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

Proceeding	91213584
Party	Plaintiff Jaguar Land Rover Limited
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Attachments	Opposer's Reply re Motion for Partial Summary Judgment .pdf(56675 bytes)

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

JAGUAR LAND ROVER LIMITED,)	Opposition No. 91213584
)	
Opposer,)	
)	Serial No. 85867803
v.)	
)	
TOYS TEKK CORPORATION,)	
)	
)	
Applicant.)	

OPPOSER’S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Opposer Jaguar Land Rover Ltd. (“JLR”) has not abandoned its LAND ROVER mark for toys. Indeed, in its Brief in Support of its Motion for Summary Judgment, JLR presented myriad evidence showing continuous use of the LAND ROVER mark¹ on toy vehicles by JLR licensees. Applicant Toys Tekk Corp. (“Toys Tekk”) cannot controvert any of this evidence. Toys Tekk thus resorts to creating an elaborate conspiracy theory, even going so far as to accuse JLR of “forging” licensing and royalty documents and adopting “counterfeit advertisement.” Not only are these egregious allegations completely unsupported, they also have no place in proceedings in front of this Board. Toys Tekk has not, and indeed cannot, present any evidence in support of its claim for cancellation of the LAND ROVER toy mark. Therefore, the Board should grant JLR’s Motion for Summary Judgment on Toys Tekk’s cancellation counterclaim.

¹ As discussed in JLR’s opening brief, the Board dismissed Toys Tekk’s cancellation claim for the RANGE ROVER mark for toys. Toys Tekk is now attempting to resurrect this long dead claim. JLR opposes any attempt to revive this claim, as discussed in JLR’s Response to Applicant’s Late Payment of Fee, which is being filed concurrently herewith.

A. Toys Tekk Presents no Evidence of Abandonment

In its opening brief, JLR came forward with extensive evidence showing that JLR uses its LAND ROVER mark on licensed toys in the US. Once JLR came forward with this evidence, it was Toys Tekk's burden "to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial." *Venture Out Properties LLC v. Wynn Reports Holding, LLC*, 81 U.S.P.Q.2d 1887, 1890 (TTAB 2007). Here, Toys Tekk failed to present a single piece of actual evidence showing a disputed fact. Rather, Toys Tekk relies solely on attorney argument, essentially stating that the Board should ignore all of JLR's evidence of use because Toys Tekk believes certain other evidence should have been produced to avoid a finding of abandonment. However, it has been held repeatedly that attorney argument is not enough to create an issue of material fact. *See Creative Compounds, LLC v. Starmark Labs.*, 651 F.3d 1303, 1311 (Fed. Cir. 2011) ("conclusory attorney arguments fail to raise a genuine issue of material fact").

Toys Tekk seems to misunderstand the burden of proof for its cancellation counterclaim. It is Toys Tekk—and not JLR—that bears the burden of showing that JLR has abandoned its mark. *Cerverceria Centroamericana S.A. v. Cerverceria India Inc.*, 892 F.2d 1021 (Fed. Cir. 1989). It is abundantly clear that Toys Tekk cannot sustain this burden, and is instead attempting to shift it to JLR. Because Toys Tekk has not carried its burden, the Board should find that there are no genuine issues of material fact and grant summary judgment in favor of JLR on the cancellation counterclaim.

B. Toys Tekk does not Address Intent to Resume Use

As discussed in JLR's opening brief, even if Toys Tekk were able to prove nonuse, which it cannot, cancellation would not be appropriate because the licenses evidence an intent to resume use. Toys Tekk did not present any actual evidence controverting JLR's evidence of its

intent to resume use—instead relying on attorney arguments, rhetorical questions, and the entirely new theory that the LAND ROVER mark for toys is generic.² As described above, however, this is nothing more than attorney argument, and is not enough to show that there is a genuine issue of material fact.

C. Toys Tekk’s Evidentiary Objections are Misplaced

In addition to its opposition brief, Toys Tekk also filed a number of evidentiary objections. As with Toys Tekk’s other arguments, Toys Tekk’s objections are based solely on attorney argument and should not be used as a basis for the Board to deny summary judgment.

1. The Clough Declaration – Toys Tekk objects to the Clough declaration on the basis that “Mr. Clough . . . is not in a position to collect royalty payments.” Toys Tekk goes further to baselessly accuse Mr. Clough of fabricating the document showing the royalties his company has collected. Toys Tekk’s objection is factually incorrect. Mr. Clough is the Assistant General Counsel for Beanstalk Group and evidence of the royalties collected attached to Mr. Clough’s Declaration as Exhibit A was generated at his direction. Thus, Mr. Clough’s declaration is based on his personal knowledge of Beanstalk Group business practices. Therefore, Mr. Clough was fully competent to make the averments in his declaration.

Toys Tekk’s objection also fails to the extent that it suggests that there is some disparity between Exhibit A to the Clough declaration and the JLR licenses. For example, contrary to Toys Tekk’s arguments, Cai Po Products International Company is a JLR licensee. The licenses between Cai Po and JLR were produced to Toys Tekk at JLR829-868, and will be produced to

² As discussed in JLR’s opening brief, Toys Tekk has only argued for cancellation on the basis of non-use. Toys Tekk should not be allowed, at this late date, to change the basis of its cancellation request to genericness. JLR has not had the opportunity to take any discovery on such a claim, and would be severely prejudiced were Toys Tekk allowed to change its argument at the eleventh hour.

the Board upon request. The Cai Po licenses, however, are limited to JLR's RANGE ROVER marks and therefore were not included in the summary. Moreover, there is absolutely no evidence that Cai Po paid the Bruder royalties—rather, Exhibit A clearly shows that Bruder paid its own royalties. Because Toys Tekk's objection is based on a faulty premise, it should be disregarded.

Finally, even if the Clough declaration is not allowed as evidence, the Board should still consider Exhibit A to the Clough Declaration in determining JLR's Summary Judgment Motion. Exhibit A was produced in response to Toys Tekk's document requests in this case.³ TBMP §528.05(a)(1) specifically states that “a party may make of record, for purposes of summary judgment, . . . documents or things produced in response to a request for production.” Moreover, TBMP§528.05(c) states “[f]or purposes of summary judgment only, the Board will consider any of the following, if a copy is provided with the party's brief on the summary judgment motion: . . . a request for production and the **documents or things produced in response thereto.**” (emphasis added). Therefore, Exhibit A should be considered regardless of whether the Clough Declaration is allowed.

2. The Cantor Declaration – the Cantor declaration is nothing more than an attorney declaration attaching exhibits to JLR's Brief in Support of its Motion for Summary Judgment. Such attorney declarations are commonplace—indeed, even Toys Tekk's attorney, Shun Chen, filed one in support of Toys Tekk's opposition. This objection is baseless.

3. Summary of the Toy Licenses (Exhibit 1) – Toys Tekk objects to the summary of the JLR LAND ROVER toy licenses. As its basis, Toys Tekk asserts that JLR did not produce the licenses being summarized. This statement is entirely false—JLR produced each

³ This document was produced on March 18, 2015 at Bates numbers JLR704-708.

and every license as Bates numbers JLR710-JLR3363 (over 2600 pages of responsive documents) in response to Toys Tekk's document requests. As stated in JLR's opening brief, the summary was provided for the convenience of the Board given the volume of documents on which it is based. But, JLR will gladly produce any or all of the summarized licenses at the Board's request. It should, however, be noted that Toys Tekk does not dispute the accuracy of JLR's summary.

4. Trademark License Agreements (Exhibit 3 and 4) – Toys Tekk objects to the license agreements mainly on the basis that they are not properly authenticated. Toys Tekk misunderstands the authentication requirement at the summary judgment stage. As discussed above, it is proper for the Board to consider materials produced in response to a request for production, and here the licenses in this case were all produced in response to Toys Tekk's request for production. Thus, they were properly made of record in JLR's summary judgment brief.

5. Amazon Printout – Toys Tekk objects to Exhibit 4 of the Cantor Declaration on the basis that it is not complete. However, Toys Tekk fails to identify what is allegedly missing from the document or otherwise come forward with evidence to refute that it is a true and correct copy of the webpage as it appeared on the date the webpage was accessed. Thus, Toys Tekk's objection should be disregarded.

D. CONCLUSION

Based on the foregoing, as well as for the reasons set forth in JLR's opening brief, JLR respectfully requests that the Board grant summary judgment on Toys Tekk's cancellation claim.

Respectfully submitted,

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Date: June 4, 2015

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CERTIFICATE OF SERVICE

I certify that I served:

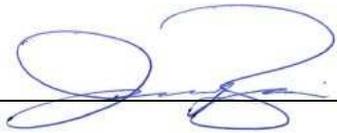
OPPOSER'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

On June 4, 2015 by First Class Mail to:

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By: 
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