

AUG 14 2008

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BABOWAL & ASSOCIATES, INC., a  
Delaware corporation,

Plaintiff-counter-defendant -

Appellee,

v.

UNIVERSITY OF CAMBRIDGE LOCAL  
EXAMINATION SYNDICATE, or its  
successors-in-interest; UNIVERSITY OF  
OXFORD DELEGACY OF LOCAL  
EXAMINATIONS, or its successors-in-  
interest CHANCELLORS, MASTERS,  
AND SCHOLARS OF THE  
UNIVERSITY OF OXFORD;  
ASSOCIATION OF RECOGNIZED  
ENGLISH SCHOOLS EXAMINATION  
TRUST, or its successors in interest,

Defendants-counter-claimants

- Appellants.

No. 06-15728

D.C. No. CV-00-20140-JF/RS

MEMORANDUM\*

BABOWAL & ASSOCIATES, INC., a  
Delaware corporation,

Plaintiff-counter-defendant -

No. 06-15874

D.C. No. CV-00-020140-RS

\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Appellant,

v.

UNIVERSITY OF CAMBRIDGE LOCAL EXAMINATION SYNDICATE, or its successors-in-interest; UNIVERSITY OF OXFORD DELEGACY OF LOCAL EXAMINATIONS, or its successors-in-interest CHANCELLORS, MASTERS, AND SCHOLARS OF THE UNIVERSITY OF OXFORD; ASSOCIATION OF RECOGNIZED ENGLISH SCHOOLS EXAMINATION TRUST, or its successors in interest,

Defendants-counter-claimants  
- Appellees.

Appeal from the United States District Court  
for the Northern District of California  
Richard Seeborg, Presiding

Argued and Submitted July 15, 2008  
San Francisco, California

Before: W. FLETCHER and TALLMAN, Circuit Judges, and DAWSON \*\*,  
District Judge.

Babowal & Associates, Inc. (“Babowal”) appeals an adverse summary  
judgment in favor of the University of Cambridge Local Examinations Syndicate

---

\*\* The Honorable Kent J. Dawson, United States District Judge for the District of Nevada, sitting by designation.

and other Defendants (collectively “Universities”). The Universities appeal the district court’s denial of attorneys’ fees under 15 U.S.C. § 1117(a). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We decline to consider arguments raised for the first time on appeal that Babowal is entitled to use the Universities’ trademarks under the nominative fair use doctrine, or alternatively, that the Universities improperly denied Babowal the right to use its certification mark. *See Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004). The district court properly concluded that the Universities maintained actual control over the quality of goods sold under their trademark and that the Letter of Intent represented a revocable license rather than an outright assignment of interest.

Even assuming the district court misapplied California’s “pleading around” rule, *see Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000) (citing *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527 (Cal. 1999)), the district court properly dismissed Babowal’s unfair competition claim because Babowal failed to present any evidence that the Universities engaged in conduct that was “immoral, unethical, oppressive, unscrupulous, or substantially injurious.” *See Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996) (internal quotation marks omitted) (discussing Cal. Bus. Prof.

Code § 17200). Babowal failed to present any evidence to suggest that the Universities acted in bad faith by warning Call Coach, Inc. of possible trademark infringement. *See Falcon Lock Co. v. Best Universal Lock Co.*, 362 F.2d 221, 223 (9th Cir. 1966).

We affirm the district court's denial of attorneys' fees under 15 U.S.C. § 1117(a). Each party shall bear its own costs on appeal.

**AFFIRMED.**