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

Proceeding	91181448
Party	Plaintiff Jeff Brown
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IN THE UNITED STATE PATENT & TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

JEFF BROWN,	)	OPPOSITION NO.: 91181448
	)	
Petitioner,	)	TRADEMARK: PATRIOT GUARD
	)	RIDERS AND DESIGN
v.	)	
	)	APPLICATION NO.: 77/040379
PATRIOT GUARD RIDERS, INC.,	)	
	)	DATE FILED: NOVEMBER 9, 2006
Applicant.	)	
	)	

**OPPOSER’S RESPONSE IN OPPOSITION  
TO APPLICANT’S MOTION FOR SUMMARY JUDGMENT, AND COMBINED  
MOTION TO STRIKE CERTAIN OF APPLICANT’S EXHIBITS THERETO**

Opposer Jeff Brown (“Opposer”) submits this response in opposition to the motion for summary judgment filed by Applicant Patriot Guard Riders, Inc. (“Applicant” or “PGR, Inc.”). The Trademark Trial and Appeal Board (“TTAB”) must Applicant’s motion for summary judgment because there exist numerous disputes of fact that are material to Applicant’s theory of recovery, and because Applicant is not entitled to summary judgment as a matter of law.

**I. MOTION TO STRIKE CERTAIN EXHIBITS IMPROPERLY SUBMITTED IN CONNECTION WITH APPLICANT’S MOTION.**

Applicant supports its motion with a number of improperly authenticated exhibits, including Exhibits 7, 16, 17 and 18. In order to be admissible under Federal Rule 56(e), documents or exhibits “must be authenticated by and attached to an affidavit (or declaration in a Board proceeding) complying with the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.” *Raccioppi v. Apogee, Inc.*, 47 USPQ2d 1368, 1998 WL 425473, slip op. at \* 2 (TTAB 1998); TBMP § 528.05(a).

Opposer requests that the Board strike Applicant's Exhibit 7 as not properly authenticated as required by Fed. R. Civ. P. 56(e). Exhibit 7 consists of a May 15, 2006 email, purportedly sent by Opposer to "SBC" and "head shed," as well as a May 15, 2006 email, purportedly sent by "SBC" to Opposer. It was not submitted in connection with any declaration or affidavit. Neither Opposer nor "SBC" nor any other individual has identified or authenticated this document. As such, it must be stricken and excluded from consideration.

Opposer also requests that the Board strike Applicant's Exhibit 16 as not properly authenticated. Exhibit 16 consists of an internet printout from [www.patriotguard.org](http://www.patriotguard.org). It was not submitted in connection with any declaration or affidavit. "In view of the recognized transitory nature of Internet postings, the information posted may be modified or deleted at a later date without notice, and thus is not 'subject to the safeguard that the party against whom evidence is offered is readily able to corroborate or refute the authenticity of what is proffered.'" *Raccioppi*, 1998 WL 425473, slip op. at \* 3 (allowing introduction of evidence only where declarant stated the date of access and the URL of access).

Opposer also requests that the Board strike Applicant's Exhibit 17 as not properly authenticated. Exhibit 17 purportedly consists of a February 24, 2006 email from Jeff Brown to several individuals, a February 24, 2006 email to Jeff Brown from "Chip," a June 15, 2006 email from Jeff Brown to Bonnie Cutler and "head shed," a June 15, 2006 email from Bonnie Cutler to "head shed," and a May 11, 2006 email from Jeff brown to "Execs." It was not submitted in connection with any declaration or affidavit as required by Federal Rule 56(e).

Opposer also requests that the Board strike Applicant's Exhibit 18 as not properly authenticated. Exhibit 18 consists of an internet printout from [www.merriam-webster.com](http://www.merriam-webster.com). It was not submitted in connection with any declaration or affidavit. Exhibit 18 cannot be

considered self-authenticating, as it does not identify a “permanent source” for the information. *Raccioppi*, at \* 3. It does not reference a printed edition of the dictionary; it contains only online citations. Thus, like the evidentiary materials rejected as improperly authenticated in *Raccioppi*, Exhibit 18 “cannot be considered” an “electronically generated version[] of the printed publication,” and must be stricken. *Id.*

## **II. OPPOSER’S RESPONSE IN OPPOSITION TO APPLICANT’S MOTION FOR SUMMARY JUDGMENT.**

While the procedures governing a response to a motion for summary judgment do not require a response to any introductory material, Opposer believes such a response is necessary in light of the fact that Applicant makes numerous allegations not supported by Applicant’s “Statement of Undisputed Facts” or any evidence of record. Opposer specifically highlights Applicant’s statement that the filing of Opposer’s trademark application was motivated by his “realiz[ation] that he needed to do something to ensure that he could continue to sell merchandise through the ‘PGR Store’ now that he was not in a leadership position in the PGR....” (Def.’s Mem. p. 2.) No such evidence appears anywhere in the record. The allegation is improperly presented and must be disregarded by the TTAB.

### **A. Opposer’s response to Applicant’s “statement of undisputed facts.”<sup>1</sup>**

The vast majority of the facts set forth in Applicant’s “Statement of Undisputed Facts” are immaterial to the determination of priority of use by Opposer and fraud by Applicant raised in this Opposition. Opposer urges the TTAB to thoroughly review those portions of the record cited by the parties in their cross-motions for summary judgment to determine the exact evidence in the record.

### **I. Opposer does not contest the facts as set forth in Subheading I. (Pl.’s Ex. 25.)**

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<sup>1</sup> Applicant submitted its “Statement of Undisputed Facts” by numbered Subheadings only, as opposed to individually numbered paragraphs. Opposer will respond in kind.

**II.** Opposer does not contest the facts as set forth in the first paragraph of Subheading II with the exception that Opposer's (amended) application states a first use date of "at least as early as October 27, 2005," and a first use in commerce date of "at least as early as November 9, 2005" with respect to services. (Pl.'s Ex. 5.)

Opposer does not contest the facts as set forth in the second paragraph of Subheading II with the exception that Opposer's amended application states a first use date of "at least as early as November 29, 2005" with respect to the earliest use of the mark "Patriot Guard Rider" on goods. (Pl.'s Ex. 6.)

**III.** Opposer does not contest the facts as set forth in the first sentence of paragraph 1 of Subheading III. (Pl.'s Ex. 25.) Opposer disputes the allegations set forth in the second and third sentences of paragraph 1.<sup>2</sup>

Opposer does not contest the facts set forth in paragraph 2. (Pl.'s Ex. 25.)

**IV.** Opposer does not contest the facts as set forth in the first paragraph of Subheading IV, but Opposer specifically disputes that any of the allegations set forth in the first paragraph are material to the determination of priority of use by the Opposer and/or fraud by the Applicant. (Pl.'s Ex. 4, Resp. to Interrog. No. 12.)

Opposer does not contest the facts as set forth in the first sentence of the second paragraph of Subheading IV. With respect to the second sentence, Opposer does not contest the allegation that he attended the funeral service and that his name appears on some sort of sign-up sheet. However, Opposer disputes the remaining allegations set forth as fact in the second sentence. (*See* Bru Supp. Decl. ¶ 2; Pl.'s Ex. 41 ¶ 3.) Opposer disputes the allegations set forth as fact in the third sentence, and again states that he did not hear the term "Patriot Guard" used to

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<sup>2</sup> The proffered testimony is inadmissible, as counsel Opposer objected to this exact testimony on the grounds that it called for a "legal conclusion." (*See* Def.'s Ex. 1 p. 23:22-23.)

refer to a group of individuals acting for a single purpose, only in reference to a description of a variety of activities being performed by a variety of individuals belonging to a variety of different groups. (Pl.'s Ex. 9, Resp. to Req. for Adm. No. 1; *see also* Def.'s Ex. 1 p. 89:6-19.) Opposer specifically denies that any of the allegations set forth in the second paragraph are material to the determination of priority of use and/or fraud.

Opposer does not dispute the facts set forth in the third paragraph of Subheading IV. However, Opposer specifically disputes that any of those allegations set forth in the third paragraph are material to the determination of priority of use by Opposer and fraud by Applicant.

V. Opposer disputes the allegations as set forth in the first sentence of the first paragraph of Subheading V to the extent that Applicant improperly characterizes or explains the communications set forth in the November 8, 2005 email as a "test" of Opposer's idea. (Pl.'s Ex. 3, Resp. to Interrog. No. 12.) Opposer does not dispute the allegations set forth in the second sentence, but Opposer disputes the allegations set forth as fact in the third and fourth sentences of the first paragraph to the extent that Applicant improperly characterizes or explains the communications set forth in the November 9, 2005 emails between Wallin and the Opposer. (Pl.'s Ex. 8.) Opposer disputes the allegations set forth as facts in the fifth sentence. (Pl.'s Ex. 41, Exhibit A.) Opposer does not dispute the allegations set forth as fact in the sixth sentence to the extent that they accurately characterize or explain the communications set forth in the November 10, 2005 email. (*See* Def.'s Ex. 5, Exhibit D.)

With respect to the first sentence of the second paragraph of Subheading V, Opposer disputes that Wallin was one of "the founders" of the PGR association. (*See* Pl.'s Ex. 9, Resp. to Req. for Adm. Nos. 3, 5.) Opposer admits only that he occasionally referred to Wallin as a

founder out of “deference” and “respect.” (Id., Resp. to No. 5.)<sup>3</sup> Opposer does not dispute the allegations set forth in the second, third and fourth sentences of the second paragraph. Opposer disputes the fifth sentence of the second paragraph. (See Pl.’s Ex. 1, Exhibit A.)<sup>4</sup>

With respect to the first sentence of Subheading V, Subparagraph A, Opposer disputes that the triangular logo was developed in response to requests from individuals desiring “Patriot Guard Riders” merchandise; Opposer does not dispute the remaining allegations. (Pl.’s Ex. 4, Resp. to Interrog. No. 3; Pl.’s Ex. 41, Exhibit A.)<sup>5</sup> Opposer does not dispute the allegations set forth in the second sentence to the extent that they accurately characterize or explain the communications set forth in the November 10, 2005 email. (Def.’s Ex. 2, Exhibit B.) However, Opposer disputes the allegations set forth in the third sentence. (Pl.’s Ex. 2 p. 70:13-24; Supp. Bru Decl. ¶ 3; Pl.’s Ex. 41, Exhibit A.) Opposer does not dispute the allegations set forth in the fourth sentence, and notes that those allegations are consistent with Opposer granting permission to the PGR organization to use the mark for noncommercial purposes. (See Pl.’s Ex. 2 pp. 70:25-71:4, 119:18-120:15; Pl.’s Ex. 4, Resp. to Interrog. 10.)

Opposer does not dispute the first sentence of Subheading V, Subparagraph B. Opposer does not dispute the allegations set forth as fact in the second, third and fourth sentences for the

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<sup>3</sup> Although Applicant’s Exhibit 7 was not authenticated, and must be stricken, *see* Motion to Strike, *supra*, that document states that Opposer “initiated the Patriot Guard Riders.”

<sup>4</sup> It must be noted that Applicant’s statement that “[a]ccordingly, on or around November 9, 2005, the PGR association was formed” is not supported by evidence or exhibit. To the extent that Applicant relies on the evidence and exhibits set forth in that paragraph, those materials do not support the statement.

<sup>5</sup> Applicant submits a November 10, 2005 email in support of its statement that Opposer created the logo “in view” of requests for merchandise displaying the “Patriot Guard Rider” mark. Other evidence of record in this case demonstrates that Opposer had developed the logo prior to November 9, 2005, when he had already placed an order for production of armbands displaying the mark “Patriot Guard Rider” and the logo. (Pl.’s Ex. 1, Exhibit D; Pl.’s Ex. 41, Exhibit B.)

purposes of this response.<sup>6</sup> Opposer does not dispute the allegations set forth as facts in the fifth, sixth, seventh and eighth sentences.

With respect to the first and second sentences of Subheading V, Subparagraph C, Opposer does not dispute that he distributed for comment a mission statement he personally drafted or that the mission statement he personally drafted was revised to be “gender neutral” and plural. (*See* Def.’s Ex. 5, Exhibit I.) Opposer does not dispute the allegations set forth in the third sentence to the extent that they accurately characterize or explain the communications set forth in the November 12, 2005 email.

**VI.** Opposer does not dispute the allegations set forth in Subheading VI, with the exception that Opposer denies that the bylaws were filed with the Secretary of State. *See* Okla. Stat. tit. 22, § 1005(A) (bylaws are not filed with the Secretary of State in connection with incorporation). (*See* Def.’s Ex. 5, ¶ 39 and Def.’s Ex. 10, ¶ 7.)

**VII.** Opposer does not dispute the allegations set forth in the first paragraph. (Pl.’s Ex. 4, Resp. to Interrog. No. 10; Ex. 9, Resp. to Req. for Adm. Nos. 11, 17.)

Opposer disputes the allegations set forth as fact in the first sentence of the second paragraph of Subheading VII and further states that the allegations are not fact, but rather constitute inadmissible legal conclusions. (Pl.’s Ex. 2 pp. 67:11-18, 69:18-71:11.) Opposer

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<sup>6</sup> Plaintiff notes that the interview given by Opposer and submitted as Applicant’s Exhibit 5 states that “this *one rider* rode up there and parked his bike in front of the protesters.” Exhibit 5 thus creates a dispute of fact regarding attendance at the Greeley, Colorado funeral. Further, this is the first time Opposer has seen allegations that Wallin printed out the mark and used it at the Colorado funeral. Applicant did not identify this use in response to any discovery requests regarding use of the mark. Nor was this use raised in Applicant’s Answer and Affirmative Defenses to this Opposition. (Pl.’s Ex. 29.) Nor was this information provided during the course of Applicant’s 30(b)(6) deposition, during which three individuals testified regarding “Applicant’s first use and first commercial use of such marks.” (Pl.’s Ex. 42.)

further disputes the allegations set forth as facts in the second and third sentences.<sup>7</sup> (Pl.'s Ex. 2 pp. 70:5-24-71:4, 74:3-7, 119:18-120:15.)

Opposer disputes the allegations set forth as fact in the first sentence of the third paragraph of Subheading VII. (*See* Pl.'s Ex. 2 pp. 119: 18-120: 15.) Opposer denies the allegations set forth in the second sentence, and further states that the allegations are not fact, but inadmissible speculation.<sup>8</sup> (*Id.*) The allegations set forth in the third sentence are undisputed by Opposer, but Opposer disputes the allegations set forth as facts in the fourth sentence, and further states that he was an incorporator. (Pl.'s Ex. 9, Resp. to Req. for Adm. No. 127.)

Opposer does not dispute the allegations set forth in the first sentence of the fourth paragraph of Subheading VII.<sup>9</sup> Opposer does not dispute the allegations set forth in the second sentence.<sup>10</sup> Opposer does not dispute the allegations set forth in the third sentence.

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<sup>7</sup> Opposer's deposition testimony is not inconsistent with his response to Interrogatory No. 25. (*See* Def.'s Ex. 8, Resp. to Interrog. No. 25.) Opposer has repeatedly testified that he allowed the PGR to use the mark for noncommercial purposes only, defined as display of the mark on the patriotguard.org website. (*See e.g.*, Pl.'s Ex. 9, Resp. to Req. for Adm. Nos. 11, 17.) The limited nature of the grant of use is the functional equivalent of a refusal to allow use of the mark for any other purpose.

<sup>8</sup> Jeff Brown previously testified that he accepted the license on behalf of the PGR organization. (Pl.'s Ex. 2 pp. 70:13-24, 119:18-120:15.) *See also* Pl.'s Summ. Judg. Br. pp. 20-21. As a result, Opposer objected to the use of the cited deposition testimony on the grounds of relevance, in that Opposer had previously testified that the license was granted when he decided to send the logo to Wallin. (Pl.'s Ex. 2 p. 70:13-24.)

<sup>9</sup> In response to Applicant's suggestion that the cited testimony was the result of the eight-minute break, Opposer notes that this testimony was previously given by Opposer during his direct examination, and is consistent with all of Opposer's statements of fact throughout this Opposition Proceeding. (Pl.'s Ex. 2 p. 73:7-10; Pl.'s Ex. 9, Resp. to Req. for Adm. No. 3.)

<sup>10</sup> This testimony was not, in fact, provided in response to a "leading question." A leading question is a question that suggests the answer or contains the information the examiner is looking for. If the question had been phrased as a leading question, it would have read as "You, as the individual owner of the logo, granted yourself, as the leader of the organization, permission to use the logo, correct?" A question phrased in terms designed to solicit an answer phrased in those terms is not a leading question. Again, this testimony is consistent with Opposer's previous testimony. (Pl.'s Ex. 2 p. 73:7-10.)

Opposer does not dispute the allegations set forth in the first and second sentences of the fifth paragraph, but further states that these amendments were made in direct response to an October 3, 2008 request from Applicant to supplement Opposer's responses to Interrogatory 10 so as to provide information regarding "all persons having knowledge of the license," and to Request for Admission No. 17a so as to clarify Opposer's intent with respect to the PGR organization and PGR, Inc. (Pl.'s Ex. 43.) Applicant expressly stated that "such amendment/supplementation need not be completed at the one week deadline prior to the depositions taking place as we are just bringing same to your attention today." (Id.)<sup>11</sup> Opposer disputes the allegations set forth in the third sentence of the paragraph. (Pl.'s Ex. 2 p. 76:22-25; Pl.'s Exs. 33-35.)

Opposer disputes the allegations set forth as fact in the first sentence of the sixth paragraph of Subheading VII.<sup>12</sup> Opposer disputes the allegations set forth as fact in the second sentence. (See Pl.'s Ex. 34; Pl.'s Ex. 37; Pl.'s Ex. 41, Exhibit C.) Opposer disputes the allegations set forth as facts in the third sentence, (Pl.'s Exs. 33-37), and further notes that none of the individuals submitting declarations in support of Applicant's motion were members of the

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<sup>11</sup> These supplemented responses provide additional information and are not inconsistent with any statement made by Opposer in connection with this proceeding. To the extent that Opposer was unable to recall this exact information during his deposition, he was able to review documents and refresh his recollection prior to supplementing the discovery. Significantly, the notice of deposition did not request that Opposer bring any documents to his deposition.

<sup>12</sup> Opposer made no allegation that Awtry knew of the making of the license, as Awtry was not a member of the PGR organization at the time the mark was designed and created by Opposer or at the time Opposer granted the organization permission to use it for noncommercial purposes. (Pl.'s Ex. 44 pp. 7:6-7, 8:3-7.) Further, the evidence cited by Applicant does not support any suggestion that the license did not exist, only that Awtry personally did not have any knowledge of it. When asked if he had "any knowledge with regard to any type of a license or permission allegedly being presented by Jeff Brown to the PGR organization and/or corporation to use the PGR trademarks?", Awtry responded "No. I'll go back to I had never spent more than ten minutes researching it. I knew Jeff Brown owned the store and I knew that the Patriot Guard Riders was using it." (Pl.'s Ex. 11 p. 84:9-18.)

PGR at the time that Opposer granted the organization permission to use the license for noncommercial uses. (Pl.'s Ex. 2 p. 73:7-24.)

**VIII.** Opposer disputes the allegations set forth as fact in the first sentence of Subheading VIII. (Pl.'s Ex. 11 pp. 17:13-19:8.) Opposer does not dispute the allegations set forth in the second sentence, but disputes any contention that this was the first time he informed the public that his store was for-profit. (Pl.'s Ex. 9, Resp. to Req. for Adm. Nos. 26-27, 29, 32-33.) Opposer does not dispute the allegations set forth in the third sentence, and further states that he has been unable to locate the earliest posting.<sup>13</sup> (*See* Def.'s Ex. 8, Resp. to Interrog. No. 29.) Opposer disputes the allegations set forth in the fourth sentence.<sup>14</sup> With respect to the allegations set forth in the fifth sentence, Opposer does not dispute that, as part of the parties' negotiations in November of 2006, he offered to close his store once he had deleted his inventory, but notes the omission from the allegations that his offer to do so was contingent upon the acceptance of other terms. Those terms were rejected by the Board, thus the Opposer did not close his store. (Pl.'s Ex. 9, Resp. to Req. for Adm. No. 111.)

**IX.** Opposer does not dispute the allegations set forth in the first sentence of the first paragraph of Subheading IX.<sup>15</sup> Opposer disputes the remaining the allegations set forth as fact in

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<sup>13</sup> Exhibit 16 was not authenticated, and must be stricken. *See* Motion to Strike, *supra*.

<sup>14</sup> Although similar allegations regarding self-dealing have been made against Opposer both before and throughout this Opposition, there is no evidence whatsoever in the record that the PGR organization or PGR, Inc. had a "tangible expectancy" in the production of merchandise, or that Opposer usurped such a corporate opportunity, as required to state a cause of action for breach of fiduciary duty. In fact, early on, before either trademark application was filed, PGR, Inc.'s current accountant, Jon Tatum, spoke with PGR, Inc.'s attorney, and advised PGR, Inc. that Opposer had not violated any applicable laws with regard to the his individual use of the mark. (Pl.'s Ex. 45.) Nevertheless, these allegations continue to surface, without any factual support, in Applicant's memorandum.

<sup>15</sup> Opposer believed that the application had already been filed. (Pl.'s Ex. 1, Exhibit O; Pl.'s Ex. 2 p. 18:17-25.)

the second, third, fourth and fifth sentences. (Pl.'s Ex. 2 p. 47:11-16; Pl.'s Ex. 4, Resp. to Interrog. Nos. 3, 4, 8, 24; Pl.'s Exs. 33-37; Pl.'s Ex. 41, Exhibit C.) With respect to the allegations set forth in the sixth sentence, Opposer does not dispute that merchandise displaying the mark "Patriot Guard Rider" was not sold until after Opposer used the mark "Patriot Guard Rider" in connection with the provision of services. (Pl.'s Ex. 5; Pl.'s Ex. 6.) Opposer disputes the allegations set forth as fact in the seventh sentence, and in response states that at all times he acted in a manner consistent with his grant of permission to the PGR organization to use the mark "Patriot Guard Rider" for noncommercial purposes.<sup>16</sup> (Pl.'s Ex. 2 pp. 70:25-71:4, 119:18-120:15; Pl.'s Ex. 4, Resp. to Interrog. 10; *see also* Def.'s Ex. 8, Resp. to Interrog. No. 25.) Opposer disputes the allegations set forth as fact in the eighth sentence. (Pl.'s Ex. 9, Resp. to Req. for Adm. Nos. 26-27, 29, 32-33.) Opposer does not dispute that he made the statement set forth in the ninth sentence, but disputes that it is contrary to his actions as a licensor granting permission to the PGR organization to use the mark "Patriot Guard Rider" for noncommercial purposes. (Pl.'s Ex. 2 pp. 70:25-71:4, 119:18-120:15; Pl.'s Ex. 4, Resp. to Interrog. 10; *see also* Def.'s Ex. 8, Resp. to Interrog. No. 25.)

Opposer is without personal knowledge to either admit or deny the allegations set forth in the first sentence of the second paragraph of Subheading IX, and therefore denies the same. Opposer does not dispute the allegations set forth as facts in the second sentence. Opposer admits the allegations set forth as facts in the third sentence for the purposes of this response.

**X.** Opposer disputes the allegations set forth in the first sentence of Subheading X. (*See e.g.*, Pl.'s Ex. 1, Exhibit A.) Opposer does not dispute the allegations set forth in the second sentence of Subheading X.

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<sup>16</sup> Exhibit 17 was not authenticated, and must be stricken. *See* Motion to Strike, *supra*.

**B. There exist numerous disputes of fact precluding summary judgment in favor of Applicant on the issue of priority of use.**

**1. Applicant supports its motion for summary judgment with self-serving affidavit testimony.**

The parties agree as to the basic standard governing their cross-motions for summary judgment under Fed. R. Civ. P. 56(c). However, Applicant submits numerous declarations in support of its motion for summary judgment, including the declarations of Mayer and Perry, who gave deposition testimony as designated corporate representatives pursuant to Fed. R. Civ. P. 30(b)(6). (Pl.'s Ex. 42.) “[A] properly supported motion for summary judgment is not defeated by self-serving affidavits.” *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638, 76 USPQ2d 1287 (8th Cir. 2005) (stating that in order to avoid summary judgment, the nonmoving party must submit more than “unsupported, self-serving allegations”). Such affidavits are “entitled to little (if any) weight,” *Romantics v. Activision Pub., Inc.*, 88 USPQ2d 1243, 1352 (E.D. Mich. 2008), particularly where, as here, they contradict documentary evidence in the record. *See Performance Aftermarket Parts Group, Ltd. v. TI Group Auto. Sys., Inc.*, 85 U.S.P.Q.2d 1838, 1840 (S.D. Tex. 2008) (noting that a “party’s self-serving and unsupported statement in an affidavit will not defeat summary judgment where the evidence in the record is to the contrary”).

Applicant presents all of the following “evidence” by means of declarations *only*:

1. At the time PGR filed its application, the declarants had no knowledge or belief that Opposer considered himself to be the owner of the marks;
2. At the time PGR filed its application, the declarants were not aware that PGR’s use of the logo was subject to a license from Opposer;
3. At the time PGR filed its application, the declarants believed that Opposer’s use of the mark was done on behalf of the PGR;

4. At the time PGR filed its application, the declarants believed they had superior rights to the mark because “the PGR association had begun using the PGR’s logo in connection with the services it provided prior to any products bearing the PGR’s logo being sold by anyone;”
5. At the time PGR filed its application, the declarants had not yet been informed that Opposer considered himself to be the owner of the logo;
6. After the PGR filed its application, the PGR entered negotiations with Opposer to attempt to resolve the issue of trademark ownership; and
7. During these negotiations, the PGR “made some announcements...including statements about possible plans for the ownership and use of the marks.”

(See Def.’s Ex. 5 ¶¶ 57, 59-61; Def.’s Ex. 9 ¶¶ 15, 17-19, 23-26; Def.’s Ex. 10 ¶¶ 25; Def.’s Ex. 14 ¶¶ 14, 16-18, 21-23; Def.’s Ex. 15 ¶¶ 15, 12-13, 16-19.) *None of these declarative statements are supported by citation to any evidence in the record.* In fact, each declaration contains self-serving allegations that directly contradict evidence in the record.<sup>17</sup> For example, although Wallin and Lines claimed to lack knowledge regarding Opposer’s ownership of the marks as of November 9, 2006, both Wallin and Bill Lines had knowledge that Opposer was using the mark “Patriot Guard Rider” in connection with goods sold in the online store owned by Opposer individually. (Def.’s Ex. 5 ¶ 57; Def.’s Ex. 14 ¶ 14; Pl.’s Ex. 11 pp. 18:24-19:8; 21: 6-13.)

As another example, although Perry declares that PGR had superior rights to the mark because “the PGR association had begun using the PGR’s logo in connection with the services it

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<sup>17</sup> Significantly, however, none of these declarations are material to whether Opposer, in his individual capacity as owner of the mark “Patriot Guard Rider,” granted Opposer, in his capacity as founder and leader of the PGR organization, a license to use the mark for noncommercial purposes. (Pl.’s Ex. 2 pp. 119-120.)

provided prior to any products bearing the PGR's logo being sold by anyone," (Def.'s Ex. 9 ¶ 19), during her 30(b)(6) deposition she testified as follows:

- Q. Who do you think owns the mark Patriot Guard Riders in your own personal opinion?
- A. Patriot Guard Riders.
- Q. And why?
- A. Because it was created for Patriot Guard Riders. It was created for an organization that was to operate under that name.
- Q. What basis do you have for that belief?
- A. The fact that we started as the Patriot Guard Riders. We as an organization, the group of us.

(Pl.'s Ex. 3 p. 30:10-19.) Perry's statements were consistent with the deposition testimony of corporate representative Bill Richart, who served as Vice President of the PGR at the time of filing of the application, and who testified as follows regarding ownership:

- Q. "[C]an you give me a sense of why the organization feels like the mark, the PGR logo, belongs to PGR, Incorporated, as opposed to Mr. Brown?
- A. It represented our mission and what we were founded under. We still use it today. None of us signed on with what we did with the intention of putting anything in anyone's pocket. What we do is strictly about the families and for our members, that's very sacred. I mean, it's just not something that we do. If you go on one of our missions and you meet a family and they look you in the eye with their tears when they're burying a loved one and say thank you to someone that's given a few hours of their time, that's why we do what we do. Not for profit. Most of us would be deeply offended if somebody offered to pay us.
- Q. I don't want to downplay anything that you just said, but I want you to tell me specifically why you think PGR owns the logo.
- A. Just the love of the PGR. And PGR, Incorporated, is an ongoing concern in accordance of what it was chartered to do and incorporated as.

(Pl.'s Ex. 46 p. 87:17-25; Pl.'s Ex. 20 pp. 97:20-98:16.) In addition, when responding to interrogatories regarding the basis for its belief that it had superior rights in the mark, Applicant stated only that "[a]s the use of the mark . . . was for all purposes done on behalf of Applicant, Opposer did not, and still does not, have superior rights in the mark...." (Pl.'s Ex. 39, Resp. to Interrog. No. 15.) It is curious that Applicant did not identify its belief that its rights were

superior because “the PGR association had begun using the PGR’s logo in connection with the services it provided prior to any products bearing the PGR’s logo being sold by anyone,” when at least four PGR Board members possessed this knowledge, “[a]t the time of Wallin’s filing of the trademark application.”

In sum, Applicant cannot cite to any record evidence, other than these self-serving affidavits, to support many of its “statements of fact.”

**2. The scope of this opposition is limited to whether Opposer has priority with respect to the word mark “Patriot Guard Rider.”**

Applicant’s statement that “Brown has essentially asserted that his use of both the Word Mark and the Logo Mark (hereinafter collectively the “Marks”), in his *individual* capacity, was prior to the PGR’s use of the Logo Mark,” is both legally unsound and not factually supported. (Def.’s Mem. p. 4.) The drawing submitted in connection with a trademark application “depicts the mark sought to be registered.” 37 C.F.R. § 2.52. An applicant may submit “only one mark” for registration per application. *Id.* The drawing submitted in connection with Opposer’s Application No. 77/041,061 presents a “standard character (typed) drawing,” without claim to any particular font style, size or color. (Pl.’s Ex. 6.) Opposer therefore cannot seek registration or claim ownership of the so-called “Logo Mark” by means of this Opposition, regardless of his deposition testimony. As such, counsel for Opposer did object to the deposition testimony cited by Applicant in support of this theory on the grounds that it required Opposer to provide a legal conclusion. (Def.’s Ex. 1 p. 23:17-24.) Further, as the TTAB well knows, a mark in typed format does not restrict its owner to any font or design accompaniment. *See* TMEP § 807.03(e).

**3. Applicant has failed to demonstrate that it used the mark “Patriot Guard Rider” before Opposer used that mark.**

The evidence and argument set forth in Applicant’s motion for summary judgment and memorandum do not entitle Applicant to judgment as a matter of law on the question of priority

of use. It is helpful to consider a chronology of the documentary evidence regarding the creation of the organization and the initial services provided by Opposer and, ultimately, the PGR:

- 11-08-2005 Opposer sends emails to various groups to solicit them to join PGR and receives responses. (Pl.'s Ex. 1, Exhibit A.)
- 11-09-2005 At 6:41 p.m., Opposer sends emails from his personal email address, jeffbrown@valornet.com, using the term "PGR" and "Patriot Guard Ride." (Pl.'s Ex. 10.)
- 11-10-2005 At 1:53 p.m., Opposer sends an email message using the term "Patriot Guard Riders." (Def.'s Ex. 5, Exhibit D.)
- 11-11-2005 At 4:21 p.m., Wallin relays information regarding the placeholder. (Def.'s Ex. 5, Exhibit D.)
- 11-11-2005 At 10:23 p.m., Wallin confirms posting of the Mission Statement. (Def.'s Ex. 5, Exhibit H.)

There exist numerous disputes of fact precluding the entry of summary judgment regarding whether Applicant first used the mark "Patriot Guard Rider." First, Applicant states that the association was formed only as of November 9, 2005, when Wallin registered the domain name patriotguard.org.<sup>18</sup> Following Applicant's argument to its logical conclusion, no association can exist without an Internet website. However, the evidence submitted by both parties shows that Opposer used "the Internet" to disseminate information regarding military funerals and promote the interests of military families long before the patriotguard.org website contained such information. (See Pl.'s Ex. 1, Exhibit C (Opposer transmitted information via email regarding a funeral in Beatrice Nebraska on November 9, 2005 at 6:41 p.m., before Wallin

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<sup>18</sup> Applicant submits Exhibit 18, an online dictionary definition of "association" in support of its argument that the association was formed when Wallin emailed Opposer to let him know that Wallin had registered the domain patriotguard.org. (Def.'s Mem. p. 16.) Exhibit 18 was not authenticated and must be stricken under *Raccioppi*. See Pl.'s Motion to Strike, *supra*. Even considering this evidence, Applicant has provided no legal authority for the proposition that, in the context of first use of a mark, that an association exists only when two or more members agree to its purposes or aims.

informed Opposer that he had registered the domain name)). As such, Opposer used “the Internet” and operated a nationwide network before Wallin registered the domain name.

The association services described in Opposer’s trademark application include “promoting the interests of families of deceased military members and families of deceased veterans.” (Pl.’s Ex. 5.) An individual can promote these interests, and Opposer’s November 8 and 9, 2005 emails did promote these interests, as the information disseminated thereby allowed Patriot Guard Riders in multiple states to protect families of deceased military members and veterans. As such, Opposer was individually engaged in the provision of association services before Wallin registered the domain name patriotguard.org or posted the Mission Statement.

Second, a dispute of fact exists as to whether Wallin posted the logo mark as a placeholder at patriotguard.org without suggestion or instruction from Opposer. (*See* Def.’s Ex. 5 ¶¶ 7-9.) As demonstrated by Plaintiff’s Exhibit 41, Exhibit A, Opposer provided a “cleaner logo” than that first posted by Wallin as a placeholder, with the request that Wallin use the “cleaner logo” on the website. Wallin placed the logo mark on patriotguard.org at the direct request and instruction of Opposer, and not without Opposer’s permission.

Third, Applicant makes a legal conclusion, without citation to evidence or legal authority, that because the organization was founded on November 9, 2005, all subsequent actions by the Opposer were done on behalf of the PGR organization. (*See e.g.*, Def.’s Mem. p. 22.) As discussed earlier, Applicant supports this statement with numerous declarations. None of these declarations reference objective, documentary evidence of Opposer’s intent as required to create a dispute of fact. *See Medinol Ltd. v. Neuro Vasx, Inc.*, 2003 WL 21189780, slip op. at \* 5, 67 USPQ2d 1205 (TTAB May 13, 2003) (noting that when reviewing questions of intent, the appropriate inquiry is not “subjective intent, but rather objective manifestations of that intent”).

Opposer has consistently denied that all of his actions related to use of the mark to were done on behalf of the PGR organization. (*See e.g.*, Pl.’s Ex. 4, Resp. to Interrog. Nos. 3, 4, 8, 24.) As such, a dispute of fact exists as to whether Opposer acted on behalf of Applicant when he used the mark in his individual capacity, including when Opposer, without suggestion from or participation by the PGR, initially began designing and ordering goods displaying the mark. (Pl.’s Ex. 1, Exhibit D; Pl.’s Ex. 41, Exhibit B.)

Fourth, the evidence submitted by Applicant regarding the interview given by Opposer to Cycles Connection Magazine corroborates that the PGR organization existed prior to Wallin’s registration of the domain name patriotguard.org. Opposer states that at the time of the Greeley, Colorado funeral, “[the association] hadn’t been in existence maybe two days.” (Def.’s Ex. 5 ¶ 24.) This evidence corroborates additional evidence that first use of the mark “Patriot Guard Rider” occurred on November 8, 2005, the date that Opposer individually sent emails to motorcycle groups across the country to spread the word about the organization and to recruit their participation in the organization and received responses signing up to participate. (Pl.’s Ex. 1, Exhibit A.) The interview statement also corroborates the additional evidence of record that use of the mark “Patriot Guard Rider” occurred at least as early as November 9, 2005, the date that Opposer sent emails to individuals and groups across the country to recruit them as members of the newly-formed PGR organization. (Pl.’s Ex. 10; Def.’s Ex. 5, Exhibit D.)

Further, application of law to the undisputed facts show that Applicant was not the first to use the mark in interstate commerce, and is therefore not entitled to summary judgment. The test for ownership of a mark in connection with the provision of services is statutory. The Lanham Act defines “use in commerce” so as to require “bone fide use of a mark in the ordinary course of trade.” 15 U.S.C. § 1127. “[A] mark shall be deemed to be used in commerce...on services

when it is used or displayed in the sale or advertising of services and the services are rendered in commerce.” Id. “All that is necessary to establish proper use of a service mark is to prove that the mark ‘is used or displayed in the sale or advertising of services’ in such a way as to ‘identify the services of one person and distinguish them from the services of others.’” 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 16:33 (4th ed. 2003).

Opposer’s emails of November 8 and 9, 2005 transmit information and advertise the services that his newly-formed PGR organization was created to provide. (Pl.’s Ex. 1, Exhibit A; Pl.’s Ex. 10; Def.’s Ex. 5, Exhibit D.) As stated above, “promoting the interests of families of deceased military members and families of deceased veterans” is the definition of the services provided by the PGR organization. (Pl.’s Ex. 5.) The provision of information regarding funerals is inextricably linked to the promotion of interests furthered by the Opposer and the PGR organization. As such, when Opposer sent the emails on November 8 and 9, 2005, Opposer first rendered association services in interstate commerce. *See e.g., United States v. Matthew Joseph Kammersell*, 7 F. Supp. 2d 1196, 1200 (D. Utah 1998) (finding that “the use of an Internet server by defendant for the transmission [of emails] involved in this case was the use of an instrumentality of interstate commerce”). In addition, as of the time that Opposer sent these emails, the mark “Patriot Guard Rider” had appeared in connection with Opposer’s individual name and email address such that Opposer became the identified source of these services. (Pl.’s Ex. 1, Exhibit A; Pl.’s Ex. 10; Def.’s Ex. 5, Exhibit D.)

Ironically, Applicant’s alleged first use of the mark in commerce is entirely contingent upon the use of the “Patriot Guard Rider” mark by Opposer. Applicant’s alleged use of the mark in connection with the Greeley, Colorado funeral was made possible only because Opposer, as an individual, (1) sent out emails on November 8, 2005, from his individual email address, to recruit

members, (2) individually created and designed the word and logo marks, and (3) soon after sent the word and logo marks to Wallin and others, across state lines, from his individual email account. (Pl.'s Ex. 1, Exhibit A; Pl.'s Ex. 10; Def.'s Ex. 5, Exhibit D.)

Applicant's use of the marks on November 11, 2005 is also consistent with undisputed testimony that Opposer granted the PGR organization a license to use the word and logo marks when he made the decision to email the logo to Wallin for noncommercial use, i.e., displaying the mark on the website. (Pl.'s Ex. 2 p. 70:13-24.) Opposer has consistently and repeatedly testified that he granted the PGR organization the right to use the mark before any other members joined. The law recognizes that Opposer, in his capacity as an individual, the individual who created and designed the mark, can grant Opposer, in his capacity as founder of the PGR organization, a license for the logo. *See In re Briggs*, 229 USPQ 76, 77 (TTAB 1986); *Monorail Car Wash, Inc. v. McCoy*, 178 USPQ 434, 438 (TTAB 1973); *McCarthy on Trademarks & Unfair Competition* § 16:36. (See also Pl.'s Summ. Judg. Br. pp. 20-21.) It is undisputed that use of the logo by Wallin and others during the Greeley, Colorado funeral constitutes licensee use.<sup>19</sup> (See e.g., Pl.'s Ex. 2 p. 70:13-24.)

In sum, it is undisputed that first use of the mark in commerce occurred on November 8, 2005, or at least as early as November 9, 2005, and that first use was by Opposer in his individual capacity, before he granted a license to the PGR to use the mark. As such, Applicant has failed to demonstrate that it has superior rights in the mark "Patriot Guard Rider."

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<sup>19</sup> Applicant offers no explanation as to why Wallin submitted an application for use of the logo mark with a first use in commerce date of at least as early as June 2006, (Pl.'s Ex. 25), despite the fact that Wallin allegedly had personal knowledge regarding use of the marks as early as November 11, 2005. (Def.'s Ex. 5 ¶¶ 19-22.)

**4. Applicant has failed to present sufficient evidence to dispute that Opposer licensed the PGR organization to use the mark.**

There exists no genuine dispute of material fact with respect to whether Opposer licensed the PGR organization to use the “Patriot Guard Rider” mark. It remains undisputed that Opposer, in his individual capacity as creator and owner of the mark, granted the PGR organization a license to use the mark for noncommercial purposes only. (Pl.’s Ex. 2 p. 70:13-24, 119:18-120:15.) The Applicant nevertheless attempts to create a dispute of fact regarding the issuance of this license by submitting numerous declarations from individuals whose participation in the organization commenced only after Opposer founded the organization on November 8 or 9, 2005, after Opposer had created and designed the mark, and after Opposer granted the organization a license to use the mark for noncommercial purposes, i.e., which occurred at least as early as Opposer emailed to logo to Wallin for use on the patriotguard.org website, which occurred on November 10, 2005. (Pl.’s Ex. 1, Exhibit A; Pl.’s Ex. 2 pp. 70:13-24, 119:18-120:15; Pl.’s Ex. 10; Pl.’s Ex. 41, Exhibit A.) As discussed above, these declarations are entitled to little weight, particularly as they contradict various evidence of record and as the information set forth therein was not provided in Applicant’s Answer and Affirmative Defenses to this Opposition, or in any of the discovery responses provided by Applicant, or in any of the deposition testimony given by Applicant’s designated corporate representatives. (Pl.’s Ex. 29; Pl.’s Ex. 42.) For each of these reasons, they cannot create a dispute of fact as to the intent of Opposer. *See Medinol*, 2003 WL 21189780, slip op. at \* 5 (noting that when reviewing questions of intent, the appropriate inquiry is not “subjective intent, but rather objective manifestations of that intent”).

Further, a genuine dispute of material fact exists as to whether many of the Applicant’s declarants knew that Opposer owned the marks and had licensed the PGR organization to use the

marks for noncommercial purposes only. In connection with his motion for summary judgment, Opposer submitted several forum postings produced by PGR, Inc. during discovery wherein numerous Board members stated that Opposer owned the mark and had only given the PGR organization the right to use the mark in connection with its website. (Pl.'s Exs. 33-36.) In addition, the Board adopted a new slogan, "Standing With Those Who Stood For Us" and produced goods displaying that slogan. (Pl.'s Ex. 3 pp. 25:12-28:4.) Now, for the first time, in self-serving declarations not supported by any documentary evidence, and directly contrary to these postings, Applicant claims that these postings were merely the result of "initial confusion" regarding ownership of the marks. (*See e.g.*, Def.'s Ex. 9 ¶ 24.) This claim of "confusion" does not negate the objective, documentary evidence of Applicant's subjective belief that Opposer owned the mark and had licensed it to PGR for noncommercial purposes only.

As early as April of 2006, long before Opposer resigned from the Board amidst localized outcry regarding the operation of his store, Opposer and attorney John Jacobs discussed the paperwork required for Opposer to confirm, in writing, his license PGR, Inc. to continue using the mark "Patriot Guard Riders." (Pl.'s Ex. 1, Exhibit M.) Thus, evidence in the record negates Applicant's argument that Opposer's claim of ownership was "nothing more than an afterthought." (Def.'s Mem. p. 20.)

**5. Applicant has failed to present factual evidence or legal argument that it was the first to use the mark "Patriot Guard Rider" on goods.**

It remains undisputed that no one other than Opposer designed or produced goods with the mark prior to Brown's resignation from PGR, Inc. (*See* Pl.'s Summ. Judg. Br. ¶¶ 8-13.) Although Applicant's declarations purport to convey the subjectively held beliefs of the declarants as to whether Opposer intended that his use of the mark on goods would inure to the benefit of the PGR, it is undisputed that Opposer personally financed the production and sale of

goods displaying the “Patriot Guard Rider” mark. (Id.) Applicant’s self-serving and subjective statements regarding Opposer’s intent cannot create a dispute of fact against these objective documents. *Medinol*, at \* 5.

Applicant has not presented any legal argument in support of its ownership of the mark “Patriot Guard Rider” in connection with goods. Applicant argues that because “the first sale of goods bearing the Marks was *after* the first use of the Marks in connection with the services provided,” Opposer’s claim of first use of the mark on goods is “incorrect” and “irrelevant.” (Def.’s Mem. p. 20.) It is a settled principal of trademark law that first use of a mark with respect to services does not automatically translate into ownership of the mark on goods.

**5. There exists no dispute of fact regarding the similarities between the word mark and the logo mark. first to use the mark “Patriot Guard Rider” on goods.**

There exists no dispute of fact that the word mark “Patriot Guard Rider” appears in the logo mark. (Def.’s Mem. p. 3.) There exists no dispute that all of the marks in question contain some version, singular or plural, of the distinctive term “Patriot Guard Rider,” or that the marks are used in an identical manner in commerce. Because Opposer’s first use of the mark in commerce any such claim by Applicant, and because Applicant’s use was pursuant to the terms of an undisputed license, Opposer is entitled to summary judgment regarding likelihood of confusion of the marks. (*See* Pl.’s Summ. Judg. Br. pp. 17-18.)

**B. Applicant has failed to demonstrate undisputed facts that would entitle it to summary judgment as a matter of law on Opposer’s fraud claim.**

The parties agree as to the standard governing a fraud claim on summary judgment. Further, Opposer will not address the issue of whether Wallin was authorized by the Board to file Trademark Application No. 77/040,379. This issue is not material to the determination of fraud, as Opposer has claimed fraud committed by the PGR, Inc., acting through Wallin. (Pl.’s Ex. 30.)

**1. Applicant’s “evidence” cannot create a genuine dispute of fact regarding Applicant’s knowledge of Opposer’s superior rights.**

The evidence of record indicates that various board members had knowledge of Opposer’s prior and/or superior rights in the mark “Patriot Guard Riders.” (Pl.’s Exs. 33-36.) Again, when reviewing questions of intent, the appropriate inquiry is not “subjective intent, but rather objective manifestations of that intent.” *Medinol*, at \* 5. Again, Applicant’s declarations state, without citation to authority or any *competent* evidence, that Applicant believed Brown was acting, at all times and in connection with all activities related to use of the mark, on behalf of the PGR. (*See e.g.*, Def.’s Ex. 9 ¶ 18.) Again, the only evidence submitted by Applicant for this statement are the declarations setting forth the subjective beliefs of numerous PGR Board members, many of whom voted to remove Opposer as President of the PGR. (Pl.’s Summ. Judg. Br. ¶ 19.) Again, Applicant has produced no objective evidence to dispute Opposer’s intent to create and own the mark in his individual capacity and to license the noncommercial use of the PGR organization and PGR, Inc. To the contrary, public statements by Applicant indicate that Applicant was aware that Opposer had superior rights in the mark “Patriot Guard Riders,” but nevertheless “took a chance” and filed its application. (Pl.’s Exs. 33-36.)

In light of this documentary evidence, Applicant cannot prove that Wallin’s signature on the declaration was truthful. Although Applicant is correct that subjective belief that its right to register a mark is superior to that of another user precludes a finding of fraud, the public statements by Wallin and those who allegedly authorized Wallin provide competent, objective evidence of the Applicant’s subjective beliefs at the time of filing.

**2. The evidence of record demonstrates fraud by clear and convincing evidence.**

Opposer has met his burden of proving fraud by clear and convincing evidence, *i.e.*, that it is substantially more likely than not that PGR, Inc. committed fraud in connection with the

filing of its trademark application, as Applicant publicly stated that Opposer was the owner of the mark, and that Applicant had been licensed to use the mark for noncommercial purposes only. (Pl.'s Exs. 33-36.) Applicant's self-serving declarations to the contrary cannot create a genuine dispute of fact as to Applicant's state of mind.

### III. CONCLUSION

The undisputed facts, and the application of governing law to those facts, shows that Opposer, in his capacity as an individual, granted himself, in his capacity as the original founder and Executive Director of the PGR organization, permission to use the mark "Patriot Guard Rider" for noncommercial purposes only, and that Applicant's subsequent use of the mark was as a licensee. As such, Applicant is not entitled to summary judgment in its favor.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 26th day of February, 2009, a true and correct copy of the above and foregoing was sent via electronic delivery to DMarr@trexlaw.com and that on the 26th day of February, 2009, mailed, with proper postage thereon, to:

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*/s/ Courtney Bru* \_\_\_\_\_