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

Proceeding	92057500
Party	Plaintiff Orbis Distribution, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Application Serial Number: 78/368710  
Registration Number: 3197276  
For the Mark: Bee Naturals

Orbis Distribution, Inc,  
Plaintiff,

v.

Bee Naturals, Inc.,  
Defendant.

Cancellation Number:  
92057500

**PLAINTIFF’S REPLY IN SUPPORT OF  
ITS MOTION FOR RECONSIDERATION AND  
IN REPLY TO THE DEFENDANT’S RESPONSE**

The plaintiff makes the following reply to the defendant’s response to the plaintiff’s motion for reconsideration and in support thereof.

**1. The defendant cites to no case law, statute or treatises in support of its reply brief.**

The defendant uses colorful, combative language in its responsive brief, but it makes no real arguments, presents no facts, and cites to no cases, statutes or treatises in support of said language. Therefore, its response brief should be ignored by the Board.

**2. The defendant fails to so much as even brief any of the issues raised by the plaintiff in its motion for reconsideration.**

The plaintiff notes that it has raised sixteen (16) issues in its motion for reconsideration (Motion for Reconsideration, 7/19/14, P 4-7, 10-11), none of which were so much as even mentioned by the defendant. The first argument of the motion (Id., P 10-11) applies these 16 issues to the relevant law in the Law section (Id., P 7-8). The second argument applies some of

these 16 issues that tie in to the decision to alter the registration after the grace-period has expired and to allow an affidavit filed in the name of someone other than the owner to stand (Id., P 11-12) to the relevant law in the Law section (Id., P 8-10). The defendant fails to brief any of these issues. Therefore, the Board should rule in favor of the plaintiff.

**3. The Board has ruled that a gap of numerous days (78) to file a response to motion meant that a response could not be heard.**

The Board has ruled that a gap of numerous days (78) to file a response to motion meant that the response could not be heard. M-Tek Inc. v. CVP Systems Inc., 17 USPQ2d 1070, 1070 (TTAB 1990). By even greater logic, the Board should hold that a party that fails to file a timely answer should have a default judgment filed against it. In this case, the defendant filed an Answer seventy (70) days after the complaint was filed; therefore, as with the case of M-Tek Inc., the Board should rule that its Answer was filed late and should rule in favor to the plaintiff's motion for default judgment.

Moreover, as shown below, because it did not legally exist at the time it filed its Answer, the defendant could not have legally filed its Answer until nearly 10 months after the Complaint was filed, and the Board should have denied any documents that were filed in this time-frame.

More importantly, it could not have obtained any interest in a trademark until that time, so its Section 8 and 15 documents were filed errantly.

**4. The defendant has submitted no documents that are currently under review that prove that it has obtained corporate existence.**

In all of the documents that are in the review of the Board, none of them show that the company was reinstated. Therefore, no documentation has attached been attached as exhibits to motions or documents currently under consideration that the company was reinstated. Because

no documentation has been submitted that is currently under the review of the Board that counters the claim that the defendant was dissolved during the period discussed, the Board should rule in favor of the plaintiff and issue an Order in favor of the plaintiff's Motion for Reconsideration and its Motion for Default Judgment.

If the documents attached to the prematurely filed motion for summary judgment are considered by the Board, these only prove that the reinstatement occurred on the 29<sup>th</sup> of April, 2014. Therefore, it could not have legally filed an Answer until that date, and the Board should not have accepted any document filed by this non-legal entity until that date. This date is nearly ten months after the complaint was filed. It is 291 days after the Complaint was filed and 251 days after the time for filing an Answer had expired.

More importantly, it was eight years and four months after the administrative dissolution occurred; eight years, three months and twenty days since the certificate of registration issued; almost one year (9 months and 20 days) after the grace period for filing the Section 8 and 15 documents expired.

**5. The Missouri Statutes clearly contemplate that an administratively dissolved corporation loses its interests in its name (and therefore potentially its trademark as well) upon dissolution.**

Unlike a voluntary dissolution in which a corporation reserves its right to its name for a period of one year following the voluntary dissolution pursuant to Mo. Rev. Stat. § 351.476.2(8), administrative dissolution under Mo. Rev. Stats. §§ 351.484 & 351.486 do not allow for such a reservation of a corporation's name. Thus, the administrative dissolution statute allows for the possibility that the name of the company and potentially its trademark might be used by another party upon the date of dissolution. The fact that another company could have registered itself as

Bee Naturals, Inc. as of December 2006 in the State of Missouri proves that the defendant was unable to preserve any trademark rights during the period of dissolution.

**6. The Federal Circuit has determined that while administratively dissolved, a corporation does not have the ability do typical things, such as obtain interest in intellectual property or file an action to enforce its intellectual property rights.**

In a recent case, the United States Court of Appeals for the Federal Circuit determined that an administratively dissolved corporation did not have the requisite ability to enter in to contracts under state law nor to obtain interest in intellectual property. Paradise Creations, Inc. v. UV Sales, Inc., 315 F.3d 1304, 1309 (Fed. Cir. 2003). (The plaintiff in Paradise Creations had signed a contract regarding a patent and then subsequently sued, all while in a state of administrative dissolution.) The Federal Circuit also held that an administratively dissolved corporation could not file a lawsuit because it did not have the requisite standing. Id. “In summary, at the time the appellant filed its suit, it agrees that it did not have enforceable rights to the patent and did not have standing to assert federal jurisdiction.” Id. at 1310

Similarly, as shown in the plaintiff’s motion for reconsideration, its motion for default judgment, and its response to the defendant’s motion for judgment on the pleadings, the defendant lacked the requisite legal existence to conduct legal business to use its mark in commerce or to obtain any interest in its trademark. Id. at 1309.

Likewise, as with standing in the Paradise Creations case, the defendant lacked the requisite corporate existence to file the Article 8 and 15 documents during the period of dissolution. Id. Furthermore, and again as with standing in the Paradise case, the defendant lacked the requisite corporate existence to file an Answer in this case. Id. Therefore, the motion for reconsideration should be granted, as should the plaintiff’s other motions.

**7. The Federal Circuit has also determined that while once reinstated, a corporation cannot use a state’s corporate revival statute to retroactively claim enforceable intellectual property rights or standing.**

In Paradise Creations, the Federal Circuit also recently determined that a corporation cannot rely on a state’s corporate revival statute to retroactively claim enforceable trademark rights or standing. Id. at 1310. (The plaintiff, after executing its contract for a patent and filing suit in a state of administrative dissolution, subsequently was reinstated and claimed that its previous acts were therefore legally accomplished.) “It cannot rely on the Florida corporate revival statute to retroactively claim enforceable patent rights on the day it filed its complaint, in order to assert standing.” Id. First, while administratively dissolved, no state or federal rights may be legally gained in intellectual property. Second, even presuming the state statute were to somehow allow for state rights to be obtained, because standing in federal court and rights pursuant to patent law are federal issues that exist as of the date of filing a complaint, a state statute does not create new rights within the federal scheme; otherwise, the federal landscape would be filled with many peaks and valleys.

Certainly, federal trademark itself law would be compromised if companies could do business illegally and still obtain federal trademark registrations. In the same way that a state statute cannot retroactively allow for standing or patent rights in the Paradise Creations case, the federal issues of (A) use in continuous legal interstate commerce by the owner of the mark, and (B) filing of the Section 8 and 15 affidavits by said owner cannot be determined retroactively.

Furthermore, as with standing, corporate revival cannot allow a defendant an opportunity to file an answer, once the time for filing said answer has long passed. The law must be fair and even handed regarding both plaintiffs and defendants.

## **8. Deficiencies cannot be cured after the expiration of the grace period.**

As shown in the brief in support of the plaintiff's motion for reconsideration, the registration must be cancelled if the affidavit or declaration is filed by someone other than the current owner of the registration. 37 C.F.R. § 2.164(b). Untimely filing and filing in the name of the wrong party cannot be cured after expiration of the grace period. In re Media Central IP Corp., 65 U.S.P.Q.2d 1637 (Comm'r Pat. & Trademarks 2002); In re ACE III Communications, Inc., 62 U.S.P.Q.2d 1049 (TTAB 2001). If the affidavit is filed by one who is not then the owner of the mark, this may not be corrected after expiration of the sixth year. In re Caldon Co. Ltd. Partnership, 37 U.S.P.Q.2d 1539 (Comm'r pat. & Trademarks 1995). If the affidavit or declaration was filed in the name of the wrong party, and there is no time remaining in the grace period, the registration will be cancelled. 15 U.S.C. § 1058; 37 C.F.R. § 2.164(b). Filing in the name of another entity is not a deficiency that can be corrected after the expiration of the grace period. *See* In re Precious Diamonds, Inc., 635 F.2d 1637, 208 U.S.P.Q. 410 (C.C.P.A. 1980); In re Media Central IP Corp., 65 U.S.P.Q.2d 1637; Re: Trademark Registration of ACE III Communications, Inc., 62 U.S.P.Q.2d 1049; In re Caldon Co. Ltd. Partnership, 37 U.S.P.Q.2d 1539; In re Weider, 212 U.S.P.Q. 947 (Comm'r Pat. & Trademarks 1981). If the affidavit or declaration was mistakenly filed in the name of a person or legal entity who did not own the mark as of the filing date of the application, a new affidavit cannot be filed in the name of the true owner unless there is time remaining in the grace period. *See* TMEP § 1604.07(a). Re: Trademark Registration of ACE III Communications, Inc., 62 U.S.P.Q.2d 1049 (T.T.A.B. 2001).

Pursuant to these cases and the Paradise Creations case, the time for the defendant to remedy the issues of this case has passed, and as a matter of federal law, the Section 8 and 15 documents must be denied and the registration cancelled.

## CONCLUSION

Therefore, the plaintiff requests the relief cited in its motion for reconsideration, and asks as well that the plaintiff's opposition (filed 8/22/13), motion for default judgment (filed 8/22/13), and motions to strike (filed 10/3/13 and 11/12/13) be granted.

Dated: August 28, 2014

Respectfully Submitted,  
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**CERTIFICATION OF SERVICE**

I hereby certify that a true and correct copy of the Plaintiff's Motion for Reconsideration was sent to Nelson D. Nolte by email at the email listed (nnolte@polsterlieder.com; mlucchesi@polsterlieder.com) and by first class mail, postage paid on this 28<sup>th</sup> Day of August, 2014:

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