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

Proceeding	91213395
Party	Defendant Westall Ranches, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BRINK'S NETWORK, INC.,)	
)	
Opposer,)	
)	Opposition No. 91213395
v.)	
)	
WESTALL RANCHES, LLC,)	
)	
Applicant.)	

**MEMORANDUM OF POINTS AND AUTHORITIES OF APPLICANT
WESTALL RANCHES, LLC IN RESPONSE TO OPPOSER'S MOTION TO
STRIKE, AND IN SUPPORT OF REQUEST FOR LEAVE TO FILE AN
AMENDED ANSWER ADDING A COUNTERCLAIM FOR CANCELLATION**

Applicant Westall Ranches, LLC ("Westall" or "Applicant"), by its undersigned counsel, submits this memorandum in response to the Motion to Strike Affirmative Defenses submitted by Opposer Brink's Network, Inc." (Brink's" or "Opposer"), and in support of its motion for leave to file an amended counterclaim. In its amended pleading, a copy of which is submitted herewith, Westall voluntarily withdraws two of the affirmative defenses challenged by Opposer, and adds a counterclaim for cancellation of two of the registrations referenced and relied upon by Opposer in its Opposition and its pending motion.

I. BACKGROUND

On May 15, 2012 Westall Ranches applied for registration of its trademark "Brinks Brangus" in connection with cattle semen in international class 5; live cattle and cattle embryos in international class 31; maintenance of a registry of cattle breeds in international class 35; and cattle breeding in international class 42, which was assigned Serial No. 85/625,846. On

November 8, 2013 Brink's filed an Opposition to Westall's application, in which Brink's contended that the name Brink's, which is the central element of a number of registered trademarks used in conjunction with a variety of security services, was a famous mark, and that if Westall were allowed to register its mark used in connection with a breed of cattle, Brink's's mark would be unfairly diluted, causing it damage. Brink's also contended that Westall's mark "Brinks Brangus" for cattle would likely cause confusion among consumers of the services offered by Brink's under its trademarks featuring the word Brink's.

On December 18, 2013 Westall answered Brink's Opposition, denying that its use of the mark "Brinks Brangus" in connection with cattle either created a likelihood of confusion or diluted the Brink's's registered mark used in connection with security services, causing harm to Brink's or consumers; and asserted a variety of affirmative defenses to Brink's's Opposition, including the defense of laches; of antitrust misuse; and that Brink's name had become generic for financial security transportation services and accordingly did not form the basis for a rejection of Westall's mark used in connection with cattle.

Within a week of having filed its Answer, during the Christmas holiday season, Westall's undersigned counsel recognized that it could and should have filed a counterclaim seeking cancellation of some of Brink's's registered marks cited in its Opposition, based on the same reason it had referenced in support of its affirmative defense asserting that the name Brinks was generic for the type of services referenced in its registrations. Westall's counsel began to prepare an amendment to its Answer to add that counterclaim. When, shortly after January 1, 2014, Brink's's counsel filed its motion to strike several of the affirmative defenses asserted in Westall's initial Answer, including Westall's defense based on the asserted generic status of the Brinks name, Westall's counsel determined to submit its proposed amended answer, with the added counterclaim, along with its response to Brink's's motion to strike. It is now doing so.

II. ARGUMENT

Westall is submitting its proposed counterclaim promptly after realizing that it had neglected to include such a counterclaim in its initial Answer. It is doing so only five weeks after submitting its initial Answer, during which the Christmas and New Year holidays intervened. It delayed doing so for two weeks in order to act with greatest efficiency in response to Brink's's Motion to Strike. The discovery period in this proceeding as set forth in the current scheduling order has just commenced, one week ago; initial disclosures are not due until February 16, 2014; no discovery has yet been served; and discovery will remain open for nearly six more months, until July 16, 2014. Brink's will in no way be prejudiced by allowing Westall to allege its counterclaim. The interests of justice will best be served by allowing the parties to plead and have the opportunity to prove any issue that bears on Westall's right to register its mark, and indirectly, the public's right to be free from Brink's's monopolization of the use of a mark that has allegedly become generic.

Rule 15(a) of the Federal Rules of Civil Procedure, which is echoed in Trademark Rule 2.107 applicable in opposition proceedings, provides that the court should liberally give leave to a party to amend a pleading when justice so requires. Since the Supreme Court's decision in Foman v. Davis, 371 U.S. 178, 83 S. Ct. 222 (1962), it has been recognized that, in proceedings before the Board as in civil matters generally, absent undue delay, bad faith, or actual prejudice to the non-moving party, leave to amend a pleading, including to add a counterclaim, should be given. Id., 371 U.S. at 181, 83 S. Ct. at 230. See, e.g., Mitek Corp. v. Woods Industries, Inc., 41 U.S.P.Q. 2d 1307 (T.T.A.B. 1996); See's Candy Shops, Inc. v. Campbell Soup Company, 12 U.S.P.Q. 2d 1395 (T.T.A.B. 1989). And Rule 13(f) of the Federal Rules, made applicable to Board proceedings by Trademark Rule 2.116, provides that when a party fails to set up a counterclaim as a result of oversight, inadvertence, or excusable neglect, or when justice so

requires, leave to amend should likewise be freely given. See's Candy Shops, Inc., supra. In the instant case, there is no legitimate reason to preclude Westall from so amending its initial Answer to assert its proposed counterclaim.

Westall's counsel have acted promptly to assert the counterclaim they neglected by oversight to allege in their initial Answer. A minimal amount of time has passed. The discovery period has just begun, and will continue for nearly six months. Westall's actions are done in good faith, and there is no prejudice to Brink's from allowing the proposed amendment. Under such circumstances, leave to amend should be allowed. See, e.g., Marshall Field & Company v. Mrs. Fields Cookies, 11 U.S.P.Q. 2d 1355 (T.T.A.B. 1989) (defendant's application to amend its pleading in an opposition to assert a counterclaim for cancellation was promptly filed and caused no prejudice to the opposer, and accordingly leave to amend was granted).

Granting Westall's request for leave to amend its Answer to add the counterclaim discussed above would make moot Brink's's motion to strike Westall's affirmative defense based upon the same contention, i.e., that two of Brink's's cited registrations are for marks that are generic. The sole basis for Brink's's motion to strike that defense was that Westall had failed to assert a counterclaim for cancellation of the registrations, and that obstacle would no longer exist with Westall's counterclaim before the Board.

CONCLUSION

For the reasons set forth above, Westall's Motion for Leave to Amend its Answer and add a counterclaim for cancellation of two of Brink's's registrations incorporating the word

"Brinks" should be granted; and its Amended Answer and Counterclaim should be accepted for filing herein.

Respectfully submitted,

PEACOCK MYERS, P.C.

Date: 1/24/2014

By: /Jeffrey L. Squires/

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**APPLICANT'S MOTION FOR LEAVE TO AMEND ITS
ANSWER AND ADD A COUNTERCLAIM FOR CANCELLATION**

Applicant Westall Ranches, LLC ("Westall" or "Applicant"), by its undersigned counsel, acting pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, moves to amend its Answer to the Notice of Opposition filed by Opposer Brink's Network, Inc. ("Brink's" or "Opposer"). Westall is submitting herewith a Memorandum of Points and Authorities in support of its Motion for Leave to Amend, which also addresses issues raised by Brink's in its Motion to Strike three affirmative defenses asserted by Westall in its initial Answer to Brink's's Opposition. Westall is also submitting herewith its Amended Answer, which includes a counterclaim seeking cancellation of two registrations held by Brink's.

As is shown in the Amended Answer submitted herewith, and discussed in the Memorandum supporting Westall's Motion for Leave to Amend, Westall is voluntarily withdrawing two of the affirmative defenses that are the subject of Brink's's pending motion, i.e., the defenses of laches and of antitrust misuse (Affirmative Defenses Nos. 1 and 3 as asserted in Westall's initial Answer). Westall's added counterclaim for cancellation would, if accepted, remove the basis for Brink's's objection to the affirmative defense based upon the generic

nature of Brink's's registered marks, and thus make moot that objection. Accordingly, Westall seeks leave to file the attached Amended Answer and counterclaim.

Applicant represents that it has sought the consent of Opposer's counsel to the amended pleading that is the subject of this motion. Opposer's counsel has consented to Applicant's withdrawal of two affirmative defenses; but has not consented to Applicant's amendment that adds a counterclaim for cancellation.

Respectfully submitted,
PEACOCK MYERS, P.C.

Date: 1/24/2014

By: /Jeffrey L. Squires/

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Motion for Leave to Amend its Answer and Counterclaim, along with the Memorandum of Points and Authorities in support thereof and in response to Opposer's Motion to Strike, and a copy of Applicant's proffered Amended Answer and Counterclaim, upon Opposer's counsel by depositing one copy thereof in the United States Mail, first-class postage prepaid, on January 24, 2014, addressed as follows:

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