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

Proceeding	91193562
Party	Defendant Unipat Products, Virginia, LLC
Correspondence Address	ANGELA HOLT LANIER FORD SHAVER & PAYNE, P.C. PO BOX 2087 HUNTSVILLE, AL 35804-2087 UNITED STATES AJH@lanierford.com
Submission	Opposition/Response to Motion
Filer's Name	Angela Holt
Filer's e-mail	ajh@lfs.com
Signature	/Angela Holt/
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DEERE & COMPANY,	)	
	)	Opposition No. 91193562
	)	
Opposer,	)	
	)	Serial No.: 77/715,080
v.	)	
	)	Mark: GEAR GATOR
	)	
UNIPAT PRODUCTS, VIRGINIA, LLC	)	
	)	Published: December 1, 2009
	)	
Applicant.	)	

**APPLICANT’S RESPONSE IN OPPOSITION TO OPPOSER’S  
REQUEST FOR RECONSIDERATION AND MODIFICATION**

Applicant UniPat Products, Virginia, LLC (“UniPat”) hereby responds to Opposer Deere & Company’s (“Deere’s”) Request for Reconsideration and Modification of the Board’s Order denying Deere’s Motion for Summary Judgment (the “Deere Request for Reconsideration”) and in support thereof states as follows:

INTRODUCTION:

1. The facts of this matter are very simple. A small company with limited resources developed an equipment rack for ATVs and named the product “GEAR GATOR,” inadvertently waking the sleeping giant Deere, of John Deere fame. Hopefully, this Board will eventually examine the merits of the core dispute: whether an equipment rack called GEAR GATOR is confusingly similar to a utility terrain vehicle called GATOR. Such an examination may never take place, however, if Deere continues to bury UniPat in paper and the associated costs of

defending technicality after technicality in this matter. Indeed, *before UniPat even produced discovery documents in this proceeding*, Deere filed a Motion for Summary Judgment that UniPat was forced to defend. Now Deere files a Request for Reconsideration, forcing UniPat to spend more money in this matter. Undoubtedly Deere will appeal if the Board remains unmoved, and UniPat will have to go back to the well to defend the appeal. No doubt Deere's strategy is to spend UniPat into submission. Admittedly, all of Deere's posturing and wasted money is technically irrelevant to the issues involved in the Request for Reconsideration. But the basic purpose of trademark law -- protection of the consumers from confusion -- should not be lost in this paper deluge that Deere has rained down upon UniPat. UniPat is hopeful that the Board will recognize Deere's tactics for what they are and deny this frivolous Request for Reconsideration, so that ultimately the merits of this proceeding will be at hand.

#### ARGUMENT:

2. Deere ascribes four errors to the Board's Order, but all of the alleged errors coalesce to the same issue: Deere believes that the Board should have disregarded Amended Interrogatories filed by UniPat (Exhibit B to Applicant's Brief in Opposition to Opposer's Motion for Summary Judgment) (the "Amended Interrogatories") and the Declaration of Scott Sayre (Exhibit C to Applicant's Brief in Opposition to Opposer's Motion for Summary Judgment), (the "Sayre Declaration"). In fact, Deere believes that the Board **must** disregard the Amended Interrogatories and Sayre Declaration as a matter of law. In support of its argument, Deere cites 23 cases Deere in parts I – IV of its Request for Reconsideration, **not one** of which is a TTAB case or an appeal from a TTAB case, and **only one case**, Brand Management, Inc. v. Menard, Inc., 135 F.3d 776 (Fig. Cir. 1998) -- an unpublished opinion -- involved issues of trademark law at all. Deere discusses the many cases as if they **require** the Board to disregard

the Amended Interrogatories and Sayre Declaration, when that is clearly not the case. See, e.g., Ball v. United GT Corp., 2010 WL680348, \*2 (denying summary judgment on the grounds that “[a]lthough a jury may not look favorably upon the Defendant's change in interrogatory answers in midst of this litigation, this is an issue for the jury, not the Court, to resolve” (emphasis added)). In fact, courts decide *based upon the circumstances* whether a later affidavit inconsistent earlier testimony should be considered. See, e.g., Patton v. MFS/Sun Life Fin. Distribs., Inc., 480 F.3d 478, 488 (7th Cir. 2007). (“[A] court must examine the particular circumstances of a change in testimony to see whether it is plainly incredible or merely creates a credibility issue for the jury.”)

3. Moreover, UniPat could no doubt cite an equal number of cases in which the courts considered the later-filed discrepant affidavits. For example, in Bass Pro Trademarks, LLC v. Sportsman’s Warehouse, Inc., 89 U.S.P.Q.2d 1844 (TTAB 2008), the petitioner filed a petition to cancel the respondent’s trademark registration for the mark SPORTSMAN’S WAREHOUSE on the basis of fraud. The petitioner based such allegation on the fact that the respondent included “wholesale services” in its goods and services description but stated in a subsequent interrogatory response that it “sells goods only at retail and does not sell goods at the wholesale level.” Id. at 1860. The respondent subsequently amended its interrogatory response to state that it sells goods at wholesale, and witnesses corroborated the amended interrogatory response. The Board stated “[w]e agree with petitioner that respondent’s testimony is self-serving, but it is credible. Unlike petitioner, we do not find it disingenuous.” Id. at 1861. The Board denied the petitioner’s petition for cancellation, holding that the respondent did not commit fraud in the filing of its application for registration. Id. at 1862. Similarly, in Securities and Exchange Commission v. Phan, 500 F.3d 895 (9th Cir. 2007), the defendants appealed the

district court's grant of summary judgment in favor of the Securities and Exchange Commission ("SEC") holding that the defendants engaged in the sale of unregistered securities and committed securities fraud. The district court disregarded critical statements in two of the defendants' declarations, viewing such declarations as "uncorroborated and self-serving." Id. at 909. The Ninth Circuit stated:

As we have previously noted, declarations oftentimes will be "self-serving" -- and properly so, because otherwise there would be no point in a party submitting them. In most cases, consequently, that an affidavit is self-serving bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact. Only in certain instances--such as when a declaration states only conclusions, and not such facts as would be admissible in evidence, can a court disregard a self-serving declaration for purposes of summary judgment.

Id. (internal quotations and citations omitted). Thus, the Ninth Circuit held that the district court's grant of summary judgment in favor of the SEC was improper and reversed the district court's grant of summary judgment regarding those claims.

4. Contrary to Deere's assertions, therefore, the inquiry into whether an affidavit that is inconsistent with prior testimony should be considered does not end as soon as the inconsistency is discovered. Rather, courts evaluate the circumstances to discover, for example, whether the inconsistent affidavit was bare or was supported by evidence, and whether the prior testimony was deposition testimony later disputed by an unsupported self-serving affidavit. In this case, the Sayre Declaration provides contemporaneous evidence showing that UniPat was a successor to the business of Sayre Enterprises with respect to the GEAR GATOR trademark. This evidence is a world apart from the bare affidavits that have been held to be insufficient to contradict earlier testimony, as Deere surely knows.

5. Finally, Deere argues that *even if* the Sayre Declaration and Amended Interrogatories were properly considered, as a matter of law UniPat is not established as the

successor to Sayre Enterprises. Deere dismisses the Sayre Declaration as “fall[ing] far short of establishing business succession,” and claims that “[i]f Unipat were in fact a successor to Sayre Enterprise’s [sic] business, Unipat would have produced an asset purchase agreement or some other document effectuating a transfer of assets between the companies.” See Deere Request for Reconsideration at ¶¶ 51, 54. Deere’s argument highlights the misplaced prematurity of Deere’s Motion for Summary Judgment. Discovery is far from complete in this opposition. UniPat has not even produced documents in this opposition, other than the initial disclosures and documents attached in response to Deere’s motions. Scott Sayre has not yet been deposed in this opposition. Surely the parties are entitled to complete the discovery process before Deere can declare the evidence insufficient as a matter of law.

6. For these reasons, UniPat requests that the Board reject Deere’s Request for Reconsideration. Meanwhile, we await Deere’s next inevitable effort to outspend UniPat into oblivion.

Respectfully submitted,

/Angela Holt/  
Attorney for Applicant

LANIER FORD SHAVER & PAYNE P.C.  
2101 West Clinton Ave., Suite 102  
P.O. Box 2087  
Huntsville, AL 35804  
Telephone: (256) 535-1100  
Facsimile: (256) 533-9322  
E-mail: AJH@lanierford.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by United States mail, postage prepaid, with a copy by e-mail, to the following counsel on this the 8th day of November, 2010:

Robert W. Hoke  
Sarah J. Gayer  
Kevin H. Collins  
NYEMASTER GOODE, P.C.  
One GreatAmerica Plaza  
625 First Street SE, Suite 400  
Cedar Rapids, IA 52401

Baldev S. Sarai  
DEERE & COMPANY  
One John Deere Place  
Moline, IL 61265

/Angela Holt/  
Attorney for Applicant