

ESTTA Tracking number: **ESTTA1168151**Filing date: **10/25/2021**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party has filed a petition to cancel the registration indicated below.

**Petitioner Information**

Name	Gerald R Mollohan		
Entity	Individual	Citizenship	UNITED STATES
Address	PO BOX 507 ST. ALBANS, WV 25177 UNITED STATES		

Correspondence information	GERALD R MOLLOHAN PO BOX 507 ST. ALBANS, WV 25177 UNITED STATES Primary Email: botwnomads@aol.com Secondary Email(s): chewybotw@aol.com 3049821309
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**Registration Subject to Cancellation**

Registration No.	2926222	Registration date	02/15/2005
Registrant	BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL INC. POST OFFICE BOX 782 PAULORLORA@SUDDENLINK.NET MADISON, WV 25130 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 200. First Use: 1993/10/16 First Use In Commerce: 1993/10/16  
All goods and services in the class are subject to cancellation, namely: Indicating membership in a beneficial fraternal organization of motorcycle riders


**Grounds for Cancellation**

Abandonment	Trademark Act Section 14(3)
Deceptiveness	Trademark Act Sections 14(3) and 2(a)
The registration is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used	Trademark Act Section 14(3)
Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof	Trademark Act Sections 14(3) and 2(b)

Fraud on the USPTO	Trademark Act Section 14(3); In re Bose Corp., 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009)
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Related Proceedings	92059164
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## Mark Cited by Petitioner as Basis for Cancellation

U.S. Registration No.	4299480	Application Date	01/05/2012
Registration Date	03/05/2013	Foreign Priority Date	NONE
Word Mark	BROTHERS OF THE WHEEL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 026. First use: First Use: 1987/00/00 First Use In Commerce: 1987/00/00 Embroidered patches for clothing		

Attachments	85509063#TMSN.png( bytes ) Petition For The Cancellation of TM 2926222.pdf(136111 bytes ) EXHIBIT_LIST_DECLARATIONS_LIST_CANCELLATION PETITION.pdf(83583 bytes ) EXHIBIT_A_Cover Sheet New Cancellation Petition.pdf(31824 bytes ) EXHIBIT_A_DECLARATION OF GERALD R. MOLLOHAN FLAG.pdf(450982 bytes ) EXHIBIT_B_Cover Sheet New Cancellation Petition.pdf(31010 bytes ) EXHIBIT_B_ALABAMA_FLAG_PREC.pdf(739265 bytes ) EXHIBIT_C_Cover Sheet New Cancellation Petition.pdf(30763 bytes ) EXHIBIT_C_Mark No. 2926222 Logo Description By-Laws File March 23rd.pdf(273362 bytes ) EXHIBIT_D_Cover Sheet New Cancellation Petition.pdf(30763 bytes ) EXHIBIT_D_GENERIC MARK No. 2926222 File March 23rd.pdf(202232 bytes ) EXHIBIT_E_Cover Sheet New Cancellation Petition.pdf(30730 bytes ) EXHIBIT_E_Mark No. 2926222 Mark Design Plus WordsLetters-andor-No's-American Flags-Flags Amer.pdf(232661 bytes ) EXHIBIT_F_Cover Sheet New Cancellation Petition.pdf(30730 bytes ) EXHIBIT_F_RECKLESS DISREGARD TRADEMARK PRECEDENT.pdf(219624 bytes ) EXHIBIT_G_Cover Sheet New Cancellation Petition.pdf(31571 bytes ) EXHIBIT_G_DECLARATION_INCONTESTABILITY.pdf(179886 bytes ) EXHIBIT_H_Cover Sheet New Cancellation Petition.pdf(39803 bytes ) EXHIBIT_H_Declaration-Motion To Cancel 2926222.pdf(147679 bytes ) EXHIBIT_I_Cover Sheet New Cancellation Petition.pdf(31571 bytes )
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	EXHIBIT_I_DECLARATION_TRADEMARK NO. 2926222.pdf(166672 bytes )
Signature	/Gerald R. Mollohan/
Name	Gerald R. Mollohan
Date	10/25/2021

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

**In the matter of Trademark Registration No. 2926222**

**(US Serial Number: 6538199)**

**Mark: Brothers of the Wheel M.C.**

**Registration Date: February 15, 2005**

**GERALD R. MOLLOHAN,  
AKA BROTHERS OF THE WHEEL  
TRADEMARK REGISTRATION NO. 4299480  
PO BOX 507  
ST. ALBANS, WEST VIRGINIA 25177  
UNITED STATES**

**PETITIONER,**

**Cancellation No. \_\_\_\_\_**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.,  
PAUL D. WARNER, PRESIDENT  
PO BOX 782  
MADISON, WEST VIRGINIA 25130  
UNITED STATES**

**RESPONDENT.**

**PETITION FOR CANCELLATION**

In accordance with 15 U.S. Code § 1064 (5) - Cancellation of registration  
and 37 CFR §2.111 - §2.115 CANCELLATION: Filing Petition for Cancellation,  
Petitioner Gerald R. Mollohan, owner of the trademark: BROTHERS OF THE

WHEEL, Registration No. 4299480 in class: 26 for embroidered patches for clothing, hereby files his Petition with the Trademark Trial and Appeal Board ("TTAB"), requesting that the TTAB cancel Trademark Registration Number 2926222 for class: 200, belonging to Brothers of the Wheel M.C. Executive Council, Inc., registered with the United States Patent and Trademark Office ("USPTO") on February 15, 2005.

**THE GROUNDS FOR CANCELLATION ARE AS FOLLOWS:**

**A trademark cancellation must allege one or more grounds for challenging a particular trademark registration. In addition to alleging a valid ground for cancellation, the petitioner must allege in the petition for cancellation that it has a direct and personal stake in the outcome of the proceeding and that it could be harmed by the continued registration of the particular trademark.**

**Count I**

The mark has been abandoned, Lanham Act (Section 45)

**Count II**

Naked Licensing Law (or Doctrine), Section 45 of 15 U.S.C. 1051

**Count III**

Fraud on the USPTO, Lanham Act §14 (3) permits cancellation of a U.S.

Trademark Registration at any time if the registration

"Was obtained fraudulently".

"Reckless Disregard for the Truth Equals Fraud"

Trademark Act Section 14(3); In re Bose Corp. 580 F.3d 1240. 91 USPQ2d1938  
(Fed. Cir. 2009)

**Exhibit "F"- Exhibit "G"**

**Count IV**

**Misrepresentation of Source**

The mark is not, has not and can never be controlled, has the mark ever been a source, identifier, nor can the mark ever be a source by the Registrant/Respondent.

**Exhibit "G" - Exhibit "I"**

**Count V**

American Flag 15 U.S.C. §1052 (b) and Trademark Act Sections 14(3) and 2(b)

Declaration of Gerald R. Mollohan Flag Declaration

New Evidence - New Precedent at TTAB Uphold 2(d) Refusal

Trademark/Logo contains simulation of U.S. Flag

**Exhibit "B"**

**Count VI**

15 U.S.C. §1064(3) Mark is being used to misrepresent the source of the goods/services in connection with which it is being used. TM Act Section 14(3)

**Exhibit "G"**

**Count VII**

15 U.S.C. § 1064(3) False Trademark Applications and Filing Fraudulent Declarations.

**Exhibit "G"**

**Count VIII**

15 U.S. Code § 1125 - False Designations of Origin, False Descriptions, and dilution forbidden. **Exhibit "F"**- False Section 15 affidavit/declaration.

The Respondent, Brothers of the Wheel M.C. Executive Council, Inc., and its President/CEO, Paul D. Warner, are the Plaintiffs in an Adversary Proceeding in the United States Bankruptcy Court, Southern West Virginia at Charleston (**Case Number: 2:21-ap-02007**), against Defendant Gerald Roscoe Mollohan, also

known as Gerald R. Molloyhan, AKA BROTHERS OF THE WHEEL, Trademark Owner 4299480.

During recent investigations, several discrepancies in Respondent's Trademark registration no. 2926222 process and in the manner of conducting "business" by Respondent Brothers of the Wheel M.C. Executive Council, Inc. have determined the following:

1. The Lanham Act, section 45 refers to "losing a Trademark under the NAKED LICENSING LAW/Doctrine. It specifically states that a Trademark licensor (i.e., the owner of the Trademark/the Registrant) is REQUIRED to control the quality of goods or services offered by a licensee under the Trademark. It goes on to state, "If quality is not monitored or enforced, the license may be considered a NAKED LICENSE, the mark may lose its significance and become involuntarily abandoned. In such circumstances, a Trademark licensor's assertion of an infringement claim against a third party may risk a counterclaim for cancellation of the mark on the grounds that the license is naked". Put another way, a NAKED LICENSE of a Trademark occurs when the licensor "fails to exercise adequate control over the licensee". When a licensor is found to have failed to exercise such control, a court may find the Trademark owner has abandoned the Trademark, in
- 2.

3. which case the owner would be stopped from asserting rights to the Trademark". Thus, it is incumbent upon the Trademark owner to enforce its mark against

4. Misuse, and if the owner fails to do so, it risks being deemed to have abandoned the mark and thus may lose its right to the mark. If that is the case, the Trademark owner no longer has a valid Trademark, and it cannot be infringed upon.

5. Upon learning more about Naked Licensing criteria, Fraud Upon the United States Patent and Trademark Office, American Flag U.S.C. §1052(b), Petitioner Gerald R. Mollohan, AKA BROTHERS OF THE WHEEL, has initiated a counterclaim - crossclaim against the Respondent Brothers of the Wheel M.C. Executive Council, Inc. in the United States Bankruptcy Court, Southern West Virginia (**Case Number: 2:2-ap-2007**) for "Violation of Collusive Fraud Practices", Section 45 of 15 U.S.C.1051 the Lanham Act, Abandonment of Trademark no. 2926222, "Fraud Upon the Court, United States Patent and Trademark Office and Trademark Trial and Appeal Board," "False Trademark Applications and Filing Fraudulent Declarations". In this counterclaim, Petitioner is claiming that the Respondent,



1) did not retain express, contractual control over the licensee's quality control measures, and

2) did not have actual control over the licensee's quality control measures, thereby allowing Naked Licensing of its Trademark, and therefore unintentionally abandoned all rights to enforcement of the mark.

6. In addition, Petitioner has learned through further research into the Respondent's trademark no. 2926222 that during the Respondent, Brothers of the Wheel M.C. Executive Council, Inc. entire existence, a proper "license" agreement

7. has never been either drawn up or provided to any and all licensees which includes

8. Multiple chapters of the respondent/registrant throughout the United States, which are factually subservient to superiors and are allowing mark no. 2926222 to be controlled, and a source by those superiors.

9. Petitioner further has determined that the Respondent's By-Laws also make no reference whatsoever to any "license" agreement or to any "quality control" criteria.

11. On information and belief, mark no. 2926222 was obtained as a result of knowingly false statements about the ownership and use of the Mark, which were made with the intent to deceive the USPTO, constituting fraud on the USPTO.

### **ADDITIONAL FACTS CONCERNING LICENSING**

- a. “Naked Licensing” occurs when a licensor “fails to exercise adequate quality control over the licensee”. *Id.* at 596. Naked licensing may result in the trademark as a symbol of quality and a controlled source. *Id.* (citing McCarthy § 18:48.)
- a. Naked licensing is “*inherently deceptive* and constitutes abandonment of any rights to the trademark by the licensor”. *Id.* at 598. Consequently, where the licensor fails to exercise adequate quality control over the licensee, ‘a court may find that
- b. The respondent/owner has abandoned the trademark, in which case the
- c. owner would be estopped from asserting rights to the trademark’. “*Id.* at 596 (quoting *Moore*, 960 F.2d at 489).
- d. Respondent President/CEO Paul D. Warner purports to be in complete charge of, and has the responsibility of the day-to-day activities and operations of a “Shell Company” known as “Brothers of the Wheel M.C. Executive Council, Inc.”, and numerous additional front companies and alias’ (legal entities.)
- e. According to documents filed in the Charleston, West Virginia Secretary of State Office in Charleston, West Virginia, Respondents' is a Shell Company known as “Brothers of the Wheel M.C. Executive Council, Inc.”, and is incorporated in West Virginia as a “for profit” business, while Respondents' President/CEO

Paul D. Warner and its members have claimed in court records that Respondents' is a non-profit and charity. Others have been allowed “free reign” use of mark no. 2926222 without any written agreement.

- g. Any geographical territory agreement is lacking.
- h. There is no quality control, whatsoever, of mark no. 2926222.
- i. Respondent does not have, nor has it ever drafted a written licensing agreement, per requirements for allowing use of its Trademark.
- j. There is absolutely no quality control of mark no. 2926222.
- k. Respondents have always let it be known that their corporation is non-territorial because they have agreed to be subservient to, and follow the orders required by the 1% Outlaw Motorcycle dominant, to obtain and gain permission to exist and use mark 2926222 - Total lack of control and not the source of trademark, and Respondents are required to wear an American Motorcycle Association ("AMA") patch/logo/trademark near their patch/logo/trademark, clearly indicating that they are “AMA”. Further, the respondent's mark is cluttered with other text on patches also worn near the mark.
- l. Respondents' Brothers of the Wheel M.C. Executive Council, Inc. has abandoned the Corporation’s Trademark No. 2926222 rights.
- m. According to the Respondents’ “by-laws”, “Any member who has been

active for a period of five (5) years or more shall have the option of retiring and may be permitted to keep his colors (Mark No. 2926222) in their possession forever”. This, in and of itself, makes “quality control” of their Trademark No. 2926222 impracticable.

n. Respondents' trademark no. 2926222 is not policed adequately to guarantee the quality of the products and/or services sold under the mark (*General Motors Corp. v. Gibson Chemical & Oil Corp.*, 786 F.2d 105, 110; 2nd Cir. 1986) -

"When a trademark owner engages in Naked Licensing, without any control over the quality of goods produced by the licensee, such a practice is inherently

deceptive and constitutes abandonment of any rights to the trademark by the licensor (*Stanfield v. Osborne Industries*, 523d 871; 10th Cir. 1995).

### **VIOLATION OF LANHAM ACT**

In addition to above, Petitioner was able to learn that the Respondent's Trademark no. 2926222 is currently, and has been since its existence, in violation of the Lanham Act - 15 U.S.C. 1052, Sub-Section (b) which states: “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it... **(b)** Consists of or comprises the flag or coat of arms or other insignia of the

United States, or of any State or municipality, or of any foreign nation, or any simulation thereof”.

Further, USPTO Examination Guide Section III – Flags and Simulations of Flags Part A, states: “Registration must be refused under §2(b) if the design to be registered includes a true representation of the flag of the United States, any state, municipality or foreign nation or is a simulation thereof”. **Exhibit "A"**

**Examination of the Respondent’s Mark No. 2926222 clearly displays a depiction of the United States Flag as was Trademark Examining Attorney William H. Dawe III opinion when he refused another similar trademark application (Serial No. 8524148 Filing Date: 02/14/2011) containing an identical American Flag, and therefore mark no. 2926222 should never have been registered with the USPTO in the first place since the MARK No. 2926222 depicted an American Flag when registration was applied for and currently, still displays a full color depiction of the American Flag. Mark No. 2926222 should be considered illegal and therefore CANCELLED.**

Numerous photographs on the internet show Respondents' members displaying the “illegal” mark-logo is proof of the “illegal” mark’s continued use. In addition, these photographs also support Petitioner’s claim of “lack of quality control” over the mark as one can clearly see multiple “other patches and emblems” surrounding

the mark-logo which lends to “confusion” of the registered mark displayed in public.

Thus, given the above reference to the Lanham Act “flag” prohibitions, Petitioner provides the below additional facts to support his petition for cancellation of the Respondent’s mark no. 2926222:

1. The Respondent’s mark (registration number 2926222) should never have been registered by the U.S.P.T.O. as mark no. 2926222 violates multiple provisions of 15 U.S.C. 1064 (Section 14 of The Lanham Act) and therefore should be canceled as it is in clear and direct violation of the guidelines for refusal set forth above. The Defendant’s mark clearly and openly displays a full color depiction of the American Flag. In addition, the Respondent’s By-Laws contains the statement (made by Respondent): **“The flag of our country shows I am proud of America and the American way of which I give total support.”** Exhibit "C" and "D"

2. Upon information and belief, Paul D. Warner is the President of Registrant and with reckless disregard, fraudulently filed and signed "SECTION 8 & 9, DECLARATION" for mark no. 2926222 at the United States Patent and Trademark Office and in violation of 15 U.S.C. § 1065- incontestability of right to

1. use mark under certain conditions.

2. Finally, a petition for “cancellation proceedings” under the Trademark Trial and Appeal Board ("TTAB") guidelines may be filed based on various grounds including, “The mark has been abandoned”, which has been shown by evidence provided, and “The mark consists of a flag or insignia of the United States or any foreign nation”. Mark no. 2926222 is not, cannot, and never has been controlled by the Registrant/Respondent.

### **DAMAGES**

The continued presence of the Registration 2926222 on the federal trademark register constitutes an obstacle to Petitioner's intended continued use of the term "BROTHERS OF THE WHEEL" Trademark no. 4299480, Class 026 in future charity works, in marketing materials, or keywords and other works. The Registration, thus, is causing injury and damage to Petitioner.

### **CONCLUSION**

WHEREFORE, Petitioner believes and avers that it is being, and will continue to be, damaged by Registration No. 2926222 for the BROTHERS OF THE WHEEL M.C. Mark, and respectfully requests that Registration No. 2926222 be canceled and that this Petition for Cancellation be sustained in favor of Petitioner. For each of the foregoing reasons, Petitioner Gerald R. Mollohan, AKA BROTHERS OF THE WHEEL, requests that the Board sustain this

proceeding in Gerald R. Mollohan's favor by canceling Registration No. 2926222 issued on February 15, 2005. There are also new facts that will overcome any defense claiming res judicata (claim preclusion.) Among those new facts are recent precedents of the TTAB regarding Fraud and The American Flag.

Respectfully submitted,

/Gerald R. Mollohan/  
Gerald R. Mollohan  
Petitioner  
botwnomads@aol.com

Please address all correspondence to:

Gerald R. Mollohan  
PO Box 507  
St. Albans, West Virginia 25177

E-Mail: botwnomads@aol.com  
Phone: 304.982.1309

The filing fee for this Cancellation in the amount of \$600.00 is hereby electronically transferred with the submission of the Petition for Cancellation.



**CERTIFICATE OF ELECTRONIC TRANSMISSION**

I hereby certify that Gerald R. Mollohan, AKA Brothers of the Wheel, Petition To Cancel Trademark No. 2926222 and all Declarations & Exhibits and a true and correct copy is being transmitted electronically to Commissioner of Trademarks: Attn: Trademark Trial and Appeal Board ("TTAB") through ESTTA pursuant to 37 C.F.R. §2.195(a).

/Gerald R. Mollohan/

Gerald R. Mollohan AKA Brothers of the Wheel  
Petitioner to Cancel Mark No. 2926222  
PO Box 507  
St. Albans, West Virginia 25177

E-Mail: [botwnomads@aol.com](mailto:botwnomads@aol.com)

Phone: 304.982.1309

## **CERTIFICATE OF SERVICE**

Per 37 CFR 2.111, the Respondent and Registered Owner of Trademark Registration Number 2926222, owner of record Brothers of the Wheel M.C. Executive Council, Inc. were mailed and (E-Mailed to: paulorlora@suddenlink.net) a copy of this Cancellation Petition Including all Declarations & Exhibits in an envelope addressed to Respondent-Defendant via United States Postal Service ("USPS") First Class Mail Delivery as follows:

Owner of Record: Brothers of the Wheel M.C. Executive Council, Inc.  
Post Office Box 782  
Madison, West Virginia United States 25130

/Gerald R. Mollohan/  
Gerald R. Mollohan AKA Brothers of the Wheel  
Petitioner-Plaintiff to Cancel Mark No. 2926222  
PO Box 507  
St. Albans, West Virginia United States 25177

Amended Trademark Rule 2.111(a), effective November 1, 2007, states that a petition to cancel "must include proof of service on the owner of record for the registration, or the owner's domestic representative of record, at the correspondence address of record in the Office, as detailed in §§ 2.111(b) and 2.119" (emphasis added)

Any plaintiff who files through ESTTA is viewed by the Board as having included proof of service with its pleading, "Schott AG v. L'rren Scott, 88 USPQ2d 1862, 1863 fn. 3 (TTAB 200).".

### **Additionally**

Petitioner-Plaintiff Gerald R. Mollohan AKA Brothers of the Wheel, Mark No. 4299480 certifies that a copy of this Cancellation Petition, including All Exhibits and Declarations has been served upon all parties, at their address [of] record by First Class Mail on this date." "[A]ny plaintiff who files through ESTTA is viewed by the Board as having included proof of service with its pleading." Schott AG v. L'Wren Scott, 88 USPQ2d 1862, 1863 fn. 3 (TTAB 2008).

**EXHIBIT - DECLARATION LIST**  
**PETITION TO CANCEL TRADEMARK NO. 2926222**

<u>Document</u>	<u>General Description</u>	<u>Page No.</u>
<u>Exhibit "A"</u>	Declaration of Gerald R. Mollohan AKA Brothers Of The Wheel) Claiming Respondent Never Legally Owned a Trademark (Common Law or Otherwise) <b><u>New Evidence - "Precedent of the TTAB"</u></b> (13 Pages)	1 - 13
<u>Exhibit "B"</u>	This Opinion Is a Precedent of the TTAB <i>In re Alabama Tourism Department</i> (31 Pages) <b><u>New Evidence - "Precedent of the TTAB"</u></b>	14 - 40
<u>Exhibit "C"</u>	In Respondent's By-laws regarding Flag. <u>American Flag intended to be in Trademark</u> (1 Page)	41
<u>Exhibit "D"</u>	Respondent Drawing filed in Civil Action 211-cv-00104 but not at USPTO (1 - Pages)	42
<u>Exhibit "E"</u>	USPTO Website Screen Shot (1 Page)	43
<u>Exhibit "F"</u>	Trademark Trial And Appeal Board Finds Reckless Disregard for the Truth Equals Fraud, Cancels Trademark Registration. October 14, 2021 (5 Pages)	44 - 48

<u>Exhibit "G"</u>	Declaration of Gerald R. Mollohan To File 15 U.S.C. 1065 (Section 15 of The Lanham Act): Incontestability of Right To Use Mark Under Certain Conditions (7 Pages)	49 - 55
<u>Exhibit "H"</u>	Petitioner, Plaintiff Gerald R. Mollohan "Declaration-Motion" Fraud Upon The United States Patent And Trademark Office Committed By Respondent, Defendant In Support of Petition to Cancel Trademark No. 2926222 (8 Pages) <b><u>New Evidence - "Precedent of the TTAB"</u></b>	56 - 63
<u>Exhibit "I"</u>	Petitioner, Plaintiff Gerald R. Mollohan "Declaration" Trademark No. 2926222 being used in Laundering of monetary instruments. (4 Pages) <b><u>New Evidence - New Facts</u></b>	64 - 67

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

**CANCELLATION PETITION**

# **EXHIBIT “A”**

**NEW EVIDENCE - "PRECEDENT OF THE TTAB"  
CANCEL MARK NO. 2926222  
DECLARATION OF GERALD R. MOLLOHAN**

# EXHIBIT "A"

1

## NEW EVIDENCE - PRECEDENT OF THE TTAB

### UNITED STATES PATENT AND TRADEMARK OFFICE TRADEMARK TRIAL AND APPEAL BOARD

IN RE:

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER**

v.

**BROTHERS OF THE WHEEL M.C.  
EXECUTIVE COUNCIL, INC.  
RESPONDENT**

#### **DECLARATION OF GERALD R. MOLLOHAN CLAIMING THAT MARK NO. 2926222 RESPONDENT**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
NEVER LEGALLY OWNED A TRADEMARK  
(COMMON LAW OR OTHERWISE)  
NEW EVIDENCE - "PRECEDENT OF THE TTAB"  
(CANCEL MARK NO. 2926222)**

#### **DECLARATION OF GERALD R. MOLLOHAN**

Petitioner/Plaintiff Gerald R. Mollohan hereby declares that Trademark No. 2926222 contains a replica of the American Flag. In its chapter on trademarks, the U.S. Code of Federal Regulations clearly states that any trademark which "consists of or compromises the flag or coat of arms or other insignia of the United States, or any State or municipality, or any foreign nation, or any simulation thereof" **shall be**

**refused registration. New Evidence:**

**"Precedent of the TTAB." William Dawe, III, Trademark Examining Attorney. Law Office 108. Kathryn E. Coward, Managing Attorney. May 6, 2020. EXHIBIT "B"**

### **THE FIRST PART OF THE STATUTE**

The first part of the statute is relatively straightforward: “any trademark displaying a nation, state or city's flag or coat of arms cannot be registered” but, regarding the last part of the statute, the question becomes, “what exactly is considered a "simulation?" That can be interpreted differently by different people. Fortunately, the U.S. Patent and Trademark Office ("USPTO") has an in-depth description, clarifying the differences between trademarks consisting of a flag “simulation” and those that consist of a “stylized” version of flags that can be registered.

### **SIMULATION**

USPTO states a simulation is "something that gives the appearance or effect or has the characteristics of an original item." For instance, if the entirety of the American Flag is CLEARLY VISIBLE/DISPLAYED (i.e., all fifty stars and all thirteen stripes), it is refused. Examples provided by the USPTO include waving

flags only barely obscured by text, black-and-white images that nevertheless include the unmistakable shape of the flags, or text emphasizes a banner's design is meant to be a national or state flag -*TMEP*

*1204 Refusal on Basis of flag, Coat of Arms, or Other Insignia of United States, or Municipality, or Foreign Nation.*

15 U.S.C. §1052 (Extract)

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it: (b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or any State or municipality, or of any foreign nation, or any simulation thereof.

Section 2(b) of the Trademark Act, **15 U.S.C. §1052(b)**, bars the registration on either the Principal Register or the Supplemental Register of marks that consist of or comprise (whether consisting solely of, or having incorporated in them) the flag, coat of arms, or other insignia of the United States, of any state or municipality of the United States, or of any foreign nation: *See Ceccato v. Manifattura Lane Gaetano Marzotto & Figli, S.p.A.*, 32 USPQ2d 1192, 1196 (TTAB 1994), noting that "it appears that the reference to 'municipality' in the statute is to a municipality in the United States, and that prohibition of registration



with respect to foreign coats of arms, etc., is to those of the countries themselves rather than to those of the states or municipalities of the foreign countries".

Moreover, registration of all such official insignia is barred regardless of the identity of the applicant, that is, the statutory prohibition allows no exception even when the applicant is a government entity seeking to register its own flag, coat of arms, or other insignia: *In re City of Houston*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013).

Section 2(b) also bars the registration of marks that consist of or comprise any simulation of such symbols. "Simulation" refers to "something that gives the appearance, or effect, or has the characteristics of an original item: "*In re Advance Indus. Sec., Inc.*, 194 USPQ 344, 346 (TTAB 1977". Whether a mark comprises a simulation must be determined from a visual comparison of the proposed mark vis-à-vis replicas of the flag, coat of arms, or other insignia in question: *In re Waltham Watch Co.*, 179 USPQ 59, 60 (TTAB 1973). Focus must be on the general recollection of the flag or insignia by purchasers, "without a careful analysis and side-by-side comparison: "*In re Advance Indus. Sec.*, 194 USPQ at 346.

The incorporation in a mark of individual or distorted features that are merely suggestive of flags, coats of arms, or other insignia does not bar registration under §2(b): *See Knorr-Nahrmittel A.G. v. Havland Int'l, Inc.*, 206 USPQ 827, 833

(TTAB 1980) [holding flag designs incorporated in the proposed mark NOR-KING and design not recognizable as the flags of Denmark, Norway, and Sweden, the Board finding that "[a]ll that the record reflects is that the mark contains a representation of certain flags, but not the flag or flags of any particular nation"): *In re Advance Indus. Sec.*, 194 USPQ at 346 (finding proposed mark comprising a gold and brown triangular shield design with the words "ADVANCE SECURITY" predominately displayed in the upper central portion of the mark, creates an overall commercial impression distinctly different from the Coat of Arms"): *In re Waltham Watch Co.*, 179 USPQ at 60 (finding mark comprising wording with the design of a globe and flags not to be a simulation of the flags of Switzerland and Great Britain, stating that "although the flags depicted in applicant's mark incorporate common elements of flag designs such as horizontal or vertical lines, crosses or stars, they are readily distinguishable from any of the flags of the nations alluded to by the examiner"].

Section 2(b) differs from the provision of §2(a) regarding national symbols (*see* **TMEP §1203.03(a)(iii)**) in that §2(b) requires no additional element such as a false suggestion of a connection, to preclude registration.

#### **1204.01 Flags and Simulations of Flags**

##### **1204.01(a) Flags and Simulations of Flags are Refused**

Registration must be refused under §2(b) if the design sought to be registered includes a true representation of the flag of the United States, any state, municipality, or foreign nation, or is a simulation thereof. A refusal must be issued if the design would be perceived by the public as a flag, regardless of whether other matter appears with or on the flag: *In re Family Emergency Room LLC*, 121 USPQ2d 1886, 1887-88 (TTAB 2017). The examining attorney should consider the following factors, with regard to both color drawings and black-and-white drawings, to determine whether the design is perceived as a flag: (1) color; (2) presentation of the mark; (3) words or other designs on the drawing; and (4) use of the mark on the specimen(s): *Cf. id.* at 1888 (discussing the factors to consider in determining whether matter in a mark will be perceived as the Swiss flag).

Generally, a refusal should be made where a black-and-white drawing contains unmistakable features of the flag, contains features of the flag along with indicia of a nation, or is shown on the specimen in the appropriate colors of that national flag. For example, merely amending a "red, white, and blue" American flag to a black-and-white American flag will not overcome a §2(b) refusal. However, black-and-white drawings of flags that consist only of common geometric shapes should not be refused unless there are other indicia of the country on the drawing or on the specimens. For example, a black-and-white drawing showing three horizontal

rectangles would not be refused as the Italian or French flag unless there is something else on the drawing or on the specimen that supports the refusal.

**1204.01(b) Stylized Flag Designs are not Refused under §2(b)**

Marks containing elements of flags in a stylized or incomplete form are not refused under §2(b). The mere presence of some significant elements of flags, such as stars and stripes (U.S. flag) or a maple leaf (Canadian flag), does not necessarily warrant a refusal. If the flag design fits one of the following scenarios, the examining attorney should not refuse registration under §2(b):

- The flag design is used to form a letter, number, or design.
- The flag is substantially obscured by words or designs.
- The design is not in a shape normally seen in flags.
- The flag design appears in a color different from that normally used in the national flag.
- A significant feature is missing or changed.

**1204.01(c) Case Law Interpreting  
"Simulation of Flag"**

The Trademark Trial and Appeal Board found that no simulation of a flag existed in the following cases: *In re Am. Red Magen David for Israel*, 222 USPQ 266, 267 (TTAB 1984) ("As to the State of Israel, it is noted that the flag of that nation

consists essentially of a light blue Star of David on a white background. In the absence of any evidence that the State of Israel is identified by a six-pointed star in any other color, we conclude that only a light blue six-pointed star would be recognized as the insignia thereof."); *In re Health Maint. Orgs., Inc.*, 188 USPQ 473 (TTAB 1975) (holding dark cross, with legs of equal length, having a caduceus symmetrically imposed thereon sufficiently distinctive from Greek red cross and flag of Swiss Confederation).

The Trademark Trial and Appeal Board found that simulation of a flag existed in the following cases: *In re Alabama Tourism Department* ("This Opinion Is a Precedent of the TTAB"), May 6, 2020, Serial No. 87599292 **William H. Dawe, III**, Trademark Examining Attorney, Law Office 108, Kathryn E. Coward, Managing Attorney. Before Mermelstein, Lynch and Larking, Administrative Trademark Judges: Opinion by Larkin, Administrative Trademark Judge.

"The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(b) of the Trademark Act, 15 U.S.C. § 1052(b), on the ground that the mark includes a simulation of the flag of the United States. (The phrase "flag of the United States" appears in Section 2(b). The flag of the United States is also referred to, both colloquially and in Section 1204.01(a) of the TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP"), Oct. 2018, as the

"American flag," and we will use the two terms interchangeably.

**William H. Dawe, III**  
**Trademark Examining Attorney, Law Office 108**

See Page no. 3 of 15, **Exhibit "B"** - REFUSAL - 2(b) AMERICAN FLAG

"Registration is refused because the applied-for mark includes an American Flag:

*See* applicant's description of mark: Trademark Act Section 2(b), 15 U.S.C.

§105(b); *see* TMEP §1204.

Trademark Act Section 2(b) bars registration of marks that include the flag, coat of arms, or other insignia of the United States, any state or municipality, or any foreign nation. TMEP §1204."

**CONCLUSION**

In the description of the mark provided by Respondents' for mark no. 2926222 trademark application **Exhibit "E"** in Respondents By-Laws **Exhibit "F"** for mark no. 2926222, and in Respondents' own testimony before the United States District Court and Trademark Trial And Appeal Board as shown in **Exhibit "D."** **Presented to the United States District Court Southern District of West Virginia at Charleston in Civil Action 2:11-cv-00104, but is not the specimen provided to the United States Patent And Trademark Office.** The evidence clearly shows that Petitioner-Plaintiff mark no. 2926222 intentionally attempted to

deceive the Court in Civil Action 2:11-cv-00104 in **Exhibit "D"** and that Respondents' intended to include a complete American Flag in mark no. 2926222 as would be determined by William H. Dawe, III Trademark Examining Attorney, Law Office 108. See last (bottom) paragraph Page 6 of **Exhibit "E"** (**"Exhibit D"** at top of page)

When new facts in a second lawsuit overcome the defense of res judicata (claim preclusion), when the second lawsuit has sufficiently new facts with the right new facts, res judicata does not bar that second suit. *State of Ohio exrel. Susan boggs, et al. v. City of Cleveland*, 655 F.3d 516 (6th Cir. 2011). New Facts include:

(1) United States Patent and Trademark Office - Trademark Trial and Appeal Board Published a new/updated Precedent regarding Section 2(b) of the Trademark Act, 15 U.S.C. § 1052(b) The phrase "flag . . . of the United States" appears in Section 2(b). The flag of the United States is also referred to, both colloquially and in Section 1204.01 of the TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") (Oct. 2018), as the "American flag." *In re Alabama Tourism Department* Serial No. 87599292

(2) United States Patent and Trademark Office - Trademark Trial and Appeal Board published a new/updated Precedent regarding Fraud in procuring or

maintaining a trademark registration; *Chutter, Inc. v. Great Management Group, LLC* Opposition No. 91223018.

(3) Plaintiff/Counterclaim Defendant and Attorney of Record Richard J. Lindroth committed Fraud Upon the Court and the United States Patent and Trademark Office - Trademark Trial and Appeal Board after Civil Action No. 2:11-cv-00104.

(4) Respondent Attorney Richard J. Lindroth was admonished by the State State of West Virginia Supreme Court of Appeals on the 5th of October 2016, pursuant to Rule 3.1 of the Rules of Lawyer Disciplinary Procedure after Petitioner had filed a complaint filed by Gerald R. Mollohan regarding Attorney Richard J. Lindroth's unethical practices including filing Fraudulent Documents in Civil Action No. 2:11-cv-00104. That civil action was completely tainted by Admonished Attorney Richard J. Lindroth.

Respectfully submitted this 25th day of October 2021,

/Gerald R. Mollohan/

Gerald R. Mollohan AKA BROTHERS OF THE WHEEL  
Petitioner/Plaintiff



The Legitimate BROTHERS OF THE WHEEL trademark and owner of US  
Registration No 4299480 Class: 26  
Registered Trademark Licensor, Word Mark: BROTHERS OF THE WHEEL  
and Letter Mark: BOTW  
Embroidered Patch Owner

PO Box 507  
St. Albans, West Virginia 25177  
Ph: 304.982.1309  
E-Mail: botwnomads@aol.com

Per 28 U.S.C., Section 1746 – Unsworn declarations under penalty of perjury,  
I, Gerald R. Mollohan, the undersigned, do confirm that the statements above  
are true and accurate to the best of my knowledge and made by me under  
possible penalty of perjury on this date, the 25th day of October 2021.

/Gerald R. Mollohan/

Gerald R. Mollohan

Signed at St. Albans, West Virginia October 25, 2021

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

**CANCELLATION PETITION**

# **EXHIBIT “B”**

**NEW EVIDENCE - "THIS OPINION IS A PRECEDENT OF THE TTAB"**

# EXHIBIT "B"

## NEW EVIDENCE

This Opinion Is a  
Precedent of the TTAB

Mailed: May 6, 2020

### UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Alabama Tourism Department*

Serial No. 87599292

Jean Voutsinas and Kai-Wen Hsieh of Frankfurt Kurnit Klein & Selz, P.C.,  
for Alabama Tourism Department.

William H. Dawe, III, Trademark Examining Attorney, Law Office 108,  
Kathryn E. Coward, Managing Attorney.

Before Mermelstein, Lynch, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Alabama Tourism Department ("Applicant") seeks registration on the Principal

Register of the mark shown below:



Serial No. 87599292

for “Advertising and marketing services, namely, promoting travel and tourism related to historical information on civil rights in the United States,” in International Class 35.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(b) of the Trademark Act, 15 U.S.C. § 1052(b), on the ground that the mark includes a simulation of the flag of the United States.<sup>2</sup>

Applicant appealed after the Examining Attorney made the refusal final. The case is fully briefed.<sup>3</sup> We affirm the refusal to register.

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<sup>1</sup> Application Serial No. 87599292 was filed on September 7, 2017 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. Applicant disclaimed the exclusive right to use U.S. CIVIL RIGHTS TRAIL apart from the mark as shown. Applicant’s amended description of its mark reads as follows: “The mark consists of a circle displaying the wording U.S. CIVIL RIGHTS TRAIL and design; the design consists of a three concentric circle design in which the wording U.S. CIVIL RIGHTS TRAIL appears between arched in between the inner most and the middle concentric circles; the images of two men, one woman and a child walking with the man in back wearing a hat and the man in front holding a stick bearing flag over his shoulder appear superimposed on the inner and middle concentric circle; the inner concentric circle is incomplete on the bottom; the bottom of the middle concentric circle is shaded beneath the feet of the individuals with two small five point stars on each end and one larger five point star in the middle.” Color is not claimed as a feature of the mark.

<sup>2</sup> The phrase “flag . . . of the United States” appears in Section 2(b). The flag of the United States is also referred to, both colloquially and in Section 1204.01(a) of the TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) (Oct. 2018), as the “American flag,” and we will use the two terms interchangeably.

<sup>3</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

## **I. Record on Appeal<sup>4</sup>**

The record on appeal includes the following:

- A Wikipedia entry entitled “Flag of the United States,” made of record by the Examining Attorney,<sup>5</sup> and Applicant;<sup>6</sup>
- The first page of search results from the USPTO’s Trademark Electronic Search System (“TESS”) database listing applications and registrations that Applicant claims are for marks comprising the American flag in some form;<sup>7</sup>
- Copies of pages from the TESS database regarding registrations of marks comprising the American flag in some form, made of record by Applicant;<sup>8</sup>
- Pages regarding applications that were refused because they contained the American flag, made of record by the Examining Attorney;<sup>9</sup>
- Webpages displaying the American flag, made of record by the Examining Attorney;<sup>10</sup> and

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<sup>4</sup> Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”). We summarize only those portions of the record that are germane to the appeal.

<sup>5</sup> December 19, 2017 Office Action at TSDR 58-68.

<sup>6</sup> June 11, 2018 Response to Office Action at TSDR 26-34; January 8, 2019 Response to Office Action at TSDR 25-33.

<sup>7</sup> June 11, 2018 Response to Office Action at TSDR 9, 35; January 8, 2019 Response to Office Action at TSDR 36-37.

<sup>8</sup> June 11, 2018 Response to Office Action at TSDR 37-127; January 8, 2019 Response to Office Action at TSDR 38-128.

<sup>9</sup> July 11, 2018 Office Action at TSDR 2-12.

<sup>10</sup> January 31, 2019 Final Office Action at TSDR 2-13, 21-26.

- The results of Google database searches regarding the American flag, made of record by Applicant,<sup>11</sup> and the Examining Attorney.<sup>12</sup>

## II. Section 2(b) Refusal

### A. Applicable Law

Section 2(b) of the Trademark Act, 15 U.S.C. § 1052(b), prohibits registration, on either the Principal or Supplemental Register, of a mark that “[c]onsists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.” As the Board explained in a case involving municipality insignia, the text of Section 2(b) was carried over from the Trademark Act of 1905 to the Lanham Act of 1946 in substantially the same form, and the absolute bar that it imposes against registration of marks that contain flags and other governmental insignia reflects the sentiment that such insignia are symbols of government authority that ought to be reserved for signifying the government. *In re Dist. of Columbia*, 101 USPQ2d 1588, 1597 n.14 (TTAB 2012), *aff’d sub nom In re City of Houston*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013).

There is very little case law discussing the registrability of a mark that “consists of or comprises the flag . . . of the United States.”<sup>13</sup> The Board’s 1973 decision in *In re*

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<sup>11</sup> January 8, 2019 Response to Office Action at TSDR 34-35.

<sup>12</sup> January 31, 2019 Final Office Action at TSDR 14-20.

<sup>13</sup> In its appeal brief, Applicant cites *In re Family Emergency Room LLC*, 121 USPQ2d 1886 (TTAB 2017), which involved the Swiss flag; a civil infringement decision, *Bros. of the Wheel M.C. Exec. Council, Inc. v. Mollohan*, 909 F. Supp. 2d 506 (S.D. W. Va. 2012), which discussed in passing the validity of a registration of a mark containing the American flag; a Board decision involving the Norwegian flag, *Knorr-Nahrmittel A.G. v. Havland Int’l, Inc.*, 206

*Waltham Watch Co.*, 179 USPQ 59 (TTAB 1973), clarified that if a flag depicted in a mark incorporates common elements of flag designs but the flag is readily distinguishable from any actual flag of a government, refusal under § 2(b) is not appropriate. *Id.* at 60. The Board's most recent precedential decision under § 2(b) clarified that refusal is appropriate "if the design would be perceived by the public as a flag, regardless of whether other matter appears with or on the flag," *Family Emergency Room*, 121 USPQ2d at 1887-88, and set forth some general principles that govern the application of § 2(b) to all flags referenced in that section.

As the Board explained in *Family Emergency Room*, the word "comprises" in the clause "[c]onsists of or comprises," which appears in subparts (a)-(d) in § 2 of the Trademark Act, means "includes." *Family Emergency Room*, 121 USPQ2d at 1887 n.2 (citation omitted). Section 2(b) thus "prohibits registration of a mark that *includes* a flag . . . or any simulation thereof." *Id.* The Board also noted that § 2(b) requires that registration be refused "if the proposed mark includes a true representation of [a] flag . . . or a simulation thereof," *id.* at 1887, and held that the "word 'simulation' in the statute 'is used in its usual and generally understood meaning, namely, to refer to something that gives the appearance or effect or has the characteristics of an original item.'" *Id.* (quoting *Advance Indus.*, 194 USPQ at 346). "Whether particular matter

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USPQ 827 (TTAB 1980); and two non-precedential Board decisions, *In re Certa ProPainters, Ltd.*, Serial No. 77046679 (TTAB Nov. 14, 2008) and *In re 3P Learning Pty Ltd.*, Serial No. 85641327 (TTAB Sept. 30, 2014), involving the Canadian flag, and a composite mark containing the flags of 12 different countries, respectively. The only Section 2(b) case cited by the Examining Attorney in his brief is *Family Emergency Room*, which in turn cited and quoted *In re Advance Indus. Sec., Inc.*, 194 USPQ 344 (TTAB 1977), a case involving the Coat of Arms of the United States.



is a simulation of a flag is determined by a visual comparison of the matter and the actual flag.” *Id.*

The Board in *Family Emergency Room* held that “the relevant question is whether consumers will perceive matter in the mark as a flag.” *Id.* at 1888. The Board further observed that “[m]arks containing elements of flags in a stylized or incomplete form are not refused under Section 2(b),” *id.* (citing *Waltham Watch*, 179 USPQ at 60), and held that the “focus of the analysis is on the relevant purchasers’ general recollection of the flag, ‘without a careful analysis and side-by-side comparison.’” *Id.* (quoting *Advance Indus.*, 194 USPQ at 346).

The Board in *Family Emergency Room* cited the § 2(b) examination guidelines in the TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”), which the Board stated were “appropriate under the statute.” *Id.* The Board noted that the TMEP “provides applicants and examining attorneys with a reference work on the practices and procedures relative to prosecution of applications to register marks in the USPTO,” *id.*, and contains a section “devoted entirely to marks containing the Swiss federation flag or coat of arms.” *Id.* (citing TMEP § 1205.01(d)).

The TMEP similarly contains examination guidelines for “Flags and Simulations of Flags” that discuss the American flag, and display multiple examples of American flag-related marks that should and should not be refused registration under § 2(b). TMEP § 1204.01(a)-(b). The TMEP instructs examining attorneys to consider the following factors that the Board found in *Family Emergency Room* to be appropriate in determining whether consumers will perceive matter in the mark as a flag: “(1)

color; (2) presentation of the mark; (3) words or other designs on the drawing; and (4) use of the mark on the specimen(s).” TMEP § 1204.01(a) (citing *Family Emergency Room*, 121 USPQ2d at 1888 (discussing these factors in the context of the Swiss flag)). Although black-and-white drawings do not depict color, Section 1204.01(a) instructs that these factors should be considered “in regard to both color drawings and black-and-white drawings,” and states that “[g]enerally, a refusal should be made where a black-and-white drawing contains unmistakable features of the flag, contains features of the flag along with indicia of a nation, or is shown on the specimen in appropriate colors of that national flag.” *Id.* Section 1204.01(a) displays “Examples of Situations Where Registration Should Be Refused,” including five involving the American flag.

The TMEP also provides examples of situations where consumers would not perceive a design as a flag, such that refusal under § 2(b) would not be warranted. TMEP § 1204.01(b) (stating that “[m]arks containing elements of flags in a stylized or incomplete form are not refused under §2(b),” and that “[t]he mere presence of some significant elements of flags, such as stars and stripes (U.S. flag) . . . does not necessarily warrant a refusal.”). Section 1204.01(b) lists the following scenarios under which registration should not be refused under § 2(b) and includes seven examples of registrable stylized designs of the American flag:

- The flag design is used to form a letter, number, or design.
- The flag is substantially obscured by words or designs.
- The design is not in a shape normally seen in flags.

- The flag design appears in a color different from that normally used in the national flag.
- A significant feature is missing or changed.

TMEP § 1204.01(b).

“Although the [TMEP] does not have the force of law, it ‘sets forth the guidelines and procedures followed by the examining attorneys at the’” USPTO. *In re Int’l Flavors & Fragrances, Inc.*, 183 F.3d 1361, 51 USPQ2d 1513, 1516 (Fed. Cir. 1999) (quoting *W. Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1664 n.8 (Fed. Cir. 1994)). As in *Family Emergency Room*, we hold that both sets of the “above standards, as set forth in the TMEP, are appropriate under the statute” to consider in determining whether consumers will perceive a mark as consisting of or comprising a flag. *Family Emergency Room*, 121 USPQ2d at 1888. We will apply those standards in our analysis of the registrability of Applicant’s proposed mark under § 2(b).

## **B. Summary of Arguments**

We summarize immediately below the general arguments of Applicant and the Examining Attorney. We address their specific arguments in our analysis of the merits of the refusal.

### **1. Applicant’s Arguments**

Applicant’s arguments address four of the scenarios in TMEP § 1204.01(b), namely, that the “flag design in Applicant’s Mark (i) is missing significant features of the U.S. flag, (ii) forms another design, (iii) is substantially obscured by other designs

in Applicant's mark, and (iv) is not in a shape normally seen in the U.S. flag." 4 TTABVUE 6.

Applicant also argues that "the fact that the USPTO has approved numerous marks with designs that contain obvious depictions of the U.S. flag shows that marks containing stylized or incomplete flag elements should not be refused registration under §2(b)." *Id.* at 6-7. Applicant devotes a significant portion of its reply brief to its claim that the registration of other marks involving elements of the American flag justifies registration of Applicant's mark. 8 TTABVUE 5-9.

## **2. The Examining Attorney's Arguments**

The Examining Attorney argues that Applicant's mark includes a simulation of the U.S. flag under two of the factors set forth in TMEP § 1204.01(a), the presentation of the flag in the mark and the words associated with the drawing. 6 TTABVUE 5-7.<sup>14</sup> With respect to the factors in TMEP § 1204.01(b), the Examining Attorney argues that none of the five scenarios in which a § 2(b) refusal should not be issued exists, *id.* at 7-8, and that the flag design in Applicant's mark is not analogous to any of the examples in § 1204.01(b) of marks that should not be refused registration. *Id.* at 8.

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<sup>14</sup> The Examining Attorney argues that the two other factors, the color of the mark and the use of the mark on a specimen, do not apply to Applicant's intent-to-use application. 6 TTABVUE 6. We note, however, that merely because Applicant has not claimed that color is a feature of the mark does not mean that Applicant could not depict the flag design in the mark in its black-and-white drawing in any color or combination of colors. *See In re Data Packaging Corp.*, 453 F.2d 1300, 172 USPQ 396, 397 (CCPA 1972) ("there is no reason why an applicant should not be able to obtain a single registration of a design mark covering all different colors in which it may appear, that is to say, not limited to a particular color."). Accordingly, we must assume that Applicant could display the flag design in its mark in the traditional red, white, and blue of the U.S. flag.

With respect to the third-party marks, the Examining Attorney argues that “the issue for consideration here is whether the U.S. flag depicted in applicant’s mark will be perceived by the public as a simulation of a U.S. flag; not whether other U.S. Registrations contain stylized U.S. flags.” *Id.* at 9. He argues that each application must be considered on its own merits, and that the issuance of registrations containing elements of the U.S. flag is not relevant to the registrability of Applicant’s mark. *Id.* at 9 n.1. He concludes that “[u]sing the guidelines established by Sections 1204.01(a) and (b) of the TMEP as to when a § 2(b) refusal should and should not be issued, it is clear that applicant’s mark must denied registration under § 2(b) because the black-and-white drawing of the mark contains the unmistakable features of the U.S. flag.” *Id.* at 10.

### C. Analysis of Refusal

#### 1. Whether the flag design would be perceived as a simulation of an actual U.S. flag, applying the considerations in TMEP § 1204.01(a)

We determine whether the flag design in Applicant’s mark is a prohibited simulation of the U.S. flag “by a visual comparison of the [design] and the actual flag.” *Family Emergency Room*, 121 USPQ2d at 1887 (citing *Waltham Watch*, 179 USPQ at 60). We depict below the American flag and Applicant’s mark:



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<sup>15</sup> December 19, 2017 Office Action at TSDR 58.



Although Applicant's flag design is not an exact reproduction of the American flag, it contains "unmistakable features of the flag," TMEP § 1204.01(a), in the form of the flag's stars and stripes in their familiar positions on the flag. These features of Applicant's design "give[ ] the appearance or effect or ha[ve] the characteristics of the original item[s]" on the actual flag. *Family Emergency Room*, 121 USPQ2d at 1887. Indeed, Applicant's original description of its mark expressly identified its flag design as the U.S. flag, referring to "the man in front holding a stick bearing the U.S. flag over his shoulder."<sup>16</sup>

Applicant argues that its flag design does not appear in its mark in what Applicant claims to be "the typical display of a single U.S. flag show[ing] the front side of the flag," 4 TTABVUE 7, but the features of the U.S. flag do not change depending on the manner of its display. The flag design in Applicant's mark is displayed on what Applicant describes as a "stick," and that manner of display simulates how the U.S. flag may appear when it is displayed on an angled flagpole, as shown below:

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<sup>16</sup> September 7, 2017 Application at TSDR 1.



By Applicant's own admission in its original description of its mark, in its particular orientation in Applicant's mark, Applicant's flag design is intended to depict or simulate the U.S. flag.

The words in Applicant's mark reinforce the perception of the design as at least a simulation of the U.S. flag. Section 1204.01(a) of the TMEP displays as examples of marks that should be refused registration under § 2(b) the designs shown below:



According to TMEP § 1204.01(a), the design on the left “is refused because the word SWISS emphasizes that the design is intended to be a simulation of the Swiss flag,” while the design on the right “is refused because the word Texas emphasizes that the design is intended to be the state flag of Texas.” *Id.* In both examples, as here, the

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<sup>17</sup> January 31, 2019 Final Office Action at TSDR 24.

wording names the nation or state whose flag is depicted in the mark and reinforces a consumer's perception of the design as that nation's or state's flag or a simulation thereof.

In Applicant's mark, the features of the U.S. flag are similarly accompanied by "indicia of a nation," *id.*, the letters "U.S.," which abbreviate the words "United States,"<sup>18</sup> in the words "U.S. CIVIL RIGHTS TRAIL." The reference to the United States leaves no doubt, in the words of Applicant's original description of its mark, that "the man in front [is] holding a stick bearing the U.S. flag over his shoulder."<sup>19</sup>

Taking into account "the relevant purchasers' general recollection of the [U.S.] flag, 'without a careful analysis and side-by-side comparison,'" *Family Emergency Room*, 121 USPQ2d at 1888, when we view Applicant's flag design against the backdrop of the "words or other designs on the drawing," TMEP § 1204.01(a), and in the context of the intended use of Applicant's mark in "promoting travel and tourism related to historical information on civil rights in the United States," we find that the U.S. flag and Applicant's flag design are highly similar and that the average member of the public would perceive Applicant's flag design to be a simulation of an actual

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<sup>18</sup> December 19, 2017 Office Action at TSDR 48 (acronymfinder.com).

<sup>19</sup> In its reply brief, Applicant argues that the "term 'U.S.' modifies the wording 'CIVIL RIGHTS TRAIL,' not the flag elements," and that "[u]pon seeing the term 'U.S.,' consumers would not think about the U.S. flag," but "would consider 'U.S.' as an indicator of the civil rights movement in the United States." 8 TTABVUE 3-4. We disagree. Applicant is correct that "U.S." modifies "CIVIL RIGHTS TRAIL," in the same way that "Swiss" modifies "Guard" and "Texas" modifies "Rock Association" in the examples given in TMEP § 1204.01(a), but as in those examples, the abbreviation "U.S." "emphasizes that the design is intended to be" the U.S. flag or "a simulation of the" U.S. flag. *Id.* We would find, in any event, that the flag design in Applicant's mark is a simulation of the U.S. flag even absent the reference to the U.S.



U.S. flag.<sup>20</sup> We add that we would make the same finding even if the relevant purchasers engaged in a more careful analysis and compared Applicant's design to the U.S. flag. "[T]he matter sought to be registered, when considered in its entirety, is prohibited under Section 2(b) because the proposed mark includes a design consisting of or comprising a simulation of the flag of [the United States]." *Family Emergency Room*, 121 USPQ2d at 1889.

**2. Whether the elements of the flag create a distinct commercial impression other than as the U.S. flag, applying the considerations in TMEP § 1204.01(b)**

We turn now to Applicant's arguments that its mark contains a stylized flag design and is thus registrable under four of the five scenarios set forth in TMEP § 1204.01(b) because consumers would not perceive the design as the U.S. flag or a simulation thereof.

**a. Whether Significant Features of the U.S. Flag Are Missing or Changed**

Applicant first argues that significant features of the U.S. flag are missing or changed in its flag design. 4 TTABVue 7. Applicant cites a WIKIPEDIA description of the U.S. flag as "consist[ing] of thirteen equal horizontal stripes of red (top and bottom) alternating with white, with a blue rectangle in the canton (referred to specifically as the 'union') bearing fifty small, white, five-pointed stars arranged in nine offset horizontal rows, where rows of six stars (top and bottom) alternate with

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<sup>20</sup> In the absence of restrictions on the classes of consumers of the services identified in the application, we find that the services are directed to members of the general public. See *Family Emergency Room*, 121 USPQ2d at 1888 (finding that consumers of hospital services were the general public).

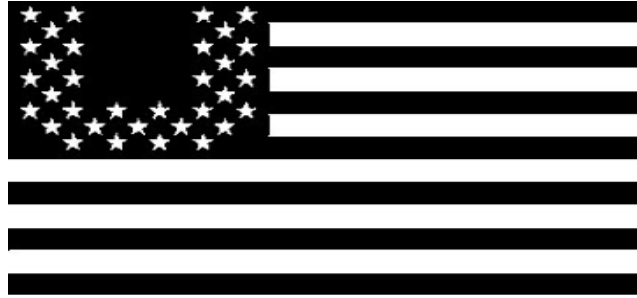
rows of five stars.” *Id.*<sup>21</sup> As noted above, Applicant claims that “the typical display of a single U.S. flag shows the front side of the flag” and that “[o]rdinary consumers would therefore expect to see the stars at the top left corner of the flag, followed by the red and white stripes,” citing the results of a “Google image search of the U.S. flag.” *Id.*<sup>22</sup>

Applicant argues that “[u]pon encountering Applicant’s mark, consumers will readily find that a number of [the] well-known features of the U.S. flag are missing,” *id.* at 8, because its flag design (1) “is not in a rectangular shape and does not have four corners;” (2) “[m]ultiple stripes are missing, and the stripes that do appear in the flag design are all slanted in varying directions, and are not horizontal;” (3) “white dots appear on the flag design” instead of “the well-known five-pointed stars in a U.S. flag;” (4) the “rectangular shape of the union in the U.S. flag is also missing—in Applicant’s mark, the union appears as a triangle;” and (5) “instead of facing the front, the flag in Applicant’s mark is backward facing (the ‘union’ appears in the right corner, not the traditional left), which is different from how U.S. flags are commonly displayed.” *Id.* Applicant analogizes its flag design to the following example in TMEP § 1204.01(b) of a registrable design in which a significant feature of the U.S. flag has been changed:

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<sup>21</sup> January 8, 2019 Response to Office Action at TSDR 26. As noted above, we must assume that the flag design in the mark may be depicted in the red, white, and blue of the U.S. flag.

<sup>22</sup> *Id.* at TSDR 34-35.



*Id.* at 7.

Applicant’s arguments miss the mark. As discussed above, what Applicant calls the “well-known features of the U.S. flag,” 4 TTABVUE 8, do not disappear or change depending on the particular manner of the flag’s display. In certain manners of display, such as that shown in Applicant’s mark and below



some features of the U.S. flag may not be entirely visible or may appear in different orientations than when they appear in what Applicant claims is the “the typical display of a single U.S. flag shows the front side of the flag,” *id.* at 7,<sup>23</sup> but they are not “missing” or “changed” in the manner contemplated by TMEP § 1204.01(b). The

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<sup>23</sup> In that regard, we note that the position and manner of display of the U.S. flag prescribed by 4 U.S.C. § 7 varies depending on the circumstances of the flag’s display.

flag displayed immediately above shares many of the characteristics that Applicant attributes to its flag design, including a “triangular” display of the union, non-horizontal stripes slanted in varying directions, and a “backward facing display,” *id.* at 8, but no reasonable observer of that flag would believe that features are missing or changed, or view it as something other than the U.S. flag.

The scenario in TMEP § 1204.01(b) in which a “significant feature is missing or changed” is exemplified by the design shown above, in which the stars in the union of the U.S. flag have been rearranged to form what appears to be the letter “U.” That rearrangement changes a “significant feature” of the U.S. flag, the layout of the rows of stars, to create a new design that does not simulate the actual flag. Applicant’s flag design does not change the U.S. flag in this manner, and this scenario in TMEP § 1204.01(b) does not apply to Applicant’s mark.

**b. Whether the Flag Design is Used to Form a Letter, Number, or Design**

Applicant next argues that “the flag element in Applicant’s Mark forms and is incorporated in a greater overall design, namely, a depiction of a scene from the civil rights movement.” 4 TTABVUE 10. Applicant analogizes its mark to one of the two marks that are shown in TMEP § 1204.01(b) as examples of this scenario:<sup>24</sup>

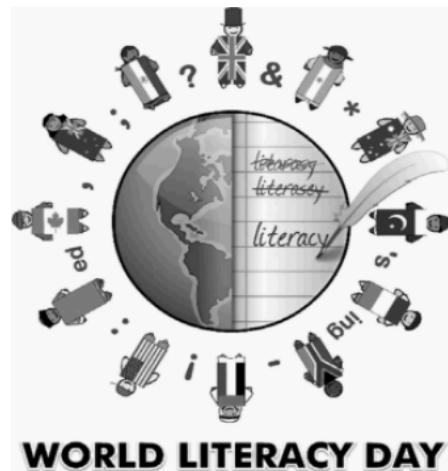
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<sup>24</sup> Applicant does not address the other example, but we show and discuss it below following our discussion of the example cited by Applicant and the mark in a non-precedential decision cited by Applicant.



Applicant argues that in the example above, “[t]here is no doubt that the mark depicts a U.S. flag, especially in view of the term ‘U.S.A.’ located directly below the flag design,” but claims that the mark is registrable “because its flag component is incorporated in a design, namely, a map of the continental United States.” *Id.*

Applicant also analogizes its mark to the mark at issue in the Board's non-precedential decision in *3P Learning*.<sup>25</sup>



<sup>25</sup> “Board decisions which are not designated as precedent are not binding on the Board, but may be cited and considered for whatever persuasive value they may hold.” *In re Soc’y of Health & Physical Educators*, 127 USPQ2d 1584, 1587 n.7 (TTAB 2018).

4 TTABVUE 9. Applicant argues that “[a]lthough the mark contains multiple countries’ national flags in their entirety (including the U.S. flag), the Board reversed the refusal to register under §2(b) because the flags form another design,” because “the flags ‘do not have the commercial impression of national flags but rather as designations of individuals from various nations,’” and because the other elements of the mark minimize the flags’ individual impact and “emphasize[ ] the international aspect of the applied-for goods and services.” *Id.* at 9-10 (quoting *3P Learning*, 12 TTABVUE 11-12 (Serial No. 85641327) (amended decision)).

Applicant argues that when “[e]ncountering Applicant’s Mark, consumers would first notice the four walking human figures, prominently displayed in the front and center of the Mark” and that “[s]eeing those figures in conjunction with the phrase U.S. CIVIL RIGHTS TRAIL and the flag design, consumers would immediately understand Applicant’s Mark to be a symbol of the civil rights movement.” *Id.* at 10. Applicant contends that “[t]he flag design, which takes up less than one fourth of Applicant’s Mark, merely completes such symbol” and that its “purpose is to describe and emphasize the other design elements, such as the significance of the walking figures and who they portray (civil rights activists).” *Id.*

Applicant claims that “[l]ike the national flags in the mark in *In re 3P Learning PTY Ltd.*, Applicant’s flag design signifies something other than a national flag,” specifically, “the hard work, sacrifice, long journey, and emotions that civil rights activists encountered while fighting to obtain equal rights for African Americans in the United States,” *id.*, and that the “flag design and component term U.S. are mere

background characters that provide information and support for that depiction.” *Id.* at 10-11.

As noted above, we are not bound by the decision or analysis in *3P Learning*, but the case is easily distinguishable. The Board found that in the subject mark, each national flag was “use[d] as the torso of each figure” and that such use was “use ‘to form a design’” within the meaning of that particular scenario in TMEP § 1204.01(b). 12 TTABVUE 10 (Serial No. 85641327). The Board noted that “the use of the flag in a manner that serves as the torso of the individuals is not a traditional flag design and while they may be generally recognizable, as incorporated in this mark, they do not have the commercial impression of national flags but rather as designations of individuals from various nations.” *Id.* at 11. The Board concluded that

the flags are not being displayed as flags, but rather are incorporated into the design as torsos of individuals. In this case, where each flag forms the torso of individuals positioned in a circle around a globe signifying the international aspect of Applicant’s goods and services we find that it is not barred by Section 2(b).

*Id.* at 12.

Unlike the flag designs in the mark in *3P Learning*, or in the marks in TMEP § 1204.01(b), the first of which is shown above and the second of which is shown below,



Applicant's flag design is not incorporated into wording or another design element, but is a self-standing design within Applicant's mark. Although the flag design is conceptually related to the design elements of the mark, that alone is insufficient to implicate this scenario in TMEP § 1204.01(b). The American flag is similarly part of the designs in the examples of unregistrable marks in TMEP § 1204.01(a) depicted below, which we consider more analogous because all significant features of the flag are present and the words or designs in the marks do not affect the flag designs in such a way that significant features of the U.S. flag are changed or missing:





The flag design in Applicant's marks does not "form[ ] **another** design," TMEP § 1204.01(b) (emphasis added), specifically, "a letter, number, or design," *id.*, such as "USA," a map, or a torso, as contemplated under TMEP § 1204.01(b). As a result, this scenario is inapplicable to Applicant's mark.

**c. Whether the Flag Design is Substantially Obscured by Words or Designs**

Applicant's third argument is that "TMEP §1204.01(b) specifies that registration should not be refused where the flag in a mark is substantially obscured by designs." 4 TTABVUE 11. Applicant analogizes its mark to the mark shown below, which is displayed in TMEP §1204.01(b) as an example of a mark that fits this scenario:



Applicant argues that "just like the example from the TMEP above, registration should not be refused here because the flag in Applicant's Mark is substantially obscured by other designs." 4 TTABVUE 12. Applicant claims that "the designs of two adult figures cover both sides of the flag design, and the design of a child figure conceals almost all of the bottom half of the flag." *Id.*

The adverb “substantially” in TMEP § 1204.01(b) means “to a large degree.”<sup>26</sup>

Unlike the flag design in the example shown immediately above, the flag design in Applicant’s mark is not obscured to a large degree by other elements of the mark:



Although portions of some of the stripes in the flag disappear behind the silhouette of the walking child and certain edges of the unfurled banner disappear behind the silhouettes of two of the walking adults, the simulations of the stars in the “union” and most of the stripes, as well as the flag as a whole, remain clearly visible, and the flag is immediately recognizable as such. As evidenced by the example accompanying this scenario in § 1204.01(b), as well as the examples of registrable marks in the preceding section, in which depictions of people or other elements appear in front of the flag designs, this scenario contemplates marks in which a significant portion of a flag design is not visible. The flag design in Applicant’s mark does not meet that criterion, and this scenario is inapplicable, because the flag design is not so obscured that consumers would not perceive it as the U.S. flag or a simulation thereof.

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<sup>26</sup> CAMBRIDGE DICTIONARY ([dictionary.cambridge.org/us](https://dictionary.cambridge.org/us), last accessed on May 1, 2020). The Board may take judicial notice of dictionary definitions, including online dictionaries. *See, e.g., In re Omniome, Inc.*, 2020 USPQ2d 3222, \*2 n.17 (TTAB 2020).

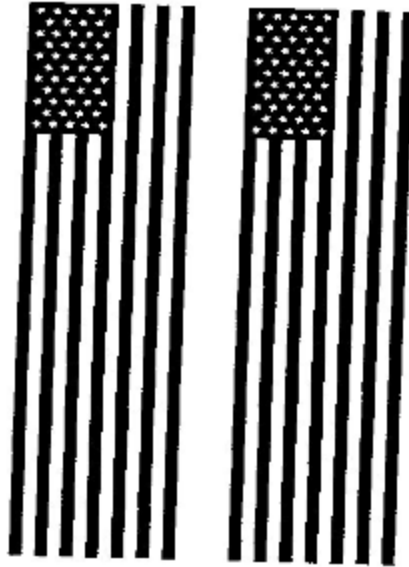
**d. Whether the Flag Design is Not in a Shape Normally Seen in the U.S. Flag**

Finally, Applicant invokes the scenario in TMEP § 1204.01(b) that states that registration should not be refused “where the flag in a mark is not in a shape normally seen in flags.” 4 TTABVUE 12. Applicant analogizes its mark to the two examples of such marks shown in TMEP § 1204.01(b). The first example is shown below:



Applicant argues that in this mark, “only a corner of the flag is depicted, without all the stripes and stars traditionally associated with the U.S. flag,” and that “[s]imilarly, in Applicant’s Mark, only a small triangular portion of the flag appears, and not all the stars and stripes are visible. Approximately only one third of the stars that normally appear on the U.S. flag are visible in Applicant’s Mark, and only a small portion of stripes can be seen.” 4 TTABVUE 12. Applicant also argues that “whereas the American flag ordinarily appears as a rectangle, Applicant’s Mark contains a small triangular portion of the U.S. flag, followed by some stripes located behind one of the walking figures and angled sideways and downward.” *Id.* at 12-13.

The second example in this scenario in TMEP § 1204.01(b) is shown below:



Applicant argues that this example

consists of two rectangular U.S. flags that display parallel rows of stars and stripes. However, because the flags are vertical and elongated, they are not considered to be in the normal flag shape and therefore the mark is registrable. Similarly, the flag in Applicant's Mark is not displayed horizontally and is not in the normal flag shape. In fact, the flag in Applicant's Mark is even less similar to an actual U.S. flag than the example in the TMEP and noted above because, unlike the above example, the flag in Applicant's Mark is not rectangular, does not have four corners, and does not display the requisite parallel rows of stars and stripes in a U.S. flag. . . . Applicant's Mark is not in a shape normally seen in flags.

*Id.* at 13.

Applicant's arguments that its flag design is "not in the normal flag shape" of the U.S. flag because the design "is not rectangular, does not have four corners, and does not display the requisite parallel rows of stars and stripes in a U.S. flag," *id.*, are similar in nature to its arguments that significant elements of the U.S. flag are missing or changed due to the manner of display of the flag design in Applicant's

mark. As shown and discussed above, the particular manner in which the flag design is displayed in Applicant's mark is consistent with the manner in which the U.S. flag appears when it is displayed on a flagpole. The required "visual comparison of the [design] and the actual flag," *Family Emergency Room*, 121 USPQ2d at 1887, may take into account any reasonable form in which the actual flag may appear or be displayed. Applicant's flag design is not artificially elongated or strangely shaped, as in the examples in TMEP § 1204.01(b) shown above, and there is thus no basis for finding that the design is "not in a shape normally seen in" the U.S. flag as contemplated in TMEP § 1204.01(b). This scenario also does not apply to Applicant's mark because Applicant's design would be perceived as the U.S. flag or a simulation thereof.

**e. Summary**

None of the four asserted scenarios in TMEP § 1204.01(b) applies to Applicant's mark because the flag "design shown in the proposed mark is not sufficiently altered, stylized, or merged with the other elements in the mark, so as to create a distinct commercial impression, other than as a simulation of the [U.S.] flag." *Family Emergency Room*, 121 USPQ2d at 1889.

**3. The Existence of Third-Party Registrations of Marks Containing Elements of the U.S. Flag**

In its appeal brief, Applicant cites and depicts more than 30 registered marks that contain elements of the U.S. flag. 4 TTABVue 15-22.<sup>27</sup> Applicant argues that "the

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<sup>27</sup> Applicant also cites and displays marks in pending applications. 4 TTABVue 14-16. We need not consider the applications because "[a]n application is not evidence of anything

Examining Attorney ignored the numerous registrable, stylized marks that contain unmistakable features of the U.S. flag,” *id.* at 14, which “include the seven registrable marks featured in TMEP § 1204.01(b) as well as many marks registered and applied for on the U.S. Trademark Register that contain recognizable U.S. flags.” *Id.* Applicant claims that these registrations and applications show that “stylized marks with designs that include flags are generally not refused registration under § 2(b).” *Id.* at 22.

Applicant argues that most of the examples

contain much more complete depictions of U.S. flags than Applicant’s Mark. To refuse registration of Applicant’s Mark while permitting registration of the foregoing marks would be to treat Applicant’s Mark inconsistently with Trademark Office practice. Applicant should be permitted to rely on the Trademark Office’s practice with respect to the foregoing marks. The courts and the TTAB encourage the Trademark Office to use a uniform standard in assessing marks and Applicant is entitled to such consistent treatment.

*Id.* (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)).

In its reply brief, Applicant argues that the

Examining Attorney does not address the Board’s and courts’ desire for consistent treatment of marks that are similar in nature, merely stating that “each application must be considered on its own record” (Footnote 1, Examining Attorney’s brief). The Examining Attorney’s refusal to address this need for consistent treatment at the Trademark Office is surely not an oversight as indeed, it would be impossible for the Examining Attorney to

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except that the application was filed on a certain date . . . .” *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1634 n.11 (TTAB 2007).

reconcile his decision to deny registration here with the decision to register or allow these other marks.

8 TTABVUE 5.

Applicant acknowledges that “the Board and courts are not bound by prior registrations for analogous marks,” but argues that the Board and the courts “encourage consistency in the Trademark Office’s assessment of the registrability of marks, and on numerous occasions have looked at prior registrations and/or applications to determine the registrability of a particular mark.” *Id.*<sup>28</sup> Applicant contends that “[w]hen those other flag marks are considered, it is clear that the Examining Attorney’s refusal in this case ‘is clearly inconsistent with what this applicant had come to expect from the United States Patent and Trademark Office over the past decade of prosecuting several similar applications.’” 8 TTABVUE 6 (quoting *Alphonse Capone Enters.*, 10 TTABVUE 7 (Serial No. 85453371)).

Applicant’s rely brief concludes with the argument that

[t]here is simply no justification for why these marks, which contain in many cases complete and accurate depictions of American flags with all of their elements plainly visible and which form the centerpiece of the marks, were permitted registration but Applicant’s Mark was refused. Based on and in reliance on the numerous federal registrations and allowed applications for marks containing obvious U.S. flag designs, it is reasonable for Applicant to think that Applicant’s Mark would not encounter a § 2(b) refusal.

*Id.* at 9.

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<sup>28</sup> In support, Applicant cites *In re Women’s Publ’g Co.*, 23 USPQ2d 1876 (TTAB 1992), and three non-precedential cases, *In re Armadahealth, LLC*, Serial No. 86713902 (TTAB June 28, 2017), *In re Alphonse Capone Enters., Inc.*, Serial No. 85453371 (TTAB Apr. 19, 2013), and *HEB Growers Co.*, Serial No. 85027087 (TTAB June 29, 2012). 8 TTABVUE 5.

These arguments, particularly Applicant's accusation that the Examining Attorney's "refusal to address this need for consistent treatment at the Trademark Office is surely not an oversight as indeed, it would be impossible for the Examining Attorney to reconcile his decision to deny registration here with the decision to register or allow these other marks," *id.* at 5, are misplaced. The Examining Attorney's obligation was to determine the registrability of the applied-for mark under § 2(b) based on the appearance of the flag design in Applicant's mark and a comparison of that design to the American flag, *Family Emergency Room*, 121 USPQ2d at 1887, taking into account the considerations and examples of registrable and unregistrable marks set forth in TMEP § 1204.01 and the record made during prosecution. He properly determined that the mark was unregistrable under the statute, and neither he nor we have any obligation "to reconcile his decision to deny registration here with the decision to register or allow . . . other marks." 8 TTABVue 5.<sup>29</sup> In addition, Applicant's evidentiary submission almost certainly presents an

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<sup>29</sup> The cases cited by Applicant in support of its argument that "on numerous occasions [the Board and courts] have looked at prior registrations and/or applications to determine the registrability of a particular mark," 8 TTABVue 5, are distinguishable because none of them involved a Section 2(b) refusal. The precedential *Women's Publ'g* decision involved genericness, descriptiveness, and acquired distinctiveness, while the non-precedential decisions in *Armadahealth* and *HEB Grocery* involved descriptiveness. The Board noted in *Armadahealth* and *HEB Grocery* that in descriptiveness cases such as those two and *Women's Publ'g*, "[c]ase law recognizes that [third-party] registrations can be used as a form of dictionary definition to illustrate how a term is perceived in the trade or industry." 15 TTABVue 11 (Serial Nos. 86713902 and 86802355); 10 TTABVue 9 (Serial No. 85027087). The non-precedential decision in *Alphonse Capone Enters.* involved a refusal to register on the ground that the applicant sought "registration of more than one mark." 10 TTABVue 1 (Serial No. 85453371). The Board noted in that case that the applicant had previously registered similar marks based "upon one substantially similar, and another identical specimen," to the one at issue on appeal, *id.* at 7, and that the refusal was "clearly inconsistent with what this applicant had come to expect from the United States Patent and



incomplete picture of USPTO practice, as it omits marks in applications that were refused registration under § 2(b) in a manner likely to be highly consistent with the action in this case.

Applicant cites the Federal Circuit’s decision in *Nett Designs* for the proposition that the “court encourages the PTO to achieve a uniform standard for assessing registrability of marks.” 4 TTABVUE 22 (citing *Nett Designs*, 57 USPQ2d at 1566). In the very next sentence in the opinion, however, the court held that “[n]onetheless, the Board (and this court in its limited review) must assess each mark on the record of public perception submitted with the application,” *id.*, and the court subsequently held that the third-party “registrations that Nett Designs submitted to the examiner” had “little persuasive value” even on the issue of whether the phrase THE ULTIMATE BIKE RACK in the applied-for mark was merely descriptive of bicycle racks and had to be disclaimed. The court held that “[e]ven if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.” *Id.*

The Board recently reiterated that “[w]hile we recognize that ‘consistency is highly desirable,’ . . . consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with the decisions of prior examining attorneys must yield to proper determinations under the Trademark Act and rules.” *In re Am. Furniture Warehouse Co.*, 126 USPQ2d 1400, 1407 (TTAB 2018) (quoting *In re Omega*

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Trademark Office over the past decade of prosecuting several similar applications, and even one identical application.” *Id.*

SA, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007) and citing *In re Cordua Rests.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016)). We do not believe that our decision here is inconsistent with the registration of the third-party marks cited by Applicant, but to the extent that it is, it is the decision required under the statute on the record before us.

For the reasons discussed above, the Examining Attorney properly determined that Applicant's mark is unregistrable under § 2(b) based on our precedent and applying the examination guidelines set forth in TMEP § 1204.01. We need to go no further to affirm the refusal to register.

**Decision:** The refusal to register is affirmed.

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

**CANCELLATION PETITION**

# **EXHIBIT “C”**

**IN SUPPORT OF CANCELLATION PETITION**

# EXHIBIT "C"

## WHAT MY COLORS MEAN TO ME AND MY BROTHERS by BILLY COOPER AUGUST 1979

I would like to tell you of something that has special meaning to me. It is my colors. I would like for you to notice that it is round. Its circular shape is symbolic of a wheel. A wheel is the common bond between all bikers and our kind of people. This ever turning wheel, whether on the road or in your mind, is what makes our life style so different. We love to ride!

I now draw your attention to the basic color of our patch. It is white. This is symbolic of purity-purity of mind and to accept you for what you are and not what others may see you as. So keep your heart pure and full of love for this patch and your fellow brothers.

You have probably wondered, "Why the eagle?" The eagle is a uniform figure in motorcycling. That is why it is honored on our patch. The eagle being a symbol of freedom, knows no bonds, but is wise and powerful. The eagle and I have a common bond. This bond only he and I know. That bond is the wind.

My brother, the chain is a metal binder that links all scooter bums together. All of us together are as links in this chain. In days of old, chains were used to fend undesirables but we shall use it for the greater purpose of binding us together as a brotherhood.

Look on my brother, there is more. The Libra scales-a symbol of equality. You and I are equal. Neither one of us is better than the next. This shows me that I am equal to every man, woman, citizen, or biker.

The axe at the eagle's claws shows me that I am set apart from the ordinary crowd. Maybe not an acceptable member of society but a useful member thereof. I am self supportive but not self centered. I love my brothers.

The flag of our country shows I am proud of America and the American way of which I give total support.

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There is one more special thing that I would like to point out. It is the eye. The eye is a constant reminder to you that you are always in the public eye. Walk with pride but never drop your guard. Keep the idea that you are an image that has been desecrated by others before you and public scrutinizing is inevitable. Strive not to bring any reproach upon my colors for they are your colors too.

Here I would like to direct your attention to the gold-the basic backing on our patch. The most precious metal on this earth is gold. Every man wants gold but some will never achieve its possession. Some will always be poor. To us, our patch is as

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

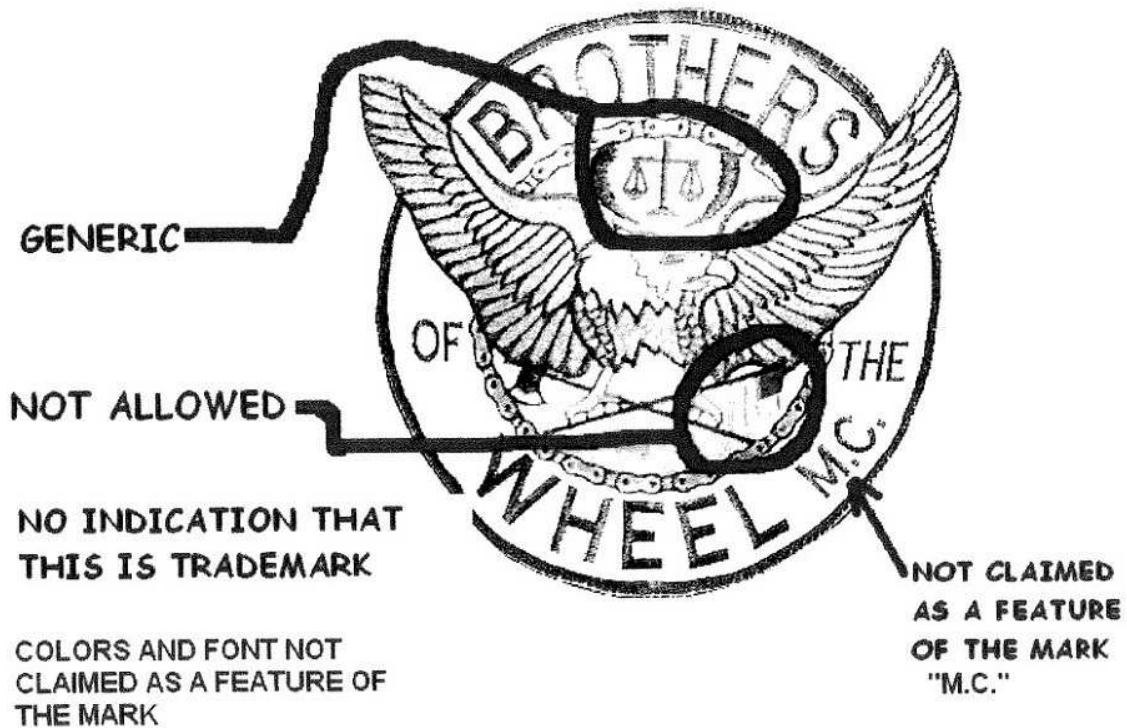
**CANCELLATION PETITION**

# **EXHIBIT “D”**

**IN SUPPORT OF CANCELLATION PETITION**

# EXHIBIT "D"

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*Presented to the court, but is not what is on file at the USPTO.*

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

**CANCELLATION PETITION**

# **EXHIBIT “E”**


**IN SUPPORT OF CANCELLATION PETITION**

TSDR

ASSIGN Status

TTAB Status

( Use the "Back" button of the Internet Browser to return to TESS)



Word Mark

BROTHERS OF THE WHEEL M.C.

Goods and Services

IC 200. US 200. G & S. Indicating membership in a beneficial fraternal organization of motorcycle riders. FIRST USE: 19931016. FIRST USE IN COMMERCE: 19931016

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Search Code

03.15.01 - Eagles  
03.15.19 - Birds or bats in flight or with outspread wings  
03.15.24 - Stylized birds and bats  
14.01.05 - Chain links (not jewelry) ; Chains, bicycle ; Chains, hardware  
17.05.02 - Scales of Justice ; Scales, two pan balance scales ; Weights, weights for scales  
24.09.05 - American flags ; Flags, American  
26.01.07 - Circles with a decorative border, including scalloped, ruffled and zig-zag edges  
26.01.11 - Circles comprised of animals ; Circles comprised of geometric figures ; Circles comprised of humans ; Circles comprised of letters or numerals ; Circles comprised of plants ; Circles comprised of punctuation ; Letters, numerals, punctuation, geometric figures, objects, humans, plants or animals comprising a circle  
26.01.17 - Circles, two concentric ; Concentric circles, two ; Two concentric circles

Serial Number

76538199

Filing Date

August 7, 2003

Current Basis

1A

Original Filing Basis

1A

Published for Opposition

November 23, 2004

Registration Number

2926222

Registration Date

February 15, 2005

Owner

(REGISTRANT) Brothers of the Wheel M.C., East Plateau Chapter, Inc. NON-PROFIT CORPORATION WEST VIRGINIA HC 61 Box 55 Kincaid WEST VIRGINIA 25119  
  
(LAST LISTED OWNER) BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL INC. CORPORATION WEST VIRGINIA post office box 782 paulorlora@suddenlink.net madison WEST VIRGINIA 25130

Assignment Recorded

ASSIGNMENT RECORDED

Attorney of Record

KENNETH L MITCHELL

Disclaimer

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE MC APART FROM THE MARK AS SHOWN

Description of Mark

Color is not claimed as a feature of the mark.

Type of Mark

COLLECTIVE MEMBERSHIP MARK

Register

PRINCIPAL

Affidavit Text

SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20141002.

Renewal

1ST RENEWAL 20141002

Live/Dead Indicator

LIVE

TESS HOME

NEW USER

STRUCTURE

FILE FORMS

BROWSE DATA

SEARCH OG

TOP

HELP

PREP LIST

CURS LIST

NOV LIST

FIRST DOC

PREV DOC

NEXT DOC

LAST DOC



**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

**CANCELLATION PETITION**

# **EXHIBIT “F”**

**IN SUPPORT OF CANCELLATION PETITION**

**Trademark Trial and Appeal Board Finds Reckless  
Disregard for the Truth Equals Fraud, Cancels  
Trademark Registration**

October 14, 2021

The U.S. trademark law provides that a trademark registration may be canceled if it was obtained fraudulently. A registration may also be canceled if the registrant commits fraud in post-registration filings, including a Section 15 Declaration of Incontestability.

Often filed in combination with the Section 8 Declaration of Use due in the 6th year of a registration, the Section 15 Declaration of Incontestability may be filed if the registrant has been using a registered mark continuously for the previous five years. However, certain other conditions are met, including that there are no pending proceedings, such as a lawsuit in federal court or a cancellation action before the US Patent and Trademark Office (USPTO) or Trademark Trial and Appeal Board (TTAB).

This was the issue in *Chutter, Inc. v. Great Management Group, LLC* and *Chutter, Inc. v. Great Concepts, LLC*, 2021 USPQ2d 1001 (TTAB 2021). In 2010, when Great Concepts was submitting a combined Section 8 and 15 Declaration of Use

and Incontestability for its trademark DANTANNA'S, the attorney for Great Concepts signed the declaration. He was aware that there were pending proceedings involving the trademark registration but, he later admitted, he did not read the declaration before signing it, and he was not familiar with the requirements of the Section 15 declaration. Years later, Chutter, Inc. filed a cancellation action against the registration, claiming that the Section 15 Declaration was fraudulently filed.

In its decision, the TTAB noted that fraud requires an intent to deceive; false statements made with a reasonable and honest belief that they are true do not result in a finding of fraud. The TTAB went on to find that the attorney who signed the declaration acted with reckless disregard and held that this reckless disregard rises to the level of intent to deceive needed to find fraud. Moreover, although the trademark law allows for the opportunity in certain circumstances to correct misstatements once they are discovered, the attorney who signed the declaration did not take any corrective steps once he discovered that he had made false statements in the declaration. "By failing to ascertain and understand the import of the document he was signing, far from conscientiously fulfilling his duties as

counsel, [the attorney] acted in reckless disregard for the truth; nor did he take any action to remedy the error once it was brought to his attention.”

Stating that the attorney’s reckless disregard was “the legal equivalent of finding that Defendant Great Concepts had specific intent to deceive the USPTO”, the TTAB granted the petition to cancel the DANTANNA’S registration.

Why does this decision matter to trademark owners? It’s a reminder to review carefully the statements in the documents you are signing and to ask questions if you do not understand something and speak up if something does not sound right.

Although there is generally a high bar to a finding of fraud leading to the cancellation of a trademark registration, this case shows that a lack of attention to reviewing and understanding the statements being made in trademark declarations can constitute “willful blindness” that rises to the level of reckless disregard and cancellation of one’s trademark registration could be the result.

## **ABOUT LAURA WINSTON**

lwinston@offitkurman.com | 347.589.8536

Laura J. Winston is a principal in the firm's intellectual property group. Ms. Winston focuses her law practice primarily in the areas of trademarks, copyrights and the internet, representing a broad range of clients from individual business owners and small startup ventures to established Fortune 500 and publicly-traded companies both domestically and abroad. Ms. Winston practiced both at large firms and specialized intellectual property firms, before co-founding an intellectual property boutique firm. Her industry experience covers various industries as diverse as pharmaceuticals and medical devices, print and online publishing, computer-related goods and services, alternative energy, and travel and transportation.

## **ABOUT OFFIT KURMAN**

Offit Kurman, one of the fastest-growing, full-service law firms in the United States, serves dynamic businesses, individuals and families. With 15 offices and nearly 250 lawyers who counsel clients across more than 30 areas of practice, Offit Kurman helps maximize and protect business value and personal wealth by providing innovative and entrepreneurial counsel that focuses on clients' business objectives, interests and goals. The firm is distinguished by the quality, breadth and global reach of its legal services and a unique operational structure that encourages a culture of collaboration. For more information, visit [www.offitkurman.com](http://www.offitkurman.com).

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

**CANCELLATION PETITION**

# **EXHIBIT “G”**

**IN SUPPORT OF PETITION TO CANCEL TRADEMARK NO. 2926222**

# EXHIBIT "G"

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

**In the matter of Trademark Registration No. 2926222**

**(US Serial Number: 6538199)**

**Mark: Brothers of the Wheel M.C.**

**Registration Date: February 15, 2005**

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
TRADEMARK REGISTRATION NO. 4299480  
PO BOX 507  
ST. ALBANS, WEST VIRGINIA 25177**

**Petitioner,**

**-v-**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
PO BOX 782  
MADISON, WEST VIRGINIA 25130**

**Respondent.**

**DECLARATION**

**TO FILE**

**15 U.S.C. 1065 (SECTION 15 OF THE LANHAM ACT):**

**INCONTESTABILITY**

**OF RIGHT TO USE MARK**

**UNDER CERTAIN CONDITIONS**

**INTRODUCTION**



COMES NOW Petitioner/Plaintiff Gerald R. Molloy, AKA Brothers of the Wheel and respectfully files his DECLARATION TO FILE 15 U.S.C. 1065 (SECTION 15 OF THE LANHAM ACT): INCONTESTABILITY OF RIGHT TO USE MARK UNDER CERTAIN CONDITIONS In Response to Inaccurate and Continued Fraudulent Claims Made by Respondent/Defendant Brothers of the Wheel M.C. Executive Council, Inc.

### **FACTS**

1) Are there defenses to incontestability, and if so, when can they be used ?

Section 33 of the Lanham Act, 15 U.S.C. § 1115, enumerates several defenses to incontestability in the United States. These include fraudulent registration, abandonment, misuse of the mark to misrepresent the source of goods and services, and that the mark is functional. In addition, U.S. Courts are split as to the weight that should be accorded an incontestable registration when examining the strength of a mark for purposes of determining likelihood of confusion. Some courts have treated incontestability as an indication of strength, while others have held that it is relevant only to the validity of the registration and not as a measure on the distinctiveness continuum.

2) Attorney Richard J. Lindroth has continued to advocate fraud upon the Court by filing documents advocating out and out fraud. In other words, Richard J. Lindroth lies a lot.

3) Under Federal law, when any officer of the court has committed "fraud upon the court", the orders and judgment of that court are void, of no legal force or effect.

4) 15 U.S.C. § 1065 INCONTESTABILITY OF RIGHT TO USE MARK  
UNDER CERTAIN CONDITIONS:

Except on a ground for which application to cancel may be filed at any time under paragraphs (3) and (5) of section 1064 of this title, and except to the extent, if any, to which the use of a mark registered on the principal register infringes a valid right acquired under the law of any State or Territory by use of a mark or trade name continuing from a date prior to the date of registration under this chapter of such registered mark, the right of the owner to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce, shall be incontestable:

*Provided, That—*

(1) there has been no final decision adverse to the owner's claim of ownership of such mark for such goods or services, or to the owner's right to register the same or to keep the same on the register; and

(2) there is no proceeding involving said rights pending in the United States Patent and Trademark Office or in a court and not finally disposed of; and

(3) an affidavit is filed with the Director within one year after the expiration of any such five-year period setting forth those goods or services stated in the registration on or in connection with which such mark has been in continuous use for such five consecutive years and is still in use in commerce, and other matters specified in paragraphs (1) and (2) hereof; and

(4) no incontestable right shall be acquired in a mark which is the generic name for the goods or services or a portion thereof, for which it is registered.

Subject to the conditions above specified in this section, the incontestable right with reference to a mark registered under this chapter shall apply to a mark registered under the Act of March 3, 1881, or the Act of February 20, 1905, upon the filing of the required affidavit with the Director within one year after the expiration of any period of five consecutive years after the date of publication of a mark under the provisions of subsection (c) of section 1062 of this title.

The Director shall notify any registrant who files the above-prescribed affidavit of the filing thereof.

**(Copy from United States Government Printing Office attached)**

### **ARGUMENT**

There are two(2) Trademark Cancellation Petitions on file at the United States Patent and Trademark Office(USPTO) showing "status" Cancellation for Trademark 2926222. Those being proceeding no. 92059292 filed by Frank J.

Visconi and proceeding no. 92056674 filed by Gerald R. Mollohan. Both listed at TTABVU and Trademark Trial and Appeal Board(TTAB) Inquiry System;  
<http://ttabvue.uspto.gov/ttabvue/v?qs=76538199>

Also, Document 76 Filed 09/02/14 Related Civil Action 2:13-cv-32251 contains COUNT ELEVEN - Violation of Naked Licensing Doctrine. Document 128 Page 12 in Related Civil Action 2:13-cv-32251 shows "Fraudulent application for three Trademarks at the United States Patent and Trademark Office (TM Registration No. 2926222, TM Serial No. 85896491 and Serial No. 8589668.) All made by Chief Operating Officer and National President Paul D. Warner."

WHEN MAKING AND SIGNING THE FOLLOWING DECLARATION AT THE UNITED STATES PATENT AND TRADEMARK OFFICE NATIONAL PRESIDENT PAUL D. WARNER COMMITTED FRAUD, as he was aware at the time that he did not control a trademark and could not anywhere during the five years mentioned and required for incontestability, nor did he have any trademark quality control. Paul D. Warner did not maintain written agreements between licensees and did not further ensure that written agreements contained robust quality control provisions. Warner's operations were not policed adequately to guarantee the quality of the products sold under the mark (*General Motors Corp v. Gibson Chemical & Oil Corp.*, 786 F.2d 105, 110; 2nd Cir. 1986.); "**When a trademark owner engages in Naked Licensing, without any control over the**

**quality of goods produced by the licensee, such a practice is inherently deceptive and constitutes abandonment of any rights to the trademark by the licensor** (*Stanfield v. Osborne Industries*, 52 F.3d 867, 871; 10th Cir. 1995.)

PAUL D. WARNER DOES NOT CONTROL MARK 2926222. GERALD R. MOLLOHAN AND FRANK J. VISCONI HAVE PROVEN THAT FACT IN COUNT ELEVEN - NAKED LICENSING, NAKED LICENSING, (Document 76 Filed 09/02/14 Page 19 of 27 Case 2:13-cv-32251.)

#### Declaration

*The mark is in use in commerce on or in connection with the goods and/or services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce. The mark has been in continuous use in commerce for five (5) consecutive years after the date of registration, or the date of publication under Section 12(c), and is still in use in commerce. There has been no final decision adverse to the owner's claim of ownership of such mark, or to the owner's right to register the same or to keep the same on the register; and there is no proceeding involving said rights pending and not disposed of either in the U.S. Patent and Trademark Office or in the courts.*

The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements and the like may jeopardize the validity of this

document, declares that he/she is properly authorized to execute this document on behalf of the Owner; and all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

Signature: /-Paul Warner/-Date: 01/10/2011

Signatory's Name: Paul Warner

Signatory's Position: President

### **CONCLUSION**

For the above stated reasons, Defendant Gerald R. Mollohan in Civil Action No. 2:11-cv-00104 asks this Court to grant leave to request this Court Order the immediate cancellation of Trademark Number 2926222 and find Richard J. Lindroth in violation of "fraud upon the court." "Fraud upon the court" makes void the orders and judgments of that court.

Respectfully submitted,

---

Gerald R. Mollohan, Pro Se  
Petitioner  
PO Box 507  
St. Albans, West Virginia 25177

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

**CANCELLATION PETITION**

# **EXHIBIT “H”**

**"PRECEDENT OF THE TTAB"**

**TMEP § 1204.02**

**Constitution Party of Texas v. Constitution Ass'n USA, 152 USPQ 443 (TTAB  
1966)**

**CANCEL MARK NO. 2926222**

**DECLARATION-MOTION OF GERALD R. MOLLOHAN**

# EXHIBIT "H"

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

**Cancellation No. \_\_\_\_\_**

**U.S. Reg. No. 2926222**

**Gerald R. Mollohan aka Brothers of the Wheel,  
Petitioner, Plaintiff**

**v.**

**Brothers of the Wheel M.C. Executive Council, Inc.,  
Respondent, Defendant,**

**PETITIONER, PLAINTIFF GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
"DECLARATION - MOTION"  
FRAUD UPON THE UNITED STATES PATENT  
AND TRADEMARK OFFICE  
COMMITTED BY RESPONDENT, DEFENDANT  
(IN SUPPORT OF PETITION TO CANCEL TRADEMARK NO. 2926222)**



## **INTRODUCTION**

COMES NOW the Petition, Plaintiff, Gerald R. Mollohan, AKA Brothers of The Wheel mark no. 4299480, by way of his "**Declaration - Motion**" and hereby makes the following allegations and claims as fact; Concerning Trademark Manual of Examining Procedure ("TMEP") § 1304.2 - PURPOSE OF MEMBERSHIP MARK. Petitioner, Plaintiff respectfully requests that the Board consider granting an order for the Immediate Cancellation of Plaintiff's registration mark number 2926222.

## **DISCUSSION OF FACTS**

Petitioner, Plaintiff Gerald R. Mollohan notifies this Honorable Board of his interpretation concerning TMEP § 1304.02 - "The sole purpose of a collective membership mark is to indicate that the user of the mark is a member of a particular organization"- see Constitution Party of Texas v. Constitution Ass'n USA, 152 USPQ 443 (TTAB 1966) holding cancellation of collective mark registration proper since mark was not being used to indicate membership in registrant. Respondent, Defendant Brothers of the Wheel M.C. Executive Council, Inc., Mark Registration Number 2926222 has always and continues to this day to

claim that its officers and members have a long-standing active membership in the "American Motorcycle Association" ("AMA"), (See TTABVUE Records AND this requirement is in Respondent, Defendant's By-Laws), at the same time as Respondent, Defendant are using registration mark number 2926222 to indicate membership in another organization, THE AMERICAN MOTORCYCLE ASSOCIATION ("AMA"), thus claiming dual membership. Identical as detailed in 152 USPQ 443 (TTAB 1966). At this same time, it is an undisputed fact that the mark of "Brothers of the Wheel M.C. Executive Council, Inc.", Number **2926222**, cannot and will not exist anywhere without first being given permission (mark no. 2926222 is controlled by others) by any local Motorcycle Gang such as Outlaw Territorial 1% Motorcycle Club and agrees to their terms, conditions, control and source of Trademark No. 2926222. Respondent, Defendant are and have always been forced, but most times volunteered to join and pay dues to "Confederation of Clubs" ("COC") coordinated and controlled by any Outlaw 1% Territorial Motorcycle Club. Thus Respondent, Defendant, "Brothers of the Wheel M.C. Executive Council, Inc.", do not control and cannot be a source or use mark no. 2926222 in commerce or anywhere else for that matter. Further, the Respondent,

Defendant registration number 2926222 is required by "COC" and "AMA" to display the logo of the "American Motorcycle Association" and "COC" at all locations of the Respondent, Defendant Mark No. 2926222. The source of mark no. 2926222 is actually at least three legal entities; "COC," "AMA" and Outlaw Territorial 1% Motorcycle Club. Mark No. 2926222 IS NOT a source from the Respondent, Defendant. Another major violation of Trademark Law.

FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 515 (9th Cir. 2010)

### **ARGUMENT**

Plaintiff Brothers of the Wheel M.C. Executive Council, Inc. President/CEO Paul D. Warner knowingly, willingly and with "reckless disregard" intentionally deceived the United States Patent and Trademark Office, signed declaration furnished by the USPTO regarding "Section 8 and 15 on January 11, 2011 and submitted a "Specimen" (Sections 8 & 9) " not controlled or a source or owned by the Plaintiff Corporation Brothers of the Wheel M.C. Executive Council, Inc., but by at least three (3) separate legal entities. "Reckless disregard" is defined as the "conscious indifference to the consequences of an act." *See* BLACK'S LAW DICTIONARY (11th ed. 2019) under "Disregard." Plaintiff's Corporation Brothers

of the Wheel M.C. Executive Council, Inc. President/CEO Paul D. Warner fraudulently described Section 8 & 9 Specimen Description; "1. Scanned image of a blank Membership Card representative of those issued to new members of the collective organization and bearing the registered collective membership mark indicating membership in the collective organization and 2. scanned image of a leather vest worn by members of the collective organization and bearing the membership in the collective organization." Both specimens clearly indicate membership in another Legal Entity not Respondent's, Defendant's; the American Motorcycle Association or "AMA." Details regarding the foregoing are available at the United States Patent And Trademark Office Website "Combined Declaration of Use and Incontestability under Sections 8 and 15" "The table below presents the data entered" for Registration Number 2926222 Registration Date 02/15/2005 Serial Number 76538199. "Filing Information" Submit Date Tue Jan 11 11:13:8 EST 2011. Signatory's Name; Paul Warner Signatory Position: President Date Signed: 01/10/2011. The "Scanned image of a blank Membership Card" does not indicate membership in the Respondent's, Plaintiff's "Brothers of the Wheel MC Executive Council, Inc." Respondent, Defendant represents

membership in "AMA" a separate legal entity entirely separate and clearly divorced of what ever Respondent, Defendant's claim is to the Trademark Office and Trademark Trial And Appeal Board. This Does Not represent membership in the Respondent, Defendant's Brothers of the Wheel M.C. Executive Council, Inc. Defendant's Brothers of the Wheel M.C. Executive Council, Inc. Legal Entity. The Trademark Trial And Appeal Board ("TTAB") has pointed out that Reckless Disregard for the Truth Is Sufficient for Proving Fraud. *In re Bose* the CAFC left open the question of whether "reckless disregard" for the true is sufficient for a finding of fraud on the USPTO. The Board has now answered that question in the affirmative, granting a petition for cancellation of a registration for the mark **DANTANNA'S** for "steak and seafood restaurant" on the ground of fraud. By no longer requiring proof of an intent to deceive the USPTO, the Board has significantly lowered the bar for proof of fraud. In a much less consequential ruling, the Board also sustained Plaintiff Chutter's opposition to registration of the marks **DANTANNA'S** for "spices and spice rubs" and **DANTANNA'S TAVERN** for "restaurant and bar services" in view of Chutter's previously used

mark **DAN TANA'S** for restaurant services and marinara sauce. Chutter, Inc. v. Great Management Group, LLC and Chutter, Inc. v. Great Concepts, LLC, 21 USPQ2d 1001 (TTAB 2021) [precedential] (Opinion by Judge Marc A. Bergsman). The Supreme Court and various circuit courts of appeal have ruled that "Willful" includes reckless behavior. In matters of trademark registration and maintenance, where the United States Patent And Trademark Office ("USPTO") relies on declarations to be complete, accurate, and truthful .... reckless disregard is equivalent to intent to deceive and satisfies the intent to deceive requirement." If the USPTO-TTAB were to find that Respond, Defendant's conduct did not constitute fraud, that could encourage declarants to conclude that such disregard carries no consequences and they can fail to read documents they are signing without penalty.

### **CONCLUSION**

Petitioner, Plaintiff moves for cancellation of mark no. 2926222 based on the fact that Respondent, Defendant mark no. 2926222 should never have been registered to begin with and that it be ordered canceled immediately, per the foregoing stated facts, including "Reckless disregard" committed by Respondent,

Defendant President/CEO Paul D. Warner and his Brothers of the Wheel M.C.  
Executive Council, Inc., upon the United States Patent And Trademark Office.

Respectfully submitted,

/Gerald R. Mollohan/  
Gerald R. Mollohan  
AKA Brothers of the Wheel  
Trademark No. 4299480

28 U.S. Code § 1746 - Unsown declarations under penalty of perjury.  
I declare under penalty of perjury that the foregoing is true and correct on  
October 23rd, 2021.

/Gerald R. Mollohan/  
Gerald R. Mollohan

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
PETITIONER PLAINTIFF**

**v.**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
RESPONDENT DEFENDANT**

**CANCELLATION PETITION**

# **EXHIBIT “I”**

**IN SUPPORT OF PETITION TO CANCEL TRADEMARK NO. 2926222**



# EXHIBIT "I"

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

**In the matter of Trademark Registration No. 2926222**

**(US Serial Number: 6538199)**

**Mark: Brothers of the Wheel M.C.**

**Registration Date: February 15, 2005**

**GERALD R. MOLLOHAN  
AKA BROTHERS OF THE WHEEL  
TRADEMARK REGISTRATION NO. 4299480  
PO BOX 507  
ST. ALBANS, WEST VIRGINIA 25177**

**Petitioner,**

**-v-**

**BROTHERS OF THE WHEEL M.C. EXECUTIVE COUNCIL, INC.  
PO BOX 782  
MADISON, WEST VIRGINIA 25130**

**Respondent.**

**DECLARATION  
NEW EVIDENCE - NEW FACTS  
MISREPRESENTATIVE OF SOURCE  
MARK NO. 2926222 IS NOT AND CANNOT BE SOURCE IDENTIFIER**

**INTRODUCTION**

COMES NOW Petitioner/Plaintiff Gerald R. Molloy, AKA Brothers of the Wheel and respectfully files his DECLARATION "NEW EVIDENCE - NEW FACTS" Misrepresentation or lack of legitimate Source. "MARK NO. 2926222 Is Not and Cannot be a SOURCE Identifier."

Respondent is using mark no. 2926222 so as to misrepresent the source of Trademark No. 2926222 and should be canceled by The United States Patent And Trademark Office for misrepresenting that trademark no. 2926222 as a source identifier, when in fact it never has served as "source identifier."

### **FACTS**

A Trademark must identify the source of a product or service.

- 1) Not all words and pictures can be protected as marks for products and services.
- 2) To be protectable, the mark must be capable of distinguishing on company's products or services from those of others.

### **ARGUMENT**

"[T]he term misrepresentation of source, as used in Section 14 (c) of the Act, *l* refers to situations where it is deliberately misrepresented by or with the consent of the registrant that goods and/or services originate from a manufacturer

or other entity when in fact those goods and/or services originate from another party." *Osterreichischer Molkerei-und Kasereiverband Registrierte GmbH v. Marks and Spencer Limited*, 203 USPQ 793, 794 (TTAB 1979); *see also Global Maschinen GmbH v. Global Banking Systems, Inc.*, 227 USPQ 862, 864 n. 3 (TTAB 1985). A pleading of misrepresentation of source "must be supported by allegations of blatant misuse of the mark by respondent in a manner calculated to trade on the goodwill and reputation of petitioner." *McDonnell Douglas Corporation v. National Data Corporation*, 228 USPQ 45, 47 (TTAB 1985); *see also McCarthy*, J. Thomas, 3 *McCarthy on Trademarks and Unfair Competition*, § 20:60 (4th ed. 2007)("A cancellation claim for misrepresentation under §14(3) requires a pleading that registrant deliberately sought to pass off its goods as those of petitioner."). In *E.E. Dickinson Co. v. T.N. Dickinson Company*, 221.

1 Pursuant to the Trademark Law Revision Act of 1988 ("TLRA"), Pub. L. No. 100-667, 102 Stat. 3935 (1988), the original "Section 14(c)" of the Act was redesignated "Section 14(3)."

Although a trademark does not have to tell purchasers who the company is that is the source for the product, the trademark must convey to purchasers that this particular product either comes from or is authorized by a single source. For that reason, generic names of products and services can never be a trademark.

Examples of generic names would be the word “chair” for a seat having a back, or the word “automobile” for a vehicle that rolls on the ground. It would be fundamentally unfair to permit a single company the exclusive right to use such a generic name to refer to their product. At the other end of the spectrum are arbitrary or coined words that have no relationship to the underlying product and may not be a word at all. An example often given of a coined trademark is “Kodak.”

### **CONCLUSION**

For the above stated reasons, Petitioner Gerald R. Mollohan asks this Board to issue an order and immediately cancel Trademark Number 2926222.

Respectfully submitted this 25th day of October 2021,

/Gerald R. Mollohan/

Gerald R. Mollohan AKA BROTHERS OF THE WHEEL

Petitioner/Plaintiff

The Legitimate BROTHERS OF THE WHEEL trademark and owner of US

Registration No 4299480 Class: 26

Registered Trademark Licensor, Word Mark: BROTHERS OF THE WHEEL  
and Letter Mark: BOTW

Embroidered Patch Owner

PO Box 507

St. Albans, West Virginia 25177

Ph: 304.982.1309

E-Mail: botwnomads@aol.com

Per 28 U.S.C., Section 1746 – Unsworn declarations under penalty of perjury,  
I, Gerald R. Mollohan, the undersigned, do confirm that the statements above  
are true and accurate to the best of my knowledge and made by me under  
possible penalty of perjury on this date, the 25th day of October 2021.

/Gerald R. Mollohan/

Gerald R. Mollohan

Signed at St. Albans, West Virginia October 25, 2021