

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

Mailed: April 20, 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 April 3, 2009) for partial reconsideration of the Board's March 17, 2009 decision on opposer's motion to strike applicant's testimonial declaration and the exhibits attached thereto.

On April 17, 2009, at approximately 2:00 p.m. Eastern time, the Board exercised its discretion to conduct a telephone conference to determine the outstanding motion. 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 motion, briefs, 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 briefs, or the statements or questions raised during the telephone conference. Instead, this order lists the decisions made by the Board, and provides a brief discussion of the Board's decision.

Brief Discussion

In addition to many other topics covered in the telephone conference, the Board discussed the following issue with the parties.

Opposer's motion for reconsideration was premised on the argument that the Board erred in reopening applicant's testimony period as a remedy to cure applicant's defective notice of reliance. That is, that the Board should not have provided applicant with additional time to conduct a testimonial deposition because the testimonial declaration which was stricken was not admissible via a notice of reliance and therefore the defect (of submitting a testimonial declaration) under the notice of reliance could not be cured.

Opposer mischaracterizes the nature of the relief granted. The reopening of applicant's testimony period was not to allow applicant to cure a defective notice of reliance; the remedy was an exercise of the Board's discretion as a matter of equity to allow applicant to conduct a testimonial deposition. The law favors disposition of a case on its merits, and not permitting applicant additional time in which to conduct a proper testimonial deposition would have effectively prevented applicant from presenting any meaningful testimony during his

period as defendant in the opposition and as plaintiff in the counterclaim.

Opposer's original motion to strike applicant's testimonial declaration was based on the argument that a testimonial declaration is not the type of evidence that may be introduced by way of a notice of reliance. In his brief in opposition to the motion to strike, applicant argued that his testimonial declaration was "a separate document from" the notice of reliance. (App. Br. unnumbered p.1.) In its brief in reply, opposer apparently accepted this separation (or delineation of the documents) and moved to strike the declaration and its accompanying exhibits on the procedural ground that the declaration was not proper testimony under Trademark Rule 2.123(b).

The Board struck the testimonial declaration -and the exhibits attached thereto- under Trademark Rule 2.123(b) on the grounds that there was no written agreement between the parties that testimony could be submitted in the form of an affidavit or declaration. The Board clearly stated in its March 17, 2009 order that the testimonial declaration and notice of reliance were separate documents, that it was the testimonial declaration which was the subject of the motion to strike, and that while the testimonial declaration and the exhibits attached thereto would be stricken, the notice of reliance and exhibits attached thereto would remain.

By implying that the Board based its prior decision on the fact that a testimonial declaration is not the type of evidence

that may be introduced by way of a notice of reliance, opposer mischaracterizes the foundation on which relief was granted to applicant. The reopening of applicant's testimony period was not to allow applicant to cure a defective notice of reliance, it was a matter of equity to allow applicant to conduct a testimonial deposition after applicant's testimonial declaration had been stricken under Trademark Rule 2.123(b).

It was further noted that, in accordance with the Board's March 17, 2009 order, the reopening of applicant's initial testimony period is limited for the purpose of conducting a testimonial deposition, should applicant choose to conduct a deposition.

Order

It is Ordered:

1. Opposer's motion for reconsideration is denied.
2. Dates remain as reset in the Board's March 17, 2009 order.