

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513**

Mailed: August 16, 2007

Cancellation No. 92028142

IOB REALTY, INC.

v.

PATSY'S BRAND, INC.

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Cancellation No. 92029614

PATSY'S BRAND, INC.

v.

IOB REALTY, INC.

**Before Sams, Chief Administrative Trademark Judge, Quinn and  
Mermelstein, Administrative Trademark Judges.**

**Mermelstein, Administrative Trademark Judge:**

On June 28, 2007, the Board entered an order in this proceeding (1) dismissing Cancellation No. 92028142 with prejudice, (2) vacating a prior order of the Board, (3) correcting the register to indicate that two of IOB's registrations were cancelled for failure to make the required filings under Trademark Act §§ 8 or 9, and (4)

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suspending Cancellation No. 92029614 pending disposition of the parties' civil suit.<sup>1</sup> ("June 28 order.")

Now before the Board is IOB's request for reconsideration, filed July 27, 2007, and opposer's response filed August 14, 2007.<sup>2</sup> IOB raises several questions, which we address in turn.

**1. Finality of Board's June 28 Order**

IOB questions whether the Board's June 28 order was "final" for purpose of appeal. If not, IOB requests final orders, or an order granting interlocutory appeal.

In accordance with IOB's voluntary withdrawal of Cancellation No. 92028142,<sup>3</sup> the June 28 order entered final judgment in that proceeding in favor of Patsy's. If there is an appealable issue, 92029142 is ripe for appeal.

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<sup>1</sup> The reader is referred to the Board's June 28, 2007, order for the background of this dispute.

<sup>2</sup> On August 3, 2007, IOB filed a "Notice of Incomplete Docket," advising the Board that its hand-filed Request for Reconsideration appears in the file of Cancellation No. 92028142, but not in 92029614. In a consolidated proceeding before the Board, "[p]apers should only be filed in the "parent" case of the consolidated proceedings.... The oldest .... of the consolidated cases is treated as the 'parent' case." TBMP § 511.

Nonetheless, because a final decision has now been rendered in Cancellation No. 92028142, this proceeding should no longer be considered consolidated, and any further papers should be filed in the appropriate proceeding. The Board again urges the parties to file all papers using ESTTA, the Board's electronic filing system.

<sup>3</sup> Cancellation No. 92028142 was IOB's petition to cancel Patsy's Registration No. 1874789 (PATSY'S PR SINCE 1944). IOB expressly withdrew its petition to cancel "in light of the Second Circuit's decision." Brief of IOB Realty, p. 3, filed June 11, 2003.

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On the other hand, Cancellation No. 92029614 has not been concluded. As explained in the June 28 order, pp. 31-33, notwithstanding the cancellation of IOB's registrations, this proceeding may still continue to a final resolution on the merits. See Trademark Rule 2.134. However, because the Board has been made aware that the parties are currently engaged in a civil action which "may have a bearing" on this matter, further proceedings in Cancellation No. 92029614 have been suspended pending a final resolution of the civil matter. June 28 order pp. 33-34. See Trademark Rule 2.117.

IOB has given no reason why it believes suspension is inappropriate or should be lifted, and we are aware of none. For a variety of reasons discussed elsewhere, *see, generally*, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 510.02 (2d ed. rev. 2004), the Board's usual practice is to suspend an *inter partes* proceeding and defer to a U.S. District Court which has before it a related proceeding. The parties' civil suit now pending in the Eastern District of New York appears to involve issues closely related to those remaining in Cancellation No. 92029614.<sup>4</sup>

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<sup>4</sup> Indeed, according to IOB's motion for reconsideration, a motion to correct the register is now pending before Judge Irizarry in that Court. According to PACER, IOB's motion was filed with the District Court in March, 2007, and was pending while the Board was considering IOB's motions for final orders, which had been filed in January, and Patsy's cross-motion to clarify the

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IOB alternatively requests that the Board issue an order granting an interlocutory appeal. While the U.S. Court of Appeals for the Federal Circuit or a U.S. District Court must decide the scope of its own jurisdiction upon a request to review an action of the TTAB, it is highly doubtful that such jurisdiction extends to review of interlocutory orders. *E.g., Copelands' Enterprises Inc. v. CNV Inc.*, 887 F.2d 1065, 12 USPQ2d 1562, 1565 (Fed. Cir. 1989). Because interlocutory appeals are not a part of Board practice, the Board does not certify cases for interlocutory appeal.

**2. Concurrent Submission of § 8 Declaration for U.S. Registration Number 2213574**

IOB advises the Board that it has recently filed a declaration under Trademark Act § 8, 15 U.S.C. § 1058. Although IOB requests acceptance of the declaration, the examination of such a filing is an ex-parte proceeding

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register, which was filed in February. The Board had been led to believe that the matters before Judge Irizarry related to two different cancellation proceedings, Nos. 92046912 and 92046867, which seek cancellation of two of Patsy's registrations not involved in either of these proceedings. See Patsy's Opposition to IOB's Motion for Final Orders and Cross-Motion, p. 4, filed February 15, 2007.

Had the Board been informed that the Court was considering virtually the same issue as that which was pending before the Board, we would have deferred to the Court, saving judicial resources which could have been put to better use. Although the Board has spoken to the issue, the parties will no doubt continue to litigate the question in District Court, resulting in two orders, rather than one. Once again, the parties have seen fit to withhold relevant information from the Board. We can only

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conducted by the Post-Registration Branch, *see generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1604 (4<sup>th</sup> ed. 2005), and is not within the Board's jurisdiction.<sup>5</sup> Any filings or argument in this regard should accordingly be directed to the Post-Registration Branch.

### **3. Motion to Correct the Register**

IOB notes that the District Court now has pending before it a "motion to correct the register." IOB does not ask the Board for any relief in this regard:

Counsel is not seeking an advisory opinion. Counsel is merely attempting to satisfy the Court's request with the best information possible. Therefore, I.O.B. Realty asks the Board or the Commissioner to inform counsel if the Trademark Office has any policy regarding such a situation or if the Trademark Office has ever corrected the register or refused to correct the register after receiving an order from a district court under the same procedural circumstances. Counsel will relay the information to Judge Irizarry without comment.

To the extent necessary to decide the issues then before it, the Board set out our opinion on these issues in the June 28 order. We decline to comment further in this regard or to opine on questions not properly before us.

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hope that they have shown more candor and respect before the District Court.

<sup>5</sup> It should be further noted that the TTAB does not have jurisdiction to consider an appeal from a decision of the Post-Registration Branch. Trademark Act § 17, 15 U.S.C. § 1067; *see* Trademark Act § 21, 15 U.S.C. § 1071(a)(1).

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**Conclusion**

In conclusion, to the extent IOB's request for reconsideration seeks a final decision in 92029614, or an order permitting interlocutory appeal, it is DENIED.

Moreover, the Board can not accept (or deny) IOB's recently-filed Section 8 affidavit, nor will we comment on the motion to correct the register now pending before the district court. Cancellation No. 92029614 remains suspended pursuant to the June 28 order.

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