

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

Mailed: March 17, 2009

Opposition No. 91162780

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

v.

Keith Cangiarella

**Robert H. Coggins,
Interlocutory Attorney:**

This case now comes up on opposer's motion (filed June 24, 2008) to strike applicant's testimonial declaration and the exhibits attached thereto, and opposer's motion (filed July 16, 2008) to strike applicant's sur-reply. On March 16, 2009, at approximately 2:15 p.m. Eastern time, the Board exercised its discretion to conduct a telephone conference to determine the outstanding motions. Participating in the conference were Keith Cangiarella, applicant, appearing *pro se*; Peter Smith, counsel for opposer; and the above-signed Board attorney responsible for resolving interlocutory matters in these cases.

During the conference, the Board considered the statements made and questions raised by both parties, as well as the supporting motions and record of this case. The Board presumes familiarity with the issues, and for the sake

of efficiency this order does not summarize the parties' arguments in the motions, or the statements or questions raised during the telephone conference. Instead, this order lists the decisions made by the Board.

Motion to Strike Testimonial Declaration

Opposer's motion to strike is granted. Accordingly, applicant's testimony declaration and the exhibits attached thereto, which were submitted with applicant's notice of reliance, will be given no further consideration by the Board. Applicant's exhibits H, I, J¹, J¹, and A --which exhibits are the subject of applicant's notice of reliance, were submitted separately from (though concurrently with) the testimonial deposition, and were not the subject of opposer's motion to strike --remain in evidence and will be accorded whatever probative value they may have.

Motion to Strike Sur-Reply

Opposer's motion to strike is granted. Accordingly, applicant's sur-reply in opposition to the motion to strike the testimonial declaration was given no consideration.

¹ Applicant labeled two separate exhibits attached to the notice of reliance as Exhibit J: a "combined affidavit of use and incontestability" and "opposer's responses to applicant's request for admissions." These remain in evidence. The Board notes that applicant also attached an Exhibit J to his testimonial declaration; however, as noted *supra*, the declaration and the exhibits attached thereto (including the additional Exhibit J which purports to be a fictitious business name statement) are stricken.

Schedule Reset

Testimony periods are reset as follows to allow applicant time in which to conduct a testimonial deposition should applicant so choose.²

30-day testimony period for plaintiff in the opposition to close: Closed

30-day testimony period for defendant in the opposition and as plaintiff in the counterclaim to close: May 18, 2009

30-day testimony period for defendant in the counterclaim and its rebuttal testimony as plaintiff in the opposition to close: July 17, 2009

15-day rebuttal testimony period for plaintiff in the counterclaim to close: August 31, 2009

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

Brief for plaintiff in the opposition shall be due: October 30, 2009

Brief for defendant in the opposition and as plaintiff in the counterclaim shall be due: November 29, 2009

Brief for defendant in the counterclaim and its reply brief (if any) as plaintiff in the opposition shall be due: December 29, 2009

Reply brief (if any) for plaintiff in the counterclaim shall be due: January 13, 2010

² This is not an order compelling a testimonial deposition. Dates are reset to allow applicant to conduct his own testimonial deposition should he so choose.

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. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

NEWS FROM THE TTAB:

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:
<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:
<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>