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

Proceeding	91181448
Party	Defendant Patriot Guard Riders, Inc.
Correspondence Address	JAMES A O'MALLEY CLARK HILL PLC 150 N MICHIGAN AVENUE, SUITE 2700 CHICAGO, IL 60601 UNITED STATES JOMalley@clarkhill.com, mkitz@clarkhill.com
Submission	Reply in Support of Motion
Filer's Name	James A. O'Malley
Filer's e-mail	jomalley@clarkhill.com, mkitz@clarkhill.com
Signature	/James A. O'Malley/
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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
v.)	
)	
PATRIOT GUARD RIDERS, INC.,)	
)	
Applicant.)	

**APPLICANT’S BRIEF IN REPLY TO OPPOSER’S RESPONSE TO
APPLICANT’S MOTION TO STRIKE**

Patriot Guard Riders, Inc. (“PGR”), by and through its counsel, hereby submits the following reply to Opposer’s Brief in Response to Applicant’s Motion to Strike filed by Jeff Brown (“Brown”) on May 16, 2011.

BACKGROUND

The Trademark Trial and Appeal Board (“Board”) previously admonished Brown for improperly attempting to broaden the scope of this Opposition proceeding. More specifically, Brown had attempted to amend its original notice of opposition to include claims that were not originally pleaded. Thus, as noted by Brown in his Response Brief, the additional grounds were ordered stricken from the amended notice of opposition. *See Dkt. #50, p. 2.*

Now, Brown argues that he should be permitted to introduce “evidence” that relates to claims that were not pleaded. This is nothing more than an attempt to circumvent the Board’s order.

More specifically, Brown argues that the disputed evidence is “highly relevant to the pleaded claims in the amended notice of opposition” (*Dkt. #50, p. 6*) when, in fact, this evidence is not even remotely relevant to the claims that were properly pleaded (namely, ownership of the

mark in Brown's application, priority and ownership of the mark in Brown's application, likelihood of confusion between Brown's use of the mark in his application and PGR's use of the mark in its application, and whether PGR's actions at the time of filing its application constituted fraud). *See generally Dkt. #24, p. 5.* To the extent that Brown is trying to submit evidence that is not relevant to any one of these claims, that evidence should be stricken.

ARGUMENT

I. Abandonment Was Not Pleaded By Brown And, Therefore, Any Evidence Submitted To Support Or Prove A Claim Of Abandonment Should Be Stricken

Brown did *not* properly plead the claim/issue of abandonment in either his original notice of opposition or in his amended notice of opposition. *Dkt. Nos. 1 and 32.* PGR further notes that the issue of abandonment was not even raised in Brown's Motion for Summary Judgment. *Dkt. #15.* If Brown wanted to include the issue of abandonment in this opposition, Brown should have filed a motion seeking leave to amend, which he never did. *See Dkt. #31, pp. 5-6.* Inclusion of such a claim/issue at this stage of the Opposition proceeding would be highly prejudicial to PGR. Thus, to the extent that any evidence submitted by Brown is to be used to support or prove a claim of abandonment, that evidence should be stricken.

Brown stated in his Notice of Reliance that the File Wrapper for PGR's Application Serial No. 77/383,586 was being submitted such that it could be "relied upon to show material changes in the use of the mark shown in United States Trademark Application Serial No. 770400379 [sic] by PGR, Inc." *Dkt. #46, p. 1.* Brown also stated in his Notice of Reliance that various Internet Printouts were being submitted such that they could be "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." *Dkt. #46, p. 2.*

Whether there have been alleged material changes in the use of PGR's mark is clearly not related to any of the properly pleaded claims, but rather it is clearly directed to a claim/issue that was *not* properly pleaded, namely abandonment. Likewise, PGR's efforts or lack thereof in policing use of its mark, as well as excusable non-use, are also clearly not related to any of the properly pleaded claims, but rather are clearly directed to abandonment, a claim/issue that was *not* properly pleaded. Nonetheless, Brown has stated that these issues are "highly relevant" to the pleaded claims in the amended notice of opposition. *Dkt. #50, pp. 4 and 6*. Brown, however, has provided absolutely no basis as to how the issues of alleged material changes to PGR's mark, PGR's policing use of its mark or any excusable non-use are in any way relevant, much less "highly relevant," to the properly pleaded claims.¹

Thus, in view of the foregoing, the file wrapper for PGR's Application Serial No. 77/383,586 should be stricken for the purpose of being "relied upon to show material changes in the use of the mark shown in United States Trademark Application Serial No. 770400379 [sic] by PGR, Inc." Furthermore, the Internet pages should be stricken for the purpose of being "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."

II. PGR Concedes That There Is A Likelihood Of Confusion Between Brown's Use Of The Mark In His Application And PGR's Use Of The Mark In Its Application

Were the parties to present evidence that was probative of the factors bearing on the likelihood of confusion issue, namely those set forth in *In re E.I. Du Pont de Nemours & Co.*,

¹ This Board has noted that, in order "to meet the requirement to 'indicate generally the relevance of the material being offered,' the propounding party should associate the materials with a relevant likelihood of confusion factor (e.g., the strength of the mark, the meaning or commercial impression engendered by the mark, etc.) or a specific fact relevant to determining a particular issue, such as whether a mark is merely descriptive. This will ensure that any adverse party has been fairly apprised of the evidence it must rebut and the issue for which it was introduced." *Safer, Inc. v. OMS Int'l, Inc.*, 2010 TTAB LEXIS 51 at *25-26 (Feb. 23, 2010). Brown has not provided any indication to PGR as to how these issues are relevant to his properly pleaded claims – the simple reason for this is because he cannot.

476 F.2d 1357 (CCPA 1973), PGR understands that there is an extremely strong probability that the Board would find that there is a likelihood of confusion between Brown's use of the mark in his application and PGR's use of the mark in its application. Thus, in an effort to save the parties and the Board both time and money, by the present filing, PGR concedes that there is no issue as to the likelihood of confusion between the two marks. In view of this concession by PGR, PGR is of the opinion that there is no need for Brown to present evidence, nor for PGR to present opposing evidence, that relates to the *Du Pont* likelihood of confusion factors.

Brown has stated that he has submitted the File Wrapper for PGR's United States Trademark Application Serial No. 77/383,586 for the purpose of relying on it "to corroborate testimony of witnesses as to PGR, Inc.'s use of a mark confusingly similar to that of the opposer." *Dkt. #46, p. 1*. As there is no need for the parties to present evidence relating to the *Du Pont* likelihood of confusion factors, PGR states that the File Wrapper should be stricken as it is clearly not relevant to the claims/issues remaining in this Opposition proceeding.

Furthermore, to the extent that Brown possibly could otherwise have argued that the File Wrapper or the Internet printouts were relevant to the *Du Pont* likelihood of confusion factors, such argument, in PGR's opinion, is now rendered moot by PGR's concession on the issue of likelihood of confusion.

Despite the foregoing, PGR does *not* concede the remaining properly pleaded claims, namely, ownership of the mark in Brown's application, priority and ownership of the mark in Brown's application, and whether PGR's actions at the time of filing its application constituted fraud.

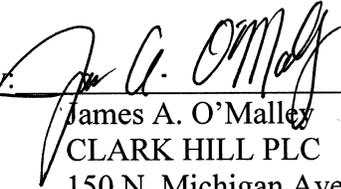
CONCLUSION

In view of the foregoing, PGR respectfully requests the Board to:

1. Strike the File Wrapper for PGR's United States Trademark Application Serial No. 77/383,586, identified in Paragraph 1 of Brown's Notice of Reliance, from the record;
2. Strike the Internet Printouts, identified in Paragraph 5 of Brown's Notice of Reliance, from the record; and
3. Instruct Brown to limit the issues raised in his main brief to those specific claims/issues that have been properly pleaded by Brown in the "clean copy" of his Amended Notice of Opposition because to rule otherwise would be highly prejudicial to PGR.

Respectfully submitted,

Date: June 3, 2011

By: 
James A. O'Malley
CLARK HILL PLC
150 N. Michigan Avenue
Suite 2700
Chicago, Illinois 60601
Tel: (312) 985-5562
Fax: (312) 985-5962
E-mail: jomalley@clarkhill.com
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2011, a true and correct copy of **APPLICANT'S BRIEF IN REPLY TO OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO STRIKE** was sent by first class mail, postage prepaid, and by e-mail, to:

Rachel Blue
McAfee & Taft
1717 S. Boulder
Suite 900
Tulsa, Oklahoma 74119
Rachel.Blue@mcafeetaft.com



James A. O'Malley
CLARK HILL PLC
150 N. Michigan Avenue
Suite 2700
Chicago, Illinois 60601
Tel: (312) 985-5562
Fax: (312) 985-5962
E-mail: jomalley@clarkhill.com

Attorney for Applicant