

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

BUO

Mailed: July 18, 2013

Opposition No. 92056510

Republic of Texas Biker
Rally, Inc.

v.

Peter Ogudo

Benjamin U. Okeke, Interlocutory Attorney:

Now before the Board is petitioner's motion, filed January 23, 2013, to strike respondent's answer to the petition for cancellation and to enter default judgment against respondent. Alternatively, petitioner requests that the Board enter judgment on the pleadings in favor of petitioner and cancel respondent's registration No. 4164790. Respondent contests this motion, denying "any fallacy of non compliance of forms," and asserting that "Registrant/Respondent raised various material issues in answer [sic] relating to differentiation of parties [sic]

trademarks and/or trade names.¹ The motion is fully briefed.²

Motion to Strike

The petition for cancellation alleges two grounds for cancellation of respondent's registration: likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. 1052(d); and dilution under Trademark Act Section 43(c), 15 U.S.C. 1125(c). To the extent that petitioner has alleged that respondent's "LOOPHOLE mark" so resembles petitioner's previously used and registered "ROT marks" so as to cause confusion as to the source of the related goods with which the marks are used, petitioner has sufficiently pleaded its likelihood of confusion claim. See Petition for Cancellation, ¶¶ 9, 15, 18, 19 and 20.

In addition to pleading that respondent's mark is similar to its pleaded marks; petitioner also alleges that

¹ The Board notes that respondent's response to petitioner's motion did not contain proof of service as required by Trademark Rule 2.119. However, because petitioner filed a reply brief thereto, the Board will consider the motion on its merits. Nonetheless, respondent is cautioned that the Board may not consider any future submissions that do not include this proof of service.

² Surreplies and any other filings, no matter how titled, will not be considered; therefore, respondent's submissions of March 8, 2013, and April 23, 2013, and petitioner's March 25, 2013 submission will be given no consideration. See TBMP § 502.02(b) (3d ed. rev. 2012); *Pioneer Kabushiki Kaisha v. Hitachi High Techs.*, 73 USPQ2d 1672, 1677 (TTAB 2005) (because 37 CFR § 2.127(a) prohibits the filing of surreply briefs, opposer's surreply to applicant's motion was not considered).

Cancellation No. 92056510

its distinctive marks would be blurred or tarnished by use of applicant's similar mark, that its marks are famous, and that its marks became famous prior to the earliest date of use that can be claimed by respondent. *See Id.* at ¶¶ 32 and 33. *See also* 15 U.S.C. 1125(c); *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 USPQ2d 1540 (TTAB 2001). Therefore, petitioner's claim of dilution has been properly pleaded.

"An answer [to a petition for cancellation] shall state in short and plain terms the respondent's defenses to each claim asserted and shall admit or deny the averments upon which the petitioner relies." Trademark Rule 2.114(b)(1) (emphasis added). "If the complaint consists of numbered paragraphs setting forth the basis of plaintiff's claim of damage, the defendant's admissions or denials should be made in numbered paragraphs *corresponding* to the numbered paragraphs in the complaint." TBMP § 311.02(a) (emphasis added). Respondent must respond to every claim (or paragraph) in the petition for cancellation; admitting, denying or stating that it is without sufficient knowledge or information to form a belief as to the allegations.

Respondent's answer does not respond to each claim in the petition, nor do the paragraphs in the answer correspond to the allegations set forth in the petition for

Cancellation No. 92056510

cancellation. For example, in response to paragraph ten of the petition, which lists petitioner's pending trademark applications, instead of admitting, denying, or stating that it did not have sufficient knowledge to form a belief, paragraph ten of respondent's answer states, "Respondent/Registrant's mark, named Adam Loophole Presents ROT Apparel, therefore has no relationship to petitioner's ROT marks." Answer, ¶ 10. This statement is wholly nonresponsive to the allegation set forth in paragraph ten of the petition. As petitioner points out, the petition for cancellation consists of thirty-three numbered paragraphs, while the answer contains only twenty-six, none of which correspond to the paragraphs in the petition.

Further, respondent's answer should not argue the merits of the allegations in a complaint, but should simply state whether each allegation is admitted or denied, or whether respondent lacks sufficient information or knowledge to form a belief as to an allegation. Therefore, the narrative arguments contained in respondent's answer are inappropriate.

For instance, paragraph eight of the answer states:

Petitioner's 'mightily dangling use of ROT registration [sic] and ROT application or 'ROT marks' confuses the issues at state. Petitioner continues to erroneously assume that third parties usage of anything ROT related is an infringement of

Cancellation No. 92056510

petitioner's trademark. Such wrong assumption is at best preposterous; and at worst arbitrary and also has no legal basis and foundation in the general stream of commerce. It only portrays tyranny, dictatorship and colonizing of words in the dictionary and Basic English usage. It is also counter to [a] free enterprise system.

Answer, ¶ 8. Both parties will have ample opportunity to prove the merits of their respective claims and defenses, through discovery, disclosure and submission of other evidence and briefs in support of their respective positions at the appropriate time.

Respondent's answer fails to provide fair notice of its claimed defenses. See TBMP § 506.01 (purpose of pleadings is to provide fair notice of the claims and defenses asserted), and does not conform to the Trademark Rules of Practice. See Trademark Rule 2.126; TBMP § 311.01. Accordingly, petitioner's motion to strike respondent's answer is **GRANTED**. Respondent's answer is **STRICKEN**. In effect, no answer has been filed in this proceeding.³ Accordingly, a notice of default is entered against respondent under Fed. R. Civ. P. 55(a).

Respondent is allowed until **THIRTY DAYS** from the mailing date of this order to show good cause why judgment by default should not be entered against respondent in

³ Inasmuch as no answer has been filed, petitioner's alternative motion for judgment on the pleadings is moot and has been given no consideration.

Cancellation No. 92056510

accordance with Fed. R. Civ. P. 55(b) and to file and serve a sufficient answer. The answer must comply with the Trademark Rules of Practice, as more fully explained below, and address each allegation set forth in the petition for cancellation, and only those allegations, and may assert any appropriate affirmative defenses, if any, supported by sufficient factual matter; failing which, the cancellation will be dismissed with prejudice. See Fed. R. Civ. P. 15(a); TBMP § 507

Respondent is also encouraged to: (1) review the petition for cancellation; (2) review the Trademark Act as it relates to claims of likelihood of confusion and dilution; and (3) review TBMP § 311.02 et seq. regarding the appropriate form and content of an answer.

Answer

An answer should bear at its top the heading "IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD," followed by the name of the proceeding (e.g., "Republic of Texas Biker Rally, Inc. v. Peter Ogudo"), the proceeding number (e.g., "Cancellation No. 92056510"), and a title describing the nature of the paper (e.g., "ANSWER," "ANSWER AND COUNTERCLAIM," etc.). See TBMP § 311.01(a).

Cancellation No. 92056510

The answer must contain admissions or denials of the allegations in the complaint and may include any defenses to those allegations. Respondent should not argue the merits of the allegations found in the complaint but rather should simply state, as to each of those allegations, that the allegation is either admitted or denied. See Trademark Rule 2.106(b)(1); Fed. R. Civ. P. 8(b); *Turner Entm't Co. v. Ken Nelson*, 38 USPQ2d 1942 (TTAB 1996) (applicant's answers were argumentative and nonresponsive and Board was ultimately forced to interpret the answer). If respondent does not have sufficient information to admit or deny an allegation, respondent may so state, and this statement will have the effect of a denial as to that allegation.

The complaint in this proceeding consists of thirty-three numbered paragraphs setting forth the basis of petitioner's claim of damage; respondent's admissions or denials should also be made in thirty-three numbered paragraphs corresponding to the numbered paragraphs in the complaint. See TBMP § 311.02(a).

Respondent may also assert any affirmative defenses it believes are appropriate. Affirmative defenses may include unclean hands, laches, estoppel, acquiescence, fraud, mistake, prior registration (Morehouse) defense, prior judgment, or any other matter constituting an avoidance,

Cancellation No. 92056510

amplification or affirmative defense. See Trademark Rule 2.106(b)(1); *Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222 (TTAB 1995).

Finally, the answer, as all other papers filed during this proceeding, must be signed by respondent and served on opposer. See Trademark Rule 2.119(a)-(b). The answer must include proof that service has been made, i.e. a certificate of service, consisting of a statement signed by the filing party, or by its attorney or other authorized representative, clearly stating the date and manner in which service was made. Respondent should review the *pro se* information below, which includes a sample certificate of service. The certificate of service should be attached to the filing to which it pertains, rather than being separately filed. Failure to include this proof of service with any papers filed may result in the Board not considering those papers. See Trademark Rule 2.119(a).

Schedule

Respondent's amended answer, including a statement of good cause, is due **August 15, 2013**. The conferencing, disclosure, discovery and trial dates are reset as follows:

Time to File Amended Answer	8/15/2013
Deadline for Discovery Conference	9/14/2013
Discovery Opens	9/14/2013
Initial Disclosures Due	10/14/2013
Expert Disclosures Due	2/11/2014

Cancellation No. 92056510

Discovery Closes	3/13/2014
Plaintiff's Pretrial Disclosures	4/27/2014
Plaintiff's 30-day Trial Period Ends	6/11/2014
Defendant's Pretrial Disclosures	6/26/2014
Defendant's 30-day Trial Period Ends	8/10/2014
Plaintiff's Rebuttal Disclosures	8/25/2014
Plaintiff's 15-day Rebuttal Period Ends	9/24/2014

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

PRO SE INFORMATION

A. Representation

The Board notes that respondent currently represents himself *pro se*, i.e. without assistance from a licensed attorney. It should be noted that, while Patent and Trademark Rule 11.14 permits any party to represent itself, it is advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney. In addition, as the impartial decision maker,

Cancellation No. 92056510

the Board may not provide legal advice, though it may provide general procedural information.

B. Nature of Board Proceedings

A cancellation proceeding before the Board is similar in many ways to a civil action in a Federal district court. There are pleadings (petition for cancellation, answer, and, sometimes, a counterclaim), a wide range of possible motions; discovery (a party's use of discovery depositions, interrogatories, requests for production of documents and things, and requests for admission to ascertain the facts underlying its adversary's case), a trial, and briefs, followed by a decision on the case. Unlike the case in a civil proceeding, the Board does not preside at the taking of testimony. Rather, all testimony is taken by deposition during the assigned testimony, or trial, periods, and the written transcripts, together with any exhibits, are then filed with the Board. No paper, document, or exhibit will be considered as evidence in the case unless it has been introduced in evidence in accordance with the applicable rules.

C. Electronic Resources

All parties may refer to the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), the Trademark Act, and the Trademark Rules of Practice, all available on

the USPTO website, www.uspto.gov. The TTAB homepage provides electronic access to the Board's standard protective order, and answers to frequently asked questions. Other useful resources include the ESTTA filing system⁴ for Board filings and TTABVUE for status and prosecution history.

Compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.

D. Service of Papers

Trademark Rule 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or the other party itself, if unrepresented, and proof of such service must be made

⁴ Use of electronic filing with ESTTA is strongly encouraged. This electronic file system operates in real time and provides filers with confirmation that the filing has been received. When papers are filed through ESTTA the papers must still be served on the other party to the proceeding.

If the parties have questions about or need assistance with ESTTA, they may call the Board at (571) 272-8500 or (800) 786-9199 (toll free) from 8:30 a.m. until 5:00 p.m. (EST).

While electronic filing is preferred, papers may also be filed by mail. The parties should refer to TBMP §§ 107-111 for information on filing by mail. If ESTTA filing is not possible for any reason, the filer should submit its papers by mail, with a certificate of mailing. See TBMP § 110 et. seq.

Cancellation No. 92056510

before the paper will be considered by the Board.

Consequently, copies of all papers which respondent may file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made. The statement, whether attached to or appearing on the paper when filed, will be accepted as *prima facie* proof of service.

The following is an example of an acceptable Certificate of Service:

Certificate of Service

The undersigned certifies that a copy of the attached <describe filing> was served, by first class mail, upon opposer at the following address:

Carl F. Schwenker
Law Offices of Carl F Schwenker
1101 East 11th Street
Austin, TX 78702,

on <insert date>.

/Peter Ogudo/