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

Proceeding	91197395
Party	Plaintiff TSDC, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No. 77/900,545

Filed on December 23, 2009

For the mark FIGHT LIKE A CAROLINA GIRL

Published in the *Official Gazette* (Trademarks) on May 18, 2010

TSDC, LLC

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and

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Sandra Ellis

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Opposers,

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Opposition No.: 91/197,395

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v.

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Beyond the Box, Inc.,

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Applicant.

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**UNITED STATES PATENT AND TRADEMARK OFFICE
ATTN: TRADEMARK TRIAL AND APPEAL BOARD
P.O. BOX 1451
ALEXANDRIA, VA. 22313-1451**

OPPOSERS' MOTION IN RESPONSE TO
APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

TSDC, LLC (hereinafter referred to as "TSDC"), a limited liability company organized and existing under the laws of the State of Ohio, having a business address at P.O. Box 45034, Cleveland, Ohio 44145 and Sandra Ellis (hereinafter referred to as "ELLIS"), a sole proprietor with her business located in the State of Ohio, having a business address at P.O. Box 45034, Cleveland, Ohio 44145 (TSDC and ELLIS are hereinafter collectively referred to as "OPPOSERS"), hereby submit their Response to Applicant's Motion for Judgment on the Pleadings ("Motion") filed on February 15, 2011.

Applicant essentially contends in its Motion that "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." *See* Motion at page 1. Opposers disagree.

15 U.S.C. §1057, pertaining to certificates of registration, states in pertinent part: "**Contingent on the registration of a mark** on the principal register provided by this Act, the filing of the application to register such mark shall constitute constructive use of the mark ..." (emphasis added); *15 U.S.C. §1057 (c)*. Here, Applicant's mark has not yet registered. Therefore, Applicant's filing of its application to register "FIGHT LIKE A CAROLINA GIRL" does not constitute constructive use of the mark. Opposers have used their marks in commerce as evidenced by their first dates of use. *See* Opposers' Notice of Opposition at ¶¶5, 7.

37 C.F.R. §2.76, with respect to an amendment to allege use, states in relevancy that “[a]n application under section 1(b) of the Act may be amended to allege use of the mark in commerce under section 1(c) of the Act at any time between the filing of the application and the date the examiner approves the mark for publication.” 37 C.F.R. §2.76 (a). Applicant alleged in its Answer that its “mark has been in continuous commercial use since January 4, 2010 and has not been abandoned.” Yet, Applicant did not file an Amendment to allege use between the time it supposedly started using its mark and the date on which its mark was approved for publication (i.e., April 10, 2010). Thus, Applicant had ample time to file an Allegation of Use as they supposedly started using the mark in commerce ninety one (91) days **prior** to publication.

As previously asserted by Opposers, TSDC nor ELLIS have found any evidence of use of the mark FIGHT LIKE A CAROLINA GIRL by APPLICANT in commerce. See Opposers’ Notice of Opposition at ¶18. To date, Opposers maintain they have not been presented with any verification that Applicant has used its mark in commerce.

37 C.F.R. §2.76 additionally provides that a “complete amendment to allege use must include ... [a] statement that is signed and verified (sworn to) or supported by a declaration ... that ... “[t]he mark is in use in commerce, specifying the date of the applicant's first use of the mark and first use of the mark in commerce, and those goods or services specified in the application on or in connection with which the applicant uses the mark in commerce.” 37 C.F.R. §2.76 (b). 37 C.F.R. §2.76 further provides that an “amendment to allege use may be filed only when the applicant has made use of the mark in commerce on or in connection with all of the goods or services, as specified in the application, for which applicant will seek registration in that application ...” (emphasis added); 37 C.F.R. §2.76 (c).

It is Opposer’s position that had Applicant been using its mark in commerce as alleged, it would have filed an amendment to allege use regarding same. However, it is Opposers’ contention that Applicant was not using its mark in commerce and could not, in good faith, file an amendment confirming same.

Accordingly, OPPOSERS respectfully request that Applicant's Motion be denied and the Suspension be lifted in the instant proceeding to allow parties to continue with discovery.

TIME FOR FILING

37 CFR §2.119 (c) provides "When service is made by first-class mail, "Express Mail," or overnight courier, the date of mailing or of delivery to the overnight courier will be considered the date of service. Whenever a party is required to take some action within a prescribed period after the service of a paper upon the party by another party and the paper is served by first-class mail, "Express Mail," or overnight courier, 5 days shall be added to the prescribed period." The Motion was mailed via U.S. First Class Mail on February 15, 2011 and set a twenty (20) days statutory period for response. The period for response ends on March 7, 2011, which is today. Accordingly, this Response is timely.

Respectfully submitted,

Date: March 7, 2011

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing OPPOSERS' MOTION IN RESPONSE TO APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS has been served upon the Applicant on this 7th day of March, 2011 by depositing the same in the United States First Class Mail, postage pre-paid, in an envelope addressed as follows:

Beyond The Box, Inc.
c/o Michael Todd Tucker, Manager of Beyond The Box, Inc.
116 Lowes Food Drive, #132
Lewisville, NC 27023

/D. Ari Sherwin/
D. Ari Sherwin