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

Proceeding	92053298
Party	Plaintiff Tyler Perry Studios, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Registration No. 3,748,123
Mark: WHAT WOULD JESUS DO
Registration date: February 16, 2010

Tyler Perry Studios, LLC	:	
	:	
Petitioner,	:	
	:	
v.	:	Cancellation No. 92053298
	:	
Kimberly Kearney	:	
	:	
Respondent.	:	

PETITIONER'S REPLY BRIEF

Introduction.

The Respondent has filed a responsive trial brief that is a complete fabrication and misstatement of the facts of the instant proceedings. Petitioner has demonstrated non-use of the subject mark by Respondent in connection with the subject services in the subject registration, and fraud in obtaining the registration. Thus, this Cancellation Proceeding should be sustained and the subject registration canceled.

Effect of the Respondent's Admissions and the Record in these Proceedings.

In proceedings before the Trademark Trial and Appeal Board, the rules of evidence are the Federal Rules of Evidence, the relevant provisions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and certain provisions of title 37 of the Code of Federal Regulations. 37 CFR 2.122. "For cases commenced on or after November 1, 2007, ... requests for admission may be served on an adversary after service of or contemporaneously with initial disclosures, through the last day of the discovery period." TBMP Section 407.01. Petitioner timely served its Initial Disclosures and Requests for Admission before the conclusion of the discovery period.

TBMP Section 407.03 provides that "[r]esponses to requests for admission must be served within 30 days after the date of service of the requests", with five days' additional cushion to account for transit time when service is via mail. *See also* 37 CFR Section 2.120(a)(3). Significantly, Section 407.03(a) also states that "[u]nder Fed. R. Civ. P. 36, a requested admission is deemed admitted unless a written answer or objection is provided to the requesting party within thirty days after service of the

request, or within such time as the parties agree to in writing." Any matter admitted under Fed. R. Civ. P. 36(a), either expressly or for failure to timely respond, is conclusively established. TBMP Section 407.04; Fed. R. Civ. P. 36(a)(3).

Respondent failed to respond to the Requests for Admissions, and proffered no evidence whatsoever during the discovery and Testimonial periods. Thus, the evidence of record in these proceedings comprises the registration file history and the Admissions of the Respondent, and nothing more. When a respondent fails timely to respond to requests for admission, the requests are deemed admitted. In *Fram Trak Industries v. Wiretracks LLC*, for example, the respondent failed to respond to the petitioner's requests for admissions, and thus was deemed to have admitted the date of its first sale under the contested mark. 77 USPQ2d 2000, 2005 (TTAB 2006). As a result, the petitioner established its prior use and priority was determined on summary judgment. *Id.* Contrary to Respondent's numerous misleading statements in her Trial Brief, the facts described in Petitioner's Brief are not mere "contentions". Rather, they are the factual admissions of Respondent herself and have been properly entered in the evidentiary record of these proceedings. For this reason, Respondent's arguments in support of her registration must fail as matters of fact and law. *See Texas Dept. of Transportation v. Tucker*, 95 USPQ2d 1241, 1244 (TTAB 2010)(admission conclusively establishes matter that is the subject of request for admission, subsequent argument to the contrary in response brief is insufficient to raise a genuine issue of material fact); Fed. R. Civ. P. 36(b).

Application of the Law to the Evidence Leads to Cancellation.

When considered in light of the evidence, Respondent's recitation of the law regarding abandonment and fraud in the procurement has only one logical conclusion: Respondent's registration should be canceled.

If the mark was ever used in commerce, which Petitioner does not concede and the record does not support, it has surely long been abandoned. Respondent admitted that she "has not produced a television program in connection with the WHAT WOULD JESUS DO mark." Admissions at 22, 27. She has not sold, distributed, nor had exhibited such a program. Admissions at 14-18. She admits she has no rights in the subject mark based on use in commerce. Admissions at 19. Significantly, the specimen of use filed in support of the '123 Reg. "was created for the sole purpose of securing the ... registration", or in other words, the purported use of the mark was merely to reserve a right in the mark. Admissions, 31. Respondent even concedes in her Brief that the specimen supporting the registration was insufficient to meet the requirements of use in commerce.

Likewise, the scope of Respondent's bad faith and fraudulent procurement of the subject registration is exposed in her Admissions. There is no issue of "honest misunderstanding or inadvertence" here. Respondent admitted she has never used the mark in commerce, nor did she intend to at the time of filing the application. Admissions, 19, 28. She never used the mark in connection with the subject services. Admissions, 22. She created a web page to advertise auditions for a proposed show under the mark but the contact information identified in the web page are nonfunctional,

have never been functional, and resolve to an email address she does not own nor have access to, at a domain name owned by an unaffiliated third-party. Admissions, 29, 30, 37-39.

Finally, even in her Trial Brief, Respondent admits that the Registration was improperly granted and should be cancelled: In her Summary, Respondent requests that the Board amend her registration "to an 'Intent to Use' application". This statement should be considered a concession of Petitioner's case against the continuing subsistence of the registration, especially in the light of the other evidence of record.

Respondent's Self-Serving Statements Should be Discounted or Discarded.

The Respondent's Trial Brief is rife with unsupported statements. The following table identifies and corrects for the record several of Respondent's key misstatements:

Respondent's Misstatements	**Contradictory Evidence**
Registration of the subject mark was made in good faith; Respondent first used the subject mark in November 2007.	Respondent did not intend to produce a television program in connection with the subject mark at the time of filing the application that became the '123 Reg. (Requests for Admissions Deemed Admitted (Notice of Reliance Filed January 7, 2012) (hereinafter, "Admissions") at 28, 33), and she obtained the registration on a Section 1(a) basis without having used the subject mark in connection with the subject services. Admissions at14-22, 40. Respondent has not produced a television program in connection with the subject mark to date. Admissions at 27.

"Respondent shared her television program and title with Petitioner."	Respondent has taken no meetings with Petitioner or anyone else in connection with the production of a television program in connection with the subject mark. Admissions at 42, 43. There is no evidence in the record to support Respondent's self-serving statements concerning any contact with or solicitation of the Petitioner.
"Petitioner *alleges* that Respondent never used this mark and fraudulently obtained it... [and that] Respondent abandoned this mark."	As shown above, these are not mere allegations; the statements have all been admitted.
Respondent "is currently working in production."	Allegations not supported by the record.
Respondent "initiated production of WHAT WOULD JESUS DO by preparing marketing packages...."	Respondent did not intend to produce a television program in connection with the subject mark as of the filing date. Admissions 28. She had not used the WHAT WOULD JESUS DO mark in connection with a television program at the time of filing the instant application, as of November 21, 2007 (the alleged first-use date), nor has she acquired any rights in the mark based on use in commerce to date, and she has not made use of the mark in connection with the subject services aside from creating the nonfunctional web page identified as a specimen of purported use in the file history. Admissions at 19, 20, 22, 27, 33, 34, 40.
Petitioner "has failed to prove... that Respondent, with purpose, attempted to engage in deception when requesting [sic] [the subject] mark."	Respondent admits she had no intention of offering the subject services in connection with the subject mark in January 2008, when the application was filed. Admissions, 28. Moreover, to date, she has not offered said services. Admissions, 27.

"Petitioner has provided no evidence... to support a nexus between 'info@coolexample.com' and the contact email on the website provided within the specimen."	Respondent admits that the "contact email addresses on the 'whatwouldjesusdo.tv' web site [comprising the specimen of use in the file history] are nonfunctional and resolve to 'info@coolexample.com'." Admissions, 29. The contact email addresses have never been functional - even at the time of filing the specimen of use. Admissions, 30. Moreover, this demonstrates the Respondent's intent to deceive, particularly in the context of Respondent's admission that her "whatwouldjesusdo.tv" web page that comprises the specimen of use in the '123 Reg. "was created for the sole purpose of securing the instant registration." Admissions, 31.
"The mark WHAT WOULD JESUS DO is being used as the title for a reality-based television show."	Respondent admits she "has not produced a television program in connection with the" subject mark. Admissions, 27.
"Respondent was not only holding auditions but soliciting investors."	Respondent "has taken no meetings in connection with the production of a television program in connection with the WHAT WOULD JESUS DO mark" at any time. Admissions, 42-43.
"The primary function of the website was to solicit participants and investors for the show - not to provide a specimen to the Trademark Office...."	"Respondent's 'whatwouldjesusdo.tv' web page that was used as a specimen of use in the instant application was created for the sole purpose of securing the instant registration." Admissions, 31.
"Respondent made bona fide use of the mark in a way that is customary in the entertainment industry."	This noxious attempt to impugn the business practices of an entire industry is obviated by Respondent's admission that she has never used the mark in commerce in connection with the subject services. Admissions, 14-19, 27, 42.
Evidence is insufficient to show abandonment with intent to discontinue use.	Respondent admitted non-use of the mark in commerce, and that the nonfunctional website specimen of use filed in support of the registration was created for the sole purpose of securing the registration -- and it has not been updated or made functional since 2007. Admissions, 31, 40.

"Respondent has offered that her activities... constitute use and demonstrate her intent to continue use in the entertainment profession."	As shown above, Respondent's allegations are contradicted by the record.
Respondent's "intention of resuming ... preproduction efforts" is "evidenced by [her] vigorous defense of her mark."	After failing to meet nearly every deadline in the instant proceedings and obtaining numerous extensions of time as a result, Respondent nonetheless submitted no evidence in support of her registration and use of the mark. Her conduct has been far from "vigorous".

Conclusion.

Petitioner respectfully requests that judgment be entered in its favor on all of the claims asserted in this Cancellation Proceeding, namely that Registrant has never used or has discontinued use of the subject mark, Registrant's Declaration of Use filed in the registration is fraudulent and the registration is thus void *ab initio*, and Registrant has never provided any record of any production or broadcast of the services specified in the registration. The undisputed facts clearly indicate that cancellation of the '123 Registration is warranted.

Date: April 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April 2014 a true and correct copy of the foregoing **Petitioner's Reply Brief** was served on Kelly J. Adams, counsel to Respondent Kimberly Kearney, at Alpha Omega Law Firm, LLC, 1382 Naamans Creek Road, Garnet Valley, Pennsylvania, 19060, via first class mail.

Victor Sapphire