

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

Leo Stoller d/b/a
CENTRAL MFG.
P.O. Box 35189
Chicago, IL 60707

Opposer,

vs.

Airframe Business Software, Inc.
800 Southwood Blvd, Suite 105
Incline Village, NV 89451

Applicant.

Opposition No: 91160234

Trademark: **AIRFRAME BUSINESS
SOFTWARE, INC.**

Opposition No: 91160234

Application SN: 78-233,204

TTAB

TTAB/NO FEE



**MOTION TO DISMISS APPLICANT'S
COUNTERCLAIMS UNDER FRCP 12(b)**

06-25-2004
U.S. Patent & TMO/c/TM Mail Rcpt Dt. #22

NOW COMES the Opposer and moves the Board for an Order dismissing Applicant's counterclaim for failure to state a claim upon which relief can be granted.

Specifically, the counterclaims, Paragraphs 3, 4, 5, 6, 7, and 8, fail to state a claim upon relief can be granted.

"3. Opposer Central Mfg. Co. is the current listed registrant for the AIR FRAME Registrations, which include the following: Registration No. 2,137,218 in class 25 for 'athletic shoes; cloth baby bibs; bandannas; baseball caps; baseball shirts; blouses; baby buntings; caps; casual pants; casual shoes; children's wear, namely, pants, shirts, pajamas, stockings, underwear, hats, shoes; collars cover-alls; dress shirts; dresses; garter belts; gloves; golf shirts; gym shirts; hats; hosiery; jackets; jeans; jumpers; knit shirts; leg warmers; lingerie; mittens; neckties; negligees; painter's caps; pajamas; parkas; poly-type shirts; ponchos; robes running shoes; running shorts; scarves; shirts; shawls; shoes; shorts; ski jackets; skirts; slacks; sleepwear; slippers; non-protective snowmobile suits; socks; sport shoes; sunsuits; sun- visors; suspenders; sweatbands; sweat pants; sweat shirts; sweat shorts; sweaters; swimwear; swimsuits; T-shirts; tank tops; tennis shirts; ties; tights; tracksuits; underwear; vests; walking shorts; wind resistant jackets; workpants; wrist bands'; Registration No. 2,128,940 in class 12 for 'motorcycles, bicycles, boats, tires'; Registration No. 2,138,609 in class 9 for 'audio cassettes, audio tapes, audio discs, and phonograph records all featuring science fiction matter; video discs, motor picture films, and prerecorded videotapes, all featuring animated works about science fiction matter; binoculars, calculators; blank audio cassettes; blank video cassettes; air tanks for use in scuba diving; electric irons; electronic flying insect light traps, electronic garage door locks; eyeglasses and sunglasses and frame there for; cases for eyeglasses and sunglasses; life jackets; life belts; life nets; decorative refrigerator magnets; slide projectors; photographic slide transparencies; photographic video cameras and lenses there for;

radios; safety goggles; telephones, telescopes; electronic calendars, namely, handheld personal electronic devices for scheduling appointments', Registration No. 2,137,059 in class 41 for 'series of television and radio programs about science fiction; musical entertainment services in the nature of live performances by a vocal group; arcade service for video amusement games; organizing and conducting sporting events for tennis and golf; amusement park services in the nature of children's bouncing ride; conducting aerobatic competitions; educational services, namely providing workshops, lectures, courses and group instruction in trademark licensing', and Registration No. 2,138,806 in class 18 for 'toys and sporting goods, namely tennis rackets, golf clubs, tennis balls, basketballs, baseballs, soccer balls, golf balls, cross bows, tennis racket strings and badminton shuttlecocks, toy airplanes, hobby craft kits for building toy airplanes, toy building structures, and toy bicycles not intended for riding, pool cues, pool tables, darts, billiards, billiard cue cases, billiard cue racks, billiard gloves, fishing rods, hockey sticks, hockey pucks, ping pong paddles, ping pong balls.'

4. The AIR FRAME Registrations are a source of damage and injury to Applicant.

5. Applicant incorporates by reference the allegations of paragraphs 1 through 4 as though fully set forth herein.

6. Upon information and belief, the AIR FRAME mark has not been used in commerce with all of the goods and services listed in the AIR FRAME Registrations as required under the Lanham Act. Because there has not been bona fide use in commerce of the AIR FRAME mark on all of the goods and services listed in the AIR FRAME Registrations, the AIR FRAME Registrations are invalid and should be canceled.

7. Applicant incorporates by reference the allegations of paragraphs 1 through 6 as though fully set forth herein.

8. Upon information and belief, the AIR FRAME Registrations were procured by fraud, because Opposer was aware, or should have been aware, that there was no bona fide use of the AIR FRAME mark in commerce on all of the listed goods and services when the statements of use and Section 8 declarations for the AIR FRAME Registrations were filed. The statements of use and Section 8 declarations, therefore, falsely represented to the Patent and Trademark Office ("PTO") that the AIR FRAME mark had been used in commerce on all of the listed goods and services. This was a material misrepresentation, since use in commerce on all of the listed goods and services is a prerequisite under the Lanham Act to obtaining federal registration of a trademark for those goods and services. Opposer knew, or should have known, that the allegation of use in commerce on all of the listed goods and services was false, and Opposer intended by this false representation to induce reliance by the PTO on the misrepresentation so that the AIR FRAME mark would be registered. The PTO did in fact rely on Opposer's material misrepresentation and the AIR FRAME Registrations were therefore issued as a result of Opposer's fraud on the PTO. Because the AIR FRAME Registrations were fraudulently obtained, they should be canceled.

FRAUD MUST BE PLEAD WITH PARTICULARITY

Fraud must be plead with particularity. Fed. R. Civ. P. 9(b). *La Maur, Inc. v. Computer Styles, Inc.*, U.S.P.Q. 495 (TTAB 1971), amended, 170 U.S.P.Q. 159 (TTAB 1971).

Fraud in procuring a Trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with his application. *Torres v. Cantine Torresella S.r.l.*, 808 F. 2d 46, 48 (Fed. Cir. 1986). Fraud will be deemed to exist only when there is a deliberate attempt to mislead the Patent Office into registering the mark. *Oreck Corp. v. Thomson Consumer Electronics, Inc.*, 796 F. Supp. 1152, 1160 (S.D. Ind. 1992).

Applicant's pleading cannot withstand Opposer's Motion to Dismiss for failure to state a claim, for the Applicant failed to allege such facts that if proven, would establish that the plaintiff has abandoned its said Registration and/or committed a fraud on the Patent and Trademark Office either in the procurement and/or maintenance of its said mark.

WHEREFORE, the Opposer prays that the Board dismiss Applicant's counterclaim.

By: Leo Stoller

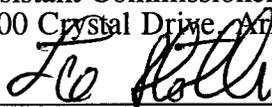
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Date: June 19, 2004

Certificate of Mailing

I hereby certify that the foregoing *Motion to Dismiss* is being deposited with the U.S. Postal Service as First Class Mail in an envelope addressed to:

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2900 Crystal Drive, Arlington, Virginia 22202-3513



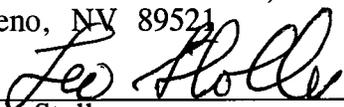
Leo Stoller

Date: June 19, 2004

Certificate of Service

I hereby certify that this *Motion to Dismiss* is being sent by U.S. Mail and deposited with the U.S. Postal Service by First Class Mail, in an envelope addressed to:

Ann Rosevear
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Date: June 19, 2004

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