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

Proceeding	92048879
Party	Defendant IRENE J. ORTEGA DBA GOGIRL ACTIVEWEAR
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Submission	Opposition/Response to Motion
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Date	05/01/2009
Attachments	RESP OPP TO PET MTN.PDF (20 pages)(1400821 bytes)

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

In re Reg. No. 2,227,005

Trademark: GO GIRL

_____)	Cancellation No. 92048879
NOR-CAL BEVERAGE CO., INC.,)	
)	
Petitioner and Counterclaim Defendant,)	RESPONDENT’S OPPOSITION TO
)	PETITIONER’S MOTION FOR
v.)	LEAVE TO FILE AMENDED
)	PETITION FOR CANCELLATION
IRENE J. ORTEGA, dba GOGIRL)	
ACTIVEWEAR,)	
)	
Respondent and Counterclaim Plaintiff.)	
_____)	

Respondent and Counterclaim Plaintiff, IRENE J. ORTEGA, aka IRENE J. ELDON, dba GOGIRL ACTIVEWEAR (hereinafter “GGA” or “Respondent”) opposes the motion filed by Petitioner and Counterclaim Defendant, NOR-CAL BEVERAGE CO., INC. (hereinafter “NOR-CAL” or “Petitioner”).

The Motion for Leave to File an Amended Petition for Cancellation is brought late in the proceedings (just prior to close of discovery period). It is opposed on the grounds that Petitioner has not alleged the recitation of additional factual circumstances in support of its Count One (based upon abandonment), and there is no factual basis whatsoever for clouding the pleadings with allegations of “fraud” in the maintenance of Registration No. 2,227,005 that is part of the subject of the present cancellation proceeding.

Petitioner is a direct infringer of Respondent’s GO GIRL registration, and Respondent’s earlier common law rights in the GO GIRL mark for clothing, having full knowledge of

Respondent's trademark rights prior to adoption and use of the same mark by Petitioner in its business. Petitioner is making every effort to cloud the record with such accusations which relate back some eight years ago, that Respondent was not the owner of the registration because she acquired the subject matter registration from a Texas company that had filed for bankruptcy protection (Go World Sports, Inc.). This cancellation proceeding was commenced by Petitioner after it was refused a license under Respondent's mark and registration.

Counsel for Petitioner is correct in that Respondent refused to consent to the proposed Amended Petition for Cancellation which is viewed as unfounded, which is a tactic to delay proceedings and to confuse and cloud the issues. The request to amend the pleadings has little, if any, factual basis; therefore any such amendment would serve no use purpose. The Board should deny the motion for leave to file the proposed amended petition for cancellation.

The proposed amendments to Count One (abandonment) should be denied as Petitioner has not alleged any factual basis that the trademark registration in question was actually sold to another party (RCL Investments, Inc.) prior to the actual sale by Girl World Sports, Inc. to Respondent. While Petitioner may have sifted through records of a bankruptcy proceeding and revealed records therein of a proposed sale from Girl World Sports, Inc. to RCL Investments, Inc., which had been brought to the attention of the Bankruptcy Court for approval, there are no allegations or supporting evidence that the trademark and/or registration was, in fact, sold to RCL Investments, Inc.; nor any evidence that the sale was, in fact, consummated.

There is no evidence on the record that any party other than Respondent herein ever obtained on assignment, nor recorded an assignment of the subject matter registration with the U.S. Patent & Trademark Office ("USPTO"). Respondent never heard from an entity RCL Investments, Inc., and this alleged entity never recorded any acquisition of the registration with

the USPTO in the past eight years. Nor have Respondent's rights ever been contested or objection brought to Respondent's attention. This is just another attempt by the Petitioner to blur the issues, raise a cloud on Respondent's title to the registration which stands properly in the name of GGA.

This shotgun approach of Petitioner to fish for theories to invalidate Respondent's registration is consistent with Petitioner's approach in the initial allegations. As grounds for cancellation, Petitioner alleged facts that the corporate charter of GGA's predecessor in interest, Girl World Sports, Inc. had been revoked (for failure to pay certain taxes) and its corporate powers therefore suspended as of a date prior to the alleged assignment of Registration No. 2,227,005. Petitioner derived a trumped up theory that at the time the assignment of the '005 registration was executed, that the Assignor had no right in the registration to transfer to ORTEGA (GGA) and that when it became time to file the Section § 8 Affidavit of Use, GGA was not the true owner of the mark and therefore had no right to file the Section § 8 Affidavit.

Petitioner contends that Girl World Sports, Inc. ("Assignor"), not GGA should have filed the Section § 8 declaration. As far stretched as this theory is, these allegations caused Respondent to retain Texas counsel to review the issue as a matter of Texas law (Texas being the state in which Respondent's predecessor-in-interest, Girl World Sports, Inc. was incorporated). Respondent learned through Texas counsel that as a matter of Texas State law, Girl Word Sports, Inc. ("GWS") did not lack the legal capacity to contract with Respondent because of its suspended status. Texas counsel provided an opinion that Petitioner's position is outright wrong.

Once an entity's charter has been forfeited, and unless the forfeiture has been set aside, the entity is considered "dissolved" or "terminated" under Texas law. Notwithstanding such dissolution or termination, the entity continues its existence until the third anniversary of the date

of the termination for certain limited purposes. Among those purposes is “holding title to and liquidating property that remained with the terminated entity at the time of termination or property that is collected by the entity after termination”. This wording appeared in the applicable law at the time of the transaction in question., *i.e.*, the Texas Tax Code (and still appears in the current law, *i.e.*, Business Corporation Act, Article 7.12A(3)). In summary, the seller of the trademark GWS, even though it was dissolved, had the legal capacity to contract with other parties such as Ortega in the sale and assignment of the trademark in question. Attached are pertinent sections of Article 7.10 of the Business Corporation Act, attached as Exhibit “B”.

Therefore, Respondent found Petitioner’s allegations wholly unfounded and without merit. These types of groundless accusations have cost Respondent a considerable expense in attorneys’ fees and costs in defending against this meritless position. These similar types of theories in which Petitioner is grasping at straws to cancel the subject matter registration have caused Respondent undue prejudice and should not be allowed at this late date, particularly when there is no factual showing in support of the proposed allegations other than to make noise.

PETITIONER HAS FAILED TO ALLEGE ANY FACTUAL BASIS TO AMEND THE PETITION FOR CANCELLATION TO INCLUDE A NEW COUNT FOR FRAUD.

Petitioner’s proposed allegations allege that when Respondent filed the Affidavit of Use on November 30, 2004, with respect to the goods recited in the ‘005 registration, Respondent knew that the GO GIRL trademark had not been in such use in commerce in connection with all of the clothing goods sold by Respondent, namely, sweatpants and leggings.

Petitioner has failed to review the discovery responses and documents produced. Applicant has, in fact, been selling the requisite clothing products including sweatpants and leggings (leggings comprised of long biking shorts, leg warmers, Capri pants and knee warmers)

as evidenced by many of the six thousand (6,000) documents produced during discovery, many of which are identified in the attached Exhibit "A" including photographs of such products and corresponding representative documents produced during discovery which establish use of the mark in connection with leggings and sweatpants in 2002-2004. Respondent's testimony will cover earlier usage.

Again, allowing Petitioner to add another count with respect to fraud in the maintenance of the registration in light of the evidence of use submitted herewith serves no useful purpose other than to unduly prejudice Respondent with respect to fees and costs in connection with defending this Petition, which Petitioner is using to circumvent its infringing activities. Fraud is a serious accusation and Petitioner should not be allowed to introduce such an unfounded allegation this late in the proceeding without a greater showing of facts to support the claim. To allow the proposed amendment would be a futile act.

WHEREFORE, it is respectfully requested that Petitioner's Motion for Leave to File Amended Petition for Cancellation be denied.

Respectfully submitted,



Barry F. Soalt, Esq.

Attorneys for Respondent and Counterclaim
Plaintiff IRENE J. ORTEGA, aka IRENE J.
ELDON, dba GOGIRL ACTIVEWEAR

Dated: May 1, 2009

Barry F. Soalt, Esq.
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 530 "B" Street, Suite 2100, San Diego, California 92101. On May 1, 2009, I served the within documents:

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR CANCELLATION

by transmitting via facsimile number (619) 235-0398 the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission confirmation report is attached hereto.

- X by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

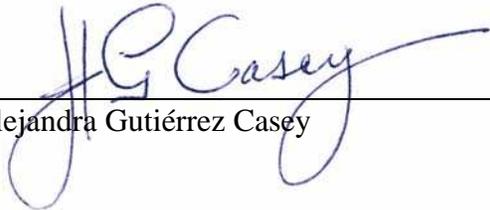
by placing the document(s) listed above in a sealed overnight envelope and depositing it for overnight delivery at San Diego, California, addressed as set forth below. I am readily familiar with the practice of this firm for collection and processing of correspondence for processing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight box located at 530 "B" Street, San Diego, California 92101 in the ordinary course of business on the date of this declaration.

by having Knox Services personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

SEE ATTACHED SERVICE LIST

- X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 1, 2009, at San Diego, California.



Alejandra Gutiérrez Casey

SERVICE LIST

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Attorney For Petitioner
NOR-CAL BEVERAGE CO., INC.

EXHIBIT “A”

LEGGINGS AND SWEATPANTS





Document numbers are those provided in discovery production which show use of the mark by Respondent on leggings and sweatpants.

Mission Imprintables-Purchase of Sweat Pants; also know as Bella Straight Leg Pants, & Bella Yoga Pants. Item # 7017

3/11/03 IJO003389

5/20/03 IJO003378

11/12/03 IJO003380
IJO003383
IJO003393
IJO003399

12/12/03 IJO004664
IJO004668
IJO004669
IJO004670
IJO004671
IJO004733
IJO004734

1/7/04 IJO004673
IJO004675
IJO004676
IJO004727
IJO004728

2/6/04 IJO004738

2/9/04 IJO004658
IJO004656
IJO004660
IJO004729
IJO004708
IJO004712

2/11/04 IJO004746
IJO004747
IJO004757

5/27/04	IJO004816 IJO004817 IJO004819 IJO004705 IJO004840
9/29/04	IJO004862 IJO004870 IJO004919
10/04/04	IJO004879 IJO004914
10/25/04	IJO004863 IJO004864 IJO004873 Example (Straight leg Pants) IJO004911
11/30/04	IJO004929 IJO004934 IJO004938
12/06/04	IJO004935 IJO004937 IJO004945
3/28/05	IJO000701 IJO000703 IJO000708

Bella Brochure – sample picture of Yoga/sweat pants

IJO004764
IJO003406
IJO004899

Digilogo – Embroidery for Sweatpants logo on back left side

IJO003278
IJO003300

Defect Socks – Sample approval for sock order and order form

2/28/00	IJO000040
11/17/03	IJO004570 IJO004608

11/12/03	IJO005280 IJO005283
11/19/03	IJO005272 IJO005277 IJO005289
12/1/03	IJO005293 IJO005297 IJO0005302 IJO0005305
12/12/03	IJO005237 IJO005239 IJO005241 IJO005244 IJO005245 IJO005252 IJO005262
12/15/03	IJO005238 IJO005242 IJO005263 IJO005271
1/5/04	IJO005233 IJO005234 IJO005235 IJO005236 IJO005303 IJO005304 IJO005307
2/18/04	IJO005308
12/6/02 9/20/2002	IJO000015 IJO000003 IJO000005 IJO000007 IJO000008 IJO000009 IJO000011 IJO000012

9/26/03 IJO000014

IJO001529
IJO001530

IJO001553
IJO001557

1/6/04 IJO0003884
1/7/04 IJO0003921

4/28/03 IJO0003811
IJO0003815 - sweatpants
IJO0003830
IJO0003832
IJO0003835
IJO0003833
IJO0003836

3/01/03 IJO0003829 – socks

2/27/04 IJO0003790

7/13/02 IJO0003969

IJO0004017
IJO0004020

2/22/03 IJO0003988

3/29/03 IJO0003999
IJO0004003 – Capri pants/Knickers

1/7/04 IJO0003981

**ST Cylcewear – Manufacturer Knickers/Capri biking Pants and Knee Warmers–
Invoices and picture**

3/2/04 IJO0001050 – Capri Pants and Knee Warmers
2/14/06 IJO0000942
IJO0000945
2/1/07 IJO0005445
IJO0005511

Front Cover of Mountain Bike Magazine- Go Girl Shorts and Socks

Socks IJO0005882
Shorts IJO0005883

E-Bay Sales – Capri Tights

4/12/07 IJO0001962
6/21/07 IJO0002070
IJO0002076

Dealers Price list: sample of items for sale

2006 IJO0004994
IJO0004995
IJO0004997
IJO0004998

ST Cyclewear/Gallop LLC

1820 John Towers Ave

Suite E

El Cajon, CA 92020

Invoice

Number: 6189

Date: March 02, 2004

Bill To:Go Girl Activewear
PO Box 21246
El Cajon, CA 92021**Ship To:**Go Girl Activewear
PO Box 21246
El Cajon, CA 92021

PO Number	Terms	Customer #	Ship	Via	Project
	Net 30 Days				
Item #	Description	Quantity	Price Each	Amount	
	Knee Warmer 2/M 1/L 1/XL	4.00	7.95	31.80	
	Capri Tight 6/S 6/M 6/L	18.00	15.95	287.10	
				Total	\$318.90

Please Send Payment to: ST Cyclewear/Gallop LLC
2677 El Presidio
Carson, CA 90810

CONFIDENTIAL

IJO001030

GoGirl

EXHIBIT “B”

Art. 7.10

BUSINESS CORPORATION ACT

shall be charged by the Secretary of State for the filing thereof.

B. The existence of the corporation shall cease on the filing of the certified copy of the decree of dissolution with the Secretary of State.

Acts 1955, 54th Leg., p. 239, ch. 64, eff. Sept. 6, 1955. Amended by Acts 2005, 79th Leg., ch. 67, § 17, eff. Sept. 1, 2005.

Section 2 of Acts 2003, 78th Leg., ch. 182 (V.A.T.S. Bus.Corp.Act, art. 11.02) provides that this Act expires January 1, 2010.

Art. 7.11. Deposit With Comptroller of Amount Due Certain Shareholders and Creditors

A. Upon the voluntary or involuntary dissolution of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found after the exercise of reasonable diligence by the person or persons responsible for the distribution in liquidation of the corporation's assets shall be reduced to cash and deposited with the Comptroller, together with a statement giving the name of the person, if known, entitled to such fund, his last known address, the amount of his distributive portion, and such other information about such person as the Comptroller may reasonably require, whereupon the person or persons responsible for the distribution in liquidation of the corporation's assets shall be released and discharged from any further liability with respect to the funds so deposited. The Comptroller shall issue his receipt for such fund and shall deposit same in a special account to be maintained by him.

B. On receipt of satisfactory written proof of ownership or of right to such fund within seven (7) years from the date such fund was so deposited, the Comptroller shall issue proper warrant therefor in favor of the person or persons then entitled thereto. If no claimant has made satisfactory proof of right to such fund within seven (7) years from the time of such deposit the Comptroller shall then cause to be published in one issue of a newspaper of general circulation in Travis County, Texas, a notice of the proposed escheat of such fund, giving the name of the creditor or shareholder apparently entitled thereto, his last known address, if any, the amount of the fund so deposited, and the name of the dissolved corporation from whose assets such fund was derived. If no claimant makes satisfactory proof of right to such fund within two months from the time of such publica-

tion, the fund so unclaimed shall thereupon automatically escheat to and become the property of the General Revenue Fund of the State of Texas.

Acts 1955, 54th Leg., p. 239, ch. 64, eff. Sept. 6, 1955. Amended by Acts 1987, 70th Leg., ch. 93, § 30, eff. Aug. 31, 1987; Acts 1997, 75th Leg., ch. 1423, § 3.01, eff. Sept. 1, 1997.

Section 2 of Acts 2003, 78th Leg., ch. 182 (V.A.T.S. Bus.Corp.Act, art. 11.02) provides that this Act expires January 1, 2010.

Art. 7.12. Limited Survival After Dissolution

A. A dissolved corporation shall continue its corporate existence for a period of three years from the date of dissolution, for the following purposes:

(1) prosecuting or defending in its corporate name any action or proceeding by or against the dissolved corporation;

(2) permitting the survival of any existing claim by or against the dissolved corporation;

(3) holding title to and liquidating any properties or assets that remained in the dissolved corporation at the time of, or are collected by the dissolved corporation after, dissolution, and applying or distributing those properties or assets, or the proceeds thereof, as provided in Subsections (3) and (4) of Section A of Article 6.04 of this Act; and

(4) settling any other affairs not completed before dissolution.

However, a dissolved corporation may not continue its corporate existence for the purpose of continuing the business or affairs for which the dissolved corporation was organized.

B. During the three-year period, the members of the board of directors of a dissolved corporation serving at the time of dissolution or the majority of them then living, however reduced in number, or their successors selected by them, shall continue to manage the affairs of the dissolved corporation for the limited purposes specified in this Article and shall have the powers necessary to accomplish those purposes. In the exercise of those powers, the directors shall have the same duties to the dissolved corporation that they had immediately prior to the dissolution and shall be liable to the dissolved corporation for actions taken by them after the dissolution to the same extent that they would have been liable had those actions been taken by them prior to the dissolution.

C. A corporation other than an escheator against a dissolution unless an action is brought before the period following or proceeding with a dissolved corporation of the three-year period and such action pursuant to Section 2 of this Act shall be a corporation that action shall be a dissolution and (2) for purposes of this Act shall be provided in Section 6.04 of this Act if so provided.

D. A dissolution against a person or against the dissolution claim to with the notice or certified or certified person has such person's

(1) state the dissolved corporation dissolved corporation the notice, with after the date

(2) state the must describe ably inform the such person claim;

(3) state a entation of t corporation is

(4) state t claim is not i date stated quished; and

(5) be acc

If a writt against the quirements t the dissolve

C. A corporation shall not be liable for any claim other than an existing claim. An existing claim by or against a dissolved corporation shall be extinguished unless an action or proceeding on such existing claim is brought before the expiration of the three-year period following the date of dissolution. If an action or proceeding on an existing claim by or against a dissolved corporation is brought before the expiration of the three-year period following the date of dissolution and such existing claim was not extinguished pursuant to Section D of this Article, the dissolved corporation shall continue to survive (1) for purposes of that action or proceeding until all judgments, orders, and decrees therein have been fully executed, and (2) for purposes of applying or distributing any properties or assets of the dissolved corporation as provided in Subsections (3) and (4) of Section A of Article 6.04 of this Act until such properties or assets are so applied or distributed.

D. A dissolved corporation may give written notice to a person having or asserting an existing claim against the dissolved corporation to present such existing claim to the dissolved corporation in accordance with the notice. The notice shall be sent by registered or certified mail, return receipt requested, to the person having or asserting the existing claim at such person's last known address, and the notice shall:

(1) state that such person's claim against the dissolved corporation must be presented in writing to the dissolved corporation on or before the date stated in the notice, which shall be not earlier than 120 days after the date the notice is sent to such person;

(2) state that the written presentation of the claim must describe such claim in sufficient detail to reasonably inform the dissolved corporation of the identity of such person and of the nature and amount of the claim;

(3) state a mailing address where the written presentation of the person's claim against the dissolved corporation is to be sent;

(4) state that if the written presentation of the claim is not received at such address on or before the date stated in the notice, the claim will be extinguished; and

(5) be accompanied by a copy of this Section D.

If a written presentation of such person's claim against the dissolved corporation that meets the requirements of this section is received at the address of the dissolved corporation stated in the notice on or

before the date stated in the notice, the dissolved corporation may thereafter give written notice to such person that such claim is rejected by the dissolved corporation. The notice shall be sent by registered or certified mail, return receipt requested, addressed to such person at such person's last known address, and the notice shall state:

(1) that such claim is rejected by the dissolved corporation;

(2) that such claim will be extinguished unless an action or proceeding on such claim is brought within 180 days after the date such notice of rejection was sent to such person and before the expiration of the three-year period following the date of dissolution; and

(3) the date such notice of rejection was sent and the date of dissolution.

Such person's claim against the dissolved corporation shall be extinguished if (a) a written presentation of that claim meeting the requirements of this section is not received at the address of the dissolved corporation stated in the notice to such person on or before the date stated in the notice or (b) an action or proceeding on such claim is not brought within 180 days after the date a notice of rejection was sent to such person and before the expiration of the three-year period following the date of dissolution.

E. A dissolved corporation that was dissolved by the expiration of the period of its duration may, during the three-year period following the date of dissolution, amend its articles of incorporation by following the procedure prescribed in this Act to extend or perpetuate its period of existence. That expiration shall not of itself create any vested right on the part of any shareholder or creditor to prevent such an action. No act or contract of such a dissolved corporation during a period within which it could have extended its existence as permitted by this Article, whether or not it has taken action so to extend its existence, shall be in any degree invalidated by the expiration of its period of duration.

F. In this Article:

(1) The term "dissolved corporation" means a corporation (a) that was voluntarily dissolved by the issuance of a certificate of dissolution by the Secretary of State and was not issued a certificate of revocation of dissolution pursuant to Section C of Article 6.05 of this Act, (b) that was involuntarily dissolved by the Secretary of State and was not reinstated pursuant to