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

Proceeding	91200818
Party	Defendant Just Bones Boardwear Limited Liability C ompany
Correspondence Address	MELANIE C HOLLOWAY LEADING EDGE LAW GROUP PLC 1031 E CARY ST STE 1130 RICHMOND, VA 23219-4023 UNITED STATES
Submission	Other Motions/Papers
Filer's Name	Melanie C. Holloway
Filer's e-mail	mholloway@leadingedgelaw.com, mhollowa@richmond.edu
Signature	/Melanie C. Holloway/
Date	08/30/2011
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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. 85145920  
For the mark: JUST BONES BOARDWEAR  
Filing Date: October 6, 2010  
Publication Date: March 22, 2011

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GEORGE A. POWELL, OPPOSER,

v.

Opposition No. 91200818

JUST BONES BOARDWEAR  
LIMITED LIABILITY COMPANY, APPLICANT

**MOTION TO STRIKE OR IN THE ALTERNATIVE  
FOR MORE DEFINITE STATEMENT AND SUPPORTING BRIEF**

Just Bones Boardwear Limited Liability Company (“Applicant”) hereby moves to strike certain immaterial and impertinent portions of the Notice of Opposition, or in the alternative for a more definite statement with respect to certain vague and ambiguous references to trademark rights in the Notice of Opposition. In support of its motions, Applicant states as follows:

1. Applicant, pursuant to Fed. R. Civ. P. 12(f) moves to strike Paragraph 2 in part, Paragraph 3 in part, Paragraph 4, and Paragraph 5 in part of the Notice of Opposition, all of which include material that is redundant, immaterial and/or impertinent to Opposer’s claims of likelihood of confusion and dilution.
2. Specifically, Paragraph 2 of the Notice of Opposition states in part “. . . because Opposer has licensed and used the mark BONES *and related marks* continuously in connection with apparel and related accessories in Class 25, long before Applicant’s filing date or use of the applied for mark, Opposer is entitled to protection of his distinctive marks.” Notice of Opp., ¶ 2 (emphasis added). Applicant moves to strike the italicized portion of Paragraph 2 as mere

surplusage, immaterial and impertinent to Opposer's claims. The "related marks" do not support Opposer's claims in the Notice of Opposition. See Notice of Opposition, ¶¶ 6-10.

3. Paragraph 3 of the Notice of Opposition includes the following statement: "By reason of such advertising and wide distribution of Opposer's goods and services, the public recognizes the mark BONES *and variations thereof* as signifying the goods and services offered by Opposer." Notice of Opp., ¶ 3 (emphasis added). Applicant moves to strike the italicized portion of Paragraph 3 as mere surplusage, immaterial and impertinent to Opposer's claims. The "variations thereof" do not support Opposer's claims in the Notice of Opposition. See Notice of Opposition, ¶¶ 6-10.

4. Paragraph 4 is immaterial and impertinent to Opposer's claims for likelihood of confusion and for dilution as evidenced by the absence of any reference to such alleged "bones design" marks in the paragraphs of the Notice of Opposition that state Opposer's claims of likelihood of confusion and dilution. See Notice of Opposition, ¶¶ 6-10. The statements and allegations in Paragraph 4, therefore, bear no relevance to any claim stated in the Notice of Opposition and must be stricken.

5. Paragraph 5 of the Notice of Opposition includes the following statement: "Notwithstanding Opposer's exclusive prior rights in and to *the trademarks incorporating the term BONES.*" Notice of Opp. ¶ 5 (emphasis added). Applicant moves to strike the italicized portion of Paragraph 5 as mere surplusage, immaterial and impertinent to Opposer's claims. The "the trademarks incorporating the term" do not support Opposer's claims in the Notice of Opposition. See Notice of Opposition, ¶¶ 6-10

6. If Applicant's Motion to Strike is denied, in whole or in part, then in the alternative Applicant moves pursuant to Fed. Rule of Civ.P 12(e) for a More Definite Statement with respect to the allegations in Paragraphs 2, 3, 4, and 5 of the Notice of Opposition.

7. Except for the list of several federal trademark registrations in Paragraph 2 of the Notice of Opposition, which Opposer defines as "Opposer's Marks," Opposer fails to specify the trademarks on which Opposer's claims are based. Aside from those trademark registrations, Opposer makes only vague and ambiguous references what one can only infer are various, purported common-law trademark rights: "related marks" (Notice of Opp. ¶ 2), "variations [of marks]" (Notice of Opp. ¶ 3), "bones design" marks (Notice of Opp. ¶ 4), and "trademarks incorporating the term BONES" (Notice of Opp. ¶ 5).

8. Applicant cannot reasonably prepare a response to the Notice of Opposition because Opposer has failed to fully identify with specificity each of the trademarks upon which it bases its assertion that it has senior trademark rights in confusingly similar trademarks. Either the references in the Notice of Opposition to any of Opposer's trademark rights other than those specifically identified, federally registered trademarks should be redacted, or Opposer should be required to identify with specificity, and provide a complete drawing of, each of its trademarks upon which Opposer's claims are based.

### **ARGUMENT**

1. Vague and Ambiguous References in the Notice of Opposition are Immaterial and Impertinent and Fail to Support Opposer's Claims and Should Be Stricken.

Opposer claims that Applicant's mark JUST BONES BOARDWEAR is confusingly similar to "Opposer's Marks" and dilutes Opposer's BONES mark. *See* Notice of Opp. ¶ 10. Yet, in addition to these references that put Applicant on notice of the particular federal trademarks

and registrations upon which Opposer bases his claims, Opposer intersperses throughout his pleading vague and ambiguous references to “related marks” (Notice of Opp. ¶ 2), “variations [of marks]” (Notice of Opp. ¶ 3), “bones design” marks (Notice of Opp. ¶ 4), and “trademarks incorporating the term BONES” (Notice of Opp. ¶ 5).

These vague and ambiguous references are insufficient to give Applicant notice of Opposer’s likelihood of confusion and dilution claims. If the Notice of Opposition was based solely on these vague and ambiguous references, it would fail to meet the standard for an adequately detailed complaint of trademark infringement. Accordingly, except for the Opposer’s pleading with respect to his federal trademark registrations and the trademark rights therein, the Notice of Opposition would be subject to a motion to dismiss. *Cf. Keep a Breast Foundation v. The Seven Group*, 11-cv-00570 BEN, 2011 WL 3240756 (S.D. Cal. July 28, 2011) (dismissing plaintiff’s trade dress claim for failure to describe the trade dress in its pleading).

As these vague and ambiguous references are inadequately pled to support Opposer’s claims in the Notice of Opposition, they are immaterial and impertinent to said claims, and therefore, must be stricken from the Notice of Opposition.

2. Opposer Fails to Identify the Trademark Rights on Which His Claims Are Based With Sufficient Specificity.

Opposer has failed to state whether the references to “related marks” (Notice of Opp. ¶ 2), “variations [of marks]” (Notice of Opp. ¶ 3), “bones design” marks (Notice of Opp. ¶ 4), and “trademarks incorporating the term BONES” (Notice of Opp. ¶ 5) are alternative ways to describe the federal trademarks and federal trademark registrations defined as “Opposer’s Marks,” or whether these references are an attempt to expand the universe of trademark rights being asserted by Opposer in the Notice of Opposition by a catch-all reference to additional

rights, most likely common-law rights. Without a more detailed description of the vague and ambiguous references to “related marks” (Notice of Opp. ¶ 2), “variations [of marks]” (Notice of Opp. ¶ 3), “bones design” marks (Notice of Opp. ¶ 4), and “trademarks incorporating the term BONES” (Notice of Opp. ¶ 5), Applicant cannot reasonably prepare an answer to the Notice of Opposition.

“[T]he issue of likelihood of confusion is determined on whether opposers’ pleaded marks are confusingly similar to applicant’s involved mark . . . .” *Mpact Immedia Systems, Inc., Mpact Immedia Corporation, and Mpact Immedia, Inc. v Chromatic Research, Inc.*, 1998 WL 111040 at \*3, Opposition No. 107, 575 (T.T.A.B. February 27, 1998). Answering the Notice of Opposition without more information regarding the Opposer’s mark rights would be unduly prejudicial to Applicant as the likelihood of confusion analysis is based on the marks Opposer pleads. *See id.* Without a clear picture of the alleged rights that are being asserted against it, Applicant cannot respond to the Notice of Opposition or raise all appropriate defenses. *See RE/MAX v. Underwood*, No. WDQ-10-2367, 2011 WL 2118911 at \*4 (D.Md. May 25, 2011). In order to put Applicant on sufficient notice, Opposer must identify and describe each trademark on which his claims are based, and must include a drawing (i.e., a visual representation) of each mark he is asserting against Applicant. *See id.*

### **CONCLUSION**

For the foregoing reasons, Applicant moves to strike Paragraph 2 in part, Paragraph 3 in part, Paragraph 4, and Paragraph 5 in part, of the Notice of Opposition because the portions of those Paragraphs cited in this motion fail to support and are immaterial and impertinent to

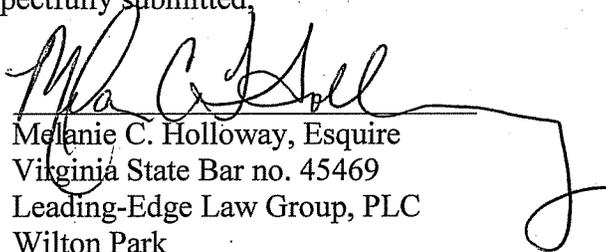
Opposer's claims. In the alternative, Applicant moves for a more definite statement of the trademark rights on which Opposer relies in its Notice of Opposition.

This Motion to Strike or in the Alternative Motion for More Definite Statement and Supporting Brief is submitted via ESTTA.

Dated: August 30, 2011

Respectfully submitted,

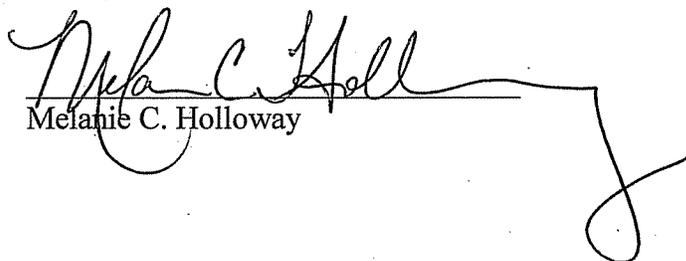
By:

  
Melanie C. Holloway, Esquire  
Virginia State Bar no. 45469  
Leading-Edge Law Group, PLC  
Wilton Park  
4905 Dickens Road  
Suite 100  
Richmond, Virginia 23230  
(804) 343-3227  
mholloway@leadingedgelaw.com

**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that this correspondence is being transmitted by electronic mail to the United States Patent and Trademark Office via ESTTA on the date identified below.

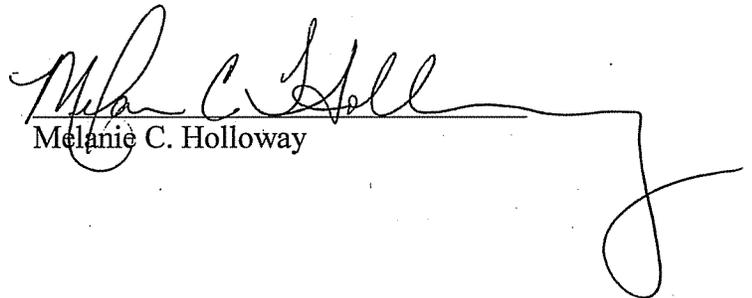
Dated: August 30, 2011

  
Melanie C. Holloway

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing "Motion to Strike or in the Alternative Motion for More Definite Statement and Supporting Brief" was served on August 30, 2011 by e-mail and by first-class mail, postage prepaid, to Applicant's counsel addressed as follows:

Kurt Koenig  
920 Garden St., Suite A  
Santa Barbara, California 93101

  
Melanie C. Holloway