

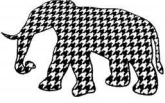
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057550
Party	Plaintiff Board of Trustees of The University of Alabama and Paul W. Bryant, Jr.
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Date	11/21/2016
Attachments	Diaz Motion to Strike.pdf(172358 bytes)

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

BOARD OF TRUSTEES OF THE)	
UNIVERSITY OF ALABAMA and)	Cancellation No. 92057550
PAUL W. BRYANT, JR.,)	
)	
Petitioners,)	Mark:
)	
)	
)	
v.)	Registration No. 3,993,520
)	
RICHARD DIAZ,)	
)	
Registrant.)	

**PETITIONERS’ MOTION TO STRIKE
CERTAIN EXHIBITS FROM REGISTRANT’S NOTICE OF RELIANCE**

Petitioners Board of Trustees of the University of Alabama (the “University”) and Paul W. Bryant, Jr. (“Bryant, Jr.”) (collectively, “Petitioners”) respectfully request that the Board strike Exhibits 16-20 and 23-27 to Registrant Richard Diaz’s (“Registrant”) Notice of Reliance.

I. INTRODUCTION AND FACTUAL BACKGROUND

This proceeding concerns Registrant’s registration of the Houndstooth elephant design mark (Reg. No. 3,993,520) for “bibs, shorts, caps, cloth bibs, dresses, gloves, headbands, infant and toddler one piece clothing; infant diaper covers; jackets; nightshirts; pants; rain jackets; scarves; shirts; shorts; sweatshirts; t-shirts; ties; toboggan hats; pants and caps.” In this action, Petitioners move to cancel Registrant’s mark because it is likely to cause confusion with Petitioners’ Marks—which include the Houndstooth Pattern, the Paul W. Bryant Museum & Houndstooth Hat Design Mark, and

Elephant Design Marks—under Section 2(d) of the Lanham Act and falsely suggests a connection with the University and Coach Bryant in violation of Section 2(a) of the Lanham Act. *See* Dkt. No. 7. Petitioners have also moved to cancel Registrant’s Mark because Registrant did not make use of Registrant’s Mark on all goods identified in his use-based application at least as early as the filing date and because Registrant has abandoned Registrant’s Mark by failing to use Registrant’s Mark in commerce outside of the State of Alabama for more than three consecutive years.

On October 28, 2016, Registrant filed his Notice of Reliance (“Registrant’s Notice of Reliance”). Dkt. No. 51 Registrant’s Notice of Reliance is rife with (1) duplicative and cumulative evidence, (2) Internet evidence the relevance of which is insufficiently identified, and (3) evidence submitted through a Notice of Reliance on the sole basis that the evidence was previously submitted as an exhibit to Registrant’s Motion for Summary Judgment. Given these many errors, the Board should strike the exhibits and decline to consider them in ruling on the Petition to Cancel Registrant’s Mark.

II. ARGUMENT AND CITATION OF AUTHORITY

“An adverse party may object to a notice of reliance, in whole or in part, on the ground that the notice does not comply with procedural requirements of the particular rule under which it was submitted.” T.B.M.P. §§ 532, 707.02(b)(2). Here, numerous exhibits submitted in Registrant’s Notice of Reliance should be stricken from the record because: (1) Exhibits 16 and 20-22 are duplicative of Exhibits 2-5 of Registrant’s Notice of Reliance; (2) Exhibits 16-27 inappropriately rely on T.B.M.P. § 704.05(b) as a basis for admission under a Notice of Reliance; and (3) Registrant has failed to properly

identify the relevance of the Internet evidence submitted in 16, 19, 21, 23-27. *See* Dkt. No. 51

A. Exhibits 2-5 and 16, 20-22 Are Identical and Unnecessarily Duplicative

The Board explicitly requires that parties only submit Internet evidence that is not “duplicative and irrelevant.” T.B.M.P. § 702.05 Duplicative evidence should not be considered. *Blue Man Productions Inc. v. Tarmann*, 75 U.S.P.Q.2d 1811, 1818 (noting that duplicative evidence is not considered); *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 1719 (same). Here, Registrant has inappropriately submitted exhibits that are duplicative and should be stricken from the record. Specifically, Exhibits 16, 22, 23, and 24 should be stricken because they are identical to Exhibits, 2, 3, 4, and 5.

B. Exhibits 16-27 Are Not Admissible Under T.B.M.P. § 704.05(b)

Registrant submits Exhibits 16-27 under Section 704.05(b) of the T.B.M.P. because the exhibits were also exhibits “to Registrant’s Motion for Summary Judgment.” *see* Dkt. 51, ¶¶12-23. However, Section 704.05(b) plainly indicates that “[e]xhibits and other evidentiary materials attached to a party’s brief on the case *can be given no consideration* unless they were properly made of record during the time for taking testimony.” T.B.M.P. § 704.05(b). Thus, exhibits to motions for summary judgement are not admissible under T.B.M.P. § 704.05(b). *See e.g., Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 U.S.P.Q.2d 1112, 1116 (T.T.A.B. 2009) (“Evidence submitted outside of the trial period—including that attached to briefs—is untimely and will not be considered.”)(Citing T.B.M.P. § 704.05(b)); *Life Zone Inc. v. Middleman Group Inc.*, 87 U.S.P.Q.2d 1953 (T.T.A.B. 2008) (same); *Bass Pro Trademarks LLC v. Sportsman’s Warehouse Inc.*, 89 U.S.P.Q.2d 1844 (T.T.A.B. 2008).

Here, Registrant improperly seeks to submit exhibits to its Motion for Summary Judgment under a Notice of Reliance solely on the basis that they were previously submitted as exhibits to said Motion. Because T.B.M.P. § 704.05(b) provides no such authority for doing so, these exhibits should be stricken from the record.

C. Registrant Has Failed to Sufficiently Indicate the Relevance of the Internet Materials Submitted in Exhibits 16, 19, 21, 23-27.

T.B.M.P. § 704.08(b) provides specific guidance on the proper submission of Internet Materials under a Notice of Reliance and specifically states that:

[F]or Internet documents it is not sufficient for the propounding party to broadly state that the materials are being submitted to support the ground at issue. For example, if the claim is likelihood of confusion, the propounding party should associate the materials with a relevant likelihood of confusion factor. Further, if the same document is submitted to support more than one element of a claim or defense, the propounding party should indicate the specific element or fact support by the document in a group of documents.

T.B.M.P. § 704.05(b). *See also FUJIFILM SonoSite, Inc. v. Sonoscape Co., Ltd.*, 111 U.S.P.Q.2d 1234, 1237 (T.T.A.B. 2014) (finding Internet materials improperly submitted because propounding party failed to identify which pages were relevant to specific likelihood of confusion factors); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 U.S.P.Q. 1022, 1025 (T.T.A.B. 2011) (Internet materials improperly submitted because propounding party failed to indicate the relevance of the material being offered).

Here, Registrant only states that Exhibits are submitted to “to refute the likelihood of confusion and Petitioner’s lack of standing.” *See* Dkt. 51, ¶¶ 12, 14-23. This generalized statement of the alleged relevance of these materials is therefore insufficient, and therefore they are improperly submitted under Registrant’s Notice of Reliance and should be stricken from the record.

III. CONCLUSION

As set forth in above, Registrant has failed to properly submit numerous exhibits in his Notice of Reliance. Specifically, (1) Exhibits 16 and 20-22 are duplicative of Exhibits 2-5 of Registrant's Notice of Reliance; (2) Exhibits 16-27 are not admissible in a Notice of Reliance under T.B.M.P. § 704.05(b); and (3) Registrant has failed to properly identify the relevance of the Internet evidence submitted in Exhibits 16, 19, 21, 23-27. These exhibits therefore should be stricken from the record.

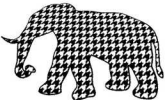
Dated: November 21, 2016

Respectfully submitted,

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

BOARD OF TRUSTEES OF THE)	
UNIVERSITY OF ALABAMA and)	Cancellation No. 92057550
PAUL W. BRYANT, JR.,)	
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Petitioners,)	Mark:
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)	
v.)	Registration No. 3,993,520
)	
RICHARD DIAZ,)	
)	
)	
Registrant.)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONERS' MOTION TO STRIKE CERTAIN EXHIBITS FROM REGISTRANT'S NOTICE OF RELIANCE was served on Registrant on November 21, 2016 via first class mail to:

Michael J. Douglas
Leak Douglas & Morano PC
17 20th Street, N., Suite 200
The John A. Hand Building
Birmingham, AL 35203

/Alicia Grahn Jones/
Counsel for Petitioners

CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing PETITIONERS' MOTION TO STRIKE CERTAIN EXHIBITS FROM REGISTRANT'S NOTICE OF RELIANCE is being filed electronically with the TTAB via ESTTA on this day, November 21, 2016.

/Alicia Grahn Jones/
Counsel for Petitioners