

ESTTA Tracking number: **ESTTA490219**

Filing date: **08/21/2012**

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

Proceeding	92055838
Party	Defendant The Worlds Pageants, LLC
Correspondence Address	THE WORLDS PAGEANTS LLC 1473 HEATHER WAY KISSIMMEE, FL 34744 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Signature	/Thomas T. Aquilla/
Date	08/21/2012
Attachments	TWP-106111L_12b6_Mot_FINAL.pdf ( 9 pages )(173592 bytes )

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

WILLIAM EADIE, Petitioner,	)	
	)	Cancellation No. 92,055,838
	)	
	)	For: "MISS NUDE
	)	INTERNATIONAL"
	)	
v.	)	Registration No. 2,037,202
	)	Registered on February 11, 1997
	)	
	)	and;
THE WORLDS PAGEANTS, LLC, Registrant.	)	
	)	for: "MISS NUDE WORLD"
	)	
	)	Registration No. 3,039,826
	)	Registered on January 10, 2006

COMMISSIONER OF TRADEMARKS  
2900 Crystal Drive  
Arlington, VA 22202-3513

**REGISTRANT'S MOTION TO DISMISS**

Pursuant to the provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure and Section 503 of the Trademark Trial and Appeal Board Manual of Procedure, Registrant The Worlds Pageants, LLC ("TWP" or "Registrant"), by and through its attorney, Thomas T. Aquilla, hereby respectfully moves the Trademark Trial and Appeal Board to dismiss Petitioner William Eadie's ("Eadie" or "Petitioner") Petition for Cancellation for failure to state a claim upon which relief can be granted. This motion is based on the fact that Registrant's Reg. Nos. 2,037,202 and 3,039,826 are registered and incontestable, the fact that Petitioner fails to recite one of the grounds specified in Trademark Act § 14(3) or 14(5), 15 U.S.C. § 1064(3) or 15 U.S.C. §

1064(5) on which relief may be granted, and the fact that Petitioner's allegations in support of damage lack a reasonable basis in fact.

## 1. FACTS

In support of this Motion, Registrant, The Worlds Pageants, LLC shows as follows:

1. Registrant, The Worlds Pageants, LLC, is the assignee of record for U.S. Registration No. 2,037,202 issued February 11, 1997 for the mark "MISS NUDE INTERNATIONAL" and U.S. Registration No. 3,039,826 issued January 10, 2006 for the mark "MISS NUDE WORLD" for entertainment services in the nature of promoting and conducting beauty pageants in International Class 041. The registrations are valid, incontestable and enforceable.

2. In the written complaint, Petitioner fails to recite one of the grounds specified in Trademark Act § 14(3) or 14(5), 15 U.S.C. § 1064(3) or 15 U.S.C. § 1064(5) on which relief may be granted.

3. Petitioner fails to establish its requisite burden of ownership necessary for standing under 37 C.F.R. § 3.73(b) and Rule 12(b)(6).

## 2. THE LAW

Motions to dismiss for failure to state a claim upon which relief can be granted in Board proceedings are governed by Rule 12(b)(6) of the Federal Rules of Civil Procedure and TBMP Section 503. A motion to dismiss for failure to state a claim is a test solely of the legal sufficiency of a complaint. *See, for example, Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 U.S.P.Q.2d 1038, 1041 (Fed. Cir. 1993) (**Rule 12(b)6 challenges the legal theory of the complaint not the sufficiency of the evidence that might be adduced.**) (emphasis added). The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare

litigants the burdens of unnecessary pretrial and trial activity. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

TBMP § 503.02 states: "To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." In order to withstand such a motion, a complaint need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that: (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought (in the case of an opposition), or for canceling the subject registration (in the case of a cancellation proceeding). *See, for example, Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998). In deciding such a motion, the standard used by the TTAB is to accept all of the plaintiff's well-pleaded allegations as true, and the complaint must be construed in the light most favorable to the plaintiff. *See Young v. AGB Corp., supra.*

#### **TBMP § 309.03(a)(2) Elements of Complaint – In General**

*"[A] petition to cancel must include (1) a short and plain statement of the reason(s) why petitioner believes it is or will be damaged by the registration sought to be cancelled (i.e., petitioner's standing to maintain the proceeding -- see TBMP § 303.03 and TBMP § 309.03(b)) and (2) a short and plain statement of the ground(s) for cancellation."*

#### **TBMP § 303.03 Meaning of the Term "Damage"**

*"The term "damage," as used in Trademark Act § 13 and Trademark Act § 14, 15 U.S.C. § 1063 and 15 U.S.C. § 1064, concerns specifically a party's standing to file an opposition or a petition to cancel, respectively. A party may establish its standing to oppose or to petition to cancel by showing that it has a "real interest"*

*in the case, that is, a legitimate personal interest in the outcome of the proceeding and a reasonable basis for its belief in damage."*

**TBMP § 307.02 Petition That Must Be Filed Within Five Years from the Date of Registration**

307.02(a) In General:

*"[A] petition to cancel filed after the expiration of the five-year period, in the case of such a Principal Register registration, must recite one of the grounds specified in Trademark Act § 14(3) or 14(5), 15 U.S.C. § 1064(3) or 15 U.S.C. § 1064(5)."*

37 C.F.R. §3.73(b) further states:

*(1) In order to request or take action in a patent or trademark matter, the assignee must establish its ownership of the patent or trademark property of paragraph (a) of this section to the satisfaction of the Director. The establishment of ownership by the assignee may be combined with the paper that requests or takes the action. Ownership is established by submitting to the Office a signed statement identifying the assignee, accompanied by either:*

*(i) Documentary evidence of a chain of title from the original owner to the assignee (e.g., copy of an executed assignment). For trademark matters only, the documents submitted to establish ownership may be required to be recorded pursuant to §3.11 in the assignment records of the Office as a condition to permitting the assignee to take action in a matter pending before the Office. For patent matters only, the submission of the documentary evidence must be accompanied by a statement affirming that the documentary evidence of the chain of title from the original owner to the assignee was or concurrently is being submitted for recordation pursuant to §3.11; or*

*(ii) A statement specifying where documentary evidence of a chain of title from*

*the original owner to the assignee is recorded in the assignment records of the Office (e.g., reel and frame number).*

*(2) The submission establishing ownership must show that the person signing the submission is a person authorized to act on behalf of the assignee by:*

*(i) Including a statement that the person signing the submission is authorized to act on behalf of the assignee; or*

*(ii) Being signed by a person having apparent authority to sign on behalf of the assignee, e.g., an officer of the assignee.*

**TBMP § 503.01(c) Recording is Not a Determination of Validity:**

*The Assignment Services Branch does not examine the substance of documents submitted for recording. The act of recording a document is a ministerial act, and not a determination of the document's validity or of its effect on title to an application or registration. The USPTO will determine the effect of a document only when an assignee attempts to take an action in connection with an application or registration (e.g., when an assignee files a statement of use under 15 U.S.C. §1051(d)(1) or a §8 affidavit). 37 C.F.R. §3.54.*

**3. ARGUMENT**

Registrant hereby respectfully moves the Board to dismiss the Petition to Cancel pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and TBMP Section 503 on grounds that Petitioner has failed to state a claim upon which relief can be granted. TBMP § 503.02 states that "To survive a motion to dismiss, a complaint must state a claim to relief that is plausible on its face." In deciding such a motion, the standard used by the TTAB is to accept all of the plaintiff's well-pleaded allegations as true, and the complaint must be construed in the light most favorable to the plaintiff. *See Young v. AGB Corp., supra.*

Petitioner's Petition to Cancel cannot survive Registrant's Motion to Dismiss, because the Petition to Cancel clearly does not "state a claim that is plausible on its face," as required by TBMP § 503. More particularly, Petitioner's complaint does not recite any legal grounds for cancellation of Registrant's marks. Although Petitioner has alleged fraud vaguely by mere reference, the complaint does not recite with particularity any facts that if true would constitute fraud, and no other grounds for cancellation are cited by Petitioner. Moreover, even if the facts alleged by Petitioner were true, Petitioner would not be entitled to the requested relief. Petitioner furthermore has not established any standing in the case, and the TTAB does not have jurisdiction to effect Petitioner's requested change in title of the subject Registrations. Therefore, it is respectfully submitted that Petitioner has failed to state a claim upon which relief can be granted and the Board should dismiss the Petition to Cancel.

**(3.1)**  
**Petitioner Fails to Recite a Ground on Which Relief may be Granted.**

Because of the incontestable status of Registrant's marks, Petitioner must recite one of the grounds specified in Trademark Act § 14(3) or 14(5), 15 U.S.C. § 1064(3) or 15 U.S.C. § 1064(5) on which relief may be granted. Neither of these grounds, as required by TBMP § 309.03(a)(2), is mentioned in the Petitioner's complaint. Although Petitioner has alleged fraud vaguely by mere reference on the Grounds for Cancellation line of Form ESTAA482603, the Petition to Cancel does not recite with particularity any facts that if true would constitute fraud, and no other grounds for cancellation are recited by Petitioner. Petitioner has therefore failed to recite a ground on which relief may be granted.

A Petition to Cancel on grounds of fraud must show that Registrant knowingly made "false, material representations of fact" in connection with the registration, maintenance or renewal of Registrant's registrations. *See In re Bose Corp.*, 580 F.3d at 1242, 91 U.S.P.Q.2d at

1938 (Fed. Cir. 2007). That is, to constitute fraud on the United States Patent and Trademark Office (USPTO), a statement must be (1) false, (2) made knowingly, and (3) a material representation. Moreover, the charge of fraud upon the USPTO must be established by clear and convincing evidence. *See Giant Food, Inc. v. Standard Terry Mills, Inc.*, 229 U.S.P.Q. 955 (TTAB 1986). *See also Smith International Inc. v. Olin Corp.*, 209 U.S.P.Q. 1033, 1044 (TTAB 1981) ("It thus appears that the very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be Opposition No. 91157315 resolved against the charging party").

Petitioner's Form ESTAA482603, which is generated on-line automatically, based on the user's input, cites "*Torres v. Cantine Torresella S.r.l.Fraud*" on the Grounds for Cancellation line thereof as the sole grounds for cancellation. However, Petitioner's attached Petition to Cancel, submitted concurrently with Form ESTAA482603, does not state any legal grounds or law in support of the requested relief and moreover, Petitioner does not state how or what law in *Torres* applies to the facts in its case. A pleading of fraud requires at a minimum an allegation of facts with sufficient particularity to show that Registrant knowingly made a false statement of material fact with the intent to deceive the Office. *See In re Bose Corp., supra*. However, other than the single line reference on Petitioner's Form ESTAA482603, Petitioner's Petition to Cancel is devoid of any statement of the legal grounds supporting its Petition to Cancel. It is respectfully submitted that Petitioner therefore has failed to recite a ground on which relief may be granted.

**(3.2)**

**Petitioner Fails to Show That it Has a "Real Interest" in the Case.**

Furthermore, the Petition to Cancel lacks any statement of the reasons why Petitioner believes it is or will be damaged by the registrations sought to be cancelled, other than the naked

assertion that it will be damaged. Thus, Petitioner fails to "state a claim that is plausible on its face," as required by TBMP § 503 and § 303, in asserting that it has a "real interest" in the case, and thus fails to establish standing. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (plausibility standard applies to all federal civil claims).

Furthermore, under 37 C.F.R. § 3.73(b), in order to request or take action in a trademark matter, the assignee must establish its ownership by submitting a signed statement identifying the assignee accompanied by either a chain of title (*e.g.*, copy of executed assignment) or a statement specifying where documentary evidence of chain of title may be found. Additionally, under 37 C.F.R. § 3.73(b), the submission establishing ownership must show that the person signing the submission is a person authorized to act on behalf of the assignee. Petitioner has not submitted either a chain of title or a statement specifying its location.<sup>1</sup> It is therefore respectfully submitted that Petitioner has not established standing to assert the Petition to Cancel. Making Petitioner's argument for ownership of the marks even more implausible is the USPTO's identification of Registrant as the Owner of Record for the marks in dispute. (See ¶ 13 of Petition to Cancel.) This record unambiguously establishes, through assignments, a clear and valid chain of title in Registrant.

**(3.3)**  
**Petitioner's Requested Relief Cannot be Granted by the TTAB.**

The relief requested in the Petition to Cancel is not a remedy available to the Petitioner in the TTAB. In the complaint, Petitioner requests the Board to effect a change in the legal title to

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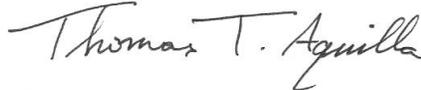
<sup>1</sup> See June 21, 2012, Interlocutory Order for Opposition No. 91200183, *The World's Pageants, LLC v. Miss G-String International, LLC*, ruling that the judgment at issue indicates that it is for financial damages only and does not expressly assign any intellectual property rights to Bell, that Petitioner's September 23, 2011 Section 7 request was subsequently rejected for failing to include the appropriate fee" (Footnote 5), and stating that "Eadie must assert his ownership."

Petitioner's name. See Requested Relief, last paragraph of Petition to Cancel. However, the Board's jurisdiction is limited to the power to determine only the right to register marks. See Sections 17, 18, 20 and 24 of the Act of 1946, 15 U.S.C. §§ 1067, 1068, 1070 and 1092 and TBMP § 102. Therefore, it is respectfully submitted that the relief requested in the Petition to Cancel is not a remedy available to the Petitioner within the jurisdiction of the TTAB.

**4. CONCLUSION**

Because Petitioner has failed to state a claim on which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure and TBMP § 503, has failed to recite legal grounds for cancellation of Registrant's marks, has failed to establish standing by showing he is a "party in interest," and has failed to plausibly assert any valid ownership interest in the marks in dispute, Registrant respectfully moves the Board to dismiss the Petition to Cancel and terminate this cancellation proceeding.

Respectfully Submitted:

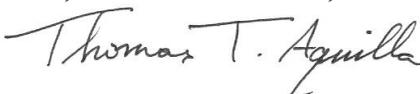


Dated: **August 21, 2012**

By: /Thomas T. Aquilla/  
Registration No. 43,473  
(603) 253-9474  
Aquila Patents & Marks PLLC  
221 Coe Hill Road  
Center Harbor, NH 03226

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been mailed via the U.S. Postal Service via First Class Mail, in an envelope addressed to Counsel for Petitioner, Luke Charles Lirot, 2240 Belleair Road, Suite 190 Clearwater FL 33764, on **August 21, 2012**.



Thomas T. Aquilla, Esq.