

Member of California
and Oregon State Bars

PETER H. SMITH
ATTORNEY AT LAW
1535 J STREET, SUITE A
MODESTO, CALIFORNIA 95354
WEBSITE: WWW.PHSMITH.COM
E-MAIL: PETERHSMITH@SBCGLOBAL.NET

Telephone (209) 579-9524
Facsimile (209) 579-9940

TTAB

July 3, 2008

Trademark Trial & Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

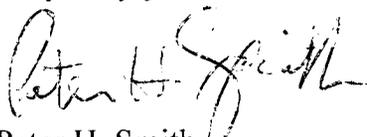
7/3/2008

Re: Message In A Bottle, Inc. vs. Cangiarella and Related Counterclaim
Opposition No. 91162780

Ladies/Gentlemen:

I am enclosing a reply to the applicant's opposition to the opposer's motion to strike in the above opposition/counterclaim proceeding, along with a certificate of service on the applicant. I am also enclosing a declaration in support of the reply accompanied by a certificate of service. Please file these documents and render your decision on the opposer's motion.

Very truly yours,


Peter H. Smith

PHS/clf
cc: Mr. Roger Rojas, Message In A Bottle, Inc.
Enclosures



07-07-2008

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

<p>MESSAGE IN A BOTTLE, INC.</p> <p style="text-align: center;">Opposer,</p> <p style="text-align: center;">v.</p> <p>KEITH CANGIARELLA</p> <p style="text-align: center;">Applicant</p>	<p>Opposition No.: 91,162,780</p> <p>Application Serial No.: 78/229,875</p> <p>Mark: MESSAGE IN A BOTTLE</p>
<p>KEITH CANGIARELLA</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>MESSAGE IN A BOTTLE, INC.</p> <p style="text-align: center;">Registrant</p>	<p>Counterclaim for cancellation</p> <p>Registration No.: 2,243,269</p> <p>Mark: MESSAGE IN A BOTTLE</p>
<p>OPPOSER MESSAGE IN A BOTTLE, INC.'S REPLY TO OPPOSITION TO MOTION TO STRIKE APPLICANT'S NOTICE OF RELIANCE</p>	

OPPOSER MESSAGE IN A BOTTLE, INC. ("Opposer") hereby replies to Applicant Keith Cangiarella's ("Applicant") Opposition to Opposer's Motion To Strike Applicant's Notice of Reliance ("Opposition").

In his Opposition Applicant states that the declaration and accompanying exhibits filed concurrently with his notice of reliance are entirely separate documents from his notice of reliance. Opposition ¶¶ 1, 7, 8, 10. Accordingly, Opposer moves to strike the declaration and all accompanying exhibits on the procedural grounds that the declaration is not properly admitted testimony pursuant to TMEP § 703.01(b).

“By written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses.” 37 CFR §2.123(b). In the absence of an agreement between the parties declarations or written statements are not permissible means to introduce testimony. *Order Sons of Italy in America v. Memphis Mafia Inc.*, 52 USPQ2d 1364, 1365 n.3 (TTAB 1999) (statement with exhibits by defendant's officer stricken where there was no agreement that defendant could file testimony in form of affidavit or declaration). There is no agreement between Applicant and Opposer allowing the introduction of testimony by declaration or any other means. See Declaration of Peter H. Smith, ¶2. Accordingly, Applicant's declaration and all exhibits accompanying the declaration should be stricken in their entirety.

Respectfully submitted,

MESSAGE IN A BOTTLE, INC.

By its attorney,



Peter H. Smith
Attorney at Law
1535 J Street, Suite A
Modesto, CA 95354
Phone (209) 579-9524
Fax (209) 579-9940
peterhsmith@sbcglobal.net

Date: July 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposer Message In A Bottle, Inc.'s Reply to Opposition to Motion to Strike Applicant's Notice of Reliance was mailed first class mail, postage pre-paid, to Keith Cangiarella, 331 N. Harrington Drive, Fullerton, California 92831, on July 3, 2008.

Dated: July 3, 2008.



Peter H. Smith

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

MESSAGE IN A BOTTLE, INC. Opposer, v. KEITH CANGIARELLA Applicant	Opposition No.: 91,162,780 Application Serial No.: 78/229,875 Mark: MESSAGE IN A BOTTLE
KEITH CANGIARELLA Petitioner, v. MESSAGE IN A BOTTLE, INC. Registrant	Counterclaim for cancellation Registration No.: 2,243,269 Mark: MESSAGE IN A BOTTLE
DECLARATION OF PETER H. SMITH	

I, Peter H. Smith, being duly sworn, make the following declaration in support of OPPOSER MESSAGE IN A BOTTLE, INC.'S REPLY TO OPPOSTION TO MOTION TO STRIKE APPLICANT'S NOTICE OF RELIANCE filed simultaneously herewith:

1. I am an attorney at law, duly licensed to practice law in the State of California, and am the attorney for opposer herein, Message In A Bottle, Inc. ("Opposer").
2. Neither Opposer nor I have entered into any agreement with the applicant herein, Keith Cangiarella, or anyone acting on his behalf, which would allow use of

sworn declarations as evidence at trial in lieu of the types of evidence allowed by the rules of the Trademark Trial and Appeal Board.

The foregoing facts are true of my own knowledge. I am competent to testify to such facts, and would so testify if I appeared before the Board as a witness.

Dated: July 3, 2008.

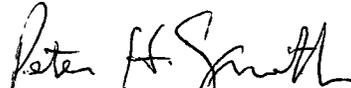
A handwritten signature in cursive script, reading "Peter H. Smith", is written over a horizontal line.

Peter H. Smith

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Declaration of Peter H. Smith was mailed first class mail, postage pre-paid, to Keith Cangiarella, 331 N. Harrington Drive, Fullerton, California 92831, on July 3, 2008.

Dated: July 3, 2008.



Peter H. Smith