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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD



SPORTS MACHINE, INC.,  
d/b/a/ Bike Source,

Opposer,

v.

MIDWEST MERCHANDISING, INC.,

Applicant.

04-24-2003

U.S. Patent & TMOfo/TM Mail RcptDt: #66

Opposition No.: 122,948

Application No. 76/035,008

COMMUNICATIONS SECTION

**APPLICANT'S REPLY TO  
OPPOSER'S ANSWER TO APPLICANT'S MOTION TO RESUME  
PROCEEDINGS AND ENTER JUDGEMENT UNDER TBMP 510.02(B) (AND  
MEMORANDUM BRIEF RESPONDING TO APPLICANT'S REPLY TO  
OPPOSER'S ANSWER TO APPLICANT'S MOTION TO RESUME  
PROCEEDINGS AND ENTER JUDGEMENT UNDER TBMP 510.02(B))**

Determined to have the last word, Opposer has filed an Answer to Applicant's Reply to Opposer's Answer to Applicant's Motion to Resume Proceedings and Enter Judgement under TBMP 510.02(b) (and Memorandum Brief Responding to Applicant's Reply to Opposer's Answer to Applicant's Motion to Resume Proceedings and Enter Judgement under TBMP 510.02(b)) ("Opposer's Second Reply").

Opposer's Second Reply is filed in direct contravention to the Rules that clearly disqualify such additional filings from being considered, and thus should be given no consideration or weight. Accordingly, Applicant is not required to respond to Opposer's Second Reply.

However, Opposer has raised the issue of whether Applicant's Reply to Opposer's Answer to Applicant's Motion to Resume Proceedings and Enter

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Judgement under TBMP 510.02(b) ("Applicant's Reply Brief") is warranted and proper, and whether it should be considered. Because Opposer has misrepresented the Rules governing consideration of Applicant's Reply brief, Applicant addresses only that single issue raised in Opposer's Second Reply.

There is no Prohibition under TBMP 510.02(B) Against Applicant's Reply Brief

TBMP 502.03 does not prohibit a reply by Applicant as Opposer suggests.

TBMP provides in relevant part:

There is no provision in the Trademark Rules of Practice for the filing of reply briefs on motions. **On the other hand, they are not expressly prohibited.** Thus, while the Board generally discourages the filing of reply briefs on motions [citations omitted], **the Board may, in its discretion, entertain a reply brief if the Board finds that such a brief is warranted under the circumstances of a particular case. For example, the Board may entertain a reply brief if, in the Board's opinion, such a brief is necessary to permit the moving party to respond to new issues raised in, or new materials submitted with, an adversary's brief in opposition to the motion; or the issue to be determined is complex or needs to be further clarified; or certain arguments against the motion should be answered so as to assist the Board in arriving at a just conclusion on the motion.** (Emphasis added).

Rule 2.127 (37 C.F.R. 2.127) specifically provides in relevant part that:

(a) Every motion shall be made in writing, shall contain a full statement of the grounds, and shall embody or be accompanied by a brief. Except as provided in paragraph (e)(1) of this section, a brief in response to a motion shall be filed within fifteen days from the date of service of the motion unless another time is specified by the Trademark Trial and Appeal Board or the time is extended by stipulation of the parties approved by the Board, or upon motion granted by the Board, or upon order of the Board. If a motion for an extension is denied, the time for responding to the motion may remain as specified under this section. **The Board may, in its discretion, consider a reply brief.** Except as provided in paragraph (e)(1) of this section, a reply brief, if filed, **shall be filed within 15 days from the date of service of the brief in response to the motion.** The time for filing a reply brief will not be extended. **No further papers in support of or in opposition to a motion will be considered by the Board.** Briefs shall be submitted in typewritten or printed form, double spaced, in at least pica or eleven-point type, on letter-size paper. The brief in support of the motion and the brief in response to the motion shall not exceed 25 pages in length; and a reply brief shall not exceed 10 pages in length. Exhibits submitted in support of or in opposition to the motion shall not be deemed to be part of the brief for purposes of determining the length of the brief. When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded. An oral hearing will not be held on a motion except on order by the Board. (Emphasis added)

Accordingly, Opposer should not be surprised to have received Applicant's Reply Brief, which the Rules do not prohibit, and which the Board by rule may and, under these circumstances, should consider.

In this regard, the Board should give consideration to Applicant's Reply Brief as one necessary to permit Applicant to respond to new issues raised in, or new materials submitted with, Opposer's brief in opposition to the motion (such as the issue of the scope of the Board's earlier ruling in the Cancellation, the issue of Opposer's intent to register its own mark, and Opposer's desire that Applicant not have a registration of the subject mark); or otherwise to clarify issues to be determined, or assist the Board in arriving at a just conclusion on the motion.

The Rules Clearly Indicate that the Board will not Consider Additional Filings Like Opposer's Second Reply

In contrast, the Rules expressly state that the Board will not consider any additional papers filed in support of or in opposition to a motion. See Rule 2.127 above. For this reason, Applicant was surprised that Opposer would file a pleading that is so clearly of the type that is expressly to be given no consideration by the Board.

Accordingly, the Board should give no consideration to Opposer's Second Reply. Indeed the Rules *expressly provide that the Board will refuse to consider such an additional filing.*

Conclusion

In conclusion, Applicant's reply is fairly within the scope of the Rules governing replies in support of motions, and is clearly warranted to address new issues raised by Opposer, or otherwise to assist the Board in understanding the issues to be determined.

Opposer has already been afforded an opportunity to reply to Applicant's Motion and raise all pertinent issues thereto, and should not be permitted to make additional filings and raise additional issues beyond the filings permitted under the Rules. Opposer's Second Reply is clearly *outside the scope* of filings that the Board will consider, and thus should be given no consideration or weight.

In view of the foregoing, Applicant maintains that further proceedings in the Opposition are completely unwarranted, and Applicant respectfully requests that judgement in favor of Applicant now be entered in the subject Opposition.

Respectfully submitted,

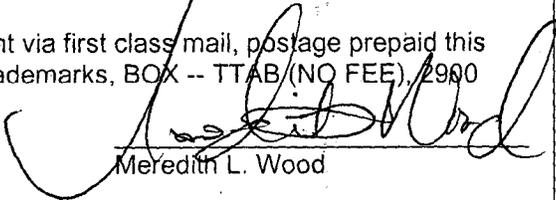
**MIDWEST MERCHANDISING, INC.**

April 22, 2003  
Date

  
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Roger A. Gilcrest  
STANDLEY & GILCREST LLP  
Attorneys for Applicant  
495 Metro Place South, Suite 210  
Dublin, Ohio 43017-5319  
Telephone: (614) 792-5555  
Facsimile: (614) 792-5536

CERTIFICATE OF FIRST CLASS MAIL

I hereby certify that this correspondence is being sent via first class mail, postage prepaid this 22<sup>nd</sup> day of April, 2003 to Assistant Commissioner of Trademarks, BOX -- TTAB (NO FEE), 2900 Crystal Drive, Arlington, Virginia 22202-3513.

  
Meredith L. Wood

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of APPLICANT'S REPLY TO OPPOSER'S ANSWER TO APPLICANT'S MOTION TO RESUME PROCEEDINGS AND ENTER JUDGEMENT UNDER TBMP 510.02(B) (AND MEMORANDUM BRIEF RESPONDING TO APPLICANT'S REPLY TO OPPOSER'S ANSWER TO APPLICANT'S MOTION TO RESUME PROCEEDINGS AND ENTER JUDGEMENT UNDER TBMP 510.02(B)) was sent U.S. Mail, postage pre-paid this 22 day of April, 2003 to Mary J. Gaskin, Esq., Attorney for Opposer, Sports Machine, Inc., Annelin & Gaskin, 2170 Buckthorne Place, Suite 200, The Woodlands, Texas 77380.

  
Roger A. Gilcrest  
STANDLEY & GILCREST LLP  
Attorneys for Applicant  
495 Metro Place South, Suite 210  
Dublin, Ohio 43017-5319  
Telephone: (614) 792-5555  
Facsimile: (614) 792-5536