

**THIS OPINION IS NOT
A PRECEDENT OF
THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

LIOC Endangered Species Conservation Federation
v.
Long Island Ocelot Club, 2002

Opposition No. 91160291
to application Serial No. 76461860
filed on October 28, 2002

LIOC Endangered Species Conservation Federation, appearing
pro se.

Long Island Ocelot Club, 2002, appearing pro se.

Before Hohein, Hairston and Wellington, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Long Island Ocelot Club, 2002 (applicant) seeks to register the mark LONG ISLAND OCELOT CLUB in standard character form for "educational services, namely, providing training in the field of all species of exotic felines; organizing sporting exhibitions featuring all species of exotic felines; [and] organizing community cultural events

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featuring all species of exotic felines" in International Class 41.¹

LIOC Endangered Species Conservation Federation (opposer) has filed a notice of opposition against registration of applicant's mark on the grounds that (1) applicant's mark is likely to cause confusion with opposer's previously used mark LONG ISLAND OCELOT CLUB for membership in an organization of feline owners, bi-monthly newsletters, Internet website, annual convention and members only Internet discussion list under Trademark Act Section 2(d), 15 U.S.C., Section 1052(d), and (2) applicant committed fraud upon the USPTO.

Applicant, in its answer, has effectively denied the allegations in the notice of opposition.

We first must address several evidentiary matters. On August 9, 2006, opposer filed a notice of reliance on (a) applicant's responses to opposer's interrogatories, requests for admissions, and requests for production of documents;

¹ Application Serial No. 76461860, filed October 28, 2002, based on an assertion of use in commerce under Trademark Act Section 1(a), 15 U.S.C. Section 1051 (a), and alleging September 4, 2002 as the date of first use and date of first use in commerce. The application contains a disclaimer of the words OCELOT CLUB apart from the mark as shown.

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(b) documents produced by applicant in response to opposer's requests for production of documents, (c) applicant's answer to the notice of opposition, (d) applicant's brief in response to opposer's motion for summary judgment, (e) documents produced by opposer in response to applicant's request for production of documents; and (f) the affidavit of Lynn Culver, opposer's director of legal affairs, and additional documents produced by opposer in response to applicant's request for production of documents. On October 16, 2006, applicant filed a notice of reliance wherein it states that it wishes to rely upon (a) the file of the involved application, and (b) "the statement of reliance filed by Opposer." On November 27, 2006, opposer filed a rebuttal notice of reliance on (a) an affidavit of Ms. Culver and (b) additional documents produced by opposer in response to applicant's request for production of documents. Finally, on January 8, 2006, applicant filed a motion to "dismiss" opposer's rebuttal notice of reliance as untimely.

With respect to opposer's initial notice of reliance, we note that a party may not ordinarily introduce into evidence by notice of reliance (a) an adverse party's response to a summary judgment motion, or (b) its own responses to an adverse party's interrogatories, requests for admissions, and requests for production of documents. See Trademark Rule 2.122(e); See also TBMP §§704.10 and

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704.11 (2d ed. rev. 2004) regarding the introduction of responses to discovery requests. However, in this case, applicant has indicated that it wishes to rely on the "statement of reliance filed by Opposer." (Applicant's Notice of Reliance, October 16, 2006). Thus, the improper materials accompanying opposer's initial notice of reliance are considered to have been stipulated into the record by applicant. See *Oxford Pendaflex Corp. v. Rolodex Corp.*, 204 USPQ 249 (TTAB 1979).

Further, to the extent that opposer seeks to rely on the pleadings herein and applicant seeks to rely on the involved application, this is unnecessary because the pleadings and the involved application are automatically of record without action by either party.

With respect to opposer's rebuttal notice of reliance, as noted, it was filed with the USPTO on November 27, 2006. The most recent trial order in this case indicates that opposer's rebuttal testimony period closed on November 24, 2006. Inasmuch as opposer's rebuttal notice of reliance was filed outside this period, and without benefit of a certificate of mailing, it is clearly untimely. We construe applicant's request to "dismiss" opposer's rebuttal notice of reliance as a motion to strike. The motion is accordingly granted, and the materials accompanying opposer's rebuttal notice of reliance will be given no

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further consideration. We should add that even if opposer's rebuttal notice of reliance had been timely filed, the accompanying materials would have been given no consideration because they were not filed in compliance with the rules of practice. In a Board inter partes proceeding, a party may submit testimony by affidavit only by written stipulation with the adverse party, approved by the Board. See Trademark Rule 2.123(b). See also TBMP §528.05(b) (2d ed. rev. 2004). In this case, there is no indication that the parties entered into any stipulation allowing opposer to introduce trial testimony by affidavit. Thus, the affidavit of Ms. Culver was not filed in compliance with the rules. Further, as to the documents which opposer produced in response to applicant's request for production of documents, as previously noted, such documents do not fall under the provisions of Trademark Rule 2.122(e).² In sum, inasmuch as opposer's rebuttal notice of reliance was not timely filed, it will be given no further consideration. See Trademark Rule 2.123(1). See also *Original Appalachian Artworks, Inc. v. Streeter*, 3 USPQ2d 1717, 1717 n.3 (TTAB 1987) [a party may not reasonably presume evidence is of record when that evidence is not offered in accordance with the applicable rules of practice].

² The documents include, inter alia, newsletters and correspondence which do not constitute printed publications under Trademark Rule 2.122(e).

Finally, and in any event, it is obvious that in the circumstances of this case, in which the sole evidence pertaining to opposer's case-in-chief consists of the evidence which has in effect been stipulated into the record by the parties, opposer cannot be permitted to offer as "rebuttal" evidence any additional evidence which simply serves to supplement its case-in-chief, as is the case herein. Accordingly, the evidence submitted with opposer's rebuttal notice of reliance constitutes improper rebuttal and will not be given any further consideration.

The record therefore consists of the pleadings, the file of the involved application, opposer's initial notice of reliance on the materials outlined *infra*, and applicant's notice of reliance. Only opposer filed a brief on the case.

We turn then to the threshold issue of opposer's standing. Section 13 of the Trademark Act, 15 U.S.C. Section 1063, provides that an opposition may be brought by "[a]ny person who believes that he would be damaged by the registration of a mark on the principal register . . ." The term "damage" as used in Section 13 relates to a party's standing to file an opposition. In order to establish standing, a party must plead and prove a "real interest" in the case, that is, a personal interest in the outcome of the proceeding beyond that of the general public or a mere

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intermeddler. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1317, 209 USPQ 41 (CCPA 1982).

Opposer has pleaded a real interest in this case by virtue of its allegation that it uses the mark LONG ISLAND OCELOT CLUB for membership in an organization of feline owners, bi-monthly newsletters, Internet website, annual convention and members only Internet discussion list. However, opposer has failed to properly introduce any testimony or evidence to prove its standing. So as to be perfectly clear, in the absence of corroborating testimony, statements in opposer's brief and a cease and desist letter, and uses of the mark LONG ISLAND OCELOT CLUB in newsletters are not proof of opposer's use of the mark. Moreover, this is not a case where we can say that there is no issue as to opposer's standing as a result of admissions in applicant's answer. Rather, as previously indicated, applicant has effectively denied the allegations of the opposition. Under the circumstances, we find that opposer has failed to prove its standing, that is, opposer has failed to prove that it has a real interest in this proceeding.

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Since opposer has not established its standing to maintain this proceeding, opposer has shown no right to relief on its claims of likelihood of confusion and fraud.

Decision: The opposition is dismissed.