ESTTA Tracking number: **ESTTA426590**
Filing date: **08/23/2011**

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

Proceeding	91200109
Party	Defendant Peter F. Wingard d/b/a TA Krumlr
Correspondence Address	RALPH H DOUGHERTY 4219 KRONOS PLACE CHARLOTTE, NC 28210 UNITED STATES ralph@ralphdougherty.com
Submission	Motion to Amend/Amended Answer or Counterclaim
Filer's Name	Ralph H. Dougherty
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Signature	/Ralph H. Dougherty/
Date	08/23/2011
Attachments	Amended Answer0001.pdf (8 pages)(3162885 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application of

Mark: TWEETMARKS

Serial No.: 77/695,071

Filed: March 19, 2009

Applicant: Peter F. Wingard

Twitter, Inc. Opposer V. Peter F. Wingard d/b/a/ Krumlr Applicant	Opposition No. 91200109

AMENDED ANSWER OF APPLICANT AND AFFIRMATIVE DEFENSES

Opposer, Twitter, Inc., filed an Amended Notice of Opposition, dated August 5, 2011.

Applicant, Peter F. Wingard, an individual, having an address of 392 Ivy Glen Circle, Avondale Estates, Georgia 30002, hereby answers each of the allegations of the Amended Notice of Opposition by Opposer, Twitter, Inc.:

1. Applicant is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 1 and therefore denies the same.

2. Applicant is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 2 and therefore denies the same.

3. Applicant admits that the Opposer has filed an application to register the mark TWEET on April 16, 2009, in three classes, classes 38, 41, and 45. Applicant denies the remainder of paragraph 3.

4. Applicant admits that the Opposer has filed an application to register the mark TWEET on August 26, 2010, in two classes, classes 9 and 35. Applicant denies the remainder of paragraph 4.

5. Applicant admits that the Opposer has filed an application to register the mark TWEETDECK on April 30, 2009, in class 9. Applicant denies the remainder of paragraph 5.

6. Applicant admits that the Opposer has filed an application to register the mark RETWEET on August 14, 2009 in three classes, classes 38, 41, and 45. Applicant denies the remainder of paragraph 6.

7. Applicant admits that Opposer attached an Exhibit A to the Notice of Opposition, which purports to show the then current status and title of Opposer's three trademark applications and single registration.

8. Applicant denies the allegations of Paragraph 8.

9. Applicant denies the allegations of Paragraph 9.

10. Applicant denies the allegations of Paragraph 10.

11. Applicant denies the allegations of Paragraph 11.

12. Applicant denies the allegations of Paragraph 12.

13. Applicant admits the allegations of Paragraph 13.

14. Applicant denies the allegations of Paragraph 14.

15. Applicant denies the allegations of Paragraph 15.

16. Applicant denies the allegations of Paragraph 16.

17. Applicant denies the allegations of Paragraph 17.

18. Applicant denies the allegations of Paragraph 18.

19. Applicant denies the allegations of Paragraph 19.

20. Applicant denies the allegations of Paragraph 20.

21. Applicant denies the allegations of Paragraph 21.

AFFIRMATIVE DEFENSES

In further Answer to the Notice of Opposition, by way of Affirmative Defenses, Applicant asserts that:

FIRST AFFIRMATIVE DEFENSE

19. Opposer has failed to state a claim on which relief can be granted, and failed to allege any proper grounds for opposition of Applicant's mark.

SECOND AFFIRMATIVE DEFENSE

20 Opposer failed to set forth those services on which Opposer utilizes Opposer's mark and which Opposer believes would be confused with services of Applicant.

THIRD AFFIRMATIVE DEFENSE

21. Applicant's mark differs so much from the marks of Opposer that there is no likelihood of confusion between the marks.

FOURTH AFFIRMATIVE DEFENSE

22. The services described in the opposed application are different from the services of Opposer covered by Opposer's Registration No. 3,780,175, and Opposer's Application Nos. 77/715,815, 77/804,481 and 85/116,717.

FIFTH AFFIRMATIVE DEFENSE

23. The services described in the opposed application are not sold in competition with any of the services with Opposer as set forth in Registration No. 3,780,175, and Opposer's Application Nos. 77/715,815, 77/804,481 and 85/116,717.

SIXTH AFFIRMATIVE DEFENSE

24. Consumers of Applicant's services are entirely too knowledgeable to be confused by Applicant's distinctive mark and Opposer's marks.

SEVENTH AFFIRMATIVE DEFENSE

25. Consumers of Opposer's services are entirely too knowledgeable to be confused by Applicant's distinctive mark and Opposer's marks.

EIGHTH AFFIRMATIVE DEFENSE

26. Applicant has been using the opposed mark and developing consumer recognition and goodwill therein since at least 2009, such use being open, notorious, and known to

Opposer, and such knowledge, in turn, being known to Applicant. During this period of more than two years, Opposer failed to take meaningful action to assert the claims on which it bases this opposition, on which inaction Applicant has relied to his detriment. Opposer's claims are consequently barred by the doctrines of laches, acquiescence and estoppel.

NINTH AFFIRMATIVE DEFENSE

27. Others have been using Opposer's TWEET marks, such use being open, notorious, and known to Opposer, and such knowledge, in turn, being known to Applicant. During this period, Opposer failed to take meaningful action to assert the claims on which it bases this opposition against others, on which inaction Applicant has relied to his detriment. Opposer's claims are consequently barred by the doctrines of laches, acquiescence and estoppel.

TENTH AFFIRMATIVE DEFENSE

28. Applicant has been using the opposed mark for a period in excess of 2 years, and during that time there has been no evidence of consumer confusion between the respective marks of Applicant and Opposer.

ELEVENTH AFFIRMATIVE DEFENSE

29. Applicant has developed its mark in good faith and without any intent to infringe or appropriate any mark owned by another.

TWELFTH AFFIRMATIVE DEFENSE

30. Opposer's claims are barred by equitable principles, including waiver, unclean hands, laches, acquiescence, and estoppel.

THIRTEENTH AFFIRMATIVE DEFENSE

31. Opposer neither utilizes nor alleges that it utilizes its mark covered by Opposer's Registration No. 3,780,175, and Opposer's Application Nos. 77/715,815, 77/804,481 and 85/116,717, on Applicant's services in International Class 42.

FOURTEENTH AFFIRMATIVE DEFENSE

32. At least 35 service marks incorporate the word "tweet" or some closely related form of "tweet therein, which indicates that Opposer does not have exclusive rights to the word "tweet".

FIFTEENTH AFFIRMATIVE DEFENSE

33. Opposer's rights in and to its alleged COTWEET, TWEET, and RETWEET service marks are generic, or, alternatively, merely descriptive of the services provided under the marks. Opposer's alleged marks are therefore inherently unprotectable absent acquired distinctiveness, which is lacking in the alleged marks COTWEET, TWEET, and RETWEET.

SIXTEENTH AFFIRMATIVE DEFENSE

34. Any similarity between Applicant's mark and Opposer's marks is restricted to that portion of the marks consisting of the word "tweet", which is not distinctive. Thus, under the anti-dissection rule, and secondary meaning Opposer might have in its marks COTWEET, TWEET, and RETWEET, is narrowly circumscribed to the exact mark alleged, and does not extend to any other feature of the mark beyond the word "tweet".

SEVENTEENTH AFFIRMATIVE DEFENSE

35. This opposition constitutes an unlawful attempt by Opposer to extend the coverage of its trademark to cover services which it neither provides, nor has any intention of so doing.

Applicant reserves the right to supplement or otherwise add to its affirmative defenses of which it may become aware through discovery or otherwise.

RELIEF REQUESTED

Having made full answer to the Notice of Opposition, Applicant prays that this Opposition proceeding be dismissed, and that Applicant's Registration issue forthwith.

Respectfully submitted,

Peter F. Wingard

By _____

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August 23, 2011

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the attached AMENDED ANSWER OF APPLICANT was served on the following persons by e-mail, as agreed by the parties, this 23rd day of August, 2011.

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