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

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| Proceeding | 91218588 |
| Party | Plaintiff Smoke Inn, LLC |
| Correspondence Address | KEVIN M DRUCKER MENDELSON DRUCKER & DUNLEAVY PC 1500 JOHN F KENNEDY BLVD, SUITE 312 PHILADELPHIA, PA 19102 UNITED STATES kevin@mendelip.com |
| Submission | Motion to Dismiss - Rule 12(b) |
| Filer's Name | Kevin M. Drucker |
| Filer's e-mail | kevin@mendelip.com |
| Signature | /kevin m. drucker/ |
| Date | 01/23/2015 |
| Attachments | Motion to Dismiss Counterclaim rev. 2.pdf(26849 bytes) Brief in Support of Motion to Dismiss Counterclaim rev. 2.pdf(90588 bytes) |

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

In Re Trademark Appln.
Serial No.: 86/104,216
Filed: October 29, 2013
Mark: KISS YOUR ASH GOODBYE
Applicant: Cross Farms Inc.
International Classes: 030 and 034
Published in the
Official Gazette: April 1, 2014

SMOKE INN, LLC,
Opposer,

v.

CROSS FARMS INC.,
Applicant

Opposition No. 91218588
Re: Application Serial No. 86/104,216

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

**OPPOSER'S MOTION TO DISMISS COUNTERCLAIM
AND TO STRIKE PORTIONS OF ANSWER**

Pursuant to 37 C.F.R. §2.116(a) and Rule 12(b)(6) F.R.Civ.P., Opposer and Counterclaim Respondent Smoke Inn, LLC ("Smoke Inn") hereby moves for dismissal of the Counterclaim for Cancellation (the "Counterclaim") brought by Applicant and Counterclaimant Cross Farms Inc.

("Cross Farms") in its Answer and Counterclaim, for failure to state a claim upon which relief may be granted on its alleged claim of fraud, on the grounds set forth in the Brief in Support of Opposer's Motion to Dismiss Counterclaim and to Strike Portions of Answer, filed herewith.

Cross Farms failed to sufficiently plead any facts or assert a statutory claim to establish fraud. Lack of facts and vague allegations of fraud on the Office fail to sufficiently establish the purported basis for cancelling Smoke Inn's registration no. 4,084,198.

Smoke Inn also moves to strike portions of Cross Farms' Answer that violate Rules 8(b)(1)(B), 8(b)(2), and 8(b)(4) of the Federal Rules of Civil Procedure, because Cross Farms violated these rules by indiscriminately denying numerous allegations in the Notice of Opposition, without making any effort to identify parts of such allegations that are indisputably true.

Respectfully submitted,

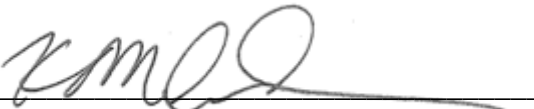
By: 

Kevin M. Drucker
David L. Cargille
Mendelsohn, Drucker, & Dunleavy, P.C.
1500 John F. Kennedy Blvd., Suite 312
Philadelphia, Pennsylvania 19102
Attorneys for Opposer, Smoke Inn, LLC

Date: 1/23/2015

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited electronically to the Trademark Trial and Appeal Board on the date shown below, with a copy sent via first-class mail to: Jordan A. LaVine, Flaster Greenberg PC, 1600 John F. Kennedy Blvd., 2nd Floor, Philadelphia, PA 19103.



Kevin M. Drucker

Dated: 1/23/2015

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**BRIEF IN SUPPORT OF OPPOSER'S MOTION TO DISMISS COUNTERCLAIM
AND TO STRIKE PORTIONS OF ANSWER**

Pursuant to 37 C.F.R. §2.116(a) and Rule 12(b)(6) F.R.Civ.P., Opposer and Counterclaim Respondent Smoke Inn, LLC ("Smoke Inn") hereby moves for dismissal of the Counterclaim for

cancellation (the “Counterclaim”) brought by Applicant and Counterclaimant Cross Farms Inc. (“Cross Farms”) in its Answer and Counterclaim, for failure to state a claim upon which relief may be granted.

Smoke Inn also moves to strike portions of Cross Farms’ Answer that violate Rules 8(b)(1)(B), 8(b)(2), and 8(b)(4) of the Federal Rules of Civil Procedure, because Cross Farms violated these rules by indiscriminately denying numerous allegations in the Notice of Opposition, without making any effort to identify parts of such allegations that are indisputably true.

I. CROSS FARMS’ COUNTERCLAIM MUST BE DISMISSED BECAUSE IT LACKS PARTICULARITY

In its sole Counterclaim, Cross Farms alleged, “upon information and belief,” that Smoke Inn committed fraud on the Office during prosecution of Smoke Inn’s trademark registration no. 4,084,198. Cross Farms has failed, however, to state with particularity any factual or statutory basis that warrants a finding of fraud, or even to allege sufficient facts to support any rational belief in the truth of the counterclaim.

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* To meet this standard, a plaintiff must provide “more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” *Twombly*, 550 U.S. at 555. “Factual allegations must be enough to raise a right to relief above the speculative level” *Id.* Moreover, a court

“is not bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678.

The TTAB follows Federal Rule 9(b) that all averments of fraud must be stated with particularity. Fed. R. Civ. P. 9(b). *Valley Paper Co. v. Whiting Paper Co.*, 107 USPQ 175 (Comm’r Pat. 1955). The pleader must state the time, place, and content of the false representation, the fact misrepresented and what was obtained in consequence. *W.R. Grace & Co. v. Arizona Feeds*, 195 U.S.P.Q. 670 (Comm’r Pat. 1977). Similarly, the Court of Customs and Patent Appeals, in affirming dismissal of a fraud charge for failure to state a claim, held that Federal Rule 9(b) requires that the pleading contain an explicit expression of the factual circumstances alleged to constitute fraud, rather than a mere implied expression. *King Automotive, Inc. v. Speedy Muffler King, Inc.*, 121 USPQ 801 (CCPA 1981) cited in *McCarthy on Trademark and Unfair Competition*, Vol. 5, § 31.84.

Charges of fraud on the Office are serious and should not be made whimsically. The Board does not take charges of fraud lightly and has often made statements to the following effect with respect to *inter partes* proceedings:

Fraud in a trademark cancellation is something that must be “proved to the hilt” with little or no room for speculation or surmise; considerable room for honest mistake, inadvertence, erroneous conception of rights, and negligent omission[;] and any doubts resolved against the charging party. *Yocum v. Covington*, 216 USPQ 210 (TTAB 1982); *Bonaventure Associates v. Westin Hotel Co.*, 218 USPQ 537, 540 (TTAB 1983). *McCarthy’s on Trademarks and Unfair Competition*, § 31:68(1).

Cross Farms does not identify *who* allegedly “knowingly made false, material misrepresentations of fact” with “the intent to defraud the U.S. Patent and Trademark Office.” See Counterclaim, ¶ 9. Nor does Cross Farms specifically state what the different “false, material misrepresentations of fact” are, other than to allege generally that Smoke Inn’s mark “was not in use in commerce in

connection with the majority of the goods identified in the application at the time the Statement of Use was filed, yet still alleged use of the mark in commerce with those goods . . .” *Id.*

When, at the time of filing and signing of the declaration of use, an applicant has a good-faith belief of sufficient use, fraud is negated. *De Mert & Dougherty, Inc. v. Chesebrough-Pond’s Inc.*, 175 USPQ 460 (N.D. Ill. 1972). In *De Mert*, the Board held that when an applicant files an application in good faith reliance on a “borderline” transaction, no fraud will be found. *Id.* The issue is whether the transaction was an intentional misrepresentation, not whether the transaction was or was not sufficient to support the application. *Pennwalt Corp. v. Sentry Chemical Co.*, 219 USPQ 542 (TTAB 1983); *McCarthy’s on Trademarks and Unfair Competition*, § 31:72, “defects in use.”

In 2009, the Court of Appeals for the Federal Circuit heightened the standard for fraud on the United States Patent and Trademark Office (“USPTO”) in the *In re Bose* decision. Since then, the importance of pleading with particularity has been even more important. *In re Bose Corporation*, 91 USPQ2d 1938 (Fed. Cir. 2009), *reversing Bose Corp. v. Hexawave, Inc.*, 88 USPQ2d 1332, 1338 (TTAB 2007) and *reversing Medinol Ltd. v. Neuro Vasx Inc.*, 67 USPQ2d 1205 (TTAB 2003). The Court of Appeals for the Federal Circuit clarified the standard by which fraud can be found, requiring that a declarant knowingly make a false material representation with the *actual intent* to deceive the USPTO. *Id.* Cross Farms’ pleading falls short of this standard and fails to state both which person allegedly knowingly made false, material misrepresentations of fact with intent to defraud, and what those different false, material misrepresentations of fact are.

As previously indicated, Cross Farms charges Smoke Inn with fraud without stating any factual or statutory basis and is thereby in violation of Federal Rule 9(b) and subsequent

precedent. It is the purpose of Rule 12(b)(6) to allow the Board to eliminate actions that are fatally flawed in their legal premises (as here) and destined to fail, and thus to spare parties to a cancellation proceeding the burdens of unnecessary pretrial and trial activity. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989), cited in *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 26 USPQ2d 1038 (Fed. Cir. 1993). Based on Cross Farms' lack of any factual basis for asserting fraud and failure to plead with particularity a statutory fraud on the Office, no relief can be granted, and Smoke Inn should be spared the unnecessary legal expense and other burdens associated with defending a cancellation proceeding on this ground.

Rule 9(b) has four purposes: (1) to ensure that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of; (2) to protect defendants from frivolous suits; (3) to eliminate fraud actions where all facts are learned after discovery, and (4) to protect defendants from harm to their goodwill and reputation. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). "A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial and (2) that plaintiff has substantial pre-discovery evidence of those facts." *Id.*

Cross Farms' allegations of fraud fall far short of what is required by Rule 9(b) of the Federal Rules of Civil Procedure. To state a claim of fraud on the Office, a Plaintiff must plead, in accordance with Rule 9(b), the following elements: "(1) a false representation was made to the Patent and Trademark Office regarding a material fact; (2) the registrant's knowledge or belief that the representation was false; (3) the intention to induce action or refraining from action in reliance on a misrepresentation; (4) reasonable reliance on the misrepresentation; and (5) damages proximately resulting from such reliance." *Marshak v. Treadwell*, 58 F. Supp. 2d

551, 566 (D.N.J. 1999), *aff'd* 240 F.3d 184, 196 (3d Cir. 1999). Here, Cross Farms' Counterclaim fails to provide any specific facts supporting elements (2) and (3) above.

Because Cross Farms' Counterclaim is based on fraud, Cross Farms must plead that Smoke Inn "knowingly made false, material representations of fact and intended to deceive" the Office. *Monster Daddy LLC v. Monster Cable Prods.*, Civil Action No. 6:10-1170-HMH, 2010 WL 4853661, at *3 (D.S.C. Nov. 23, 2010). Rule 9(b) allows "malice, intent, knowledge, and other conditions[s] of mind" to be "alleged generally." Fed. R. Civ. P. 9(b). "It is true that Rule 9(b) requires particularity when pleading fraud or mistake, while allowing . . . knowledge [to] be alleged generally." *Iqbal*, 556 U.S. at 686 (internal quotations marks omitted). "But 'generally' is a relative term." *Id.* "In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake." *Id.* "Rule 9 merely excuses a party from pleading [state of mind] under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8." *Id.* Accordingly, to plead fraud on the Office, a plaintiff "must allege sufficient *underlying facts* from which a court may reasonably infer that a party acted with the requisite state of mind." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009); *Asian and Western Classics B.V. v. Selkow*, 92 U.S.P.Q. 2d 1478, 2009 WL 3678263 (T.T.A.B. 2009).

In the Counterclaim here, Cross Farms has failed to allege sufficient underlying facts supporting its allegations of knowledge and intent on the part of Smoke Inn. The Counterclaim sets forth the following three allegations in support of its fraud claim:

7. Based upon information and belief gathered through [Cross Farms]'s investigation of [Smoke Inn]'s business and its website, notwithstanding the allegations contained in [Smoke Inn]'s Statement of Use filed on November 9, 2011, [Smoke Inn] has never used its alleged ***Kiss My Ash*** trademark with any of the following goods: pants, shorts, jackets, sweaters, pullovers, coats, neckwear, footwear, and outerwear, namely, jackets and coats.

8. At the time [Smoke Inn] filed its Statement of Use for ***Kiss My Ash*** trademark, it was not using the trademark in connection with all of the goods included within the Statement of Use and knew that it was not using the mark with all of the goods for which it alleged use in the Statement of Use.

9. Upon information and belief, and based upon the results of [Cross Farms]'s investigation and based upon the goods currently available for sale at [Smoke Inn]'s website and through [Cross Farms]'s review of archival copies of [Smoke Inn]'s website, [Smoke Inn] knowingly made false, material misrepresentations of fact in procuring registration of its Kiss My Ash trademark that is the subject of registration no. 4,084,198 with the intent to defraud the U.S. Patent and Trademark Office. Specifically, [Smoke Inn] knew that the ***Kiss My Ash*** trademark was not in use in commerce in connection with the majority of the goods identified in the application at the time the Statement of Use was filed, yet still alleged use of the mark in commerce with those goods, namely, pants, shorts, jackets, sweaters, pullovers, coats, neckwear, footwear, and outerwear, namely, jackets and coats.

(*Id.*, ¶¶ 7-9) (emphasis in original).

Cross Farms alleges in paragraph 7, “upon information and belief,” that Smoke Inn has never used its mark on all of the goods for which the mark was registered. Cross Farms further alleges in paragraph 9, “upon information and belief,” that Smoke Inn knowingly made false, material representations of fact in procuring its registration with the intent to defraud the USPTO, and that Smoke Inn knew the mark was not in use in commerce in connection with all of the recited goods yet still alleged use of the mark in commerce with those goods.

Conspicuously absent from Cross Farms’ terse recitation of the elements of its cause of action are any supporting facts suggesting knowledge or intent on the part of Smoke Inn. *See Exergen*, 575 F.3d at 1331 (“Pleading on ‘information and belief’ is permitted under Rule 9(b) when essential information lies uniquely within another party’s control but only if the pleading sets forth the *specific facts* on which the belief is reasonably based.”). While Cross Farms provides some factual circumstances surrounding Cross Farms’ presentation of these statements to the Office and Cross Farms’ alleged non-use of the mark, these allegations are insufficient

with regard to Smoke Inn’s state of mind. In *Mayfield v. National Association for Stock Car Auto Racing*, the Fourth Circuit Court of Appeals held that a plaintiff’s assertion that defendant’s statements “were known by [the defendant] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity” were “entirely insufficient.” 674 F.3d 369, 378 (4th Cir. 2012). The Fourth Circuit stated that this kind of “conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegation that *Twombly* and *Iqbal* rejected.” *Id.* Likewise, Cross Farms’ pleading merely marches through the legal standard for fraud on the Office; Cross Farms alleges, based solely on its own belief, that Smoke Inn made false, material statements of fact, that Smoke Inn knew these statements were false, and that Smoke Inn intended to defraud the Office.

More specifically, Cross Farms’ assertions in paragraphs 7 and 9 regarding Smoke Inn’s knowledge and intent to use the KISS MY ASH mark in commerce lack factual assertions supporting Cross Farms’ belief. Cross Farms’ only facts alleged regarding Smoke Inn’s alleged intent to deceive are vague references in paragraphs 7 and 9 to Cross Farms’ own purported review of the goods currently available for sale at Smoke Inn’s website and “archival copies of [Smoke Inn]’s web site.” Counterclaim, ¶¶ 7 and 9. Such facts, even if true, do not suffice in pleading the element of intent to deceive. The Board cannot infer from Cross Farms’ pleading that Smoke Inn had any specific intent to defraud the Office.

As to Cross Farms’ assertions in paragraph 8 that (i) Smoke Inn knew at the time it filed its Statement of Use that it was not using the mark in connection with all of the goods included within the Statement of Use and (ii) Smoke Inn knew that it was not using the mark with all of the goods for which it alleged use in the Statement of Use, Cross Farms neither provides the Board with any facts from which to draw a reasonable inference that Cross Farms purportedly

had knowledge of use of the mark with fewer than all of the alleged goods, nor provides any explanation for its purported belief therein. In *Intellimedia Sports Inc. v. Intellimedia Corp.*, the Board explained that this type of allegation is insufficient “because it does not set forth any particular facts which, if proven, would establish that respondent believed or had no reasonable basis not to believe” the purportedly false statement. 43 U.S.P.Q. 2d 1203 at *4 (1997). Here, again, Cross Farms has not pleaded any facts sufficient to suggest that Smoke Inn had any specific intent to defraud the Office.

Indeed, although Cross Farms was on notice that Smoke Inn had at least *eight different physical retail locations* in 2012 (*see, e.g.*, Notice of Opposition, Exhibit E), Cross Farms’ Counterclaim alleges finding fewer than all of the recited goods *only on Smoke Inn’s web site*—without even acknowledging the existence of, let alone any investigation of, any of Smoke Inn’s (presently 12) physical locations in Florida and North Carolina.

The crux of Cross Farms’ Counterclaim is a bald assertion that Cross Farms was unable to find all of the recited goods on Smoke Inn’s web site, and so Smoke Inn’s statement of use must necessarily be fraudulent. Cross Farms’ claim of fraud fails to plead facts sufficient to support a reasonable inference of Smoke Inn’s knowledge or intent. Cross Farms has not set forth any facts underlying its belief that Smoke Inn knew that its Statement of Use was false or that the statement was made with intent to deceive the USPTO. Cross Farms’ pleading hinges upon the unfounded assumption that any statements purportedly made by Smoke Inn were not just false, but also fraudulent. This is plainly improper, because all of the elements of fraud—including fraudulent intent—must be pleaded with specificity. The mere fact that fewer than all of the recited goods were found by Cross Farms during its review of Smoke Inn’s web site does not itself support any inference that statements made on behalf of Smoke Inn were therefore

made with the intent to defraud the Office. *See, e.g., Zao Odessky Konjatschnyi Zawod v. Sia Baltmark Invest*, 109 U.S.P.Q.2d 1680, 1683-84, 2013 WL 5945677 (E.D. Va. 2013).

In *Zao*, the district court held that “[Plaintiff] has not set forth any facts underlying its belief that [Defendant] knew that its affidavit of excusable non-use was false or that it was made with intent to deceive the USPTO. [Defendant]’s pleading hinges upon the assertion that after the merger with GEOCOM, any statements purportedly made on [Defendant]’s behalf were not just false, but also fraudulent. The Court disagrees. [Defendant]’s knowledge of the merger with GEOCOM does not raise any inference that statements made on behalf of [Defendant] were therefore made with the intent to defraud the USPTO. Without any factual basis for its belief that [Defendant] knowingly and intentionally deceived the USPTO, [Plaintiff] cannot prevail on its claim of fraud in [Defendant]’s section 8 affidavit.” *Id.*

Without any factual basis for its unfounded belief that Smoke Inn knowingly and intentionally deceived the USPTO, Cross Farms cannot prevail on its claim of fraud in Smoke Inn’s Statement of Use. The Counterclaim therefore fails to provide a plausible factual basis for Cross Farms’ claims that Smoke Inn knowingly and intentionally presented false statements to the Office, and the Board should dismiss this Counterclaim.

In sum, Cross Farms’ unsupported allegation of fraud provides no reasonable basis for the Counterclaim for cancellation, and the lack of any actual factual basis and the failure to state particular information required by Federal Rule 9(b) lead inexorably to a conclusion that the Counterclaim lacks the required sufficiency.

II. CROSS FARMS’ BLANKET DENIALS IN ITS ANSWER ARE IMPROPER AND SHOULD BE STRICKEN

Federal Rule of Civil Procedure 8(b)(1)(B) states that “[i]n responding to a pleading, a party must admit or deny the allegations asserted against it by an opposing party.” *Id.* “A denial

must fairly respond to the substance of the allegation.” FRCP 8(b)(2). Where a defendant cannot in good faith deny an entire allegation, he “*must admit* the part that is true and deny the rest.” FRCP 8(b)(4) (emphasis added).

Cross Farms violated this rule by indiscriminately denying multiple allegations in its Answer, without making any effort to identify parts of such allegations that are indisputably true, even those that Cross Farms admits elsewhere in its Answer and Counterclaim. In particular, Cross Farms’ blanket denials of paragraphs 12, 13, 14, and 18 of the Notice of Opposition are improper and lead to some confounding results.

For example, paragraph 12 of the Notice of Opposition alleges:

12. [Cross Farms]’s recited goods are “Cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes; Chemical flavorings in liquid form used to refill electronic cigarette cartridges; Electronic cigarette liquid (e-liquid) comprised of flavorings in liquid form used to refill electronic cigarette cartridges; Absorbent paper for tobacco pipes; Asian long tobacco pipe sheaths; Asian long tobacco pipes (kiseru); Cartomizers, namely, combination electronic cigarette refill cartridges sold empty and atomizers, sold as a component of electronic cigarettes; Chewing tobacco; Cigar and cigarette boxes; Cigar and cigarette boxes not of precious metal; Cigar and cigarette boxes of precious metal; Cigarette ash receptacles; Cigarette cases; Cigarette cases made of precious metal; Cigarette cases not of precious metal; Cigarette filters; Cigarette holders; Cigarette holders not of precious metal; Cigarette holders of precious metal; Cigarette lighter holder; Cigarette lighter holder not of precious metal; Cigarette lighters not for land vehicles; Cigarette lighters not of precious metal; Cigarette lighters of precious metal; Cigarette lights not of precious metal; Cigarette paper; Cigarette papers; Cigarette rolling machines; Cigarette rolling papers; Cigarette tubes; Cigarette-rolling machines; Cigarettes; Cigarettes containing tobacco substitutes not for medical purposes; Clips for attaching cigarette lighters onto objects; Computerized cigarette lighters; Electric cigarettes; Electronic cigarette lighters; Electronic cigarette refill cartridges sold empty; Electronic cigarettes; Electronic cigarettes for use as an alternative to traditional cigarettes; Electronic cigars; Electronic hookahs; Electronic smoking pipes; Filter-tipped cigarettes; Filtered cigars and cigarettes; Fitted covers for tobacco pipes; Flavored tobacco; Hand-held machines for injecting tobacco into cigarette tubes; Hand-rolling tobacco; Holder for a cigarette pack and lighter; Holders for cigar and cigarette of precious metal; Holders for cigars and cigarettes; Holders of cigars and cigarettes of precious metal; Hookah tobacco; Japanese shredded tobacco (kizami tobacco); Leaf tobacco; Lighters for smokers; Liquefied gas cylinders for cigarette lighters; Machines allowing smokers to make cigarettes by themselves; Molasses tobacco; Pipe tobacco; Pocket apparatus for rolling cigarettes; Pocket apparatus for self-

rolling cigarettes; Pocket appliances for rolling one's own cigarettes; Pocket devices for self-rolling of cigarettes; Pocket machines for rolling cigarettes; Pocket-size cigarette rolling machines; Roll your own tobacco; Rolling tobacco; Smokeless cigar vaporizer pipes; Smokeless cigarette vaporizer pipe; Smokeless tobacco; Smokers' articles, namely, outdoor cigar and cigarette disposal units; Smokers' articles, namely, outdoor receptacles for cigar and cigarette ash and waste; Smoker's articles, namely, metal pocket-sized receptacles with lids for cigarette butts; Smoking tobacco; Tobacco; Tobacco filters; Tobacco grinders; Tobacco jars; Tobacco jars of precious metal; Tobacco pipe cleaners; Tobacco pipes; Tobacco pouches; Tobacco powder, namely, snus; Tobacco spittoons; Tobacco substitute; Tobacco substitutes; Tobacco substitutes not for medical purposes; Tobacco tins; Tobacco water pipes; Tobacco, cigars and cigarettes.”

In paragraph 12 of Cross Farms’ Answer, Cross Farms denied paragraph 12 of the Notice of Opposition in its entirety. Yet, paragraph 12 of the Notice of Opposition lists verbatim all of the goods that are recited in Cross Farms’ application serial no. 86/104,216, which is the application Smoke Inn is opposing herein. It defies logic that Cross Farms would deny, *in its entirety*, the goods listed in its own USPTO application, particularly without the required identification of the portion(s) of the recital of goods it purportedly disputes.

As another example, in paragraph 13 of Cross Farms’ Answer, Cross Farms denied in its entirety paragraph 13 of the Notice of Opposition, which alleges:

13. [Cross Farms] proposes to sell cigars, tobacco cigarettes, tobacco, ash receptacles, lighters, electronic cigarettes, and countless other smoking-related items. [Smoke Inn] also sells cigars, tobacco, ash receptacles, lighters, and countless other smoking-related items. Due to these goods being highly related, it would be reasonable for users of the parties’ products to believe or to be confused or deceived into thinking that [Cross Farms’] products originate with or are in some way associated with or connected with, sponsored, authorized or endorsed by [Smoke Inn].

It is nonsensical that Cross Farms would deny that it “proposes to sell cigars, tobacco cigarettes, tobacco, ash receptacles, lighters, electronic cigarettes, and countless other smoking-related items” when its own intent-to-use trademark application (serial no. 86/104,216) recites that Cross Farms intends to use its mark in connection with these very same goods (which are discussed above with reference to paragraph 12 of the Answer).

As a further example, in paragraph 14 of Cross Farms' Answer, Cross Farms denied in its entirety paragraph 14 of the Notice of Opposition, which alleges:

14. Further, it is noted that [Cross Farms] did not apply, in the application being opposed, to federally register its KISS YOUR ASH GOODBYE mark in connection with articles of clothing. However, [Cross Farms] does use its KISS YOUR ASH GOODBYE mark on articles of clothing, such as t-shirts, just as [Smoke Inn] uses its KISS MY ASH mark on articles of clothing, such as t-shirts. Example photographs of some of [Cross Farms'] products are attached as Exhibit F hereto.

Despite Cross Farms' blanket denial, Cross Farms' own application (serial no. 86/104,216) being opposed shows that Cross Farms did not, in fact, apply to register the mark in connection with articles of clothing, and so at least that portion of paragraph 14 should have been admitted. Moreover, Exhibit F to the Notice of Opposition clearly shows Cross Farms' own products, which Cross Farms failed to admit.

As an additional example, in paragraph 18 of Cross Farms' Answer, Cross Farms denied in its entirety paragraph 18 of the Notice of Opposition, which alleges:

18. [Smoke Inn] has granted no license, right or title in its KISS MY ASH mark to [Cross Farms], and [Cross Farms'] mark is confusingly similar to that of [Smoke Inn] when used in connection with [Cross Farms'] proposed goods. Therefore, [Cross Farms] is not entitled to registration of the proposed mark shown in Serial No. 86/104,216.

It is undisputed that Smoke Inn has, in fact, granted no license, right, or title in its KISS MY ASH mark to Cross Farms, and Cross Farms has no good-faith basis for denying at least that portion of paragraph 18, even if Cross Farms disputes the remaining allegations contained in that paragraph.

Smoke Inn should not be required to guess which factual allegations in the Notice of Opposition Cross Farms denies and which ones Cross Farms does not. These unqualified denials should be stricken because it is impossible for Smoke Inn to tell whether Cross Farms is denying all of the averments in the paragraphs or whether it is merely denying some, but not all, of the

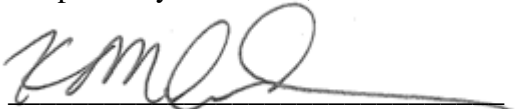
allegations in the paragraphs, especially when read together with the allegations of Cross Farms' Counterclaim. *U.S. v. Beary*, 2007 WL 2712217 at * 10 (N.D. Cal. Sept. 14, 2007) (striking answer that failed to adequately address allegations of complaint); *Clarendon Am. Ins. Co. v. All Bros. Painting, Inc.*, 6:13-CV-934-ORL-22, 2013 WL 5921538 (M.D. Fla. Nov. 4, 2013) (blanket denials of allegations in complaint stricken because it was impossible to tell whether defendant was denying all of the averments in each paragraph); *Massacre v. Davies*, No. 13-cv-04005 NC (N.D. Cal. Aug. 18, 2014) (striking answer in its entirety because it "includes sweeping denials that do not line up with the facts [Defendant] has himself pled in his counterclaims. . . . These denials do not conform to the requirement of the Federal Rules of Civil Procedure that a party admit parts of allegations that are true and deny the parts that are not.").

Cross Farms' blanket denials of the allegations in paragraphs 12, 13, 14, and 18 of the Notice of Opposition should be stricken, and Cross Farms should be required to specify which allegations it admits and which it denies, and otherwise bring them into conformance with the allegations of his Counterclaim.

III. CONCLUSION

WHEREFORE, Opposer and Counterclaim Respondent Smoke Inn requests (i) that Cross Farms' Counterclaim for cancellation be dismissed for failure to state a claim upon which relief may be granted, and (ii) that paragraphs 12, 13, 14, and 18 of Cross Farms' Answer be stricken for violating Rules 8(b)(1)(B), 8(b)(2), and 8(b)(4) of the Federal Rules of Civil Procedure.

Respectfully submitted,


By: 
Kevin M. Drucker
David L. Cargille
Mendelsohn, Drucker, & Dunleavy, P.C.

1500 John F. Kennedy Blvd., Suite 312
Philadelphia, Pennsylvania 19102
Attorneys for Opposer, Smoke Inn, LLC

Date: 1/23/2015

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited electronically to the Trademark Trial and Appeal Board on the date shown below, with a copy sent via first-class mail to: Jordan A. LaVine, Flaster Greenberg PC, 1600 John F. Kennedy Blvd., 2nd Floor, Philadelphia, PA 19103.

A handwritten signature in black ink, appearing to read 'KMD', is written over a horizontal line.

Kevin M. Drucker

Dated: 1/23/2015