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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

BUO

Mailed: November 9, 2015

Opposition No. 91213584

Jaguar Land Rover Limited

v.

Toys Tekk

Before Richey, Deputy Chief Administrative Trademark Judge, and Bergsman and Wolfson, Administrative Trademark Judges.

By the Board:

Toys Tekk (“Applicant”) seeks to register the mark CLOUD ROVER, in standard character format, for “radio controlled toy vehicles; remote control toys, namely, remote control car, remote control vehicle,” in International Class 28.¹

On November 20, 2013, Jaguar Land Rover Limited (“Opposer”) filed a notice of opposition pleading ownership of seven registrations for the following standard character marks: 1) LAND ROVER, for “motor cars, namely, estate wagons,” in International Class 12;² “motor vehicles, namely, automobiles, sport-utility vehicles,

¹ Application Serial No. 85867803 (“the ’803 application”), filed March 5, 2013, based on Applicant’s current use of the mark in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a). Applicant alleges January 15, 2013, as the date of first use of the mark anywhere, and February 1, 2013, as the date of its first use in commerce.

² Registration No. 0541722, issued May 1, 1951, from an application filed March 17, 1949. Opposer’s combined Declaration of Use and Application for Renewal under Trademark Act Sections 8 and 9 was accepted on November 19, 2010.

and structural parts and engines therefor; [and] bicycles,” also in International Class 12;³ and “toys, game and playthings, namely toy model vehicles, replica and scale model vehicles, hobby kits for the construction of toy model and scale model vehicles,” in International Class 28;⁴ 2) RANGE ROVER, for “road and cross-country motor car of the station-wagon type and structural parts thereof,” in International Class 12;⁵ and for “toys, namely, toy automobiles, toy station wagons, and toy sport utility vehicles; games, namely, board games and computer game software; scale models, namely, miniature automobiles, miniature station wagons, and miniature sport utility vehicles sold complete or in kit form,” in International Class 28;⁶ and 3) LAND ROVER EXPERIENCE, for “pre-recorded video, audio, and audio-visual tapes and discs in the field of motor land vehicles,” in International Class 9; “clothing, namely, head wear; articles of outer clothing, namely, wind-resistant jackets, T-shirts, and polo-shirts,” in International Class 25; “scale model and toy model vehicles,” in International Class 28; and “off-road driving instruction services and educational services, namely, providing courses of instruction and education in four-wheel driving techniques, vehicle mechanics, map reading, driving

³ Registration No. 2767628, issued September 23, 2003, from an application filed September 21, 2001. Opposer’s combined Declaration of Use and Application for Renewal under Trademark Act Sections 8 and 9 was accepted on August 19, 2013.

⁴ Registration No. 2860099 (“the ’099 registration”), issued July 6, 2004, from an application filed January 30, 2003. Opposer’s combined Declaration of Use and Application for Renewal under Trademark Act Sections 8 and 9 was accepted on April 8, 2014.

⁵ Registration No. 0929034, issued February 15, 1972, from an application filed July 13, 1970. Opposer’s combined Declaration of Use and Application for Renewal under Trademark Act Sections 8 and 9 was accepted on October 5, 2011.

⁶ Registration No. 2100825 (“the ’825 registration”), issued September 30, 1997, from an application filed January 17, 1996. Opposer’s combined Declaration of Use and Application for Renewal under Trademark Act Sections 8 and 9 was accepted on August 31, 2007.

safety and environmental responsibility as concerns land vehicles; educational services, namely, providing an academy for training drivers,” in International Class 41;⁷ and the following design mark, for “sports utility vehicles,” in International Class 12:⁸



1 TTABVUE 7-8, ¶ 2.⁹

As grounds for its opposition, Opposer alleges deceptiveness and false suggestion of a connection under Trademark Act Section 2(a), 15 U.S.C. § 1052(a); likelihood of confusion under Section 2(d), 15 U.S.C. § 1052(d); and dilution under Section 43(c), 15 U.S.C. § 1125(c). With respect to Opposer’s claim under Section 2(d), Opposer alleges, *inter alia*, that Applicant’s applied-for mark is likely to cause confusion with respect to the marks in its pleaded registrations, given the similarity of the marks, the similarity of the goods, and the fame of Opposer’s marks. *Id.* at 9-10, ¶¶ 9-11

⁷ Registration No. 2380434, issued August 29, 2000, from an application filed August 11, 1998. Opposer’s combined Declaration of Use and Application for Renewal under Trademark Act Sections 8 and 9 was accepted on August 24, 2010.

⁸ Registration No. 3485024, issued August 12, 2008, from an application filed August 9, 2006. Opposer’s combined Declaration of Use and Incontestability under Trademark Act Sections 8 and 15 was accepted and acknowledged on February 28, 2014.

⁹ Citations to the record will be to TTABVUE, the docket history system for the Trademark Trial and Appeal Board. Because the Board primarily uses TTABVUE in reviewing evidence, the Board prefers that citations to material or testimony in the record that has not been designated confidential include the TTABVUE docket entry number and the TTABVUE page number. For material or testimony that has been designated confidential and which cannot be viewed on TTABVUE, the TTABVUE docket entry number where such material or testimony is located should be included in any citation. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

and 16. With respect to Opposer's claim under Section 2(a), Opposer asserts that "Applicant's CLOUD ROVER mark ... so resembles ... Opposer's ROVER Family of Marks and the goods identified are so closely related ... as to be likely ... to falsely suggest a connection with Opposer in violation of Section 2(a)."¹⁰ Opposer further pleads under Section 43(c) that "Opposer's ROVER Family of Marks became famous prior to the filing date of the application for the CLOUD ROVER mark," thus, "Applicant's use and/or registration of a 'ROVER' component mark is likely to cause, and will cause, dilution of the distinctive value of Opposer's LAND ROVER and RANGE ROVER marks." *Id.* at 10-11, ¶¶ 12 and 18-19.

It appears that Opposer is seeking to assert its pleaded registrations as a "family" of marks, inasmuch as each of Opposer's claims with regard to confusion, false suggestion of a connection, and dilution reference "Opposer's ROVER Family of Marks." *Id.* at 9-11. However, if Opposer actually intends to assert a family of

¹⁰ Opposer's false suggestion of a connection claim is insufficiently pleaded inasmuch as to state a claim of false suggestion of a connection under Trademark Act Section 2(a), Opposer must allege facts from which it may be inferred (1) that Applicant's mark points uniquely to Opposer as an entity – *i.e.*, that Applicant's mark is Opposer's identity or "persona;" (2) that purchasers would assume that goods sold under Applicant's mark are connected with Opposer; and (3) either (a) that Opposer was the prior user of Applicant's mark, or the equivalent thereof, as a designation of *its identity or "persona"*, or (b) that there was an association of the identity or persona with Opposer prior in time to Applicant's use. *See Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1712-13 (TTAB 1993). Opposer has merely alleged that Applicant's mark is a "a close approximation of Opposer's ROVER Family of Marks," and "the purchasing public has come to recognize and associate the products of Opposer with the ROVER Family of Marks," but failed to allege that any one of Opposer's marks is the *identity or persona* of Opposer. A claim under Section 2(a) claiming false suggestion of a connection is not a surrogate claim to a claim under Section 2(d) for likelihood of confusion. Opposer is allowed twenty days from the mailing date of this order to submit an amended notice of opposition repleading its false suggestion of a connection claim, failing which, the Board will construe the false suggestion of a connection claim to be withdrawn.

marks, it has not properly pleaded that its marks in fact constitute a “family” of marks.¹¹

By its claim of ownership of its pleaded registrations, two of which are of record in this proceeding by virtue of Applicant’s counterclaims to cancel those registrations as discussed further below, Opposer has established its standing to bring this opposition against the ’803 application. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). *See also* Trademark Rule 2.122(b) (“each registration against which a ... counterclaim for cancellation is filed forms part of the record of the proceeding without any action by

¹¹ It is noted that although Opposer has sufficiently asserted ownership of a group of marks containing a recognizable common characteristic – ROVER, that the adoption of those marks predates the earliest date Applicant can claim as its first date of use, and that “the purchasing public has come to know and recognize products of the Opposer by the marks within the ROVER Family of Marks,” 1 TTABVUE 9, ¶ 5, these allegations taken as true would nonetheless not entitle Opposer to the relief it seeks with regard to its alleged family of marks. The claim is factually deficient inasmuch as Opposer has failed to adequately plead that the public associates not only the individual distinctive marks, *but the singular common characteristic of the family – ROVER – with a single source, namely, – Jaguar Land Rover Limited.* *See Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482 (TTAB 2007) (“A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.”) (quoting *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). Opposer is allowed twenty days from the mailing date of this order to submit an amended notice of opposition repleading its likelihood of confusion claim to include a family of marks, failing which, at trial, the Board will not consider any evidence or arguments regarding a family of “Rover” marks.

the parties and reference may be made to the file for any relevant and competent purpose.”).¹²

Applicant, in its answer filed December 23, 2013, denied the salient allegations of the notice of opposition. Applicant also asserted counterclaims seeking the cancellation of the '099 and '825 registrations. Applicant alleges that “Opposer discontinued use of [the marks subject to those registrations] for 3 or more years and has no intent to resume such use.”¹³ 4 TTABVUE 4, ¶¶ 13-14.

Opposer filed an answer to the counterclaims on January 22, 2014, denying the allegations advanced in the counterclaims.

Now before the Board is Opposer’s motion for summary judgment, filed April 10, 2015, seeking judgment on Applicant’s counterclaim against the '099 registration. By its motion, Opposer alleges that it “has continuously used its LAND ROVER mark [subject of the '099 registration] in connection with toy vehicles for at least the past five years. Thus, there is no basis for Toys Tekk’s allegation that [Opposer] has abandoned the mark.” 13 TTABVUE 4. Opposer also asserts that “the Board [in an order issued January 30, 2014] rejected the counterclaim related to the '825

¹² In order for Opposer to rely on its other pleaded registrations, Opposer must establish current status and title, which can be done by submitting current printouts of information from the electronic database records of the Office such as (a) printouts from TSDR (Trademark Status and Document Retrieval), or (b) printouts from TESS (Trademark Electronic Search System), along with a copy of any records from the Assignment database showing an assignment, if any, to the current owner of the registrations. *See* Trademark Rule 2.122(d); *Research In Motion Ltd. v. NBOR Corp.*, 92 USPQ2d 1926, 1928 (TTAB 2009). *See also* TBMP § 704.03(b)(1)(A) and authorities cited therein.

¹³ Applicant also advanced two “affirmative defenses” asserting that Opposer has abandoned use of the marks in the '099 and '825 registrations. 4 TTABVUE 3-4, ¶¶ 11-12. However, these statements are not actually affirmative defenses, but are collateral attacks on Opposer’s pleaded registrations, and absent Applicant’s counterclaim to cancel the pleaded registrations would be impermissible. Trademark Rule 2.114(b)(2)(ii).

Registration [for the RANGE ROVER mark] on the basis that Toys Tekk had only paid one fee.” *Id.* at 6.

Applicant contends that “Opposer admitted it did not manufacture, market and sell any toys with [the] LAND ROVER mark in the United States,” and that “Opposer’s alleged use of the mark is through ‘licensing’ only,” but there is no evidence that its alleged single licensee has “engaged in any U.S. sale of any toy vehicle bearing LAND ROVER.” 17 TTABVUE 5, 8 and 12. Additionally, Applicant argues that “[t]he Board did not issue any notice to dismiss the counterclaim ‘825 [sic], nor a deadline to remit additional fee.” *Id.* at 4. Further, Applicant objects to Opposer’s evidence as “objectionable on the ground of lack of foundation, speculation, and legal conclusion, because there is no evidence presented the webpage ad was connected with Bruder [Opposer’s licensee], and there is absence of prior approval of licensor before [Opposer’s licensee] could advertise on Internet [sic].” *Id.* at 5.

Summary Judgment

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to material facts, thus leaving such cases to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). In deciding motions for summary judgment, the Board must follow the well-established principles that, in considering the propriety of summary judgment, all evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant’s favor. The Board may not resolve disputes of material fact; it may

only ascertain whether such disputes are present. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

The burden is on the party moving for summary judgment to demonstrate the absence of any genuine dispute of material fact, and that it is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). When a moving party's motion for summary judgment is supported by evidence sufficient to indicate that there can be no genuine dispute as to any material fact and that the moving party is entitled to judgment, the burden shifts to the non-moving party to demonstrate the existence of at least one genuine dispute as to a material fact that requires resolution at trial. The non-moving party may not rest on the mere allegations of its pleadings and assertions, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to a material fact for trial. Consequently, factual assertions, without evidentiary support, are insufficient to defend against a motion for summary judgment. *See Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1739 (TTAB 2001) ("applicant has produced no evidence, or raised any expectation that at trial it could produce evidence"); *S & L Acquisition Co. v. Helene Arpels Inc.*, 9 USPQ2d 1221, 1225 n.9 (TTAB 1987).

In support of its motion, Opposer submitted the declarations of Rebecca J. Cantor, Opposer's counsel, and Edward Clough, Opposer's Assistant General Counsel, with the following accompanying exhibits:

- a summary of licenses for use of the LAND ROVER mark in territories that include the United States;¹⁴
- copies of licenses between Opposer and Bruder Spielwaren GmbH & Co. KG executed in 2009 and 2013 for use of the LAND ROVER mark;¹⁵
- printouts of an Amazon.com webpage "showing one of Bruder's licensed Land Rover toys for sale;"¹⁶
- a copy of Applicant's responses to Opposer's interrogatories served July 5, 2014;¹⁷
- a copy of a portion of the transcript of Applicant's 30(b)(6) deposition;¹⁸ and
- a copy of a spreadsheet showing the royalties that have been collected from Opposer's licensees since 2010 from the sale of toy vehicles.¹⁹

12 TTABVUE 17-18 and 140, Cantor Exhibits 1-6; and Clough Exhibit A.

Before turning to the merits of Applicant's abandonment claim, we first address Applicant's evidentiary objections and the issue regarding the fee submitted in connection with the counterclaim to cancel the '825 registration.

¹⁴ 12 TTABVUE 19-33.

¹⁵ *Id.* at 34-112.

¹⁶ *Id.* at 113-119.

¹⁷ *Id.* at 120-132.

¹⁸ *Id.* at 133-139.

¹⁹ *Id.* at 141-146.

Applicant interposed evidentiary objections *i.e.*, relevancy, foundation, conclusory, and speculation, to portions of statements and accompanying exhibits in the declarations submitted in support of the motion for summary judgment. However, Applicant's objections are essentially arguments regarding the probative value of the objected-to exhibits and statements, and not objections as to admissibility. *See Weatherford/Lamb, Inc. v. C&J Energy Services, Inc.*, 96 USPQ2d 1834, 1836-37 (TTAB 2010). Applicant's evidentiary objections are **OVERRULED**. We have evaluated all of the statements and accompanying exhibits as to whether they are sufficiently probative to foreclose a genuine dispute of material fact. Moreover, evidence, such as that submitted by Opposer, consisting of discovery responses, deposition transcripts, and printed publications in the form of Internet printouts, are properly considered on summary judgment. *See Fed. R. Civ. P. 56(c); Trademark Rules 2.122(e) and 2.127(e)(2); Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1369-70 (TTAB 1998). *See also* Trademark Rule 2.120(j)(8); TBMP §§ 528.05(a)(1)-(e).

With regard to the fee submitted by Applicant, a counterclaim to cancel a pleaded registration, just as a cancellation proceeding, is only instituted by the "filing in the Office [of] a timely petition for cancellation *with the required fee.*" Trademark Rule 2.111. A petition to cancel filed without a filing fee will not be accorded a filing date. Where a petition to cancel or counterclaim is filed against multiple classes or registrations, but the accompanying fees are insufficient to proceed against all the classes or registrations, and the particular classes or

registrations against which the petition is filed is not specified, the petition will be presumed to be against the classes or registrations in ascending numerical order, including only the classes or registrations for which sufficient fees have been submitted. Therefore, Opposer's statement that the Board "dismissed" or "rejected" the counterclaim with respect to the '825 registration is inaccurate, inasmuch as the Board could not dismiss a counterclaim that was not instituted prior to the filing of this motion for summary judgment. The Board's January 30, 2014 order applied the fee submitted by Applicant to a single registration, the '099 registration. That order did not set a time for Applicant to file a supplemental fee sufficient to proceed against the '825 registration; therefore, that order did not function to preclude the filing of a supplemental fee to institute the counterclaim to cancel the '825 registration. Accordingly, the counterclaim to cancel the '825 registration is now a part of this proceeding. Nonetheless, Opposer need not argue against a claim that was not properly raised prior to the filing of its motion for summary judgment. Accordingly, the Board will only consider the counterclaim as to the registration for which a sufficient fee had been submitted prior to the filing of the motion for summary judgment, and the only one for which Opposer submitted argument and evidence to support – the '099 registration.²⁰

²⁰ Applicant submitted the fee to petition to cancel the '825 registration on May 18, 2015, over one month after the motion for summary judgment had been filed. "The filing date of a petition for cancellation is the date of receipt in the Office of the petition for cancellation, with proof of service on the owner of record, ... *and with the required fee.*" Trademark Rule 2.111(c)(4). Therefore, the counterclaim to cancel the '825 registration was instituted on May 18, 2015, after the filing of the present motion for summary judgment. Regrettably, the result of the delay in submitting the required fee may be piecemeal litigation.

- *Abandonment*

“There are two elements to an abandonment claim that a plaintiff must [allege and subsequently] prove: nonuse of the mark and intent not to resume use.” *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1042 (TTAB 2012). However, a *prima facie* showing of abandonment may be established where the alleged nonuse has ensued for three years or more. *See* 15 U.S.C. § 1127; *ShutEmDown Sports*, 102 USPQ2d at 1042.

Use of a mark by a controlled licensee is sufficient to maintain rights in a trademark or service mark, even when the only use of the mark has been made, and is being made, by the licensee. *Turner v. HMH Publ'g Co.*, 380 F.2d 224, 229, 154 USPQ 330, 334 (5th Cir. 1967), *cert. denied*, 389 U.S. 1006, 156 USPQ 720 (1967); *Cent. Fid. Banks, Inc. v. First Bankers Corp. of Fla.*, 225 USPQ 438, 440 (TTAB 1984) (holding that use of the mark by petitioner's affiliated banks considered to inure to the benefit of petitioner bank holding company, even though the bank holding company could not legally render banking services and, thus, could not use the mark).

Opposer asserts that it maintains “a robust licensing program under which licensees may use [Opposer's] marks on a variety of goods, including toy vehicles.” 13 TTABVUE 4. Opposer submitted, as exhibits with its confidential brief, a summary of its existing licenses, and a series of executed licensing agreements between Opposer and Bruder Spielwaren GmbH & Co. KG for the sale of “1:16, scale replica model vehicles featuring” the LAND ROVER mark with worldwide

territory (the most recent specifically identifying the United States and its territories and possessions). 12 TTABVUE.²¹ A review of the licensing agreements shows that the agreements contain provisions for quality control and assurance measures covering the production of the goods as well as controls over the channels of trade and marketing and payment of royalties. Further, the agreements provide for control over any significant changes to the manufacture of the toy vehicles or use of the mark on those vehicles, requiring prior approval from Opposer for such changes. *Id.* Accordingly, Applicant's argument alleging that Opposer granted its licensee a "naked" license is not well-taken. *See Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, 1288 (TTAB 1998).

Opposer also included an Internet screenshot taken from Amazon.com, which shows its licensee's use of the mark on toy vehicles, offering for sale a Land Rover Defender toy vehicle on the website. 12 TTABVUE. Additionally, Opposer indicated that substantial royalties were paid from the sales of the toy vehicles by Bruder between 2010 and 2014, as evidenced by the summary of royalty payments which accompanied the Clough declaration. *Id.*

The evidence of record is sufficient to establish that Opposer, through use that inures to its benefit by its licensee(s), has in fact made use of its mark in the United States on the goods identified in the '099 registration, and thus has not abandoned its mark in relation to those goods.

²¹ The confidential brief posted at 12 TTABVUE is not available to the public. The public version, including redactions, is available at 13 TTABVUE.

The burden now shifts to Applicant to demonstrate the existence of at least one genuine dispute as to a material fact that requires resolution at trial. Applicant offered, as exhibits to its brief in response to the motion for summary judgment, evidence consisting of Opposer's 2013-14 Annual Report, Opposer's responses to Applicant's document requests, and a search result list from a search of the term "land rover toys" from Amazon.com. 15 TTABVUE.²²

Applicant's evidence falls well short of raising a genuine dispute of material fact. Indeed, the annual report was not authenticated by Applicant in its declaration, and was not identified as a document produced by Opposer in response to a discovery request propounded by Applicant, and therefore may not be considered as it is not a publication in general circulation available to the general public and thus admissible through a notice of reliance pursuant to Trademark Rule 2.122(e).²³ Documents submitted with a summary judgment affidavit, but not identified therein, cannot be considered as exhibits to the affidavit. *See Mo. Silver Pages Directory Publ'g Corp. Inc. v. Sw. Bell Media, Inc.*, 6 USPQ2d 1028, 1030 n.9 (TTAB 1988) (documents were related to information given in affidavit, but were not specifically identified therein). Moreover, Applicant's proffered Amazon.com search

²² 15 TTABVUE was designated as confidential and is not available to the public. The public version, including redactions, is available at 17 TTABVUE.

²³ Printed publications are self-authenticating and, therefore, may be relied on for purposes of summary judgment without further evidence of authenticity. TBMP § 528.05(e) (June 2015). However, corporate annual reports are not printed publications available to the general public in libraries or in general circulation among the general public or that segment of the public which is relevant. *Research In Motion Ltd. v. NBOR Corp.*, 92 USPQ2d 1926, 1929 (TTAB 2009); *Wet Seal Inc. v. FD Management Inc.*, 82 USPQ2d 1629, 1632 (TTAB 2007).

results, for their limited probative value, only serve to support Opposer's claim of use by its licensees, as many of the toys listed are offered by licensees identified in Opposer's summary of its licensees, e.g. Bruder, Matchbox, Oxford, and Rastar. 12 TTABVUE. Finally, Opposer's responses to Applicant's document requests do not raise a genuine dispute as to abandonment. The excerpts cited by Applicant, Opposer's responses to requests for documents that evidence the sale of toy, model or hobby kit vehicles, merely state that Opposer objects to the requests, but that Opposer's "review of responsive documents is ongoing," and "[t]o the extent they are available, Opposer will produce responsive documents." 15 TTABVUE. This cannot be construed as an admission that no such documents exist, as Applicant would have it construed. If Applicant believed that Opposer's responses were inadequate, it had an obligation to file a motion to compel responses. *Cf. Midwestern Pet Foods Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1439 (Fed. Cir. 2012) (Board did not abuse its discretion by refusing to strike plaintiff's evidence where defendant failed to follow up on plaintiff's offer to produce the evidence at a mutually agreeable time and place and in view of defendant's failure to file a motion to compel); *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1719 (TTAB 2008) (party that receives response it believes inadequate but fails to file a motion to test sufficiency of response, may not thereafter complain about its insufficiency); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1656 (TTAB 2002) (having failed to file motion to compel, defendant will not later be heard to complain that interrogatory responses were inadequate). Moreover, if

Applicant needed responses to those discovery requests to respond to Opposer's motion for summary judgment, it should have filed a request for discovery pursuant to Fed. R. Civ. P. 56(d).

The remaining contentions raised by Applicant amount to mere attorney argument. However, as previously stated, factual assertions, without evidentiary support, are insufficient to defend against a motion for summary judgment. *See Hornblower & Weeks Inc.*, 60 USPQ2d at 1739. "Whenever an inference is based on pure speculation and 'there is no basis ... to infer nonuse,' a *prima facie* case of abandonment must fail." *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 13 USPQ2d 1307, 1310 (Fed. Cir. 1989) (quoting *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A. e. M. Usellini*, 570 F.2d 328, 332-33, 196 USPQ 801, 804-05 (CCPA 1978)). Further, even had Applicant shown a cessation of use shorter than three years, which it has not, Applicant has provided no evidence to support any claim that Opposer has stated an intent not to resume use of the mark.

For the foregoing reasons, Opposer's motion for summary judgment with regard to Applicant's counterclaim to cancel the '099 registration based upon a claim of abandonment is **GRANTED**. Accordingly, judgment is entered against Applicant on its counterclaim. The counterclaim to cancel will go forward only as to Registration No. 2100825.

Amended Pleading

It is the Board's policy to allow amendment of pleadings found to be insufficient, particularly where the offending pleading is the initial pleading. *See Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1208 (TTAB 1997). In view thereof, Opposer is allowed until **TEN DAYS** from the mailing date of this order to submit an amended notice of opposition repleading its false suggestion of a connection claim and any claim it may properly have under Sections 2(d) or 43(c) with respect to an alleged family of marks, if possible, justified and appropriate. Applicant is allowed until **TEN DAYS** from the filing of any amended notice of opposition to file an amended answer thereto, and to restate its remaining counterclaim, if desired.²⁴ Opposer is then allowed until **TEN DAYS** to file an answer to the restated counterclaim and any motion for summary judgment on Applicant's restated counterclaim, if desired. The parties are prohibited from filing any other motion for summary judgment. If Opposer fails to file an amended notice of opposition within the time allowed, the proceeding will go forward as to Opposer's claims of likelihood of confusion and dilution only with respect to the individually pleaded marks. If Applicant fails to restate its counterclaim in its amended answer, the counterclaim as to the '825 registration will be considered withdrawn and, of course, there is no need for Opposer to file a motion for summary judgment.

If Applicant restates its counterclaim and Opposer files a motion for summary judgment on Applicant's restated counterclaim, action in this proceeding will be

²⁴ This is not, however, an opportunity for Applicant to advance new claims against Opposer's pleaded registration. Applicant's restatement is limited to the abandonment claim initially asserted.

suspended pending disposition of Opposer's motion for summary judgment. If Applicant does not restate its counterclaim or Opposer does not file a motion for summary judgment, trial dates are reset below.

Schedule

The proceeding is **RESUMED**. The remaining disclosure and trial dates are reset as follows:

Plaintiff's Pretrial Disclosures	12/21/2015
Plaintiff's 30-day Trial Period Ends	2/4/2016
Defendant's Pretrial Disclosures	2/19/2016
Defendant's 30-day Trial Period Ends	4/4/2016
Plaintiff's Rebuttal Disclosures	4/19/2016
Plaintiff's 15-day Rebuttal Period Ends	5/19/2016

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.