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

JEFF BROWN,	)	
	)	
Opposer,	)	
	)	Opposition No. 91181448
	)	
PATRIOT GUARD RIDER, INC.,	)	
	)	
Applicant.	)	

OPPOSER'S BRIEF IN RESPONSE TO APPLICANT'S MOTION TO STRIKE

Jeff Brown ("Opposer"), by and through his counsel, hereby submits the following response to Applicant's Motion to Strike Portions of Opposer's Notice of Reliance and Applicant's Memorandum in Support of it Motion to Strike Portions of Opposer's Notice of Reliance (collectively "Applicant's Motion") filed by Patriot Guard Rider, Inc. ("Applicant") on April 25, 2011.

INTRODUCTION

Applicant's Motion seeks to strike the evidence described in paragraphs 1 and 5 of Opposer's Notice of Reliance filed on April 20, 2011 ("Notice of Reliance") and reprinted in pertinent part below.

> 1. File Wrapper for United States Trademark Application Serial No. 77383586 for PATRIOT GUARD RIDERS filed on January 29, 2008. The application history will be relied upon to show material changes in the use of the mark shown in United States Trademark Application Serial No. 770400379 by PGR, Inc. and to corroborate testimony of witnesses as to PGR, Inc.'s use of a mark confusingly similar to that of the opposer.
>
> 5. The home page, the PGR Gear Store home page, the PGR terms of use, the PGR history page, and PGR archived home pages printed from the publicly accessible portions of the PGR website, www.patriotguard.org, on April 18, 2011, relied upon to show PGR'S efforts or lack thereof in policing use of the mark and in

> denying Opposer access to the organization insofar as such denial gives rise to excusable non-use.

Doc. #46.

The foregoing evidence submitted in Opposer's Notice of Reliance is relevant and admissible to the present proceeding and Opposer hereby requests that Applicant's Motion be denied.

BACKGROUND

On July 21, 2009, The Trademark Trial and Appeal Board ("Board") denied the Parties' cross-motions for summary judgment and allowed Opposer fifteen days to file and serve an amended pleading to sufficiently allege likelihood of confusion, ownership of Application Serial No. 77041061 for Opposer's PATRIOT GUARD RIDER Mark ("Opposer's Application") and priority of said application. *Doc # 24.* Opposer filed an amended pleading and in response, on August 18, 2009, Applicant filed Applicant's Motion to Dismiss or in the Alternative, Strike and for Suspension of These Proceedings. *Doc. #26.*

The Board's order dated March 1, 2010, denied Applicant's motion to dismiss and motion to strike the claims improperly pled in the original notice of opposition. *Doc. # 31.* The Board did, however, strike the claims for which Applicant did not request leave to amend, claims that were not pled in the original notice of opposition. *Id.* In its order of March 1, 2010, the Board stated that it granted leave to amend the priority and likelihood of confusion grounds only and that Opposer had not sought leave to amend additional grounds. *Id.* Therefore, the additional grounds were ordered stricken from the amended notice of opposition; however, the order stated nothing with respect to what evidence could or could not be submitted in this proceeding for Opposer to present its case in chief. *Id.*

ARGUMENT

I. The file wrapper for Applicant's word mark identified in Paragraph 1 of Opposer's Notice of Reliance is relevant and admissible in the current proceeding.

In Applicant's Motion, Applicant first requests that the file wrapper for its own PATRIOT GUARD RIDERS word mark application, Application Serial No, 77383586 ("Applicant's Word Mark Application"), be stricken from the record, arguing that the file wrapper should not be relied upon for any purpose in this proceeding. Applicant correctly states that the Board's March 1, 2010 Order reads, "[i]nasmuch as application Serial No. 77383586 is currently in examination and has not been published for opposition, any attempt to assert likelihood of confusion or fraud with respect to this application is premature. In view thereof, applicant's motion to strike any issues and references relating to application Serial No. 77383586 in the amended notice of opposition is granted." *Doc. #31.* Applicant, however, then boldly and inaccurately concludes, "Thus, Brown should not be entitled to rely on the file wrapper for PGR's Word Mark Application for *any* purpose in connection with this Opposition proceeding" [emphasis added] and requests that the file wrapper of Applicant's Word Mark Application be stricken from the record. *Doc. #48.*

"[O]fficial records, if the publication or official record is competent evidence and relevant to any issue, may be introduced in evidence by filing a notice of reliance on the material being offered. . . A copy of an official record of the Patent and Trademark Office need not be certified to be offered in evidence." 37 CFR § 2.122(e). "A party to a proceeding before the Board may introduce, as part of its evidence in the case, a copy of an application *that is not the subject of the proceeding,* by filing, during its testimony period, a copy of the application file, or of the portions which it whishes to introduce, together with a notice of reliance thereon specifying the application and indicating generally its relevance." [Emphasis added] TBMP §

704.03(b)(2). "[I]f the application is owned by a party to the proceeding, the allegations made and documents and things filed in the application may be used as evidence against the applicant, that is, as admissions against interest and the like." *Id.* As stated in the Notice of Reliance and further explained herein, Opposer intends to use the file history of Applicant's Word Mark Application for such relevant purposes.

Applicant makes the overly broad conclusion from the Board's order that the statement disallowing new claims in the pleading itself applies to the inadmissibility of evidence in the proceeding. The Board's order of March 1, 2010, however, relates solely to additional claims being set forth in the pleading, not to the relevancy or appropriateness of evidence within the file history of a related application for use in association with the current claims. *Doc. #31.*

Applicant also argues that Opposer's intended reliance on the file wrapper to show alleged material changes of the mark is improper. Opposer disagrees. The word mark PATRIOT GUARD RIDERS is identical to terms incorporated in Applicant's design mark application, the mark at issue in this proceeding. The word mark PATRIOT GUARD RIDERS is also virtually identical to the mark PATRIOT GUARD RIDER, which is Opposer's pleaded mark and the subject of Opposer's Application in this proceeding. Therefore, the file history for Applicant's broader word mark application is highly relevant to the narrower of the two applications, i.e., the application at issue. Statements and admissions in the file wrapper of this application are clearly highly relevant to this proceeding.

Applicant's final argument to strike the file wrapper of Applicant's Word Mark Application states that Opposer's intended reliance on the file wrapper to corroborate testimony of witnesses as to Applicant's use of the mark confusingly similar to that of Opposer is improper arguing, "Any allegations regarding likelihood of confusion are properly limited to being

between Brown's use of the mark in Brown's Word Mark Application and PGR's use of the mark in PGR's Logo Mark Application." *Doc. #48.* This is just not so. As explained in TBMP § 704.03(b)(2), "[I]f the application is owned by a party to the proceeding, the allegations made and documents and things filed in the application may be used as evidence against the applicant, that is, as admissions against interest and the like." *Id.* As set forth in Opposer's Notice of Reliance, the file history of Applicant's Word Mark Application will establish material changes in use of the mark and will be used to corroborate testimony of witnesses who have made admissions against interest in this matter that directly relate to the current proceeding.

II. The Internet printouts identified in Paragraph 5 of Applicant's Notice of Reliance are relevant and admissible in this proceeding.

Applicant next argues to strike the internet printouts submitted by Opposer and identified in Paragraph 5 of the Notice of Reliance. Applicant states that the Board has "repeatedly held that Internet web pages do *not* constitute 'printed publications' within the meaning of Trademark Rule 2.122(e). Applicant cites two cases which, unfortunately, are out of date to the extent that Applicant uses them to establish the foregoing proposition.

The Board has more recently held that printouts of documents from Web sites that identify their source and date (formerly requiring authentication by a witness) can now be introduced by a notice of reliance. In *Safer Inc. v. OMS Investments Inc.*, 94 U.S.P.Q.2d 1031, 1039 (TTAB 2010), the Board explained that it is "expanding the types of documents that may be introduced by notice of reliance to include not only printed publications in general circulation, but also documents such as websites, advertising, business publications, annual reports, studies or reports prepared for or by a party or non-party, if, and only if, they can be obtained through the Internet as publicly available documents." The Board went on to hold that "if a document obtained from the Internet identifies its date of publication or date that it was accessed and

printed, and its source (e.g., the URL), it may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation in accordance with Trademark Rule 2.122(e)." *Id.* Therefore, the documents set forth in Paragraph 5 of Applicant's Notice of Reliance are admissible as presented.

Applicant finally argues that Opposer's intended use of the Internet printouts is improper for the same reasons raised in its Motion to Strike filed on August 18, 2009. Although this is a somewhat unclear proposition as Applicant speculates as to the intended use of the evidence, again, the March 1, 2010 order of the Board applies to the claims presented in the amended pleading and not to the admissibility of evidence in this proceeding generally. As set forth in Opposer's Notice of Reliance, the evidence will be relied upon to show Applicant's efforts or lack thereof in policing use of the mark and in denying Opposer access to the organization insofar as such denial gives rise to excusable non-use, issues highly relevant to the pleaded claims in the amended notice of opposition.

Wherefore, Opposer respectfully requests that Applicant's Motion to Dismiss be denied.

Dated this 16th of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2011, a true and correct copy of the foregoing Opposer's Brief in Response to Applicant's Motion to Strike was sent via e-mail and via first class mail, postage prepaid to:

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