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

Proceeding	91207333
Party	Defendant IP Application Development LLC
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Attachments	[063] 2016-04-21 - IPAD LLC Motion to Strike Portions of Clements Decl.pdf(281102 bytes)

Pursuant to Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) Sections 502 and 528.05(b) and Federal Rule of Civil Procedure (“FRCP”) 56(c)(4), Applicant IP Application Development LLC (“IPAD LLC”) respectfully submits this Motion to Strike Portions of the Declaration of Brian Clements in Support of RxD Media LLC’s (“RxD”) Opposition to IP Application Development LLC’s Motion for Summary Judgment (the “Clements Declaration”).

PRELIMINARY STATEMENT

The Clements Declaration utterly fails to comply with the requirements for a declaration submitted in support of, or in opposition to, a motion for summary judgment, as it (1) contains statements not made on personal knowledge, and (2) fails to show affirmatively that the declarant is competent to testify on the matters stated therein. In particular, Paragraph 6 of the Clements Declaration offers unsupported speculation about consumers’ interpretation of the prefix “I” in RxD’s alleged IPAD mark, which is contrary to the Trademark Manual of Examining Procedure (“TMEP”) and the evidence of record. Because the statements in the Clements Declaration are not supported by the declarant’s personal knowledge or otherwise, and the declarant is not an expert in consumer perception, these statements should be stricken.

I. FACTUAL BACKGROUND

On April 6, 2016, RxD submitted the Clements Declaration in support of its opposition to IPAD LLC’s motion for summary judgment. The declarant, Brian Clements (“Clements”), is “the president” and “a founder” of RxD and has been deposed in this proceeding. (Clements Decl. ¶ 2; D.E. 52, Hill Decl., Ex. 6.) Clements has not been offered as an expert in this proceeding, and indeed, the deadline for expert disclosures passed more than a year ago. *See* TBMP § 401.03; D. E. 30 (setting deadline for expert disclosures as January 10, 2015).

Although the Clements Declaration purports to be “based on [Clements’s] personal knowledge and experience” (Clements Decl. ¶ 1), rather than offering purely factual allegations it includes statements of opinion and unsupported speculation. In particular, Clements asserts that “‘I’ is not universally

thought by consumers to mean ‘internet’ or ‘internet enabled.’” (*Id.* ¶ 6.)¹ Yet, Clements (1) does not provide sufficient basis for that assertion, (2) does not himself have any expertise with regard to consumer perception, and (3) RxD has offered no expert testimony on that topic. The only support Clements claims to have for his speculation about consumer perception is the assertion that “[i]t has . . . been reported that current consumers do not associate the ‘I’ in IPAD with ‘internet,’” relying on an article on the website *Tech Times*. (*Id.*; *see also id.*, Ex. 3.) But that article merely theorizes, without support, as to what “i” means with respect to *Apple’s* products, not even for products or services generally, much less RxD’s services, which is the relevant issue here.

II. THE CLEMENTS STATEMENTS SHOULD BE STRICKEN BECAUSE THEY ARE NOT MADE ON THE BASIS OF PERSONAL KNOWLEDGE OR SUFFICIENT FACTS

A party to an opposition proceeding may submit a declaration in support of, or in opposition to, a motion for summary judgment, provided it (1) is “made on *personal knowledge*”; (2) “set[s] forth such facts as would be admissible in evidence”; and (3) “show[s] affirmatively that the affiant is competent to testify to the matters stated therein.” TBMP § 528.05(a–b) (emphasis added); *see also* FRCP 56(c)(4). The Board has stricken portions of declarations that are not based on personal knowledge, or otherwise go beyond the scope of a permissible declaration.

For instance, in *John T. Clark Co. v. Colgate-Palmolive Co.*, the affidavit of a party’s Vice President was rejected as “not meet[ing] the criteria” of FRCP 56 because “there is no foundation for the statements made by [the declarant] nor does it appear therefrom that the allegations were made on personal knowledge.” 176 U.S.P.Q. 93, 1972 WL 17198 (T.T.A.B. 1972). Similarly, in *Anheuser-Busch Inc. v. Molson Breweries*, the Board struck portions of an affidavit submitted by a party’s Vice President of Marketing in opposition to a motion for summary judgment, as violating FRCP 56. 58 U.S.P.Q.2d 1477, 1999 WL 33265806 (T.T.A.B. 1999). In particular, the Board struck the executive’s statements that (1) “[c]onsumer perception regarding BLACK ICE was that consumers did not perceive the BLACK

¹ For the convenience of the Board, the statements in the Clements Declaration that IPAD LLC moves to strike are highlighted in the attached Exhibit A. Such statements are hereafter referred to as the “Clements Statements.”

ICE product to be dark liquid” and (2) “[c]onsumers did not believe it was a dark beer,” because they were “neither made with personal knowledge nor substantiated with specific facts.” *Id.* at *2. Here, as explained below, because they are not made with personal knowledge or sufficient factual basis, the Clements Statements violate TBMP § 528.05(b) and FRCP 56(c)(4) and should therefore be stricken.

The Clements Statements consist of mere speculation about consumer perceptions regarding the meaning of the prefix “i.” (Clements Decl. ¶ 6.) As a preliminary matter, Clements’s assertion that “‘I’ is not universally thought by consumers to mean ‘internet’ or ‘internet enabled’” is contrary to the TMEP, which provides that an “i”-formative term such as “IPAD” is “merely descriptive” when used in connection with a product or service sold or delivered over the Internet. TMEP § 1209.03(d). Moreover, Clements is not an expert in consumer perception, and has offered nothing to suggest that he has any personal knowledge about consumers’ perceptions regarding the meaning of “i,” or indeed anything else. Nor does the online article that the Clements Declaration references offer any support, as it contains no data regarding consumer perception, and in fact discusses potential meanings associated with *Apple’s* marks, not RxD’s purported IPAD mark, or even products or services more generally. (*Id.*, Ex. 3.) Further, the article actually contradicts Clements’s assertion, as it explicitly recognizes that “i” is commonly thought to mean “Internet,” and in fact states that that “would be the first definition of the ‘i’ [in Apple marks such as IPHONE] if there was a dictionary on Apple terms.” (*Id.* at 1.) Clements’s rank speculation about consumer perception is precisely the sort of material that the Board rejected in *Anheuser-Busch Inc.* 58 U.S.P.Q.2d 1477. The same treatment is warranted here.

III. CONCLUSION

Because Clements is not an expert on consumer perception, does not have personal knowledge of, and has not otherwise offered adequate support for his speculation regarding consumer perceptions of the prefix “i,” IPAD LLC respectfully requests that the Board grant its motion to strike the Clements Statements.

Dated: April 21, 2016

Respectfully submitted,
/s/ Allison W. Buchner

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ATTORNEYS FOR APPLICANT
IP APPLICATION DEVELOPMENT LLC

RxD Media, LLC v. IP Application Development LLC
Opposition Nos. 91207333, 91207598

APPLICANT'S EXHIBIT A

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

RXD MEDIA, LLC, :
 :
 Opposer, :
 :
 v. : **Opposition No. 91207333**
 : **91207598**
 IP APPLICATION DEVELOPMENT LLC, :
 :
 Applicant. :
 _____ :
 :

**DECLARATION OF BRIAN CLEMENTS IN SUPPORT OF
RXD MEDIA, LLC'S OPPOSITION TO
IP APPLICATION DEVELOPMENT LLC'S MOTION FOR SUMMARY JUDGMENT**

I, Brian Clements, hereby declare as follows:

1. My name is Brian Clements, and my address is 234 Bradley Court, Holland, Pennsylvania 18966. I am over the age of 18, and I make this declaration based on my personal knowledge and experience. If called upon, I am competent and will testify to the matters set forth in this declaration.

2. I am a founder of RxD Media, LLC ("RxD"), the Opposer in the opposition proceedings identified above. I am the president of RxD and have been since its founding. I also am and have been involved as a founder and officer of other companies that, like RxD, offer products and services through online channels.

3. In 2007, RxD adopted the mark IPAD for use in connection with offering the storage of personal information and files on a mobile platform that would allow the information and files to be accessed for modification or retrieval on a mobile device, such as a phone. RxD began rendering its services under the IPAD mark on September 1, 2007. The services were and are rendered through RxD's IPAD website located at ipad.mobi. True and correct copies of

screen shots showing the various types of information, including photos and videos, that can be stored and accessed as part of the IPAD service, and which were produced to Applicant with production numbers RXD0001893-96, are attached as Exhibit 1.

4. Details regarding RxD's adoption and use of the IPAD mark, including the reasons that the mark was chosen, were provided to Applicant in *Opposer RxD Media, LLC Supplemental Response to Applicant's Interrogatory No. 1*. A true and correct copy of RxD's supplemental response is attached hereto as Exhibit 2. A primary consideration in choosing a name for RxD's service was to limit the number of characters, and thus keystrokes, that would be needed to type in the name of the service because it was anticipated (and hoped) that users would access RxD's services from their mobile phones. In 2007, most mobile phones were "flip phones," with a small, limited keypad that, unlike a QWERTY keyboard, did not have a dedicated key for all letters of the alphabet.

5. Thus, RxD rejected the name it originally considered, "MyPad," because it determined that the name would likely be considered too long by subscribers who might have to enter it on a flip phone. RxD then considered shortening the name to "MPAD," but discovered that name was not available for all the uses that RxD intended. RxD therefore chose IPAD because it had a sufficiently small number of characters (four) and had a similar connotation to "MyPad." *Id.* at 3.

6. As stated in RxD's supplemental response, the "I" in "IPAD" was intended to represent the personal nature of the services, and because "I" is synonymous with "my." Exhibit 2, at 3. My understanding is that "I" is not universally thought by consumers to mean "internet" or "internet enabled." As explained in RxD's supplemental response, RxD's experience when it began offering its IPAD services was that potential subscribers did not understand or appreciate

the nature of those services because, in 2007, they had no frame of reference by which to understand the unique service RxD was offering. For that reason, RxD adopted a slogan to educate potential subscribers about the nature of its IPAD services. *Id.*, at 2-3. It has also been reported that current consumers do not associate the “I” in IPAD with “internet.” See Quinten Plummer, *Apple iPhone, iPad, iMac, iPod: Here’s What The ‘i’ Means*, Tech. Times (Feb. 20, 2016), <http://www.techtimes.com/articles/135191/2016220/apple-iphone-ipad-imac-ipod-heres-what-the-i-means.htm>, attached as Exhibit 3.

7. RxD never considered IPAD as describing its services. To the contrary, that is why RxD adopted the slogan as described above. In addition, RxD did not receive any indication from the U.S. Patent and Trademark Office prior to the filing of the opposition proceedings that the examiner considered RxD’s IPAD mark descriptive. The first suggestion RxD received of any assertion that its mark was descriptive was from Applicant’s counsel in the course of discussions with RxD’s counsel at that time concerning extensions of time to file the oppositions. While RxD did not, and still does not, believe that its mark describes its services, it nevertheless took Applicant’s allegations into consideration in an effort to avoid a potentially costly legal issue. That consideration was the purpose behind, for example, my instructions to David Wiles, the developer hired by RxD to work on its IPAD site. See Motion Exhibit 39.

8. RxD employs a business model that is fairly standard in the online industry. A general description of online models can be found in the following article: David Chaffey, 8 *Online Revenue Model Options for Internet Business*, Smart Insights (Jan. 11, 2011) at <http://www.smartinsights.com/digital-marketing-strategy/online-business-revenue-models/online-revenue-model-options-internet-business/>, attached as Exhibit 4. RxD began offering subscriptions to its IPAD services at no charge, with the goal of eventually charging for

subscriptions, but also attracting advertising as the subscription numbers increase. For this model, the value of the advertising is anticipated to be greater than what could be achieved from increasing subscription costs. For that reason, even well-known, established companies have employed the same business model as RxD. A report regarding one such company, Microsoft, can be found at <http://www.ibtimes.com/real-reason-tech-giants-are-offering-everyone-free-storage-1612492>, attached as Exhibit 5.

9. Based on my experience in the industry, it is not uncommon for companies that employ a business model similar to RxD's to experience low, even zero, revenue for several years.

10. RxD has consistently advertised its services since its IPAD services were first offered. Attached are true and correct copies of the following documents evidencing advertising of RxD's IPAD services:

- a. Exhibit 6, AdMob Account Summary (Oct. 27, 2008-Jun. 29, 2010), as produced to Applicant with production numbers RXD000463-64.
- b. Exhibit 7, AdMob Account Summary (Aug. 2, 2008-Oct. 10, 2008), as produced to Applicant with production number RXD000465.
- c. Exhibit 8, Google AdWords Campaign Status (Mar. 15, 2011-Mar. 28, 2011), as produced to Applicant with production number RXD0001309.
- d. Exhibit 9, YouTube Promoted Videos Campaign (Mar. 2, 2011-Feb. 8, 2016), as produced to Applicant with production numbers RXD0002059-60.
- e. Exhibit 10, Bing Ads Summary (Jan. 25, 2014-Jan. 25, 2016), as produced to Applicant with production numbers RXD0002037-2040.

- f. Exhibit 11, Google AdWords Campaign Summary (Feb. 12, 2015-Feb. 8, 2016), as produced to Applicant with production number RXD0002192.

11. RxD has experienced difficulties over the years advertising its IPAD services. Consistent with its business model, RxD primarily advertises online. In January 2010, RxD's IPAD site experienced a dramatic spike in the number of views that corresponded with Apple's January 27, 2010 announcement of the launch of its iPad tablet computer. Subsequently, and online advertisers rejected RxD's advertisements based on a mistaken belief that RxD has no rights in the IPAD mark for its services. Attached are true and correct copies of the following documents reflecting rejections RxD has received from online advertisers:

- a. Exhibit 12, S. Nelson April 22, 2011 Email to B. Clements, which was produced to Applicant with production number RXE0002237, stating that "problem still exists with the TM" for RxD's advertisement campaign.
- b. Exhibit 8, RxD's AdWords campaign status, which was produced to Applicant with production number RXD0001309, showing "Disapproved" for "Trademark terms."

12. Upon launching of its IPAD services, RxD received positive media coverage and reviews for its innovative services. For example:

- a. RxD's website through which its IPAD services are offered was selected in August 2007 to be featured in the dotMobi Showcase at <http://mtld.mobi/showcase>. A true and correct copy of an email from V. Hedderel to B. Clements reflecting the selection, which was produced to Applicant with production numbers RXD000030-33, is attached as Exhibit 13.

- b. RxD's IPAD services were identified as a "Showcase" product by MobiThinking. A true and correct copy of the MobiThinking "Showcase" page identifying RxD's IPAD services, which was produced to Applicant with production number RXD000021, is attached as Exhibit 14.
- c. In May 2008, RxD's IPAD site was identified as an "excellent mobile website," and its IPAD services were chosen as a finalist for service of the year by mobility.mobi. A true and correct copy of the MobiEnthusiast publication regarding RxD's IPAD services, which was produced to Applicant with production number RXD000022, is attached as Exhibit 15.
- d. RxD's IPAD site and IPAD services were featured and described in a March 2009 blog posting on the Philadelphia Phans mobile site. A true and correct copy of the Philadelphia Phans blog posting, which was produced to Applicant with production number RXD000052, is attached as Exhibit 16.
- e. In 2008, RxD's IPAD services were favorably reviewed, and described as "unique and the first of its kind" in a posting regarding "Eva's mobile review" on Mobilopen.org. A true and correct copy of the posting, which was produced to Applicant with production number RXD000067, is attached as Exhibit 17.

13. From 2007 through to the present, RxD has continuously and consistently received a high volume of traffic on its IPAD website through which its IPAD services are offered. For example:

- a. A true and correct copy of the 2009 website statistics for RxD's IPAD site, which was produced to Applicant with production number RXD000367, is

attached as Exhibit 18. As Exhibit 16 shows, by 2009, the year before Applicant filed the applications that RxD is opposing, and the year before Apple introduced its iPad tablet computer, RxD's IPAD site received over 21,000 hits and over 12,000 page views from over 3,000 visitors. *Id.*, at 1. The largest number of views were by far from the U.S., and the top keyword term searched was "ipad." *Id.*, at 3, 9.

- b. A true and correct copy of the 2012 website statistics for the IPAD site, which was produced to Applicant with production number RXD000370, is attached as Exhibit 19. In 2012, the year that the present proceedings were filed, RxD's IPAD site received over 23,000 hits and almost 16,000 page views from over 3,000 visitors. *Id.*, at 1. The largest number of views were again from the U.S., and again, the top keyword term searched was "ipad." *Id.* at 3, 9.
- c. A true and correct copy of the January-October 2015 website statistics for the IPAD site, which was produced to Applicant with production number RXD000925, is attached as Exhibit 20. During the first ten months in 2015, RxD's IPAD site received over 34,000 hits and well over 26,000 page views from over 5,000 visitors. *Id.*, at 1. A large number of views came from the U.S., but even larger numbers came from visitors in China and Ukraine. *Id.* at 4. "Ipad" was one of the top keyword terms searched. *Id.* at 9.

14. As the above statistics demonstrate, RxD's IPAD site, and thus its IPAD services, has received steadily increasing recognition in the online channels through which the services are offered. While the IPAD services have always been rendered from the U.S., and the largest

number of views of the IPAD site have been from the U.S., RxD has, as the statistics also demonstrate, achieved significant interest from numerous countries outside the U.S.

15. The national and international recognition RxD has received for its IPAD services has resulted in a consistent increase in subscribers to RxD's IPAD service. By 2012, two years after Apple introduced its iPad tablet computer, RxD had 2200 subscribers for its IPAD services. A true and correct copy of RxD's IPAD subscriber list reflecting the 2012 numbers, which was produced to Applicant with production numbers RXD000388-433, is attached as Exhibit 21. That number continued to grow despite the issues with RxD's IPAD advertising described above, and by the end of 2015, there were over 3,000 subscribers from the U.S. and around the world to RxD's IPAD services. A true and correct copy of RxD's IPAD subscriber list reflecting the 2015 numbers, which was produced to Applicant with production numbers RXD0001833, is attached as Exhibit 22.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Date: April 5, 2016

/s/ Brian Clements
Brian Clements

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing IP APPLICATION DEVELOPMENT LLC'S MOTION TO STRIKE PORTIONS OF THE DECLARATION OF BRIAN CLEMENTS IN SUPPORT OF RXD MEDIA, LLC'S OPPOSITION TO IP APPLICATION DEVELOPMENT LLC'S MOTION FOR SUMMARY JUDGMENT was filed electronically on this 21st day of April, 2016, and a copy was electronically mailed to the following:

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