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

Proceeding	92054069
Party	Plaintiff Marc Hogue
Correspondence Address	JIMMIE PURSELL JENNINGS STROUSS & SALMON PLC ONE EAST WASHINGTON ST, SUITE 1900 PHOENIX, AZ 85004 UNITED STATES jpursell@jsslaw.com
Submission	Opposition/Response to Motion
Filer's Name	Jimmie Pursell
Filer's e-mail	trademarks@jsslaw.com
Signature	/Jimmie Pursell/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark Registration No. 3,099,847 (Application Serial No. 76/641,146)

MARC HOGUE, Petitioner, SKYDIVE ARIZONA, INC., Respondent.	Cancellation No. 92/054,069
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**PETITIONER’S RESPONSE TO RESPONDENT’S MOTION TO DISMISS
CANCELLATION PETITION**

Marc Hogue (“Petitioner”), through his attorneys, respectfully responds to Respondent’s Motion to Dismiss Cancellation Petition. Doc. 8. Because Respondent has raised the issue of *res judicata*, the parties have stipulated to treat the motion as one for summary judgment. Doc. 9.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Respondent seeks summary judgment arguing that the cancellation action is barred by claim preclusion or issue preclusion based upon summary judgment entered in a suit to which Petitioner was not a party and which ended more than a year before Respondent even obtained registration of the contested mark. Claim preclusion and issue preclusion cannot be asserted against an entity not a party to the prior litigation and that did not have its rights adequately represented. Further, the prior litigation at issue involved § 43(a) and (c) of the Lanham Act, as well as state law infringement claims. The registerability of the contested mark was not, and could not have been, an issue in the prior litigation. Finally, as numerous TTAB decisions have recognized, there is no *res judicata* effect between infringement actions (even actual § 32

infringement actions) and cancellation proceedings, as those types of actions involve fundamentally different issues.

Respondent also asserts that the Petition for Cancellation fails to state a claim. Under the pleadings standards at issue, Petitioner has plead sufficient facts to conclude that he has been or will be harmed by Respondent's registration. Respondent's motion should be denied.

II. Factual and Procedural Background

Petitioner provides skydiving instruction, training, and services within the State of Arizona. [Declaration of Marc Hogue ("Hogue Declaration"), attached hereto as **Exhibit "A"** at ¶ 2]. In other words, Petitioner operates a business that serve consumers who wish to skydive in Arizona. Respondent operates a similar business, but has obtained a registration for the descriptive mark SKYDIVE ARIZONA and is attempting to stifle competition by preventing others from using the words "skydive" and "Arizona" to describe their services (and geographic location of those services). [Hogue Declaration at ¶ 5].

On September 28, 2001, Respondent initiated a personal lawsuit against non-party Mike Mullins ("Mullins"), alleging, *inter alia*, infringement under the Lanham Act § 43(a) and dilution under the Lanham Act § 43(c) (the "2001 lawsuit"). Exhibit A to Respondent's Motion at 3. The 2001 lawsuit was based on Mullins' ARIZONA SKYDIVING mark. *Id.* The 2001 lawsuit did not involve a federal trademark infringement claim pursuant to § 32 of the Lanham Act, nor could it because Respondent did not have a federally-registered mark at that time. Thus, whether Respondent's mark was registerable was not and could not have been adjudicated in the 2001 lawsuit. Petitioner was not a party to the 2001 lawsuit.

Petitioner agreed to purchase Mullins's skydiving business during late 2002, while the 2001 lawsuit was pending. In 2003, while Respondent and Mullins were still litigating the 2001 lawsuit, Respondent and Petitioner entered into a settlement agreement (the "Settlement Agreement"), regarding the use of the "Arizona Skydiving" designation. The Settlement

Agreement¹ was intended to settle any potential claims that Respondent might have had against Petitioner in connection with the 2001 lawsuit. Exhibit D to Respondent's Motion at 1, ¶ 3. Pursuant to the Settlement Agreement, Respondent promised not to add Petitioner as a party to the 2001 lawsuit and not to sue Petitioner for an injunction or for damages for any claim of trademark infringement based upon the use of the "Arizona Skydiving" designation. Exhibit D to Respondent's Motion at 1-2, ¶ 5. However, the Settlement Agreement specifically provides that it did not resolve any of the claims that Respondent had against Mullins. Exhibit D to Respondent's Motion at 1, ¶ 3. After executing the Settlement Agreement (effective January 1, 2003), Respondent continued pursuing Mullins in the 2001 lawsuit. Petitioner had no involvement with the litigation, nor any reason to believe that his rights might be impacted by its resolution. [Hogue Declaration at ¶ 4].

On or about March 29, 2004, one year after the Settlement Agreement, the court issued its ruling in the 2001 lawsuit, granting, *inter alia*, Respondent's Motion for Summary Judgment on the trademark infringement claim. The Court stated that the ruling was "specifically limited by the unique factual and procedural background of the case" and that "the Plaintiff [Respondent] has made a minimal showing of owning a protectable mark and of infringement on that mark by the Defendant [Mark Mullins]." Exhibit A to Respondent's Motion at 30. The court entered judgment on February 8, 2005. *See* Exhibit B to Respondent's Motion.

Petitioner is not Mullins' successor-in-interest and is not bound by the court's "findings" because (1) the 2001 lawsuit was a personal lawsuit against Mullins that was adjudicated after Petitioner purchased the business from Mullins and after Petitioner entered into the Settlement Agreement with Respondent, (2) Mullins did not adequately represent Petitioner's interests, and (3) the court made no actual findings of fact, but rather relied on Mullins's lack of evidence.

¹ Petitioner disputes the authenticity of the Settlement Agreement attached as Exhibit D to Respondent's Motion because there is more than version of the Settlement Agreement. However, the provisions of the Settlement Agreement cited in Petitioner's Response and herein are not in dispute.

On or about June 17, 2005, one year after the 2001 lawsuit ended, Respondent filed an application for federal registration of the mark SKYDIVE ARIZONA (the "Application"). The Application was filed under §1(a) and 2(f) of the Trademark Act, 15 U.S.C. §1051(a) and 15 U.S.C. §1052(f), and was assigned serial number 76/641,146. On or about January 12, 2006, the United States Patent and Trademark Office issued a non-final office action denying registration to Respondent because the word "SKYDIVE" was "merely descriptive because it describes a feature of the applicant's educational services." By Examiner's Amendment dated January 20, 2006, the Application was amended to include the disclaimer "no claim is made to the exclusive right to use skydive apart from the mark as shown." The Application passed to publication and was subsequently registered on June 6, 2006.

On June 2, 2011, Petitioner filed a Petition for Cancellation of Respondent's registration of the SKYDIVE ARIZONA mark because Petitioner is harmed by the registration and because there are grounds for cancellation of the registration; Respondent's SKYDIVE ARIZONA mark merely describes Respondent's services and is geographically descriptive.

Respondent thereafter filed its Motion to Dismiss Cancellation Petition, alleging Petitioner failed to plead sufficient facts to state a claim upon which relief can be granted. Additionally, Respondent alleged the Petition for Cancellation was barred by claim preclusion. Respondent and Petitioner filed a stipulation to treat Respondent's Motion to Dismiss as a Motion for Summary Judgment.

As set forth more fully below, the Petition to Cancel is not barred by either claim preclusion or issue preclusion because Petitioner is not a successor-in-interest to Mullins and, even if he were, a prior infringement action does not bar a subsequent cancellation proceeding. Further, Petitioner has met the two requirements of a petition for cancellation. Petitioner has standing because he is harmed by the registration, and there are grounds for cancellation of the registration because Respondent's SKYDIVE ARIZONA mark merely describes Respondent's services and is geographically descriptive.

Respondent also argues that the Petition for Cancellation is barred because the claim brought by Petitioner is one that should have been brought during the 2001 lawsuit. However, Respondent's argument ignores the fact that Respondent filed its trademark application on June 17, 2005, one year *after* the 2001 lawsuit was adjudicated. A Petition for Cancellation is a petition to cancel a registration not a petition to cancel a trademark. Therefore, Petitioner could not have brought this claim during the 2001 litigation because there was no registration to cancel during the 2001 lawsuit. Finally, the Federal Circuit Court of Appeals and the Trademark Trial and Appeal Board have held that a trademark infringement claim is not the same as an *inter partes* cancellation or opposition claim. This principle applies to Petitioner's Petition for Cancellation because the 2001 lawsuit against Mullins did not address Petitioner's claim that he is harmed by the registration of Respondent's mark.

III. Legal Argument

A. Standard for Granting Summary Judgment.

Summary judgment is appropriate where there is no genuine issue of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party seeking the motion bears the initial burden of demonstrating the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The evidence on a motion for summary judgment must be viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in the non-movant's favor. *Lloyd's Food Products, Inc. v. Eli's, Inc.* 987 F.2d 766, 25 U.S.P.Q.2d 2027, 2029 (Fed. Cir. 1993).

B. The Petition for Cancellation is not Barred by Claim Preclusion or Issue Preclusion.

Respondent asserts that the Petition for Cancellation is barred by the 2001 lawsuit against non-party Mullins based on claim preclusion (i.e., *res judicata*). Respondent further asserts that the issue of whether Respondent's mark can be registered based on its secondary meaning was actually decided in the 2001 lawsuit against non-party Mullins and therefore issue preclusion

(i.e., collateral estoppel) applies. Neither doctrine applies in this case because Petitioner was not a party to the prior proceeding and the court did not decide the issue of the mark's registerability.

1. Claim Preclusion Does Not Bar A Claim Against One Not A Party To The Prior Suit Nor Does It Bar A Claim That Could Not Have Been Brought In That Suit.

In order for claim preclusion (i.e., *res judicata*) to apply, the following requirements must be satisfied: (1) there is identity of the parties (or their privies); (2) there has been an earlier final judgment on the merits of the claim; and (3) the second claim is based on the same set of transactional facts as the first claim. *Jet Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1362 55 U.S.P.Q.2d 1854, 1856 (Fed. Cir. 2000). *Mayer/Berkshire Corp. v. Berkshire Fashions Inc.*, 424 F.3d 1229, 1232, 76 U.S.P.Q.2d 1310, 1312-13 (Fed. Cir. 2005). The doctrine of claim preclusion also “forecloses litigation of a [claim] that [was not litigated], because of a determination that it should have been advanced in an earlier suit.” *Jet Inc. v. Sewage Aeration Systems*, U.S.P.Q.2d at 1856. Here, Respondent can satisfy none of the elements required to assert claim preclusion.

a. The 2001 lawsuit and the Petition for Cancellation involve different parties.

As a general rule, “one is not bound by a judgment *in personam* in a litigation in which he is not designated a party or to which he has not been made a party by service of process.” *Taylor v. Sturgell*, 553 U.S. 880, 893, 128 S. Ct. 2161, 2171 (2008) (citations omitted). The foundation of this rule lies in the “deep-rooted historic tradition that everyone should have his day in court.” *Richards v. Jefferson County*, 517 U.S. 793, 798, 116 S.Ct. 1761 (1996). Here, there can be no dispute that Respondent was not a party to the 2001 lawsuit.

As recognized by the Supreme Court in *Taylor*, however, there are six exceptions to the rule against nonparty claim preclusion: (1) person agrees to be bound by determination of issues in action between others; (2) there is pre-existing substantive legal relationship between person to be bound and party to judgment, e.g. preceding/succeeding property owners, bailee/bailor,

assignee/assignor; (3) nonparty was adequately represented by someone with same interests who was a party, as in a properly conducted class action or suit brought by trustee, guardian or other fiduciary; (4) nonparty assumed control over litigation; (5) nonparty serves as proxy for party; or (6) special statutory scheme expressly forecloses successive litigation by nonlitigants and is otherwise consistent with due process. *See Taylor*, 553 U.S. at 893-896, 128 S. Ct. at 2172-73. None of the six exceptions apply in this case. Respondent has not attempted to specify what, if any, of these exceptions apply. Instead, Respondent argues that Petitioner should be bound to the outcome of a suit to which he was not a party because he was “in privity” with Mullins.

Contrary to Respondent’s argument, however, “privity” is not a test to determine whether claim preclusion or issue preclusion should apply. Rather, “[i]t is merely a word used to say that the relationship between the one who is party on the record and another is close enough to include that other within the res judicata.” *Bruszewski v. U.S.*, 181 F.2d 419, 423, cert. denied, 340 U.S. 865, 71 S. Ct. 87 (1950). *See* 18A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, pp. 351-53, and n. 33 (collecting cases). Indeed, the United States Supreme Court recognized this fact in *Taylor*, stating, “To ward off confusion, we avoid using the term ‘privity’ in this decision.” *Taylor*, 553 U.S. at 894, 128 S. Ct. at 2172, n. 8. Here, the relationship between Petitioner and non-party Mullins is simply not “close enough.”

There is no “privity” here within the meaning of these authorities. Respondent filed the lawsuit against Mullins in 2001. While Respondent and Mullins litigated the 2001 lawsuit, Respondent and Petitioner entered into a Settlement Agreement. Pursuant to the Settlement Agreement, Respondent promised not to add Petitioner as a party to the pending lawsuit and promised not to sue Petitioner for an injunction or for damages for any claim of trademark infringement based upon the use of the “Arizona Skydiving” designation. The Settlement Agreement also specifically stated that it did not resolve any of the claims that Respondent had against Mullins personally for his prior alleged common-law trademark infringement.

The provisions of the Settlement Agreement prove that Petitioner was not a party to the 2001 lawsuit. Further, Petitioner is not a successor-in-interest to Mullins because the 2001 lawsuit was personal against Mullins and did not involve the property transferred, was completed after Petitioner had purchased the business, and was completed after Petitioner and Respondent had entered into the Settlement Agreement. The 2001 lawsuit against Mullins for his alleged common-law trademark infringement was personal to Mullins and did not involve or determine any interest in the business that was transferred. *See* 2 Restatement (Second) of Judgments § 43, p. 3 cmt. a (1982). To find that Petitioner is a successor-in-interest to Mullins would suggest some interest involving the business was determined (which it was not) or that Petitioner agreed to be bound by the unknown outcome of a lawsuit to which he was not a party, which Petitioner did not do. [Hogue Declaration at ¶ 4].

Further, the facts in this case are materially different from the facts in the case cited by Respondent. In *John W. Carson Foundation v. Toilets.com, Inc.* 94 U.S.P.Q.2d 1942 (T.T.A.B), the Board applied claim preclusion against a party whose sole shareholder and controlling party formed the new corporation solely for the purpose of avoiding an injunction against his prior corporation. The applicant claimed that his new company was not bound by the injunction against his prior company. The Board disagreed finding that “[b]y definition, Mr. Braxton, as an officer and sole owner of the prior defendant, was, at a minimum, in active concert and participation with the party bound by the permanent injunction and, therefore, is bound by the permanent injunction himself.” Thus, “Mr. Braxton cannot avoid the permanent injunction against him by merely forming another corporation of which he is the sole owner.” 94 U.S.P.Q.2d at 17-18.

Here, Petitioner and non-party Mullins are two sole proprietors who conducted an arms-length transaction prior to any decision in the personal litigation against non-party Mullins. Respondent has not alleged, and cannot allege, that Petitioner is acting in concert with non-party Mullins in an attempt to avoid the effect of the prior judgment. *Carson* is inapposite.

b. A Cancellation Proceeding Could Not Have Been Brought in the 2001 Lawsuit.

Respondent fails to meet the second two elements of claim preclusion because a cancellation proceeding could not have been brought as part of the 2001 lawsuit. It is axiomatic that one cannot bring a proceeding to cancel a claimed common-law mark. As stated above, Respondent did not have a registered mark at the time it brought the 2001 lawsuit against non-party Mullins. The 2001 litigation terminated with the entry of judgment in February 2005. Respondent did not even apply for the mark until July 17, 2005, and the mark was not registered until June 6, 2006. Respondent's right to a federal registration of its mark could not have been litigated as part of Respondent's § 43(a) and (c) claims. *See also, Treadwell's Drifters, Inc. v. Marshak*, 18 U.S.P.Q.2d 1318, 1321, 1990 WL 354600 (TTAB 1990) (denying claim preclusion and stating an infringement suit is based on a claim of damage from use, while a petition to cancel is based on a claim of damage from registration, and "[t]hus, the claims are fundamentally different."). Thus, there has been no judgment on the merits of the registrability of the contested mark and the cases necessarily involve different transactional facts.

Claim preclusion (i.e., *res judicata*) does not apply in this matter.

2. Issue Preclusion Does Not Bar The Petition For Cancellation Because The Issues Tried Were Not Identical And Because Petitioner Did Not Have a Full And Fair Opportunity To Litigate The Issue In The 2001 Lawsuit.

In order for issue preclusion to apply, the following requirements must be satisfied: (1) the issue in the first proceeding must be identical to issue in the second proceeding; (2) the issue in the first proceeding was actually litigated; (3) the determination of the issue in the first proceeding was necessary to the judgment in that proceeding; and (4) the party defending against preclusion had a full and fair opportunity to litigate the issue in the first proceeding. *Jet Inc. v. Sewage Aeration Systems*, at 1856. *Mayer/Berkshire Corp. v. Berkshire Fashions Inc.*, at 1312-13. Here, not only did Petitioner have no opportunity to litigate the issue (and Petitioner is not

bound by the prior decision in any event), but the issues involved in the two proceedings are not identical.

a. Petitioner never had a full and fair opportunity to litigate the harm caused by Respondent's registration.

From the outset, Respondent's issue preclusion argument fails for the same reason that claim preclusion fails: Petitioner was not a party to the 2001 lawsuit and did not have an opportunity to litigate any issues therein. As explained in detail above, Petitioner and Respondent entered in to the Settlement Agreement so that Respondent would not add Petitioner to the 2001 lawsuit. Further, Respondent continued to litigate the personal claim against non-party Mullins even after the Settlement Agreement was executed. Petitioner had no reason to believe that Respondent's success or failure on its § 43(a) and (c) claims against non-party Mullins would have any effect on him whatsoever. Petitioner was not in "privity" with Mullins as that term is used in relevant authorities. Therefore, Petitioner never had a full and fair opportunity to litigate the harm caused by Respondent's registration.

b. The Issues Involved in the 2001 Lawsuit Were not Fully Litigated on the Merits and the Issues were not Identical to those Presented in the Petition for Cancellation.

Respondent asserts that the court in the 2001 lawsuit decided that its mark had secondary meaning "as a matter of law." While those words appear in the ruling, Respondent ignores the context and basis for that conclusion. In its ruling, the court, after recognizing that whether a mark has acquired secondary meaning is ordinarily a question of fact, stated that "the Defendant [Mullins] has not put those facts in dispute. Rather, the Defendant has relied on evidentiary objections and vague notions that Plaintiff's evidence is not enough." Exhibit A to Respondent's Motion at 20. Indeed, Mullins did not dispute the essential facts and failed to come forward with any contrary evidence. Given what the trial court referred to as a "unique situation," it can hardly be said that Mullins actually litigated this issue, and it would be patently unfair to bind Petitioner to an issue decided based upon non-party Mullen's failures.

Further, whether such secondary meaning was established in a prior infringement action is irrelevant in a cancellation proceeding. First, the Federal Circuit Court of Appeals and the Trademark Trial and Appeal Board have held that a trademark infringement claim is not the same as an *inter partes* cancellation or opposition claim. In *Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 55 U.S.P.Q.2d 1854 (Fed. Cir. 2000), the court found that “the overall transactional facts are simply too distinct to allow claim preclusion from an infringement claim action to bear on a subsequent cancellation claim.”

In *American Hygienic Lab v. Tiffany & Co.*, 228 U.S.P.Q. 855, 857, 1986 WL 84984 (TTAB 1986), the Trademark Trial and Appeal Board held that the opposer was not precluded from proceeding because of either the compulsory counterclaim rule or claim preclusion arising from previous civil case dismissed on stipulation. The Board stated that “a claim of infringement before the court and a claim of priority and likelihood of confusion before this Board are different claims. The former claim is, in essence, a claim of injury resulting from applicant’s use of its mark in commerce; the latter claim, in essence, is a claim where opposer believes it would be damaged by registration of applicant’s mark.” *See also, Treadwell’s*, 18 U.S.P.Q.2d at 1321, 1990 WL 354600 (denying claim preclusion and stating an infringement suit is based on a claim of damage from use, while a petition to cancel is based on a claim of damage from registration, and “[t]hus, the claims are fundamentally different.”).

This principle is applicable to Petitioner’s Petition for Cancellation because claims in the 2001 lawsuit against Mullins were fundamental different than Petitioner’s claim that he is harmed by the registration of Respondent’s mark. Further, as noted above, non-party Mullins did not fully litigate these claims, and Petitioner Hogue did not have a full and fair opportunity to litigate the issues in the previous court case.

C. Respondent's Motion Should be Dismissed Because Petitioner Stated a Valid Claim Upon Which Relief Can be Granted.

In an *inter partes* proceeding, a motion to dismiss under Fed. R. Civ. P. 12(b)(6) should not be granted unless there is certainty beyond any doubt that Petitioner will not prevail. *Stanspec Co. v. American Chain & Cable Co.*, 531 F.2d 563, 566 189 U.S.P.Q. 420 (CCPA 1976) (“[T]he petition for cancellation should not be dismissed for insufficiency unless it appears to a certainty that [petitioner] is entitled to no relief under any state of facts which could be proved in support of the claim.”). To survive Respondent’s 12(b)(6) motion, Petitioner need only allege facts that would, if proven, show that Petitioner has standing and that a statutory ground exists for cancellation of Respondent’s trademark.

Petitioner has standing because he is harmed by Respondent’s registration of the mark, SKYDIVE ARIZONA. Respondent’s registration prevents Petitioner from describing his services, providing skydiving instruction in Arizona, without the risk of facing an infringement claim. [Hogue Declaration at ¶ 5].

Further, Petitioner has set forth a statutory ground for cancellation of Respondent’s registration. A petition for cancellation of a mark that has been on the principal register for less than five years may be based on any of the bars to registration set forth in Section 2 of the Lanham Act. Petitioner filed the Petition for Cancellation within the five-year time period. The Petition for Cancellation is based on two bars to registration: Respondent’s SKYDIVE ARIZONA mark merely describes Respondent’s services and is geographically descriptive.²

D. Conclusion

The Petition for Cancellation is not barred by claim preclusion or issue preclusion. First, Petitioner was not a party to the 2001 lawsuit as evidenced by the provisions of the Settlement Agreement. Second, Petitioner is not Mullins’ successor-in-interest because the 2001 lawsuit involved Mullins personally and did not make determinations as to the business purchased by

² If the Board has concerns regarding whether additional facts are need to state a claim for cancellation, Petitioner requests leave to amend to correct any perceived deficiency.

Petitioner, was adjudicated *after* Petitioner purchased the business from Mullins and *after* Petitioner entered into the Settlement Agreement with Respondent. Third, Petitioner could not have brought the claim that he is harmed by the registration of Respondent's mark during the 2001 lawsuit because Respondent had not applied to register the mark until after the conclusion of the 2001 lawsuit, thus there was no registration to cancel. Finally, Petitioner's claim of being harmed by the registration of Respondent's mark is fundamentally different than the claims litigated in the 2001 lawsuit between Respondent and Mullins.

Petitioner has stated a claim upon which relief can be granted. Petitioner has met the two requirements of a petition for cancellation: (1) that Petitioner has standing because he is harmed by the registration and (2) that there are grounds for cancellation because Respondent's mark merely describes Respondent's services and is geographically descriptive.

WHEREFORE, Petitioner respectfully requests an order dismissing Respondent's Motion to Dismiss.

August 16, 2011

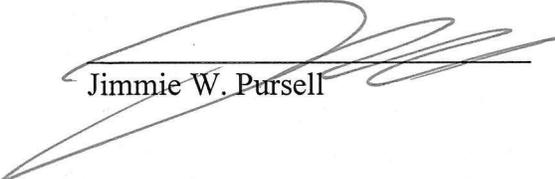
Respectfully submitted,

By: 

Jimmie Pursell
Jennings Strouss & Salmon PLC
One East Washington St.
Suite 1900
Phoenix, AZ 85004
(602) 262-5812
Fax (602) 495-2643
trademarks@jsslaw.com

Certificate of Service

The undersigned certifies that a copy of this Petitioner's Response to Respondent's Motion to Dismiss Cancellation Petition was sent by certified first class mail to: Sid Leach, Esq., SNELL & WILMER, One Arizona Center, 400 E. Van Buren Street, Suite 1900, Phoenix, AZ 85004.



Jimmie W. Pursell

Exhibit A

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

In the matter of trademark Registration No. 3,099,847 (Application Serial No. 76/641,146)

<p>MARC HOGUE, Petitioner, SKYDIVE ARIZONA, INC., Respondent.</p>	<p>Cancellation No. 92/054,069</p>
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DECLARATION OF MARC HOGUE

Marc Hogue hereby declares the following to be true under penalty of perjury:

1. I am the Petitioner in the above-captioned and numbered proceeding.
2. I provide skydiving educational services, including instructions and training in parachuting and skydiving, within the State of Arizona.
3. I provide skydiving educational services through business entities in which I am a member or shareholder, including Skydive Force, Inc., Skydive Coolidge, Inc., and Skydive Phoenix, Inc.
4. I was not involved in the litigation between Respondent and Mike Mullins. I entered into a Settlement Agreement with Respondent to avoid becoming involved in that litigation. Therefore, I did not believe that any of my rights would be impacted by the outcome of that litigation, and I did not agree to be bound by the outcome of that litigation.

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5. Subsequent to entering into the Settlement Agreement, Respondent has begun attempting to stifle competition and impede my business by claiming that I cannot use the words "skydive" and "Arizona" to describe my services.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 16, 2011.



MARC HOGUE