

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Littel Concepts, LLC
v.
Striker Records, Inc.

Cancellation No. 92050431

Samuel B. Morrison of Morrison Law Offices, P.C. for Littel Concepts, LLC.

Striker Records, Inc., pro se.

Before Grendel, Zervas and Cataldo, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Introduction.

Striker Records, Inc. ("respondent") is the owner of record of Registration No. 3421999, which is of the mark ATL'S BADDEST CHICKS (in standard character form; ATL'S

disclaimed) for services recited in the registration as "presentation of live show performances," in Class 41.¹

Littel Concepts, LLC ("petitioner") filed a petition to cancel respondent's registration. As grounds for cancellation, petitioner pleaded (a) common-law priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d), and (b) what we construe to be a claim of fraud, under Trademark Act Section 14(3), 15 U.S.C. §1064(3), based on respondent's alleged filing of the application "with full knowledge of Petitioner's prior use..."² Petitioner also pleaded that it is the owner of application Serial No. 77487191 by which it seeks to register the mark ATL'S BADDEST CHICKS for, inter alia, "entertainment production, in the nature of theatrical and concert productions," and that its application has been refused under Section 2(d) based on respondent's registration involved in this case.

¹ The registration was issued on May 6, 2008, from an application filed on August 11, 2007. March 1, 2007 is alleged in the registration to be the date of first use of the mark and the date of first use of the mark in commerce.

² See discussion of the fraud claim, below. Also, we note that petitioner has argued in its brief that respondent's registration should be cancelled pursuant to Trademark Act Section 43(a), 15 U.S.C. §1125(a). That claim was unpleaded, and in any event the Board has no jurisdiction to hear claims based on Section 43(a). See Trademark Trial and Appeal Board Manual of Procedure (TBMP) (2nd ed. rev. 2004) at §102.01 and cases cited therein.

Respondent filed an answer to the petition to cancel, by which it pleaded a general denial of all of the allegations in the petition to cancel.

The evidence of record in this case consists, solely, of the pleadings and, by rule, the prosecution file (including the specimen of use, which is a concert poster) for respondent's registration involved in this proceeding. See Trademark Rule 2.122(b)(1), 37 C.F.R. §2.122(b)(1).

Specifically with respect to the record, we find that petitioner submitted no evidence during its assigned testimony period which, as set forth in the Board's January 14, 2009 institution order in this case, closed on December 20, 2009, opening thirty days prior thereto. Petitioner submitted an untimely notice of reliance on March 5, 2010, but we have not considered the evidence submitted therewith.³ (We note that our decision would not have been

³ That notice of reliance evidence consists of: (a) a concert poster and (b) a printout of an purported listing for petitioner from yellowpages.com. See discussion below. Regarding the concert poster, it appears that the poster is the same poster that respondent submitted as its specimen of use in its application for the registration involved in this case, and the poster therefore is automatically of record by rule. We have considered it in that capacity.

Regarding the untimeliness of petitioner's March 5, 2010 notice of reliance, we note that, in the Board's January 14, 2009 institution order setting out the dates and deadlines for this proceeding, March 5, 2010 was set as the deadline for "Plaintiff's Rebuttal Disclosures." However, the order clearly identified "Plaintiff's 30-day Trial Period" as closing on December 20, 2009. We find that petitioner has no reasonable basis for any claim of confusion as to the dates and deadlines clearly set forth in the institution order (if such a claim were to be asserted by petitioner now).

different even if we had considered the evidence, for the reasons discussed below.)

Respondent submitted no evidence at trial.

Opposer filed a brief; respondent did not.

For the reasons discussed below, we **deny** the petition to cancel respondent's registration.

Petitioner's Burden.

Respondent's registration is entitled to a presumption of validity. Trademark Act Section 7(b), 15 U.S.C. §1057(b). Petitioner bears the burden of rebutting that

Additionally with respect to petitioner's failure to present evidence, we note that at Paragraph 6 of the petition to cancel, petitioner made reference to an "exhibit A," purported to be a contract of some sort. In the Board's TTABVue official electronic record of this proceeding, the referenced "exhibit A" was not attached to the petition to cancel. In any event, this type of exhibit to the pleading would not in itself be evidence of record unless it also had been properly made of record at trial. See Trademark Rule 2.122(c), 37 C.F.R. §2.122(c); TBMP §§ 317, 704.05(a). In this case, it was not.

Finally with respect to petitioner's failure to present evidence, we have not considered petitioner's discovery requests which were attached to petitioner's brief on the case (and which are relied upon by petitioner for its arguments in its brief), because they were not made of record during trial. See TBMP §704.05(b). These discovery documents should have been submitted under a timely notice of reliance during petitioner's testimony period, along with appropriate testimony or other evidence to support petitioner's contention that respondent failed to answer the discovery requests (including the requests for admissions). Trademark Rule 2.120(j)(3)(i), 37 C.F.R. §2.120(j)(3)(i); TBMP §704.10. We note that on April 14, 2009 (during the discovery period), petitioner filed with the Board a copy of the discovery requests (which according to the certificate of service was the same day they were served on respondent). The submission to the Board of discovery documents unrelated to a relevant motion was improper, see Trademark Rule 2.120(j)(8), 37 C.F.R. 2.120(j)(8); TBMP §409, and did not suffice to make them evidence of record at trial. See Trademark Rule 2.120(j)(3)(i).

presumption by a preponderance of the evidence. See *West Florida Seafood, Inc. v. Jet Restaurants, Inc.*, 31 F.3d 1122, 31 USPQ2d 1660 (Fed. Cir. 1994).

To prevail in this cancellation proceeding, petitioner must establish (1) its standing to petition to cancel respondent's registration, and (2) at least one statutory ground for cancellation of the mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Person's Co. Ltd. v. Christman*, 900 F.2d 1565, 14 USPQ2d 1477, 1479 (Fed. Cir. 1990); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982).

Standing.

We first shall determine whether petitioner has established its standing to petition to cancel respondent's registration. To establish standing, petitioner must prove that it is not a mere intermeddler, but rather that it has a real interest in the outcome of this proceeding and thus a reasonable basis for its belief that it is damaged by the existence of respondent's registration. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, *supra*, 213 USPQ 185 at 189.

As noted above, in its petition to cancel (at ¶¶ 1, 4), petitioner alleged that it owns an application by which it seeks to register the mark ATL'S BADDEST CHICKS, and that its application has been refused under Section 2(d) based on respondent's registration. Those allegations suffice as a pleading of standing, and they would suffice, if proven at trial, to establish petitioner's standing in this case. See *Lipton Industries, Inc., supra*, 213 USPQ 185 at 189; *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008).

However, petitioner failed to prove at trial its pleaded allegations regarding the refusal of its application (allegations which respondent denied in its answer). Petitioner did not make its application file of record (or, in particular, those portions of the file which would establish petitioner's ownership of the application and the Office's Section 2(d) refusal thereof),⁴ nor did petitioner submit any testimony or other evidence at trial which would prove its allegations regarding the refusal of its application. See *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009); *ABC Moving Company, Inc. v. Brown*, 218 USPQ 336, 338 (TTAB 1983).

⁴ We also note that no such evidence was submitted with petitioner's untimely March 5, 2009 notice of reliance.

For these reasons, we find that petitioner may not rely on the alleged refusal of its alleged application as the basis for standing in this case. If petitioner is to establish its standing, it must do so based on other evidence in the record.

In the petition to cancel at ¶¶ 2 and 5, petitioner alleged ownership of prior common law rights in the mark ATL'S BADDEST CHICKS. Respondent denied those allegations in its answer, thus putting on petitioner the burden of proving the allegations at trial. Petitioner submitted no testimony or other timely evidence to support its allegations of common-law rights in ATL'S BADDEST CHICKS. (See above at footnote 3.)

As noted above, the only evidence of record (aside from the pleadings) is the file of respondent's registration. The registration file includes the specimen of use submitted by respondent, which is a poster advertising a concert featuring several performers. The poster, and an enlargement of its lower half, are reproduced below:

ATL'S
Baddest Chicks

LADIES NIGHT, LADIES FIRST AND FOREVER!
SATURDAY AUGUST 11TH

AN EVENING OF SOUL & SISTERHOOD
DOORS OPEN AT 8PM-SHOW STARTS AT 9PM



PERFORMING LIVE:
JOI :: TAMIKA SCOTT :: SHAMORA
(FORMERLY OF XSCAPE)
PHILLIPPIA :: POET TAMEKA "GAME" HARPER
POET RENTIA WALLS

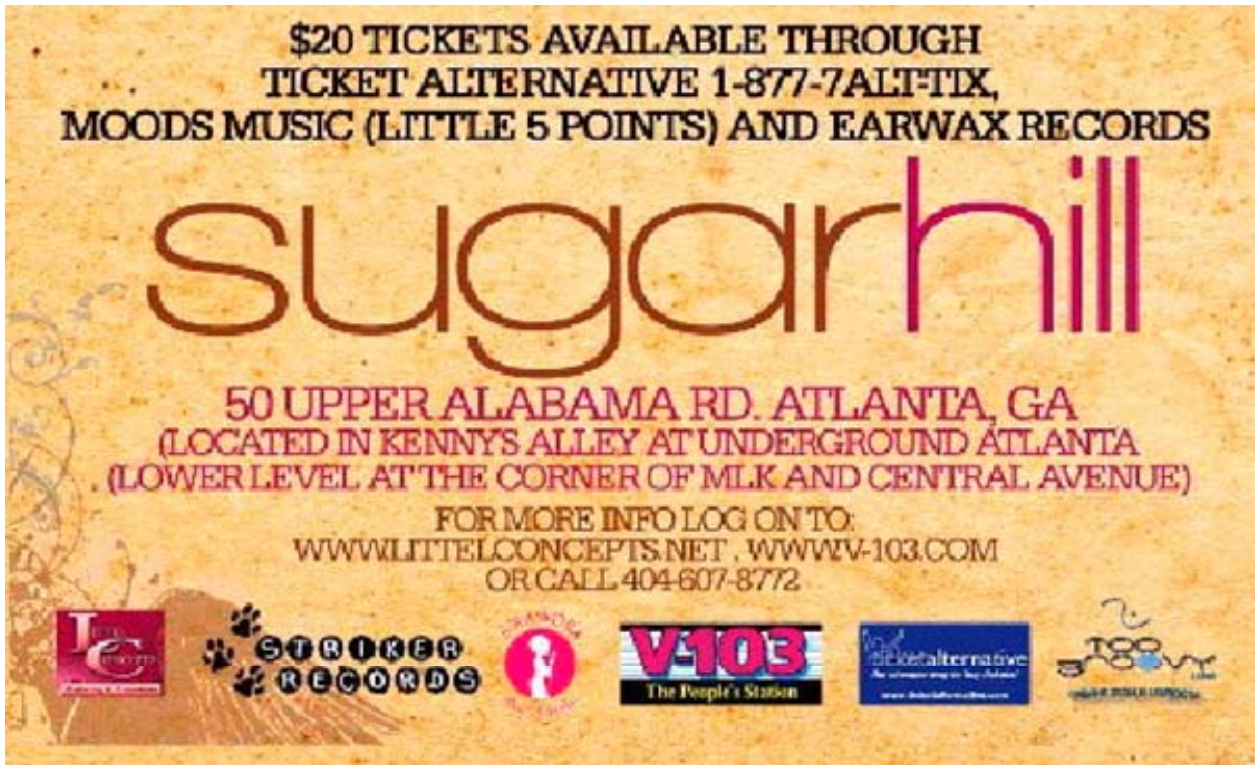
\$20 TICKETS AVAILABLE THROUGH
TICKET ALTERNATIVE 1-877-7ALT-TIX,
MOODS MUSIC (LITTLE 5 POINTS) AND EARWAX RECORDS

sugarhill

50 UPPER ALABAMA RD. ATLANTA, GA
(LOCATED IN KENNY'S ALLEY AT UNDERGROUND ATLANTA
(LOWER LEVEL AT THE CORNER OF MLK AND CENTRAL AVENUE))

FOR MORE INFO LOG ON TO:
WWW.LITTELCONCEPTS.NET, WWW.V-103.COM
OR CALL 404-607-8772





Of particular significance in this case is the wording which appears near the bottom of the poster: "For more info log on to www.littelconcepts.net, WWW.V-103.com, or call 404-607-8772." Also, across the bottom of the poster are an array of six logos, the first of which appears to be petitioner's logo and the second of which appears to be respondent's logo.

In its petition to cancel and in its brief, petitioner contends that it owns common-law rights in the ATL'S BADDEST CHICKS mark because it was the producer and promoter of the "ATL'S BADDEST CHICKS" concert advertised in the poster.

However, respondent denied this allegation in its answer to the petition to cancel, and petitioner submitted no testimony or other evidence at trial to support this contention.

Petitioner contends in its brief that the poster itself shows that the concert was produced by petitioner because the website URL "www.littelconcepts.net" and the telephone number "404-607-8772," which are identified in the poster as the source of "more info" about the concert, are petitioner's website and petitioner's telephone number. However, petitioner presented no testimony or other evidence at trial to support its contention that the URL and the telephone number on the poster in fact are petitioner's.⁵

Nonetheless, we will assume and find (charitably to petitioner) that the URL and the telephone number appearing on the poster are petitioner's. On that basis, we find that the reference to petitioner on the poster suffices to establish that petitioner had some sort of connection to the ATL'S BADDEST CHICKS concert advertised in the poster. We therefore find that petitioner is not a mere intermeddler and has a real interest in the outcome of this proceeding, and that, under the lenient standard for determining standing, petitioner has established its standing to

⁵ As discussed above at footnote 3, the printout of the yellowpages.com webpage purporting to be the listing for petitioner is not of record and we have not considered it.

petition to cancel respondent's registration of the ATL'S BADDEST CHICKS mark.

Petitioner's Pleaded Grounds for Cancellation.

We turn now to petitioner's pleaded grounds for cancellation of respondent's registration, i.e., a Section 2(d) claim of priority and likelihood of confusion, and a claim of fraud. For the reasons discussed below, we find that petitioner has failed to prove either of these grounds for cancellation.

Petitioner Has Not Proven Its Ownership of the Mark.

Although we have found that petitioner has standing because we assume from the poster that petitioner had some sort of a connection to the concert advertised in the poster, we find that petitioner has failed to meet the more stringent standard of proving that it is the owner of prior common-law rights in the ATL'S BADDEST CHICKS mark.

Petitioner has pleaded a Section 2(d) claim of priority and likelihood of confusion, and a claim that respondent fraudulently filed the application which matured into the involved registration "with full knowledge of Petitioner's prior use." Both of these pleaded grounds are premised on petitioner's contention that it is the owner of the mark ATL'S BADDEST CHICKS and has rights in the mark which are

superior to respondent's rights. Petitioner has failed to prove this premise, and both of its pleaded grounds for cancellation therefore fail.

Again, aside from the pleadings (in which respondent in its answer denied petitioner's allegations that it is the owner of the mark), the concert poster is the only evidence of record. The references to petitioner on the poster identify petitioner as nothing more than the source for "more info" about the concert. The poster does not establish that petitioner was the producer of the concert, any more than the similarly-placed reference to the website of the radio station, which likewise identifies the radio station as the source of "more info" about the concert, would establish that the radio station was the producer of the concert.

The only other reference to petitioner is what appears to be petitioner's logo at the bottom of the poster, but it appears only as one of six similarly-sized logos (including respondent's) identifying other entities. This logo on the poster does not establish that petitioner was the producer of the concert or anything more than one of the sponsors of the concert (along with the other entities whose logos appear at the bottom of the poster). We also note that the poster identifies other entities as well, such as the sources of tickets for the event and what appears to be the

venue at which the concert was to be held ("sugarhill"). We cannot conclude, based solely on this poster, that it was petitioner, and not any of these other entities, that was the producer of the concert.

Also, even if we were to assume that the poster establishes that petitioner was the producer (or one of the producers) of this particular concert, the poster does not establish that the ATL'S BADDEST CHICKS mark, itself, is owned by petitioner or that petitioner has any prior rights in the mark vis-à-vis respondent.

In short, although we have assumed and found that petitioner has established its standing based on the existence of some sort of connection between petitioner and the concert, petitioner has failed to establish that it is in fact the owner of the mark. Because petitioner has failed to prove that it owns the mark, both of petitioner's pleaded grounds for cancellation fail.

Section 2(d) Claim.

To prevail on its Section 2(d) ground for cancellation in this case, petitioner must prove both that it has prior rights in the ATL'S BADDEST CHICKS mark vis-à-vis respondent, and that a likelihood of confusion exists. Trademark Act Section 2(d), 15 U.S.C. §1052(d). For the reasons discussed above, we find that petitioner has failed

to establish its ownership of prior rights in the mark. Having failed to prove the priority element of its Section 2(d) claim, that claim must fail.

Fraud Claim.

Petitioner's failure to prove that it has prior rights in the registered mark also necessarily defeats what we construe to be petitioner's fraud claim, i.e., its claim that respondent filed its application for the registration involved in this proceeding "with full knowledge of Petitioner's prior use..."⁶

Fraud in procuring a trademark registration occurs when an applicant for registration knowingly makes specific false, material representations of fact in connection with the application with the intent of obtaining a registration to which it is otherwise not entitled. *See in re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009);

⁶ In its entirety, petitioner's fraud claim was alleged in Paragraph 6 of the petition to cancel as follows:

Registrant filed the application for its registration with full knowledge of Petitioner's prior use, as shown by the "use" evidence that was used in Registrant's application, [sic - which] was actually a poster advertising Petitioner's entertainment production, in the nature of a theatrical and concert production. Further proof of Registrant's knowledge of Petitioner's prior use is attached as exhibit A, consisting of the contract for that particular performance that was advertised in the poster of Petitioner, which Registrant usurped as evidence of its purported use of the mark in commerce.

Qualcomm Inc. v. FLO Corp., 93 USPQ2d 1768, 1770 (TTAB 2010).

We construe petitioner's allegation that respondent's registration should be cancelled because respondent filed its application for registration of the mark "with full knowledge of Petitioner's prior use..." as an allegation that respondent committed fraud in executing the application declaration verifying that

To the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive...

Trademark Act Section 1(a)(3)(D), 15 U.S.C. §1051(a)(3)(D).

To prevail on this sort of a fraud claim, i.e., that the declaration or oath in defendant's application for registration was executed fraudulently, the party alleging fraud must plead and prove that: (1) there was in fact another user (petitioner, here) of the same or a confusingly similar mark at the time the oath was signed; (2) the other user had legal rights superior to applicant's; (3) applicant knew that the other user had rights in the mark superior to applicant's, and either believed that a likelihood of confusion would result from applicant's use of its mark or had no reasonable basis for believing otherwise; and that

(4) applicant, in failing to disclose these facts to the Patent and Trademark Office, intended to procure a registration to which it was not entitled. *Qualcomm Inc. v. FLO Corp.*, *supra*, 93 USPQ2d 1768 at 1770; *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1205 (TTAB 1997). We find that petitioner has failed to prove these elements of its fraud claim.⁷

For all of the reasons discussed above, we find that petitioner has failed to prove that it possesses rights in the ATL'S BADDEST CHICKS mark that are superior to respondent's. Petitioner's fraud claim fails on that basis alone. See *Bayer Consumer Care AG v. Belmora LLC*, 90 USPQ2d 1587, 1593 (TTAB 2009) ("... because petitioner has not [proven] prior use of its mark in the United States, petitioner has also not sufficiently [proven] that it has 'legal rights superior to' respondent's, and its fraud claim is therefore untenable.").

Having failed to prove that it has superior rights in the mark vis-à-vis respondent, petitioner *ipso facto* has not and cannot prove that respondent filed its application with

⁷ We note that petitioner's mere allegation that respondent filed its application "with full knowledge of Petitioner's prior use..." is an insufficient pleading of this fraud claim. The pleading "must consist of more than a mere conclusory allegation that the defendant 'knew' about a third party's superior rights in the mark." See *Intellimedia Sports Inc.*, *supra*, 43 USPQ2d 1203, 1207. However, we shall proceed in this decision to a determination of the merits of petitioner's claim.

knowledge of petitioner's superior rights, and that it committed fraud when it failed to disclose such rights to the Office in filing its application. Stated differently, petitioner having failed to prove its superior rights, there were no such rights of which respondent could have had knowledge and which respondent could have knowingly failed to disclose to the Office.

Moreover, even if petitioner had proven in this case that it in fact possessed superior rights in the mark, petitioner's fraud claim still fails because petitioner has not proven that respondent had actual knowledge that petitioner's asserted rights in the mark were superior to its own and that, due to such knowledge, respondent had no reasonable basis for believing that it was entitled to the registration it applied for. The Board has stated:

... [I]f the other person's rights in the mark, vis-a-vis the applicant's rights, are not known by applicant to be superior or clearly established, e.g., by court decree or prior agreement of the parties, then the applicant has a reasonable basis for believing that no one else has the right to use the mark in commerce, and the applicant's averment of that reasonable belief in its application declaration or oath is not fraudulent.

Intellimedia Sports, Inc., supra, 43 USPQ2d 1203, 1207.

Here, petitioner has presented no evidence that there has been any prior litigation between the parties or any prior decision by a court establishing that petitioner has

prior rights in the mark vis-à-vis respondent. There is no evidence of any prior agreement between the parties which would establish that petitioner has superior rights in the mark.⁸ There is no evidence in the record of any other facts which would show that respondent had actual knowledge of petitioner's asserted superior rights in the mark, and which would preclude respondent from having had a reasonable basis for its claim of ownership of the mark in the application.

For all of these reasons (and especially because petitioner has failed to prove its ownership of and superior rights in the mark), we find that petitioner has failed to prove its pleaded fraud claim.

Respondent's Alleged "Non-Ownership" of the Registration.

In its brief, petitioner argues that the registration should be cancelled because respondent expressly denied ownership of the registration in its answer to the petition for cancellation. Specifically, petitioner argues that when respondent made its general denial in its answer, respondent also denied Paragraph 3 of the petition to cancel, which alleged that "[t]he Registrant, Striker Records, Inc., is

⁸ The purported contract referenced as "exhibit A" to the petition to cancel is not of record, as discussed above at footnote 3. Moreover, the petition to cancel does not even identify the parties to the contract, in particular whether respondent was a party to the contract.

the owner of U.S. Trademark Registration No. 3,421,999 for the mark "ATL'S Baddest Chicks" for presentation of live show performances." Petitioner argues that, by making that denial in its answer, "... Respondent admits Petitioner's case. Respondent is not properly the owner of the mark as registered, and the registration should be cancelled."

(Petitioner's brief at unnumbered page 3; emphasis petitioner's.)

We reject this argument. First, this was not asserted as a ground for cancellation in the petition to cancel, nor did petitioner ever move to amend the petition to cancel to add this claim after it received respondent's answer (upon which the purported claim is based).

Even if the claim had been pleaded, we reject it. Even if we assume that respondent's denial of this allegation was not simply inadvertent, we find that it does not suffice to warrant cancellation of the registration. Respondent was the owner of record of the registration at the time of the pleadings, and has remained the record owner of the registration throughout this proceeding and up to the present time. Petitioner specifically alleged in the petition to cancel that respondent is the owner of the registration, and any purported admission by respondent in its answer that it was not the owner of the registration is offset by petitioner's affirmative allegation and admission

in its petition to cancel that respondent in fact is the owner of the registration.

Additionally, respondent's "admission" that it was not the owner of the registration is not an admission that it was not and is not the owner of the registered mark itself, which would actually be a ground for cancellation of the registration.

In short, we find that respondent's denial of petitioner's affirmative allegation and admission that respondent is the owner of the registration does not suffice as a ground for cancellation of the registration.

Conclusion.

Even if we assume that petitioner has established its standing to petition to cancel respondent's registration, we find that petitioner has failed to prove either its Section 2(d) claim of priority and likelihood of confusion, or its fraud claim. Petitioner has failed to prove the necessary premise to both of those claims, i.e., that it is the owner of the ATL'S BADDEST CHICKS mark or that it has rights in the mark which are superior to respondent's. We also reject petitioner's argument in its brief that the registration should be cancelled based solely on respondent's denial in its answer of petitioner's affirmative allegation in the

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petition to cancel that respondent is the owner of the
registration.

Decision: The petition to cancel is DENIED.