

TTAB



03-25-2002

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

U.S. Patent & TMO/TM Mail Rcpt. Dt. #40

STEVEN R. HYKEN, )  
)  
Petitioner )  
)  
v. )  
)  
AST SPORTSWEAR, INC., )  
)  
Respondent. )

Cancellation No. 32, 513

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MOTION FOR LEAVE TO AMEND ANSWER

Respondent, AST Sportswear, Inc., hereby moves for leave to amend its Answer to the Petition for Cancellation, under Rule 15(a) of the Federal Rules of Civil Procedure.

Respondent has set forth the affirmative defenses of unclean hands, laches and acquiescence. Further review of this matter, in light of a recent discovery responses, has revealed that Petitioner's stage name JOHNNY BLAZE does not function as either a trade name, trademark or service mark, and that even if Petitioner's stage name JOHNNY BLAZE functions as a trade name, trademark or service mark, any rights therein have been abandoned.

The granting of leave to amend will necessitate no additional discovery and no prejudice will result because (a) the facts are exclusively in the possession of Petitioner; and (b) it would be inequitable to allow Petitioner to rely on a stage name that does not function as a trade name, trademark, or service mark; and (c) it would be inequitable to allow Petitioner to rely on common law rights, if any such rights were acquired, since Petitioner has abandoned his rights therein.

Permission for leave to amend a pleading "shall be freely given when justice so requires" TMBP § 507.02; Fed. R. Civ. P. 15(a). Thus, "the Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party". TMBP § 507.02.

The testimony periods have not yet begun. The amendment does not require additional discovery, and does not place any additional burden on either party. Thus, leave to amend should be granted. See, e.g., Focus 21 International Inc. v. Pola Kasei Kogyo Kabushiki Kaisha, 22 U.S.P.Q.2d (T.T.A.B. 1992) (leave granted where motion to amend filed prior to petitioner's testimony period); Caron Corp. v. Helena Rubenstein, Inc., 193 U.S.P.Q. 113 (T.T.A.B. 1976); Anheuser-Bush, Inc. v. Martinez, 185 U.S.P.Q. 434 (T.T.A.B. 1975) (where the proceeding was still in the pre-trial stage, amendment of pleadings was not prejudicial).

The proposed amendment contains matter that the Board should consider in order to make a complete and fair evaluation of this proceeding and to fully adjudicate the validity of the Petitioner's claim. Accordingly, the policy underlying Rule 15(a) will be advanced by the granting of this motion for leave to amend Respondent's Answer.

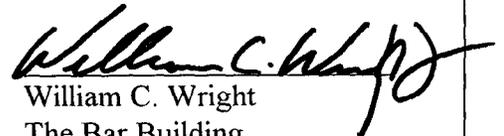
Respondent's proposed Amended Answer is submitted herewith.

Respectfully submitted,

GRAHAM, CAMPAIGN  
Attorney's for Respondent

Dated: March 20, 2002

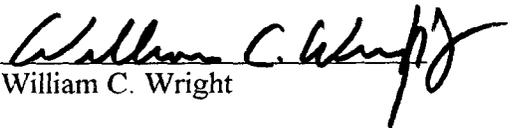
BY:



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New York, New York  
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**CERTIFICATE OF MAILING**

I hereby certify that the foregoing is being deposited with the U.S. Postal Service as Express Mail, with sufficient postage prepaid, in an envelope addressed to: BOX TTAB - NO FEE , Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513, this 20<sup>th</sup> day of March, 2002.

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William C. Wright

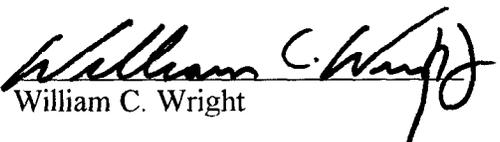
**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served on Petitioner's attorneys by first-class mail, postage prepaid, this 20<sup>th</sup> day of March, 2002, addressed to:

Law Offices of Michael S. Duberchin, P.C.  
Michael S. Duberchin, Esq.  
4768 Park Granada, Suite 212  
Calabasas, California 91302-3349

Law Offices of Levy, McMahon, et. al.  
16830 Ventura Blvd., Suite 500  
Encino, California 91436

Dated: March 20, 2002  
New York, New York

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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

STEVEN R. HYKEN,	)	
	)	
Petitioner	)	<b>Cancellation No. 32,513</b>
	)	
v.	)	
	)	
AST SPORTSWEAR, INC.,	)	
	)	
Respondent.	)	

**RESPONDENT'S PROPOSED AMENDED ANSWER  
TO PETITION FOR CANCELLATION**

Respondent, by its undersigned attorneys, answers the allegations set forth in the Petition for Cancellation as follows:

1. Respondent denies the allegations set forth at the top of the Petition for Cancellation that the registration sought to be cancelled comprises the words "JOHNNY BLAZE/JOHNNY BLAZE 'FLAME'".
2. Respondent denies the allegations set forth in Paragraph 1 of the Petition for Cancellation.
3. Respondent denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in each and every allegation in Paragraph No. 2, 2 (a), 2(b), 2(c) and 2(d), and therefore denies same.

**AFFIRMATIVE DEFENSES**

4. The relief sought by the Petitioner is barred by the equitable doctrine of unclean hands.
5. The relief sought by the Petitioner is barred by the equitable doctrines of laches and acquiescence.

6. The relief sought by the Petitioner is barred, since the stage name JOHNNY BLAZE does not function as a trade name, trademark or service mark.
7. The relief sought by the Petitioner is barred, since any rights that may have accrued in the stage name JOHNNY BLAZE have been abandoned.

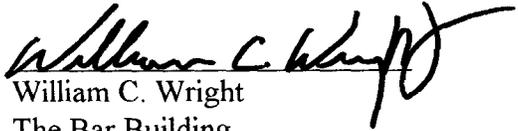
WHEREFORE, Respondent prays that the Petition for Cancellation be dismissed on the merits and without leave to replead.

Respectfully submitted,

GRAHAM, CAMPAIGN P.C.  
Attorneys for Respondent

Dated: March 20, 2002

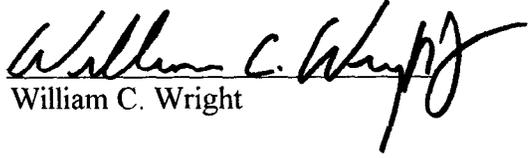
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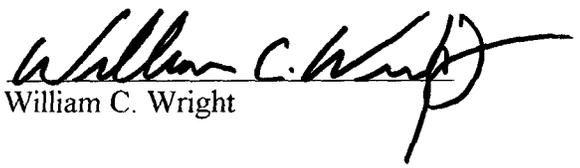
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