

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

MBA

Mailed: November 15, 2010

Cancellation No. 92052967

Episode Audio

v.

Wirepath Home Systems, LLC

Michael B. Adlin, Interlocutory Attorney:

Respondent's motion for a more definite statement, filed October 11, 2010, is hereby **GRANTED** as conceded, because petitioner failed to respond thereto, Trademark Rule 2.127(a), and for good cause shown. Petitioner is allowed until **THIRTY DAYS** from the mailing date of this order to file and serve an amended petition for cancellation which clearly sets forth, in separately numbered paragraphs, at the very least: (1) the identity and address of the petitioner; (2) any of petitioner's alleged trademark(s) or service mark(s) which form the basis for petitioner's allegations; (3) the basis for petitioner's claim of damage; and (4) each ground for cancellation. The amended petition for cancellation shall also otherwise comply with Trademark Board Manual of Procedure ("TBMP") §§ 309.02 and 309.03 (2d ed. rev. 2004). The TBMP may be accessed here:

http://www.uspto.gov/trademarks/process/appeal/tbmp_ed2_rev1.pdf

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In the event petitioner fails to file an amended petition for cancellation as set forth herein, its current, original petition for cancellation may be stricken. TBMP § 505.03.

In the event petitioner seeks to plead fraud as a ground for cancellation, it should be aware of In re Bose Corp., 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009), under which the elements of fraud must be pled with particularity in accordance with Fed. R. Civ. P. 9(b), made applicable to Board proceedings by Trademark Rule 2.116(a). In fact, under Rule 9(b), together with Fed. R. Civ. P. 11 and USPTO Rule 11.18, "the pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud." King Automotive, Inc. v. Speedy Muffler King, Inc., 212 USPQ 801, 803 (CCPA 1981). As the Board recently held:

Pleadings of fraud made "on information and belief," when there is no allegation of "specific facts upon which the belief is reasonably based" are insufficient. Exergen Corp. v. Wal-Mart Stores Inc., 91 USPQ2d 1656, 1670 (Fed. Cir. 2009) and cases cited therein (discussing when pleading on information and belief under Fed. R. Civ. P. 9(b) is permitted); see also In Re Bose Corp., 91 USPQ2d at 1938. Additionally, under USPTO Rule 11.18, the factual basis for a pleading requires either that the pleader know of facts that support the pleading or that evidence showing the factual basis is "likely" to be obtained after a reasonable opportunity for discovery or investigation. Allegations based solely on information and belief raise only the mere possibility that such evidence may be uncovered and do not

constitute an adequate pleading of fraud with particularity. Thus, to satisfy Rule 9(b), any allegations based on "information and belief" must be accompanied by a statement of facts upon which the belief is founded. See Exergen Corp., 91 USPQ2d at 1670 n.7, citing Kowal v. MCI Comm. Corp., 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) ("'[P]leadings on information and belief [under Rule 9(b)] require an allegation that the necessary information lies within the defendant's control, and ... such allegations must also be accompanied by a statement of the facts upon which the allegations are based'.")

Asian and Western Classics B.V. v. Selkow, 92 USPQ2d 1478, 1479 (TTAB 2009).

Furthermore, "[a] pleading of fraud on the USPTO must also include an allegation of intent." In re Bose, 91 USPQ2d at 1939-1940. Under Asian and Western Classics, "[p]leadings of fraud which rest solely on allegations that the trademark applicant or registrant made material representations of fact in connection with its application or registration which it 'knew or should have known' to be false or misleading are an insufficient pleading of fraud because it implies mere negligence and negligence is not sufficient to infer fraud or dishonesty." Asian and Western Classics, 92 USPQ2d at 1479 (quoting In re Bose, 91 USPQ2d at 1940 and Symbol Techs., Inc. v. Opticon, Inc., 935 F.2d 1569, 1582 (Fed. Cir. 1991)). Under Bose, "intent is a specific element of a fraud claim and an allegation that a

declarant 'should have known' a material statement was false does not make out a proper pleading." Id.

Petitioner should also be aware that the Board's jurisdiction is limited. The only issue in this proceeding is whether respondent's involved registration should be cancelled, and issues of trademark use, alleged defamation, domain name issues and alleged unfair business practices are beyond the Board's jurisdiction.

Finally, it is generally recommended that parties retain experienced trademark practitioners to represent them in Board proceedings. Whether or not petitioner retains an attorney, it or he will be expected and required to comply with all applicable rules and procedures, including those relating to service of papers, as set forth in 37 C.F.R. § 2.119. Petitioner may wish to review the following sources of information which may be useful, among others:

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

<http://ttabvue.uspto.gov/ttabvue/>

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/index.html>

<http://www.uspto.gov/web/offices/tac/tmlaw2.pdf>

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

In the event petitioner files an amended petition for cancellation, respondent is allowed until **THIRTY DAYS** from service thereof to answer or otherwise move with respect to the amended

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petition for cancellation. Disclosure, discovery, trial and other dates are reset as follows:

Deadline for Discovery Conference	February 14, 2011
Discovery Opens	February 14, 2011
Initial Disclosures Due	March 16, 2011
Expert Disclosures Due	July 14, 2011
Discovery Closes	August 13, 2011
Plaintiff's Pretrial Disclosures	September 27, 2011
Plaintiff's 30-day Trial Period Ends	November 11, 2011
Defendant's Pretrial Disclosures	November 26, 2011
Defendant's 30-day Trial Period Ends	January 10, 2012
Plaintiff's Rebuttal Disclosures	January 25, 2012
Plaintiff's 15-day Rebuttal Period Ends	February 24, 2012

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.
