

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

EJW/tdc

Mailed: November 22, 2017

Cancellation No. 92066858

*Mark J. Shapley, Mary B. Shapley,
and Shapley's, Inc.*

v.

Koestler, Inc.

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

On September 11, 2017, the original Petitioner, Mark J. Shapley, filed a petition to cancel. In response thereto, on October 12, 2017, Respondent filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on the grounds that the petition lacks sufficient (or any) factual allegations that would support a plausible claim that the mark is subject to cancellation under Section 2(a) or Section 2(c) of the Trademark Act.¹ On November 1, 2017, Petitioner filed an amended petition to cancel and a separate response to Respondent's motion, asserting that the motion to dismiss is moot.

Pursuant to Fed. R. Civ. P. 15(a)(1), made applicable to Board proceedings by Trademark Rule 2.116(a), a party may amend its pleading once as a matter of course within 21 days after serving it, or if the pleading is one to which a

¹ Respondent's supplemental certificate of service filed October 16, 2017 is noted.

responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Fed. R. Civ. P. 12(b), (e) or (f), whichever is earlier. *See* Trademark Rule 2.115; TBMP § 507.01 (June 2017).

Petitioners' amended petition to cancel was filed as a matter of course, and is accepted as Petitioners' operative pleading in this proceeding. *See* Fed. R. Civ. P. 15(a)(1)(A) and (B).²

Accordingly, Petitioners' additional names have been added to this proceeding. Additionally, Respondent's motion to dismiss is moot and will be given no consideration. Respondent is allowed until **thirty days from the mailing date of this order** to file an answer to the amended petition to cancel.

The discovery conference deadline, discovery period, disclosure due dates, and trial dates are reset as follows:

Time to Answer	12/22/2017
Deadline for Discovery Conference	1/21/2018
Discovery Opens	1/21/2018
Initial Disclosures Due	2/20/2018
Expert Disclosures Due	6/20/2018
Discovery Closes	7/20/2018

² The Board also notes the appearance of counsel for Petitioners by counsel's submission of the amended petition to cancel. *See Jacques Moret Inc. v. Speedo Holdings B.V.*, 102 USPQ2d 1212, 1216 (TTAB 2012) (law firm that filed motion to dismiss recognized as counsel of record for respondent); *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1613 n.1 (TTAB 1991) (appearance made by filing motion on behalf of respondent); TBMP § 114.03.

Plaintiff's Pretrial Disclosures Due	9/3/2018
Plaintiff's 30-day Trial Period Ends	10/18/2018
Defendant's Pretrial Disclosures Due	11/2/2018
Defendant's 30-day Trial Period Ends	12/17/2018
Plaintiff's Rebuttal Disclosures Due	1/1/2019
Plaintiff's 15-day Rebuttal Period Ends	1/31/2019
Plaintiff's Opening Brief Due	4/1/2019
Defendant's Brief Due	5/1/2019
Plaintiff's Reply Brief Due	5/16/2019
Request for Oral Hearing (optional) Due	5/26/2019

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).