

ESTTA Tracking number: **ESTTA858011**

Filing date: **11/13/2017**

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

Proceeding	91235287
Party	Defendant Hakkasan Holdings, LLC
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Date	11/13/2017
Attachments	Hakkasan reply ISO motion for leave to amend.pdf(14445 bytes )

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

In the matter of trademark Application Serial No. 87/230,621  
For the mark LEVEL UP in Class 41 and 43  
Application filed on November 8, 2016.

Level Up, LLC,

Opposer,

v.

Hakkasan Holdings, LLC,

Applicant.

Opposition No.: 91235287

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

**APPLICANT’S REPLY IN SUPPORT OF ITS  
COUNTER-MOTION FOR LEAVE TO AMEND ITS  
ANSWER AND AFFIRMATIVE DEFENSES**

Applicant, Hakkasan Holdings, LLC (“Applicant”), by and through its counsel, the law firm of Greenberg Traurig, LLP, files its Reply in support of its Counter-Motion for Leave to Amend its Answer and Affirmative Defenses (“Reply”). This Reply is made pursuant to the following memorandum of points and authorities and the pleadings and papers on file in this action.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Opposer’s response to Applicant’s Counter-Motion for Leave to Amend argues that Applicant’s request to amend its answer and affirmative defenses should be denied because the requested changes would be futile. Once again, Opposer seeks to stifle Applicant’s ability to adequately defend this Opposition. In arguing that Applicant’s proposed amendment is futile, Opposer focuses solely on whether Applicant could seek a concurrent use registration in this proceeding. However, Opposer fails to recognize that Applicant’s proposed amendments are

also relevant to the issue of *priority*.<sup>1</sup> Indeed, priority is an essential element of Opposer's claim for likelihood of confusion and without demonstrating that it has priority of use over Applicant, Opposer's opposition fails. "In a likelihood of confusion case under Trademark Act § 2(d),...opposer [has the burden] to prove that it has some prior trademark right and that applicant's mark is likely to cause confusion with that mark." *Life Zone, Inc. v. Middleman Group, Inc.*, 87 USPQ.2d 1953, 1959 (TTAB 2008) (dismissing the opposition because opposer failed to prove priority by a preponderance of the evidence). Where, opposer has not pleaded ownership of any registered trademark, opposer must rely on its common law use of the mark at issue to prove priority. *See Giersch v. Scripps Networks, Inc.*, 90 USPQ.2d 1020, 1023 (TTAB 2009).

In its Notice of Opposition, Opposer has alleged facts relating both Opposer's and Applicant's respective dates of first use of the LEVEL UP mark. Applicant filed its initial answer responding to Opposer's allegations based on facts that have since changed. Indeed, since the time that Applicant filed its answer, Applicant has acquired rights in the LEVEL UP mark that predate Opposer's alleged dates of first use. Thus, as it currently stands, Applicant's answer and affirmative defenses contain incorrect factual assertions relating to Applicant's dates of first use that must be corrected as they materially relate to the claims and defenses asserted. Accordingly, because Applicant's proposed amendments directly relate to the issue of priority (which must be proven by Opposer in order for Opposer to prevail), they are relevant to the claims and defenses involved in the Opposition, and Applicant should be entitled to amend its answer and affirmative defenses.

Leave to amend should be freely granted "when justice so requires" and where the proposed amendment would not violate settled law or prejudice the adverse party. *See* FRCP 15(a); *see also Embarcadero Technologies, Inc. v. Delphix Corp.*, 117 USPQ2d 1518, 1523 (TTAB 2016) ("Trademark Rule 2.115, 37 CFR § 2.115, and Fed. R. Civ. P. 15(a) encourage the

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<sup>1</sup> Nevertheless, Applicant disagrees with Opposer's analysis of whether Applicant could be entitled to at least a concurrent use registration in light of its acquisition of senior common law rights.

Board to look favorably on motions to amend pleadings, stating that ‘leave shall be freely given when justice so requires.’”). Further, “[a] proposed amendment need not set forth a new claim or defense; a proposed amendment may serve simply to amplify allegations already included in the moving party’s pleading.” TBMP § 507.02 (citing *Avedis Zildjian Co. v. D. H. Baldwin Co.*, 180 USPQ 539, 541 (TTAB 1973) (allegations amplified)). Notably, “whether or not the moving party can actually prove the allegation(s) sought to be added to a pleading is a matter to be determined after the introduction of evidence at trial or in connection with a proper motion for summary judgment.” *Id.* (citing *Focus 21 International Inc. v. Pola Kasei Kogyo Kabushiki Kaisha*, 22 USPQ2d 1316, 1318 (TTAB 1992)).

Here, Applicant’s request for leave to amend has been made early in the proceeding and does not violate settled law. Rather, the proposed amendment corrects factual inaccuracies regarding the issue of priority and which directly relate to the claims and defenses asserted. Moreover, Opposer has not argued that it would suffer any prejudice as a result of the amendment, nor could it, since the proceeding is in its early stages and Applicant promptly sought leave to amend. Accordingly, for all the reasons set forth above, Applicant respectfully requests that the Board grant its Counter-Motion for leave to amend its answer and affirmative defenses.

Dated this 13<sup>th</sup> day of November, 2017.

**GREENBERG TRAUIG, LLP**

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 13, 2017, I served the foregoing **OPPOSER'S  
REPLY IN SUPPORT OF ITS COUNTERMOTION FOR LEAVE TO AMEND ITS  
ANSWER AND AFFIRMATIVE DEFENSES** on:

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by causing a full, true, and correct copy thereof to be sent by electronic mail to the following email addresses:

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/s/ Cynthia Ney

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