

ESTTA Tracking number: **ESTTA1027671**

Filing date: **01/08/2020**

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

Proceeding	91237356
Party	Plaintiff Rocket Sports, LLC
Correspondence Address	PAUL W KODA KODA LAW FIRM PLLC 1775 EYE STREET NW SUITE 1150 WASHINGTON, DC 20006 UNITED STATES paul@kodafirm.com 240-997-1116
Submission	Reply in Support of Motion
Filer's Name	Paul W. Koda
Filer's email	paul@kodafirm.com
Signature	/Paul W. Koda/
Date	01/08/2020
Attachments	Opposers Reply to Applicants Response to Opposers Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Federal Rule of Civil Procedure 12b6.pdf(90536 bytes)

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

ROCKET SPORTS, LLC	:	
	:	
Opposer,	:	
	:	
vs.	:	Opposition No. 91237356
	:	
DEXTER KAN	:	
	:	
Applicant.	:	

**OPPOSER’S REPLY TO APPLICANT’S RESPONSE TO
OPPOSER’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF MAY BE GRANTED PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

Pursuant to TBMP § 503, Rocket Sports, LLC (“Opposer”) submits this Opposer’s Reply to Applicant’s Response to Opposer’s Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Opposer’s Reply”).

On June 17, 2019, Applicant filed Applicant’s Motion for Leave to Amend Answer to Notice of Opposition in which Applicant proposed the addition of several counterclaims. On July 7, 2019, Opposer responded with Opposer’s Response to Applicant’s Motion for Leave to Amend Answer to Notice of Opposition. Then, on July 22, 2019, Applicant responded with Applicant’s Reply to Opposer’s Response to Applicant’s Motion for Leave to Amend Answer to Notice of Opposition. On November 9, 2019, the Board issued an order stating that, “[a]pplicant’s motion to amend its answer to include a counterclaim is GRANTED IN PART, that is, only to the extent that it includes a claim of non-use in commerce.” Applicant states in Applicant’s Response to

Opposer’s Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Applicant’s Response”) that the Board set November 30, 2019 as a deadline for Opposer to answer the Counterclaim. Yet, the Board’s ruling did not preclude the Opposer from taking full advantage of the opportunity to test the sufficiency of the Applicant’s new counterclaim as set forth under the rules. Consequently, under Federal Rule of Civil Procedure 12(b)(6) and TBMP § 503, Opposer has the opportunity to argue that the Applicant’s new counterclaim fails to state a claim for which relief may be granted. In addition, the rules state, “[w]hen the defense of failure to state a claim upon which relief can be granted is raised by means of a motion to dismiss, the motion must be filed before, or concurrently with, the answer.” TBMP § 503.01. Furthermore, the rules dictate that “[w]hen the motion is directed to an amended pleading, it must be filed before, or concurrently with, the movant’s answer to the amended pleading.” TBMP § 503.01. Not only has Opposer done precisely what is allowed under the rules in its Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Federal Rule of Civil Procedure 12(b)(6) filed November 30, 2019 (“Opposer’s Motion to Dismiss”), but Opposer’s Motion to Dismiss explains why the Applicant’s new counterclaim fails as a matter of law – namely that the relied upon “facts” are not true. Applicant states in Applicant’s Response that “[t]o 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) emphasis added, quotations omitted).” This is precisely the Opposer’s point. The matter being tested for sufficiency must be “factual matter,” not merely any “matter,” particularly such matter that includes

mischaracterizations, misstatements, and false allegations. The word “factual” is important in this context. And, it is precisely the Applicant’s new counterclaim, which is not based on “factual matter,” but rather, merely “matter,” consisting of mischaracterizations, misstatements, and false allegations that Opposer seeks to test with Opposer’s Motion to Dismiss.

Finally, Applicant argues that Opposer’s Motion was meritless and filed in “Bad Faith” because the Opposer “*knew* it was meritless and defective.” The Federal Rules of Civil Procedure allow the Opposer to test the sufficiency of a counterclaim once it is allowed. The Opposer’s argument has merit because the matter to be tested in the counterclaim must be “factual matter,” not merely any “matter.” And, the rules specifically provide for rescheduling the date for filing an answer in the event that such a filing becomes necessary. The Applicant’s “Bad Faith” argument is itself bad faith. Consequently, Opposer respectfully requests that the Board disregard Applicant’s “Bad Faith” argument.

CONCLUSION

Again, for the foregoing reasons in this Opposer’s Reply and the reasons stated in Opposer’s Motion to Dismiss, Opposer hereby respectfully requests that the Board: 1) grant Opposer’s Motion to Dismiss; 2) disregard Applicant’s argument that the deadline to Answer the Counterclaim was *not* tolled; and 3) disregard Applicant’s demand that Opposer show cause why it should not be found in default for failing to “Answer the Counterclaim.”

Dated: January 8, 2020

Respectfully Submitted,

_____/Paul W. Koda/_____
Paul W. Koda
Koda Law Firm PLLC
1775 Eye Street, Suite 1150
Washington, DC 20006
240-997-1116 direct
paul@kodafirm.com
Attorney for Opposer

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 8th day of January, 2020, a copy of this OPPOSER'S REPLY TO APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) was sent by electronic mail at rkl@rklatlaw.com to:

Christopher Reaves, Esq.
Rosenberg, Klein & Lee
3458 Ellicott Center Drive, Suite 101
Ellicott City, MD 20143
Attorney for Applicant

and

Morton J. Rosenberg, Esq.
Rosenberg, Klein & Lee
3458 Ellicott Center Drive, Suite 101
Ellicott City, MD 20143
Attorney for Applicant

_____/Paul W. Koda/
Paul W. Koda
Koda Law Firm PLLC
1775 Eye Street, Suite 1150
Washington, DC 20006
240-997-1116 direct
paul@kodafirm.com
Attorney for Opposer