

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

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Mailed: August 24, 2010

Cancellation No. 92052575

Donald Mlynek

v.

Combat Medical Systems, LLC

**Before Seeherman, Holtzman, and Cataldo,  
Administrative Trademark Judges.**

**By the Board:**

Donald Mylnek ("petitioner") seeks to cancel the registration owned by Combat Medical Systems, LLC ("respondent") for the mark COMBAT MEDICAL SYSTEMS in standard character format which is registered on the Supplemental Register, with the wording "MEDICAL SYSTEMS" disclaimed, for "online mail order catalog services and online retail store services featuring a wide variety of combat casualty care medical goods, supplies and equipment" in International Class 35.<sup>1</sup>

As grounds for cancellation, petitioner has asserted a claim of priority of use and likelihood of confusion under

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<sup>1</sup> Reg. No. 3805112, issued on June 15, 2010 on the Supplemental Register, alleging March 1, 2008 as the first date of use anywhere and May 27, 2008 as the first date of use in commerce.

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Section 2(d) of the Trademark Act. Additionally, petitioner has pleaded ownership of the registration for the mark COMBAT MEDICAL LLC and design, as displayed below, with the wording "COMBAT MEDICAL LLC" disclaimed, for "medical bags sold empty" in International Class 18.<sup>2</sup>



In lieu of filing an answer, respondent filed a motion to dismiss for failure to state a claim and for lack of standing on July 23, 2010. Petitioner filed an opposition to respondent's motion on August 10, 2010.

This case now comes before the Board for consideration of respondent's motion to dismiss.

In support of its motion to dismiss, respondent maintains that petitioner is attempting to enforce an exclusive right to disclaimed elements of his pleaded registered mark. Specifically, respondent contends that

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<sup>2</sup> Reg. No. 3780231, issued on April 27, 2010 on the Principal Register, alleging April 1, 2008 as both the date of first use anywhere and date of first use in commerce.

since petitioner has disclaimed exclusive rights in the wording COMBAT MEDICAL LLC and inasmuch as the only elements shared by the respondent's registration and petitioner's pleaded registration are the elements that petitioner has disclaimed, petitioner has failed to state a claim upon which relief may be granted. Additionally, respondent argues that petitioner lacks standing to bring this case. In particular, respondent contends that since petitioner does not have exclusive rights to the COMBAT MEDICAL portion of his pleaded registered mark and because the record does not demonstrate that petitioner's pleaded mark has acquired distinctiveness, petitioner does not have a right under the Lanham Act to exclude others from using the descriptive and disclaimed elements of his mark.

In response, petitioner maintains that he has standing to pursue this case since he has pleaded ownership and prior use of his registered mark and therefore has a real interest in this proceeding. Moreover, petitioner argues that, notwithstanding the disclaimer of the literal portion of his registered mark, petitioner is entitled to prevent others from misappropriating his trademark.

In this case, petitioner has alleged the following in his petition to cancel:

**Opposer, Don Mylnek, 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.**

To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a petition for cancellation need only allege such facts as would, if proved, establish (1) petitioner has standing to maintain the proceeding and (2) a valid ground exists for cancelling the subject registration. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 1985 (CCPA 1982). A distinction is to be drawn between pleaded facts which, if proved, would establish petitioner's standing and those additional facts which are necessary to the cause of action. *Lipton*, 213 USPQ at 188.

We may quickly dispose of respondent's assertion that petitioner has not pleaded facts which, if proved, would establish his standing. We believe that petitioner has sufficiently alleged a "real interest" and a "direct and personal interest" in the outcome of this proceeding by pleading prior use and ownership of his registered COMBAT MEDICAL LLC and design mark and that the continued use of respondent's registered mark is likely to cause confusion with petitioner's pleaded registered mark. Clearly, these facts, if proved, would be sufficient to establish petitioner's real interest in this proceeding, that is, an interest beyond that of the general public, and that is all the law requires. See *International Order of Job's*

*Daughters v. Lindeburg and Company*, 952 F.2d 1317, 21 USPQ2d 1145 (Fed. Cir. 1991).

We next turn to the issue of whether petitioner has properly pleaded a claim of priority and likelihood of confusion.

In order to properly state a claim of likelihood of confusion, a petitioner must plead that (1) the petitioner's mark, as applied to its goods or services, so resembles the respondent's mark or trade name as to be likely to cause confusion, mistake, or deception; and (2) priority of use. See Fed. R. Civ. P. 8; and *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

After a careful review of petitioner's pleading, the Board finds that the allegations set forth in the petition to cancel, while minimal, constitute adequate notice pleading of a claim of priority and likelihood of confusion.

The Board notes that respondent's arguments in support of its motion to dismiss for failure to state a claim are not in fact directed to any deficiencies in petitioner's pleading; rather, respondent is merely contesting the merits of petitioner's asserted likelihood of confusion claim. As noted above, respondent contends that petitioner cannot prevail on his asserted likelihood of confusion claim because petitioner cannot claim exclusive rights of the disclaimed portion of his

pleaded registered mark. However, a motion to dismiss is a test solely of the legal sufficiency of the plaintiff's pleading and does not involve a determination of the merits of the case. See *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992).

Accordingly, inasmuch as respondent's motion to dismiss concerns the merits of petitioner's asserted claim of likelihood of confusion, as compared to the sufficiency of the pleading itself, respondent's motion to dismiss for failure to state a claim upon which relief may be granted, as well as for lack of standing, is not well-founded and, therefore, is denied.

Proceedings herein are resumed. Respondent is allowed the time set forth below to answer the petition to cancel. Disclosure, discovery and trial dates are reset as indicated below:

Time to Answer	9/24/2010
Deadline for Discovery Conference	10/24/2010
Discovery Opens	10/24/2010
Initial Disclosures Due	11/23/2010
Expert Disclosures Due	3/23/2011
Discovery Closes	4/22/2011
Plaintiff's Pretrial Disclosures	6/6/2011
Plaintiff's 30-day Trial Period	7/21/2011
Ends	
Defendant's Pretrial Disclosures	8/5/2011
Defendant's 30-day Trial Period	9/19/2011
Ends	
Plaintiff's Rebuttal Disclosures	10/4/2011
Plaintiff's 15-day Rebuttal Period	11/3/2011
Ends	

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In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.