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

Proceeding	92052967
Party	Defendant Wirepath Home Systems, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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Date	12/23/2010
Attachments	12.23.10 motion dismiss episode-144046.pdf (6 pages)(213949 bytes)

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

In the Matter of U.S. Registration No. 3,343,180
Mark: EPISODE
Registration Date: November 27, 2007

EPISODE AUDIO, **Petitioner,** **v.** **WIREPATH HOME SYSTEMS, LLC,** **Respondent.**	**Cancellation No.: 92052967**

RESPONDENT'S MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Respondent, Wirepath Home Systems, LLC ("Wirepath"), by and through counsel, hereby moves to dismiss the claim of fraud in the Amended Petition for Cancellation.

Background

On August 12, 2005, Respondent Wirepath filed an application to register the mark EPISODE in connection with "loudspeakers; loudspeaker systems; loudspeakers with built-in amplifiers; loudspeaker cabinets."

The latter application, assigned Serial No. 78/691,565, was based on intent-to-use under Section 1(b) of the Trademark Act. The office records were searched and no similar registered or pending marks were found that would bar registration under Section 2(d); subsequently, the application was approved for publication on March 29, 2006, and a Notice of Allowance was issued on July 11, 2006.

Wirepath inadvertently failed to file a Statement of Use within the six-month statutory period following the Notice of Allowance mailing date, and in order to preserve its rights, Wirepath filed a separate application to register the mark EPISODE in connection with similar goods on March 8, 2007. The latter application, assigned Serial No. 77/125,342 was based on use in commerce at least as early as January 1, 2006 (hereinafter the '342 Application").

However, a petition to revive Application Serial No. 78/691,565 was granted. The application was granted registration following submission of a Statement of Use on October 23, 2007 under U.S. Registration No. 3,320,350 (hereinafter, the '350 Registration").

The '342 Application was subsequently granted registration on November 27, 2007 under U.S. Registration No. 3,343,180.

On or about August 30, 2010, Petitioner Episode Audio[1] instituted the above-captioned proceeding against U.S. Registration No. 3,343,180.

Pursuant to an order of the Board on November 15, 2010, Petitioner filed an Amended Petition for Cancellation on November 24, 2010.[2]

The Amended Petition for Cancellation sets forth two claim(s): one claim for fraud and the other claim under Section 2(d) of the Trademark Act. The instant motion is directed only at the fraud allegations which Wirepath contends fail to state a claim upon which relief can be granted by the Board.

Argument

A motion to dismiss for failure to state a claim upon which relief can be granted relates to the legal sufficiency of the pleading. *See* TBMP Sec. 503.02. The Board will accept the facts alleged in the Amended Petition for Cancellation as true, and dismiss any claim(s) if it is clear

[1] Wirepath has found no evidence of a legal entity "Episode Audio" at the address indicated in the Petition.
[2] The order was pursuant to Wirepath's Motion for a More Definite Statement, which was granted as conceded.

that no relief could be granted upon any set of facts proven consistent with the pleading's allegations. *Young v. AGB Corp.*, 152 F.3d 1377, 1379, 47 U.S.P.Q.2d 1752, 1754 (Fed. Cir. 1998).

It is appropriate under recent but established precedent that the Board should dismiss the claim of fraud set forth in pages 3-4 of the Amended Petition for Cancellation. A pleading of fraud under Fed. R. Civ. P. 9(b) must state the facts constituting the fraud with particularity. *DaimlerChrysler Corp. v. American Motors Corp.*, Cancellation No. 92045099 at p. 5 (T.T.A.B. January 14, 2010). In this respect, the pleading must contain *explicit* rather than *implied* averments concerning the circumstances of fraud. *King Automotive, Inc. v. Speedy Muffler Kings, Inc.*, 667 F.2d 1008, 212 U.S.P.Q. 801, 803 (C.C.P.A. 1981).

A trademark registration is obtained fraudulently under the Trademark Act where the applicant makes a knowingly false, material misrepresentation with the intent to deceive the USPTO. *Enbridge Inc. v. Excelerate Energy Ltd. Partnership*, 92 U.S.P.Q.2d 1537, 1540 (T.T.A.B. October 6, 2009). Both of these essential elements are insufficiently pled in this case.

First, the Amended Petition for Cancellation fails to state with particularity the knowingly false, material representation that was made by Wirepath in the '342 Application.

The '342 Application includes the standard declaration signed by the applicant or his/her representative that states in part:

> *he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive*

Presumably this portion of the declaration is contended by Petitioner to be a false, material misrepresentation by Wirepath – but this is only *implied* by the circumstances described in the pleading. The only explicit averments of the fraud claim relate to an apparent chance encounter in which the owner of Episode Audio, Ira Pazandeh, was introduced to the President of Wirepath, Jay Faison. According to the pleading, this encounter between the parties occurred not in the U.S., but in the Philippines, on an unspecified date at the premises of a manufacturer. The pleading fails to allege what was discussed or otherwise exchanged in terms of information by the parties that would be relevant to making the declaration.

Second, the claim of fraud lacks the requisite element of *intent to deceive the USPTO. See DaimlerChrysler Corp.*, *supra* at p. 5 ("[I]ntent to deceive the Office, whether to obtain a registration, or to maintain a registration, is also an element to be pleaded in a fraud claim."). The pleading does not contain any allegations concerning Wirepath's intent; construed in the light most favorable to the Petitioner, the pleading could at most lead the Board to infer that Mr. Faison knew or should have known to investigate Petitioner's alleged use of EPISODE AUDIO before filing the '342 Application. Under *in re Bose Corp.*, 580 F.3d 1240, 91 U.S.P.Q.2d 1938, 1940 (Fed. Cir. 2009), allegations that an applicant knew or should have known that a representation of fact may be false are insufficient to plead fraud. *See Asian and Western Classics B.V. v. Selkow*, Cancellation No. 92048821, 92 U.S.P.Q.2d 1478, 1479 (T.T.A.B. October 22, 2009).

For all of these reasons, the claim of fraud falls short of satisfying the requirements of Fed. R. Civ. P. 9(b) and should be dismissed.

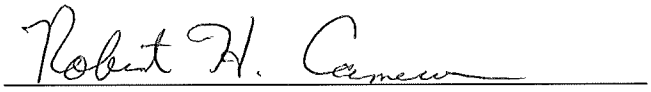
Conclusion

Wirepath notes that it has filed and served its Motion for to Dismiss within the period to file and serve an Answer to the Amended Petition for Cancellation and in lieu of an Answer, and thus, this Motion is timely and appropriate. *See* TBMP Sec. 503.01.

Accordingly, Wirepath respectfully requests that the Board grant its Motion to Dismiss and order any and all additional relief that the Board deems proper.

This 23rd day of December, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss was served on Petitioner by mailing a copy by first class mail, postage prepaid to the following address of record with the Trademark Trial and Appeal Board:

Ira Pazandeh
Episode Audio
18700 Yorba Linda Blvd. #56
Yorba Linda, CA 92886

Dated: December 23, 2010

By: Robert H. Cameron
Robert H. Cameron