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

Proceeding	92065883
Party	Defendant William J. Bearden dba NERO Central
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Submission	Opposition/Response to Motion
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD

Joseph Valenti, NERO International Holding)
Co., Inc., & NERO Live Adventure Games, LLC,)
v.) Cancellation No. 92065883
) (Parent Case)
William J. Bearden dba NERO CENTRAL)
_____))
Joseph Valenti, NERO International Holding)
Co., Inc., & NERO Live Adventure Games, LLC,)
v.) Cancellation No. 92065911
) (Child Case)
NERO World, LLC,)

**RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR
SUMMARY JUDGMENT**

COMES NOW Respondents, by and through counsel, and for their opposition to Petitioners' Motion for Summary Judgment state as follows:

I. INTRODUCTION

Petitioners have moved for Summary Judgment in this matter, alleging that they are entitled based on no question of material facts regarding priority, likelihood of confusion, and fraud. Respondents have reviewed the evidence submitted with Petitioners' Motion for Summary Judgment and agree that there are no questions of fact. However, this evidence all shows that the issues are in

favor of Respondents, not Petitioners. In this Response and in their cross Motion for Summary Judgment, Respondents demonstrate that they are the prior users of the marks, that Petitioners are using marks confusingly similar to Respondents', and that no fraudulent statements were made to the USPTO by Bearden. For these reasons, Petitioners' Motion for Summary Judgment should be denied and Summary Judgment should be entered in favor of Respondents.

II. RESPONSE TO PETITIONER'S STATEMENT OF FACTS

Respondents respond to Petitioners' Statement of Facts as follows:

1. Valenti is the President, sole owner, and sole member of NIHC. Valenti Decl. ¶1.

Response: Deny. Affidavit of Matthew Pearson (hereinafter referred to as Pearson Affidavit and incorporated herein by this reference), filed with Respondents' cross Motion for Summary Judgment as Exhibits, ¶¶ 1, 14, and Exhibit 1, demonstrating that Matthew Pearson is also a shareholder of Nero International Holding Company, Inc..

2. Valenti is the sole owner and sole member of NLAG. Id., ¶ 2.

Response: Deny. See Pennsylvania Department of State Certification dated August 21, 2018, attached as Exhibit 2 to the Declaration of William Joseph Bearden (hereinafter referred to as Bearden Affidavit and incorporated herein by this reference), filed with Respondents' cross Motion for Summary Judgment as Exhibits, certifying that NERO Live Adventure Games, LLC is not registered in Pennsylvania. See also the current registry of businesses in Pennsylvania, <https://www.corporations.pa.gov/Search/corpsearch>.

3. NIHC is a single-member corporation, with Valenti as the sole owner and sole operator of NIHC. As such, Valenti has a personal stake in the outcome of these proceedings. Id., ¶ 4.

Response: Deny. See Pearson Affidavit ¶¶ 1, 14, and Exhibit 1. See also arguments and facts laid out in Respondent’s Cross Motion for Summary Judgment incorporated in its entirety throughout this opposition by this reference.

4. Valenti’s company, NIHC, is the owner of U.S. Application Ser. No. 87/865,575 (“Petitioners’ NERO Application”) for use of Petitioners NERO Mark with Petitioners’ NERO Services. Horton Decl. ¶ 3.

Response: Deny, NIHC is not “Valenti’s company.” Pearson Affidavit ¶¶ 1, 14, and Exhibit 1.

5. Bearden is the owner of U.S. Registration No. 4697406 for use of Bearden’s NERO NERO Mark with Bearden’s NERO Marks Services. Id., ¶ 4, Ex. 2

Response: Admit.

6. Bearden was the applicant of U.S. Registration No. 4657988 for use of Bearden’s NERO Mark with Bearden’s NERO Marks Services. Id., ¶ 5, Ex. 3

Response: Admit.

7. NERO World, LLC, is the current owner of Bearden's NERO Registration by way of an Assignment of Trademark from Bearden on 09/14/2015 and recorded on 09/14/2015 recorded on Reel/Frame: 5622/0904. Id., ¶ 5, Ex. 3

Response: Admit.

8. On July 30, 2018, the U.S. Patent and Trademark Office ("USPTO") issued an Office Action refusing registration of Petitioners Application under Section 2(d) of the Trademark Act based on alleged likelihood of confusion with the mark in both Defendant's Registrations. Id., ¶ 6, Ex. 4

Response: Deny. According to the Petitioners' exhibit, the application would have been denied even were there not likelihood of confusion with the with the Defendants' Registrations. Id., ¶ 6, Ex. 4.

Timing for Petitioner's Motion for Summary Judgment

9. On 05/31/2019, Petitioners served Petitioners' Rule 26(a)(1) Initial Disclosures on Defendant's. Id., ¶ 2

Response: Admit.

10. Petitioners filed this motion for summary judgment before the November 11, 2019, deadline for pretrial disclosures for the first testimony period. See Docket Entry No. 41.

Response: Admit.

Priority

11. Petitioners have continuously used the NERO mark with Petitioner's Services since at least as early as August 3, 1998, to present. Valenti Decl., ¶ 1,2,3, 9, Ex. G.

Response: Deny, Bearden Declaration Exhibit 1 at 39:9, 40:18-22, 43:5-17, 44:8-19, 52:8-53:22, and Exhibits 2, 3, 4, 5, 6, and 7; See also arguments and facts laid out in Respondent's Cross Motion for Summary Judgment

12. Bearden was a former licensee of NIHC's, which allowed Bearden to operate under the name NERO Central using Petitioners Mark. Valenti Decl. ¶ 19 and 20, Ex. K and L.

Response: Deny, Bearden Declaration Exhibits 4, 5, 6, and 7; See also arguments and facts laid out in Respondent's Cross Motion for Summary Judgment

13. According to Bearden's first use on Bearden's NERO Registration, Bearden was a licensee of NIHC and had no rights or interest to the NERO mark. Horton Decl. ¶ 5, Ex. 3.

Response: Deny, Bearden Declaration Exhibits 4, 5, 6, and 7; See also arguments and facts laid out in Respondent's Cross Motion for Summary Judgment.

14. Bearden admitted “Valenti asked/told/instructed Bearden to cease and desist all use of the NERO Trademark prior to, during, and after a) Bearden’s NERO Trademark filing and b) Bearden’s NERO NERO Trademark filing.” Horton Decl. ¶ 13, Ex. 11, No. 22.

Response: Admit.

15. Defendants have admitted that “the annual dollar amount of Defendant’s revenues from sales of services using Bearden’s NERO Trademark and Bearden’s NERO NERO Trademark in United States commerce during each of the past ten years and the annual dollar amount of Defendant’s promotional expenditures promoting Bearden’s NERO Trademark and Bearden’s NERO NERO Trademark in United States commerce during each of the past ten year” was “none.” Id. ¶ 15, Ex. 13, No. 10.

Response: Deny. Respondents responded to Interrogatory No 10 “As defined, none.” The question present in Interrogatory 10 requested the annual dollar amount of the revenues and promotional expenditures of Defendants William Bearden and Nero World *collectively*. Respondents do not have any collective revenues or expenses, as they have no joint accounts of any kind. Respondents tried to meet and confer regarding issues with the Petitioners’ definitions, and were instructed that no definitions would be changed, and to answer to the best of their ability based on the definitions provided. Declaration of Jovanna R. Bearden In Opposition to Petitioners’ Motion for Summary Judgment, incorporated herein by

reference. Therefore, this response cannot be used as a basis to assert that there have been no annual revenues or expenditures, as Plaintiffs have done in this Statement of Facts. Bearden Declaration ¶ 15.

Petitioners' Use of the NERO Mark with Petitioners' NERO Services

16. Petitioners' NERO Services are offered through a website controlled by Valenti, and run under NLAG at <http://nerolarp.com>. Valenti Decl., ¶ 13.

Response: Deny, Refer to arguments and facts laid out in Respondent's Cross Motion for Summary Judgment

17. Petitioners' NERO Services are also offered through license contracts, which are signed by licensees to run NERO Chapters and promote the NERO mark. Id. 17, Ex. J.

Response: Deny, Refer to the facts and arguments of Respondents' Motion for Summary Judgment

18. Petitioners currently have numerous NERO Chapters under license agreements. Each NERO Chapter prominently features the NERO mark. Id. ¶ 17, Ex. J

Response: Deny, Refer to the facts and arguments of Respondents' Motion for Summary Judgment

19. From August 3, 1998, to present, Petitioners have spent approximately \$30,000 on advertising for its NERO mark. Valenti Decl. ¶ 12.

Response: Deny, Respondents cannot find paragraph 12 of the Valenti Declaration in the Petitioners' Motion for Summary Judgment Filing and on that basis Deny. Refer to the facts and arguments of Respondents' Motion for Summary Judgment.

20. Petitioners advertising targets consumers interested in meeting and conducting roleplaying events via advertising through word of mouth, flyers, NLAG's website, and social media outlets. Valenti Decl. ¶ 13 and 14.

Response: Unable to Admit or Deny in part and deny in part. Respondents lack knowledge of these facts and have sought discovery regarding these issues which has not yet been responded to. With regard to NERO Live Adventure Games, LLC and Nero International Holding Company, Inc. for the time period in question, Deny. Refer to the facts and arguments of Respondents' Motion for Summary Judgment.

21. Since at least as early as August 3, 1998, through present, Petitioners have promoted Petitioners NERO Services offered by Petitioners and through NERO Chapters and through NLAG's websites. Id. 1-3, 5, 13-18, Ex. A, B, C, D, G, H, I, J, K.

Response: Deny, Bearden Declaration Exhibit 1 at 39:9, 40:18-22, 43:5-17, 44:8-19, 52:8-53:22, and Exhibits 2, 3, 4, 5, 6, and 7. Refer also to the facts and arguments of Respondents' Motion for Summary Judgment

22. Petitioners have policed third-party use of the NERO mark, including sending cease and desist letters to Defendants using the NERO mark. Id. 22

Bearden's NERO Marks and Bearden's NERO Marks Services

Response: Admit with regard to Valenti. Deny as to other Petitioners. Refer to the facts and arguments of Respondents' Motion for Summary Judgment

23. Bearden's NERO Registrations is for use of Bearden's NERO Mark with Bearden's NERO Marks Services. Horton Decl. 5, Ex. 3.

Response: Admit.

24. Bearden's NERO NERO Registrations is for use of Bearden's NERO NERO Mark with Bearden's NERO Marks Services. Id. 4, Ex. 2

Response: Admit.

25. "NERO" is an acronym for "New England Role Playing Organization." Id. 17, Ex. 15.

Response: Admit.

26. Defendants admitted that Bearden's NERO Marks Services have a target market of consumers who want to engage in "Entertainment, namely, production of live-action roleplaying games and interactive theatre productions." Id. 13, Ex. 11, No. 27.

Response: Admit.

27. Bearden admitted he "knew of NLAG's Website prior to Bearden's application" for Bearden's NERO Marks. Id. 13, Ex. 11, No. 9

Response: Admit.

28. Bearden admitted "Bearden's Website (<http://nerocentral.com>) had hyperlinks or links to NLAG's Website under the "NERO LARP" link." Id. 13, Ex. 11, No. 17.

Response: Admit in part and deny in part. Defendants response to Request for Admission Number 17 actually stated "Admit that Bearden's Website contained a link to "www.nerolarp.com" which has been defined as "NLAG's Website", however, was identified as being owned by "NERO® International Holding Co., Inc." at the time the link was in existence."

29. Bearden's Website, <http://nerocentral.com>, contained language, and at sometimes links, referencing a "parent company" of NERO International. These links, when available, were hyperlinked to NLAG's Website. Id. 16, Ex. 14.

Response: Deny. NLAG is not a legal entity and cannot own property or websites, and did not have a website at the time referenced.

30. Bearden admitted his selection of NERO was based on his business since 2006, however, during that time he was a licensee of NIHC and did not have any rights or interest in the NERO mark. Id. 15, Ex. 13, No. 1.

Response: Deny, Bearden Declaration Exhibit 1 at 39:9, 40:18-22, 43:5-17, 44:8-19, 52:8-53:22, and Exhibits 2, 3, 4, 5, 6, and 7. Refer to the facts and arguments of Respondents' Motion for Summary Judgment.

31. According to Bearden, "he searched google, facebook, and the USPTO's records" when determining if the NERO mark was available. However, Bearden has previously admitted to knowing of NLAG's website and had links to NLAG's website. Id. at 15, Ex. 13, No 3.

Response: Respondents deny that Id at 15, Ex. 13 No 3 supports the fact stated in paragraph 31.

32. Defendant's responded with "none" when asked if "Defendants have sold or licensed in the United States commerce any services bearing any of Bearden's NERO Trademark and Bearden's NERO NERO Trademark." Id. 15, Ex. 13, No. 5.

Response: Deny. In response to Interrogatory 5, Defendants responded "As defined, none." This is because the question asked if Defendants had *collectively*

sold or licensed in US commerce any services bearing the marks. Defendants have not made any collective sales or licences, and therefore answered accordingly.

32. Bearden answered “no” when asked if “Bearden acquired Bearden’s NERO Trademark and Bearden’s NERO NERO Trademark by assignment.” As a licensee, he had no ownership in the NERO mark and was only permitted to use the NERO mark by Petitioners. Id. 13, Ex. 13, No. 6.

Response: Deny. Bearden Declaration Exhibit 1 at 39:9, 40:18-22, 43:5-17, 44:8-19, 52:8-53:22, and Exhibits 2, 3, 4, 5, 6, and 7. Refer to the facts and arguments of Respondents’ Motion for Summary Judgment.

33. Bearden responded that NERO International Holding CO., Inc. was identified as “NERO International,” which also was listed as the parent company. Id. 13 and 16, Ex. 13, No. 20 and Ex. 14.

Response: Admit in part and deny in part. Bearden was asked who NERO International referred to and responded:

“Full Name - NERO INTERNATIONAL HOLDING CO., INC.
Principal place of business – Upon information belief, 219
Fremont Street, Peeskill, New York 15066, Westchester County
State of incorporation – New York
Juridical status – Abandoned in 2009, Dissolved by
Proclamation April 27, 2011.”

34. There are no limitations as to the consumers or channels of trade in Petitioners' NERO Application. Id. 3, Ex. 1.

Response: Admit.

35. There are no limitations as to the customers or channels of trade in Bearden's NERO Registrations. Id. 4 and 5, Ex. 2 and 3.

Response: Admit.

36. There are no limitations as to the customers or channels of trade in Bearden's NERO Registrations. Id. 4 and 5, Ex. 2 and 3.

Response: Admit.

III. ARGUMENT

THERE IS NO ISSUE OF MATERIAL FACT THAT *RESPONDENTS* ARE THE PRIOR AND SENIOR USERS OF THE MARK

Respondents refer to their arguments regarding priority from their Cross Motion for Summary Judgment. These arguments are not repeated herein due to page limit considerations.

THERE IS NO ISSUE OF MATERIAL FACT THAT THE *PETITIONER* IS USING A MARK THAT IS CONFUSINGLY SIMILAR TO *RESPONDENTS*'

Respondents admit that there is no issue of material fact that Petitioner is using a mark that is confusingly similar to Respondents' NERO Mark. For further discussion regarding Respondents' priority and ownership of the mark, please see Respondents' cross Motion for Summary Judgment. These arguments are not repeated here due to page limit considerations.

THERE WERE NO FRAUDULENT STATEMENTS MADE TO THE USPTO, AND THEREFORE NO QUESTION OF FACT ON THIS ISSUE

Petitioners argue that there is no question of material fact that Bearden made fraudulent statements to the USPTO while acquiring his NERO and NERO NERO marks. However, because Bearden has priority, (see Respondent's Cross Motion for Summary Judgment, not repeated herein due to page limit considerations), Bearden's statements were not false, and there was no fraud. Petitioners also fail to provide any evidence to support their claim of fraud. Further, even if evidence was provided, there cannot be fraud when there is a subjective belief that the applicant has a superior right to use the mark, even if this belief is mistaken. Therefore, because Bearden is the superior owner of the marks, there is no evidence to support Petitioner's claim, and at worst Bearden was mistaken in his belief of ownership, Petitioners have failed to make their argument without question of fact, and summary judgment on this issue must fail.

Petitioners argue that there is clear and convincing evidence that Bearden:

- a. knowingly rendered false misrepresentations in his original application by alleging first use of the Infringing NERO NERO Mark in November 2014, as well as a false misrepresentation in his original application by alleging first use of the Infringing NERO Mark in June 2006 (Valenti Decl., Ex. K);
- b. perpetuated that false statement by fabricating documents for use as specimens in support of said application;
- c. failed to withdraw or repudiate this false evidence at any time during the proceeding despite his knowledge and, instead, kept perpetuating such fraud by means of renewed assertions throughout the registration process; and
- d. obtained a registration for the NERO mark and the NERO NEW ENGLAND ROLEPLAYING ORGANIZATION mark.
- e. The evidence attached to Valenti's Declaration leaves no doubt that Bearden knew the NERO Mark was being used Petitioners, was owned by the Petitioners, and Bearden knew he was not the true owner of the NERO Mark. Valenti Decl. 18, 19 and 22, Ex. K and L. Horton Decl. 16, Ex. 14."

However, Petitioners failed to substantiate these statements or provide any evidence to support them, let alone clear and convincing evidence. Each of Petitioners' evidentiary claims is either irrelevant or misleading:

- a. Petitioners' Exhibit K to Valenti's Declaration, taken together with evidence of Mr. Valenti's knowing misrepresentations, does not demonstrate deception on the part of Bearden, but rather supports his date of first use (See Respondent's Cross Motion for Summary Judgment);

- b. Petitioners' Exhibit L is not evidence of Valenti's use and ownership, rather, it is evidence of his abandonment of the mark as well as Bearden's good faith basis for applying for the marks;
- c. Petitioners' Exhibit 14 is historical evidence of Bearden's use dating back to 2006, directly cutting against Petitioners' argument that Bearden fabricated evidence of use and defeating Petitioner's argument that Bearden was not using the mark in 2006, since Bearden was not a licensee as he then believed, due to Petitioners' fraud, but was rather using the mark in commerce without a valid license and therefore accruing rights to the mark;
- d. Defendants responded Interrogatory 20 that the parent company NERO International actually referred to NIHC-B, the same company referred to in Interrogatory 21, which was being fraudulently held out as owning the NERO mark (See Respondent's Cross Motion for Summary Judgment).

Furthermore, the complete response to Interrogatory 21 was not that Valenti was the owner of NERO International Holding Co., Inc., but that Valenti was held out as one of many owners of that company to the best of Respondents' knowledge.
- e. Valenti's demands of Bearden are irrelevant, as Valenti had no interest in the NERO name at the time or since.
- f. There has been no evidence provided that supports the argument that Bearden fabricated documents to use as specimens to support his application;

- g. There is no support that Bearden provided false evidence to the USPTO therefore supporting his application for the marks cannot be evidence of fraud; and
- h. As there is no support that Bearden did anything wrong, obtaining registrations of the marks at issue cannot be evidence of fraud.

Even if Petitioners had provided evidence of false statements, their argument still fails. Bearden did not deceive the Board because he believed he was, and in fact was, the legitimate owner of the mark.

“If the declarant subjectively believes the applicant has a superior right to use the mark, there is no fraud, even if the declarant was mistaken. See *Bose*, 580 F.3d at 1246 (“There is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive.”). Here, The Florida [**26] Priory did not put forth any evidence to establish that Pace—or Plaintiff Order, for that matter—knew or believed that The Ecumenical Order or The Florida Priory had a superior right to the marks at issue. See *Angel Flight*, 522 F.3d at 1211; *Citibank*, 724 F.2d at 1545 (rejecting a defendant’s fraud claim where the plaintiff was the “senior use[r] of th[e] term”); see also *Sovereign Order of Saint John v. Grady*, 119 F.3d 1236, 1241 (6th Cir. 1997) (“[A] valid trademark registration requires only that the registrant ‘believe’ himself to be the owner of the mark.” (quoting 15 U.S.C. § 1051)). Even assuming knowledge of The Ecumenical Order as of 1983, Plaintiff Order’s relevant service mark registrations provide that the marks were first used in commerce in 1926 and 1927. The bare knowledge that The Ecumenical Order existed as of 1983 does not undermine Plaintiff Order’s claim to be the senior user of those marks because, even knowing of The Ecumenical Order’s existence, Plaintiff Order could justifiably believe that its marks were superior based on their first use dating back to the 1920s. See *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366 (Fed. Cir. 2008) (explaining [**27] that even though circumstantial evidence may be used to prove intent, the evidence “must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement”). In any event, The Florida Priory failed to proffer any evidence to show that Pace (or Plaintiff Order) believed that The Ecumenical Order had a right to use the objected-to marks in commerce. This is fatal to the claim of fraud. See *Angel Flight*, 522 F.3d at 1210.

Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & Malta v. Fla. Priory of the Knights Hospitallers of the Sovereign Order of Saint

John of Jerusalem, Knights of Malta, the Ecumenical Order, 702 F.3d 1279, 1292 (11th Cir. 2012)

Petitioners' evidence shows that Bearden believed he was the legitimate, superior owner of the marks while providing no evidence to the contrary. Respondents' Motion for Summary Judgment demonstrates that Bearden's statements to the USPTO during registration were true. Therefore, Bearden could not have defrauded the USPTO in his application for the marks.

IV. CONCLUSION

Respondents have demonstrated that the Board should not grant Summary Judgment in favor of Petitioners. Petitioners' evidence shows that Bearden, in good faith, used the mark before Petitioners and made no knowingly false statements to the USPTO. Therefore, Summary Judgment should be entered in favor of Respondents.

Dated: December 3, 2019

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CERTIFICATE OF SERVICE

I, Jovanna R. Bearden, certify that on this 3rd day of December, 2019, a true and correct copy of the foregoing document was filed with the Trademark Trial and Appeal Board via the Electronic System for Trademark Trials and Appeals and sent by email to Counsel for Plaintiff, Phillip Thomas Horton at NEROLitigation@gmail.com .

Dated: December 3, 2019

By: / Jovanna R. Bearden /

Jovanna R. Bearden

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Joseph Valenti, NERO International Holding)
Co., Inc., & NERO Live Adventure Games, LLC,)
v.) Cancellation No. 92065911 (Child Case)
NERO World, LLC,)

**DECLARATION OF JOVANNA R. BEARDEN IN SUPPORT OF
RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR
SUMMARY JUDGMENT**

I, Jovanna R. Bearden, declare as follows:

1. I am the attorney of respondents in the above captioned cancellation proceedings.
2. I attempted to meet and confer with Petitioners' counsel regarding definitions provided with their discovery requests.

3. Petitioner's counsel instructed that no definitions would be changed, and for my clients to answer to the best of their ability based on the definitions provided.
4. My clients answered the discovery requests in good faith, to the best of their ability, given the instructions provided with the discovery requests.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 3rd day of December, 2019 at Adrian, Missouri.

Dated: December 3, 2019

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