UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

CME

Mailed: February 24, 2017

Cancellation No. 92056703

3 Square, Inc.

v.

San Pasqual Casino Development Group, Inc.

Christen M. English, Interlocutory Attorney:

The Board notes Respondent's motion to strike, filed January 28, 2017 (80 TTABVUE), Petitioner's responses thereto, filed February 16 and 17, 2017 (83-85 TTABVUE), and Respondent's request for judicial notice, filed February 1, 2017 (82 TTABVUE).[1] The Board defers consideration of these filings until final decision. TBMP §§ 502.01 and 533 (Jan. 2017).

This case now comes up on Respondent's motion, filed October 18, 2016, to strike portions of Petitioner's third notice of reliance, filed October 7, 2016. Petitioner opposes the motion.

Respondent moves to strike from Petitioner's third notice of reliance Exhibit 20 in its entirety (66 TTABVUE 4-9) and a portion of Exhibit 22, namely, Petitioner's

[1] The Board also notes Respondent's change of correspondence address, filed November 28, 2016. 69 TTABVUE. The Board's records have been updated accordingly.

response to Respondent's Request for Admission 25 (66 TTABVUE 18).[2] In response to the motion, Petitioner has withdrawn Exhibit 20 from its notice of reliance. 68 TTABVUE 2. Accordingly, Respondent's motion to strike Exhibit 20 is moot and will be given no further consideration.

With respect to Exhibit 22, Respondent argues that Petitioner's response to Request for Admission 25 should be stricken because Petitioner did not admit Request for Admission 25 and only admissions may be submitted via notice of reliance. 67 TTABVUE 3-4. In response, Petitioner asserts that it submitted its response to Request for Admission 25 "to rebut any adverse inference that [Respondent] may attempt to draw from the Answers to Request for Admission Nos. 24, 26, and 27 which were included by [Respondent] to its notice of reliance." 68 TTABVUE 2-3.

Trademark Rule 2.120(k)(5) provides:

> Written disclosures, an answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record only by the receiving or inquiring party except that, if fewer than all of the written disclosures, answers to interrogatories, or fewer than all of the admissions, are offered into evidence by the receiving or inquiring party, the disclosing or responding party may introduce under a notice of reliance any other written disclosures, answers to interrogatories, ***or any other admissions***, which should in fairness be considered so as to make not misleading what was offered by the receiving or inquiring party.

37 C.F.R. § 2.120(k)(5) (emphasis added). The Board has explained that a denial of a request for admission cannot be submitted under notice of reliance because "unlike

[2] Respondent does not seek to strike Exhibit 21 (66 TTABVUE 10-15) or the portion of Exhibit 22 consisting of Petitioner's response to Respondent's Request for Admission 28 (66 TTABVUE 19).

an admission (or a failure to respond which constitutes an admission), the *denial* of a request for admission establishes neither the truth nor the falsity of the assertion, but rather leaves the matter for proof at trial. *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1957 n.10 (TTAB 2008); *see also, e.g., Ayoub, Inc. v. ACS Ayoub Carpet Services*, 118 USPQ2d 1392, 1395 n.9 (TTAB 2016); *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1477 (TTAB 2014).

In response to Request for Admission 25, Petitioner objected that the request "is vague and ambiguous" and stated that "[i]nasmuch as the request is vague and ambiguous, denied." 66 TTABVUE 18. Because Petitioner did not admit Request for Admission 25, Petitioner cannot submit its response to this request under a notice of reliance. Trademark Rule 2.120(k)(5). Accordingly, Respondent's motion to strike is **granted** to the extent that Petitioner's response to Request for Admission 25 (66 TTABVUE 18) is **stricken**.[3]

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[3] The Board notes that this proceeding is fully briefed and that Respondent has requested an oral hearing pursuant to Trademark Rule 2.129(a). 81 TTABVUE.