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

Proceeding	92057242
Party	Plaintiff Elite Motorcycle Tours
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Date	07/17/2013
Attachments	2013 07 16 Response to Motion to Dismiss.pdf(101915 bytes)

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

Elite Motorcycle Tours Petitioner, v. Bruce Odiorne II, d/b/a Elite Motorcycle Tours Registrant	)	Cancellation No. 92057242 Mark: **ELITE MOTORCYCLE TOURS** Reg. No.: 4,278,733 Reg. Date: January 22, 2013

RESPONSE TO REGISTRANT'S MOTION TO DISMISS

Petitioner Elite Motorcycle Tours ("Petitioner") hereby responds to Registrant Bruce Odiorne's ("Registrant's") Motion to Dismiss.

On May 22, 2013, Petitioner filed a Petition for Cancellation of Registrant's trademark registration for ELITE MOTORCYCLE TOURS on grounds of fraud. On June 28, 2013, on the day Registrant's Answer was due, Registrant filed a Motion to Extend Time to Answer by sixty (60) days. On July 1, 2013, Petitioner filed a Motion to Oppose Registrant's Motion to Extend Time to Answer. Also on July 1, 2013, Registrant filed a Motion to Dismiss. For the reasons set forth herein, Registrant's Motion to Dismiss should be denied.

A. REGISTRANT'S MOTION TO DISMISS DOES NOT SET FORTH ANY PROPER GROUNDS FOR DISMISSAL

Registrant's Motion to Dismiss does not assert any ground for dismissal recognized by the Board. The T.B.M.P. recognizes one ground to file a motion to dismiss, namely, failure to state a claim upon which relief can be granted. *See* T.B.M.P. 503. "A motion to dismiss for

failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of the complaint." *See* T.B.M.P. 503.02. Registrant's Motion to Dismiss does not question the legal sufficiency of the complaint. Rather, Registrant's Motion to Dismiss presents a single assertion - "Petitioner… is not the registered owner of the business name in the state of Colorado." *See* Pet. Mot. Dismiss p. 1. Registrant attached to its Motion a PDF Copy of a screenshot from the Colorado Secretary of State Website.

Registrant's Motion to Dismiss is based on a document that is outside the scope of the pleadings and does not challenge the legal sufficiency of Petitioner's Complaint *in any way*. In other words, Registrant raises a factual issue, one that is not appropriate for resolution by Motion to Dismiss. Petitioner's complaint "sufficiently states a claim for relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007), and Registrant's Motion to Dismiss does not allege otherwise. For purposes of a motion to dismiss, all of petitioner's allegations in a petition for cancellation must be accepted as true and the complaint must be construed in a light most favorable to petitioner. See *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993). Petitioner's complaint alleges that Registrant fraudulently obtained registration of the ELITE MOTORCYCLE TOURS mark, and the evidence presented by Registrant does not negate this allegation.

Insufficiency of Registrant's Motion to Dismiss aside, Registrant also fails to include proper content. Registrant includes the signature of Petitioner's representative in the Certificate of Service. Moreover, the Certificate of Service improperly includes the title of Petitioner's previously filed motion (Motion to Oppose Registrant's Motion for Extension of Time") and does not include any information that Registrant had actually served Petitioner. Rather, the

Certificate of Service identified *Registrant* as the party who was served. Further, the case law cited by Registrant, namely *Instruments SA Inc. v. ASI Instrument Inc.,* 53 USPT2d 1925, 1927 (TTAB 1999) and *Luemme, Inc. v. D.B. Plus, Inc.*, 53 USPOQ2d 1758, 1760-61 (TTAB 199) is law that was cited in Petitioner's Motion to Oppose Registrant's Extension of Time. This case law is completely irrelevant to the motion at hand. In light of the insufficient and improper nature of Registrant's Motion to Dismiss, Petitioner requests that Registrant's Motion to Dismiss be denied.

Respectfully submitted,

ELITE MOTORCYCLE TOURS

By its Attorneys,

Date: July 16, 2013

/s/ Dana P. Jozefczyk

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