

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

Baxley

Mailed: December 10, 2012

Cancellation No. 92055643

Monster Cable Products, Inc

v.

NeoVictory Technology Co.,
Ltd.

Andrew P. Baxley, Interlocutory Attorney:

Pursuant to Fed. R. Civ. P. 26(f) and Trademark Rules 2.120(a)(1) and (2), the parties to this proceeding conducted a discovery conference on December 6, 2012.¹ Participating in the conference were petitioner's attorney Julie Hofer, respondent's attorney Lin-Yun Cheng, and Board interlocutory attorney Andrew P. Baxley.

In this proceeding, the parties should review the Trademark Rules of Practice and the Trademark Board Manual of Procedure ("TBMP"), both of which are online at <http://www.uspto.gov/trademarks/process/appeal/index.jsp>. The Board expects all parties appearing before it, whether or not they are represented by an attorney, to comply with the Trademark Rules of Practice and where applicable, the

¹ Petitioner requested Board participation by telephone on July 23, 2012.

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Federal Rules of Civil Procedure, online at <http://www.law.cornell.edu/rules/frcp/>.

The parties stated that there are no current settlement talks between them. The parties further indicated that they are involved in no other Board proceedings or litigation. The parties stipulated to (1) service by e-mail,² and (2) the authenticity of documents produced during discovery.

The Board's standard protective order, online at <http://www.uspto.gov/trademarks/process/appeal/guidelines/standardagmt.jsp>, is operative in this case. See Trademark Rule 2.116(g). If the parties wish to add or modify any provisions to the standard protective order, they may negotiate an amended protective agreement, subject to Board approval. The Board further reminded the parties that neither the exchange of discovery requests nor the filing of a motion for summary judgment (except on the basis of *res judicata* or lack of Board jurisdiction) could occur until the parties made their initial disclosures as required by Fed. R. Civ. P. 26(f).

The Board will consider at final hearing a printout of an excerpt from an Internet website that is submitted under notice of reliance in the same manner as a printed publication in general circulation in accordance with

² As a backup, the parties should also make follow-up service by mail.

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Trademark Rule 2.122(e), where that printout identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL). See *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010).

The Board then reviewed the pleadings in this case. In the amended petition to cancel, petitioner has adequately pleaded its standing. See, e.g., *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). That is, the statements in paragraphs 1 and 2 of the amended petition to cancel allege facts which would show a personal interest in the outcome of the proceeding and a reasonable basis for a belief of damages. See *Universal Oil Prod. Co. v. Rexall Drug & Chem. Co.*, 463 F.2d 1122, 1123, 174 USPQ 458, 459 (CCPA 1972); TBMP Section 309.03(b). In addition, petitioner sets forth a claim of nonuse in the ordinary course of trade at the time respondent filed its statement of use in the application for its involved registration in paragraphs 14-16.

However, petitioner's abandonment claim as set forth in the amended petition to cancel remains insufficiently pleaded. In particular, petitioner alleges nonuse for more than three years in connection with the goods listed in the involved registration. However, as noted in the Board's July 25, 2012 order, wherein the Board determined that the abandonment claim set forth in the original petition to

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cancel was insufficient, respondent filed the statement of use in the application for the involved registration on November 4, 2009, less than three years prior to the filing of the petition to cancel. See *Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.*, 9 USPQ2d 1061 (TTAB 1988) (opposer failed to make out a prima facie case of abandonment based on nonuse of mark for statutory period prior to the filing of the opposition). Cf. *Volkswagenwerk AG v. Advance Welding and Mfg. Corp.*, 193 USPQ 673 (TTAB 1976) (abandonment based on nonuse for statutory period prior to filing of petition to cancel). Because the application for the involved registration was an intent-to-use application until respondent filed the statement of use, petitioner cannot properly assert abandonment based on a three-year period of nonuse that began prior to the filing of that statement of use.³ See *Consolidated Cigar Corp. v. Rodriguez*, 65 USPQ2d 1153 (TTAB 2002). Accordingly, the abandonment claim set forth in the amended petition to cancel is insufficient. The Board *sua sponte* strikes paragraphs 10-13 from the amended petition to cancel. See Fed. R. Civ. P. 12(f); TBMP Section 506.01. Respondent, in

³ Petitioner may, however, allege abandonment based on cessation of use with intent not to resume use, provided that it has a good faith basis for so alleging. See *Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861 (TTAB 2007).

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his answer, denied the salient allegations of the amended petition to cancel.

In view of the relatively few issues in this case, resolution by accelerated case resolution (ACR) may be appropriate. The parties are directed to review the Board's website regarding ACR at http://www.uspto.gov/web/offices/com/sol/notices/acrognotice_rule.pdf. If the parties later agree to pursue ACR after some disclosures and discovery, they should notify the above-signed interlocutory attorney by not later than two months from the opening of the discovery period.

In view of the claim herein, the parties are urged to focus their discovery on applicant's use in commerce of the involved mark on the identified goods between the time period contemporaneous with the filing of the statement of use and the present. Annual sales and advertising figures for applicant's involved are discoverable under protective order. See TBMP Section 414(18). Customer names, however, are generally not discoverable and may be redacted. See TBMP Section 414(3).

If the parties appear to be uncooperative in discovery, the Board may require a telephone conference prior to the filing of motions to compel discovery. See TBMP Section 408.01.

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If either party files an unconsented motion to extend or suspend in this case, the moving party must contact the Board interlocutory attorney assigned to the case by telephone upon filing so that such motion can be resolved promptly by telephone conference.

The schedule adopted by way of the Board's November 16, 2012 order is incomplete. The full operative schedule herein is as follows.

Discovery Opens	12/16/2012
Initial Disclosures Due	1/15/2013
Expert Disclosures Due	5/15/2013
Discovery Closes	6/14/2013
Plaintiff's Pretrial Disclosures Due	7/29/2013
Plaintiff's 30-day Trial Period Ends	9/12/2013
Defendant's Pretrial Disclosures Due	9/27/2013
Defendant's 30-day Trial Period Ends	11/11/2013
Plaintiff's Rebuttal Disclosures Due	11/26/2013
Plaintiff's 15-day Rebuttal Period Ends	12/26/2013

The Board thanks the parties for their participation.