

ESTTA Tracking number: **ESTTA317043**

Filing date: **11/16/2009**

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

Proceeding	91191016
Party	Plaintiff Intellectual Reserve, Inc.
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Date	11/16/2009
Attachments	motion to strike.pdf (5 pages)(115031 bytes)

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

<p>INTELLECTUAL RESERVE, INC. Opposer/Registrant, vs. KENDAL M. SHEETS Applicant/Petitioner.</p>	<p>Opposition No. 91191016</p>
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**MOTION TO STRIKE EVIDENTIARY MATTERS
PLEADED IN THE ANSWER AND COUNTERCLAIMS**

Plaintiff Intellectual Reserve, Inc. (“IRI”) moves to strike the evidentiary matters included in the Answer and Counterclaim served by Applicant Kendal M. Sheets (“Sheets”). Sheets’ Answer and Counterclaim improperly pleaded evidentiary matters in Paragraphs 4-7 and improperly attached corresponding evidentiary exhibits A, B, and C. Due to this violation of the Rules, the Board should strike Paragraphs 4-7 of the Answer and Counterclaim and Exhibits A, B, and C thereof.

I. INTRODUCTION

IRI opposed Sheets’ application Serial Number 77/337,325 on the grounds that his alleged mark SECRET MORMON would cause (1) a likelihood of confusion, (2) a false suggestion of connection or affiliation, and (3) a likelihood of dilution of IRI’s marks through blurring or tarnishment. IRI based its Opposition on various trademark registrations and applications that it owns for marks containing the word “MORMON” (the “MORMON Marks”).

In response to the Opposition, Sheets filed an Answer and Counterclaim in which he petitioned to cancel IRI’s registrations. Sheets argues the marks should be cancelled because

they are functional, descriptive and generic. With his Answer and Counterclaim, Sheets filed various impertinent documents allegedly derived from various publications.

II. POINTS AND AUTHORITIES

A. Pleading Evidentiary Matter is Improper

Petitions for cancellation are to be kept short. “The petition for cancellation must set forth a short and plain statement showing why the petitioner believes he, she or it is or will be damaged by the registration, state the ground[s] for cancellation, and indicate, to the best of petitioner's knowledge, the name and address of the current owner of the registration.” 37 C.F.R. § 2.112(a).

The TTAB Manual of Procedure declares that it is improper to include evidentiary matters in a Cancellation Petition. “Evidentiary matters (such as, for example, lists of publications or articles in which a term sought to be registered by an applicant is alleged to be used descriptively) should not be pleaded in a complaint. They are matters for proof, not for pleading.” TBMP § 309.03(a)(2) (2d ed. Rev. 2004) (emphasis added). Not only do such exhibits improperly lengthen the complaint, but they also unduly burden the answering party and cloud the issues for trial. Therefore, the Board should strike the attachments that Sheets improperly submitted with his Answer and Counterclaim.

B. Sheets Has Improperly Pled Evidentiary Matter Which Should be Stricken

The Board should also strike Paragraphs 4, 5, 6 and 7 of Sheets' Answer and Counterclaim because they improperly plead evidentiary matters.

Paragraph 4 cites an alleged excerpt from *Merriam-Webster's Encyclopedia of World Religions*, which Sheets attached as part of Exhibit A. In the same paragraph, Sheets also cites

alleged excerpts from the *Encyclopedia of Religion*, which were also included as part of Exhibit A. Sheets also attached an alleged Wikipedia excerpt as part of Exhibit A.

Paragraph 5 of Sheets' Answer and Counterclaim refers to evidentiary matters allegedly derived from five newspaper articles, which he attached as Exhibit B.

Paragraph 6 refers to other evidentiary matter, including a magazine allegedly published in 1990, which Sheets submitted as Exhibit C.

Paragraph 7 violates the rules in a similar manner by referring to an excerpt from Exhibit A and otherwise making evidentiary allegations.

The Trademark Rules of Practice prescribe the time and manner in which evidence may be submitted in a Board proceeding. Submission of evidence with a notice of opposition or petition for cancellation is not permitted. Because Sheets has attempted to place evidentiary matter into the record in violation of TBMP § 309.03(a)(2), Paragraphs 4-7 and Exhibits A-C of the Answer and Counterclaim should be stricken.

C. It is Unduly Burdensome to Require IRI to Respond to the Pled Evidentiary Matters

As a practical matter, attaching the evidentiary exhibits to the pleadings unduly burdens IRI in answering the Petition. Sheets asks IRI to admit or deny hearsay statements contained in alleged documents for which no foundation has been offered and no opportunity for cross-examination has been afforded. This violates the Board's rules pertaining to pleading and the documents and related allegations are not proper subject matter for a petition for cancellation.

IRI should not be required to address objectionable evidentiary matters in its answer to the counterclaims. No party should be required to take a position as to the authenticity, content, and admissibility of the documents or other alleged evidence at the pleading stage of a proceeding.

Accordingly, the Board should grant the motion and strike Paragraphs 4-7 and exhibits A, B, and C of the Answer and Counterclaim.

III. CONCLUSION

For the foregoing reasons, IRI respectfully requests that the Motion to Strike be granted and that IRI be relieved of the obligation to serve an answer to the counterclaims until after the motion has been decided.

Respectfully submitted this 16th day of November, 2009.

INTELLECTUAL RESERVE, INC.

By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2009, a true and correct copy of the foregoing MOTION TO STRIKE EVIDENTIARY MATTERS PLEADED IN THE ANSWER AND COUNTERCLAIMS was served on Applicant by first class United States mail, postage prepaid, in an envelope addressed as follows:

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Douglas R. Bush