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

Proceeding	91197393
Party	Defendant Beyond The Box, Inc.
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Submission	Motion for Summary Judgment
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Date	02/15/2011
Attachments	Sandra Ellis - Motion for Judgment on the Pleadings.pdf (4 pages)(81458 bytes)

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

SANDRA ELLIS, Opposer, v. BEYOND THE BOX, INC., Applicant.	In the Matter of Application Serial No. 77/900,545 Opposition No. 91197393

APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Federal Rule of Civil Procedure 12(c) and the TTAB Manual of Procedure (TBMP) § 504, Beyond the Box, Inc. (hereinafter, "Applicant") hereby moves the Board for judgment on the pleadings in Opposition No. 91197395 filed on November 15, 2010 ("Opposition") by Sandra Ellis ("Opposer"). This motion is supported by the following Brief.

I. INTRODUCTION

The present Opposition seeks the refusal of Applicant's U.S. Trademark Application Serial No. 77/900,545 (the "'545 Application"), an intent-to-use application, on the grounds that Opposer will be damaged by registration of the mark that is the subject of the Application. Pursuant to Federal Rule of Civil Procedure 12(c) and TBMP § 504, Applicant hereby moves for judgment in its favor on the pleadings. Opposer's Notice of Opposition alleges, for each of U.S. Trademark Application Serial Nos. 85/022,163 and 85/082,681 on which it bases the Opposition, a filing date and a date of first use that postdates the filing date alleged by Opposer for Applicant's '545 Application. Based on Opposer's own pleadings, therefore, Applicant's priority date precedes the earliest priority dates alleged by Opposer. Consequently, Opposer has failed to demonstrate in its pleadings that it possesses any superior rights in its marks that may be harmed by registration of Applicant's mark, or provided any other basis for its

Opposition. Judgment in favor of Applicant in the present Opposition is therefore appropriate.

II. ARGUMENT

A. Legal Standard for Motion for Judgment on the Pleadings

"A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law." TBMP § 504.02. "For purposes of the motion, all well pleaded factual allegations of the nonmoving party must be accepted as true, while those allegations of the moving party which have been denied … are deemed false." *Id.* "A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law." *Id.*

B. Opposer's Asserted Filing and First Use Dates Demonstrate Applicant's Priority

As noted above, for purposes of this Motion, all of Opposer's factual allegations in its Notice of Opposition must be accepted as true. In its Notice of Opposition, Opposer presents a copy of USPTO TESS database records for its U.S. Trademark Application Serial No. 85/022,163, which shows that Application Serial No. 85/022,163 was filed on April 23, 2010. Notice of Opposition, Exhibit 1. Opposer further alleges that its Application Serial No. 85/022,163 states a date of first use in commerce at least as early as May 12, 2010. Notice of Opposition, page 3 at paragraph 5. The earliest priority date alleged by Opposer for its Application Serial No. 85/022,163, therefore, is **April 23, 2010**.

Opposer also alleges that its Application Serial Nos. 85/082,681 was filed on July 12, 2010, and states a date of first use in commerce at least as early as May 12, 2010 for some goods and services. Notice of Opposition, page 3 at paragraph 7. Thus, the earliest

priority date alleged by Opposer for its Application Serial No. 85/082,681 is **May 12, 2010**.

Finally, Opposer alleges that Applicant's intent-to-use Application Serial No. 77/900,545 was filed on December 23, 2009, and notes that no Allegation of Use has been filed as of the date of the Notice of Opposition. Notice of Opposition, page 5 at paragraph 17. As a result, the priority date for Applicant's application alleged by Opposer is **December 23, 2009**.

Opposer's applications, thus, were filed after Applicant's application, and Opposer alleges no use of its marks prior to Applicant's constructive first use date (*i.e.*, its filing date of December 23, 2009). Accordingly, Opposer's factual allegations in its Notice of Opposition establish that it is Applicant, not Opposer, who possesses prior rights in its mark. Because Opposer has failed to demonstrate in its pleadings that it possesses any superior rights in its marks that may be harmed by registration of Applicant's mark, judgment in favor of Applicant in the present Opposition is therefore appropriate.

IV. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board enter judgment on the pleadings in favor of Applicant in the present Opposition.

DATED: February 15, 2011

Respectfully submitted,

__/Michael Todd Tucker/_____
Michael Todd Tucker
President
Beyond the Box, Inc.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this date caused to be served a copy of the attached **APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS** upon Opposer via e-mail and U.S. First Class Mail, postage prepaid, as follows:

D. ARI SHERWIN
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DATED: February 15, 2011

_/Michael Todd Tucker/_____
Michael Todd Tucker
President
Beyond the Box, Inc.