

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

Baxley

Mailed: November 4, 2013

Cancellation No. 92057220

Motion Fitness

v.

Jonathan Jarashow

**By the Trademark Trial and Appeal Board:**

In the petition to cancel, petitioner seeks cancellation of the involved registration on the ground of abandonment. In lieu of an answer, respondent, on June 26, 2013, filed a motion to dismiss. Petitioner filed a brief in response thereto wherein it alleges that respondent's motion is a premature motion for summary judgment.

Respondent's motion consists of a notice of motion, a proposed draft order, and a certification of respondent. By such motion, respondent essentially argues the merits of the case, asserting that he has not abandoned the registered mark, instead of asserting that dismissal is warranted under one of the bases set forth in Fed. R. Civ. P. 12(b). Because respondent relies on matters outside of the pleadings in seeking dismissal of this case, his motion is one for summary judgment and will be treated accordingly.

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See Fed. R. Civ. P. 12(d) and 56(c); TBMP Sections 503.04 and 528 (3d ed. rev. 2 2013).

Except on grounds of lack of Board jurisdiction or claim or issue preclusion, a party may not file a motion for summary judgment until it has served its initial disclosures. See Trademark Rule 2.127(e)(1). Respondent's motion was filed nearly two months prior to the due date for respondent's initial disclosures and does not indicate that respondent served its initial disclosures. Accordingly, the motion for summary judgment is denied as premature.

To the extent that respondent's motion is intended as a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), petitioner has adequately pleaded its standing in paragraph 4 of the petition to cancel based on its alleged ownership of the EXERGAME mark for use in connection with "[e]xercise machines incorporating electronic and video game [c]ontrollers" and "[e]ntertainment services, namely, providing virtual environments in which users can interact for recreational, leisure or entertainment purposes." See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187-90 (CCPA 1982). Petitioner has also pleaded a claim of abandonment in paragraphs 1 and 5-9 of the petition to cancel based on cessation of use with intent not to resume use. See Trademark Act Section 45, 15 U.S.C. Section 1127;

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*Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861 (TTAB 2007). See also TBMP Section 503. Whether or not petitioner can prevail on that claim is a matter to be determined after the introduction of evidence at trial (or in connection with a proper motion for summary judgment). See *Flatley v. Trump*, 11 USPQ2d 1284 (TTAB 1989).

Proceedings herein are resumed.<sup>1</sup> Dates are reset as follows.

Answer Due	12/1/2013
Deadline for Discovery Conference	12/31/2013
Discovery Opens	12/31/2013
Initial Disclosures Due	1/30/2014
Expert Disclosures Due	5/30/2014
Discovery Closes	6/29/2014
Plaintiff's Pretrial Disclosures Due	8/13/2014
Plaintiff's 30-day Trial Period Ends	9/27/2014
Defendant's Pretrial Disclosures Due	10/12/2014
Defendant's 30-day Trial Period Ends	11/26/2014
Plaintiff's Rebuttal Disclosures Due	12/11/2014
Plaintiff's 15-day Rebuttal Period Ends	1/10/2015

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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<sup>1</sup> In this proceeding, the parties should review the Trademark Board Manual of Procedure (TBMP) and the Trademark Rules of Practice, 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 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>.

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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 2.129.

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