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

Proceeding	92051170
Party	Defendant O2 HOLDINGS LIMITED
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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O2Micro International Ltd.	Cancellation No. 92051170
Petitioner,	Mark: O2
v.	Reg. No. 2231093
O2 Holdings, Ltd.	
Registrant.	

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**REGISTRANT’S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FIRST  
AMENDED PETITION FOR CANCELLATION**

Registrant, O2 Holdings, Ltd., (“Registrant”), by and through its attorneys Baker & Rannells, PA, hereby replies to Petitioner’s Response to Registrant’s motion to dismiss Petitioner’s, O2Micro International Ltd., (“Petitioner”) first Amended Petition for Cancellation in lieu of filing an Answer.

Petitioner states that regardless of the merits of Registrant’s proof of its use, such proof does not rebut the allegation that fraud occurred at renewal or that Registrant abandoned its mark so that Petitioner’s motion to dismiss the pleading must be denied. However, not only is the amended pleading insufficient, Registrant’s proof clearly supports its motion to dismiss the pleading under Rule 12(b)(6) as negating all claims of intent to deceive or abandon, filed after initial disclosures were served.

“If on a motion to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleadings are submitted and not excluded by the Board, the motion will be treated as a motion for summary judgment under Fed. R. Civ. P. 56.” *See, for example*, Fed. R.

Civ. P. 12(b); *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 26 USPQ2d 1038 (Fed. Cir. 1993); *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons Ltd.*, 22 USPQ2d 1594 (TTAB 1992); TBMP §503.04 (2nd ed. rev. 2004). While the Board does not allow a party to file a motion for summary judgment prior to the moving party's service of initial disclosures on the adverse party, the Board generally will exercise its discretion to convert motions to dismiss that refer to matters outside the pleadings into motions for summary judgment if such motions are filed after the moving party serves its initial disclosures. *See Compagnie Gervais Danone v. Precision Formulations LLC*, 89 USPQ2d 1251, 1256 (TTAB 2009).

Thus, the Board should treat Registrant's motion to dismiss the amended pleading as one for summary judgment. A summary judgment motion is appropriate when there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c)*.

Registrant's motion includes evidence of its actual use both during the relevant period for renewal and continuously thereafter leaving no issue of fact remaining regarding Registrant's use or intent. Thus, Petitioner's pleading with claims based on a threshold element of intent to defraud or abandon must fail as a matter of law.

Even without Registrant's evidence, Petitioner's amended pleading, in and of itself, is flawed and must be dismissed. As Petitioner admits, its paragraphs raising claims of fraud do no more than allege that "On faith and belief, Registrant committed fraud...by making material representations of fact...which it knew or should have known to be false." Under *Bose*, these paragraphs are insufficient despite what the remainder of the pleading contains. The insufficient paragraphs cannot be cured by facts and suppositions raised later in the pleading.

Petitioner's claims of abandonment through naked licensing are likewise insufficient. Abandonment claims must allege that Registrant had the intent to abandon and not to resume use, if cessation of use can be shown at all. Claims of naked licensing via negligent oversight do not support allegations of intent to abandon and not to resume use.

Ultimately, the amended Petition is futile and baseless. Not only did Petitioner again fail to plead with specificity for claims based on intent, but Registrant has demonstrated that it had use that it believed supported its renewal. There can be no intent to deceive where deception either did not occur or where Registrant acted in good faith. Either way, Petitioner's pleading as filed is ultimately futile and if left intact will be a waste of the Board's time and resources.

**I. Conclusion**

Registrant requests that the Board grant Registrant's Motion in its entirety.

Dated: August 23, 2010

BAKER AND RANNELLS, PA

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of Registrant's Reply in Support of its Motion to Dismiss Petitioner's First Amended Petition for Cancellation in re O2Micro International Ltd.v. O2 Holdings, Ltd., Cancellation Number 92051770 was forwarded by email and first class mail, postage prepaid, on this 23rd day of August, 2010 to the attorneys for the Petitioner at the following address:

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