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

**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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v.)	Opposition No. 91213395
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Applicant.)	
_____)	
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WESTALL RANCHES, LLC,)	
)	
Petitioner,)	
)	
v.)	
)	
BRINK'S NETWORK, INC.,)	
)	
Respondent/Registrant.)	

**APPLICANT'S AMENDED ANSWER TO OPPOSER'S NOTICE OF
OPPOSITION AND COUNTERCLAIM TO CANCEL U.S. TRADEMARK
REGISTRATION NUMBERS 529,622 AND 1,411,610**

Applicant Westall Ranches, LLC ("Westall" or "Applicant"), by and through its undersigned counsel, here submits its Amended Answer to the above-captioned Opposition submitted herein by Opposer Brink's Network, Inc. ("Brink's" or "Opposer"), by which Westall deletes two affirmative defenses that are the subject of a pending motion to strike filed by Brink's, and adds a counterclaim seeking cancellation of two of Brink's's registered marks.

14. Applicant is without knowledge or information sufficient to admit or deny the allegations of this paragraph of the Opposition, and accordingly denies them.

15. Applicant is without knowledge or information sufficient to admit or deny the allegations of this paragraph of the Opposition, and accordingly denies them.

16. Applicant is without knowledge or information sufficient to admit or deny the allegations of this paragraph of the Opposition, and accordingly denies them.

17. Applicant is without knowledge or information sufficient to admit or deny the allegations of this paragraph of the Opposition, and accordingly denies them.

18. Applicant is without knowledge or information sufficient to admit or deny the allegations of this paragraph of the Opposition, and accordingly denies them.

19 – 21. The Notice of Opposition is missing allegations 19-21. Applicant is without knowledge as to whether such allegations actually exist and thus denies allegations 19 – 21 if they do in fact exist.

22. Applicant denies the allegations of this paragraph of the Opposition.

23. Applicant denies the allegations of this paragraph of the Opposition.

24. Applicant denies the allegations of this paragraph of the Opposition.

AFFIRMATIVE DEFENSES

As and for its Affirmative Defenses, Applicant asserts the following:

1. Opposer's Opposition is barred under principles of waiver and estoppel.
2. Opposer's trademarks have become generic for use in connection with financial security transportation services and accordingly do not evidence or indicate a source of origin as necessary to permit Opposer to claim exclusive use of these trademarks for any purposes; and Opposer's Opposition fails for that reason among others.

3. There is no likelihood that the relevant public will be confused as to the source or origin of Opposer's goods or services by Applicant's use or registration of the mark that is the subject of its application.

4. Applicant will assert any additional affirmative defenses that may be determined applicable during the discovery or testimony periods in this proceeding.

COUNTERCLAIM

As and for its Counterclaim, Applicant requests that the Board order cancellation of Brink's Networks, Inc.'s ("Brink's" or "Registrant") U.S. Trademark Registration No. 529,622, for "carrying [checks] or other moneys or securities, guarding and protecting same" in international class 035; and U.S. Trademark Registration No. 1,411,610 for "security transportation-namely, armored car transport services of currency, securities and other valuables" in international class 035. The term "Brinks" has become the generic name for armored car transport services of moneys, securities, currency, and other valuables.

Westall believes it is being damaged by Brink's's U.S. Trademark Registrations No. 529,622 and No. 1,411,610 ("Opposer's Registered Marks"), and hereby petitions for cancellation of those registrations, pursuant to Section 18 of the Trademark Act, 15 U.S.C. § 1068.

Applicant states the following as grounds for this petition for cancellation:

1. Brink's's Registration No. 529,622 is for "carrying [checks] or other moneys or securities, guarding and protecting same" in international class 035.

2. Brink's's Registration No. 1,411,610 for "security transportation – namely, armored car transport services of currency, securities and other valuables" in international class 035.

3. In its current Opposition, Brink's relies on its registered marks to assert that a likelihood of confusion exists between those marks and Applicant's mark "Brinks Brangus," and

also claims its marks are famous and would be diluted if Westall were to register its mark for cattle, embryos, cattle breeding and the like.

4. Westall sought registration of its mark "Brinks Brangus" by submitting an application for registration with the U.S. Patent and Trademark Office on May 15, 2012, seeking to register its mark for cattle semen in international class 5; live cattle and embryos in international class 31; maintaining a registry of cattle breeds in international class 35; and cattle breeding in international class 42. While Westall contends that there is no basis for the contention there is a likelihood of confusion between its mark and the registered marks of Brink's's cited in the latter's Notice of Opposition, Westall nonetheless is being damaged by Brink's's reliance on those registrations in its Opposition to Westall's application to register Brinks Brangus.

5. Further, the word Brinks, as used in Opposer's business and as is the subject of its two Registered Marks, is generic for the types of services identified in its registrations. The general public knows and immediately associates the word "Brinks" with the type of services and means of delivering those services, employed by all providers of similar financial security transportation services, rather than with Opposer/Registrant individually and accordingly should be cancelled.

6. Applicant has been and continues to be injured by Brink's's registered marks, which Brink's is attempting to use to bar Applicant's pending application for registration of the mark "Brinks Brangus" in connection with goods and services related to breeding of cattle.

RELIEF

For the reasons set forth above, Opposer's Opposition should be denied and dismissed with prejudice; U.S. Trademark Nos. 529,622 and 1,411,610 should be canceled as to the

above-indicated services in international class 035; and Applicant should be awarded its costs and whatever further relief the Board deems just.

Respectfully submitted,
PEACOCK MYERS, P.C.

Date: 1/24/2014

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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:

Alan S. Cooper
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