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

Mailed: January 26, 2005

Concurrent Use No. 94001250

CDS, Incorporated

v.

I.C.E.D. Management, Inc.

Karen Kuhlke, Attorney:

This case now comes up for consideration of (1) CDS, Incorporated's (CDS) motion (filed July 9, 2004) for an extension of its rebuttal testimony period[1] and (2) I.C.E.D. Management, Inc.'s (I.C.E.D.) motion (filed August 5, 2004) to strike certain matter from CDS' reply brief.[2]

Motion to Strike Portion of CDS' Reply Brief

In support of the motion to strike, I.C.E.D. seeks to strike three arguments presented in CDS' reply brief in support of its motion to extend the rebuttal period, namely, that: (1) proceedings should be considered suspended because of a potentially deficient notice of attorney

[1] I.C.E.D. is advised that surreplys are not considered by the Board. Trademark Rule 2.127(a).

[2] The Board notes CDS' substitution of attorney. Correspondence in behalf of CDS will be forwarded to Diane M. Smith–Misemer, Sonnenschein Nath & Rosenthal LLP, American Century Tower, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111.

withdrawal; (2) CDS was prejudiced because I.C.E.D. designated the entire testimony transcript confidential until it was able to redact certain information on June 30, 2004; and (3) CDS' request for the testimony transcript from the court reporter should not constitute service.

The Board may, in its discretion, consider a reply brief. TBMP § 502.02(b). The purpose of a reply brief is to clarify the issues raised by the motion and to respond to issues raised in response to the motion.

With regard to the first argument concerning attorney withdrawal, this argument was raised for the first time in CDS' reply brief and is hereby stricken. The third argument concerns issues that were raised by I.C.E.D. in its response brief and it is entirely appropriate for CDS to respond to those arguments in its reply brief. While the second argument regarding the confidentiality issue could be considered tied to the third argument as an alternative argument in the event the Board found in favor of I.C.E.D. with regard to its argument that the court reporter served CDS, it is not necessary to consider this argument inasmuch as the Board did not reach it in its decision on the motion to extend rebuttal testimony. In view thereof, I.C.E.D.'s motion to strike matter from CDS' reply brief is granted as to argument one, denied as to argument three and moot as to argument two. The Board in its discretion has considered

that portion of the reply brief regarding CDS' request for the testimony transcript. Trademark Rule 2.127(a).

Motion to Extend Rebuttal Period

By its motion, CDS states that I.C.E.D. did not serve the testimony transcript of Brian Gay within thirty days after the completion of the deposition as required by Trademark Rule 2.125(a). In response, I.C.E.D. states that the copy forwarded by the court reporter suffices as service because (1) the court reporter was an "authorized representative" and (2) the certificate of service created and signed by the court reporter as part of the response to CDS' motion is "prima facie proof of service."

I.C.E.D.'s arguments are not well taken. I.C.E.D. selectively quotes the Board's manual stating that service may be made by any "other authorized representative." TBMP § 113.03. However, section 114.04 clarifies that "other authorized representatives" are "non-lawyers permitted to represent others in trademark cases...who were recognized to practice before the Office in trademark cases under Chapter 1 of 37 CFR prior to January 1, 1957." The court reporter, Shirley Houston, does not fall into that category. I.C.E.D. further states that "a certificate of service signed by an employee of the court reporting service...is prima facie proof that the deposition transcript and exhibits were timely served" on June 11, 2004. However, the certificate

of service was apparently created and signed on July 8, 2004 expressly for the purpose of responding to this motion. In any event, in reply CDS states that it ordered and paid for that copy of the transcript sent by Shirley Houston and that this should not serve to absolve I.C.E.D. of its obligation under Trademark Rule 2.125(a).

Under these circumstances, the Board finds that I.C.E.D. did not serve the transcript within thirty days as required by Trademark Rule 2.125(a) and it is appropriate to reset CDS' rebuttal period. In view thereof, CDS' motion to extend the rebuttal period is granted and dates are reset as indicated below.

DISCOVERY PERIOD TO CLOSE:	**closed**
30-day testimony period for party in position of plaintiff to close:	**closed**
30-day testimony period for party in position of defendant to close:	**closed**
15-day rebuttal testimony period to close:	**February 18, 2005**

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