UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

Baxley

December 28, 2023

Opposition No. 91272143

Hangzhou Mengku Technology Co., Ltd and Fuzhou Mengku Technology Co., Ltd

v.

Shanghai Zhenglang Technology Co., Ltd

Andrew P. Baxley, Interlocutory Attorney:

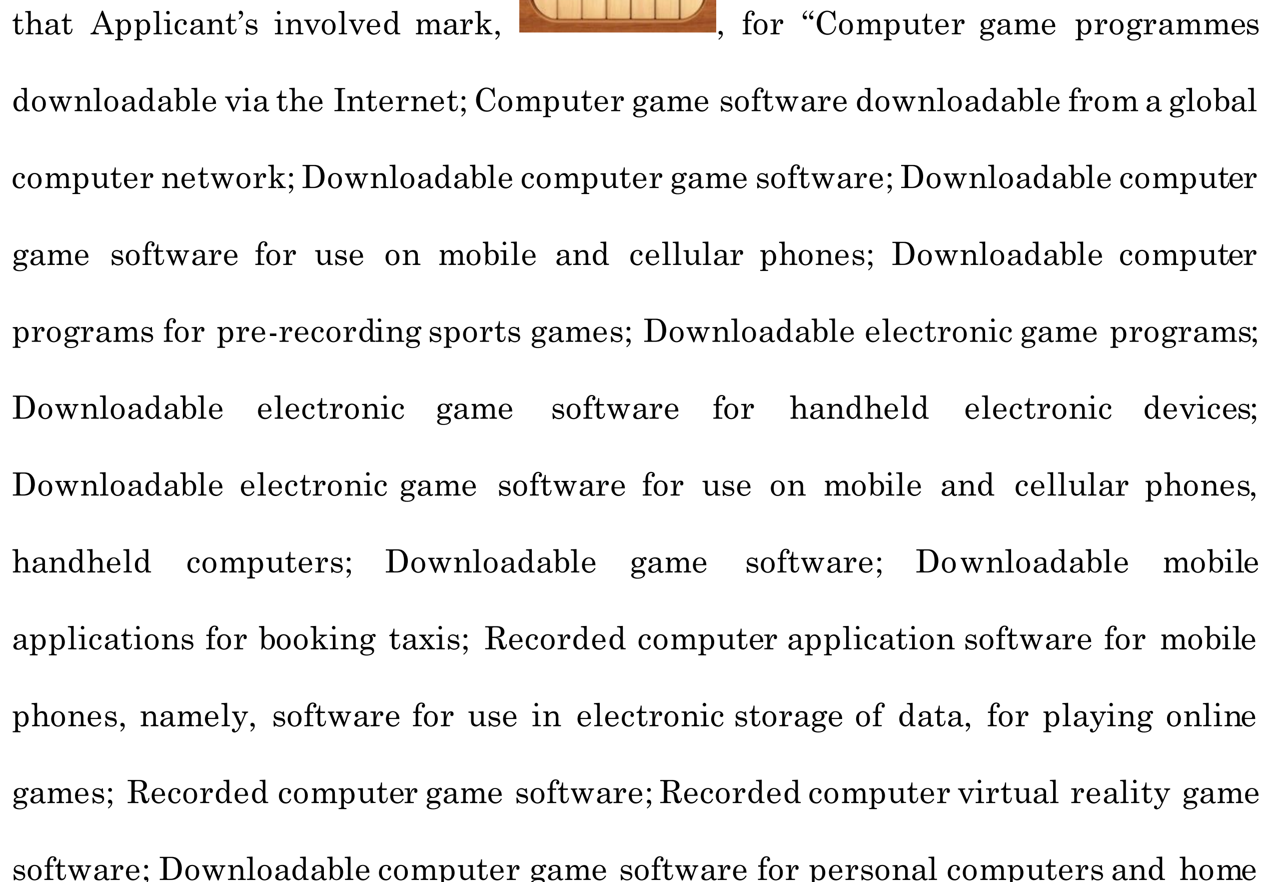
This case now comes up for review of Opposers' motion (filed November 16, 2023) to strike portions of Ruihua Ji's testimony declaration and exhibits thereto that Applicant filed on September 6, 2023.[1] 46 TTABVUE. The motion has been fully briefed.

By such motion, Opposers seek to strike (1) paragraphs 8, 10 and 14 and exhibits 2, 4, and 6 on grounds of lack of foundation and hearsay; (2) paragraphs 9, 25 and 26 and exhibits 15-46 on grounds of inadequate and untimely pretrial disclosures; and (3) paragraphs 25 and 26 and exhibits 15-17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43 and 45 on the ground of irrelevance. Because the lack of foundation, hearsay and irrelevance objections are substantive in nature, consideration of those objections

[1] Mr. Ji is identified in Applicant's pretrial disclosures as Applicant's president. 46 TTABVUE 12 and 17.

is deferred until final decision. *See Barclays Capital Inc. v. Tiger Lily Ventures Ltd.*, 124 USPQ2d 1160, 1167 (TTAB 2017) (substantive objection to declaration testimony deferred; such an objection "may be raised by a motion to strike and maintained in the brief, or raised in the brief for the first time."); TBMP § 707.03(c)(2). At this juncture, the Board may only decide whether paragraphs 9, 25 and 26 and exhibits 15-46 should be stricken on the ground of inadequate and untimely pretrial disclosures.

In this proceeding, Opposer asks that the Board refuse registration on the ground that Applicant's involved mark, , for "Computer game programmes



downloadable via the Internet; Computer game software downloadable from a global computer network; Downloadable computer game software; Downloadable computer game software for use on mobile and cellular phones; Downloadable computer programs for pre-recording sports games; Downloadable electronic game programs; Downloadable electronic game software for handheld electronic devices; Downloadable electronic game software for use on mobile and cellular phones, handheld computers; Downloadable game software; Downloadable mobile applications for booking taxis; Recorded computer application software for mobile phones, namely, software for use in electronic storage of data, for playing online games; Recorded computer game software; Recorded computer virtual reality game software; Downloadable computer game software for personal computers and home

video game consoles" in International Class 9[2] is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), and has not become distinctive under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).[3]

Under the operative schedule, Applicant's pretrial disclosures were due by Friday, June 23, 2023, and Applicant's testimony period commenced on July 9, 2023 and was to close on August 7, 2023. 28-29 TTABVUE. Applicant served its original pretrial disclosures on the following Monday, June 26, 2023, three days late.[4] 46 TTABVUE

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[2] Application Serial No. 90371133, filed December 10, 2023, based on an assertion of use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and alleging September 20, 2023 as the date of first use anywhere and of first use in commerce. The colors tan, brown, black, white and blue are claimed as a feature of the mark. The application also includes the following description:

> The mark consists of 7 columns of cubes which contain two incomplete cubes with curved edges in the bottom left and right hand corners. These 7 columns contain tan cubes, and wedged within the middle three columns is a T shape comprised of brown shaded cubes with a brown outline. These figures sit against a black grid comprised of black cubes with brown outlines. There is another T shape that sits above the aforementioned brown T shape. This shape is comprised of tan cubes which are outlined in white and have what appears to be a blue glow around them. All of the aforementioned elements sit within a square that is shaded in a brown woodgrain design. The inner corners of the outline of the square are rounded.

[3] In the notice of opposition, Opposer also alleged (1) likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. 1052(d); (2) nonownership under Trademark Act Section 1(a), 15 U.S.C. § 1051(a); and (3) fraud in the application declaration. 1 TTABVUE. In a January 10, 2023 decision, the Board, among other things, struck the nonownership and fraud claims and entered partial summary judgment in Applicant's favor on the likelihood of confusion claim. 25 TTABVUE.

[4] In the original pretrial disclosures, Applicant stated that Ruihua Ji was expected to testify to the following subjects:

- Creation and selection of Applicant's Design Mark (as used herein, "Applicant's Design Mark" refers to the mark contained in [the involved application]);
- Design elements of Applicant's Design Mark;
- The goods offered under Applicant's Design Mark;

11-14. In an August 2, 2023 order, the close of Applicant's testimony period was extended to September 6, 2023. 36 TTABVUE. On the closing day of its testimony period, Applicant served amended pretrial disclosures in which it named an additional subject to which Mr. Ji was expected to testify and filed its evidence, including Mr. Ji's testimony declaration.[5] 38 TTABVUE 3-46 TTABVUE 16-20. Opposer contends that the amended disclosures were untimely and that the paragraphs 9, 25 and 26 and exhibits 15-46 of Mr. Ji's testimony declaration pertain the additional subject set forth in the amended disclosures. Accordingly, Opposer asks that the Board strike those paragraphs and exhibits on the ground of inadequate and untimely pretrial disclosures. 46 TTABVUE.

Pursuant to Trademark Rule 2.121(e).

> no later than fifteen days prior to the opening of each testimony period, or on such alternate schedule as may be provided by order of the Board, the party scheduled to present evidence must disclose the name and, if not previously provided, the telephone number and address of each witness from whom it intends to take testimony, or may take testimony

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- The offering for sale, sale, and distribution of goods under Applicant's Design Mark;
- Content of Applicant's mobile games offered under Applicant's Design Mark;
- Distinctiveness of Applicant's Design Mark;
- Secondary meaning acquired by Applicant's Design Mark; and
- Consumer perception of Applicant's Design Mark as a source indicator for Applicant's mobile games.

46 TTABVUE 12.

[5] In the amended pretrial disclosures, Applicant stated that Mr. Ji was also expected to testify to the following additional subject:

- The purpose and effect of design marks, like Applicant's Design Mark, that are used as icons for downloadable game apps.

46 TTABVUE 17.

> if the need arises, general identifying information about the witness, such as relationship to any party, including job title if employed by a party, or, if neither a party nor related to a party, occupation and job title, **a general summary or list of subjects on which the witness is expected to testify, and a general summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness.**

(emphasis added).

In addition, Applicant had a duty under Fed. R. Civ. P. 26(e)(1)(A) to supplement its pretrial disclosures "in a timely manner" if it learned "that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Applicant may supplement its pretrial disclosures during its testimony period. *Cf. Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005) (a party may supplement its discovery responses "at any time, even during trial"). Under the estoppel sanction, a party that fails to timely supplement its pretrial disclosures may, upon motion or objection by its adversary, be precluded from relying upon that supplemental disclosure at trial, "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). *See also* TBMP § 527.01(e) (2023).

In determining whether opposer's failure to disclose the additional subject in Applicant's original pretrial disclosures is substantially justified or harmless, the Board is guided by the following five-factor test: "1) the surprise to the party against whom the evidence would be offered; 2) the ability of that party to cure the surprise; 3) the extent to which allowing the testimony would disrupt the trial; 4) importance

of the evidence; and 5) the nondisclosing party's explanation for its failure to disclose the evidence."

Even if the Board assumes for purposes of this order only that the information in paragraphs 9, 25 and 26 and the documents in exhibits 15-46 are outside of the scope of Applicant's original pretrial disclosures, the Board finds that Applicant's supplementation of those pretrial disclosures is harmless. In view of the nature of the involved mark and the mere descriptiveness claim herein, there should have been minimal surprise that Applicant would rely on third party marks in defense of that claim.[6] Any surprise can be cured by extending Opposer's time to rebut the declaration paragraphs and evidence at issue, which would only minimally disrupt this case. In addition, the paragraphs and evidence at issue may be useful in deciding this case. *See, e.g., Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (third-party registrations are relevant to prove that marks at issue have a normally understood and well-recognized descriptive or suggestive meaning). Finally, Opposer's explanation that the amended pretrial disclosures were served to clarify its original pretrial disclosures is persuasive.

Based on the foregoing, Opposer's motion to strike paragraphs 9, 25 and 26 and exhibits 15-46 of Mr. Ji's testimony declaration on the ground of inadequate and

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[6] Opposer does not contend that admission into evidence of information and documents related to the additional subject set forth in Applicant's amended pretrial disclosures would require a reopening of the discovery period.

untimely pretrial disclosures is denied. The motion to strike is otherwise deferred until final decision.

Proceedings are resumed. Remaining dates are reset as follows.

Plaintiff's Rebuttal Disclosures Due	1/30/2024
Plaintiff's 15-day Rebuttal Period Ends	2/29/2024
Plaintiff's Opening Brief Due	4/29/2024
Defendant's Brief Due	5/29/2024
Plaintiff's Reply Brief Due	6/13/2024
Request for Oral Hearing (optional) Due	6/23/2024

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Such briefs should utilize citations to the TTABVUE record created during trial, to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing.

Note: Parties are strongly encouraged to check the entire document before filing.[7] The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the ESTTA help webpage.

[7] To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.