

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

Mailed: July 15, 2010

Opposition No. 91191159 (parent)  
Opposition No. 91191160  
Opposition No. 91191161  
Opposition No. 91191162  
Opposition No. 91191163  
Opposition No. 91191164  
Opposition No. 91191165  
Opposition No. 91192776  
Opposition No. 91194368  
Opposition No. 91194369  
Opposition No. 91194370

Upward Unlimited

v.

United Football League, LLC

**Frances S. Wolfson, Interlocutory Attorney:**

Consolidation

On January 19, 2010, the Board granted opposer's motion to consolidate several oppositions pending between the parties. It has now come to the Board's attention that three new oppositions have been filed by opposer against applicant's applications for marks similar to those at issue in the earlier-consolidated actions, Opposition Nos. 91194368, 91194369, and 91194370.

When cases involving common questions of law or fact are pending before the Board, the Board may order the

consolidation of the cases. Such consolidation may be ordered on the Board's own initiative. See Fed. R. Civ. P. 42(a); and TBMP § 511 (2d ed. rev. 2004).

Because these cases involve the same parties and similar marks, they are hereby consolidated and may now be presented on the same records and briefs. Papers should bear the number of each of the consolidated cases, although Opposition No. 91191159 remains the "parent" case, and most of the papers filed by the parties, or issued by the Board, will be placed only in the file of the parent case. An exception is the answer to the notices of opposition; applicant should file its answer separately in each case. Thereafter, the parties need not file a copy of submitted papers for each consolidated case; a single copy, bearing the number of each consolidated case, normally is sufficient. Consolidated cases do not lose their separate identity because of consolidation. Each proceeding retains its separate character and requires entry of a separate judgment. See Wright & Miller, Federal Practice and Procedure: Civil §2382 (1971).

Pleadings in the Oppositions

Opposer's amended notices of opposition (filed February 16, 2010) and applicant's answers to the amended notices of opposition are hereby entered as the operative pleadings in Opposition Nos. 91191159, 91191160, 91191161, 91191162,

91191163, 91191164, 91191165, and 91192776. The amended complaints and answers thereto were filed pursuant to Board order dated January 19, 2010.

Applicant's answer (filed June 7, 2010) in Opposition No. 91194369 is further entered hereby.

Applicant's Pending Motions

On April 28, 2010, applicant filed a motion for judgment on the pleadings in Opposition No. 91191159. On May 11, 2010, applicant filed motions to dismiss in Opposition Nos. 91194368, 91194369 and 91194370. Opposer filed a response to the motion for judgment on the pleadings and to the motions to dismiss in Opposition Nos. 91194368 and 91194370. In Opposition No. 91194369, however, the Board ruled prior to the due date for response that the motion had been filed prematurely.

The Board reasoned in that case that applicant's motion should be construed as a motion for summary judgment instead of as a motion to dismiss, and refused to consider the motion as prematurely filed, in contravention of Trademark Rule 2.127(e), prior to the date applicant's initial disclosures were due. The Board construed the motion as one seeking summary judgment rather than as a motion to dismiss because it did not contest the sufficiency of opposer's pleading but rather argued the merits of opposer's asserted claim of priority and likelihood of confusion. The Board

further determined that applicant failed to indicate in its motion papers that it had served its initial disclosures on opposer.

On June 4, 2010, applicant filed a request for reconsideration of the Board's ruling in Opposition No. 91194369. Opposer filed a response to the motion.

Generally, the premise underlying a motion for reconsideration, modification or clarification under Trademark Rule 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. See TBMP § 518 (2d ed. rev. 2004). A request for reconsideration may not be used to introduce additional evidence, and may not be devoted simply to a reargument of points presented in the requesting party's brief on the original motion.

Applicant argues that the Board should not have considered its motion as one for summary judgment. However, applicant's motion seeks dismissal on the basis of a judgment that there is no likelihood of confusion. Such determination cannot be decided on a motion to dismiss but may be decided on summary judgment. The Board's past practice, whereby motions to dismiss may be converted to motions for summary judgment, has been modified in light of the changes to Trademark Rule 2.127(e)(1). See Miscellaneous Changes to Trademark Rules, 72 Fed. Reg.

42242, 42245 (August 1, 2007). Under Trademark Rule 2.127(e)(1), a party may not move for summary judgment until it has made its initial disclosures. Thus, the Board may not convert a motion to dismiss into one for summary judgment before the moving party has made its initial disclosures. See *Compagnie Gervais Danone v. Precision Formulations LLC*, 89 USPQ2d 1251, 1255 n.7 (TTAB 2009) (if a party moves for summary judgment prior to the deadline for making initial disclosures it should indicate in its motion that the disclosures have been made).

Applicant has not shown that the Board erred in reaching the decision it issued. Accordingly, applicant's motion for reconsideration is denied.

Turning to applicant's motions in Opposition Nos. 91191159, 91194368 and 91194370, we likewise construe them as motions for summary judgment that have been prematurely filed in contravention of Trademark Rule 2.127(e)(1). We initially note that applicant has not indicated that it served its initial disclosures on opposer in any case, and that moreover, in response to the motions filed in Opposition Nos. 91194368 and 91194370, opposer also asserts that applicant has failed to serve its initial disclosures. We further note that the due date for service of initial disclosures has not yet passed in any case; and that rather than go to the sufficiency of the claims, the motions argue

their merits as would be consistent with a motion for summary judgment. Finally, we note that applicant's motions are not based on claim or issue preclusion nor do they contest the Board's jurisdiction.

In view thereof, the motions are construed as premature motions for summary judgment under Trademark Rule 2.127(e)(1). Accordingly, applicant's motions will be given no further consideration.

Trial dates, including applicant's time to file answers in Opposition Nos. 91194368, 91194369 and 91194370; and conferencing, disclosures and the close of discovery, are reset as indicated below.

Time to Answer	7/20/2010
Deadline for Discovery Conference	8/19/2010
Discovery Opens	8/19/2010
Initial Disclosures Due	9/18/2010
Expert Disclosures Due	1/16/2011
Discovery Closes	2/15/2011
Plaintiff's Pretrial Disclosures Due	4/1/2011
Plaintiff's 30-day Trial Period Ends	5/16/2011
Defendant's Pretrial Disclosures Due	5/31/2011
Defendant's 30-day Trial Period Ends	7/15/2011
Plaintiff's Rebuttal Disclosures Due	7/30/2011
Plaintiff's 15-day Rebuttal Period Ends	8/29/2011

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