

ESTTA Tracking number: **ESTTA359735**

Filing date: **07/23/2010**

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

Proceeding	92052575
Party	Defendant Combat Medical Systems, LLC
Correspondence Address	COMBAT MEDICAL SYSTEMS, LLC 6441 YADKIN ROAD FAYETTEVILLE, NC 28303 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Date	07/23/2010
Attachments	cmsmtd.pdf (5 pages)(934374 bytes)

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

DONALD MLYNEK (AN INDIVIDUAL),)	
)	
)	
Plaintiff,)	Cancellation 92/052575
)	Registration No. 3,805,112
)	
v.)	
)	
COMBAT MEDICAL SYSTEMS, LLC,)	
)	
Defendant.)	

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Registrant, Combat Medical Systems, LLC (hereinafter “CMS”), through its attorneys, pursuant to Federal Rule of Civil Procedure 12(b)(6), and TBMP §503 *et seq.*, hereby moves to dismiss Cancellation No. 92/052,575 filed by plaintiff Donald Mlynek for the reasons set forth below.

Factual Background

CMS filed application serial no. 77/931446 for the word mark COMBAT MEDICAL SYSTEMS covering online mail order catalog services and online retail store on February 9, 2010. Both the online mail order catalog and online retail store feature a wide variety of combat casualty care medical goods, supplies, and equipment in International Class 35. The mark COMBAT MEDICAL SYSTEMS is merely a word mark and appears on the register without any stylization or design. The application was amended to disclaim an exclusive right to the terms “MEDICAL SYSTEMS” and was amended to register on the Supplemental Registry of the U.S. Patent & Trademark Office (hereinafter, “PTO”). On June 15, 2010, the PTO issued U.S. Registration No. 3,805,112 for COMBAT MEDICAL SYSTEMS.

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On June 16, 2010 plaintiff, Donald Mlynek, through his attorney, petitioned the Director to cancel such registration. On June 18, 2010, the Trademark Trial and Appeal Board (the “Board”) instituted the instant Cancellation proceeding. Plaintiff’s sole ground for cancellation is cited as a likelihood of confusion under section 2(d) based on Plaintiff’s U.S. Registration No. 3,780,231 for the mark COMBAT MEDICAL, LLC .The petition was filed electronically with the Board.

Plaintiff is the listed registrant of U.S. Registration No. 3,780,231 for the mark COMBAT MEDICAL, LLC and Design covering medical bags sold empty in International Class 10. Plaintiff, in the prosecution of the COMBAT MEDICAL, LLC and Design application, disclaimed any exclusive rights to “COMBAT MEDICAL, LLC” apart from the entire composite mark pursuant to section 6 of the Act. Plaintiff claims a date of first as April 1, 2008. Plaintiff makes no claim that the COMBAT MEDICAL, LLC and Design mark has acquired distinctiveness under section 2(f) in his application or in his Petition to Cancel filed with the Board.

Argument

1. This Cancellation Should be Dismissed Because Plaintiff is Attempting to Enforce an Exclusive Right to Disclaimed Elements of its Registered Mark.

The Federal Circuit has held that the Lanham Act’s disclaimer requirement strikes a balance between two competing trademark principles. Through the use of disclaimers, applicants may register composite marks which contain unregistrable components, but they may not claim an exclusive right to disclaimed portions. *Dean Corp. v. Belvedere Int’l. Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991). The disclaimer also allows competitors in

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Registrant's industry to use the "unregisterable" and disclaimed components in describing their own services and goods.

Here Plaintiff seeks to claim an exclusive right to components of the mark that he clearly and unequivocally disclaimed in his application under Section 6 of the Act. The disclaimer provides a statement from the applicant that the applicant or registrant does not claim the exclusive right to use a specified element or elements of the mark. TMEP §1213. Plaintiff here disclaimed "COMBAT MEDICAL, LLC" in the registration he cites to support his position in this proceeding, but asks the Board to ignore his prior admission that he has no rights in the phrase.

The only elements shared by the registrations of Plaintiff and CMS are the elements that Plaintiff disclaimed. As this Board noted in *In Re Candy Bouquet*, the purpose of the disclaimer is to permit registration of a composite mark, containing descriptive elements, while providing a means to prevent any false impression that the registrant owns registered rights to the disclaimed portion of the mark. 73 USPQ2d 1883, (TTAB 2004). Having no registered or exclusive rights to "COMBAT MEDICAL," Plaintiff has stated no claim upon which relief may be granted.

2. This Cancellation Should be Dismissed Because Plaintiff Lacks Standing.

To establish standing as a petitioner for cancellation, the petitioner must show that there is a likelihood of damage from the continuing registration of the subject mark. Lanham Act § 14, 15 U.S.C. 1064. The Plaintiff in the instant action claims likelihood of confusion as its sole grounds for standing. As discussed in the previous section, the only shared elements of Plaintiff and Registrant's marks are the terms "COMBAT MEDICAL," to which Plaintiff disclaimed any exclusive right.

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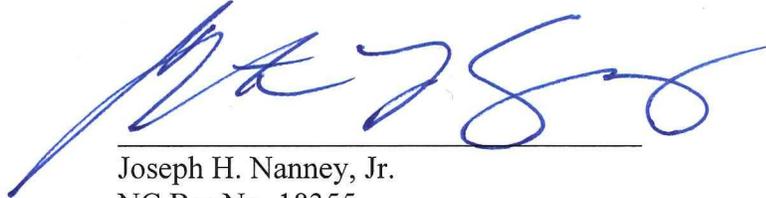
Having no exclusive right to the "COMBAT MEDICAL" terms, Plaintiff has no standing to bring this cancellation proceeding. Plaintiff's one sentence, one paragraph, untitled complaint reads in its entirety: "Opposer, Don Mlynek, owner of the registered mark Combat Medical, LLC, has prior rights and the use of the Combat Medical Systems mark is likely to cause confusion under Section 2(d) of the Lanham Act."

In this case, Plaintiff has failed to state grounds that provide standing as a petitioner to cancel the COMBAT MEDICAL SYSTEMS trademark. Having acquired no secondary meaning, Plaintiff does not have a right under the Lanham Act to exclude others from using the descriptive elements of his mark.

Accordingly, Combat Medical Systems, LLC respectfully requests that the above Cancellation be dismissed according to Federal Rule of Civil Procedure 12(b)(6), and TBMP §503 *et seq.*

Respectfully submitted this the 23 day of July, 2010.

WYRICK ROBBINS YATES & PONTON LLP



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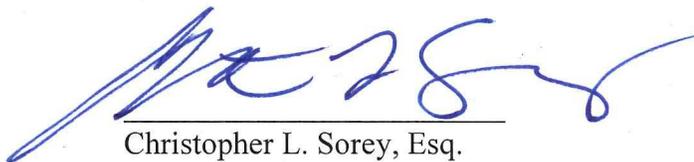
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July ___, 2010 a true and correct copy of the foregoing Motion to Dismiss for Failure to State a Claim was electronically filed with the TTAB via the ESTTA Filing System with the same served upon counsel of record for Plaintiff by email and U.S. Mail, postage prepaid, addressed as follows:

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Counsel for Opposer
DONALD MLYNEK (AN INDIVIDUAL)

A handwritten signature in blue ink, appearing to read "C. L. Sorey", is written over a horizontal line.

Christopher L. Sorey, Esq.
Wyrick Robbins Yates & Ponton, LLP