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December 10, 2004

United States Patent & Trademark Office
Commissioner for Trademarks
TRADEMARK TRIAL & APPEAL BOARD
P.O. Box 1451
Alexandria, VA 22313-1451

Box TTAB Fee

RE: Answer to Notice of Opposition; Counterclaim for Cancellation
Gold Shells, Inc. v. Cangiarella; Cangiarrella v. Roger Rojas
Opposition No. 91162780 78229875
Cancellation No. _____
ESTTA confirmation receipt ID: ESTTA21089

Dear Sir or Madam:

Please find enclosed Applicant Keith Cangiarella's Answer to Notice of Opposition and Counterclaim filed against Registration No. 2,243,269 in the name of Roger Rojas (as then alleged predecessor-in-interest).

Such document was filed via ESSTA this date under confirmation receipt ID: ESTTA21089, however, inasmuch as the ESTTA system has no apparent means to accept payment for the counterclaim, we are again providing you a copy herewith along with check No. 1632 in the amount of $300.00 as and for the fee associated with the counterclaim for cancellation of a registered mark.

Please also find a Power of Attorney Form executed by the Applicant herein appointing the undersigned attorney in this matter.

Such document was also filed via ESTTA this date.

Please note that all of the above-listed documents (aside from the check) as well as a copy of this letter, have been forwarded to Opposer's counsel, Peter H. Smith.

Please feel free to contact me with any questions or concerns.

Thank You,

Stephen L. Anderson
Attorney for Applicant

12-15-2004
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #64

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

In the Matter of Trademark Application Serial No.: 78/229,875 Mark: MESSAGE IN A BOTTLE GOLD SHELLS, INC., a California corporation, Opposer, v. KEITH CANGIARELLA, Applicant.	Opposition No. 91162780 Cancellation No. _____
In the Matter of Trademark Registration No.: 2,243,269 Mark: MESSAGE IN A BOTTLE KEITH CANGIARELLA, Petitioner, v. ROGER ROJAS, Registrant	

APPLICANT'S ANSWER TO NOTICE OF OPPOSITION AND COUNTERCLAIM

Applicant, Keith Cangiarella ("Applicant"), for his answer to the Notice of Opposition against his application for registration of his trademark: MESSAGE IN A BOTTLE, Serial No. 78/229,875, filed on March 25, 2003 and published in the Official Gazette on June 29, 2004, filed by Opposer Gold Shells, Inc. (as the alleged assignee, and/or successor-in-interest of Registrant Roger Rojas), hereby generally and specifically denies each and every allegation contained in the Opposition hereinafter not specifically admitted, modified, or qualified, and strict proof is demanded thereof. Applicant further responds to Opposition with the answers as follows:

1. Applicant admits that the filing date of his application, Serial No. 78/229,875 was March 25, 2003. Applicant also admits that his date of first use of the trademark applied for as

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claimed was at least as early as March 10, 1998. Otherwise, to the extent that the allegations are understood, Applicant denies the allegations of Paragraph 1 for the reason that they are untrue or on the grounds that Applicant is without knowledge or information sufficient to form a belief as to the allegations and therefore denies same. Applicant more specifically denies that Opposer, Gold Shells, Inc. "is the owner of U.S. service mark registration no. 2,243,269 for the mark MESSAGE IN A BOTTLE in Class 38 for receiving communications from others, recording such communication in written or printed form, and transmitting such communication to others, which was registered on the Principal Register on May 4, 1999."

Applicant further denies the allegation that "[s]aid registration is valid and subsisting and is conclusive evidence of Opposer's exclusive right to use said mark in commerce on the services specified in said registration, Opposer's predecessor having timely filed a combined affidavit of continuing use under Sectrions 8 and 15 of the Lanham Act between the fifth and sixth anniversaries of Opposer's registration date."

Applicant further denies that the allegation that there is a "related nature of the services for which Opposer's mark was registered and the goods for which Applicant's application has been filed."

Applicant further denies that "Applicant's mark so resembles Opposer's registered mark as to be likely to cause confusion, or to cause mistake, or to deceive."

2. Applicant is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 2 and therefore denies the same.

3. Applicant admits that the filing date of his application, Serial No. 78/229,875 was March 25, 2003. Applicant also admits that his claimed first use in commerce was at least as early as June 10, 1998. Otherwise, to the extent that the allegations are understood, Applicant

denies the allegations of Paragraph 3 for the reason that they are untrue, or otherwise that Applicant is without knowledge or information sufficient to form a belief as to the allegations and therefore denies the same. To the extent that a legal conclusion is therein stated, no response is required. Applicant further specifically denies the allegation that "[s]ince Janaury 16, 1999, Opposer or its predecessor have been, and Opposer is now, actually using the mark MESSAGE IN A BOTTLE in connection with the sale of services as described in the registration and as a trademark in connection with the sale of goods consisting of novelty, favor, and souvenir bottles containing messages and greetings, identical to some of the goods set forth in Applicant's application."

Applicant further denies the allegation that "[u]nder section 7(c) of the Lanham Act, Opposer has a priority right to the mark through constructive use based on the filing date of its predecessor's original intent-to-use service mark application..."

Applicant further denies the allegation that "[u]se by Opposer and its predecessor has been valid and continuous since the date of first use and has not been abandoned."

Applicant further denies the allegation that "Applicant uses the the mark on services which are identical to those for which Opposer has registered its mark, namely receiving communications from others, recording such communications in written or printed form, and transmitting such communications to others."

Applicant further denies the allegation that [s]aid mark of Opposer is symbolic of extensive good will and consumer recognition built up by Opposer and its (alleged) predecessor through a substantial amount of time and effort in advertising and promotion."

Applicant further denies the allegation that "the nature of the goods and services of the parties are substantially similar", and also for purposes of this proceeding, only, denies that

"Applicant's mark so resembles Opposer's mark as to be likely to cause confusion, or to cause mistake, or to deceive."

4. Applicant admits that he is not a person who has used the mark MESSAGE IN A BOTTLE prior to the application filing date of Opposer's alleged predecessor. Applicant denies that Opposer has any "right of priority under Section 7(c) of the Lanham Act" or otherwise. To the extent that a legal conclusion is therein stated, no further response is required.

5. Applicant denies the allegations of Paragraph 5 for the reason that they are untrue. Applicant is without knowledge or information sufficient to form a belief as to the allegations with respect to Opposer's alleged predecessor and therefore denies same. Applicant specifically denies that "the relevant class of the public has come to associate Opposer with (any) said designation." Applicant denies that his "mark consists of and comprises matter that may disparage and falsely suggest a connection with Opposer." To the extent that a legal conclusion is therein stated, no response is required.

6. Applicant denies the allegations of Paragraph 6 for the reason that they are untrue.

Defendant denies Opposer's Prayer and all allegations therein contained and further submits the following separate and alternative affirmative defenses as to this matter:

AFFIRMATIVE DEFENSES

1. As a result of his long term, continuous and substantial usage of his mark MESSAGE IN A BOTTLE since adoption, such mark has become distinctive of the Applicant's goods in commerce and such mark is a valuable asset of Applicant which has become and carries considerable goodwill and consumer acceptance of Applicant's products sold under the mark. Such goodwill and widespread usage has made the mark distinctive to the Applicant.

2. Opposer lacks any standing to bring this opposition.

3. Opposer is barred by laches, acquiescence and estoppel from contesting this opposition.

4. Opposer's claims are barred due to its own fraud and fraudulent conduct and that of its alleged predecessor as engaged in before the United States Patent & Trademark Office.

5. Opposer's claims are barred as unconscionable and due to Opposer's (and its alleged predecessor, Roger Rojas') unclean hands.

6. Opposer (and its alleged predecessor, Roger Rojas) has not used the mark MESSAGE IN A BOTTLE on goods or services as an identification of origin of those goods or services identified in the Notice of Allowance. As such, Opposer has no trademark rights to the term for the goods or services, regardless of when and if it allegedly first used the term in commerce.

7. Opposer and its alleged predecessor has not used the MESSAGE IN A BOTTLE mark on any services that may be properly characterized as within International Class 38.

8. There is a myriad of adoptions and uses of the mark MESSAGE IN A BOTTLE. As such, any service mark rights that Opposer (and/or its alleged predecessor) may allegedly have are narrowly circumscribed to the specific services identified by the Notice of Allowance of the Registration No. 2,243,269 and any other use would not lead to a likelihood of confusion.

9. Notice of Opposition fails to state a claim upon which relief can be granted, and in particular, fails to state legally sufficient grounds for sustaining the opposition.

In view of the foregoing, Applicant contends that this opposition is groundless and baseless in fact; that Opposer has not shown wherein it will be, or is likely to be, damaged by the registration of Applicant's trademark; that Applicant's trademark is manifestly distinct from any

alleged mark of the Opposer or any designation of the Opposer and Applicant prays that this Opposition be dismissed and that Applicant be granted registration of his trademark.

APPLICANT'S COUNTERCLAIM FOR CANCELLATION
[37 C.F.R. § 2.106(b)(2)(i); 37 C.F.R. §2.114(b)(2)(i)]

Petitioner Keith Cangiarella, an individual, and doing business as DreamWeaver Studios, having a place of business at 331 N. Harrington Drive, Fullerton, CA 92831 ("Applicant") believes that he has been and will be damaged by Registration No. 2,243,269, owned in the name of Roger Rojas, ("Registrant") and pursuant to 15 U.S.C. §1064 et. seq. and 37 C.F.R. §2.111 et. seq. hereby petitions to cancel the same.

As grounds therefore it is alleged that:

1. Applicant is an individual engaged in the business producing and selling favor, and novelty souvenir bottles containing messages and greetings, invitations, promotional materials of others, and advertising materials of others; Kits comprised of bottles, paper for creating promotional messages, advertising messages, greetings, messages and invitations and packaging and boxes for mailing.

2. Applicant uses and has continuously used the trademark MESSAGE IN A BOTTLE in connection with his goods and services in connection with his business for well over six (6) years with a first use date of March 10, 1998 and a first use in commerce date of June 10, 1998.

3. That on March 03, 1999, Applicant filed with the United States Patent & Trademark documents pertaining to his MESSAGE IN A BOTTLE branded novelty gift souvenir bottles under the Disclosure Document No. 452308.

4. That on March 08, 1999, Applicant filed with the United States Patent & Trademark a nonprovisional Patent Application No. 09/265,237 as pertaining to his MESSAGE IN A BOTTLE branded novelty souvenir gift bottles.

5. Applicant obtained a Federal copyright registration, namely Registration No. VAu 483-244 for his work consisting of a photograph of his distinctive MESSAGE IN A BOTTLE novelty souvenir gift bottle on January 28, 2000, which was based on a creation date of January 1998.

4. Since adopting his MESSAGE IN A BOTTLE trademark in 1998, Applicant has spent substantial sums in the advertising and promotion of Applicant's business and professional quality of the goods and services under the MESSAGE IN A BOTTLE trademark throughout the United States, and is continuing to spend substantial amounts of time and money in promotion the same.

5. As a result of the expenditure of considerable sums for promotional activities, advertising, and by virtue of the excellence of his products and services, Applicant has garnered for his MESSAGE IN A BOTTLE trademark a most valuable reputation and has developed extensive goodwill throughout the United States. His products have further been the subject of reports, advertisements and features in newspapers and magazines of general circulation, including, without limitation, the Orange County Register (April 4, 1999) and Modern Bride magazine (Fall, 2001).

6. On March 25, 2003, Applicant filed a trademark application on the Principal Register for MESSAGE IN A BOTTLE in Class 16 for "favor, and souvenir bottle containing messages and greetings, invitations, promotional materials of others, and advertising materials of others; Kits comprised of bottles, paper for creating promotional messages, advertising

messages, greetings, messages and invitations and packaging and boxes for mailing." This application was assigned Serial No. 78/229875.

7. Applicant is the owner of State of California Service mark Registration No. 059960 for the mark MESSAGE IN A BOTTLE as registered for "manufacturing and shipping a novelty, favor, souvenir bottle, containing messages and greetings, invitations, promotional materials of others and advertising materials of others.

8. On October 21, 2004, a California corporation, GOLD SHELLS, INC., as the alleged successor-in-interest to Registrant Roger Rojas, relying on his trademark MESSAGE IN A BOTTLE, filed the above- answered opposition to Applicant's application. The trademark relied on by the Opposer has been registered and remains in the name of an individual, Roger Rojas ("Registrant"). On January 6, 1997, Registrant Roger Rojas filed application Serial No. 75226521 for registration on the Principal Register for the mark MESSAGE IN A BOTTLE in International Class 38 for "receiving communications from others, recording such communications in written or printed form, and transmitting such communications to others." This application matured into Reg. No. 2,243,269 on May 4, 1999 and is the subject of this petition.

9. Applicant is informed and believes that on or about January 28, 1999, under notice of Section 1001 of Title 18 of the United States Code, Registrant submitted a sworn declaration to the U.S. Patent & Trademark Office in which he stated that "Applicant is using the mark in commerce on or in connection with the services identified in the Notice of Allowance in this application as receiving communications from others, recording such communications in written or printed form, and transmitting such communications to others."

10. On information and belief, Registrant fraudulently obtained the registration by purposefully providing a false and misleading description of the goods and/or services covered by his application. The specification in the formal application papers filed by Registrant under oath stated that the goods and/or services were being used in International Class 38 as "telecommunication services" and was further described as "receiving communications from others, recording such communications in written or printed form, and transmitting such communications to others." Notwithstanding such representations, Applicant is informed and believes that the goods and/or services actually used by Registrant, if any, were actually more properly described as within International Class 16, as related to, similar, or identical to the goods that were then in use, and remain in use by the Applicant herein.

11. Applicant on information and belief further alleges that the Registrant, Roger Rojas intentionally mischaracterized his goods as "telecommunication services" with the intent to avoid a potential descriptiveness refusal, (with respect to the sale and offering of "messages in a bottle,") and/or with the intent to mislead potential third party opposers, including Applicant, as to the nature of the goods and services used in connection with his purported MESSAGE IN A BOTTLE mark to the extent that his goods and services were not similar in nature to those of the Applicant herein, but instead were "telecommunications services." In fact, Applicant is informed and believes that the goods and services used in connection with Registrant's alleged MESSAGE IN A BOTTLE trademark application filed under Serial No. 75226521 and subsequently registered under Registration No. 2,243,269 were not properly classified as "telecommunications services" but rather actually consisted of the sale of novelty and souvenir gift bottles containing personalized messages of others.

12. Upon information and belief, when Registrant submitted his Statement of Use under 37 C.F.R. § 2.88 to the U.S. Patent & Trademark Office ("PTO") on or about January 28, 1999, which indicated under oath and with knowledge that "willful false statements may jeopardize the validity of the application or any resulting registration" and which further alleged that that he had first used the mark MESSAGE IN A BOTTLE in connection with "receiving communications from others, recording such communications in written or printed from others, and transmitting such communications to others" with a first use date of January 16, 1999. In further support of his Statement of Use filed on or about January 28, 1999, Registrant alleged that "the manner and mode of use of the mark in connection with the services is on advertising flyers, letterheads, (sic) business cards, computer screen displays in electronic commerce, and labels and containers used in carrying out the services." Upon information and belief, such representations concerning the date of first use and the manner and mode of use was intentionally false and misleading and was done with the specific intent of misleading the Patent & Trademark Office and/or depriving potential third parties, including Applicant of their opportunity to oppose such application.

13. On further information and belief, the sole purpose for Registrant's fraudulent description and misleading representations was to avoid a conflict based on Applicant's prior use of the term MESSAGE IN A BOTTLE on novelty, favor and souvenir gift bottles containing messages of others and advertising materials of others; Kits comprised of bottles, paper for creating promotional messages, advertising messages, greetings, messages and invitations and packaging and boxes for mailing, which Registrant knew or should have known that Applicant had used since at least as early as March 10, 1998.

14. Upon information and belief, Registrant Rojas knowingly submitted his false description of goods and services as being properly classified as "telecommunications services" in International Class No. 038, while he was aware that the actual goods and/or services allegedly used in connection with the MESSAGE IN A BOTTLE mark was more closely related to and more properly classified within International Class 016 as involving "the sale of goods consisting of novelty, favor and souvenir bottles containing messages and greetings, identical to some of the goods set forth in Applicant's application" herein. Indeed, in its Opposition herein, Opposer has alleged at paragraph 3, that it is now, and heretofore, its alleged predecessor since January 16, 1999 has been "actually using the mark MESSAGE IN A BOTTLE in connection with the sale of services as described in the registration and as a trademark in connection with the sale of goods consisting of novelty, favor and souvenir bottles containing messages and greetings, identical to some of the goods set forth in Applicant's application."

15. Upon information and belief Applicant alleges that the representations made within Registrant's Statement of Use as submitted to the Trademark Office on or about January 28, 1999 was made by the owner of the application, Roger Rojas with the knowledge and belief that said statement was false. Said false statement was made with the intent to induce authorized agents of the U.S. Patent and Trademark Office to grant said registration, and, reasonably relying upon the truth of said false statements, the U.S. Patent and Trademark Office did, in fact, grant said registration to Registrant. Applicant was damaged by said false statements and the registration issued in reliance thereon in that Applicant, since March 10, 1998, has continuously used the mark MESSAGE IN A BOTTLE, and Applicant's continued and legal use of said mark has been impaired and will be further impaired by the continued registration of said mark of Registrant.

16. On information and belief, Registrant did not use the mark MESSAGE IN A BOTTLE *in commerce* at the time when he filed the Statement of Use. Further, Applicant alleges that the specimen attached to Registrant Rojas' Statement of Use filed on January 28, 1999, could not sufficiently support the allegation of use in commerce. As a specimen, the mark was allegedly placed on letterhead only, and such letterhead constituted only of an generalized and unparticularized announcement which did not and does not sufficiently demonstrate any actual use in commerce by the Registrant. It was not placed on the goods themselves, their containers or the tags, labels affixed, nor was displayed in connection with the bona fide offering or sale of services. Such "token" usage is not a proper use in commerce upon which a registration may properly issue.

17. On information and belief, when Registrant submitted its Statement of Use to the PTO indicating that he first used the mark MESSAGE IN A BOTTLE in commerce beginning on January 16, 1999, such information was false.

18. Upon information and belief, as stated above, Registrant misrepresented the nature of his alleged use in commerce of the MESSAGE IN A BOTTLE trademark at the time he submitted his Statement of Use which finally led to the registration that is the subject of this petition. On information and belief, Registrant procured the aforesaid registration by false means and/or by knowingly and willfully making false and/or fraudulent declarations or representations to the PTO, including, *inter alia*, false alleging in a Declaration under 37 CFR §1(a) that

(a) Registrant used the mark *in commerce*, and

(b) the first use of the mark was on January 16, 1999 for receiving, recording and transmitting communications, when, on information and belief, Registrant did not use and still does not use the mark for receiving, recording and transmission communications of others in

International Class 038. Upon information and belief, said false statements were made with the intent to induce authorized agents of the PTO to grant said registration, and reasonably relying upon the truth of said false statements, the PTO did, in fact, grant said registration to Registrant.

19. Upon information and belief, Registrant knew at the time he filed his statement of use made as related to the application that ultimately matured into Reg. No. 2243269 that the statements contained therein were false.

20. Upon information and belief, Registration No. 2243269 was fraudulently obtained by the Registrant since Registrant's mark MESSAGE IN A BOTTLE and design and the services performed under the mark—namely, souvenir bottles containing messages and greetings—upon information and belief are not and at the time of filing of the application which resulted in Registration No. 2243269 were not rendered in interstate commerce as alleged in the application, but to the contrary were wholly rendered, within the state of California. As such, the Registrant did not qualify the mark for Federal Registration, and Registration No. 2243269 is invalid.

21. Upon information and belief, after the filing of the application which matured into Registration No. 2243269, Registrant abandoned the registered mark as he failed to use the mark in connection with his products and services for at least two years, with no intention to resume such use.

22. On information and belief, Registration No. 2243269 is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used. Applicant specifically alleges that without proper licensing or any assignment, Registrant has knowingly required or consented to a third party GOLD SHELLS, Inc. to describe itself in its advertising, marketing and sales promotion materials as MESSAGE IN A BOTTLE owner since at least 2003, long before the date of

October 5, 2004, when the assignment was allegedly made from Registrant to GOLD SHELLS, Inc. GOLD SHELLS, Inc. never was, in fact, the owner of the mark MESSAGE IN A BOTTLE at that time.

23. Upon information and belief, Registrant failed to disclose to the United States Patent & Trademark Office known uses of the MESSAGE IN A BOTTLE mark, or an allegedly confusingly similar marks by others, including the Applicant, whose legal rights are superior to Registrant's. Registrant knew that the other third parties had rights in the mark superior to Registrant's and either believed that a likelihood of confusion would result from Registrant's use of his mark or had no reasonable basis for believing otherwise and Registrant, in failing to disclose these facts to the Patent & Trademark Office, intended to procure a registration to which Registrant was not entitled.

24. Applicant has used the mark MESSAGE IN A BOTTLE long prior to any use, if at all, by the Registrant. As alleged by the Opposer in its opposition herein, Registrant's mark caused consumers to make a false connection with Applicant. Registrant's mark falsely suggests a connection with Applicant's mark as barred by Lanham Act §2(a).

25. Applicant has been, and will continue to be damaged by the issuance and existence of Registration No. 2243269 issued to the Registrant, in that since 1998, Applicant has continuously used the mark MESSAGE IN A BOTTLE in the United States in connection with his business producing and selling souvenir bottles containing messages. Using Registration No. 2243269 as the basis of its claim, the third party GOLD SHELLS, Inc. has opposed the registration of Applicant's trademark MESSAGE IN A BOTTLE herein.

26. A duplicated copy of this Answer to Notice of Opposition and Counterclaim and the fee required in §2.6(a)(16) is enclosed herewith.

WHEREFORE, in view of the above allegations, Registrant is not entitled to continue registration of his alleged mark since Registrant, upon information and belief, committed fraud in the procurement of the subject registration, and/or in the alternative has abandoned use of said mark, and/or that the registration is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used. As such, the Applicant prays that Registration No. 2243269 issued May 4, 1999 be cancelled and that his Counterclaim for Cancellation be sustained in favor of Applicant.

ANDERSON & ASSOCIATES

Dated: December 10, 2004

By: _____

Stephen L. Anderson, Esq.
Hao Fang, Esq.
27349 Jefferson Avenue, Ste. 211
Temecula, CA 92590
(951) 719-1371

Attorneys for Applicant/Petitioner
KEITH CANGIARELLA

Certificate of Service

I hereby certify that a copy of the foregoing APPLICANT'S ANSWER TO NOTICE OF OPPOSITION; COUNTERCLAIM FOR CANCELLATION was mailed first-class mail, postage prepaid, to Peter H. Smith, Attorney at law, 1535 J Street, Suite A, Post Office Box 1867, Modesto, California, 95353, attorney for Opposer, December 10, 2004

_____
DOLLY J. SMITH

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

In the Matter of Trademark Application Serial No.: 78/229,875 Mark: MESSAGE IN A BOTTLE GOLD SHELLS, INC., a California corporation, Opposer, v. KEITH CANGIARELLA, Applicant.	Opposition No. 91162780 Cancellation No. _____ POWER OF ATTORNEY
In the In the Matter of Trademark Registration No.: 2,243,269 Mark: MESSAGE IN A BOTTLE KEITH CANGIARELLA, Petitioner, v. ROGER ROJAS, Registrant	

The undersigned Applicant/Petitioner KEITH CANGIARELLA hereby appoints Stephen L. Anderson, (CBN 150860) and Hao Fang (CBN 231174) of the law firm of Anderson & Associates, 27349 Jefferson Ave. Suite 211, Temecula, CA, 92590, its duly authorized agents and attorneys in the matter of this opposition/cancellation matter, and to transact all business in the Patent and Trademark Office and in the United States courts connected therewith, to sign all papers which may hereinafter be filed in connection therewith, and to receive all communication relating to the same.

Dated: December 8, 2004

Keith Cangiarella
KEITH CANGIARELLA