

ESTTA Tracking number: **ESTTA547487**

Filing date: **07/09/2013**

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

Proceeding	91210245
Party	Defendant Lynne Waggoner-Patton
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Date	07/09/2013
Attachments	Applicant's Response to Motion to Suspend Proceeding.pdf(209612 bytes)

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

LIFE FOREVER CHANGED, LLC,
KIEANN BROWNELL and
LISA COUCH,

Opposers,

v.

LYNNE WAGGONER-PATTON,

Applicant.

Opposition No. 91210245

THE ORIGINAL SILHOUETTES
& Design
Application Serial No. 85639133

LYNNE WAGGONER-PATTON
SILHOUETTES & Design
Application Serial No. 85639140

THE SILHOUETTES & Design
Application Serial No. 85639143

**APPLICANT'S RESPONSE AND BRIEF IN OPPOSITION TO
OPPOSERS' MOTION TO SUSPEND PROCEEDING**

Lynne Waggoner-Patton ("Applicant"), by and through her counsel, CR MILES P.C., hereby opposes the Motion to Suspend Proceeding, submitted by Opposers on June 20, 2013, in the above captioned Opposition proceeding. As grounds therefore Applicant states as follows:

On March 27, 2013, Opposers filed a Notice of Opposition regarding U.S. Trademark Application Serial No. 85/639,133 for the mark THE ORIGINAL SILHOUETTES & Design, U.S. Trademark Application Serial No. 85/639,140 for the mark LYNNE WAGGONER-PATTON SILHOUETTES & Design, and U.S. Trademark Application Serial No. 85/639,143 for the mark THE SILHOUETTES & Design (the "Marks"). Applicant filed an Answer to the Notice of Opposition on May 24, 2013. A discovery planning conference was ordered to be held by or before June 25, 2013. However, on June 24, 2013, Opposers filed the current Motion to

suspend this opposition proceeding pending the outcome of a civil action which they had filed on June 21, 2012. In accordance with TBMP 501.02(a), a copy of Applicant's Answer, Affirmative Defenses, and Counterclaims to the Complaint in that action is provided as Exhibit 1 hereto.

A grant of suspension under 37 C.F.R. § 2.117(a) is clearly permissive and not obligatory. Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 510.02(a) states that "[s]uspension of a Board proceeding pending the final determination of another proceeding is solely within the discretion of the Board; the court in which a civil action is pending has no power to suspend proceedings in a case before the Board, nor do parties or their attorneys." The TTAB in *Robin Singh Educ. Serv., Inc. v. Test Masters Educ. Serv. Inc.*, U.S. Trademark Opposition No. 76/413,999 (February 7, 2005) noted:

"The power to stay proceedings flow from the power inherent in the court to schedule disposition of the cases on its docket with the goal of promoting fair and efficient adjudication." *Opticians Assn. of America v. Independent Opticians of America, Inc.*, 734 F. Supp. 1171, 1181, 14 U.S. P.Q.2d 2021 (D.N.J. 1990) [district court has no control over TTAB docket and no power to suspend TTAB proceedings], *rev'd on other grounds*, 920 F.2d 187, 17 U.S.P.Q.2d 1117 (3d.Cir. 1990), *citing Landis v. North American Co.*, 299 U.S. 248, 254-255, 57 S.Ct. 163, 81 L.Ed. 153 (1936). "How this can best be done calls for exercise of judgment which must weigh competing interests and maintain an even balance." *Landis, supra*, 299 U.S. at 254-255; *see also Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1077 (3d Cir. 1983). To determine whether to stay or suspend proceedings, the United States Supreme Court noted that "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility

that the stay for which he prays will work damage to some one else.” *Landis, supra*, 299 U.S. at 255.

In the present case, the court proceeding has been pending for more than a year and no trial date has yet been set. Any date for trial is likely to be set substantially in the future. Applicant, as the rightful owner of the Marks, continues to actively use the Marks to offer and provide high-profile shadow dance performances which Applicant choreographs and produces throughout the U.S. and abroad and for which Applicant expends substantial resources to continue to develop the goodwill associated with the Marks and to prevent loss of the value of them. Opposers’ unauthorized use of the mark THE SILHOUETTES to offer shadow dance performances and to represent their dancers as THE SILHOUETTES has created actual confusion in the marketplace and harm to the Marks. Resolving Applicant’s ownership of and the right to register the Marks is necessary to protect the public from further confusion and loss of their reasonable expectancy when contracting for and purchasing tickets to see THE SILHOUETTES and is vital to Applicant’s business.

Opposers’ motion is founded solely on the fact of the pending civil action which Opposers themselves instituted. Opposers allege no hardship or inequity in being required to go forward with this consolidated opposition proceeding. The discovery that has been completed in the district court case could be used by the parties in this opposition, thereby significantly reducing the time necessary for any discovery. In the event the opposition is not suspended, Accelerated Case Resolution may be an appropriate option in this proceeding.

Applicant respectfully submits that good cause exists to require the parties to move forward with this opposition proceeding. Opposers have failed to make out any case of hardship or inequity in being required to do so. Applicant therefore respectfully requests that the Board

exercise its discretion in accordance with 37 C.F.R. § 2.117(a) and TBMP 510.02 and deny Opposers' motion to suspend this opposition proceeding.

Dated this 9th day of July, 2013.

Respectfully Submitted,

CR MILES P.C.

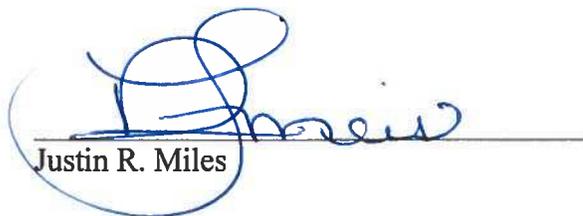


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of July, 2013, the foregoing APPLICANT'S RESPONSE AND BRIEF IN OPPOSITION TO OPPOSERS' MOTION TO SUSPEND PROCEEDING with Exhibit 1 was served via first-class mail, postage prepaid, upon counsel for Opposers as follows:

Sarah J. Schneider
Sabrina C. Stavish
SHERIDAN ROSS P.C.
1560 Broadway, Suite 1200
Denver, CO 80202-5141



Justin R. Miles

TRADEMARK OPPOSITION NO. 91210245

**LIFE FOREVER CHANGED, LLC, KIEANN BROWNELL and
LISA COUCH, Opposers,**

v.

LYNNE WAGGONER-PATTON, Applicant

EXHIBIT

1

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Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action, File Number 1:12-CV-01789-PAB

_____)	
KIEANN BROWNELL and,)	
LISA COUCH, individually and)	ANSWER
derivatively on behalf of)	AFFIRMATIVE DEFENSES
LIFE FOREVER CHANGED, LLC,)	and
Plaintiffs)	COUNTERCLAIMS
)	
v.)	AND
)	
LYNNE WAGGONER-PATTON;)	DEMAND FOR JURY TRIAL
aka LYNNE D. PATTON and,)	
ROCKY MOUNTAIN SCHOOL)	
OF DANCE, INC.)	
Defendants.)	
)	
)	
)	
)	
)	
)	
_____)	

NOW COME Defendants by and through counsel Alan F. Blakley of CR MILES, PC and for their answer, affirmative defenses and counterclaims state as follows:

INTRODUCTION

Simply put, Lynne Waggoner-Patton (“Lynne”) has worked hard to help children enjoy dance and, while encouraging their success, recognizing they need to enjoy their childhood. Her primary focus throughout her career is to teach children to dance, but not to forget that dance is

only a part of their lives. In 2009, she found some incredible opportunities for the children to excel and she developed a program where the dancers would dance behind a screen, projecting their shadows onto that screen to create images that were replicas of famous photographs, such as the U.S. Marine's planting a flag on Iwo Jima or the Christian Nativity Scene. After forming the "silhouette" the original photograph would be projected onto the screen. The acts and her many modifications of them, in many iterations, became very popular very quickly.

Two of the mothers of dancers, Plaintiffs Kieann Brownell ("Kieann") and Lisa Couch ("Lisa"), volunteered to help schedule engagements, stating repeatedly that they wanted nothing from the effort, but that their volunteering was "a labor of love." Unfortunately, after Lynne created a successful endeavor for the children and Kieann lost her job, Kieann and Lisa thought they knew more about dance and about working with children than Lynne, developed visions of personal income, forgot the focus on the children, and tried to appropriate and produce for their sole benefit the impressive productions that Lynne has built. In the process, they have alienated children and parents alike, attempted to take Lynne's brand, used her copyrighted performances, failed to pay children for their work (and acquire work permits for them as required by law and their contractual obligations to the children), and then, after professionals could replace them to do marketing and to be agents for the children, Kieann and Lisa filed this litigation.

ANSWER

First, Defendants object to the Complaint in this matter because it is so verbose it is in derogation of Fed. R. Civ. Proc. 8(a)(2)'s proscription that a complaint contain "a short and plain statement of the claim," and Fed. R. Civ. Proc. 8(d)(1)'s requirement that "[e]ach allegation must be simple, concise and direct." Rather than filing a motion to dismiss based on the blatant violation of Fed. R. Civ. Proc. 8 or asking for a more definite statement under Fed. R. Civ. Proc.

12(e) Defendants wish to move this litigation along and, therefore, have attempted to give a complete answer. Consequently, they may have denied an entire paragraph because it is false through being misleading, is incomprehensible, or may contain one or two minor points in a lengthy account that may not be completely incorrect. Defendants ask the Court's indulgence and hope that at the pretrial conference under Fed. R. Civ. Proc. 16 the issues may be clarified and joined more properly. Without waiving their Rule 8 objection:

1. Defendants admit the allegations contained in Paragraphs 1, 2, 3, 4, 9, 14, 18, 20, 23, 26, 30, 31, 39, 41, 49, 55, 61, 67, 68, 69, 70, 74, 78, 82, 84, 87, 88, 97, 100, 105, 110, 111, 112, 114, 116, 121, 122, 125, 126, 149, 150, 151 of the Complaint.

2. Defendants deny each and every allegation contained in Paragraphs 5, 15, 16, 17, 19, 21, 22, 24, 29, 33 – 37, 40, 42, 45, 48, 50, 53, 56 – 59, 64, 66, 72, 75, 76, 79, 80, 85, 86, 93, 99, 101, 102, 106, 108, 113, 117, 118, 120, 124, 128 – 148, 152 – 157, 160 – 163, 166, 167, 168, 170 – 175, 177, 178, 179, 181 – 186, 188, 189, 190, 192 – 197, 200, 201, 202, 206, 207, 212, 213, 215, 216, 218, 220, 221 – 225, 227, 228, 229, 231 – 234, 236 – 242, 244 – 248, 250, 251, 253, 254 of the Complaint as they are compound and contain some portions that are not true, are misleading, or are legal conclusions, thus making the entire allegation untrue or inappropriate under Fed. R. Civ. Proc. 8(d)(1) and impossible to address.

3. Defendants lack knowledge sufficient to admit or deny the allegations contained in Paragraphs 6, 7, 8, 10 – 13, 25, 27, 28, 32, 38, 43, 44, 46, 47, 51, 52, 54, 60, 62, 63, 65, 71, 73, 77, 81, 83, 89 – 92, 94, 95, 96, 98, 103, 104, 107, 109, 115, 119, 123, 127, 158, 165, 199, 204, 205, 209 – 211, 219 of the Complaint and, therefore, deny each and every allegation contained in those Paragraphs.

4. The following Paragraphs, merely containing reference to previous Paragraphs, are neither admitted nor denied, but rather Defendants incorporate their answers above into the answers to those Paragraphs: 159, 164, 169, 176, 180, 187, 191, 198, 203, 208, 214, 217, 226, 230, 235, 243, 249, 252.

5. Paragraph 255 of the Complaint is not an allegation and insofar as it deviates from the requirements of Fed. R. Civ. Proc. 15, should be stricken from the Complaint.

AFFIRMATIVE DEFENSES

I. Plaintiffs' claims are barred by the doctrine of unclean hands.

II. Plaintiffs' claims arising from purported contracts are barred by the statute of frauds and the defense of failure of consideration.

III. Plaintiffs' claims are barred by waiver.

IV. Plaintiffs' Seventh Cause of Action is barred by the defense of truth.

V. Plaintiffs' First, Second, Third, Fifth, Sixth, Seventeenth Causes of Action are barred in that Plaintiffs constituted two-thirds of the management of Life Forever Changed, LLC, furthermore, their allegations are internally inconsistent. If their own allegations are true, they were tasked with its day to day operations and, further according to their allegations (however, erroneously), Defendants were simply to perform creative work and not the business functions.

VI. Plaintiffs' claims are barred because Plaintiffs have no ownership rights in The Silhouettes, The Rocky Mountain Silhouettes or Lynne's choreographic productions.

COUNTERCLAIMS¹

A. Trademark

¹ Plaintiffs are on notice that allegations contained in any one individual section below give them actual notice and may be applicable to other sections of the Counterclaims as necessary.

A1. In early 2011, in consultation with Nigel Caaro of America's Got Talent, Lynne chose the names The Rocky Mountain Silhouettes and The Silhouettes to brand the choreographic productions she was creating for children to dance behind a screen, projecting their shadows onto that screen to create images that were replicas of photographs, such as the U.S. Marine's planting a flag on Iwo Jima or the Christian Nativity Scene.

A2. Lynne and Rocky Mountain School of Dance, Inc. adopted and have used the names The Rocky Mountain Silhouettes, The Original Silhouettes, Lynne Waggoner-Patton Silhouettes and The Silhouettes (collectively the "Marks") continuously since that time.

A3. On March 27, 2011, Lynne purchased the domain, www.rockymountainsilhouettes.com, and registered it in the name of Rocky Mountain School of Dance, Inc.

A4. Lynne is the sole owner of Rocky Mountain School of Dance, Inc.

A5. Through performances using Lynne's choreographic productions, the Marks have been used continuously in commerce by Lynne and Rocky Mountain School of Dance, Inc., and have developed good will and identification with Lynne.

A6. Lynne has applied for registration of the marks The Silhouettes, Lynne-Waggoner Patton Silhouettes and The Original Silhouettes with the United States Patent and Trademark Office.

A7. Lynne created a company in Colorado called The Silhouettes, LLC on March 26, 2011 and was at that time, and has been continuously since, the sole owner of that company.

A8. Lynne has common law rights in the Marks from early 2011 and her use has been ongoing and continuous since then.

A9. After Life Forever Changed, LLC, was formed by Kieann and Lisa on November 30, 2011 to be agents for acts, Lynne permitted Kieann and Lisa to use the Marks within the context of

Life Forever Changed, LLC solely for the purposes of booking her choreographic products and being an agent for the children dancing in her productions.

A10. In May 2012, Lynne withdrew her permission for Life Forever Changed, LLC and Kieann and Lisa to use her Marks in any way.

A11. Kieann and Lisa have continued using the Marks for their benefit without authorization from Lynne.

A12. Kieann's and Lisa's use of the Marks has been willful, deliberate and with intentional disregard of Lynne's rights, intentionally creating consumer confusion, mistake and deception.

A9. Kieann's and Lisa's acts constitute violations of the Lanham Act, including trademark infringement, unfair competition, false designation of origin, false representation and dilution; common law trademark infringement; common law unfair competition; trade name infringement; trade dress infringement; contributory trademark infringement; and, Colorado Deceptive Trade Practices.

A10. As a result of Kieann's and Lisa's acts, Lynne and Rocky Mountain School of Dance, Inc. have been injured.

B. Copyright

B1. Lynne developed and created the choreography for various pieces for dance programs for children to dance behind screens, projecting their shadows onto those screens to create images that were replicas of photographs or scenes, such as the U.S. Marine's planting a flag on Iwo Jima or the Christian Nativity Scene.

B2. Lynne, on behalf of Rocky Mountain School of Dance, Inc., has filed for copyright protection for her choreographic works with the United States Copyright Office.

B3. Kieann and Lisa, without Lynne's permission, have misappropriated Lynne's choreographic creations and continue to use them without her permission.

B4. Kieann and Lisa have taken Lynne's choreographic creations and made minor modifications, constituting derivative works, without Lynne's permission.

B5. Kieann and Lisa have reproduced and produced public performances of Lynne's choreographic creations without Lynne's permission.

B6. Kieann and Lisa took control of the domain name www.rockymountainsilhouettes.com, and website registered to Lynne, without Lynne's permission; it has now been restored to Lynne.

B5. Kieann's and Lisa's actions constitute willful infringement of copyright as prohibited by 17 U.S.C. § 501, including violation of Lynne's right to reproduce, to prepare derivative works, to perform and to display the copyrighted work; and, contributory copyright infringement.

C. Defamation

C1. Beginning in March 2012 and continuously thereafter, Kieann and Lisa have made false statements that they knew were false to dancers and the parents of dancers working with Lynne, to professional colleagues of Lynne, to booking agents, and to others.

C2. For instance, Kieann and Lisa told booking agents and professional colleagues of Lynne that she was incapable of handling business arrangements; they made disparaging, false statements about her ability and abusive statements to Lynne in front of employees, dancers and their parents; they made false statements directly to dancers and their parents.

C3. On at least one occasion, Plaintiffs sent emails to parents of Lynne's dancers stating that checks Plaintiffs had written to those dancers were dishonored because Lynne had stolen the money from Plaintiffs.

C4. These statements were false, defamatory and malicious.

C5. Kieann and Lisa knew the statements were false and, when they made them, intended to and, in fact, did cause serious harm to Lynne's reputation.

C6. Lynne suffered damages as a result of Kieann's and Lisa's defamatory statements.

D. Intentional Interference with Business Relationships

D1. Lynne had the prospect of business relationships with several corporations and booking agents, including Chris Starkey of Starkey Entertainment, Terri Fisher of 5 Star Talent & Entertainment, and Stuart Noble, of Noble Productions, Inc.; some of which she had previously produced performances for.

D2. Kieann and Lisa knew of the previous relationships and the prospects of future bookings for Lynne's choreographic creations using projection, dance and screens.

D3. Kieann and Lisa, intending to interfere with the prospective and future business relationships between Lynne and corporations and booking agents, contacted them and prevented Lynne from creating a business relationship with them.

D4. This interference was improper and designed to purloin the business for themselves and away from Lynne.

D5. Lynne and Rocky Mountain School of Dance, Inc. have suffered damage as a result of Kieann's and Lisa's tortious behavior.

E. Minority Member Oppression

E1. Kieann and Lisa formed Life Forever Changed, LLC and named Lynne as the third member.

E2. Kieann and Lisa used Lynne's attorney, Brad Rupert, to draft an operating agreement for Life Forever Changed, LLC specifying terms that they wanted included to be favorable to them.

E3. The only persons with any input into the draft operating agreement were Kieann and Lisa.

E4. Even though Brad Rupert provided a draft of an operating agreement to Kieann and Lisa, they never provided it to Lynne.

E5. No operating agreement was ever adopted for Life Forever Changed, LLC.

E6. No written operating agreement has ever existed for Life Forever Changed, LLC; and, no written agreements have ever existed between Lynne and Life Forever Changed, LLC or between Rocky Mountain School of Dance, Inc. and Life Forever Changed, LLC.

E7. Because Kieann and Lisa together held a majority membership interest and were taking actions that Lynne found oppressive, she asked for Life Forever Changed, LLC to be dissolved.

E8. As a minority owner, Lynne has the right to be bought out or to have Life Forever Changed, LLC dissolved.

F. Breach of Contract

F1. Kieann and Lisa offered to collect fees and to disburse payments to Lynne and Rocky Mountain School of Dance, Inc. if Lynne would organize and produce performances.

F2. Kieann and Lisa offered to manage payments to the child performers and to acquire work permits for underage performers as required by the state laws of the states in which they would perform.

F3. Lynne accepted the offer and, in reliance on their promises, organized and produced performances.

F3. Kieann and Lisa failed to perform under the contract and breached the contract by failing to make payments, as promised, to Lynne, to Rocky Mountain School of Dance, Inc. and to the child performers, and failed to acquire work permits for underage performers for each state in which they performed.

F4. Kieann's and Lisa's breaches of contract not only damaged Lynne and Rocky Mountain School of Dance, Inc., by the amount of money not paid to them, but also damaged them by opening them up to potential liability under child worker laws.

G. False Imprisonment – Kieann

G1. On May 7, 2012 at approximately 4:00 PM, Kieann physically prevented Lynne from leaving an office at Rocky Mountain School of Dance, Inc.

G2. Lynne repeatedly demanded that Kieann not block her path and let her out of the small office. She was fearful of her physical safety.

G3. Kieann confined Lynne intentionally, without lawful privilege and against Lynne's consent within a limited area.

G4. This confinement constitutes the tort of false imprisonment.

G5. Lynne was injured by Kieann's false imprisonment of her.

RELIEF SOUGHT

Lynne prays this Court that Plaintiffs take nothing for their complaint and that it be dismissed with prejudice. For her counterclaims, Lynne prays for the following relief:

- I. Actual damages in an amount to be proved at trial;
- II. Statutory damages for those claims that provide statutory damages;
- III. Attorneys' fees for those claims that authorize attorneys' fees;
- IV. A permanent injunction enjoining Kieann, Lisa and any and all entities with which they are affiliated in any way from using any of the Marks, from reproducing, performing, displaying, making derivative works or using in any way any of Lynne's choreographic productions;

V. An accounting for all funds received by and disbursed by Life Forever Changed, LLC, and dissolution and distribution of Lynne's share of its assets or, in the alternative, purchase of Lynne's portion of the fair market value of Life Forever Changed, LLC;

VI. Punitive damages for intentional acts;

VII. Treble damages for willful or intentional infringement of trademark;

VIII. Enhanced statutory damages for copyright infringement;

IX. Such other and further relief as the Court and Jury find appropriate.

Respectfully submitted, this 10th day of July 2012.

/s/ Alan F. Blakley, Esq.

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DEMAND FOR JURY TRIAL

NOW COME DEFENDANTS through undersigned counsel, and pursuant to Fed. R. Civ. Proc. 38, demand a jury trial for all issues so triable.

DATED this 10th day of July 2012.

/s/ Alan F. Blakley, Esq.

Alan F. Blakley
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PROOF OF SERVICE

On this 10th day of July 2012, I served a true and correct copy of the foregoing Answer, Affirmative Defenses and Counterclaim *and* Demand for Jury Trial on counsel for Plaintiffs through the Courts ECF system.

/s/ Alan F. Blakley
Alan F. Blakley