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

Proceeding	92051532
Party	Plaintiff PictureCode, LLC
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Date	04/14/2010
Attachments	Reply iso Motion to Amend Protective Order and for Stay.pdf ( 6 pages )(16746 bytes )

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

In re Registration No. 3,321,797  
Mark: DIGITAL NINJA  
Issued: October 23, 2007

PICTURECODE, LLC,

Petitioner,

v.

JUAN B. MELENDEZ III

Respondent

Cancellation No. 92051532

**PETITIONER'S REPLY IN  
SUPPORT OF APPLICATION  
FOR (1) MODIFICATION OF  
"STANDING" PROTECTIVE  
ORDER TO EXPLICITLY  
PERMIT FILING IN DISTRICT  
COURT ACTION UNDER SEAL,  
OR ORDER SHORTENING  
TIME ON NOTICED MOTION  
THEREON; AND (2) STAY OF  
TTAB CANCELLATION  
PROCEEDING;  
DECLARATION OF KENNETH  
G. PARKER IN SUPPORT  
THEREOF**

## MEMORANDUM

### I. INTRODUCTION

With the filing of this reply, briefing is complete regarding Petitioner PictureCode's application to modify the standard protective order in this action and to stay this cancellation proceeding. The TTAB should modify the protective order and stay this action. Doing so will allow all issues between the parties to be resolved in the a single proceeding in the district court, something that cannot happen in this cancellation proceeding.

Importantly, as it stated in its opening papers, PictureCode is not seeking to evade its production obligations in seeking a stay. PictureCode has produced documents, and expressly stated to the TTAB that it intended to do so regardless of the entry of a stay. Respondent has filed a frivolous motion to compel in an attempt to create the impression that documents remain unproduced, and in addition Respondent seeks to compel response to requests for admission that it just served on Petitioner two days ago. The TTAB should not allow itself to be distracted by the red herring that is the Respondent's motion to compel.

### II. ARGUMENT

#### A. The TTAB Should Modify Its Standard Protective Order.

PictureCode seeks an order modifying the TTAB standard protective order to expressly permit the filing of documents produced under the TTAB order in the district court proceeding (and all appeals from it), as long as the documents are filed under seal

and protected from public disclosure in that action. Such an order is proper for two reasons.

First, Respondent does not dispute that the TTAB has the inherent discretion, as a tribunal, to modify its own orders. Although Respondent claims that the parties agreed to the standard order, that is not correct. In this instance the standard protective order came into operation automatically under 37 C.F.R. § 2.116(g). The TTAB should modify the order, as doing so will permit filing of substantive motions in a companion action and potentially expedite resolution of the cancellation matter and related causes of action.

Second, modifying the standard protective order is required by the First Amendment. PictureCode, like all citizens, has a right to petition the district court, as a branch of government, for redress. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). The complaint in the district court is such a petition, and the substantive motion or motions that PictureCode seeks to file are part of the petitioning process. Respondent has articulated no reasoned response to this independent reason to modify the protective order.

**B. The TTAB Should Stay This Cancellation Proceeding.**

After the TTAB amends its protective order to allow documents to be filed in the district court under seal, the TTAB should stay this action. A stay is appropriate pursuant to 37 C.F.R. § 2.117, and TBMP § 510.02(a) and the cases cited there. The district court will be able to fully and finally decide all issues between the parties, not just the cancellation issue, and it would be a more efficient use of resources to stay this action and allow the action in the district court to proceed.

As previously mentioned, PictureCode has stated that it intends to complete its production of documents, and Respondent's motion to compel is a red herring. The same is true for Respondent's newly filed "motion for summary judgment," which has been cobbled together and filed in an effort to forestall a stay. To the extent Melendez believes that the motion has merit, he can simply refile it in the district court action, where the district court may hear all such motions and all disputes between the parties.

**C. This Application Is Fully Briefed and Should Be Decided Without Delay.**

Whether the TTAB treats PictureCode's application as a motion or ex parte application is no longer relevant. Briefing is now complete on this issue and the TTAB should decide it one way or the other with dispatch, to avoid unnecessary duplicative briefing in both actions.

**III. CONCLUSION**

For the foregoing reasons, PictureCode requests an order modifying the TTAB

standard protective order to permit filing of documents in the action in the district court under seal and stay of this action.

Dated: April 14, 2010

Respectfully Submitted,

/Kenneth G. Parker/

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**Certificate of Service**

Pursuant to 37 C.R.F. § 2.119 (a), I hereby certify that a true and complete copy of the foregoing document has been delivered to Respondent at his e-mail address pursuant to an agreement to accept electronic service documents.

/Kenneth G. Parker/

Kenneth G. Parker, Esq.  
Attorney for PictureCode, LLC