidence, the exhibits attached to the brief obviously are not of record. Thus, this material has not been considered.

Lastly, applicant's brief contains numerous factual allegations relating to her purported ownership of the involved mark. Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value. Electronic Data Systems Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1462 n.5 (TTAB 1992); and TBMP § 704.06(b) (2d ed. rev. 2004).

In sum, inasmuch as applicant did not take any testimony or properly introduce any other evidence, the exhibits attached to her pleading and her brief, and the factual allegations made in her pleading and her brief based thereon, have not been considered.

Notwithstanding that applicant did not properly introduce testimony or evidence in support of her position, the burden of proof remains with opposer in this opposition proceeding. In Board proceedings, the plaintiff must establish its pleaded case (in this case, priority and likelihood of confusion), and must do so by a preponderance of the evidence. Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). In order for a plaintiff to prevail on a claim of likelihood of confusion, opposer must prove it has proprietary rights in the term it relies upon to demonstrate likelihood of confusion as to source. If its claim of likelihood of confusion is based, as in this case, on ownership of an unregistered mark, the mark must be distinctive, inherently or otherwise, and plaintiff must show priority of use. Otto Roth & Co. v. Universal Foods Corp., 640 F.2d 1317, 209 USPQ 40 (CCPA 1981).

*3 As we indicated above, opposer has pleaded use of CHOCOLAT and CHOCOLAT and design. Opposer's word designation is substantially similar to applicant's mark, and the logo designation is identical to applicant's mark. It is obvious that in the present case the contemporaneous use of the parties' marks in connection with identical services is likely to cause confusion as contemplated by Section 2(d) of the Trademark Act.

Thus, priority is the central issue in this case. In most cases, the issue of priority is raised by two competing parties who adopted and began using their marks without knowledge of the other party. In the present case, however, although there is no properly introduced evidence on this point, it would appear that, at some point in time, the parties had some relationship in this candy business endeavor. Inasmuch as both parties are claiming rights to the identical mark for identical services, it would appear that the crux of this controversy involves ownership of the mark. Accordingly, the issue of priority in this case is dependent on ownership of the mark. Priority and ownership are closely related issues because ownership in and to a mark arises from prior use of the mark in connection with a particular product or service. E. I. duPont de Nemours & Co. v. G. C. Murphy Co., 199 USPQ 807, 812 (TTAB 1978); and La Maur Inc. v. International Pharmaceutical Corp., 199 USPQ 612, 616 (TTAB 1978).

Unfortunately, the record introduced by opposer does not shed any light on the ownership issue. The entirety of opposer's evidence solely comprises examples of how opposer used its marks. We are at a complete loss to determine whether opposer's use was as the owner of the mark or whether opposer was acting as the

manufacturer for applicant, or whether applicant was acting as a retailer for opposer, or if some other business relationship bearing on ownership existed between the parties. There simply is no testimony or any other evidence regarding the issue of ownership.

As the plaintiff in this proceeding, it was incumbent upon opposer to submit evidence to demonstrate its proprietary rights in its claimed marks. Opposer, having the burden of proof herein, failed to meet its burden in this regard, and thus cannot prevail on its claim of likelihood of confusion based on the marks.

Decision: The opposition is dismissed.

FN1. Application Serial No. 78256728, filed June 2, 2003, alleging a bona fide intention to use the mark in commerce. The term "CHOCOLAT" is disclaimed. The application includes a statement that "[t]he foreign wording in the mark translates into English as chocolate."

FN2. Opposer originally appeared pro se, subsequently retaining counsel. Opposer's original counsel, who represented opposer during trial, withdrew as attorneys for opposer. Mr. Lehat was appointed counsel shortly before the briefing stage, and he prepared opposer's briefs at final hearing.

FN3. Opposer's motion to strike applicant's brief as untimely is denied.

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2003 WL 1862154 (Trademark Tr. & App. Bd.)

THIS OPINION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

Trademark Trial and Appeal Board
Patent and Trademark Office (P.T.O.)

THE CHILDREN'S HOSPITAL OF PHILADELPHIA
v.
CHILDREN'S MEMORIAL HOSPITAL

Opposition No. 124,739

March 20, 2003

Before Hanak, Hairston, and Bucher
Administrative Trademark Judges

By the Board:

The Children's Hospital of Philadelphia filed a notice of opposition to registration of application Serial No. 76/131,735^[FN1] on the ground that applicant's mark WHERE KIDS COME FIRST, when used on its "educational services, namely, seminars for continuing medical education for doctors and lectures for parents of patients and patients and distributing educational materials in connection therewith" and "pediatric hospital and health care services; medical research related to children's health care", so resembles opposer's previously registered mark KIDS FIRST for "pediatric healthcare services that do not target Medicaid eligible children" (Registration No. 2,370,499^[FN2]) as to be likely to cause confusion).

Applicant filed an answer and counterclaim to cancel opposer's claimed registration on the ground that, because opposer had failed to police third party use, the term KIDS FIRST has lost source-identifying function and applicant has thereby abandoned its mark. On June 26, 2002, opposer filed its answer denying the salient allegations of the counterclaim.

Before reaching opposer's motion for summary judgment, we address two pending matters.

First, we turn to opposer's motion to amend its answer to the counterclaim. Applicant has opposed the motion on the ground that opposer's amended answer to the counterclaim is argumentative and more in the nature of a brief on the case than a responsive pleading to the notice of opposition. Applicant moves to reject the amended answer in its entirety or, alternately, to strike all but Section II.

Upon review of opposer's 11-page amended answer to the counterclaim, we agree with applicant. Only Section II of applicant's amended answer (p. 2-3) admits or denies the allegations contained in the seven paragraphs of the counterclaim. The remainder of applicant's amended answer does not comply with Rule 8(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Trademark Rule 2.116(a). Accordingly, applicant's motion to file an amended answer to the counterclaim is granted only with regard to Section II. The remainder of the amended answer is stricken.^[FN3]

Next, we address applicant's motion to file late supplemental evidence in opposition to opposer's motion for summary judgment. Opposer's motion for summary judgment was filed July 3, 2002, making applicant's response due August 2, 2002. On August 2, 2002, applicant filed a consented motion to extend its time to respond until August 13, 2002. On August 13, 2002 (by certificate of mailing), applicant filed its 22-page response with accompanying exhibits, including evidence relating to applicant's allegations of third party use of opposer's mark. On September 9, 2002, opposer filed a reply brief.

*2 On September 30, 2002, some six weeks after its extended response date, applicant filed the instant motion to file late supplemental evidence. In support of its motion, applicant argues that the attached declaration was executed September 12, 2002 and thus was unavailable when applicant filed its opposition to the motion for summary judgment. Opposer objects to consideration of the late-filed evidence, and correctly notes that Trademark Rule 2.127(e)(1) states that, after the filing of a reply brief, "No further paper in support of or in opposition to a motion for summary judgment will be considered by the Board."

Accordingly, applicant's motion is denied, and applicant's late-filed evidence was not considered by the Board in reaching its decision on the motion for summary judgment.^[FN4]

We turn now to opposer's motion for summary judgment on the ground that its priority of use is undisputed, the services of the two parties are competitive, and there is no genuine issue of material fact that the marks KIDS FIRST and WHERE KIDS COME FIRST are substantially similar and likely to cause confusion. The summary judgment motion is supported by a status and title copy of opposer's Registration No. 2,370,499, the declaration of Jill McClary, Art Director of opposer's Public Relations Department, and attached exhibits, including several advertisements featuring use of opposer's mark promoting opposer's services.^[FN5]

Opposer contends that summary judgment is inappropriate insofar as genuine issues of material fact exist as to the strength and fame of the KIDS FIRST mark, the nature and extent of third-party use of KIDS FIRST marks in connection with similar services, and the extent of potential confusion. In support of its position, opposer relies upon the declaration of Maureen Murphy, applicant's Chief Marketing and Managed Care Officer, stating that applicant's mark WHERE KIDS COME FIRST has been in use since September 2000, and attached exhibits, including several advertisements featuring use of applicant's mark promoting applicant's services, opposer's discovery responses indicating that opposer consented to use of the mark KIDS FIRST for pediatric medical services by Independence Blue Cross of

Philadelphia, the declaration of Chad O'Hara, attorney of applicant, setting forth how an Internet search produced evidence of third party use of the term KIDS FIRST in connection with pediatric health services, use which Mr. O'Hara confirmed with telephone calls to the owners of the websites or common law trademarks.

The motion has been fully briefed.

The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. See Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986). The evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor.^[FN6] In considering the propriety of summary judgment, the Board may not resolve issues of material fact; it may only ascertain whether such issues are present. See Lloyd's Food Products Inc. v. Eli's Inc., 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); Opryland USA Inc. v. Great American Music Show Inc., 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

*3 Upon careful consideration of opposer's motion, and resolving all reasonable inferences in applicant's favor, we find that opposer has not demonstrated that it is entitled to summary judgment on the issue of likelihood of confusion as a matter of law. Because the marks are not identical and there are some variations among the services of the parties, there are genuine issues of material fact regarding, at a minimum, the similarity of the marks; the similarity of the trade channels and prospective purchasers of the parties' services; the perception of the term KIDS FIRST in the relevant industry; and the nature and extent of third-party uses of similar marks for similar services.

Accordingly, opposer's motion for summary judgment is denied.

Opposer's motion for summary judgment includes a request that, in the event that the motion is denied, the Board reset discovery and trial dates "in order to preserve Children's Hospital's right to take discovery." Applicant argues that opposer took no discovery prior to filing its motion for summary judgment, that opposer's motion for summary judgment was filed with only five days left in the discovery period, and that the Board should deem discovery closed and deny opposer's motion. Insofar as opposer has made no showing that more time is warranted for discovery than was remaining at the time opposer's motion for summary judgment was filed, and applicant has made no showing that less time or no time is warranted than was remaining at the time opposer's motion for summary judgment was filed, the Board will follow its usual practice and reset dates to include the time remaining at the time opposer's motion for summary judgment was filed. Opposer's motion is granted to the extent discovery and trial dates are reset as indicated below.

DISCOVERY PERIOD TO CLOSE:

Testimony period for party in position of plaintiff
to close:

(opening thirty days prior thereto)

April 4, 2003

July 3, 2003

Testimony period for defendant in the opposition and plaintiff in the counterclaim to close:

September 1, 2003

(opening thirty days prior thereto)

Testimony period for defendant in the counterclaim and rebuttal testimony as plaintiff in the opposition to close:

October 31, 2003

(opening thirty days prior thereto)

Rebuttal testimony period for plaintiff in the counterclaim to close:

December 15, 2003

(opening fifteen days prior thereto)

Briefs shall be due as follows: [See Trademark rule 2.128(a)(2)].

Brief for plaintiff in the opposition shall be due:

February 13, 2004

Brief for defendant in the opposition and as plaintiff in the counterclaim shall be due:

March 14, 2004

Brief for defendant in the counterclaim and its reply brief (if any) as plaintiff in the opposition shall be due:

April 13, 2004

Reply brief (if any) for plaintiff in the counterclaim shall be due:

April 28, 2004

*4 In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

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

FN1. Application Serial No. 76/131,735 was filed on September 19, 2000 under Trademark Act Section 1(b) based on applicant's assertion of a *bona fide* intention to use the mark in commerce.

FN2. Registration No. 2,370,499 issued July 25, 2000 and sets forth October 31, 1995 as its date of first use, and first use in commerce.

FN3. Opposer's arguments as to the admissibility and appropriate weight to be given applicant's evidence regarding the counterclaim to cancel opposer's registration should be brought up at trial.

FN4. Applicant is advised that consideration of applicant's supplemental declaration and exhibits relating to applicant's allegations of third party use of opposer's mark would not have affected the Board decision made herein.

FN5. Applicant objects to consideration of Ms. McClary's declaration as "inadmissible" on the ground that the declarant's first hand knowledge of the facts has not been established. Ms. McClary, in her capacity as an officer of the company (Art Director), is considered qualified to make statements in the declaration based on her own knowledge and her familiarization with opposer's business records. Moreover, greater latitude is given in summary judgment declarations, and the Board, in view thereof, affords such evidence its appropriate probative weight. Accordingly, applicant's objection is overruled.

FN6. The parties should note that the evidence submitted in connection with their motions for summary judgment is of record only for consideration of those motions. Any such evidence to be considered at final hearing must be properly introduced in evidence during their appropriate trial periods. See Levi Strauss & Co. v. R. Joseph Sportswear Inc., 28 USPQ2d 1464.

(TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

2003 WL 1862154 (Trademark Tr. & App. Bd.)
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