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

Proceeding	91209617
Party	Plaintiff Xikar, Inc.
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Date	03/11/2015
Attachments	20150311 Xikar's Opposition to BWC's Motion for Reconsideration.pdf(370222 bytes) Exhibit A - 20140312 Xikar's Supplemental Answers to 1st Interrogatories_FINAL.pdf(2680586 bytes) Exhibit B - XIKAR-000544-000547 Assignment_FINAL.pdf(3163877 bytes)

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

In re Application Serial No. 85/652,496
filed June 14, 2012 for CICAR

Xikar, Inc.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91209617
)	
Debra Wiseberg)	
d/b/a Bram Warren Company,)	
)	
Applicant.)	
_____)	

OPPOSITION TO APPLICANT’S MOTION FOR RECONSIDERATION

Opposer, Xikar, Inc. (“Xikar”), hereby files its opposition to Applicant Debra Wiseberg’s (“Ms. Wiseberg” or “Bram Warren Company” or “BWC”) Motion for Reconsideration of the Board’s January 20, 2015 dismissal order.

I. The Board Has Not Erred; Therefore Reconsideration is Not Appropriate

The purpose of BWC’s motion for reconsideration is not entirely clear. Such motions are reserved for instances when the Board has erred in reaching an order or decision in light of relevant facts and legal authorities. *See* TBMP § 518. BWC has not stated that the Board erred in its order. On the contrary, BWC appears to actually accept the order and now only seeks to amend its counterclaims in light of the order. *See e.g.*, Brief in Support of Motion for Reconsideration, p. 9 (“The Applicant prays that the Board will allow her to amend the fraud claim against the Opposer, which they deemed was insufficiently pled by the Applicant...”). Because BWC has not asserted that the Board erred in its January 20, 2015 order, the motion for

reconsideration is defective on its face. There is no reason to reconsider an order that is not in error. Even if the motion implies that the Board erred, BWC provides no factual or legal basis for reconsideration; instead it simply repeats previously presented arguments.¹ A motion for reconsideration should not be used to reargue points previously asserted by the moving party. *See* TBMP § 518.

The Applicant's motion is simply an attempt to get another bite – a third bite in fact – at the proverbial apple. BWC has already been given two opportunities to assert tenable counterclaims and both attempts were largely unsuccessful.² BWC's motion does not claim that the Board's decision was in error nor does it provide any legal or factual basis to support reconsideration. It is nothing more than a repackaged version of previously presented arguments. The motion for reconsideration is facially defective and must be denied.

II. There Is No Reason To Allow BWC's Proposed Amendment

BWC requests leave “to amend the fraud claim to correct the deficiencies the Board found in such pleading.” Motion for Reconsideration, p. 1. The motion provides no explanation as to why the proposed amendment should be allowed. Instead it blames the Board for being “silent in their decision dated January 20, 2015, as to whether or not the Applicant

¹ BWC's arguments can be summarized as follows: 1) that BWC should be allowed to amend its claims as requested in its opposition to Xikar's motion to dismiss, 2) the terms “knowingly” and “fraudulently” should support a fraud claim, and 3) failure to disclose a translation is material. None of these issues is new. Each issue was presented to and addressed by the Board when it ordered dismissal on January 20, 2015. BWC continues to waste the time and resources of the parties and Board by reasserting arguments that have already been decided.

² BWC's original counterclaims were summarily rejected by the Board in its Summary Judgment Decision on July 18, 2014, but BWC was allowed to amend the counterclaims. All but one of the amended counterclaims was dismissed by the Board on January 20, 2015. Genericness is BWC's only pending counterclaim.

could amend the fraud counterclaim.”³ *Id.* at 9. The motion includes scattered references to TBMP § 503.03 but there is no explanation how the section authorizes the proposed amendment. Section 503.03 explains that amendments can be granted “when justice so requires” but it also indicates that an amendment is not appropriate when a party has already had two opportunities to perfect its pleading. *See* § 503.03, n. 4 (citing *McDonnell Douglas Corp. v. National Data Corp.*, 228 USPQ 45, 48 (TTAB 1985)).

BWC has been given multiple opportunities to present valid counterclaims. At this late stage of the proceeding it would be highly prejudicial to Xikar to allow additional amendments. Every allegation in BWC’s proposed amendment could have been asserted the last time it amended the counterclaims.⁴ Giving BWC a third opportunity to concoct a counterclaim would only increase the duration and expense of this dispute. In previous cases, the Board has indicated that undue prejudice to an opposing party and failure to cure deficiencies using previous amendments are valid reasons to decline a request to amend the pleadings. *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 USPQ2d 1540 (TTAB 2001) (citing *Foman v. Davis*, 331 U.S. 178 (1962)).

The reason BWC is having such a difficult time formulating a counterclaim for fraud is because there was no fraud. BWC is fabricating facts and misapplying trademark law in an attempt to invent a cause of action that does not exist. The procedural morass being created by BWC is a waste of the Board’s and parties’ resources. It is time for the gamesmanship to

³ For some reason, BWC focuses on the fact that the “Board was silent in their decision” with regard to counterclaim amendments. Xikar cannot understand why the Board’s “silence” would be a factor in the present motion for reconsideration. BWC would need leave to amend its counterclaims regardless of what was said or not said in the Board’s dismissal order. *See* TBMP § 503.03.

⁴ Xikar’s most recent responses to BWC’s discovery requests were sent to BWC on March 12, 2014. BWC amended its counterclaims more than five months later on August 14, 2014.

cease and this dispute to move toward a resolution. For all of these reasons, BWC's request to amend its counterclaims should be denied.

III. BWC's Arguments Regarding Fraud are Nonsense

BWC's motion includes a convoluted argument that the terms "knowingly" and "fraudulently" are sufficient to show the intent element of a fraud claim. While not entirely clear, it appears this argument is in response to the Board's statement that BWC failed "to set forth with particularity a specific material misrepresentation which Opposer is alleged to have knowingly made in procuring or maintaining its registration, including that such misrepresentation was made with the intent to deceive the USPTO . . ." Dismissal Order issued on January 20, 2015, p. 7.

BWC has clearly missed the point. The problem with BWC's fraud claim was not the use of "knowingly" or "fraudulently" but the lack of substance in the claim. Fed. R. Civ. P. 9(b) requires that fraud be pled with a heightened degree of particularity. BWC failed to provide any particularity based on fact, much less the elevated level required by Rule 9(b). The claim cannot now be corrected by redefining a couple of adverbs and fabricating facts in a last-ditch effort to meet pleading standards.

BWC accuses Xikar's president, Kurt Van Keppel, of improperly registering the XIKAR trademark. Specifically, BWC suggests that Mr. Van Keppel was not the original owner of the mark and that he did not have a bona fide intention to use the mark in commerce when he filed the registration. *See* Second Amended Counterclaim, p. 2-5. BWC makes this allegation knowing full well that it is false. Xikar provided verified interrogatory answers to BWC showing that Mr. Van Keppel used the mark on products he sold before he assigned the mark to

his company Xikar, Inc. See Ex. A, Opposer's Answers and Supplemental Answers to Applicant's First Set of Interrogatories, pp. 17-18; Ex. B, Assignment of XIKAR to Xikar, Inc.

Another issue that BWC fails to grasp is that XIKAR is a completely made-up word.⁵ It does not translate to or mean "cigar" in any language. It is not Mayan, Spanish, Taino or any other language that BWC has tried to connect it to. For reasons unknown, BWC continues to suggest that Xikar committed fraud by not submitting a translation when applying to register the trademark. This impossible argument is becoming maddeningly overplayed. As Xikar has stated many times, there is no translation for XIKAR. The word does not mean anything. Even if XIKAR did require a translation, the Board has clarified that "lack of disclosure of a translation of a mark . . . is not as a matter of course a material element of filing an application for registration." See Dismissal Order issued on January 20, 2015, n. 7.

IV. The Board Should Use Its Inherent Authority To Sanction BWC

The Board has discretion under Fed. R. Civ. P. 11 to impose sanctions for filings that are presented for an improper purpose. See *Carrini Inc. v. Carla Carini, Srl*, 57 USPQ2d 1067, 1071 (TTAB 2000). Rule 11 states that the act of signing and filing a paper is a certification by the filing party that the claims and legal contentions in the paper are warranted by existing law and the factual contentions are likely to have evidentiary support. Fed. R. Civ. P. 11(b). The Board's authority to sanction extends to pro se parties as well as attorneys. See *Central Manufacturing Inc. v. Third Millennium Technology Inc.*, 61 USPQ2d 1210, 1213 (TTAB 2001).

⁵ BWC makes the absurd statement that XIKAR is "not a technically good trademark." This statement highlights BWC's ignorance regarding trademark law. As an original, made-up word, XIKAR is a fanciful trademark – the best and strongest type of mark. See J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 11:5 (Fanciful marks consist of words "that have been invented or selected for the sole purpose of functioning as a trademark.").

Xikar believes that BWC has violated Rule 11 on a number of occasions – most recently by filing the present motions. The arguments in BWC’s motion for reconsideration regarding the Board’s dismissal of the fraud counterclaim are frivolous and not based on existing law. BWC repeatedly argues that Xikar committed fraud by not submitting a translation to the USPTO but, as explained above, this argument is bogus. Xikar has stated numerous times that there is no translation for XIKAR. The Board has also stated that a translation is not material element of filing an application.

BWC’s proposed counterclaim amendment includes knowingly false factual allegations and legal theories. BWC asserts that Xikar filed for registration of its mark “with the intent to deceive the USPTO and prevent the USPTO from properly scrutinizing the mark during the application process in an attempt to obtain invalid rights to the word ‘cigar.’ ” *See* Second Amended Counterclaim, p. 6. This allegation is nonsense and has no legal or factual basis. BWC also falsely accuses Xikar’s president, Kurt Van Keppel, of improperly registering the XIKAR trademark. *See id.* at 2-5. BWC makes this allegation despite the fact that all of the evidence proves the contrary. *See* Ex. A, pp. 17-18; Ex. B. There is no evidence that supports her claims.

Throughout this proceeding BWC has made a habit of fabricating facts and asserting frivolous arguments. Xikar would prefer to avoid filing a formal Rule 11 motion because such a motion would extend an already protracted dispute. At this point, however, Xikar cannot allow BWC to continue muddying the record with frivolous and slanderous arguments. Xikar beseeches the Board to invoke its inherent authority to sanction BWC for its frivolous

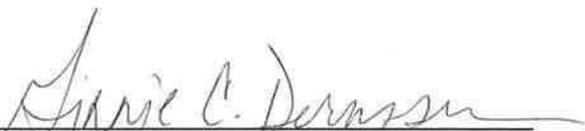
conduct.⁶ See § 527.03. Xikar proposes that through sanctions the Board either (1) dismiss BWC's application with prejudice, or (2) dismiss BWC's counterclaims with prejudice and dismiss Xikar's opposition without prejudice. Either option will resolve this dispute. The second option is acceptable to Xikar because it allows Xikar to refile if the circumstances surrounding BWC's use change (e.g., actual confusion occurs).

V. Conclusion

For the foregoing reasons, Opposer respectfully requests that the Board deny BWC's motion for reconsideration.

Respectfully submitted,

Dated: March 11, 2015

By 

Ginnie C. Derousseau, Reg. #35,855

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Attorneys for Opposer

XIKAR, INC.

⁶ It should be noted that, despite the Board's strong recommendation, BWC refuses to hire an attorney. If BWC was represented by an attorney we would not be wasting time arguing about frivolous conduct. Instead this case would likely already be resolved.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSITION TO APPLICANT'S MOTION FOR RECONSIDERATION has been served upon Debra Wiseberg d/b/a Bram Warren Company, 18100 S.W. 50 Street, Southwest Ranches, Florida 33331 by deposit in the United States Mail with first class postage thereon fully prepaid, this 11th day of March 2015.



Ginnie C. Derusseau

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

In re Application Serial No. 85/652,496,
filed June 14, 2012, CICAR

XIKAR, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91209617
)	
DEBRA WISEBERG D/B/A BRAM)	
WARREN COMPANY,)	
)	
Applicant.)	
_____)	

**OPPOSER’S ANSWERS AND SUPPLEMENTAL ANSWERS TO
APPLICANT’S FIRST SET OF INTERROGATORIES**

Pursuant to 37 C.F.R § 2.120 and Fed. R. Civ. P. 26 and 33, Opposer, Xikar, Inc., by and through its attorneys, hereby supplements its answers to Applicant’s First Set of Interrogatories. Opposer reserves the right to further supplement its answers to these interrogatories upon the discovery of additional information through discovery or otherwise.

GENERAL OBJECTIONS

1. Opposer objects to Applicant’s definitions and instructions to the extent they seek to require Opposer to do more than that which is required by the Federal Rules of Civil Procedure and the Trademark Rules.

2. Opposer objects to each and every interrogatory to the extent it calls for the disclosure of attorney-client privileged communications and/or attorney work product. Opposer will not undertake to locate and log communications between Opposer and Applicant regarding the subject matter of this proceeding dated after the institution of this action.

3. Opposer objects to each and every interrogatory, and Applicant's definitions of "relating to," "related to," and "relation to," and has not responded to the extent that the definitions of those terms and Applicant's interrogatories seek "each," "any," "every," "all," or "related" information as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence if, by these terms, Applicant purports to require Opposer to investigate for and produce all information and materials touching on the subject of the interrogatory. Opposer is interpreting such interrogatories as calling for the identification of information or materials, to the extent not objected to, which most fully or directly addresses the subjects of the interrogatories, or is representative of the subject information or materials of Opposer. If, by these terms in the interrogatories, Applicant expects Opposer to also produce information or material that is repetitive, duplicative, cumulative, or only incidentally related to the interrogatory subject, then Opposer objects to this purported scope on the basis that such interrogatories are vague, ambiguous, overbroad, unduly burdensome, oppressive, and not reasonably calculated to lead to the discovery of admissible evidence.

4. Opposer objects to each interrogatory to the extent that it calls for information not reasonably available to, or not within the possession, custody, or control of Opposer, or that has been previously produced by Opposer or Applicant. The responses below are based on information reasonably available to Opposer and documents within Opposer's possession, custody, or control. Opposer's objections and responses to these interrogatories are by, and on behalf of, Opposer alone.

5. Opposer objects to the extent that there are no time limitations set forth in some of Applicant's interrogatories rendering some of them overbroad, unduly burdensome, not relevant, and not reasonably calculated to lead to the discovery of admissible evidence.

6. Each of the foregoing objections shall be considered continuing and are hereby incorporated by reference into each specific response.

OBJECTIONS AND ANSWERS TO INTERROGATORIES

Interrogatory No. 1:

Identify each officer of your corporation, including each officer's name, title, address, and job duties.

Answer:

Kurt Van Keppel, President and Chief Executive Officer

Scott Almsberger, Executive Vice-President and Chief Design Officer

Tim Webster, Executive Vice-President and Chief Strategy Officer

Gary Gates, Vice-President and Chief Financial Officer

All of the above can be contacted at:

Xikar, Inc., P.O. Box 025757, Kansas City, MO 64102, 816-994-7150.

Each gentleman's job duties are indicated by their respective titles.

Interrogatory No. 2:

Identify each predecessor, parent company, affiliated company, or subsidiary of Xikar, Inc.

Answer:

Defiance Cigar Group, LLC

P.O. Box 025757, Kansas City, Missouri 64102

Kansas Limited Liability Company

Interrogatory No. 3:

Identify each person who participated in the selection of the Opposer's mark "Xikar".

Answer:

Kurt Van Keppel. For his contact information, see Answer to Int. No. 1 above.

Interrogatory No. 4:

Describe in detail the exact pronunciation used by you for the Opposer's mark "Xikar" since its inception.

Answer:

ZI-car (long i, hard c, accent on the first syllable); Ze-CAR (soft e, hard c, accent on the second syllable); Ci-CAR (soft initial C, soft i, hard second c and accent on the second syllable).

Interrogatory No. 5:

Do you believe that you have a sole right of use to any of the characteristics that comprise the word "sikar" by and through your mark "Xikar"?

Answer:

Opposer objects to this interrogatory on the ground that it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence, as neither Opposer's belief nor the use of "sikar" is at issue in this proceeding. Furthermore, Opposer objects on the ground that this interrogatory is vague and ambiguous to the extent that "the characteristics that comprise the word 'sikar'" has not been defined and is not

understood.

Subject to the foregoing general and specific objections, Opposer does not claim an exclusive right to use to the word “sikar”. Opposer owns the incontestable right to use the mark Xikar and the right to use Xikar For Life. As a result, Opposer has the right to exclude others from using any name, mark or designation confusingly similar thereto, including Cicar.

5a.) If the answer to Interrogatory No. 5 is yes, describe in detail the exact characteristics of the word "sikar" that you believe you have a sole right of use of, by and through your mark "Xikar".

Answer:

Not applicable.

Interrogatory No. 6:

Do you believe that you have a sole right of use to any of the characteristics that comprise the word "cigar" by and through your mark "Xikar"?

Answer:

Opposer objects to this interrogatory on the ground that it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence as neither Opposer’s belief, nor the use of “cigar” is at issue in this proceeding. Furthermore, Opposer objects on the ground that this interrogatory is vague and ambiguous to the extent that the meaning of “any of the characteristics that comprise the word ‘cigar’” has not been defined and is not understood.

Subject to the foregoing general and specific objections, Opposer does not claim an exclusive right to use the word “cigar”. Opposer owns the incontestable right to use the mark

Xikar and the right to use Xikar For Life. As a result, Opposer has the right to exclude others from using any name, mark or designation confusingly similar thereto, including Cicar.

6a.) If the answer to Interrogatory No.6 is yes, describe in detail the exact characteristics of the word "cigar" that you believe you have a sole right of use of, by and through your mark "Xikar".

Answer:

Not applicable.

Interrogatory No. 7:

Describe in detail the exact characteristics of the Applicant's mark "Cicar" in which you believe you have a sole right of use and control, by and through your mark "Xikar".

Answer:

Opposer objects to this interrogatory on the ground that it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence as Opposer's belief is not at issue in this proceeding. Furthermore, Opposer objects on the ground that this interrogatory is vague and ambiguous to the extent "the exact characteristics of the Applicant's mark 'Cicar'" has not been defined and is not understood.

Subject to the foregoing general and specific objections, Opposer does not claim an exclusive right to use the word "cicar". However, Opposer owns the incontestable right to use the mark Xikar and owns the right to use the mark Xikar For Life. As a result, Opposer has the right to exclude others from using any name, mark or designation confusingly similar thereto, including Cicar. *See* 15 U.S.C. § 1114(1)(a); *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d

920, 924 (10th Cir. 1986). Two of the most important factors used in determining likelihood of confusion are similarity of the marks and the relatedness of the goods on which the marks are used. *Mattel, Inc. v. Funline Merchandise Co., Inc.*, 81 U.S.P.Q.2d 1372 (TTAB 2006).

Another factor to consider is overlap in channels of trade. *Id.*

As is the case in this proceeding, when the marks are similar and the goods are closely related, a likelihood of confusion exists. *In Re White Swan Ltd.*, 8 U.S.P.Q.2d 1534 (TTAB 1988). This is even a stronger case than in *White Swan*. In addition to Opposer's registered cigar cutters and other cigar accessory products that are closely related to Applicant's ashtrays for smokers, Opposer has also used its Xikar mark on the identical product, ashtrays for smokers, since prior to Applicant. *Sengoku Works Ltd. v. RMC Intern., Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996). Furthermore, the channels of trade through which Opposer and Applicant directly overlap. Because neither Applicant's product description in its application for registration nor Opposer's product descriptions in its registrations specify a channel of trade, it is presumed that the parties sell their respective goods in all of the usual trade channels for goods of this type. *Mattel, Inc. v. Funline Merchandise Co., Inc.*, 81 U.S.P.Q.2d 1372 (TTAB 2006).

Interrogatory No. 8:

Describe in detail your strong affiliation with the Mayan culture.

Answer:

Opposer objects to this interrogatory on the ground that it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence as an affiliation with the Mayan culture is not at issue and has no bearing on any issue in this proceeding. Opposer further objects on the ground the interrogatory is vague and

ambiguous as “affiliation” has not been defined and is not understood.

Subject to the foregoing general and specific objections, Opposer sells several lighters and cutters with art inspired by Mayan designs. Opposer has also stated in past marketing publications that its name was inspired by the Mayan word for cigar.

Interrogatory No. 9:

Describe in detail what connection, if any, the Opposer or its products have with Havana, Cuba.

Answer:

Opposer objects to this interrogatory on the ground that it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence as Havana, Cuba is not at issue and has no bearing on any issue in this proceeding.

Subject to the foregoing general and specific objections, Opposer does not have any connection with Havana, Cuba. Opposer sells several lighters and cutters with art inspired by Cuban designs.

Interrogatory No. 10:

Identify every product and service in connection with which you have used or are using the "Xikar" mark, U.S. Registration No. 2200215.

Answer:

Opposer objects to this interrogatory on the ground that it is unduly broad and burdensome to the extent that identification of “every product and service” is requested. Subject to the foregoing general and specific objections, pursuant to Fed. R. Civ. P. 33(d), documents are

produced herewith showing use of Opposer's incontestable right to use the Xikar mark on its products and in connection with its services.

Supplemental Answer:

Without waiving the foregoing objections made in the original answer, in addition to the documents previously produced, see the additional documents produced herewith. Among other things, these additional documents include the specimens filed in connection with the XIKAR trademark application and registration and the specimens filed in connection with the XIKAR FOR LIFE trademark application and registration as well as a sampling of invoices dating back to 2008 identifying a variety of products.

Interrogatory No. 11:

For each product requested to be identified in Interrogatory No. 10, identify the manufacturer of each product.

Answer:

In addition to the foregoing general objections, Opposer objects to this interrogatory on the ground that it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this interrogatory on the ground it seeks proprietary, confidential information.

Supplemental Answer:

Without waiving the objections made in the foregoing original Answer, Opposer clarifies its previous objection. This request seeks trade secret information, which pursuant to the Protective Order, is only disclosed to outside counsel. Because no outside counsel exists, this information will not be disclosed.

Interrogatory No. 12:

For each product requested to be identified in Interrogatory No. 10, identify the persons most knowledgeable about each product.

Answer:

Kurt Van Keppel. For contact information, see Answer to Int. No. 1.

Interrogatory No. 13:

For each product requested to be identified in Interrogatory No. 10, identify the price at which each of those products are offered.

Answer:

Opposer objects to this interrogatory on the ground that it is unduly broad and burdensome to the extent that the price of “each product” is requested. Subject to the foregoing general and specific objections, pursuant to Fed. R. Civ. P. 33(d), documents are produced herewith that provide suggested retail pricing information.

Interrogatory No. 14:

For each product requested to be identified in Interrogatory No.10, describe the channels of trade of the product.

Answer:

Opposer objects to this interrogatory on the ground it is unduly broad and burdensome to the extent that the channels of trade for “each product” is requested. Subject to the foregoing general and specific objections, the channels of trade through which Opposer sells

its products include but are not limited to retail cigar shops, convenience tobacco shops, men's lifestyle retail and or accessory shops, gift shops, golf shops, liquor stores, knife and/or gun shops, hotels & restaurants, internet sites selling any of the above, and distributors selling to any of the above.

Interrogatory No. 15:

For each product requested to be identified in Interrogatory No. 10, describe the target markets and characteristics of targeted consumers.

Answer:

Opposer objects to this interrogatory on the ground it is unduly broad and burdensome to the extent that the target market for "each product" is requested. Subject to the foregoing general and specific objections, Opposer's target markets and characteristics of targeted consumers include cigar smokers, gift givers, and men and women above eighteen (18) years of age.

Interrogatory No. 16:

Describe in detail each incident, known to you, of actual confusion between you and any of your products and services and Applicant or any of its products.

Answer:

None known of to date.

Interrogatory No. 17:

For each of the incidents described in response to Interrogatory No. 16, identify

the persons with knowledge thereof.

Answer:

Not applicable.

Interrogatory No. 18:

For each product requested to be identified in Interrogatory No. 10, explain in detail how the products are presented and sold to retail establishments for resale to final consumers.

Answer:

Opposer objects to this interrogatory on the ground it is vague, ambiguous and confusingly worded. Opposer objects to this interrogatory on the ground that it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects on the ground the interrogatory is overly broad and burdensome to the extent it applies to “each product.”

Subject to the foregoing general and specific objections, Opposer sells its products through its sales team, distributors, trade shows, consumer events, festivals, catalogs and via the Internet. Opposer’s products are presented and sold to retail shops for resale to consumers in whatever manner the store owner desires, including but not limited to, unique packaging and displays.

Interrogatory No. 19:

For each product requested to be identified in Interrogatory No. 10, do you supply display boxes to all of the retail establishments that offer your products for sale?

Answer:

Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it applies to “each product”. Opposer objects to this interrogatory on the ground it is vague, ambiguous and confusingly worded to the extent “display boxes” is not defined or understood. Opposer further objects to this interrogatory on the ground that it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it is understood and subject to the foregoing general and specific objections, each of Opposer’s products is generally sold packaged. This may include a box in which the product can be displayed. Opposer also utilizes various types of displays.

Supplemental Answer:

Without waiving the foregoing objections made in the original Answer, no.

19a.) If the answer to Interrogatory No. 19 is no, identify each retail establishment that offers each of your products identified in Interrogatory No. 10 for sale, that do not use display boxes for your products.

Answer:

Subject to the foregoing general and specific objections, Opposer lacks the information necessary to answer.

Interrogatory No. 20:

For each product requested to be identified in Interrogatory No. 10, identify the persons most knowledgeable about sales and distribution of the product.

Answer:

Kurt Van Keppel. For contact information, see Answer to Int. No. 1.

Interrogatory No. 21:

For each product requested to be identified in Interrogatory No. 10, identify the persons most knowledgeable about the advertising and promotion of the product.

Answer:

Kurt Van Keppel. For contact information, see Answer to Int. No. 1.

Interrogatory No. 22:

For each product requested to be identified in Interrogatory No. 10, list by calendar year the expenditures you have made on advertising and promotion of the product.

Answer:

In addition to the foregoing general objections, Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it seeks advertising expenses for each product which is unavailable. Opposer further objects to this interrogatory on the ground it requests confidential, proprietary information. To the extent a confidentiality agreement would usually be entered into allowing disclosure of this information to Applicant's counsel, Applicant is not represented by counsel but only by its Vice President rendering any such agreement ineffective. Upon entry of an agreeable confidentiality agreement, annual advertising and promotional expenditure information will be provided.

Supplemental Answer:

Without waiving the objections made in the foregoing original Answer, Opposer

clarifies its previous objection. This request seeks trade secret information, which pursuant to the Protective Order in place, is only disclosed to outside counsel. Because no outside counsel exists, this information will not be disclosed.

Interrogatory No. 23:

For each product requested to be identified in Interrogatory No.10, identify the nature and title (if applicable) of the media in which all advertisements of the product have appeared, including the date of, and geographic scope (by city and state) of such advertisements.

Answer:

Opposer objects to this interrogatory on the ground that it is overly broad and burdensome to the extent it applies to “each product” and “all advertisements.” Subject to the foregoing general and specific objections, pursuant to Fed. R. Civ. P. 33(d), representative advertisements are produced herewith, with dates noted thereon. A representative list of publications in which advertisements labeled Doc. Nos. 275-340 were published is as follows:

Cigar Aficionado

Smoke Magazine

Smokeshop Magazine

Tobacconist Magazine

Cigar Press Magazine

Cigar Snob Magazine

Cigar Journal Magazine

Various blogs and websites of the above magazines

Other representative advertisements produced identify the publication in which they each appeared.

Interrogatory No. 24:

For each product requested to be identified in Interrogatory No. 10, give a complete list by calendar year, separately, of each product that you have given away for promotional purposes and to whom given.

Answer:

Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it requests a “complete list . . . separately, of each product”. Subject to the foregoing general and specific objections, Opposer does not keep records of this information.

Interrogatory No. 25:

For each product requested to be identified in Interrogatory No. 10, list by calendar year, separately, all sales of such product.

Answer:

In addition to the foregoing general objections, Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it requests information by “calendar year . . . separately, all sales of [each] product”. Opposer further objects to this interrogatory on the ground it requests confidential, proprietary information. To the extent a confidentiality agreement would usually be entered into allowing disclosure to Applicant’s counsel, Applicant is not represented by counsel but only by its Vice President rendering any such agreement ineffective. Upon entry of an agreeable confidentiality agreement,

annual sales information for specified products or total sales, will be provided.

Supplemental Answer:

Without waiving the objections made in the foregoing original Answer, Opposer clarifies its previous objection. This request seeks trade secret information, which pursuant to the Protective Order in place, is only disclosed to outside counsel. Because no outside counsel exists, this information will not be disclosed.

Interrogatory No. 26:

For each product requested to be identified in Interrogatory No. 10, state the facts that support the exact date, upon which you intend to rely, of first use of the "Xikar" mark to identify the product.

Answer:

Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it relates to "each product" and "exact date". Subject to the foregoing general and specific objections, pursuant to Fed. R. Civ. P. 33(d), representative dated documents showing early use of Xikar are produced herewith. Xikar began selling cigar cutters in 1997 and began selling ashtrays in 2009. Additionally, see the application file of Reg. No. 2,200,215 which is available on the U. S. Patent & Trademark Office web-site.

Supplemental Answer:

Subject to the foregoing objections made in the original Answer, Applicant states the following:

Applicant's predecessor in interest, Kurt Van Keppel, filed the application for federal registration for XIKAR on August 19, 1996 based on an intent to use the mark in the

future. The filing date accords the Applicant its constructive nationwide first use date.

Mr. Van Keppel's first sale of a Xikar cigar cutter was to Alexander Kemper, President, UMB Bank. The first sale to a retailer was to Diebel's Sportsmen's Gallery. Both occurred in 1997, from custom units built in Mr. Van Keppel's garage.

An order form and packaging ribbons in connection with the Statement of Use for the application were submitted to the U. S. Trademark office December 8, 1997 proving actual use of the XIKAR mark on the cigar cutters. Doc. Nos. 586-590.

Product packaging for the XIKAR cigar cutter was submitted to the U.S. Trademark Office on April 15, 2004 proving continued use of the mark. Doc. No. 591.

The Fall 2009 catalog proves use of XIKAR for ashtrays. See Doc. Nos. 121-152. The other catalogs previously produced show use of the various cigar accessory products, from which the year of first use can be ascertained.

Additionally, see the documents, produced herewith.

Interrogatory No. 27:

Identify the persons with the most knowledge about the facts stated in response to Interrogatory No. 26.

Answer:

Kurt Van Keppel. For contact information, see Answer to Int. No. 1.

Interrogatory No. 28:

For each product requested to be identified in Interrogatory No.10, explain the extent to which there has been any interruption to continuous use of the "Xikar" mark to

identify the product.

Answer:

Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it relates to “each product”. Subject to the foregoing general and specific objections, no interruption of use has occurred. The Xikar mark has been in continuous use since at least as early as 1997. The Xikar mark has been continuously use on ashtrays since at least as early as 2009, prior to Applicant’s alleged first use of Cicar on ashtrays.

Supplemental Answer:

Subject to the foregoing objections above in the original Answer, no interruption in use of the XIKAR mark has occurred. To the contrary, use of the XIKAR mark has expanded. Use began in connection with cigar cutters in 1997, and now the variety and scope of products sold under the mark are shown in the catalogs previously produced. The sale of these various products is evidenced by the documents previously produced as well as the price sheets and sample invoices from 2008, produced herewith. Invoices prior to 2008 are no longer available.

Interrogatory No. 29:

Identify all documents supporting your allegation in Paragraph 5 and Paragraph 12 of the Notice of Opposition, that "Opposer", since at least as early as 1997 has been and is now using the mark "Xikar" in connection with the sale and promotion of smoking accessories.

Answer:

Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it seeks “all documents”. Subject to the foregoing general and specific

objections, pursuant to Fed. R. Civ. P. 33(d), representative documents showing use by Opposer of Xikar since 1997 are produced herewith.

Supplemental Answer:

Subject to the foregoing objections made in the original Answer, see the Answer and Supplemental Answer to Int. No. 26.

In addition to the documents already produced which included catalogs showing use of the mark from at least as early as 1999, see the documents produced herewith. These include print-outs from Xikar's web-site showing current use of the mark on various products and photos of products and their associated packaging. Furthermore, price sheets and sample invoices from 2008 are included, among other things.

Interrogatory No. 30:

Identify all documents supporting your allegation in Paragraph 9 of the Notice of Opposition that "Opposer", since at least as early as 2010 has been and is now using the mark "Xikar for Life", US Registration No.85751610, in conjunction with its smoking accessories.

Answer:

Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it seeks "all documents". Subject to the foregoing general and specific objections, pursuant to Fed. R. Civ. P. 33(d), representative documents showing use by Opposer of Xikar For Life since 2010 are produced herewith. Additionally, see the application file of Reg. No. 4,375,111 which is available on the U. S. Patent & Trademark Office web-site.

Supplemental Answer:

Subject to the foregoing objections made in the original Answer, Applicant filed its application for federal registration of XIKAR FOR LIFE on October 11, 2012 with product catalog pages proving use of the mark on the goods. Also see the Fall 2010 catalog which was previously produced showing use of the mark and which supports the October 31, 2010 first use date of the registration.

Interrogatory No. 31:

Identify every opinion, legal or otherwise, requested or received by you, regarding the right to use of the mark "Xikar" including the identity of persons requesting the opinion, the date and substance of the opinion, and the persons receiving the opinion.

Answer:

Opposer objects to this interrogatory on the ground it seeks the attorney-client privilege information to the extent the substance of any communication between Opposer and its counsel is sought. Subject to the foregoing general and specific objections, none are available.

Interrogatory No. 32:

Describe in detail all efforts you have made to enforce against third parties, other than Applicant, the rights you claim in the "Xikar" mark.

Answer:

None.

Interrogatory No. 33:

Describe in detail any instances in which a third party, other than Applicant, has challenged your right to use, or the rights you claim in the "Xikar" mark.

Answer:

None.

Interrogatory No. 34:

For each product requested to be identified in Interrogatory No. 10, list all legal proceedings in which Xikar, Inc. and its predecessors in interest have been a party since the inception of its mark "Xikar", related to such products.

Answer:

Opposer was a party to an opposition unrelated to XIKAR or XIKAR FOR LIFE, Opposition No. 91186534.

Supplemental Answer:

Opposer objects to this interrogatory to the extent it seeks information that does not relate to the trademarks at issues in this proceeding. Such information is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 35:

For each product requested to be identified in Interrogatory No.10, identify your major competitors and their competing products.

Answer:

Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it seeks information for “each product”. Subject to the foregoing general and specific objections, Opposer’s competitors include any entity making or selling a lighter, cigar cutter, humidification device or supplies, cigar container, ashtray, or any other cigar related accessory.

Interrogatory No. 36:

For each product requested to be identified in Interrogatory No. 10, identify all geographic areas in which the product is offered.

Answer:

Opposer objects to this interrogatory on the ground it is overly broad and burdensome to the extent it seeks information for “each product”. Subject to the foregoing general and specific objections, Opposer’s products are offered world-wide.

Supplemental Answer:

Without waiving the foregoing general and specific objections, Opposer’s products are sold throughout the United States, through retail establishments in forty-nine (49) states and the District of Columbia, and are sold world-wide, through retailers in six (6) Canadian Provinces and fifty-eight (58) other foreign countries. Pursuant to Fed. R. Civ. P. 33(d), Doc. Nos. 735-756 are produced herewith that provide a listing of the states, provinces and foreign countries.

Interrogatory No. 37:

Describe in detail the investigation that was performed by you concerning this matter; include the findings of such investigation and date(s) of such investigation(s) performed.

Answer:

Opposer learned of the Cicar application upon its publication in the Official Gazette. Thereafter, the application file was examined and an internet investigation conducted. It was determined that a likelihood of confusion exists between the Cicar mark which is the subject of the application and Opposer's incontestable trademark rights and other federally registered and common law trademark rights. Mr. Van Keppel contacted Mr. Bram Warren prior to filing the opposition in an effort to settle the issues amicably between the parties.

Interrogatory No. 38:

Describe in detail the evidence you have to support your allegation in Paragraph 11 of the Notice of Opposition that the Opposer's mark "Xikar" has developed significant recognition and goodwill amongst consumers.

Answer:

Pursuant to Fed. R. Civ. P. 33(d), representative documents in support of this allegation are produced herewith.

Supplemental Answer:

In addition to the numerous testimonials, advertisements and articles previously produced, see the additional product reviews, testimonials and advertisements produced herewith.

AS TO OBJECTIONS,

Dated: 3-12-14

By Annie C. Deru

Ginnie C. Derusseau, Reg. #35,855

James J. Kernell, Reg. #42,720

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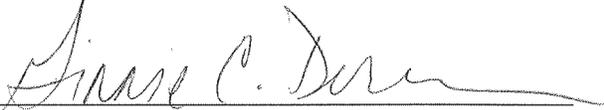
E-mail: jjk@kcpatentlaw.com

Attorneys for Opposer

XIKAR, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSER'S ANSWERS AND SUPPLEMENTAL ANSWERS TO APPLICANT'S FIRST SET OF INTERROGATORIES has been served upon Debra Wiseberg d/b/a Bram Warren Company, 18100 S.W. 50 Street, Southwest Ranches, Florida 33331 by deposit in the United States Mail with first class postage thereon fully prepaid, this 12th day of March 2014.


Ginnie C. Derousseau



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231



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APRIL 13, 2004

PTAS

STINSON MORRISON HECKER LLP
CONSTANCE M. JORDAN
1201 WALNUT, SUITE 2800
KANSAS CITY, MO 64106-2150

UNITED STATES PATENT AND TRADEMARK OFFICE
NOTICE OF RECORDATION OF ASSIGNMENT DOCUMENT

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RECORDATION DATE: 04/06/2004

REEL/FRAME: 002827/0250
NUMBER OF PAGES: 3

BRIEF: ASSIGNS THE ENTIRE INTEREST AND THE GOODWILL

ASSIGNOR:
KEPPEL, KURT VAN

DOC DATE: 03/25/2004
CITIZENSHIP: UNITED STATES
ENTITY: INDIVIDUAL

ASSIGNEE:
XIKAR, INC.
P.O. BOX 025757
KANSAS CITY, MISSOURI 64102

CITIZENSHIP: KANSAS
ENTITY: CORPORATION

APPLICATION NUMBER: 75152549
REGISTRATION NUMBER: 2200215

FILING DATE: 08/19/1996
ISSUE DATE: 10/27/1998

MARK: XIKAR
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN TYPED FORM

EXHIBIT B
OPP. NO. 91209617; XIKAR, INC. v. WISEBERG

002827/0250 PAGE 2

VIOLET MCCOY, EXAMINER
ASSIGNMENT DIVISION
OFFICE OF PUBLIC RECORDS

EXHIBIT B
OPP. NO. 91209617; XIKAR, INC. v. WISEBERG

04/13/2004 TUE 01:36 [TX/RX NO 6231] 003

XIKAR-000545

ASSIGNMENT

WHEREAS, Kurt Van Keppel, an individual, of Shawnee, Kansas (hereinafter the "Assignor"), is the owner of all right, title and interest in and to the following mark, and the registration thereof (hereinafter the "Mark"):

MARK	REGISTRATION NO.
XIKAR	2,200,215

WHEREAS, XIKAR, Inc., a Kansas corporation, of P.O. Box 025757, Kansas City, Missouri 64102-5757 (hereinafter the "Assignee"), wishes to acquire the entire right, title and interest in and to the Mark and the goodwill of the business associated therewith.

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN:

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Assignor, Assignor does by these presents, transfer, convey, assign and set over unto Assignee, all right, title and interest in and to the above-listed mark, throughout the world, together with the goodwill of the business associated therewith, including all claims for damages by reason of past infringement of said mark with the right to sue and collect therefor, all common law rights in the mark, and the registration listed above.

This Assignment is dated this 25 day of March, 2004.



Kurt Van Keppel

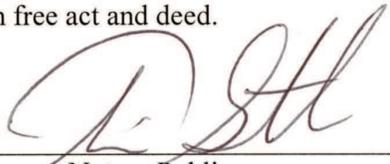
EXHIBIT B
OPP. NO. 91209617; XIKAR, INC. v. WISEBERG

XIKAR-000546

ACKNOWLEDGEMENT

State of Missouri)
) ss.
County of Jackson)

On this 25 day of March, 2004 before me, a Notary Public in and for the State and County aforesaid, personally appeared Kurt Van Keppel, to me well known and known by me to be the person who signed the foregoing instrument, and acknowledged that he executed the same for the purposes therein contained as his own free act and deed.



Notary Public

(SEAL)

MY COMMISSION EXPIRES:

TIM STONEBROOK
Notary Public - State of Missouri
County of Jackson
My Commission Expires Aug. 1, 2005