

ESTTA Tracking number: **ESTTA41411**

Filing date: **08/08/2005**

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

Proceeding	92043516
Party	Defendant Stich, Willi Lorenz Stich, Willi Lorenz 950 Jennings Street Bethlehem, PA 18017
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Date	08/08/2005
Attachments	specificnegativeavermnt.080705.pdf (12 pages)

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7
8 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
9 **TRADEMARK TRIAL AND APPEAL BOARD**
10

11 JZCHAK N. WAJCMAN dba BILL
12 LAWRENCE PRODUCTS and BILL
13 LAWRENCE GUITAR PICKUPS,

14 Petitioner,

15 vs.

16 WILLI LORENZ STICH a/k/a BILL
17 LAWRENCE,

18 Registrant/Respondent.
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23

) Cancellation No.: 92043516
) Serial Number: 76594437
) Registration Number: 2,303,676
)
)

) **In the matter of Registration No. 2,303,676**
) **Mark: BILL LAWRENCE**
) **Date Registered: December 28, 1999**
)

) **NOTICE OF MOTION AND MOTION TO**
) **MAKE A SPECIFIC NEGATIVE**
) **AVERMENT UNDER FRCP 9(A)**
) **REGARDING PETITIONER'S CAPACITY**
) **TO SUE; POINTS AND AUTHORITIES IN**
) **SUPPORT OF WILLI STICH aka BILL**
) **LAWRENCE'S FRCP 9(A) SPECIFIC**
) **NEGATIVE AVERMENT REGARDING**
) **PETITIONER'S CAPACITY TO SUE**
)

) **[IN SUPPORT OF MOTION FOR**
) **SUMMARY JUDGMENT]**
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**NOTICE OF MOTION AND MOTION TO MAKE A SPECIFIC NEGATIVE AVERMENT UNDER FRCP 9(A) REGARDING
PETITIONER'S CAPACITY TO SUE; POINTS AND AUTHORITIES IN SUPPORT OF WILLI STICH aka BILL LAWRENCE'S
FRCP 9(A) SPECIFIC NEGATIVE AVERMENT REGARDING PETITIONER'S CAPACITY TO SUE**

1 1. PLEASE TAKE NOTICE that Registrant/Respondent Bill Lawrence hereby raises under
2 Federal Rule of Civil Procedure 9(a) a specific negative averment as to the capacity of the
3 Petitioner to sue.

4 2. The Plaintiff/Petitioner is titled JZCHAK N. WAJCMAN d/b/a BILL LAWRENCE
5 PRODUCTS and BILL LAWRENCE GUITAR PICKUPS. The name and legal status of the
6 Plaintiff/Petitioner is unclear and ambiguous, i.e. whether suit is filed in the name of one dba or
7 two.

8 3. Counsel for the Plaintiff/Petitioner signed the NOTICE OF MOTION AND MOTION
9 FOR RULE 56(F) DISCOVERY: “Attorneys for Petitioner JZCHAK N. WAJCMAN d/b/a
10 BILL LAWRENCE PRODUCTS and BILL LAWRENCE PICKUPS.” This signature is for a
11 single “Petitioner”.

12 4. The Plaintiff appears to be a single entity, an individual JZCHAK N. WAJCMAN, doing
13 business as (dba) BILL LAWRENCE PRODUCTS and BILL LARENCE GUITAR PICKUPS.
14 But Registrant/Respondent has found no evidence of a valid dba under the name d/b/a BILL
15 LAWRENCE PRODUCTS and BILL LAWRENCE GUITAR PICKUPS, so the
16 Plaintiff/Petitioner is unable to verify from public records whether the Petitioner has any legal
17 capacity to sue or to file, serve and argue motions under a dba. In addition to the doubts about
18 the current validity of the alleged dbas, at least at the time the Petition for Cancellation was filed,
19 the Petitioner is suing based on events going back 20 years, yet has not demonstrated any valid
20 dbas for such a long period of time.

21 5. Registrant/Respondent Bill Lawrence should not be forced to provide information
22 through discovery to an unknown plaintiff or petitioner because he may suffer irreparable harm
23 through the disclosure of personal information and confidential business information and trade
24 secrets to an unknown or legal non-entity.

25
**NOTICE OF MOTION AND MOTION TO MAKE A SPECIFIC NEGATIVE AVERMENT UNDER FRCP 9(A) REGARDING
PETITIONER’S CAPACITY TO SUE; POINTS AND AUTHORITIES IN SUPPORT OF WILLI STICH aka BILL LAWRENCE’S
FRCP 9(A) SPECIFIC NEGATIVE AVERMENT REGARDING PETITIONER’S CAPACITY TO SUE**

1 6. This motion is based on the accompanying memorandum of points and authorities, the
2 declaration of Gregory Richardson, the pending Motion for Summary Judgment, as well as the
3 records of this case and the file herein.

4 Dated: August 6, 2005.

5
6 Respectfully submitted by:
7 Law Offices of Gregory Richardson

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) Cancellation No.: 92043516
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) **In the matter of Registration No. 2,303,676**
) **Mark: BILL LAWRENCE**
) **Date Registered: December 28, 1999**
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) **MOTION FOR SPECIFIC NEGATIVE**
) **AVERMENT UNDER FRCP 9(C); POINTS**
) **AND AUTHORITIES IN SUPPORT OF**
) **WILLI STICH aka BILL LAWRENCE'S**
) **MOTION FOR A SPECIFIC NEGATIVE**
) **AVERMENT**
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22 **MAKING A SPECIFIC NEGATIVE AVERMENT AS TO PETITIONER'S**
23 **CAPACITY TO SUE IS JUSTIFIED BECAUSE THERE IS NO PROOF**
24 **THAT THE INDIVIDUAL JZCHAK WAJCMAN HOLDS A VALID DBA**
25 **AND WITHOUT A VALID DBA THE WAJCMAN WOULD BE UNABLE**
TO SUE.

NOTICE OF MOTION AND MOTION TO MAKE A SPECIFIC NEGATIVE AVERMENT UNDER FRCP 9(A) REGARDING
PETITIONER'S CAPACITY TO SUE; POINTS AND AUTHORITIES IN SUPPORT OF WILLI STICH aka BILL LAWRENCE'S
FRCP 9(A) SPECIFIC NEGATIVE AVERMENT REGARDING PETITIONER'S CAPACITY TO SUE

1 1. Registrant/Respondent Bill Lawrence through his attorney hereby makes a specific
2 negative averment that Petitioner has no capacity to sue, i.e. that the individual JZCHAK N.
3 WAJCMAN has no legal capacity to sue under dba BILL LAWRENCE PRODUCTS and BILL
4 LAWRENCE GUITAR PICKUPS.

5 2. A dba does not create a separate legal entity apart from the owner. *Pinkerton's Inc. v.*
6 *Superior Court* (App. 4 Dist. 1996) 57 Cal. Rptr. 2d 356. However, the California system for
7 fictitious business names requires that a person doing business under a name different than their
8 surname must have a valid dba.

9 3. **California Business and Professions Code**, Section 17918 provides:

10 17918. No person transacting business under a fictitious
11 business name contrary to the provisions of this chapter, or his
12 assignee, may maintain any action upon or on account of any
13 contract made, or transaction had, in the fictitious business
14 name in any court of this state until the fictitious business
15 name statement has been executed, filed, and published as
16 required by this chapter. For the purposes of this section, the
17 failure to comply with subdivision (b) of Section 17917 does not
18 constitute transacting business contrary to the provisions of
19 this chapter.

20 4. JZCHAK N. WAJCMAN alleges that he did business as (dba) Bill Lawrence Products
21 and Bill Lawrence Guitar Pickups. Since "Wajcman" is not contained within any asserted dba,
22 and because "Lawrence" is not his real surname, WAJCMAN must have a valid dba in order to
23 do business in California. **California Business and Professions Code**, Section 17918.

24 5. In this case, it does appear the JZCHAK WAJCMAN did fill out a form for various dbas.
25 Nonetheless, filling out a form does not automatically result in obtaining a valid dba. There are
several other important tasks that must be accomplished, or else the dba does not come to life.
See Hand Rehabilitation Center v. W.C.A.B. (app. 4 Dist. 1995) 40 Cal. Rptr. 2d 734 (no person
transacting business under fictitious business name may maintain any action upon any account or
contract made in the fictitious business name in any court of state until fictitious business name

1 statement has been executed, filed, and published); **Business and Professions Code**, Section
2 17918.

3 6. Respondent/Registrant has spent considerable time preparing to meet the discovery
4 demands of the Plaintiff/Petitioner, believing them to be legitimate. However, based on a
5 diligent search of the records at the Assessor/Recorder's Office of San Diego County, California,
6 no legally valid dba, i.e. as opposed to a mere filing for a name, exists for JZCHAK
7 WAJCMAN. Without a valid dba, Petitioner cannot maintain an action in either California
8 courts or at the TTAB. *See Creditors' Adjustment co. v. Rossi* (App. 1915) 26 Cal. App. 725
9 (word "maintain within statute means to commence, institute, begin or bring).

10 7. If the Petitioner is suing under an invalid dba, then the Petition for Cancellation must be
11 denied because the Petitioner has no legal capacity to bring any action. Moreover, it cannot be
12 reasonably required of Respondent/Registrant Bill Lawrence to frame an answer to the discovery
13 requests of the Petitioner or respond to his motions to compel. The Respondent/Registrant Bill
14 Lawrence should not be forced to turn over documents and business information to a strange
15 legal non-entity until the Petitioner avers correct capacity. And this Petition for Cancellation
16 must be dismissed.

17 8. This specific negative averment of Petitioner's capacity to sue could have been raised in
18 a motion to dismiss. *See Coburn v. Coleman* (1947, DC SC) 75 F. Supp. 107. However, since
19 this motion is supported by matters outside the pleadings, i.e. to include the official records for
20 fictitious business names of the San Diego County Recorder's Office, it should be treated as a
21 motion for summary judgment under FRCP 56, and joined with the pending Motion for
22 Summary Judgment, which attempts to deal with this threshold issue of the legal capacity of the
23 Petitioner. *See Pasos v. Eastern S. S. Co.* 9 F.R.D. 279 (although the specific negative averment
24 might properly be made in the answer, where the answer has been filed and then a new fact is
25 discovered requiring the specific negative averment, it would be an unnecessary refinement to

1 require an amended answer be filed containing the averment when the same issue was raised by
2 motion for summary judgment and affidavits).

3 9. The Petitioner may sue as an individual without using a dba. *See Dennis v. Overholtzer*
4 (1960) 178 Cal. App. 2d 766. But he has not chosen to do so. Rather, the Petitioner has sued
5 under one or two dbas with doubtful provenance. Even if the Petitioner were to obtain a valid
6 dba now, this new dba would not relate back to any of the events alleged in the Petition for
7 Cancellation, i.e. the dba would not have an retroactive purpose back to the early 1980s.

8 10. An invalid or illegal dba of the Petitioner cannot support the jurisdiction of the TTAB
9 because the Petitioner is unable to maintain any action in California courts without a valid dba.
10 *See Creditors' Adjustment co. v. Rossi* (App. 1915) 26 Cal. App. 725 (word "maintain within
11 statute means to commence, institute, begin or bring); *Hand Rehabilitation Center v. W.C.A.B.*
12 (App. 4 Dist. 1995) 50 Cal. Rptr. 2d 734 (Workers' Compensation Appeals Board is a "court"
13 for purposes of statute providing that no person transacting business under a fictitious business
14 name may maintain any action upon or on account of any contract made, or transaction had, in
15 fictitious business name in any court until fictitious business name statement has been executed,
16 filed, and published); *Clemente Engineering Co. v. Deliso Const. Co.* (1944, DC Conn.) 53 F.
17 Supp. 434 (nonexistence of a named corporate party plaintiffs was said to be jurisdictional and
18 subject to noticed motion at any time).

19 11. The Petitioner lacks standing without a valid dba because a legal non-entity cannot suffer
20 harm, as alleged in the Petitioner for Cancellation. The purpose of filing a dba is to allow people
21 to do business under fictitious business names. California law requires that people doing
22 business under a name different than their own surname to file a fictitious business name in the
23 county where they conduct business.¹ If the Petitioner has no dba filed for some year, then it is
24

25 ¹ California **Business and Professions Code**, Section 17910 provides:
17910. Every person who regularly transacts business in this state

1 reasonable to infer that he was not doing business under that name during the period for which
2 there was no dba registration, and hence would not suffer harm from the continued registration of
3 Bill Lawrence's Mark BILL LAWRENCE. See Motion for Summary Judgment, para. 24.

4 12. Without a valid dba, the Petitioner could not have continuously used the mark BILL
5 LAWRENCE as alleged in his Petition for Cancellation. Since the Petitioner has failed to set
6 forth any facts to rebut the presumption that he abandoned the mark BILL LAWRENCE for
7 thirteen (13) years from 1985 until 1998, or for fifteen years (15) from 1985 until 2000, the
8 Registrant is entitled to judgment as a matter of law that the Petitioner has not "continuously
9 used the mark BILL LAWRENCE ". Hence, this Petition for Cancellation must be dismissed
10 and summary judgment granted. See Motion for Summary Judgment, para. 26 *et seq.*

11 13. The doubtful status of Petitioner's dbas raises the presumption that he abandoned the
12 Mark BILL LAWRENCE (assuming only *arguendo* that he ever acquired the Mark legally).
13 Even assuming that the Petitioner acquired the Mark BILL LAWRENCE in 1985, there is at
14 least a thirteen-fifteen (13-15) year gap during which duration the Petitioner has failed to allege
15 any facts that he used the Mark BILL LAWRENCE in the "United States since [allegedly]
16 acquiring it". From this unexplained gap, a reasonable inference can be made that the Petitioner
17 abandoned the Mark BILL LAWRENCE without any intention of reviving it. A presumption of
18 abandonment is established and the Registrant has made a *prima facie case* for abandonment.²
19 See Motion for Summary Judgment, para. 34.

21
22 for profit under a fictitious business name shall:

23 (a) File a fictitious business name statement in accordance with
24 this chapter not later than 40 days from the time he commences to
25 transact such business; and

(b) File a new statement in accordance with this chapter on or
before the date of expiration of the statement on file.

² 15 USC Section 1127(1) provides:

A mark shall be deemed to be "abandoned" if either of the following
occurs:

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1 14. No additional discovery is required by the Petitioner to respond this to specific negative
2 averment or any other motion, including the motion for summary judgment, because the
3 Respondent/Registrant has no documents regarding the legal capacity of the Petitioner or his
4 dbas. The legal capacity of the Petitioner can be determined solely through public documents, of
5 which the TTAB may take judicial notice as appropriate.

6 15. During the long and expensive process of preparing documents to comply with discovery
7 requests of Petitioner, the Respondent/Registrant Bill Lawrence assumed from the face of the
8 pleadings that the Petitioner was suing not in his individual capacity but rather as a dba. As
9 discovery responses were prepared, Bill Lawrence was unable to verify the existence of any
10 valid dba for JZCHAK N. WAJCMAN for the periods relevant to the Petitioner for Cancellation,
11 i.e. from approximately 1982 through the time of filing. Due to the difficulty in determining the
12 validity of dbas, especially when a mere application is misused to demonstrate the validity of a
13 nonexistent dba, this specific negative averment of the capacity of dba BILL LAWRENCE
14 PRODUCTS and BILL LAWRENCE GUITAR PICKUPS could not be brought soon or in the
15 answer.

16
17 **CONCLUSION**

18 16. Filling out an application at the county recorder's office does not create a dba. There are
19 other specific steps that WAJCMAN must have taken, and must now prove that he took, if he
20 wants to sue under a dba, including filing, executing, and publishing. The laws of the State of
21

22
23 (1) When its use has been discontinued with intent not to resume such
24 use. Intent not to resume may be inferred from circumstances. Nonuse for
25 3 consecutive years shall be prima facie evidence of abandonment. "Use"
of a mark means the bona fide use of such mark made in the ordinary
course of trade, and not made merely to reserve a right in a mark.

1 California govern whether dba Bill Lawrence Products and Bill Lawrence Guitar Pickups has
2 any capacity to sue.

3 17. Under California law, someone doing business under a fictitious business name that is
4 not properly registered cannot maintain an action in court. *See Folden v. Lobrovich* (App. 1957),
5 153 Cal. App. 2d 32. Accordingly, WAJCMAN lacks capacity to sue under dba Bill Lawrence
6 Products and Bill Lawrence Guitar Pickups.

7 18. Registrant/Respondent Bill Lawrence should not be forced to provide information
8 through discovery to an unknown plaintiff or petitioner because he may suffer irreparable harm
9 through the disclosure of personal information and confidential business information and trade
10 secrets to an unknown or legal non-entity or to unrelated third parties. In fact, allowing this
11 Petition for Cancellation to Proceed defeats the purpose of California's fictitious business name
12 statutes, i.e. allowing the public to know and locate people operating under a fictitious business
13 name.

14
15 Respectfully submitted by:
16 Law Offices of Gregory Richardson

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21 (951) 680-9388
22 Attorney for Bill Lawrence
23
24
25

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that a copy of:

3 **NOTICE OF MOTION AND MOTION TO MAKE A SPECIFIC NEGATIVE**
4 **AVERMENT UNDER FRCP 9(A) REGARDING PETITIONER’S CAPACITY TO SUE;**
5 **POINTS AND AUTHORITIES IN SUPPORT OF WILLI STICH aka BILL**
6 **LAWRENCE’S FRCP 9(A) SPECIFIC NEGATIVE AVERMENT REGARDING**
7 **PETITIONER’S CAPACITY TO SUE**

8 on the following attorney of record for Petitioner, by depositing same with
9 the United States Postal Service on August 8, 2005, addressed as follows:

10 Jay S. Kopelowitz
11 Kopelowitz & Associates
12 12702 Via Cortina, Suite 700
13 Del Mar, California 92014

14 _____
15 Gregory Richardson
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NOTICE OF MOTION AND MOTION TO MAKE A SPECIFIC NEGATIVE AVERMENT UNDER FRCP 9(A) REGARDING
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