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

Proceeding	91224000
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SPIRITLINE CRUISES, LLC,

Opposer,

v.

TOUR MANAGEMENT
SERVICES, INC.,

Applicant.

Opposition No. 91224000

Mark: CHARLESTON HARBOR TOURS

Serial No.: 86334681

Published in the Official Gazette

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**APPLICANT'S REPLY TO OPPOSER'S RESPONSE IN OPPOSITION TO
APPLICANT'S MOTION TO STRIKE/OBJECTION
TO NOTICE OF RELIANCE (ESTTA871285)**

Applicant Tour Management Services, Inc. ("Applicant") files this Reply to the Opposition/Response to Applicant's Motion to Strike the Notice of Reliance (ESTTA871285) filed by SpiritLine Cruises, LLC ("Opposer") wherein Opposer offered 155 pages of materials allegedly generated by operating the "Wayback Machine" program found on the Internet Archive website (www.archive.org).

SUMMARY OF ARGUMENT

Opposer continues to fail to demonstrate that its proposed documents generated by the Wayback Machine are appropriate for submission via a Notice of Reliance because, among other things:

(1) Opposer's documents fail to provide the date the user of the computer *accessed* them online, as required by 37 C.F.R. §2.122(e);

(2) the dating methodology for web pages generated by operating the Wayback Machine software is faulty and unreliable, and thus Opposer's documents are not self-authenticating and are not appropriate for a Notice of Reliance; and

(3) Opposer's reliance upon the Safer decision is misplaced.¹

ARGUMENT

1. Opposer's Internet Documents Fail to Show the Date Accessed by the User, So They Do Not Satisfy the Requirements for a Proper Notice of Reliance

Opposer admits in its brief that the only date shown on its submitted Wayback Machine webpages is the date that the Internet Archive's "Wayback Machine" software purportedly "captured" an image of an underlying website, not the date that the user of the computer "accessed" and printed the Wayback Machine pages from the Internet Archive's website (archive.org). As a result, Opposer's proffered Wayback Machine webpages are not appropriate for a Notice of Reliance and must be stricken for failure to comply with 37 C.F.R. §2.122(e); TBMP 704.08(b).

2. The Dating Methodology for Webpages Generated by Operating the Wayback Machine Software is Faulty and Unreliable, and Thus Opposer's Documents Are Not Self-Authenticating and Are Not Appropriate for a Notice of Reliance.

As noted in the testimony of Internet Archive employee, Christopher Butler, referenced by Opposer, the date inserted into the webpage URL by the Wayback Machine software does not always reflect the date that the all of content on the page was "captured" by that software. More specifically, Mr. Butler's Affidavit states:

The Internet Archive assigns a URL on its site to the archived files in the format http://web.archive.org/web/[Year in yyyy][Month in mm][Day in dd][Time code in hh:mm:ss]/Archived URL.... A web browser may be set such that a printout from it will display the URL of a web page in the

¹ Applicant also objects to the admissibility of the documents on the substantive grounds of hearsay, lack of proper foundation, double-hearsay, relevance and lack of probative value; but as noted in Applicant's motion, Applicant reserves these substantive objections until the trial brief. TBMP Rule 707.02.

printout's footer. *The date assigned by the Internet Archive applies to the HTML file but not to image files linked therein. Thus images that appear on a page may not have been archived on the same date as the HTML file.*

Likewise, if a website is designed with "frames," the date assigned by the Internet Archive applies to the frameset as a whole, and not the individual pages within each frame.

(Butler Affidavit, ¶ 5 (emphasis added).)

As a result, the date listed in the URL assigned by the Internet Archive's Wayback Machine may not accurately reflect the date of all the content that appears on that webpage. Thus, even if Opposer's proposed date for the webpages is used, such date is not reliable and cannot support self-authentication of the document via a Notice of Reliance.

3. Opposer's Reliance Upon the Safer Decision is Misplaced

In its Motion to Strike, Applicant noted that the Trademark Trial and Appeals Board has already held that the Internet Archive Wayback Machine "database is not self-authenticating and there is no reason to treat its existence as authenticating the pages in its historical record." Paris Glove of Canada Ltd. v. SBC/Sporto Corp., 84 USPQ2d 1856, 1858 (TTAB 2007). In its Response brief, Opposer claims that this holding in Paris Glove has been "overruled" by the Board's decision in Safer Inc. v. OMS Investments, Inc., 94 USPQ2d 1031 (TTAB 2010).

Opposer's reliance on Safer is misguided. Unlike Paris Glove, Safer did not address the unusual issue of webpages generated by operation of the Wayback Machine software. Thus, Safer did not "overrule" Paris Glove – at least not in relation to Wayback Machine images.²

² In fact, the Safer decision favorably cited Paris Glove. See, Safer, 94 USPQ2d at 1037.

Moreover, this Board recognized the continued applicability of Paris Glove in its order in the present case, dated November 27, 2017, denying Opposer’s Motion for Summary Judgment (“Summary Judgment Order”). In its Summary Judgment Order, the Board cited Paris Glove (including the exact quotation listed above) when rejecting Opposer’s proffered Internet Archive Wayback Machine webpage evidence. More specifically, the Board stated:

Opposer relies on Internet materials which do not provide the date the Internet materials were accessed and their source (e.g., URL) as required by Trademark Rule 2.122(e) (2). Accordingly, no consideration has been given to the screenshots from the Wayback Machine, the South Carolina Secretary of State, and the NOAA Vessel Documentation database. *See also Hiraga v. Arena*, 90 USPQ2d 1102, 1106 (TTAB 2009) (exception where parties stipulate as to admissibility of Wayback Machine evidence) and *Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856, 1858 (TTAB 2007) (the Internet Archive and its “Wayback Machine” feature are not self-authenticating and there is no reason to treat its existence as authenticating the pages in its historical record).

(Summary Judgment Order, p. 6.)

This citation to Paris Glove appropriately reflects that Paris Glove was not overruled by Safer as concerns Wayback Machine evidence. The Summary Judgment Order also sets forth the applicable law for these Board proceedings as concerns whether Wayback Machine evidence is self-authenticating.

Finally, even if Safer were applied, Opposer’s Wayback Machine evidence fails to satisfy the requirements set by Safer for submission under a Notice of Reliance – because Opposer’s

evidence fails to provide the date that the Internet Archive pages were “accessed and printed.”

Safer, 94 USPQ2d at 1039.³

CONCLUSION

Opposer’s Internet documents from the Wayback Machine are not appropriately submitted pursuant to a Notice of Reliance, and as a result, they should be excluded from evidence. Accordingly, Applicant respectfully requests that its Motion to Strike Opposer’s Notice of Reliance (ESTTA871285) be granted.

Respectfully submitted,

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³ Opposer also fails to specify the date that its Wayback Machine pages were “published,” which is a potential factor listed by Safer. Safer, 94 USPQ2d at 1039. And even if Opposer had included the date of publication, such date has been rendered irrelevant by not including it in the updated version of 37 CFR §2.122(e), which codified the pertinent requirements of Safer. TBMP §704.08(b).

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Applicant's Reply to Opposer's Response in Opposition to Applicant's Motion to Strike/Objection to Notice of Reliance (ESTTA871285)* was served on counsel for Opposer, this 8th day of March, 2018 by sending the same by first class mail, postage prepaid, and by electronic mail to:

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March 8, 2018