

ESTTA Tracking number: **ESTTA570521**

Filing date: **11/12/2013**

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

Proceeding	92054629
Party	Defendant Wohali Outdoors, LLC
Correspondence Address	S MAX HARRIS DOYLE HARRIS DAVIS HAUGHEY 1350 SOUTH BOULDER, SUITE 700 TULSA, OK 74119 UNITED STATES max.harris@1926blaw.com
Submission	Motion to Strike
Filer's Name	S. Max Harris
Filer's e-mail	max.harris@1926bLaw.com
Signature	/S. Max Harris/
Date	11/12/2013
Attachments	11-12-13 - Wohali's Mot to Strike Wings' Not Reliance - Final & Submitted.pdf(27429 bytes)

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

In re Registration No. 3,904,929)	
)	
SHELTERED WINGS, INC.)	Cancellation No. 92054629
)	
Petitioner/Plaintiff,)	
)	
v.)	
)	
WOHALI OUTDOORS, LLC)	
)	
Respondent/Defendant.)	
)	

**RESPONDENT’S MOTION TO STRIKE PETITIONER’S
NOTICE OF RELIANCE AND ALLEGED EXHIBITS AND BRIEF IN SUPPORT**

Pursuant to TBMP §§ 532 and 707.02, Respondent/Defendant, Wohali Outdoors, LLC (“Wohali”), moves to strike and objects to Sheltered Wings, Inc.’s (“Wings”) Notice of Reliance (filed September 27, 2013) concerning Wings’ alleged Trial Exhibits 17, 18 and 25-29; and moves to strike these specific alleged Trial Exhibits filed by Wings.

1. Wings’ trial period ended September 30, 2013. Wings’ Notice of Reliance was not filed until Friday, September 27, 2013.

2. Wohali moves to strike Wings’ alleged Trial Exhibits 17 and 18 on the grounds they are not appropriate for introduction by notice of reliance under TBMP §§ 532, 707.02(b)(2) or 37 CFR § 2.122. Procedurally, the Declaration of Brett L. Foster¹ (Wings’ Exhibit 17) is not admissible by notice of reliance. There is no authority permitting the introduction of a prior declaration. Additionally, Wings failed to establish any relevance for the Declaration. A notice

¹*Sheltered Wings, Inc. v. Wohali Outdoors, LLC*, No. 11-cv-300, filed in the United States District Court for the Western District of Wisconsin.

of reliance must include a description of the proffered materials and must state the relevance of those materials to the case. TMBP §704.02; 37 CFR §2.122(e).

Wings' Exhibit 18 (Order Granting Motion to Dismiss) should be stricken for the same reasons. "Statements in pleadings cannot be considered as evidence on behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony." TBMP 704.06(a). Procedurally, the introduction of an Order from a U.S. District Court is not permitted under TBMP §§ 704.02 – 704.12. The type of materials that may be introduced by a notice of reliance is limited. TMBP §704.02, 37 CFR §2.122(e). Exhibit 18 may not be introduced by a notice of reliance. Moreover, Wings has failed to identify a specific reason for why Exhibit 18 may be relevant.

3. Wings' alleged Trial Exhibits 25-29 are alleged copies of pages from various Internet sites. A notice of reliance for internet materials must be accompanied by more than a broad statement declaring the information relevant to the proceedings.

"[F]or Internet documents it is **not** sufficient for the propounding party to broadly state that the materials are being submitted to support the ground at issue. For example, if the claim is likelihood of confusion, the propounding party should associate the materials with a relevant likelihood of confusion factor."

TMBP §704.08(b).

Wings failed to specifically describe the relevance of the offered Internet materials. The probative value of Internet materials is limited. Internet materials may be used to demonstrate what the documents show on their face, but may not be used to demonstrate the truth of what has been printed. TMBP §704.08(b). Wings' attempt to use Internet materials to purportedly show a Nikon product has been discontinued is improper. Wings' alleged Trial Exhibits 25-29 should

be stricken. Moreover, Exhibit 25 does not contain the source (URL); and Exhibit 26 fails to identify the complete source (URL). TBMP § 704.08(b) requires the source (URL):

“A document obtained from the Internet must be publicly available; that is, it must identify its date of publication or the date it was accessed and printed, and its source (URL).”

TBMP 704.08(b).

For the reasons stated herein, Wohali moves the Board to strike Wings’ Notice of Reliance concerning Wings’ alleged Trial Exhibits 17, 18, and 25-29. Wohali further moves to strike Wings’ alleged Trial Exhibits 17, 18 and 25-29. Wohali reserves its right to assert additional objections.

Respectfully Submitted,

DOYLE HARRIS DAVIS & HAUGHEY

/s/ S. Max Harris

Steven M. Harris, OBA #3913

S. Max Harris, OBA #22166

Doyle Harris Davis & Haughey

1350 South Boulder, Suite 700

Tulsa, OK 74119

(918) 592-1276

(918) 592-4389 (fax)

Attorneys for Wohali

CERTIFICATE OF SERVICE

I do hereby certify that on the 12th day of November, 2013, I caused a true and correct copy of the above and foregoing instrument to be sent to the following parties in the manner indicated below:

James D. Peterson Jennifer L. Gregor GODFREY & KAHN, S.C. One East Main Street, Suite 500 Madison, Wisconsin 53701-2719	<u>Email & U.S. Mail</u>
---	------------------------------

Pat Guest	<u>Email only</u>
-----------	-------------------

JT Griffin	<u>Email only</u>
------------	-------------------

JT Brocksmith	<u>Email only</u>
---------------	-------------------

/s/ S. Max Harris

1637-5:mh