

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Alexandria, VA 22313-1451
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BUO

Mailed: January 15, 2016

Opposition No. 91214191 (Parent)

BBK Pictures, Inc.

v.

Boston Iced Tea Company, Inc.

Cancellation No. 92061664

Boston Iced Tea Company, Inc.

v.

BBK Pictures, Inc.

Benjamin U. Okeke, Interlocutory Attorney:

On December 28, 2015, the Board conducted a telephone conference with the parties to this proceeding. The conference was held to discuss accelerated case resolution (ACR), and to set the parameters for ACR and a modified schedule for the cancellation (counterclaim) proceeding in order to coordinate the simultaneous disposition of the opposition proceeding and recently consolidated cancellation proceeding. Participating in the conference were Opposer's counsel, Dina Leytes, Applicant's counsel, Roger N. Behle Jr., and Board interlocutory attorney, Benjamin U. Okeke.

The parties have consented to a modified proceeding under the Board's ACR procedure to expedite resolution of this proceeding.

Accordingly, the parties have entered into the following procedural stipulations:

- 1) The parties agree to continue service by email of all documents that are subject to being served pursuant to the applicable rules of procedure per their prior agreement in Opposition No. 91214191 ("the '191 opposition").
- 2) The parties agree to the following modifications to the traditional proceeding schedule and procedures to apply to the instant ACR proceeding:
 - a) By February 5, 2016, the parties will agree to and submit an amendment of the Joint Statement of Stipulated Material Facts produced for the '191 opposition, that adds facts eliminating as many of the ownership, and primarily geographically deceptively misdescriptiveness factors from this dispute ("Joint Statement of Material Facts") as reasonably appropriate;
 - b) no discovery of any type shall be served by any party until the Amended Joint Statement of Material Facts has been submitted;
 - c) the discovery period shall commence upon the submission of the Amended Joint Statement of Material Facts and shall close sixty (60) days thereafter;
 - d) the parties will forego service of additional initial disclosures;
 - e) limit, including all subparts, the number of interrogatories served to twenty (20); the number of requests for the production of documents ("RFP") served to ten (10); and the number of requests for admission served to fifteen (15);

- f) limit the number of depositions to two (2) per Party; not to exceed seven (7) hours each; and to cooperate at all times in good faith with respect to scheduling depositions and with respect to containing and minimizing unnecessary costs to the extent reasonably possible;
- g) to the extent necessary any deposition noticed by the parties will identify whether the deposition will be *duces tecum* or simply require the appearance of the deponent.
- h) following the close of discovery, Petitioner (counterclaim plaintiff), Boston Iced Tea Company, Inc., shall have thirty (30) days to submit its supplemental ACR Brief, in summary judgment format, not to exceed ten pages in length (the “BITC Cancellation ACR Brief”);
- i) thirty (30) days after the submission of the BITC Cancellation ACR Brief, Respondent (counterclaim defendant), BBK Pictures, Inc. (“BBK”), shall submit its supplemental ACR Brief, in summary judgment format, not to exceed ten pages in length (the “BBK Cancellation ACR Brief”);
- j) within fifteen (15) days after the submission of the BBK Cancellation ACR Brief, BITC may submit a reply ACR Brief not to exceed ten pages in length.

In keeping with the parties’ prior stipulation in the ’191 opposition:

- k) no expert witnesses will be called by either party;
- l) the Parties will forego trial and oral hearings and will submit the case to the Board through ACR briefing in summary judgment format;
- m) testimony and evidence will be presented by deposition transcript, affidavit or declaration;
- n) materials that, in a typical trial, could be submitted by notice of reliance can be submitted as attachments to the Parties’ respective ACR briefs

without need for such materials to be accompanied by notices of reliance;

- o) documents and things produced in response to an RFP, or reprints of pages retrieved from the Internet, may be submitted as exhibits without the need for accompanying testimony; subject to the Board's requirement that any document obtained from the Internet must identify the date the document was accessed and printed, and must display the URL address of the website the document was obtained from;
- p) the record and arguments created by the utilization of the ACR process will be the entire record and the Board may resolve any remaining genuine issues of material facts that are necessary to the Board's resolution of the instant case on its merits in consideration of the Parties' respective summary judgment briefs; and
- q) the burden of proof, which requires a showing by a preponderance of the evidence by the party occupying the position of plaintiff remains.

Because the parties agree that the Board may resolve disputes as to material fact which the Board may find to exist,¹ and may issue a final ruling after considering the parties' ACR submissions, the parties' stipulation to resolve the proceeding using the Board's ACR procedure is **APPROVED**. The Board will expedite determination of this matter and render a final decision in accordance with the evidentiary burden at trial, that is, by a preponderance of the evidence. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). The Board will endeavor to issue a decision on the merits within 50 days of the due date for BITC's reply brief on the cancellation (counterclaim).

¹ The Board construes the parties' stipulation as an agreement that the Board may decide any issues not anticipated by the parties, but which the Board may find the record to present.

Briefing of the opposition is closed and the parties should not attempt to re-brief the issues involved in the opposition. Similarly, the parties should not attempt to use this as an opportunity to seek discovery on the issues involved in the opposition.

The interlocutory attorney assigned to this case is available for telephone conferences should any questions or issues arise concerning this ACR proceeding.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b), except as modified by this order.

Finally, according to the parties' stipulation the following represents the modified schedule of this proceeding, subject to the parties' right to extend the deadlines upon consent:

Amended Joint Statement of Material Facts Due	2/5/2016
Discovery Opens for the Cancellation	2/5/2016
Discovery Closes	4/6/2016
BITC's Supplemental Brief on Cancellation Due	5/6/2016
BBK's Supplemental Cancellation Response Brief Due	6/5/2016
BITC's Supplemental Reply Brief Due, if Any	6/20/2016