

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



MagnaFlex Industries Inc.,

Opposer,

vs.

Trans Continental Equipment Ltd./
Equipment Trans Continental Ltee.,

Applicant.

Opposition No. 91152322

Serial No. 75/723671

Mark:

CHIMNEYFLEXIBLE LINERS

and Design



09-16-2002

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #66

Attorney's Reference: 32071-183239

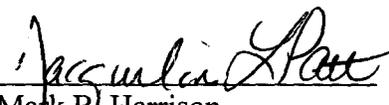
APPLICANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Applicant, Trans Continental Equipment, Ltd./ Equipment Trans Continental Ltee., respectfully moves to dismiss the pending Opposition for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b) of the Federal Rules of Procedure and TBMP § 503.

This motion is supported by the accompanying Memorandum and the attached exhibits.

Respectfully submitted,

Dated: September 16, 2002


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WHEREFORE, Applicant prays that the notice of opposition be dismissed.

Respectfully submitted,

Dated: September 16, 2002

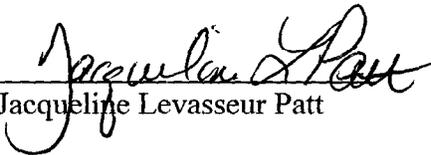


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Attorneys for Applicant

CERTIFICATE OF SERVICE

The undersigned, attorney for Applicant, hereby certifies that he served, by first class mail, postage prepaid, a copy of the foregoing ANSWER upon Opposer, John C. Craven, V.P. Sales & Marketing, MagnaFlex Industries, Inc., 211 Winsdor Drive, Mt. Sterling, Kentucky 40353, this 16th day of September, 2002.


Jacqueline Levasseur Patt

commerce since at least as early as January 1999. The Application Serial No. 75/723,671 for the mark CHIMNEYFLEXIBLE LINERS and Design includes a disclaimer of the terms CHIMNEY FLEXIBLE LINERS.

The Application Serial No. 75/723,671 was published on March 19, 2001. Opposer filed a one page Notice of Opposition on April 5, 2002 alleging that the mark in Application Serial No. 75/723,671 is descriptive. The conclusory allegations contained in Opposer's Notice of Opposition are insufficient to state a claim upon which relief can be granted and Opposer's Notice of Opposition should be dismissed.

DISCUSSION

"A motion to dismiss for failure to state a claim upon which relief may be granted is a test solely of the legal sufficiency of the complaint." TBMP § 503.02. A pleading must allege such facts as would, if proved, establish that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought. See id.

The facts alleged by Opposer in its Complaint are insufficient to create standing in that Opposer has not alleged how it may be damaged by the registration of the Applicant's mark as required under the Section 13 of the Lanham Act, 15 USC § 1063, the Federal Rules of Procedure, Rule 12(b) and Trademark Rules of Practice § 2.104.

Moreover, regardless of whether Opposer has standing, Opposer is required to state a valid ground on which to deny the registration. In this case, Opposer has apparently alleged that the Applicant's Mark CHIMNEY FLEXIBLE LINER is descriptive. However, Applicant has disclaimed the wording CHIMNEY FLEXIBLE LINER from its design mark, thus, no valid ground for denying registration exists..

Opposer's Lack of Standing

“The purpose of the standing requirement is to avoid litigation where there is no real controversy between the parties”, that is, where the opposer is no more than an “intermeddler.” See Aruba v. Excelsior, Inc., 5 USPQ2d 1685 (TTAB 1987). “In order to withstand a Motion to Dismiss, the Opposer must plead facts sufficient to show a personal interest in the outcome of the case beyond that of the general public.” See id. Opposer’s allegations alone do not establish standing. Lipton Industries, Inc. v. Ralston Purina Co., 213 USPQ 185 (CCPA 1982).

Standing is determined from a reading of the allegations made in the pleading. Lipton Industries, 213 USPQ 185. In this case, Opposer has alleged that it finds it “disturbing and unacceptable that a company wants to trademark a descriptive term.” See Notice of Opposition. Applicant submits that Opposer’s personal feelings concerning Applicant’s mark do not establish standing.

Further, in support of its Opposition, Opposer alleged generally that the “term Flexible Chimney Liner, Chimney Flexible Liner and Flexible Chimney Liner Systems have been used in brochures, price list and promotional materials.” Also, Applicant’s mark “is a basic description that has and is used by most chimney liner manufactures [sic] in the United States.” And, according to Opposer’s Notice of Opposition, “[t]here are many manufacturers of Flexible Chimney Liners/Chimney Flexible Liners and . . . not one of these United States Manufacturers has ever attempted to trademark a descriptive term for any of their products.” These broad statements fail to establish that Opposer has a personal interest in the outcome of the case beyond that of the general public.

Since no other allegations are present in the Notice of Opposition, Opposer's Notice of Opposition, on its face, fails to establish standing.

No Valid Ground Exists for Denying the Registration

Opposer is required to state a valid ground on which to deny the registration. TBMP §503.02. In this case, it appears that Opposer has based its Notice of Opposition on the single allegation that Applicant's mark is descriptive. However, Applicant's mark is a composite mark in which the words CHIMNEY FLEXIBLE LINER are accompanied by a design element. Applicant disclaimed any exclusive right to use the words CHIMNEY FLEXIBLE LINER apart from the mark as shown.

As used in trade mark registrations, a disclaimer of a component of a composite mark amounts merely to a statement that, in so far as that particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the composite; and the particular registration represents only such rights as flow from the use of the composite mark.

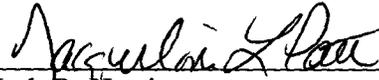
Sprague Electric Co. v. Erie Resistor Corp., 101 USPQ 486, 486-87 (Comm'r Pats. 1954); TMEP § 1213.

In this case, because Applicant has denied any exclusive rights in the term "CHIMNEY FLEXIBLE LINERS" apart from the composite mark, Opposer's allegation that the mark is descriptive is insufficient to deny registration of the mark. Thus, Opposer's Notice of Opposition, on its face, fails to state a valid ground on which for denying the registration and should be dismissed.

WHEREFORE, for the reasons stated above, Opposer's Notice of Opposition should be dismissed.

Respectfully submitted,

September 16, 2002

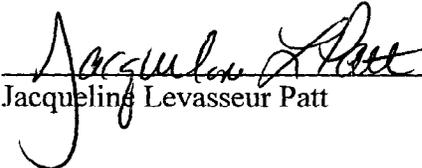


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CERTIFICATE OF SERVICE

The undersigned, attorney for Applicant, hereby certifies that he served, by first class mail, postage prepaid, a copy of the foregoing Motion to Dismiss for Failure to State a Claim and Memorandum in Support of its Motion to Dismiss upon Opposer, John C. Craven, V.P. Sales & Marketing, MagnaFlex Industries, Inc., 211 Winsdor Drive, Mt. Sterling, Kentucky 40353, this 16th day of September, 2002.



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