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

Proceeding	91195331
Party	Plaintiff Cisco Technology, Inc.
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Attachments	91195331 - Opposer's Reply iso Its Motion to Amend Notice of Opposition and Motion to Strike.pdf (5 pages)(60781 bytes)

TRADEMARK
Docket No. 058110-06-9901

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

In the matter of application Serial No. 77/616,274
Filed November 18, 2008
For the mark **FLIPPINGBOOK**
Published in the OFFICIAL GAZETTE on February 9, 2010

CISCO TECHNOLOGY, INC. Opposer, v. OBSHESTVO S OGRANICHENNOY OTVETSTVENNOSTJU DBA "FB MEDIA SOLUTIONS" Applicant.	Opposition No.: 91195331

OPPOSER'S REPLY IN SUPPORT OF ITS MOTION TO AMEND NOTICE OF OPPOSITION AND MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO ORDER THAT AN ANSWER MEETING THE REQUIREMENTS OF THE RULES BE FILED

Demonstrating that it continues to ignore the requirements of the Board's Rules, Applicant FB Media Solutions' ("Applicant") response to the issues Opposer Cisco Technology, Inc. ("Cisco") properly raised in the Motion to Amend Notice of Opposition and Motion to Strike ("Motion") is filled only with unsupported and, for the most part, utterly incomprehensible claims that Cisco has no basis for amending its Notice of Opposition and that Applicant's Answer is entirely proper. Not surprisingly, Applicant fails to cite even a single controlling case or Board Rule to support either of its untenable positions. Applicant also continues to mis-serve its pleadings to Opposer directly rather than to Opposer's counsel as the Board's Rules require. (See proof of service for Response.)[1] Applicant's Response and its Amended Answer contain

[1] Notably, Applicant's proof of services is executed by a "Sergey Platonov" not by Applicant although Applicant supposedly is unrepresented in this proceeding.

the same improper factual allegations and improper admissions and denials as its first Answer. Thus, Cisco's Motion to Amend should be granted and the Applicant's Answer stricken.

A. The Motion to Amend Is Entirely Proper

In its Motion, Cisco properly set out the requirements for a Motion to Amend particularly at this early stage of the proceedings. Motion at 2-3. In response, Applicant inexplicably relies on its belated and improper request to amend its Application from an intent to use application to a use application (Dkt. 4). *See, e.g.*, Response at 2. Applicant's motion is not timely, nor well founded, nor does it bear in any way on whether Cisco should be allowed to amend its Notice of Opposition. In all events, Applicant's request is entirely improper. It was filed *after* the commencement of the Opposition. More importantly, none of the materials that are provided to prove the so-called use of the applied for designation constitute proper specimens of use for goods in Class 9 or services in Class 35 (Dkt. 4) based on the governing rules. Invoices, for example, do not suffice to support trademark use. Neither do transactions completed outside the United States.

Similarly, Applicant's bald denial that it admitted in its purported Answer that the applied-for designation is descriptive of the covered goods and services does not suffice to overcome Cisco's motion to amend. Applicant has not provided any evidence that entry of the amendment would violate settled law or be prejudicial to Applicant's rights, presumably because it cannot, and thus, the amendment should be granted. *See Polaris Indus. v. DC Comics,* 59 U.S.P.Q.2d 1789 (T.T.A.B. 2001) (motion to amend granted liberally); *Amer. Optical Corp. v. Amer. Olean Tile Co*., 168 U.S.P.Q. 471 (T.T.A.B. 1971) (motion to amend granted when new facts were uncovered during discovery).

Revealingly, in its response, Applicant does not deny that it stated its product converts files "to the appearance imitating flipping pages of a paper book" (Dkt. 5 at 1) and that it elsewhere refers to having chosen the FLIPPINGBOOK.COM designation "to describe the focus

of the web-site to potential visitors." (Dkt. 5 at 3). Rather, Applicant asserts that Cisco should have noticed the descriptiveness of the mark beforehand, even though the application is an intent-to-use application. Response at 2. Despite Applicant's unfounded assertions to the contrary, the fact remains that Applicant's admissions in its purported Answer and amendment provided the first information as to Applicant's intent in adopting the applied-for designation. Likewise, the purported Answer (Dkt. 5) and Applicant's motion (Dkt. 4) were the first time Cisco had reason to believe that Applicant does not have a good faith intent to use the designation for all of the listed goods.

B. The So-called Answer to the Notice of Opposition Does Not Meet Well-established Standards.

Turning to Applicant's so-called "Answer" in this proceeding, Applicant appears to claim, again with no legal basis whatsoever, that its Answer was proper. Nonetheless, Applicant also submits a [PROPOSED] ANSWER TO [PROPOSED] AMENDED NOTICE OF OPPOSITION ("Amended Answer"). Neither Applicant's initial Answer, nor its Amended Answer comply with Rule 8(b) of the Federal Rules of Civil Procedure and the Board's Rules, which require that a party admit or deny the averments upon which the other party relies. In particular, the governing rules require that "[d]enials must fairly respond to the substance of the allegation." Fed. R. Civ. P. 8(b)(2). Moreover, an allegation is deemed admitted where, as here, a responsive pleading is required and the allegation is not denied. Fed. R. Civ. P. 8(b)(6).

Applicant's initial Answer does not admit or deny anything. And the so-called admissions and denials in Applicant's Amended Answer are likewise deficient. The so-called denials and admissions are entirely unclear. They are either cluttered with other information to the point of being unintelligible or, on their face, do not admit or deny the allegation as alleged in the Notice of Opposition. For example, Applicant's answer to paragraph 15 of Cisco's Proposed Amended Notice of Opposition ("Amended Opposition") is four paragraphs long and curiously

includes a citation to the Federal Rules of Civil Procedure concerning when it is proper to amend an Answer, which has nothing to do with the allegations of paragraph 15 of the Amended Notice of Opposition. Amended Answer at 2-3. By way of further example, Applicant' responds to paragraph 19 of Cisco's Amended Opposition by denying that Applicant's mark is likely to dilute Cisco's marks, even though paragraph 19 alleges that the marks are similar in sight, sound and meaning and alleges nothing as to dilution. Amended Answer at 4. Accordingly, Applicant's Amended Answer continues not to abide by well-established standards and it too should be stricken. Applicant should be ordered to comply with the Federal Rules and file and serve a proper Answer.

Conclusion

Since Applicant's response fails to provide any factual or legal basis to deny Cisco's motions, Cisco requests that the Board allow the Amended Notice of Opposition and that it either strike the Answer and Amended Answer in their entireties or, in the alternative, order that a proper Answer be filed.

Dated: September 13, 2010

Respectfully submitted,

By: /LEW/

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TRADEMARK
Docket No. 058110-06.9901

CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is One Market, Spear Street Tower, San Francisco, CA 94105.

On **September 13, 2010**, I served the within documents:

OPPOSER'S REPLY IN SUPPORT OF ITS MOTION TO AMEND NOTICE OF OPPOSITION AND MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO ORDER THAT AN ANSWER MEETING THE REQUIREMENTS OF THE RULES BE FILED

☒ **(BY MAIL)** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at **San Francisco**, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY FEDERAL EXPRESS)** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and delivery to the party/ies listed below:

☐ **(BY ELECTRONIC MAIL)** I emailed the above-mentioned documents to the party/ies listed below:

Andrey Borodkin, General Director
"FB MEDIA SOLUTIONS" Obshestvo S Ogranichennoy Otvetstvennostju
16-07 Lomonosova Street, POBox#341 Zhukovsky
Moscow Region, MOSCOW 140181
RUSSIA
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I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct, and that this declaration was executed on **September 13, 2010**, at San Francisco, California.

Yelena Lolua