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

Proceeding	91171687
Party	Defendant CENTAUR ENTERTAINMENT, INC. CENTAUR ENTERTAINMENT, INC. 45 MAIN STREET SUITE 707 Brooklyn, NY 11201
Correspondence Address	NICK DE BIASE NICHOLAS R. DE BIASE, ESQ. 45 MAIN STREET SUITE 707 BROOKLYN, NY 11201
Submission	Motion to Dismiss - Rule 12(b)
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Attachments	MotionToDismiss.txt (6 pages)(17026 bytes)

A. Motion To Dismiss for Failure To State A Claim

A defendant may bring a motion to dismiss a proceeding for failure to state a claim upon which relief can be granted. Fed. R. Civ. Proc. 12(b)(6). Plaintiffs Master Entertainment, Inc. ("Master") and Gay Days Hollywood, Inc. ((Hollywood(and collectively, Plaintiffs are hereinafter referred to as "Opposers") have filed an Opposition petition to oppose the trademark registration of the mark GAY DAYS by Centaur Entertainment, Inc. ((Centaur(), Serial No. 78521976 (the (Petition(). This Petition fails to meet the requirements of a pleading for opposition under the trademark laws and therefore should be dismissed.

1. Plaintiff Gay Days Hollywood Lacks Standing

An extension of time to oppose is a personal privilege which inures only to the benefit of the party to which it was granted and those in privity with that party. Trademark Trial and Appeal Board Manual of Procedure ((TBMP() (303.05(b). For this reason, an opposition filed during an extension of time to oppose must be filed in the name of the party to which the extension was granted. Id. An opposition filed in a different name will be accepted only if the opposition is filed by a person in privity with the person granted the extension of time. Id. If the opposition is filed both in the name of the party granted the previous extension and in the name of one or more different parties, an explanation will be required as to each different party, and the opposition will not be accepted as to any different party that fails to make a satisfactory showing of privity. Id. The "showing" of privity should be in the form of a recitation of the facts on which the claim of privity is based, and must be submitted with the opposition. Id. Once the time for opposing has expired, the right to pursue the filed case is a right individual to the timely filer. While this right may be transferred to another party, as by an assignment of the mark with the associated goodwill, it may not be shared. Id.

The extension of time to oppose the application of Centaur for the mark GAY DAYS, Serial No.78521976, was granted solely to Master Entertainment, Inc. Other than this one extension, the time to oppose the subject application expired on April 6, 2006. For the reasons set forth above, Gay Days Hollywood, Inc. is not a timely filer and has no standing to file an opposition in this proceeding. See Cass Logistics Inc. v. McKesson Corp., 27 USPQ2d 1075, 1077 (TTAB 1993) (a party cannot claim the benefit of an extension granted to another, unrelated party).

2. Factual Averments Are Required.

A plaintiff/claimant is required to plead the elements of a claim simply, concisely, and directly. See Fed. R. Civ. P. 8(e)(1). However, the pleading should include enough factual detail to give the defendant fair notice of the basis for each claim. See McDonnell Douglas Corp. v. National Data Corp., 228 USPQ 45, 48 (TTAB 1985) (Plaintiff's Section 2(a) allegations were merely conclusory and unsupported by factual averments). See also Ohio State University v. Ohio University, 51 USPQ2d 1289, 1292 (TTAB 1999) (since purpose of pleadings is to give fair notice of claims Board may in its discretion decline to strike even objectionable pleadings where their inclusion will not prejudice adverse party but rather will provide fuller notice of basis for claim).

(A party opposing a registration pursuant to Section 13 of the Lanham

Act must show (1) that he has standing and (2) a statutory ground which negates the applicant(s) entitlement to registration. Moreover, an opposer must at the pleading stage allege facts in support of both. (Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998); see also 37 C.F.R. (2.112(a) (1997) (requires plain statement of the ground(s) for cancellation); Person's Co. v. Christman, 900 F.2d 1565, 14 USPQ2d 1477, 1479 (Fed. Cir. 1990); International Order of Job's Daughters v. Lindeburg and Company, 727 F.2d 1087, 220 USPQ 1017, 1019 (Fed. Cir. 1984); Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982); Kelly Services Inc. v. Greene's Temporaries Inc., 25 USPQ2d 1460, 1464 (TTAB 1992); and American Vitamin Products Inc. v. Dow Brands Inc., 22 USPQ2d 1313, 1314 (TTAB 1992). Cf. Fed. R. Civ. P. 8(a).

The petition of Opposers is unclear on its grounds for opposition of Centaur(s) GAY DAYS mark. Based on paragraphs 1-4 of the Petition, it appears that Opposers may intend to rely upon Section 2(d) of the Lanham Act, 15 U.S.C. (1052(d), as grounds for opposition but never specifically states this as a ground.

3. Opposers Fail to Allege A Requisite Prior Use

Pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. (1052(d), Plaintiff must assert that defendant(s) mark, as applied to its goods or services, so resembles Plaintiff's previously used or registered mark as to be likely to cause confusion, mistake, or deception. TBMP (309.03(c). A Plaintiff must also plead (and later prove) priority of use. TBMP (309.03(c)(A); Otto Roth & Co., Inc. v. Universal Corp., 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981). In order to assert a valid prior use, a plaintiff must allege facts showing proprietary rights in its pleaded mark that are prior and superior to defendant's rights in the challenged mark and that produce a likelihood of confusion. See Jewelers Vigilance Committee Inc. v. Ullenberg Corp., 853 F.2d 888, 7 USPQ2d 1628, 1632 (Fed. Cir. 1988) (a successful claim "requires that the [plaintiff(s) mark], in fact, function as a mark that is as an indication of source."); Otto Roth & Co., Inc. v. Universal Corp., 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981) ((to establish priority, the petitioner must show proprietary rights in the mark that produce a likelihood of confusion()).

Such proprietary rights may be shown by: (1) ownership of an application with a filing date (or a registration with an underlying application filing date) prior to any date of first use on which defendant can rely [see Larami Corp. v. Talk To Me Programs Inc., 36 USPQ2d 1840 (TTAB 1995) (owner of an intent-to-use application may rely on its application filing date as a constructive use date for purposes of priority); Gor-Ray Limited v. Garay & Co., Inc., 167 USPQ 694 (TTAB 1970) (a cancellation petitioner is entitled to rely on the filing date of its pleaded registration as prima facie evidence of its first use of the mark)]; (2) prior trademark or service mark use; (3) or prior use analogous to trademark or service mark use. See Otto Roth & Co., Inc. v. Universal Corp., 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981).

Based on the above law, it is clear that Opposers have failed to allege facts showing any proprietary rights that are prior and superior to Centaur(s) rights in and to the GAY DAYS mark. Opposers at paragraph 1 of their Petition simply allege that: (Opposer's has [sic] prior use of the mark on identical goods/services." At paragraph 2 of the Petition, Opposers allege: (On information and belief, 3rd parties have

used and are using the identical mark on identical goods/services. (Opposers simply alleges that there is a prior use without any information as to what those rights might be. Specifically, Opposers fail to allege: (1) any goods or services upon which they rely as having created a use of a GAY DAYS mark that is prior to Centaur's trademark use; (2) the identity of these alleged third-parties; (3) the specifics, including the date of use, by such third parties of their alleged use. Opposers are required to plead such facts with specificity so that Defendant Centaur can properly respond to this action. See Fed. R. Civ. P. 8(e)(1) (claim should be stated simply, concisely, and directly); see McDonnell Douglas Corp. v. National Data Corp., 228 USPQ at 48 (pleading should include enough detail to give the defendant fair notice of the basis for each claim).

Furthermore, as the court found in Holmes Products Corp. v. Duracraft Corp., 30 USPQ2d 1549 (TTAB 1994), the plaintiff must plead as the basis for a likelihood of confusion ground, some (legitimate interest in preventing confusion between the pleaded mark on which it predicates its Section 2(d) claim and the mark whose registration it opposes. Any other interpretation could lead to the result that a business competitor who used a mark totally different from an applicant's mark would be able to harass the applicant simply by searching the register and asserting the ground of likelihood of confusion based on any marks it happened to find there. (Holmes Products Corp. v. Duracraft Corp., 30 USPQ2d at 1554.

Opposers must allege the factual statements that support their (superior rights(and demonstrate their alleged likelihood of confusion as to a single source of the mark. Opposers(s conclusory allegations will not withstand a motion to dismiss. Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752 (allegation of economic damage does not constitute a ground under the Lanham Act to preclude registration of a mark and motion to dismiss granted); see McDonnell Douglas Corp. v. National Data Corp., 228 USPQ at 48 (pleading should include enough detail to give the defendant fair notice of the basis for each claim).

B. Motion To Strike, In The Alternative

([T]he court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. Proc.12(f).

1. Gay Days Hollywood Should Be Stricken As An Opposer.

Alternatively, if the Board does not dismiss the Opposition Petition, for the reasons set forth above, Centaur requests that the Board strike Gay Days Hollywood, Inc. from the Petition as it has no standing to object in this opposition proceeding.

2. Paragraphs 1, 2, 3 and 4 Should Be Stricken.

At paragraph 1, Opposers alleges that they have an unspecified prior use of the mark on identical goods/services yet Opposers intentionally fail to identify these goods or services or the dates of use. In paragraph 2, Opposers indicate that third parties may have rights in and to the subject mark. However, Opposers have no standing to assert the rights of third parties not a party to this proceeding. Holmes Products Corp. v. Duracraft Corp., 30 USPQ2d at 1554.

At paragraph 3, Opposers claim on "information and belief" that the application of Centaur was filed by a party not the owner of the mark without any indication of a fact as to who is the purported owner of the mark. Such a fishing expedition is not permitted under the

trademark laws and rules regarding a permissible opposition and is evidence of the harassment of Opposers against Centaur. *Holmes Products Corp. v. Duracraft Corp.*, 30 USPQ2d at 1554.

At paragraph 4, Opposers seem to refer to the joint owner of the subject trademark, which such owner is being joined to this proceeding by the Motion to Join made below. Based on the discussion below at Sections C and D, there is no legal basis to this unsubstantiated claim.

Accordingly, paragraphs 1-4 of the Opposition Petition should be stricken.

C. Motion to Join Gay Days, Inc. as a Defendant

When there has been an assignment of a mark that is the subject of an inter partes proceeding before the Board, the assignee may be joined upon motion granted by the Board, or upon the Board's own initiative, provided that the assignment has been recorded or that proof of the assignment has been submitted. TBMP (512.01; see 37 CFR . ((3.71 and 3.73(b). Moreover, an assignee should be joined after filing copy of an assignment where such filing occurred subsequent to commencement of a trademark proceeding. *Western Worldwide Enterprises Group, Inc. v. Qingdao Brewery*, 17 USPQ2d 1137, 1138 n.4 (TTAB 1990).

Together with this Motion and the Declaration of Nicholas R. De Biase filed herewith, Defendant has filed an Assignment of Trademark for Serial No. 78521976 for its mark GAY DAYS in International Class 09 (the "GAY DAYS Trademark"). By this Assignment, Centaur has assigned to GayDays, Inc. d.b.a. GayDays.com, GayOrlando.com, GayFlorida.com, Gay Orlando Talk on WPRK 91.5FM, and Gay Orlando Film Festival (collectively, "GayDays, Inc."), fifty percent (50%) ownership in the GAY DAYS Trademark (the "GAY DAYS Assignment"). By reason of this assignment, which is effective as of May 1, 2005, GayDays, Inc. should be joined to this action as a real party in interest.

D. Motion to Amend Application Serial No. 78521976

An application involved in a proceeding may be amended upon motion of the party (37 CFR (2.133) and compliance with 37 CFR ((2.71-2.75. TBMP (514. CFR (2.71(c) permits an applicant to "amend the dates of use" of an application to a date prior to the filing date of the application. Furthermore, the applicant may claim the benefit of use by a related company in an amendment to the application, and specifically to amend the dates of use. *Greyhound Corporation and Armour and Company v. Armour Life Insurance Company*, 214 USPQ 473, 475 (TTAB 1982).

The date of first of the GAY DAYS mark by Defendant GayDays, Inc. is August 25, 1997, as evidenced by the state trademark registration from the State of Florida attached to the Declaration of Nicholas R. De Biase filed with this motion. Given the above GAY DAYS Assignment, Centaur may claim the benefit of use by GayDays, Inc. to amend the first date of use of the GAY DAYS Trademark to August 25, 1997.

Based on the foregoing, Centaur respectfully submits that good cause exists to grant the present motions to:

- (i) Dismiss the Opposition of Master Entertainment, Inc. and Gay Days Hollywood, Inc.;
- (ii) Alternatively, to strike Gay Days Hollywood, Inc. from the pending Opposition and to strike paragraphs 1-4 thereof;
- (iii) Join GayDays, Inc. as a Defendant to this proceeding; and
- (iv) Amend the application of Centaur (Serial No. 78521976) to amend

the dates of use to August 25, 1997.

DATED: August 11, 2006

NICHOLAS R. DE BIASE, ESQ.

By: _____

Nicholas R. De Biase
Attorney for Defendant
CENTAUR ENTERTAINMENT, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; MOTION TO STRIKE ALLEGATIONS; MOTION TO JOIN DEFENDANT GAY DAYS, INC.; AND MOTION TO AMEND APPLICATION has been served on Plaintiffs Master Entertainment, Inc. and Gay Days Hollywood, Inc. by mailing said copy to its attorneys in an envelope with pre-paid postage and depositing said envelope into the U.S. mail:

Kenyon & Kenyon LLP

One Broadway
New York, NY 10004-1007
Attn: Joseph F. Nicholson, Esq.
Michael Kelly, Esq.

An additional copy was also served by electronic transmission via email to Michael Kelly, Esq. at Mkelly@kenyon.com and Joseph Nicholson, Esq. at JNcholson@kenyon.com.

Executed on August 11, 2006 at Fire Island Pines, New York.

Nicholas R. De Biase _____

Type or Print Name

Signature