

ESTTA Tracking number: **ESTTA478471**

Filing date: **06/17/2012**

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

Proceeding	92055585
Party	Defendant Drew Massey dba myUndies Inc.
Correspondence Address	DREW MASSEY DBA MYUNDIES INC 3387 XANTHIA STREET DENVER, CO 80238 UNITED STATES massey@masseyventures.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Drew Massey
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Signature	/Drew Massey/
Date	06/17/2012
Attachments	myUNDIES Trademark Request for Cancellation Dismissal Response to P.pdf ( 8 pages )(357042 bytes )

REGISTRANT DID NOT RECEIVE SERVICE OF PLAINTIFF'S RESPONSE TO REGISTRANT'S REQUEST FOR DISMISSAL. REGISTRANT JUST CHECKED TTABVUE WEBSITE AND SAW PLAINTIFF'S FILED RESPONSE. PLAINTIFF HAS SERVICE EMAIL FOR REGISTRANT AND ACKNOWLEDGED RECEIPT OF REGISTRANT'S PRIOR DISMISSAL FILING. HOWEVER, PLAINTIFF HAS SINCE FAILED TO PROVIDE SERVICE FOR PLAINTIFF'S CURRENT FILING. THEREFORE AS THE FILING DEADLINE IS OVER A WEEKEND THE REGISTRANT IS FILING THIS QUICKLY AND REQUESTS AGAIN THAT AN IMMEDIATE DISMISSAL OF THE PETITIONER'S CANCELLATION PROCEEDINGS POST HASTE.

PETITIONER HAS MADE ADDITIONAL FALSE STATEMENTS AND IS NOT ACCURATE THAT REGISTRANT DOES NOT HAVE GOODS IN COMMERCE. AND PETITIONER'S CANCELLATION REQUEST IS WITHOUT LEGAL MERIT AND BASED ON FRAUD.

PETITIONER HAS ATTEMPTED TO STEAL A LEGAL TRADEMARK BY CHANGING ONE LETTER OF THE REGISTERED MARK AND HAS FAILED TO GET APPROVAL FOR THE INFRINGING COPYCAT TRADEMARK.

PETITIONER IS CAUSING HARM TO LEGALLY OWNED REGISTRANT BY THE CONTINUED USE OF SIMILAR MARK AND IS NOW CAUSING FURTHER HARM TO REGISTRANT BY MAKING FALSE ALLEGATIONS, FABRICATED TESTIMONY AND CAUSING DURESS ON REGISTRANT BY FILING A FRAUDULENT CANCELLATION PETITION.

THE USPTO BOARD SHOULD NOT ALLOW THE CONTINUED UNETHICAL LEGAL ACTIVITY BY THE PETITIONER'S COUNSEL AND SHOULD REJECT AND DISMISS THE CANCELLATION AGREEMENT IMMEDIATELY AND NOT SUBJECT THE REGISTRANT TO 15-18 MONTHS OF EXTRAORDINARY LEGAL PROCEEDINGS AND COSTS. PLEASE SEE BELOW.

## SPECIFIC DENIALS TO THE PETITIONER'S ADDITIONAL CLAIMS:

Petitioner's new claims for Denial of Registrant's Dismissal of Cancellation Request:

1. Petitioner claims that only one sample has been produced.
2. Petitioner claims that goods are not used in commerce.
3. Petitioner claims that Store/App/Marketing example is not real.
4. Petitioner claims non-ownership of myndies.com URL.
5. Petitioner claims that "hang-tag" sample provided has a non-owned URL and is "bogus evidence".
6. Petitioner's Counsel claims under signed decree that he completed extensive diligence prior to using infringing name.

## REGISTRANT RESPONSE

1. DENY. Registrant has thousands of produced product with trademark. If needed, additional pictures can be provided. However, the best proof is to merely purchase the merchandise (see #2 below). [Additionally, experienced apparel manufacturers can ascertain and confirm that the evidence photo provided demonstrates mass production as different elements of the manufactured product with the Registered brand name would not be produced for one item.]
2. DENY. Similar to public company Zynga (\$4-5 billion market capitalization) that sells a majority of each of its products via [www.facebook.com](http://www.facebook.com), Registrant leverages the world's biggest website [www.facebook.com](http://www.facebook.com) to sell its goods. The commerce site can be found at [www.facebook.com/MYUNDIES](http://www.facebook.com/MYUNDIES). Registrant's products are also listed in the largest "shopping mall" on Facebook by payment who powers thousands of brands and merchants.
3. DENY. As explained, Registrant does have additional commercial/mobile Apps in development to supplement the store on Facebook. Without divulging confidential information, the previously

attached and referenced image is a direct preview. And, while irrelevant, the picture is from an actual beta website (contrary to Petitioner's unfounded contrary assertion) and the image on the front is merely a styled branding image (ie., not unlike one shown by Abercrombie & Fitch that shows an Ivy College on a splash page without any product). Those "splash page" brand images will constantly change and (like many ad and brand campaigns) may or may not include any of the thousands of produced and available for purchase product currently available from the Registrant.

4. IRRELEVANT. Although Registrant is using other means of commerce as outlined above, Registrant owns many URLs with MYUNDIES trademark including MYUNDIES.ORG, MYUNDIES.INFO, GETMYUNDIES.COM, FREEMYUNDIES.COM, SHOPMYUNDIES.COM, etc. And while strategic reasons are confidential, Registrant's marketing efforts include plans for leveraging several URLs (not unlike companies like bit.ly and de.licio.us). For example, Registrant's core consumer is aligned with social and charitable causes so the .org domain is important to the Registrant (ie., like craigslist.org). The company has no legal requirement, nor intention to own every available domain extension. **To that point, the Petitioner does not own every URL iteration of the infringing mark MEUNDIES. Currently, MEUNDIES.ORG and MEUNDIES.INFO as well as at least 50 more extensions are available for purchase.** Similarly, hundreds of top brands do not own all of the different iterations of URLs available for their brands. To that point, the ability to register a brand's own top level domain just became available for registration via ICANN and this process was ignored by most major brands including companies like NBC and Facebook. More importantly, leveraging the social nature of the Internet, the Registrant has other social site URLs like [www.twitter.com/MYUNDIES](http://www.twitter.com/MYUNDIES). Again, owning every direct URL is irrelevant especially considering the social platforms across the Internet and the well known trend among brands to leverage those platforms for commerce. And some would argue that owning a brand (ie., /MYUNDIES) on [www.facebook.com](http://www.facebook.com) and on [www.twitter.com](http://www.twitter.com) is probably the most important URL ownership on the Internet.

Furthermore, contrary to Petitioner's false claims, Marchex who owns the .com extension of MYUNDIES does not have a competing underwear company. Marchex is the world's largest and most well known "cyber-squatter" who sits on millions of website names related to different brands attempting to extort brands to purchase URLs from them (or litigate via ICANN to secure the URLs).

5. DENY. Petitioner is blatantly fabricating false statements. Petitioner claims that a photo including a sample "hang-tag" filed with the USPTO by Registrant shows a URL owned by a third party. Petitioner is blatantly lying as a full URL is not shown in the photo. The Petitioner is making a false assumption that the URL is maniaTV.com and is making a false claim that Registrant is providing "bogus" evidence without knowledge of actual printed hang-tag. The actual URL printed on the hang-tag is FREEmyUndies.com which is another URL owned by the Registrant (see Exhibit below). Though, again, owned URLs are irrelevant. And, as outlined in the previous request for dismissal, this is another acute example of Petitioner's counsel grasping at straws. In this case, blatantly fabricating false and misleading statements.

6. DENY. Besides Petitioner's legal counsel fabricating false allegations, Petitioner's legal counsel claims under signed decree that he did a thorough investigation prior to Petitioner's use of infringing trademark. Again, the Petitioner's counsel is providing false testimony and should be held liable and accountable. He clearly failed to do the basic necessary research prior to his client using the infringing mark and they are now attempting to recreate a paper trail to attempt to prove diligence. Had counsel merely typed in the word "undies" in the USPTO.gov TESS search engine, he would have found fewer than 100 trademarks and would have found the live MYUNDIES mark. At that time counsel would have seen that the Registrant's mark was a LIVE trademark and should have advised his client to find another mark. Any qualified intellectual property attorney would do that basic trademark search and make that determination and advise client accordingly versus attempting to

duplicate a live trademark. **Either the Petitioner's counsel failed to do the most basic necessary diligence required of an intellectual property attorney (ie., type in a few variations of a client's desired trademark name into the search engine and review the results) and falsely claimed otherwise under signed testimony, or Petitioner's counsel unwisely and illegally advised client to purposely infringe on a LIVE registered trademark with just a single letter difference for an identical service.** Either way, the USPTO correctly denied the Petitioner's trademark application. And now Petitioner's counsel is attempting to "save face" (and generate unneeded billable hours) by attempting to cancel Registrant's legal mark. Again, unduly burdening a legally owned and LIVE trademark Registrant.

Furthermore, upon correctly being denied registration of infringing mark by the USPTO, Petitioner's counsel had one of its employees (Noah Taubman) call the Registrant and fraudulently pretend to be a college student in order to attempt to gather more information. Petitioner's failure to acknowledge this information in his signed testimony is further proof of bad faith and fraud by Petitioner and Petitioner's counsel. Besides the fact that having the Petitioner's employee contact Registrant under false pretenses is possible grounds for counsel's disbarment (breach of ethics), it proves that Registrant could be contacted and that Petitioner's counsel could and should have easily done the same had he done a basic trademark search prior to attempting to register an infringing trademark. **The fact that counsel never contacted Registrant except under false pretenses AFTER Petitioner's trademark application was denied, proves lack of diligence.**

Again, the Petitioner failed to register an identical mark via USPTO as Registrant's LIVE legal trademark. The Petitioner is therefore attempting any and all other methods to steal Registrants mark—from having employees fraudulently contact Registrant, to having counsel burden Registrant with attempt to cancel a LIVE trademark, to unduly causing harm to owner of LIVE trademark with

fabricated and false allegations—rather than focus on the basic fact that Petitioner is infringing on a LIVE trademark and that Petitioner has had its trademark application correctly denied by the USPTO. We therefore request that this fraudulent Cancellation petition be immediately DISMISSED.

**In summary, the basic fact is that the Registrant owns a LIVE trademark for goods that are produced and sold. The mark was approved on September 29, 2012. Less than 3 years ago. And the Registrant is investing and building its business legally in good faith with an original name and brand that is now being infringed upon by the well-financed Petitioner.** The Petitioner can continue to respond with more fabrications and nitpick details—such as what specific trademarked goods are currently being manufactured and sold by Registrant, while at the same time the Petitioner’s denied trademark application includes selling “undergarments”, “clothing”, “apparel”, and “lifestyle accessories” yet the Petitioner does not produce or sell any products besides just 3 types of underwear bottoms for men and women (and not even not bras/tops for women)—but cancellation of a LIVE mark carries serious legal, financial and business implications and should only be considered in the case of fraud which is clearly not the case with Registrant.

The USPTO denied the Petitioner’s attempted infringing trademark application based on unmistakable likelihood of confusion (again, just ONE letter difference in the name while selling identical goods). Please do not now allow the Petitioner to abuse the trademark process by fraudulently attempting to cancel Registrant’s legal trademark. Please do not allow the Petitioner to unduly burden Registrant with 15-18 months of legal expenses. **As the USPTO attorney who denied the Petitioner’s attempted infringing trademark succinctly said best:**

“It appears that you are being bullied by a party whose TM rights are junior to yours.

I sincerely hope you prevail.”

BASED ON THESE FACTS, AND THE FACTS PREVIOUSLY SUBMITTED, THE REGISTRANT AGAIN REQUESTS IMMEDIATE DISMISSAL OF THE PETITIONER'S CANCELLATION PROCEEDINGS POST HASTE. PLEASE DO NOT LET BASELESS CLAIMS WASTE THE RESOURCES OF THE USPTO AND LAW ABIDING LEGAL TRADEMARK OWNERS.

THANK YOU IN ADVANCE FOR YOUR CONSIDERATION AND ACTION TO IMMEDIATELY DISMISS THE CANCELLATION REQUEST.

EXHIBIT

myUNDIES Hang-tag showing URL owned by Registrant



## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this paper has been served upon petitioners legal counsel via USPS at address below provided on this date.

Victor Sapphire, Esq.  
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Signature: /Drew Massey/

Name: Drew Massey

Date: 06/17/12