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

Baxley

Mailed: July 21, 2011

Cancellation No. 92053419

W.A. Industries, Inc.

v.

LT Biosyn, Inc.

By the Trademark Trial and Appeal Board:

Respondent's motion (filed June 29, 2011) for leave to amend its answer is granted as conceded and as well-taken. See Fed. R. Civ. P. 15(a)(2); Trademark Rule 2.127(a); TBMP Section 507.02. Respondent's concurrently filed amended answer is the operative responsive pleading herein.[1]

In reviewing respondent's motion, the Board had occasion to review the pleadings herein. The electronic cover sheet of the petition to cancel indicates that petitioner seeks to cancel respondent's involved registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). A Section 2(d) claim requires allegations of: (1) priority; and (2) likelihood of confusion with a specific mark or marks as used on specific goods and/or services. See *King Candy Co. v. Eunice King's Kitchen,*

[1] Allegations of use dates set forth in pleadings are not evidence of use. Rather, dates of use must be established by competent evidence. See Trademark Rule 2.122(b)(2).

Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Petitioner has not clearly pleaded a Section 2(d) claim in the text of the petition to cancel. In particular, petitioner has not clearly alleged likelihood of confusion with a specific, previously used mark or trade name for specific goods and/or services.[2]

Further, notwithstanding the electronic cover sheet, the text of the petition to cancel is more in the nature of a fraud claim. To the extent that petitioner seeks to allege that respondent committed fraud in obtaining its involved registration, that fraud claim is insufficiently pleaded.

Fraud in procuring or maintaining a trademark registration occurs when an applicant for registration or a registrant in a declaration of use or a renewal application knowingly makes specific false, material representations of fact in connection with an application to register or in a post-registration filing with the intent of obtaining or maintaining a registration to which it is otherwise not entitled. See *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009). Because intent is a required element

[2] In the petition to cancel, petitioner directs the Board's attention to certain websites and provides links thereto. Merely providing a link to a website does not operate to make information from that website part of the petition to cancel. Websites are transitory in nature and subject to change at their owners' discretion. See *In re Planalytics Inc.*, 70 USPQ2d 1453 (TTAB 2004).

to be pleaded for a claim of fraud, allegations that a defendant "knew or should have known" of the plaintiff's alleged prior rights in a mark are insufficient.[3] See *id.*

In addition,

> a plaintiff claiming that the declaration or oath in defendant's application for registration was executed fraudulently, in that there was another use of the same or a confusingly similar mark at the time the oath was signed, must allege particular facts which, if proven, would establish that: (1) there was in fact another use of the same or a confusingly similar mark at the time the oath was signed; (2) the other user had legal rights superior to applicant's; (3) applicant knew that the other user had rights in the mark superior to applicant's, and either believed that a likelihood of confusion would result from applicant's use of its mark or had no reasonable basis for believing otherwise; and that (4) applicant, in failing to disclose these facts to the Patent and Trademark Office, intended to procure a registration to which it was not entitled.

Intellimedia Sports Inc. v. Intellimedia Corp., 43 USPQ2d 1203, 1205 (TTAB 1997). In determining whether a registrant, when its principal signed an application declaration, held an honest, good faith belief that the applicant was entitled to registration of a mark, the Board has stated that "if the other person's rights in the mark, vis-à-vis that applicant's rights are not known by applicant

[3] There is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive. *Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981). Unless a party alleging fraud can point to clear and convincing evidence that supports drawing an inference of deceptive intent, it will not be entitled to

to be superior or clearly established, e.g., by court decree or prior agreement of the parties, then the applicant has a reasonable basis for believing that no one else has the right to use the mark in commerce, and that applicant's averment of that reasonable belief in its application declaration or oath is not fraudulent."[4] *Id.* at 1207. However, the rights of a junior user must be clearly established and must be in an identical mark or one so similar as to be clearly likely to cause confusion. See *Rosso and Mastracco, Inc. v. Giant Food Inc.*, 219 USPQ 1050 (Fed. Cir. 1983).

Petitioner's fraud claim is insufficient because it is based on allegations that respondent "should have known" about respondent and respondent's prior rights in the MEGAGRO mark. Moreover, even if, as alleged in the petition to cancel, petitioner filed an application to register the involved MEGAGRO mark for "plant growth hormone/stimulator for domestic use on domestic plants" on September 17, 2001, petitioner concedes in the petition to cancel that such application was abandoned on October 22, 2002, nearly three

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judgment on a fraud claim. *In re Bose Corp., supra* at 1942. Any doubt must be resolved against the party making a claim of fraud. *Id.* at 1939.

[4] A declaration "is phrased in terms of a subjective *belief,* such that it is difficult, if not impossible, to prove objective falsity and fraud so long as the affiant or declarant has an honestly held, good faith belief." J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition,* Section 31:76 (4th ed. 2009) (emphasis in original).

years prior to the filing date of the application for respondent's involved registration. By analogy, a trademark attorney searching for conflicting marks during *ex parte* examination rarely, if ever, reviews marks in abandoned applications. Thus, petitioner's long-abandoned application may not have provided respondent with notice of petitioner's alleged prior rights in the MEGAGRO mark.

Petitioner also may intend to allege that respondent's involved registration was issued in error because the examining attorney did not cite Registration No. 2109859 for the MAGNAGROW mark, which petitioner contends was cited against the MEGAGRO mark in petitioner's pleaded abandoned application, as a basis for a Section 2(d) refusal of registration. However, examining attorney error is not a proper ground for cancellation of a registration. See *Demon International LC v. Lynch*, 86 USPQ2d 1058, 1060 (TTAB 2008).

Based on the foregoing, petitioner has not pleaded a sufficient claim in the petition to cancel. Petitioner is allowed until twenty days from the mailing date set forth in this order to file an amended petition to cancel consistent with the foregoing.[5] See TBMP Section 503.03 (3d ed. 2011).

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[5] See TBMP Section 309 (3d ed. 2011) regarding the form and content of a petition to cancel.

Petitioner intends to represent itself herein. While Patent and Trademark Rule 11.14 permits any legal person to represent itself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure

Respondent is allowed until forty days from the mailing date set forth in this order to file an answer to the amended petition to cancel. Dates herein are otherwise reset as follows.

Expert Disclosures Due	**9/26/11**
Discovery Closes	**10/26/11**
Plaintiff's Pretrial Disclosures	**12/10/11**
Plaintiff's 30-day Trial Period Ends	**1/24/12**
Defendant's Pretrial Disclosures	**2/8/12**
Defendant's 30-day Trial Period Ends	**3/24/12**
Plaintiff's Rebuttal Disclosures	**4/8/12**
Plaintiff's 15-day Rebuttal Period Ends	**5/8/12**

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.

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the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

In this proceeding, petitioner should review the Trademark Board Manual of Procedure (TBMP), online at http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp, and the Trademark Rules of Practice, online at http://www.uspto.gov/trademarks/law/tmlaw.pdf. The Board expects all parties appearing before it, whether or not they are represented by counsel, to comply with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, online at http://www.law.cornell.edu/rules/frcp.

Trademark Rules 2.119(a) and (b) state that every paper filed in this proceeding must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all papers which petitioner may subsequently file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made, e.g., by mail. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service.

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.l29.

If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.