

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

MWR HOLDINGS, LLC,

Petitioner,

v.

THEODORE A. STONER,

Registrant.

Cancellation No. 92059305 - 78812529

Mark: BONGO BI-LINGO BUDDY

Reg. No.: 3,700,403

Registered: October 20, 2009

ATTN: Trademark Trial and Appeal Board  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

TRANSMITTAL OF PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE

Sir:

Enclosed please find the following documents:

(1) Petitioner's Reply in Support of its Motion to Strike (4 pages);

We have included a self-addressed, stamped postcard. Please stamp this postcard as filed and return to us. No fees are believed to be due in connection with submission of this Response. However, if any such fees are due, the Examiner is hereby authorized to charge them to Deposit Account No. 50-1561.

Respectfully Submitted,

GREENBERG TRAURIG, LLP



By: William W. Stroever

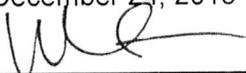
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CERTIFICATE OF MAILING

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on December 24, 2015

  
\_\_\_\_\_  
William W. Stroever  
December 24, 2015

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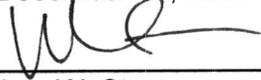


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**PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE**

In his Opposition to Petitioner's Motion to Strike, Stoner argues that it is appropriate and acceptable to submit an affidavit with a reply brief, and that the purpose of the affidavit was simply to "certify previously supplied evidence." These arguments misinterpret the caselaw and TTAB rules, and cannot serve as an excuse for the late filing of the Affidavit of Theodore A. Stoner, which should be stricken from Stoner's reply brief.

**ARGUMENT**

Stoner's argument that an affidavit may be freely filed with a reply brief ignores well-established caselaw requiring a moving party to give the non-moving party notice and an opportunity to respond to relevant evidence. *See, e.g., Beird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998). Stoner argues that as long as the minimum requirements of an affidavit are met, the affidavit should be accepted regardless of when it was filed. However, the inclusion of additional evidentiary matter with a summary judgment reply should only be allowed in the exceptional case. *Plenger, et al. v. Alza Corp.*, 11 Cal. App. 4th 349 (Cal. App. 1992). Stoner's citation to *Shalom Children's Wear Inc. v. In-Wear A/S* does not contradict this

principle, as it even highlights the Board's discretionary authority to allow or reject supplemental affidavits. 26 USPQ2d 1516, 1517 (TTAB 1993) (noting that "We exercise our discretion ..."). Stoner's citation to TMBP § 528.05(b) is equally misguided, as that rule allows for affidavits in support of or in opposition to a motion, but not in reply. If Stoner wanted to introduce new facts in an affidavit with his reply brief, it was his obligation to establish that this was an exceptional circumstance requiring such an affidavit. This is not such an exceptional situation, and Stoner has made no such showing.

Instead, this is a situation where Stoner has offered no explanation for the late filing of this affidavit. Stoner makes no allegation that these were newly discovered facts, or that he was somehow unavailable to provide his affidavit earlier. Stoner's only explanation for his late affidavit was that it was submitted as "a way to certify previously supplied evidence." (Opp. Br. at 2). Notably, Stoner does not cite to the location of any of this new evidence, instead making the conclusory assertion that the evidence had been previously supplied in discovery responses. Yet Stoner was unable to provide pinpoint citations to where this evidence had been previously supplied because this is new evidence, never before produced by Stoner.

Nor is this a situation where Stoner's failure to disclose these new facts is innocuous or harmless. For example, nowhere else does Stoner provide evidence of his state of mind when filing the Statement of Use in the BONGO BI-LINGO BUDDY application (Stoner Affidavit ¶ 5) – which is a central issue in the fraud claim. Nowhere else has Stoner provided evidence of any use of the BONGO BI-LINGO BUDDY mark anywhere, much less in the summer of 2015 (Stoner Affidavit ¶ 6) – a central issue in Stoner's priority and abandonment claims. Stoner deprived Petitioner of the opportunity to address all of the new facts in Stoner's affidavit, and Stoner's affidavit should be stricken.

**CONCLUSION**

For the foregoing reasons and those set out in Petitioner's Motion to Strike, Petitioner respectfully requests that the Board disregard the Affidavit of Theodore A. Stoner submitted as Exhibit 1 to Stoner's Reply in Support of his Counter-Motion for Summary Judgment, and any reference to that Affidavit in the Reply. Alternatively, Petitioner requests leave from the Board to address the substance of the Affidavit.

Dated: December 24, 2015

GREENBERG TRAURIG, LLP

By:  \_\_\_\_\_

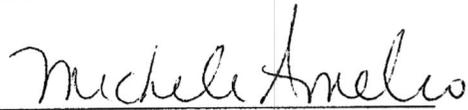
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Attorneys for Petitioner  
MWR Holdings, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE has been served on Theodore A. Stoner by mailing said copy on December 24, 2015, via First Class Mail, postage prepaid to:

Matthew H. Swyers  
The Trademark Company PLLC  
344 Maple Ave. W, Suite 151  
Vienna, VA 22180



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Michele Amelio