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

Proceeding	91174438
Party	Defendant Toytrackerz LLC
Correspondence Address	TOYTRACKERZ LLC 302 S LOWMAN ST FORT SCOTT, KS 66701 UNITED STATES toylaw@classicnet.net
Submission	Other Motions/Papers
Filer's Name	Terri Lynn Coop
Filer's e-mail	circlexranch@sbcglobal.net
Signature	/Terri Lynn Coop/
Date	06/08/2008
Attachments	unsuspendjwest.pdf ( 2 pages )(47369 bytes ) Ex1TransferVenue.pdf ( 5 pages )(38276 bytes ) Ex2BBJEJudgment.pdf ( 2 pages )(47087 bytes ) Ex3FederalOpinion.pdf ( 32 pages )(102411 bytes )

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

In the matter of trademark application No: **78788525**

In the matter of TTAB Opposition proceeding No: **91174438**

For the mark: "**Johnny West**"

Date published for Opposition: **August 22, 2006**

Date Notice of Opposition Filed: **December 07, 2006**

**American Plastic Equipment Inc.** [Opposer/Plaintiff]

A Florida Corporation

vs.

**Toytrackerz LLC** [Applicant/Defendant]

A Kansas Limited Liability Company

**UPDATE ON CIVIL PROCEEDINGS**

*COMES NOW*, the Defendant, Toytrackerz LLC, who respectfully presents the following update on the civil proceedings between the parties:

1. On March 7, 2007, the TTAB suspended any further action on the above referenced trademark pending the civil proceedings between the parties.
2. On June 6, 2007, the Federal Court for the Western District of Missouri granted Toytrackerz' motion to transfer venue to the District of Kansas. [Ex. 1]
2. On August 1, 2007, the District Court of Bourbon County Kansas entered a consent judgment between the parties stating that American Plastic Equipment had 'no protectible or actionable interest' in the disputed trademarks under Kansas law. [Ex. 2]
3. On March 31, 2007, the Federal Court for the District of Kansas granted Toytrackerz' motion to dismiss all trademark related claims [counts II - IX] filed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on the grounds of:
  - a) Failure to maintain a compulsory counterclaim,
  - b) Res Judicata, citing the state court judgment,
  - c) Collateral Estoppel, citing the state court judgment. [Ex. 3]

4. Count I, copyright infringement, remains open in the federal court, but all issues regarding the disputed trademarks are complete and settled in Toytrackerz favor.

Accordingly, Toytrackerz asks for guidance from the TTAB on whether the suspension can be lifted and further proceedings may commence in this matter.

/Terri Lynn Coop/  
Owner - Toytrackerz LLC  
302 South Lowman Street  
Fort Scott KS 66701  
(620) 224-2945

### **CERTIFICATE OF SERVICE**

I, *Terri Lynn Coop*, certify that on the 8<sup>th</sup> day of June 2008, I mailed a copy of the foregoing *Update on Civil Proceedings* [Letter only - no exhibits] by first class mail, postage prepaid, Delivery Confirmation attached, to the following:

David E. Herron II  
Attorney for the Respondent  
PO Box 2678  
Kansas City KS 66110

/Terri Lynn Coop/  
Owner - Toytrackerz LLC

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

AMERICAN PLASTIC EQUIPMENT, INC.,            )  
a Florida Corporation,                            )  
  )  
  )            Plaintiff,                                    )  
  )  
vs.    )            No. 07-00185-CV-W-SOW  
  )  
TOYTRACKERZ LLC, et al.,                        )  
  )  
  )            Defendants.                                    )

ORDER

Before the Court is Defendants Toytrackerz and Noah Coop’s Motion to Transfer Venue, Motion to Dismiss for Lack of Subject Matter Jurisdiction, Motion for Sanctions (Doc. # 6). For the reasons stated below this case is transferred to the District of Kansas pursuant to 28 U.S.C. § 1404(a).

Background

This is a case brought by plaintiff American Plastic Equipment Inc. (“American Plastic”) against defendants Toytrackerz and Noah Coop for federal trademark infringement. According to the record, the parties are currently engaged in a state law suit in Bourbon County, Kansas, filed in January 2006 styled Toytrackerz v. American Plastic Equipment, Inc. (“state suit”). In February 2006, American Plastic attempted, unsuccessfully, to remove the state suit to federal court in the District of Kansas. The Bourbon County Petition relied solely on Kansas trademark statutes and Kansas common law theories of trademark abandonment. On August 30, 2006, the case was remanded to state court by the Kansas District Court, after a finding that the removal action was “frivolous and meritless.” In Magistrate Judge Waxse’s Order, he found that the only

federal claims asserted were contained in American Plastic's Answer, which included a counterclaim against Toytrackerz and individuals Noah and Terri Coop. Relying on the well-pleaded complaint rule which requires that federal question jurisdiction must be found on the face of the Complaint, and removal cannot be predicated on allegations contained in a defendant's proposed counterclaim, the case was remanded.

On March 9, 2007, American Plastic filed a lawsuit in this Court against Toytrackerz LLC and Noah Coop for trademark infringement under federal law. American Plastic's Complaint states that this Court has original jurisdiction over the subject matter of this action pursuant to the Lanham Trademark Act and supplemental jurisdiction over any state law claims. American Plastic also states that venue is proper in the Western District of Missouri under 28 U.S.C. § 1391(b) because the defendants have conducted business, advertised infringing articles for sale, sold infringing articles, and shipping infringing articles to buyers that reside within the Western District of Missouri.

Defendants Toytrackerz and Coop bring the instant motion to transfer venue under 28 U.S.C. § 1404(a), to the District of Kansas because that court has familiarity with the parties and the case. American Plastic is a resident of Ohio and Toytrackerz and Coop are residents of Kansas, and neither party resides or maintains a place of business in Missouri.

#### Discussion

Federal courts are courts of limited jurisdiction. The court may only exercise that jurisdiction which is granted by Congress. The starting point for the Court is to determine whether venue is proper within this District. Even though this action is brought under the Lanham Trademark Act ("the Act"), the Act "has no special venue provision and thus the general

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