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

Proceeding	91199405
Party	Plaintiff Engineered Products Company
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Submission	Opposition/Response to Motion
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Attachments	ENGINEERED PRODUCTS_20110613152142.pdf ( 4 pages )(164543 bytes )

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

Engineered Products Company,

Opposer,

Opposition No. 91199405  
Applicant: Brown Machine, LLC  
Application No. 77/934,320  
Trademark: EPCO  
Published: December 14, 2010

v.

Brown Machine, LLC

Applicant.

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**OPPOSER'S BRIEF IN OPPOSITION TO MOTION TO STRIKE**

Opposer Engineered Products Company opposes the motion of Applicant Brown Machine, LLC, for an order striking Paragraph 2 of the Notice of Opposition filed by Opposer. The grounds for Opposer's opposition to the motion are set forth herein.

In Paragraph 2 of the Notice of Opposition, Opposer states:

Applicant claims to have used the mark "EPCO" in interstate commerce since at least as early as August 2, 1961. On information and belief, Applicant did not begin to use the term "EPCO" as a service mark until long after its claimed date of first use and has not used the term "EPCO" continuously since August 2, 1961.

The Opposition is based upon the likelihood that Applicant's mark will be confused with Opposer's mark. To establish likelihood of confusion under §2(d) of the Lanham Act, 15 U.S.C. § 1052(d), the Opposer must prove that it owns a prior trademark right and that an applicant's mark is likely to cause confusion with that trademark. *Life Zone, Inc. v. Middleman Group, Inc.*, 87 U.S.P.Q.2d 1953, 1959 (T.T.A.B. 2008)

The alleged date of first use in Applicant's application is not immaterial to the question of whether Opposer owns prior rights in the disputed mark "EPCO." Opposer owns a prior registration; but Applicant claims a prior date of first use. Applicant's claimed date of first use may be material to a final determination by the Trademark Trial and Appeal Board ("T.T.A.B.") Therefore Paragraph 2 of the Opposition should not be stricken.

The decisions relied upon by Applicant are inapposite. *General Mills, Inc., v. Nature's Way Products, Inc.*, 202 U.S.P.Q. 840 (T.T.A.B. 1979) was a cancellation proceeding in which the petitioner alleged that, by misstating its date of first use, the applicant committed fraud upon the United States Patent and Trademark Office ("USPTO"). The TTAB rejected that argument because "misstatement of the date of first use does not, *per se*, constitute fraud because any use prior to the filing date is sufficient for purposes of registration." 202 U.S.P.Q. at 841. Here, Petitioner alleges that the date of first use was misstated and that use has not been continuous. If proven, both facts would serve as a basis for rejecting Applicant's registration if Applicant has not made continuous trademark use of the claimed mark until after Opposer's date of first use.

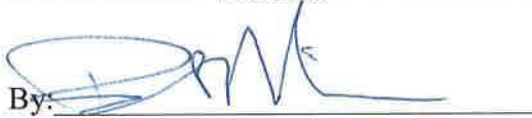
Like *General Mills, Harsco Corp. v. Electrical Sciences, Inc. et al.*, 9 U.S.P.Q.2d 1570 (T.T.A.B. 1988) was a cancellation proceeding (not an opposition). In *Harsco*, the allegation that was stricken pertained to the date that the mark had acquired secondary meaning: the opposer alleged that it had not acquired secondary meaning as of the date of the application for registration, and the TTAB properly found that the relevant date for acquisition of secondary meaning was the date of registration. 9 U.S.P.Q.2d at 1571. Opposer's allegation that Applicant has not used the claimed mark as a service mark until long after the claimed date of first use, and has not used the claimed mark continuously, is relevant to Opposer's claim under 37 C.F.R. § 2.101(b) that Opposer has superior rights to the mark.

Accordingly, Paragraph 2 should not be stricken from the Notice of Opposition.

Date: June 13, 2011

Respectfully submitted,

ENGINEERED PRODUCTS COMPANY

By: 

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**AFFIDAVIT OF SERVICE**

I hereby certify that on June 13, 2011, I caused the Brief In Opposition To Motion To Strike to be served upon Mr. John R. Benefiel, Law Offices of John R. Benefiel, 525 Lewis Street, Birmingham, MI 48009-6565, *via* first class United States Mail, postage pre-paid at the above-stated address.

LINDQUIST & VENNUM, P.L.L.P.

DATED: June 13, 2010



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