

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Baxley

Mailed: February 27, 2008

Opposition No. 91162780

Message In A Bottle, Inc.
f/k/a Gold Shells, Inc.

v.

Keith Cangiarella

Before Hohein, Drost and Walsh,
Administrative Trademark Judges

By the Board:

On January 28, 2008, the Board issued an order wherein, among other things, it denied Cangiarella's motion for leave to amend his counterclaim to add a ground of genericness thereto. On February 20, 2008, Cangiarella filed a motion for partial reconsideration of that order. Although opposer/counterclaim defendant Message In A Bottle, Inc.'s ("Message") time to respond thereto has not lapsed, the Board, in its discretion, elects to decide the motion for partial reconsideration at this time.¹

Cangiarella asks that the Board reconsider its denial of the motion for leave to amend his counterclaim and allow him to add a genericness ground thereto. Cangiarella argues

¹ On February 21, 2008, the Board suspended this case pending its decision on Cangiarella's motion for partial reconsideration.

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that he had been represented by an attorney in this case in whose competence he had "faith and trust;" and that, after he began representing himself several years into this case, he acted as quickly as possible upon becoming aware that a genericness claim could be raised herein. Accordingly, Cangiarella contends that "[t]he Board would not want to prejudice [him] for acting pro se" and asks that the Board reconsider the January 28, 2008 order and allow him to add the genericness ground to his counterclaim.

The premise underlying a motion for reconsideration under Trademark Rule 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in the order it issued. Such a motion may not properly be used to reargue points presented in a brief on the original motion. See TBMP Section 518 (2d ed. rev. 2004).

Cangiarella has merely reargued points previously raised in support of his motion for leave to amend his counterclaim and has failed to persuade us that denial of his request to add a genericness ground to his counterclaim was in error. Rather, the Board remains of the opinion that Cangiarella unduly delayed by waiting nearly three years after the initial counterclaim was filed to seek to add the genericness ground thereto and that prejudice to Message would result from Cangiarella being allowed to add that ground on the eve of trial. The failure of Cangiarella's

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former attorney to seek to add the genericness counterclaim earlier in no way entitles Cangiarella to add that ground at this late juncture. See, e.g., *Williams v. The Five Platters, Inc.*, 510 F.2d 963, 184 USPQ 744 (CCPA 1975), *aff'g* 181 USPQ 409 (TTAB 1974).

In view thereof, Cangiarella's request for partial reconsideration of the January 28, 2008 order is denied. Proceedings herein are resumed. Testimony periods are reset as follows.

30-day testimony period for
plaintiff in the opposition to close: April 4, 2008

30-day testimony period for defendant in the opposition
and as plaintiff in the counterclaim to close: June 3, 2008

30-day testimony period for defendant
in the counterclaim and its rebuttal testimony
as plaintiff in the opposition to close: August 2, 2008

15-day rebuttal testimony period for plaintiff
in the counterclaim to close: September 16, 2008

**Briefs shall be due as follows:
[See Trademark rule 2.128(a)(2)].**

Brief for plaintiff in the opposition shall be due: November 15, 2008

Brief for defendant in the opposition and as
plaintiff in the counterclaim shall be due: December 15, 2008

Brief for defendant in the counterclaim and its reply
brief (if any) as plaintiff in the opposition is due: January 14, 2009

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Reply brief (if any) for plaintiff in the
counterclaim shall be due:

January 29, 2009

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.