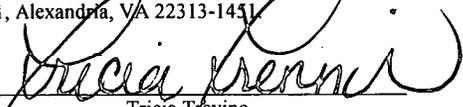


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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FORT JAMES OPERATING COMPANY and GEORGIA-PACIFIC CORPORATION,	REGISTRATION NO. 0940243
Petitioners,	MARK: BRAUNY <span style="float: right;">72399973</span>
v.	CANCELLATION NO. 92044395
BRAUNY PLASTICS, INC.,	I hereby certify that on June 27, 2005, this paper is being deposited with the U.S. Postal Service by "Express Mail Post Office to Addressee" service with Express Mail Label No. ED027952305US for delivery to the Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313-1451.
Registrant.	 Tricia Trevino

**REPLY IN SUPPORT OF MOTION TO DISMISS; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT THEREOF**

BPI and NexTep hereby reply to Petitioners' Opposition to BPI's and NexTep's Motion to Dismiss. Dismissal is warranted based on Petitioners' failure to name the proper party in interest. For the reasons set forth below, BPI and NexTep's Motion should be granted.

**ARGUMENT**

A. Dismissal is Warranted Based on the Absence of the Real Party in Interest.

The Board cannot cancel a trademark without the real party in interest before it to defend its interests. *Informix Software, Inc. v. Oracle Corp.*, 927 F. Supp. 1283, 1286, 40 USPQ.2d 1152, 1155 (N.D.Cal. 1996), 15 U.S.C. § 1119. Since NexTep is not a named party, this proceeding should be dismissed.

The Petitioners attempt to distinguish *Informix* by identifying the factual difference between an exclusive licensee and an assignee. However, in doing so, Petitioners ignore the broad underlying question addressed by the *Informix* Court – who can be sued in a cancellation proceeding. *Informix Software, Inc. v. Oracle Corp.*, 927 F.



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Supp. 1283, 1286, 40 USPQ.2d 1152, 1155 (N.D.Cal. 1996). *Informix* stands for the proposition that the cancellation proceeding should proceed against the party who owns the trademark registration. *Informix*, 927 F. Supp. at 1286, 40 USPQ.2d at 1155. In the instant case, no such party is before the court, and neither the law nor common sense support the proposition that a case should continue in absence of the real party in interest. *Id.* Nextep, as the absent party, clearly has a legally protected interest in the subject matter of the dispute and must have the ability to properly protect its interests. Since the real party in interest is unable to protect its interests, the Cancellation Proceeding should be dismissed.

Petitioners make several opposition arguments which miss the point. In their 12(b)(6) analysis, Petitioners claim that the Court may only consider whether the Petition sets forth a valid ground for canceling the registration, and then provide a self-serving analysis of their fraud allegation. Opposition, pp. 5-7. Nextep realizes that it will need to wait until at least summary judgment to dispose of Petitioners' fraud claim. However, there can be no valid grounds for canceling a registration when the proper owner of the registration is not of record. Petitioners cannot in good faith allege that they desire a cancellation order with the improper owner named as the registrant. This defies any notion of logic, and would result in a massive misuse of resources and, ultimately, an unenforceable order.

Petitioners' 12(b)(7) arguments fare no better. Petitioners begin by asserting their alleged good faith in naming BPI as the only party. Opposition, pp. 7-8. However, Petitioners knew (or should have known) when their Petition was signed on March 24, 2005, and subsequently filed on March 28, 2005, that BPI was not the record owner of

the '243 Registration. Nextep's counsel had advised Petitioners' counsel on March 22, 2005, in related Opposition No. 91164081, that Application No. 78268015 had been recorded and confirmed by the PTO, and Petitioners knew at least as early as October 3, 2003 that Nextep was the assignee of the '243 Registration. See 4/15/05 Francis Decl. in Opposition No. 91164081, Exhibit E; Paul Decl., ¶¶ 2-3 (attached). Moreover, the day that Petitioners signed their Petition, Nextep was listed as the record owner of the '243 Registration. These facts do not imply the good faith that Petitioners suggest, and there was no "oversight" in Nextep's Motion to Dismiss arguments.

B. If the Cancellation Proceeding is Not Dismissed, NexTep Should be Joined to the Proceeding.

If this proceeding is not dismissed due to NexTep's absence, NexTep should be joined to the Cancellation Proceeding since NexTep is a necessary party pursuant to Rule 19(a). NexTep is a necessary party since it has a legally protected interest in the subject of this action. *Taylor v. Chater*, 907 F.Supp. 306, 309 (N.D.Ind.1995). As the assignee of all right, title and interest in the '243 Reg., NexTep is the sole owner of the '243 Reg. *Premier Dental Products, Co.*, 794 F.2d 850, 854 (3<sup>rd</sup> Cir. 1986). Relief cannot be granted to the parties currently named in the proceeding in NexTep's absence, nor can NexTep properly protect its interest without being joined to this proceeding. Therefore, NexTep should be joined to this Cancellation Proceeding if

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the proceeding is not dismissed for failure to name a real party in interest.

Dated: June 27, 2005

By: Michael D. Rounds

Michael D. Rounds  
Matthew D. Francis  
WATSON ROUNDS  
5371 Kietzke Lane

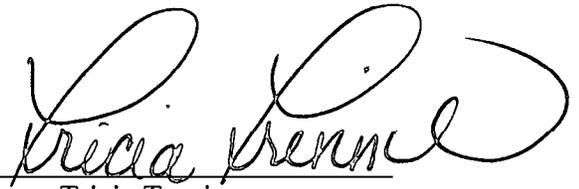
Reno, Nevada 89511  
Attorneys for BPI and NexTep

**CERTIFICATE OF SERVICE**

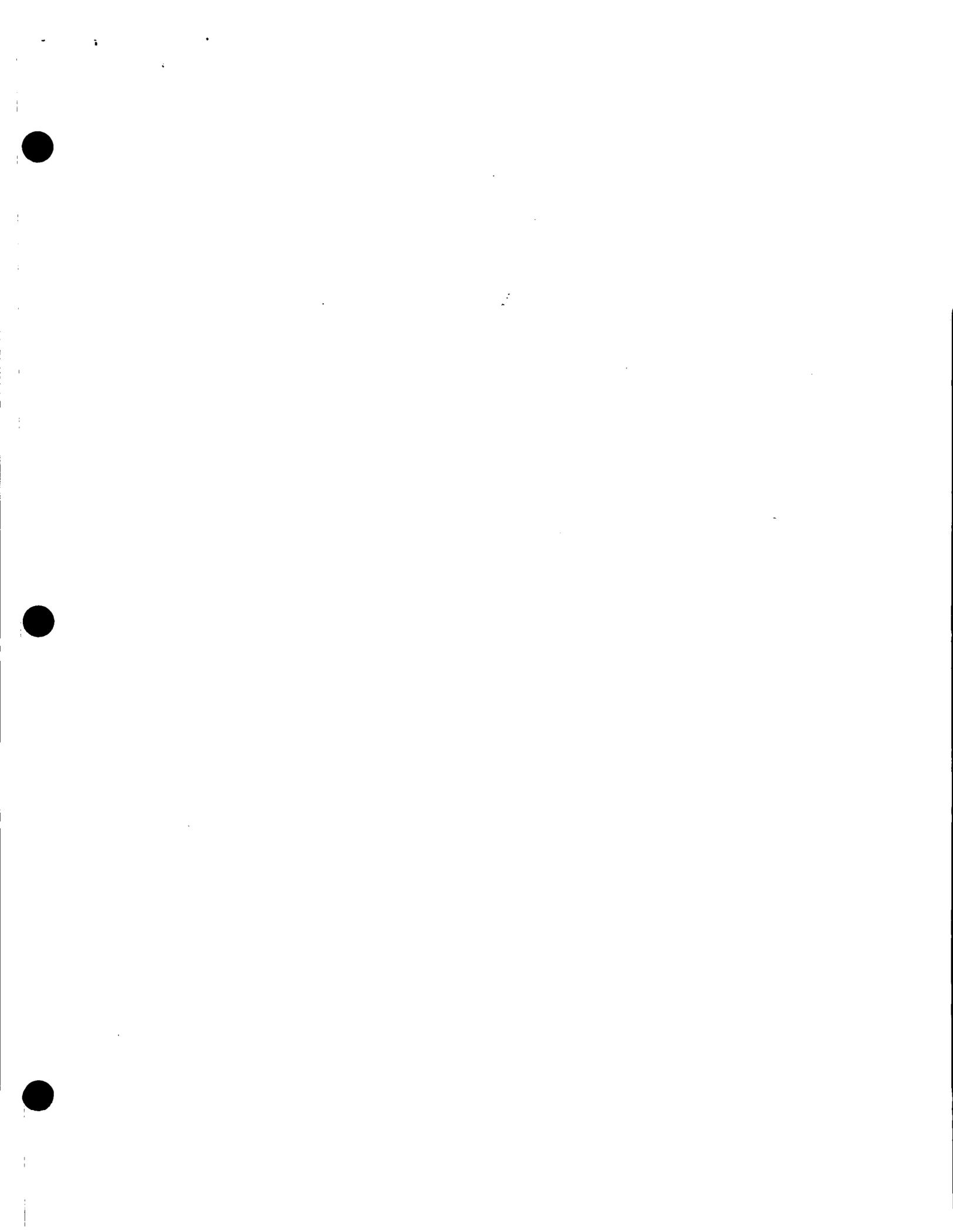
I certify that I am an employee of the Law Offices of Watson Rounds, a Professional Corporation, and on this day I deposited a true and correct copy in the United States mail, first class postage prepaid, of the within document entitled **REPLY IN SUPPORT OF MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**, addressed as follows:

Judith A. Powell  
James H. Sullivan  
Carrie A. Johnson  
Kilpatrick Stockton LLP  
Suite 2800  
1100 Peachtree Street  
Atlanta, Georgia 30309-4530

Dated: June 27, 2005

A handwritten signature in black ink, appearing to read "Tricia Trevino", written over a horizontal line.

Tricia Trevino



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DECLARATION OF SAM PAUL

I, Sam Paul, do hereby declare and state:

1. I am an owner and the secretary of NexTep, Inc. ("NexTep"). NexTep is a Nevada corporation with its principal place of business located in Reno, Nevada. This declaration is based upon my personal knowledge and is made in support of NexTep's Opposition to Defendants' Georgia-Pacific Corporation's and Fort James Operating Company's Motion to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P.

12(b)(1).

2. NexTep is in the business of developing, manufacturing, marketing, and selling innovative household goods, which include polyethylene bags and trash cans. NexTep is the owner of all rights, title and interest to incontestable U.S. Registration No. 940243 ("243 Reg.") for the "Brawny" mark, and U.S. Application Serial No. 78268015 for the same mark.

3. On October 8, 2003, I met with Robert M. Lorys, the Executive Vice President of Consumer Marketing for Georgia-Pacific, and Gino F. Biondi, Director of Marketing for Georgia Pacific's paper towel division. Also present at this meeting was Joe Farinella of NexTep. Mr. Farinella is a member of the board of directors for NexTep, and is also a shareholder in the company. This meeting was held at Georgia-Pacific's offices located in Atlanta, Georgia.

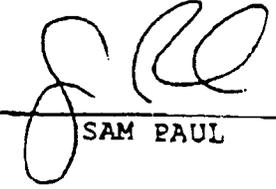
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4. During that meeting, I discussed Nextep's potential license of the "Brawny" lumberjack logo, including trademark issues surrounding such use with Messrs. Lorys, Biondi, and Farinella. Also during that meeting, Mr. Lorys told me and Mr. Farinella that if Nextep did not enter into a license agreement for the "Brawny" lumberjack logo with Georgia-Pacific, Georgia-Pacific's lawyers would be "carefully watching" Nextep's use of the "Brawny" logo.

5. The October 8, 2003 meeting discussed above did not result in a license agreement between Nextep and Georgia-Pacific.

6. I have read the May 19, 2005 declaration of Joe Farinella, and agree with all of the facts set forth in that declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: 5-19-05 By:   
SAM PAUL