

ESTTA Tracking number: **ESTTA1135452**

Filing date: **05/21/2021**

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

Proceeding	92075086
Party	Plaintiff Black Rifle Coffee Company LLC
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Submission	Motion to Amend Pleading/Amended Pleading
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Date	05/21/2021
Attachments	2021 05 21 Second Amended Petition for Cancellation 92075086.PDF(132442 bytes )

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

Black Rifle Coffee Company LLC,	)	
	)	Cancellation No. 92075086
Petitioner,	)	
	)	Mark: <b>ORCA</b>
v.	)	
	)	Registration No. 5,101,888
Giancarlo Fantappié,	)	
	)	Registration Date: December 13, 2016
Registrant.	)	
	)	

**SECOND AMENDED PETITION FOR CANCELLATION**

1. Black Rifle Coffee Company LLC (hereinafter “Petitioner”), a limited liability company organized under the laws of Utah, located at 1144 South 500 West, Salt Lake City, Utah 84101, believes that it is and will continue to be damaged by the existence of U.S. Registration No. 5,101,888 for the mark ORCA, owned by Giancarlo Fantappié (hereinafter “Registrant”), an individual believed to have an address at 1605 Lockness Place, Torrance, California 90501, and hereby petitions to cancel the registration. The grounds for cancellation are as follows:

2. On December 13, 2016, U.S. Registration No. 5,101,888 for the mark ORCA (the “Registered Mark”) issued to Registrant for use in connection with “coffee pods, tea pods, tea based pods containing milk,” in International Class 30 (the “Registered Goods”). Mr. Fantappié filed a trademark application for the ORCA mark on January 8, 2016, and filed a Statement of Use in support of the application on September 26, 2016, asserting that the mark was in use in commerce on all of the goods listed as of December 15, 2015.

3. Upon information and belief, U.S. Registration No. 5,101,888 was assigned from Giancarlo Fantappié to Drinkstation, Inc. on or about March 23, 2020, and was assigned from Drinkstation, Inc. to Giancarlo Fantappié on August 14, 2020.

4. Petitioner is the owner of U.S. Application Serial No. 88/638,724 for the mark ATOMIC ORCA for use in connection with “drinkware and beverageware,” in International Class 21, “apparel, namely, shirts, shorts, and hats,” in International Class 25, and “coffee and coffee-based beverages,” in International Class 30. The ATOMIC ORCA application was filed on October 2, 2019 based on Petitioner’s intent to use the applied-for mark in U.S. commerce. A current printout of information from the electronic database records of the USPTO showing the current status of U.S. Application No. 88/638,724 is attached hereto as Exhibit A.

5. On November 19, 2019, and again on June 12, 2020, Petitioner’s U.S. Application Serial No. 88/638,724 for the goods in Class 30 was denied registration by the USPTO on the grounds that the applied-for mark may be likely to cause confusion with the Registered Mark.

6. Petitioner began an investigation into whether Registrant was currently using, or had ever used, the Registered Mark in interstate commerce in connection with the Registered Goods.

### **ABANDONMENT**

7. Upon information and belief, Registrant expressly abandoned the Registered Mark. Petitioner conducted an independent investigation and failed to identify current use of the Registered Mark in connection with the Registered Goods on the Internet or elsewhere.

8. Upon information and belief, Registrant is not currently providing the Registered Goods in U.S. commerce under the Registered Mark. Upon information and belief, Registrant has not used the Registered Mark on the Registered Goods for at least three consecutive years.

Further, upon information and belief, Registrant discontinued use of the Registered Mark on the Registered Goods with an intent not to resume use.

9. According to Registrant's Facebook page, Registrant's business is "permanently closed." *See* Exhibit B. By telling the public that ORCA Coffee is permanently closed, Registrant evidenced its intent not to resume use of the mark, and therefore expressly abandoned the ORCA mark.

10. Registrant referred to a website located at <https://orca.coffee> on its Facebook page. *See* Exhibit B. However, there is no active website at that URL. *See* Exhibit C.

11. Upon information and belief, Registrant has not provided any of Registrant's Goods in U.S. commerce under the Registered Mark for an extended period of time. This extended period of nonuse also supports the conclusion that Registrant has no intent to resume use of the mark in connection with the Registered Goods and expressly abandoned the mark.

12. Therefore, based on the above allegations, upon information and belief, Registrant has ceased use in commerce of the Registered Mark in connection with the goods identified in the Registration with no intent to resume use and thus legally abandoned the Registered Mark pursuant to 15 U.S.C. § 1127.

13. Petitioner is being damaged by U.S. Registration No. 5,101,888 in that it reasonably believes that the Registration is invalid and may wrongfully prevent the registration of Petitioner's U.S. Application Serial No. 88/638,724.

### **PARTIAL ABANDONMENT**

14. In addition, Registrant has abandoned the Registered Mark with respect to particular goods covered in the registration due to non-use. The Registered Mark was registered

on January 8, 2016 for use in connection with “coffee pods, tea pods, [and] tea based pods containing milk.”

15. Upon information and belief, Registrant is not currently providing “tea pods” or “tea based pods containing milk” under the Registered Mark in U.S. commerce, and has never offered these goods under the Registered Mark in U.S. commerce. Accordingly, upon information and believe, Registrant has not used the Registered Mark for “tea pods” or “tea based pods containing milk” for more than three consecutive years.

16. In its motion to dismiss, Registrant has provided no evidence that it has ever used the Registered Mark in connection with the “tea pods” or “tea based pods containing milk.” *See* 2 TTABVUE, D Mot to Dismiss: FRCP 12(B).

17. Upon information and belief, more than three consecutive years of non-use of the Registered Mark in connection with “tea pods” and “tea based pods containing milk” have elapsed since the mark registered. As a result, Registrant has abandoned the mark for “tea pods” and “tea based pods containing milk.”

18. In addition, upon information and belief, Registrant’s business is permanently closed and Registrant stopped any use with no intent to resume use of the Registered Mark in connection with the “tea pods” and “tea based pods containing milk” claimed in the Registration. *See, e.g.*, Exhibits B and C.

19. Upon information and belief, Registrant has no bona fide use of the Registered Mark in connection with “tea pods” and “tea based pods containing milk” made in the ordinary course of trade for more than three consecutive years and has thus legally abandoned the Registered Mark pursuant to 15 U.S.C. § 1127.

20. Petitioner is being damaged by U.S. Registration No. 5,101,888 in that it reasonably believes that the Registration is invalid and may wrongfully prevent the registration of Petitioner's U.S. Application Serial No. 88/638,724 in Class 30.

### **FRAUD**

21. Paragraphs 1-20 are incorporated as if fully set forth herein.

22. Upon information and belief, Registrant was not using the Registered Mark in U.S. commerce in connection with at least "tea pods" and "tea based pods containing milk" as required by 15 U.S.C. § 1051 prior to the expiration of the deadline for Registrant to file the Statement of Use.

23. Upon information and belief, the only Statement of Use that Registrant filed in support of its application was false and/or fraudulent because, at the time of submission, and up to and through the deadline to submit the Statement of Use, the Registered Mark was not in use in the United States in connection with at least "tea pods" and "tea based pods containing milk."

24. Upon information and belief, at the time Registrant submitted the Statement of Use, Registrant knew that it did not sell "tea pods" and "tea based pods containing milk" in connection with the Registered Mark and that it would not begin doing so before the deadline to submit the Statement of Use. Consequently, its statement to the contrary to the USPTO was false.

25. Upon information and belief, Registrant submitted the Statement of Use with specific willful intent to deceive the USPTO for purposes of gaining registration of the Registered Mark.

26. Petitioner's belief as to Registrant's intent surrounding its submitted Statement of Use is based on a reasonable investigation into Registrant's business and offerings and its review

of all information publicly available, including the information provided by Registrant in its motion to dismiss. No information available to Petitioner shows or otherwise suggests that Registrant has ever offered “tea pods” or “tea based pods containing milk” in connection with the Registered Mark.

27. The application upon which the Registered Mark was based ultimately issued on December 13, 2016. In issuing the resulting registration for the Registered Mark, the USPTO relied on Registrant’s false and fraudulent declaration in the Statement of Use that Registrant was using the Registered Mark in connection with all of the Registered Goods when in fact Registrant was not using the mark then, was not using the mark prior to the deadline to submit the Statement of Use, and still hasn’t used the mark on such goods.

28. But for Registrant’s false and fraudulent declaration in the Statement of Use that Registrant was using the Registered Mark in connection with all of the Registered Goods, the USPTO would not have granted registration of the Registered Mark.

29. Upon information and belief, Registrant has fraudulently obtained registration of the Registered Mark pursuant to 15 U.S.C. § 1119.

30. Registration of the mark shown in U.S. Registration No. 5,101,888 damages and will continue to damage Petitioner because the Registration has been fraudulently obtained and may wrongfully prevent the registration of Petitioner’s U.S. Application Serial No. 88/638,724.

WHEREFORE, Petitioner requests that its Petition for Cancellation be granted and that U.S. Registration No. 5,101,888 be cancelled.

**Please direct all correspondence to:**

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Petitioner herein appoints Gregory C. Golla; Andrew S. Ehard; Scott W. Johnston; Lindsay M.R. Jones; Danielle I. Mattessich; Christopher J. Schulte; William D. Schultz; and all other attorneys of the firm of Merchant & Gould P.C., its attorneys to transact all business in the U.S. Patent and Trademark Office relating to this matter with full power of substitution.

Respectfully submitted,

BLACK RIFLE COFFEE COMPANY LLC

By its Attorneys,

Date: May 21, 2021

s/Scott W. Johnston  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing SECOND AMENDED PETITION FOR CANCELLATION was served upon the following attorney of record for Registrant by email this 21<sup>st</sup> day of May, 2021:

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s/Scott W. Johnston  
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Scott W. Johnston