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

Proceeding	92053542
Party	Defendant Fegley Enterprises, Inc.
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Date	09/13/2011
Attachments	PDF of Amended Answer and Counterclaims as filed.pdf ( 6 pages )(31876 bytes )

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

In the matter of U.S. Registration No. 3,047,757  
For the mark RUDE ELF'S RESERVE and Design  
Registered on January 24, 2006

TROEGS BREWING COMPANY,

Petitioner/Counterdefendant,

vs.

FEGLEY ENTERPRISES, INC.,

Registrant/Counterclaimant.

Cancellation No. 92053542

**AMENDED ANSWER TO PETITION TO CANCEL  
AND COUNTERCLAIMS**

Registrant FEGLEY ENTERPRISES, INC. ("Fegley") for its Answer to the  
Petition to Cancel filed in this proceeding, by its attorneys, alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth  
of the allegations of paragraph 1 of the Petition to Cancel.

2. In response to paragraph 2 of the Petition to Cancel, denies that U.S. Reg.  
No. 3,047,757 is for "RUDE ELF" alone without reference to other subject matter in the  
registration and admits that its corporate name and address are as alleged in the Petition  
to Cancel.

3. In response to paragraph 3 of the Petition to Cancel, refers to the records  
of the U.S. Patent and Trademark Office ("USPTO") for the particulars of the filings  
referred to in paragraph 3 of the Petition to Cancel.

4. In response to paragraph 4 of the Petition to Cancel, refers to the records of the USPTO for the particulars of the USPTO filings and actions referred to in paragraph 4 of the Petition to Cancel.

5. In response to paragraph 5 of the Petition to Cancel, refers to the records of the USPTO for particulars of its registration and denies that such registration is for the “RUDE ELF mark” without reference to additional subject matter.

6. Denies the allegations of paragraph 6 of the Petition to Cancel.

7. Denies the allegations of paragraph 7 of the Petition to Cancel.

8. Denies the allegations of paragraph 8 of the Petition to Cancel.

9. In response to paragraph 9 of the Petition to Cancel, refers to the records of the USPTO for particulars as to Registration Nos. 2,887,242 and 3,035,721 and denies that they are the “MAD ELF Registrations” insofar as such a label does not adequately communicate other subject matter covered by the registrations.

10. Denies the allegations of paragraph 10 of the Notice of Opposition insofar as the relevant consuming public does not refer to the registrations as the “MAD ELF Mark” without reference to additional subject matter in the registrations.

11. In response to paragraph 11 of the Petition to Cancel, refers to the refers to the records of the U.S. Patent and Trademark Office for particulars as to Registration Nos. 2,887,242 and 3,035,721 and denies that they are “the MAD ELF Registrations”

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12 of the Petition to Cancel.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13 of the Petition to Cancel.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14 of the Petition to Cancel.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of the Petition to Cancel.

16. Denies the allegations of paragraph 16 of the Petition to Cancel.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 of the Petition to Cancel.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18 of the Petition to Cancel.

19. In response to the allegations of Paragraph 19 of the Petition to Cancel, repeats and re-alleges its responses to the allegations of paragraphs 1 through 18 of the Petition to Cancel.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20 of the Petition to Cancel.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21 of the Petition to Cancel.

22. Denies the allegations of paragraph 22 of the Petition to Cancel.

## **AFFIRMATIVE DEFENSES**

### **FIRST AFFIRMATIVE DEFENSE**

The Petition to Cancel fails to state a claim upon which relief may be granted.

### **SECOND AFFIRMATIVE DEFENSE**

The claim set forth in the Petition to Cancel is barred in whole or in part by the doctrine of laches.

### **THIRD AFFIRMATIVE DEFENSE**

The claim set forth in the Petition to Cancel is barred in whole or in part by the doctrines of waiver, acquiescence, estoppel and unclean hands.

WHEREFORE, Registrant requests that Petitioner's Petition to Cancel be dismissed.

### **COUNTERCLAIMS**

Counterclaimant, Fegley Enterprises Inc. ("Fegley"), a corporation duly organized under the laws of the State of Pennsylvania with an address of 569 Main Street, Bethlehem, Pennsylvania 18018, believes it will be damaged by the continued registration of U.S. Trademark Registration No. 2,887,242 by Counterdefendant Troegs Brewing Company ("Counterdefendant") and, by and through its undersigned counsel, hereby petitions to cancel this registration for the reasons stated in the First and Second Counterclaim below.

#### **FIRST COUNTERCLAIM**

On information and belief, Counterdefendant has discontinued use of the mark shown in U.S. Reg. No. 2887242 for "beer, ale and lager" with no intent to resume use, thus abandoning the mark. Accordingly, the registration should be canceled.

#### **SECOND COUNTERCLAIM**

On information and belief, Counterdefendant committed a fraud on the USPTO by filing a false Combined Declaration of Use & Incontestability Under Sections 8 & 15 ("Declaration of Use") on October 26, 2010. In that declaration, Petitioner stated that the "mark has been continuously used in commerce for five (5) consecutive years after the date of registration" and "is still in use" in connection with beer, ale and lager. On

information and belief, the Declaration of Use was knowingly false because Counterdefendant stated that the mark was “still in use in commerce” when Counterdefendant knew that any use made by it was a sham or token use; and stated that the mark had been continuously used in commerce for five consecutive years after the date of registration when Counterdefendant knew the mark had not been so used. Counterdefendant therefore made these representations with the intention of deceiving the Trademark Office in order to procure the continued maintenance of the registration. If the USPTO was aware that the statements in the Declaration of Use were false, it would not have permitted the registration to remain in force. As a result of the fraud perpetrated on the USPTO, Counterdefendant’s mark is being fraudulently maintained on the Principal Register to the detriment of Fegley. Accordingly, the registration should be invalidated.

WHEREFORE, in accordance with Section 14 of the Trademark Act, Fegley prays that these Counterclaims be sustained and that U.S. Registration No. 2,887,242 be cancelled.

Dated: September 13, 2011  
New York, New York

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2011 a copy of the foregoing Amended Answer to Petition to Cancel and Counterclaims is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the attorneys for Petitioner as follows:

Harvey Freedenberg  
Brian P. Gregg  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, PA 17108



Jeanne Hamburg