

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3514

Mailed: 5/6/04

Opposition No. 91157596

Herban Avenues, LLC

v.

Herbancowboy.com, Inc.

Linda Skoro, Interlocutory Attorney

This case now comes up on opposer's motion to dismiss and/or strike, in part, applicant's counterclaim, filed November 6, 2003. Applicant has responded.<sup>1</sup>

As grounds for the motion, opposer states that paragraph 29 of applicant's answer and counterclaim "should be stricken and any claim based upon improper marking or misuse of statutory notice should be dismissed." Opposer contends that improper use of the registration symbol on goods not the subject of the registration is not relevant to whether cancel lies for that registration. In response, applicant contends that while paragraph 29 alone may be insufficient for

---

<sup>1</sup> Applicant is advised of the required format for filings with the Board provided in 37 CFR § 2.126. It is noted that the response was filed through ESTTA, which is greatly appreciated, but did appear as single-spaced and difficult to read.

cancellation of opposer's registration, when combined with the remaining paragraphs of the counterclaim it sets forth the statutory grounds of fraud with paragraph 29 being illustrative of misrepresentation and fraudulent behavior.

Upon motion of a party, the Board may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. Fed. R. Civ. P. 12(f). As the primary purpose of pleadings is to give fair notice of the claims or defenses asserted, matter will not be stricken unless it clearly has no bearing on the issues in the case. TBMP Section 506 (2d ed. Rev. 1 March 2004).<sup>2</sup>

In regard to opposer's motion to strike paragraph 29 of the counterclaim, we do not find the motion well taken. The information provided by the applicant in this paragraph may relate to opposer's use of its marks and registrations that provide the basis for applicant's claim of fraud upon the office. Therefore, paragraph 29 is not prejudicial and serves to put each party on notice of the positions that may be presented at trial by each other party. Accordingly, opposer's motion to strike is hereby denied. Proceedings herein are resumed and dates are reset as indicated below.

**THE PERIOD FOR DISCOVERY TO CLOSE:**

**8/20/2004**

---

<sup>2</sup> The Trademark Trial and Appeal Board Manual of Procedure (TBMP) is available on line through the office web site at [www.uspto.gov](http://www.uspto.gov).

**Opposition No. 91157596**

Thirty-day testimony period for  
plaintiff in the opposition to close: 11/18/2004

Thirty-day testimony period for defendant in the opposition  
and as plaintiff in the counterclaim to close: 1/17/2005

Thirty-day testimony period for defendant in the counterclaim  
and its rebuttal testimony as plaintiff in the  
opposition to close: 3/18/2005

Fifteen-day rebuttal testimony period for plaintiff in the  
counterclaim to close: 5/2/2005

**Briefs shall be due as follows:**

[See Trademark rule 2.128(a)(2)].

Brief for plaintiff in the opposition shall be due: 7/1/2005

Brief for defendant in the opposition and as  
plaintiff in the counterclaim shall be due: 7/31/2005

Brief for defendant in the counterclaim and its reply  
brief (if any) as plaintiff in the opposition  
shall be due: 8/30/2005

Reply brief (if any) for plaintiff in the  
counterclaim shall be due: 9/14/2005

. o o .