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

Proceeding	92050557
Party	Plaintiff TRP Entertainment, LLC
Correspondence Address	Matthew D. Francis Watson Rounds 5371 Kietzke Lane Reno, NV 89511 UNITED STATES mfrancis@watsonrounds.com
Submission	Motion to Strike
Filer's Name	Matthew D. Francis
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Date	02/19/2010
Attachments	Motion to Strike.pdf (10 pages)(1270436 bytes)

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

TRP ENTERTAINMENT, LLC, a Nevada limited liability company, Petitioner, v. DIRECT FROM VEGAS PRODUCTIONS, INC., a California corporation, Respondent.	Registration No.: 3220387 Mark: DIRECT FROM VEGAS THE RAT PACK Cancellation No.: 92050557

PETITIONER'S MOTION TO STRIKE RESPONDENT'S OPPOSITION TO PETITIONER'S FED. R. CIV. P. 56(f) MOTION FOR ORDER DENYING RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT; BRIEF AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

I. INTRODUCTION

Pursuant to 37 C.F.R. §§ 2.119 and 2.127 Petitioner/Counterdefendant TRP Entertainment, LLC. ("TRP" or "Petitioner") hereby moves the Board for an order striking Respondent Direct from Vegas Productions, Inc. ("DVP" or "Respondent") Opposition to Petitioner's Fed. R. Civ. P. 56(f) Motion for Order Denying Respondent's Motion for Summary Judgment ("DVP Opposition"). Docket No. 19. Because DVP failed to comply with both 37 C.F.R. §§ 2.119 and 2.127, the DVP Opposition should be stricken and TRP's Fed. R. Civ. P. 56(f) Motion for Order Denying Respondent's Motions for Partial Summary Judgment (Docket Nos. 13 and 15) and Alternative Motion for Continuance to Oppose Respondent Direct from Vegas Productions, Inc. Motions for Partial Summary Judgment ("TRP's Rule 56(f) Motion" or "Rule 56(f) Motion)[1] should be granted as conceded.

II. BACKGROUND

This is a cancellation proceeding whereby TRP seeks to cancel DVP's Reg. No. 3220387 for the mark "Direct From Vegas the Rat Pack." See Docket Nos. 1 and 4. On December 9,

[1] TRP incorporates by reference its Rule 56(f) Motion. See Docket No. 18.

2009, and on December 11, 2009, approximately three (3) weeks before the close of discovery, and before TRP was given the opportunity to depose DVP and its Rule 26 witnesses despite scheduled deposition dates, DVP filed (respectfully) a motion for partial summary judgment on the issue of genericness and a motion for partial summary judgment on the issue of misdescriptiveness (collectively the "DVP SJ Motions"). TRP's Rule 56(f) Motion, pp. 1-19.

On December 11, 2009, TRP's counsel received an Order from the TTAB stating that this proceeding had been suspended in light of DVP's December 9, 2009 genericness motion for summary judgment. TRP's Rule 56(f) Motion, p. 7. When TRP's counsel had yet to receive the DVP SJ Motions, he sent DVP's counsel a letter on December 21, 2009, advising him that he had not yet received the DVP SJ Motions, and it did not appear that the Motions were served in accordance with 37 C.F.R. § 2.119. Id.

On December 22, 2009, DVP's counsel advised TRP's counsel in an email that he had served the DVP SJ Motions on December 21, 2009. Id. TRP's counsel responded by stating that he had never received the DVP SJ Motions, and if they were not served before December 21, 2009, then the service date should be December 21, 2009. Id., pp. 7-8. DVP's counsel agreed to enter into a Stipulation stating that the service date of the DVP SJ Motions was December 21, 2009. Id., p. 8. The parties submitted that Stipulation on December 23, 2009, and the Board approved it on January 4, 2010. Id.; see Docket Nos. 16 and 17.

On January 19, 2010, in lieu of filing opposition briefs to the DVP SJ Motions, TRP filed and served its Rule 56(f) Motion. See Docket No. 18. On February 10, 2010, after the response deadline imposed by 37 C.F.R. §§ 2.119 and 2.127 had expired, DVP filed and served the DVP Opposition. See Docket No. 19. Although the date of service on the DVP Opposition states that it was served on February 9, 2010, it was not served on that date. See February 19, 2010 declaration of Matthew D. Francis, ¶ 2, Exhibit 1. Even if the DVP Opposition was served on that date, it still would have been late, and would not have complied with 37 C.F.R. §§ 2.119 and 2.127. See infra. For these reasons, and the reasons set forth below, the DVP

Opposition must be stricken, and TRP's Rule 56(f) Motion should be granted as conceded.

III. ARGUMENT

The DVP Opposition Must be Stricken and TRP's Rule 56(f) Motion Should be Granted as Conceded Because the DVP Opposition was Not Filed and Served in Accordance with 37 C.F.R. §§ 2.119 and 2.127

37 C.F.R. §§ 2.119(a-b) provide that all papers filed in the TTAB must be served upon the other parties in the proceeding, and that service must be made upon opposing counsel. 37 C.F.R. § 2.119(b)(4) provides that service may be accomplished by first-class mail. Id. Pursuant to 37 C.F.R. § 2.119(c), "[i]f service is made by first-class mail ... the date the paper was mailed or delivered to the overnight courier will be considered the date of service." 37 C.F.R. § 2.119(c); see also 4B Charles A. Wright, Arthur R. Miller, Federal Practice and Procedure 3d, § 1148 (2009)(citations omitted). 37 C.F.R. § 2.119(c) also provides that "[w]henever a party is required to take some action within a prescribed period after the service of a paper upon the party by another party and the paper is served by first-class mail ..., 5 days shall be added to the prescribed period." Id.

Pursuant to 37 C.F.R. § 2.127(a), responses to motions shall be filed within fifteen days from the date of service of a motion. Id. Furthermore, "[w]hen a party fails to file a brief in response to a motion, the Board may treat the motion as conceded." Id.; see also 3 J.T. McCarthy Trademarks and Unfair Competition ("McCarthy"), § 20.129, p. 20-245 (4th Ed. 2009), citing Central Manufacturing Inc. v. Third Millennium Technology, Inc., 61 U.S.P.Q.2d 1210, 1211 (TTAB 2001)(opposition proceeding was dismissed as conceded when the opposer failed to file opposition brief); see also Chesebrough Pond's, Inc. v. Faberge, Inc., 618 F.2d 776, 780, 205 U.S.P.Q. 888, 890-891 (CCPA 1980)(affirming the Board's decision to treat a motion for summary judgment as conceded).

TRP's Rule 56(f) Motion was filed and served on January 19, 2010 via first class mail in accordance with 37 C.F.R. § 2.119(b)(4). See Docket No. 18. Because TRP's Rule 56(f) Motion was served via first class mail, five days were added to the fifteen day response period

mandated by 37 C.F.R. § 2.119(a). See 37 C.F.R. § 2.119(c). All told then, DVP had twenty days to respond to TRP's Rule 56(f) Motion. Id. Twenty days from January 19, 2010 was February 8, 2010. The DVP Opposition was not filed or served until February 10, 2010. See Docket No. 19. As such, DVP failed to comply with 37 C.F.R. §§ 2.119 and 2.127.[2] Id. The DVP Opposition must therefore be stricken and TRP's Rule 56(f) Motion should be granted as conceded. 37 C.F.R. § 2.127(a); 3 McCarthy, § 20.129, p. 20-245, citing Central Manufacturing Inc., 61 U.S.P.Q.2d at 1211; see also Chesebrough, 618 F.2d at 780; 205 U.S.P.Q. at 890-891

IV. CONCLUSION

In light of the foregoing, TRP's Motion to Strike Respondent's Opposition to Petitioner's Fed. R. Civ. P. 56(f) Motion for Order Denying Respondent's Motions for Partial Summary Judgment should be granted, and TRP's Rule 56(f) Motion should be granted as conceded.[3]

Dated: February 19, 2010

WATSON ROUNDS

By: _____

Michael D. Rounds
Matthew D. Francis
WATSON ROUNDS
5371 Kietzke Lane
Reno, Nevada 89511
(775) 324-4100

Attorneys for Petitioner/Counterdefendant
TRP Entertainment, LLC

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[2] This is at least the third time DVP has failed to comply with deadlines or applicable law. The first instance was when DVP did not serve its initial disclosures until July 24, 2009, despite the fact that it was required to do so by July 5, 2009. See TRP's Rule 56(f) Mot., p. 2. The second instance was when DVP failed to serve the DVP SJ Motions when they were filed in accordance with 37 C.F.R. § 2.119. See supra.; TRP's Rule 56(f) Motion, pp. 7-8.

[3] Even if the DVP Opposition is considered – which it should not be – the Opposition is without merit and TRP's Rule 56(f) Motion must be granted. See Docket No. 18.

CERTIFICATE OF SERVICE

I certify that I am an employee of the Law Offices of Watson Rounds, a Professional Corporation, and on this day I deposited a true and correct copy in the United States mail, first class postage prepaid, in Washoe County, Nevada, of the within document entitled **Petitioner's Motion to Strike Respondent's Opposition to Petitioner's Fed. R. Civ. P. 56(f) Motion for Order Denying Respondent's Motions for Partial Summary Judgment; Brief and Memorandum of Points and Authorities in Support Thereof,** addressed as follows:

JACOB L. HAFTER, ESQ.
LAW OFFICE OF JACOB L. HAFTER & ASSOCIATES
7201 W. Lake Mead Boulevard, Suite 210
Las Vegas, Nevada 89128

Dated: February 19, 2010

Carla Ousby

Carla Ousby

Declaration of Matthew D. Francis

Declaration of Matthew D. Francis

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DECLARATION OF MATTHEW D. FRANCIS PURSUANT TO 37 C.F.R. § 2.20

I, Matthew D. Francis, do hereby declare and state as follows:

1. I am a partner at the law firm of Watson Rounds located at 5371 Kietzke Lane, Reno, Nevada 89511. This declaration is based upon my personal knowledge, and is made in support of Petitioner's Motion to Strike Respondent's Opposition to Petitioner's Fed. R. Civ. P. 56(f) Motion for Order Denying Respondent's Motions for Partial Summary Judgment; Brief and Memorandum of Points and Authorities in Support Thereof.

2. Attached hereto as Exhibit 1 is a true and correct copy of the envelope that Respondent's Opposition to Petitioner's FRCP 56(f) Motion for Order Denying Respondent's Motion for Summary Judgment was mailed in. Id.; Docket No. 19. The postage date is listed as February 10, 2010. See Exhibit 1.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting

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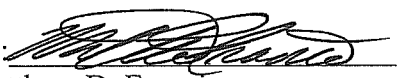
therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Dated: February 19, 2010

WATSON ROUNDS

By: 

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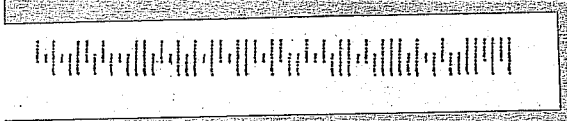
TRP Entertainment, LLC

Exhibit 1

Exhibit 1



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