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

Proceeding	91197395
Party	Plaintiff TSDC, LLC
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Submission	Opposition/Response to Motion
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No. 77/900,545

Filed on December 23, 2009

For the mark FIGHT LIKE A CAROLINA GIRL

Published in the *Official Gazette* (Trademarks) on May 18, 2010

TSDC, LLC)	
)	
)	
and)	
)	
)	
Sandra Ellis)	
)	
Opposers,)	<u>Opposition No.: 91/197,395</u>
)	
)	
v.)	
)	
)	
Beyond The Box, Inc.,)	
)	
Applicant.)	
)	
)	

**UNITED STATES PATENT AND TRADEMARK OFFICE
ATTN: TRADEMARK TRIAL AND APPEAL BOARD
P.O. BOX 1451
ALEXANDRIA, VA. 22313-1451**

**OPPOSERS' SUPPLEMENTAL RESPONSE TO
APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS,
OR IN THE ALTERNATIVE, OPPOSERS' MOTION FOR
JUDGMENT ON THE PLEADINGS**

TSDC, LLC (hereinafter referred to as "TSDC") and Sandra Ellis (hereinafter referred to as "ELLIS") (TSDC and ELLIS are hereinafter collectively referred to as "OPPOSERS"), through their undersigned attorney, hereby submit their Supplemental Response to Applicant's Motion for Judgment on the Pleadings.

In the alternative, and pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and the TTAB Manual of Procedure (TBMP) §504, OPPOSERS hereby move the Honorable Trademark Trial and Appeal Board (hereinafter referred to as "the Board") for judgment on the pleadings in Opposition No. 91/197,395 filed on November 15, 2010 ("Opposition") by OPPOSERS. This motion is supported by the following Brief. OPPOSERS' motion is being filed prior to the opening of testimony in this case and is therefore, timely and not made so as to delay the trial. OPPOSERS note that no Suspension Notice has been entered in the present proceeding. However, OPPOSERS are aware that the corresponding opposition proceeding (Opposition No. 91/197,393) has been suspended pending disposition of Applicant's Motion for Judgment on the Pleadings filed on February 15, 2011. OPPOSERS' motion is relevant to Applicant's Motion for Judgment on the Pleadings, as the Board cannot permit a void application to proceed to allowance. Therefore, the present paper should be given consideration by the Board.

Applicant's subject application is *void ab initio* and cannot be corrected by amendment. The Applicant was not the owner of the mark when the application was filed. If the application is void, it should be unnecessary for the parties and the Board to spend time and resources deciding any other grounds presented in the Notice of Opposition.

LEGAL STANDARD FOR MOTION FOR JUDGMENT ON THE PLEADINGS

“A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law.” TBMP § 504.02. “For purposes of the motion, all well pleaded factual allegations of the nonmoving party must be accepted as true, while those allegations of the moving party which have been denied ... are deemed false.” *Id.* “A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law.” *Id.*

THE PLEADINGS

The Notice of Opposition was filed November 15, 2010, and it was accepted as the operative pleading by Order dated November 15, 2010. In the Notice of Opposition, OPPOSERS asserted that the alleged Applicant filed its mark in the subject application to register FIGHT LIKE A CAROLINA GIRL on the Principal Register of the United States Patent and Trademark Office for athletic apparel, namely, shirts, pants, jackets, hats and caps, athletic uniforms excluding footwear in International Class 025. *See Notice of Opposition* at ¶ 15. OPPOSERS asserted that the alleged Applicant had not filed an Allegation of Use in the application, and OPPOSERS have not found any evidence of use of the mark FIGHT LIKE A CAROLINA GIRL by Applicant in commerce. *Id.* at ¶ 18.

In its Answer, Applicant has admitted – **no less than three (3) times** – that it was **acting as the agent of END THE FIGHT, INC.**, a non-profit corporation based in Charlotte, North Carolina. See *Answer* at Pg. 2, Pg. 4; ¶ 4 in “Counterclaims” section; and Pg. 5. By its Answer filed on December 27, 2010, the Applicant admits that it is not the actual owner of the subject mark.

Under the Federal Trademark Act of 1946 (*i.e.*, the Lanham Act), the terms “applicant” and “registrant” embrace the legal **representatives**, predecessors, successors and assigns of such applicant or registrant. See §45 (15 U.S.C.A. 1127) (emphasis added). The commonly accepted definition of an “agent” is that of a *representative*, one who is authorized to act for or in the place of another, a person who manages business, financial, contractual matters for another. See *Merriam-Webster Dictionary* on-line definitions, attached hereto as EXHIBIT 1. *Black’s Law Dictionary* defines “agent” as a “person authorized by another (principal) to act for or in place of him; one instructed with another’s business. See *Black’s Law Dictionary*, 6th ed., p. 63, attached hereto as EXHIBIT 2. “Agency” is a consensual relationship created by contract or by law where one party, the principal, grants authority for another party, the agent, to act on behalf of and under the control of the principal to deal with a third party. An agent is one authorized to transact all business of principal, or all of principal’s business of some particular kind, or all business at some particular place. *Farm Bureau Mut. Ins. Co. v. Coffee*, 136 Ind. App. 12, 186 N.E.2d 180, 182. One of the most important elements of a principal-agent relationship is the concept of control: the agent agrees to act under the control or direction of the principal. See *Law Dictionary* on-line definition, attached hereto as EXHIBIT 3. Therefore, Applicant, by its own admission, is a representative of END THE FIGHT, INC., has been authorized to act for or in the place of END THE FIGHT, INC., and has been instructed with END THE FIGHT, INC.’s business matters. However, an agent or a representative cannot be named in a trademark application instead of the true trademark owner, or the entity that has the *bona fide* intent-to-use the mark. For these reasons, Applicant is incorrectly and unlawfully listed as the owner of the subject trademark application. Accordingly, the mark should be denied registration.

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