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

Proceeding	91176065
Party	Plaintiff Lenovo (Singapore) Pte. Ltd
Correspondence Address	Stanley D. Ference III Ference & Associates LLC 409 Broad Street Pittsburgh, PA 15143 UNITED STATES uspto@ferencelaw.com
Submission	Motion to Dismiss - Rule 12(b)
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Date	10/05/2009
Attachments	740.043 Motion (Oct 2009).pdf (32 pages)(1231089 bytes)

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

In the matter of trademark application Serial No. 78/636,480
For the mark THINKCP
Published in the Official Gazette on November 7, 2006

Lenovo (Singapore) PTE Ltd.)	
)	Opposition No. 91176065
Opposer,)	
)	
vs.)	
)	
H. Co. Computer Products)	
)	
Applicant.)	
_____)	
H. Co. Computer Products)	
)	
Counterclaimant,)	
)	
vs.)	
)	
Lenovo (Singapore) PTE Ltd.)	
)	
Respondent.)	
_____)	

**RESPONDENT’S MOTION TO DISMISS PETITIONER’S COUNTERCLAIM
(FRAUD ON THE USPTO) IN PETITIONER’S SECOND AMENDED ANSWER
PURSUANT TO FED. R. CIV. P. 12(b)(6) AND 9(b)**

Introduction

The Respondent, Lenovo (Singapore) PTE Ltd. (“Lenovo”), by and through its undersigned counsel, moves to dismiss the counterclaim by Petitioner, H. Co. Computer Products (“H. Co.”), alleging Lenovo committed fraud on the United States Patent and Trademark Office. H. Co.’s counterclaim should be dismissed with prejudice because H.

Co's allegation clearly falls short of the heightened pleading standard of Fed. R. Civ. P. § 9(b) required when alleging fraud. Lenovo hereby requests that the Board dismiss Applicant's counterclaim for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. § 12(b)(6). In addition, Lenovo further requests that the Board deny H. Co. leave to amend its pleading because it will be unfairly prejudicial, futile, and inconsistent with Fed. R. Civ. P. 11.

Applicable Legal Standard

Procedure and practice in inter partes proceedings before the Trademark Trial and Appeal Board, except as otherwise provided, and wherever applicable and appropriate, shall be governed by the Federal Rules of Civil Procedure. 37 C.F.R. § 2.116. More specifically, when one of the special matters listed in Fed. R. Civ. P. 9 (including, *inter alia*, capacity, ***fraud***, and judgment) is pleaded, the provisions of Fed. R. Civ. P. 9 governing the pleading of that special matter should be followed. TBMP § 311.02(b) (*emphasis added*). Accordingly, Fed. R. Civ. P. 9(b) unequivocally states that in alleging fraud or mistake, a party must state with particularity the circumstances constituting the fraud or mistake wherein malice, intent, knowledge and other conditions of a person's mind may be alleged generally. Fed. R. Civ. P. 9(b). Although Fed. R. Civ. P. 9(b) does not require the pleading of detailed evidentiary matters, it does require that the pleadings contain an explicit, rather than an implied, expression of the circumstances constituting fraud. *King Automotive, Inc. v. Speedy Muffler King, Inc.*, 667 F2d 1008 (CCPA 1981).

Fraud "occurs when an applicant knowingly makes false, material misrepresentations of fact in connection with his application." *See Torres v. Cantine*

Torresella S.R.L., 1 USPQ2d 1483 (Fed. Cir. 1986). To constitute fraud on the USPTO, the statement must be (1) false, (2) a material representation and (3) made knowingly. *Id.* Allegations of fraud in a cancellation proceeding must be proven ‘to the hilt,’ without relying on speculation and inferences, and with doubts resolved in against the charging party. *Smith Int’l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (T.T.A.B. 1981).

Fraud implies some intentional deceitful practice or act designed to obtain something to which the person practicing such deceit would not otherwise be entitled. *First International Services Corp. v. Chuckles Inc.*, 5 USPQ2d 1628 (TTAB 1988) (citing *Smith International, Inc. v. Olin Corp.*, 209 USPQ 1033 (TTAB 1981)). Specifically, it involves a willful withholding from the Patent and Trademark Office by an applicant or registrant of material information or fact, which, if disclosed to the Office, would have resulted in the disallowance of the registration sought or to be maintained. *Id.*

Intent to deceive must be “willful”. *First International Services Corp. v. Chuckles Inc.*, 5 USPQ2d 1628 (TTAB 1988) (citing *Smith International, Inc. v. Olin Corp.*, 209 USPQ 1033 (TTAB 1981)). If it can be shown that the statement was a “false misrepresentation” occasioned by an “honest” misunderstanding, inadvertence, negligent omission or the like rather than one made with a willful intent to deceive, fraud will not be found. *Id.* Thus, without the essential intent to deceive the Patent and Trademark Office, even a material misrepresentation does not constitute fraud justifying cancellation of a registered trademark. *King Auto., Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 1011 (CCPA 1981).

An allegation of fraud must then be accompanied by a statement of facts upon which the belief is founded. *Segal v. Gordon*, 467 F.3d 602 (2nd Cir. 1972). In order to set forth the circumstances with particularity, the pleader must state the time, place and content of the false representation, the fact(s) misrepresented and what was obtained or given up as a consequence of the fraud. *W.R. Gracie & Co. v. Arizona Feeds*, 195 USPQ 670 (TTAB 1977). A fraud count that is almost wholly conclusory and lacking in specifics is too vague to meet the Fed. R. Civ. P. 9(b) benchmark. *Powers v. Boston Cooper Corp.*, 926 F.2d 109 (1st Cir. 1991).

Recently, the Court of Appeals for the Federal Circuit held that a pleading of fraud alleging that an applicant made a material representation of fact on the USPTO which the applicant “knew or should have known” was false or misleading is insufficient. *In re Bose Corp.*, ___ F.3d ___, ___ USPQ2d ___ (Fed. Cir., August 31, 2009). To hold otherwise would remove the requirement that the applicant knowingly intended to deceive the USPTO and would lower the fraud standard to a simple negligence standard. *Id.* Furthermore, the court went on to find that a pleading made on “information and belief” is insufficient if it does not include a separate indication that the charging party has actual knowledge of the facts supporting the claim. *Id.*

The stricter standard for pleading intent to deceive described by the court in *In re Bose Corp.* was drawn from law announced in patent inequitable conduct cases, which apply “with equal force to trademark fraud cases.” *Id.* As such, the recent *Exergen Corp. v. Wal Mart Stores, Inc.*, 575 F.3d 1312 (Fed. Cir. 2009) decision of August 4, 2009, which involved pleading a claim of inequitable conduct during prosecution of a patent, is also relevant to a current understanding of the pleading standard of Fed. R. Civ.

P. 9(b). In *Exergen, Corp.*, the court, partially relying on *King Automotive, Inc. v. Speedy Muffler King, Inc.*, 667 F2d 1008 (CCPA 1981), held:

[T]o plead the “circumstances” of inequitable conduct with the requisite “particularity” under Rule 9(b), the pleading must identify the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO. Moreover, although “knowledge” and “intent” may be averred generally, a pleading of inequitable conduct under Rule 9(b) must include sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the PTO.

Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1328 (Fed. Cir. 2009) (*emphasis added*). Thus, for example, if a pleading for fraud refers generally to a party and their agents or representatives, but does not name the specific individual associated with the allegedly fraudulent act, the pleading is deficient in that it “fails to identify the “who” of the material omissions and misrepresentation.” *Id* at 1329.

H. Co.’s Counterclaim Alleging Fraud Fails to State a Claim for Which Relief Can Be Granted Because it is not Plead with the Particularity Required by Fed. R. Civ. P. § 9(b)

H. Co.’s counterclaim alleging fraud fails to plead specific facts sufficient to establish fraud. Specifically, H. Co. has failed to adequately plead that Lenovo (1) knowingly made (2) false (3) material representations to the USPTO during procurement of the trademark registrations named in H.Co.’s counterclaim. *See Torres v. Cantine Torresella S.R.L.*, 1 USPQ2d 1483 (Fed. Cir. 1986).

H. Co. alleges in its second counterclaim:

on information and belief that Lenovo or its agent made material false representations of fact during the prosecution of its applications that Lenovo knew or should have known were false and that, justifiably relying on the purported

truth of these misrepresentations, the USPTO issued each of the following registrations.

See Amended Answer to Amended Notice of Opposition; Second Amended Counterclaim, ¶ 25, p. 11 (emphasis added).

H. Co.'s pleading is based on "information and belief." Such pleading is insufficient because it fails to include a separate indication that H. Co. has any knowledge whatsoever to support this claim. *In re Bose Corp.*, __ F.3d __, __ USPQ2d __ (Fed. Cir., August 31, 2009). In addition, H. Co.'s pleading does not allege that H. Co.'s "information and belief" is based upon essential information uniquely in Lenovo's control together with any set of facts to substantiate that such a belief is reasonable. *Exergen, Corp. v. Wal Mart Stores, Inc.*, 575 F.3d 1312, 1329 (Fed. Cir. 2009).

Furthermore, H. Co. asserts in its pleading that Lenovo "knew or should have known" that Lenovo or its agent made material false statements to the USPTO in procuring the registrations named in H. Co.'s counterclaim. "Knew or should have known" refers to negligent conduct and not fraud. *In re Bose Corp; Iletto v. Glock, Inc.*, 565 F.3d 1126, 1155 (9th Cir. 2009). As such, H. Co. is essentially charging Lenovo with negligent conduct and not fraud. Such pleading clearly fails to approach the heightened pleading standard of Fed. R. Civ. P. 9(b).

Lenovo would like to draw the Board's attention to the September 20, 2009 Board decision of *Societe Cooperative Vigneronne Des Grandes Caves Richon-Lezion and Zicron-Jacob Ltd. v. Albrecht-Piazza, LLC*, wherein the sufficiency of a pleading of fraud was analyzed in view of the August 31, 2009 *In re Bose* decision. *Societe Cooperative Vigneronne Des Grandes Caves Richon-Lezion and Zicron-Jacob Ltd. v. Albrecht-*

Piazza, LLC, Opposition No. 91190040, Docket No. 13 (TTAB September 20, 2009). In *Societe Cooperative*, the Board found that applicant's counterclaim to cancel opposer's registration was legally insufficient. In view of *In re Bose*, the Board stated that it "will not approve pleadings of fraud which rest solely on allegations that the trademark applicant made material representations of fact in its declaration which it 'knew or should have known' to be false or misleading." *Id* at p. 5. Furthermore, the Board stated that a pleading made on "information and belief" that fails to provide a separate indication of actual knowledge to support such a claim is also insufficient. *Id*.

In its pleading, H. Co. fails to name the specific individual who allegedly made the material false representations of fact to the USPTO. Instead, H. Co.'s pleading merely refers to Lenovo, or to Lenovo or its agents. By neglecting to specifically identify the individual(s) who allegedly made the material false representations of fact, H. Co. has failed to adequately plead all of the facts sufficient to establish fraud. *Exergen, Corp. v. Wal Mart Stores, Inc.*, 575 F.3d 1312, 1329 (Fed. Cir. 2009) (a pleading asserting inequitable conduct for withholding information during patent prosecution before the USPTO is fatally deficient under Fed. R. Civ. P. 9(b) for referring generally to "Exergen, its agents and/or attorneys" and failing to specifically name the individuals who knew of the information and intentionally withheld it).

H. Co. further alleges in its second counterclaim:

In the statement of use filed in connection with the '462 Registration, **Lenovo or its agent** stated that the subject mark of the '462 Registration was being used on or in connection with modular connectors, base units and prototyping cards, temperature probes, light probes, photo event probes, distance probes, and lasers for measuring purposes. Research conducted on behalf of [H. Co.] shows that **Lenovo was not using the subject mark of the '462**

Registration on or in connection with these goods as indicated in its statement of use as of the date the statement.

See Amended Answer to Amended Notice of Opposition; Second Amended Counterclaim, ¶ 26, p. 11 (emphasis added). H. Co. makes similar allegations against two other Lenovo registrations. *See Amended Answer to Amended Notice of Opposition; Second Amended Counterclaim, ¶¶ 27 and 28, pp. 11-12.*

H. Co. does not detail these allegations of fraud beyond a generalized, blanket statement that Lenovo did not use the marks for any of the goods described in the recitation of goods and services. In addition, H. Co. fails to assert any facts H. Co. has in its possession supporting such a claim. To the contrary, the foundation of H. Co.'s allegations is a vague reference to research conducted on H. Co.'s behalf. These allegations clearly do not divulge facts sufficient to establish fraud and clearly do not meet the heightened pleading standards of Fed. R. Civ. P. 9(b). *See Exergen, Corp. v. Wal Mart Stores, Inc.*, 575 F.3d 1312 (Fed. Cir. 2009) (a pleading asserting inequitable conduct for failing to disclose prior art references to the USPTO that fails to identify, *inter alia*, the particular claims and the particular limitations in those claims the withheld references refer to is a fatal factual deficiency under Fed. R. Civ. P. 9(b)).

Furthermore, and consistent with the above, a complaint alleging fraud should only be filed after a wrong is reasonably believed to have occurred. *Segal v. Gordon*, 467 F3d 602 (2nd Cir. 1972). Such complaints alleging fraud should seek to redress a wrong, not find one. *Id.* Clearly, the present allegation of fraud is not seeking to redress any wrong, otherwise it would contain facts to clarify, for example, the specific individual(s) who allegedly made false statements to the USPTO, the specific goods for each mark

allegedly not being used on or in connection with each mark, and the specific facts H. Co. has in its possession supporting the claim of fraud. Instead, H. Co. merely lodged a broad and general accusation of fraud against Lenovo's marks. Specifically, H. Co.'s fraud counterclaim neglects to allege facts that reasonably support that Lenovo and anyone associated with the registrations named in H. Co.'s counterclaim had: "(1) knowledge of the withheld material information or of the falsity of the material misrepresentation, and (2) specific intent to deceive the PTO." *Exergen, Corp. v. Wal Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009). As such, H. Co.'s counterclaim alleging fraud clearly does not meet the heightened pleading standards required of Fed. R. Civ. P. § 9(b).

H. Co.'s Second Counterclaim Alleging Fraud Should Be Dismissed and H. Co. Should Not Be Granted Leave to Amend

H. Co. has failed to adequately plead with particularity specific facts to support a claim of fraud pursuant to the heightened pleading standards of Fed. R. Civ. P. 9(b). As such, Lenovo requests that H. Co.'s second counterclaim alleging fraud be dismissed. Furthermore, Lenovo respectfully requests that the Board deny H. Co. leave to amend the counterclaim because this would be futile, unduly prejudicial to Lenovo, and may implicate Fed. R. Civ. P. § 11 ("Rule 11").

Granting H. Co. leave to amend its fraud counterclaim will unfairly prejudice Lenovo because evidence is now unavailable to Lenovo which may have been accessible had H. Co. asserted this claim earlier in the opposition, and because this would be the third time that H. Co. has been given leave to amend its answer due to defective pleading.

Furthermore, each instance of defective pleading has been brought to the attention of the Board through a motion filed on Lenovo's behalf.

Respondent became the owner of these registrations sought to be cancelled by H. Co. through its acquisition of IBM's personal computing division (PCD) in April 2005. (FERENCE Dec. ¹ ¶ 2). H. Co.'s proposed counterclaim asserts that fraud was committed in connection with the filing of statements of use by IBM prior to Lenovo's acquisition of IBM's personal computing division, i.e., the statements of use falsely stated IBM was using the mark on or in connection with all of the goods and services listed in the statement of use on the date the statement was filed.

Fraud involves a willful withholding from the Patent and Trademark Office by an applicant or registrant of material information or fact, which, if disclosed to the Office, would have resulted in the disallowance of the registration sought or to be maintained. *First International Services Corp. v. Chuckles Inc.*, 5 USPQ2d 1628 (TTAB 1988) (citing *Smith International, Inc. v. Olin Corp.*, 209 USPQ 1033 (TTAB 1981)). As such, the testimony of the individual who signed the statement of use is necessary for Lenovo to refute such a counterclaim.

The individual at IBM who signed all of the statements of use is Alexander Tognino, IBM's trademark counsel. Mr. Tognino, however, is no longer available as a witness having died in 2008. (FERENCE Dec., Exs. A-C). Had H. Co. asserted a counterclaim for fraud in 2007 when its original answer was filed, Lenovo would have

¹ "FERENCE Dec." refers to the Declaration of Stanley D. Ference III submitted herewith.

had the opportunity to confer with Mr. Tognino regarding the fraud allegations. Because Mr. Tognino is no longer available as a witness, Lenovo is unfairly prejudiced should H. Co. be granted leave to amend its counterclaim. *See, Trek Bicycle Corp.v. StyleTrek Ltd.*, 64 USPQ2d 1540 (TTAB 2001).

H. Co.'s delay in asserting its fraud claim two years after the filing of the opposition and four years after the completion of the acquisition will severely prejudice Lenovo in that evidence is now unavailable to Lenovo which may have been accessible had H. Co. timely asserted its claim. For this reason alone, the Board should not grant H. Co. yet another chance to amend its defective pleading.

Lenovo will further be unfairly prejudiced if H. Co. is granted leave to amend its counterclaim because this would represent the third time the Board has granted H. Co. leave to amend its counterclaim due to insufficient pleading within H. Co.'s control.

On September 5, 2007, Lenovo filed a Motion for a More Definitive Statement because H. Co. had filed a defective counterclaim. Specifically, H. Co.'s counterclaim was unintelligible to Lenovo because it merely addressed general allegations unrelated to the Lenovo marks specifically or to any of the goods and/or services identified in H. Co.'s pleading. In addition, H. Co.'s counterclaim was ambiguous to Lenovo because several of the registrations identified by H. Co. in its pleading fell into multiple classes and H. Co.'s pleadings failed to state the specific classes and with respect to which registrations H. Co. took issue. On August 21, 2008 the Board granted Lenovo's September 5, 2007 Motion for a More Definitive Statement and ordered H. Co. to fix the deficiencies and

errors in its asserted counterclaims. H. Co. subsequently filed an amended answer on September 10, 2008.

On November 6, 2008, Lenovo filed a Motion to Dismiss Amended Counterclaim. The basis of this motion was that H. Co.'s counterclaim did not clearly state which Lenovo registrations H. Co. was actually seeking to cancel, that H. Co. did not have standing because H. Co. had not pled a reasonable basis for likelihood of confusion, and that H. Co. had not properly pled priority. The Board issued an order on June 30, 2009, finding, *inter alia*, that H. Co.'s allegations of priority were unclear and outlining steps for H. Co. to clarify which Lenovo registrations and which classes of said registrations H. Co. was seeking to cancel. In this order, the Board again granted H. Co. leave to amend its defective pleading. Subsequently, on July 20, 2009, H. Co. filed an amended pleading in response to the Board's June 30, 2009 order. Also on June 30, 2009, H. Co. submitted a motion to amend its pleading to add a second counterclaim for fraud.

Herewith, Lenovo is filing a motion to dismiss H. Co.'s counterclaim alleging fraud because it fails to meet to the heightened pleading standards of Fed. R. Civ. P. 9(b). If H. Co. is granted leave to amend its pleading to address its defective counterclaim, this would represent the third time that H. Co. has been given to amend its pleadings due to insufficiencies completely within its control. Lenovo filed this opposition on March 7, 2007, approximately two and one half years ago. Over a year and a half of this time has been spent in this opposition resolving H. Co.'s defective pleadings: one year from Lenovo's Motion for a More Definitive Statement until H. Co.'s responsive amended pleading, and eight months from Lenovo's first Motion to Dismiss until H. Co.'s filed a responsive amended pleading. Granting H. Co. even more time and yet another chance to

fix deficiencies completely within H. Co.'s control would unfairly prejudice Lenovo by unnecessarily prolonging the proceedings and granting H. Co. yet another "bite of the apple." For this reason alone, the Board should deny H. Co. leave to amend its defective counterclaim for the third time.

H. Co. should also not be granted leave to amend its defective counterclaim because this would be futile. It is apparent from the current record that H. Co.'s fraud counterclaim is not supported and cannot withstand a motion to dismiss for failure to state a claim. In its fraud counterclaim, H. Co. has presented nothing but conclusory arguments unsubstantiated by specific supportive facts and H. Co. simply will not be able to present anything else. As fully described above, crucial evidence is now unavailable to Lenovo which may have been accessible had H. Co. asserted its claim from the outset of this opposition. This evidence is essential to proving or disproving a claim of fraud. As stated above, Lenovo would be unduly prejudiced in defending H. Co.'s claim of fraud without this evidence. More importantly, however, H. Co. will simply not be able to prove the elements of its counterclaim without this evidence. Thus, even if H. Co. amended its insufficient counterclaim to name a specific individual it alleges withheld information or made a material misrepresentation, H. Co.'s pleading would still be fatally defective. This is because H. Co. just does not currently possess, and cannot construct in the future, a record necessary to support its claim. As such, H. Co.'s counterclaim of fraud, however pleaded, is futile and the Board should deny H. Co. leave to amend.

As the Board is no doubt aware, H. Co. must amend its counterclaim consistent with its obligations under Rule 11 and Trademark Rule § 11.18. Rule 11 provides, in part:

(b) Representations to the Court.

By presenting to the court a pleading...an attorney...certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation...
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

Fed. R. Civ. P. 11. This language from Rule 11 is similar to the language of Trademark Rule § 11.18. Thus, even if H. Co. has suspicions that, for example, the specification of goods for certain of Lenovo's marks might be broader than as stated in their statements of use, H. Co. cannot under Rule 11 plead this claim until it actually possesses the basis for such a claim. It is apparent from the current record that H. Co. does not have a basis for its fraud counterclaim. As described in detail above, crucial evidence involving this fraud counterclaim is now unavailable to Lenovo and is therefore not available for discovery by H. Co. Thus, it appears that H. Co. does not have evidentiary support, nor can H. Co. specifically identify factual contentions that will likely yield evidentiary support after a reasonable opportunity for further investigation or discovery. Fed. Civ. P. R. 11(b)(3). As such, it is appears that H. Co. cannot amend its counterclaim of fraud consistent with its obligations under Rule 11. For this reason alone, the Board should not permit H. Co. leave to amend its counterclaim alleging fraud.

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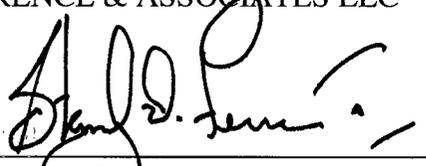
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Conclusion

H. Co. has failed to adequately plead with particularity specific facts to support a claim of fraud pursuant to the heightened pleading standards of Fed. R. Civ. P. § 9(b). To the contrary, H. Co. has not alleged facts to establish its plead allegation and is seeking to find a wrong rather than redress a wrong. Wherefore, Lenovo respectfully requests that the Board dismiss the counterclaim of fraud put forth by H. Co. pursuant to FRCP 12(b)(6) and 9(b) and deny H. Co. leave to amend the counterclaim.

Respectfully submitted,

FERENCE & ASSOCIATES LLC

By: 

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Registration No. 33,879

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Attorneys for Opposer

Dated: October 5, 2009

CERTIFICATE OF TRANSMISSION AND SERVICE

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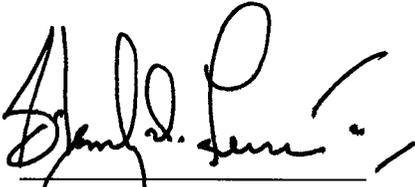
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Attorneys for Counterclaimant

this 5th day of October, 2009



Stanley D. Ference III

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

In the matter of trademark application Serial No. 78/636,480
For the mark THINKCP
Published in the Official Gazette on November 7, 2006

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Lenovo (Singapore) PTE Ltd.)	
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Respondent.)	
_____)	

**DECLARATION OF STANLEY D. FERENCE III
IN SUPPORT OF RESPONDENT’S MOTION TO DISMISS
PETITIONER’S COUNTERCLAIM (FRAUD ON THE USPTO)
IN PETITIONER’S SECOND AMENDED ANSWER**

I, Stanley D. Ference III, declare that the following facts are based upon my personal knowledge and if called to testify regarding these facts, I could and would so competently testify:

1. I am an attorney with the law firm of Ference & Associates LLC, counsel for Lenovo (Singapore) PTE Ltd. (“Lenovo”).

2. I am submitting this declaration, based upon my personal knowledge, in support of Respondent's Motion to Dismiss Petitioner's Counterclaim (Fraud On The Uspto) In Petitioner's Second Amended Answer.

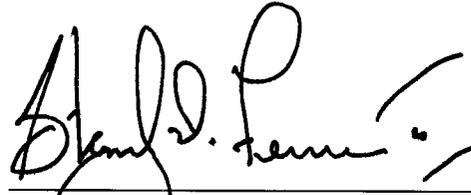
3. Trademark Registration Nos. 2,931,692 for the mark THINKVISION and 2,995,709 for the mark THINKCENTRE were assigned by International Business Machines Corporation ("IBM") to IBM Asia Products Pte. Ltd. on April 30, 2005, in an assignment recorded at Reel 3080 and Frame 0149. The name of IBM Asia Products Pte. Ltd. was subsequently changed to Lenovo (Singapore) Pte. Ltd. as noted in the document recorded at Reel 3148 and Frame 0353. These marks were assigned by IBM as part of the divestiture of IBM's personal computing division.

4. Attached hereto are Exhibits A and B, true and correct copies of the statements of use filed for U.S. Trademark Registration Nos. 2,931,692 for the mark THINKVISION and 2,995,709 for the mark THINKCENTRE. As shown thereon, these documents were signed by Alexander Tognino.

5. Attached hereto is Exhibit C, a true and correct copy of the obituary of Alexander Tognino, IBM's trademark counsel, obtained from The New York Times through www.nytimes.com.

6. I declare under the penalties of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Dated: Pittsburgh, Pennsylvania
October 5, 2009



Stanley D. Ference III

CERTIFICATE OF TRANSMISSION AND SERVICE

I certify that the foregoing is electronically filed with:

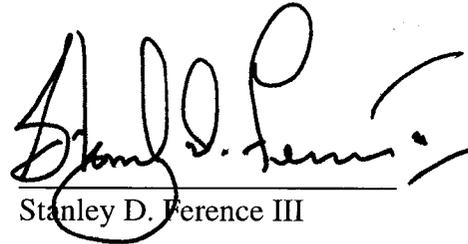
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Attorneys for Counterclaimant

this 9th day of October, 2009.



Stanley D. Ference III

EXHIBIT A

Statement of Use Filing

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78193728
LAW OFFICE ASSIGNED	LAW OFFICE 114
NOTICE OF ALLOWANCE	YES
EXTENSION OF USE	NO
MARK SECTION	
MARK	THINKVISION
OWNER SECTION (no change)	
ATTORNEY SECTION	
NAME	Alexander Tognino
DOCKET NUMBER	RPS520020010
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	009
KEEP EXISTING GOODS AND/OR SERVICES	YES
FIRST USE ANYWHERE DATE	05/00/2003
FIRST USE IN COMMERCE DATE	05/00/2003
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SPECIMEN DESCRIPTION	manual
INTERNATIONAL CLASS	016
KEEP EXISTING GOODS AND/OR SERVICES	YES
FIRST USE ANYWHERE DATE	05/00/2003

FIRST USE IN COMMERCE DATE	05/00/2003
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SPECIMEN DESCRIPTION	manual
PAYMENT SECTION	
NUMBER OF CLASSES	2
SUBTOTAL AMOUNT	200
TOTAL AMOUNT	200
SIGNATURE SECTION	
SIGNATURE	/alexander tognino/
SIGNATORY NAME	Alexander Tognino
SIGNATORY DATE	11/01/2004
SIGNATORY POSITION	Attorney for Applicant
FILING INFORMATION	
SUBMIT DATE	Tue Nov 02 11:07:59 EST 2004
TEAS STAMP	USPTO/SOU-172.30.230.5-20 041102110759009017-781937 28-200aa8e34a460cc889edb8 012d66fd4c27-RAM-828-2004 1101003459286089

**Trademark/Service Mark Statement of Use
(15 U.S.C. Section 1051(d))**

To the Commissioner for Trademarks:

MARK: THINKVISION
SERIAL NUMBER: 78193728

This Allegation of Use is being filed after a Notice of Allowance has issued.

The applicant, International Business Machines Corporation, residing at New Orchard Road , Armonk, NY US 10504, is using or is using through a related company or licensee the mark in commerce on or in connection with the goods and/or services as follows:

For International Class: 009, the applicant, or the applicant's related company or licensee, is using the mark in commerce on or in connection with all goods and/or services listed in the application or Notice of Allowance.

The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 05/00/2003, and first used in commerce at least as early as 05/00/2003, and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) manual.

Specimen-1

Specimen-2

For International Class: 016, the applicant, or the applicant's related company or licensee, is using the mark in commerce on or in connection with all goods and/or services listed in the application or Notice of Allowance.

The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 05/00/2003, and first used in commerce at least as early as 05/00/2003, and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) manual.

Specimen-1

Specimen-2

The applicant hereby appoints Alexander Tognino to submit this Statement of Use Filing on behalf of the applicant. The attorney docket/reference number is RPS520020010.

A fee payment in the amount of \$200 will be submitted with the form, representing payment for 2 classes.

Declaration

Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq., as amended). Applicant is the owner of the mark sought to be registered, and is using the mark in commerce on or in connection with the goods/services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce.

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: /alexander tognino/ Date: 11/01/2004

Signatory's Name: Alexander Tognino
Signatory's Position: Attorney for Applicant

RAM Sale Number: 828
RAM Accounting Date: 11/02/2004

Serial Number: 78193728
Internet Transmission Date: Tue Nov 02 11:07:59 EST 2004
TEAS Stamp: USPTO/SOU-172.30.230.5-20041102110759009
017-78193728-200aa8e34a460cc889edb8012d6
6fd4c27-RAM-828-20041101003459286089

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EXHIBIT B

Statement of Use Filing

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78157926
LAW OFFICE ASSIGNED	LAW OFFICE 116
NOTICE OF ALLOWANCE	YES
EXTENSION OF USE	NO
MARK SECTION	
MARK	THINKCENTRE
OWNER SECTION (no change)	
ATTORNEY SECTION	
NAME	Alexander Tognino
DOCKET NUMBER	RPS520020008
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	009
KEEP EXISTING GOODS AND/OR SERVICES	YES
FIRST USE ANYWHERE DATE	06/13/2003
FIRST USE IN COMMERCE DATE	06/13/2003
SPECIMEN FILE NAME(S)	<u>\\tlers\EXPORT11\IMAGEOUT</u> <u>11\781\579\78157926\xml2\ SOU0002.JPG</u>
	<u>\\tlers\EXPORT11\IMAGEOUT</u> <u>11\781\579\78157926\xml2\ SOU0003.JPG</u>
	<u>\\tlers\EXPORT11\IMAGEOUT</u> <u>11\781\579\78157926\xml2\ SOU0004.JPG</u>
	<u>\\tlers\EXPORT11\IMAGEOUT</u> <u>11\781\579\78157926\xml2\ SOU0005.JPG</u>
SPECIMEN DESCRIPTION	user manual

INTERNATIONAL CLASS	016
KEEP EXISTING GOODS AND/OR SERVICES	YES
FIRST USE ANYWHERE DATE	06/13/2003
FIRST USE IN COMMERCE DATE	06/13/2003
SPECIMEN FILE NAME(S)	<u>\\ticters\EXPORT11\IMAGEOUT</u> <u>11\781\579\78157926\xml2\ SOU0006.JPG</u>
	<u>\\ticters\EXPORT11\IMAGEOUT</u> <u>11\781\579\78157926\xml2\ SOU0007.JPG</u>
	<u>\\ticters\EXPORT11\IMAGEOUT</u> <u>11\781\579\78157926\xml2\ SOU0008.JPG</u>
	<u>\\ticters\EXPORT11\IMAGEOUT</u> <u>11\781\579\78157926\xml2\ SOU0009.JPG</u>
SPECIMEN DESCRIPTION	page from applicant's web site offering goods for sale
PAYMENT SECTION	
NUMBER OF CLASSES	2
SUBTOTAL AMOUNT	200
TOTAL AMOUNT	200
SIGNATURE SECTION	
SIGNATURE	/alexander tognino/
SIGNATORY NAME	Alexander Tognino
SIGNATORY DATE	10/22/2004
SIGNATORY POSITION	Attorney for Applicant
FILING INFORMATION	
SUBMIT DATE	Fri Oct 22 19:56:54 EDT 2004
TEAS STAMP	USPTO/SOU-172.30.230.5-20 041022195654411091-781579 26-20080fd39af1e2d3c77562 abccd9cceb-RAM-506-20041 022162846342443

**Trademark/Service Mark Statement of Use
(15 U.S.C. Section 1051(d))**

To the Commissioner for Trademarks:

MARK: THINKCENTRE
SERIAL NUMBER: 78157926

This Allegation of Use is being filed after a Notice of Allowance has issued.

The applicant, International Business Machines Corporation, residing at New Orchard Road , Armonk, NY US 10504, is using or is using through a related company or licensee the mark in commerce on or in connection with the goods and/or services as follows:

For International Class: 009, the applicant, or the applicant's related company or licensee, is using the mark in commerce on or in connection with all goods and/or services listed in the application or Notice of Allowance.

The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 06/13/2003, and first used in commerce at least as early as 06/13/2003, and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) user manual.

Specimen-1

Specimen-2

Specimen-3

Specimen-4

For International Class: 016, the applicant, or the applicant's related company or licensee, is using the mark in commerce on or in connection with all goods and/or services listed in the application or Notice of Allowance.

The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 06/13/2003, and first used in commerce at least as early as 06/13/2003, and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) page from applicant's web site offering goods for sale.

Specimen-1

Specimen-2

Specimen-3

Specimen-4

The applicant hereby appoints Alexander Tognino to submit this Statement of Use Filing on behalf of the applicant. The attorney docket/reference number is RPS520020008.

A fee payment in the amount of \$200 will be submitted with the form, representing payment for 2 classes.

Declaration

Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq., as amended). Applicant is the owner of the mark sought to be registered, and is using the mark in commerce on or in connection with the goods/services identified above, as evidenced by the attached specimen(s) showing the mark as used in commerce.

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: /alexander tognino/ Date: 10/22/2004

Signatory's Name: Alexander Tognino

Signatory's Position: Attorney for Applicant

RAM Sale Number: 506

RAM Accounting Date: 10/25/2004

Serial Number: 78157926

Internet Transmission Date: Fri Oct 22 19:56:54 EDT 2004

TEAS Stamp: USPTO/SOU-172.30.230.5-20041022195654411

091-78157926-20080fd39af1e2d3c77562abccd

9cceb-RAM-506-20041022162846342443

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EXHIBIT C

May 8, 2008

Paid Notice: Deaths

TOGNINO, ALEXANDER

TOGNINO--Alexander, Associate General Counsel, Trademarks & Licensing and Managing Attorney, IBM Corporation, died suddenly on May 5, 2008 at age 58. Alex was born in The Bronx, the adored son of the late Gennaro and the late Catherine Tognino. Alex was Associate General Counsel for IBM with worldwide responsibility for all activity associated with trademarks, domain names and brand licensing, as well as Managing Attorney for the IBM's Intellectual Property Law Group, with worldwide budget and personnel responsibility. Alex joined IBM in 1985 and worked as a Patent and Trademark attorney at various IBM locations. During his 23 year career at IBM, Alex personally mentored many IP Law professionals and provided invaluable advice and service to IBM senior management. Alex's early education was at Saint Phillip Neri School and Cardinal Hayes High School. Alex holds a BA degree (cum laude) in Physics from the State University of New York at New Paltz, an MS Ed in Physics from the State University of New York at Cortland, and a Juris Doctor Degree from Pace University School of Law, White Plains, New York. Alex was admitted to the Bars of New York and Connecticut. He was the beloved partner, Patricia Cramer; the devoted brother of John Tognino and Norma Tognino; the loving uncle of John N. (Terry) Tognino, Jr.; Michael Tognino and Katherine (Mark) Albanese, and fond granduncle of John N. III and Michael Tognino and Christopher Albanese, all of whom survive him. The family will receive friends at Clark Associates Funeral Home, 4 Woods Bridge Road, Katonah, NY on Thursday from 5:00pm to 9:00pm. The Mass of Christian Burial will be on Friday, May 9, at 11:00am at Fordham University Church, on the Fordham University Campus, Bronx, NY. The reception will follow at Duane Library of Fordham University. Interment will be private. In memoriams to Tognino Endowment for Disability Services, 888 7th Ave, 7th Floor, NY, NY 10106 would be deeply appreciated.